Of Law, Virtue and Justice – An Introduction

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I. THE REVIVAL OF VIRTUE

IN THE LAST decades, there has been a blossoming of virtue-based approaches to a number of philosophical problems. Virtue theory has a prominent place in both contemporary ethics and epistemology.

A. Virtue Ethics

Virtue ethics has its origins in Classical Greece and it was the dominant approach in western moral philosophy until the Enlightenment. During the nineteenth century and the first half of the twentieth century, virtue theory faded from the landscape of moral philosophy, and the discussion on ethics centered around two traditions, namely, deontology and utilitarianism. Virtue ethics re-emerged in the late 1950s, with Elizabeth Anscombe's important article 'Modern Moral Philosophy', and has established itself as a major approach in normative ethics.[1] The revival of virtue ethics was motivated by an increasing dissatisfaction with deontology and utilitarianism. Proponents of virtue theories objected that these theories sidestepped or ignored a number of topics that any adequate moral philosophy should address, such as motives, moral character, moral education, the moral significance of friendship, family relations, and community bonds, questions about what sort of person one should be, the role of emotions in our moral life, and a concern with happiness and flourishing.[2] There is a wide variety of views that fall under the heading of virtue ethics, as critics have objected to different aspects of modern ethical theory and have developed a virtue-based approach

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[1] Anscombe (1958), reprinted in Crisp and Slote (1997). For an introduction to virtue ethics, see Trianosky (1990); Pence (1993); and Annas (2005). Some of the most important monographs in virtue ethics include: Foot (1978) and (2001); MacIntyre (1984); Slote (1995) and (2001); McDowell (1998); Hursthouse (1999); Driver (2001); Arpaly (2003); Hurka (2003); Swanton (2003); Brewer (2009); Annas (2011). For some anthologies of virtue ethics, see French, Uehling and Wettstein (1988); Crisp (1996); Crisp and Slote (1997); Statman (1997); Darwall (2002); Gardiner (2005); and Chappell (2006).
[2] Hursthouse (1999: 2–3); Nussbaum (1999: 170–79); and Baron (2011: 11–12).

to ethics in different directions.[3] Despite differences, all varieties of virtue ethics take the notion of virtue as basic within ethical theory, and this sets them apart from deontology, which emphasises duties or rules, and utilitarianism, which focuses on the consequences of actions.

B. Virtue Epistemology

Virtue epistemology is one of the most important developments in contemporary epistemology.[4] The virtue turn in epistemology began with the publication of a paper by Ernest Sosa, 'The Raft and the Pyramid', where he argued that virtue theory could provide a solution to the impasse between foundationalism and coherentism.[5] The central commitment of virtue epistemology is that intellectual agents and communities, instead of beliefs, are the primary focus of epistemic evaluation. This commitment entails a distinctive direction of analysis: virtue epistemology explains the normative properties of beliefs in terms of the epistemic virtues of agents, rather than the other way around, and this differentiates it from non-virtue approaches to knowledge and justification. Two main kinds of virtue epistemology may be distinguished: virtue responsibilism and virtue reliabilism.[6] According to virtue reliabilism, intellectual virtues are reliable cognitive faculties, such as perception, intuition and memory.[7] According to virtue responsibilism, intellectual virtues are personality traits or qualities of character, such as open-mindedness, perseverance and intellectual autonomy, which are analogous to the moral virtues.[8] While virtue reliabilism is a descendant of early externalist epistemologies, responsibilism is aligned with internalist theories of knowledge and justification.[9] Mixed approaches, that aim at combining reliabilist with responsibilist components, have also been articulated and defended in the literature.[10]

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[3] For some proposals as to how the domain of virtue ethics may be mapped out, see Oakley (1996) and Nussbaum (1999).

[4] For an introduction to virtue epistemology, see Greco (2002); Battaly (2008); Kvanvig (2010); and Greco and Turri (2011). Collections of articles in virtue epistemology may be found in Axtell (2000); Fairweather and Zagzebski (2001); Steup (2001); Brady and Pritchard (2003); and DePaul and Zagzebski (2003).

[5] Sosa (1980), reprinted in Sosa (1991).

[6] For this distinction, see Axtell (1997) and Battaly (2008).

[7] Sosa (1991) and (2007).

[8] See Code (1987) and Montmarquet (1993). Zagzebski (1996) is the most detailed and systematic articulation of a theory of knowledge and epistemic justification grounded in a moral model of intellectual virtues.

[9] See Axtell (1997: 2–3).

[10] See Greco (2000) and (2010), for a version of virtue reliabilism that makes, nonetheless, internal conditions for epistemic value crucial. Zagzbeski (1996), unlike other forms of virtue responsibilism, incorporates reliability as a component of virtue.

C. Virtue Theory: Conventional and Alternative

In both ethics and epistemology, virtue theory not only has provided new answers to traditional questions, but it has also led to an expansion of these fields of inquiry by drawing attention to new questions. Some moral philosophers have used virtue ethics to inquire into the nature, source, and content of moral reasons and have provided accounts of right action in which virtue plays a primary explanatory role.[11] Others, however, portray virtue ethics as a form of theorising that questions the conventional understanding of moral philosophy as a theory of right action and stress the need for moral philosophy to be also concerned with issues such as the overall course of an agent's life, the character of the inner moral life, and the nature of an agent's emotions, motivations and desires.[12] Likewise, in epistemology, while some philosophers have used the resources of virtue theory to address traditional epistemological problems, such as the analysis of knowledge and justification, others have deployed virtue theory to pursue a different set of problems, for example, issues about deliberation, the role of agency in inquiry, wisdom and understanding, and the social and political dimensions of knowledge.[13] In addition, the virtue turn has also led to an expansion of the methods and sources used in philosophical inquiry. Some philosophers working in the field of virtue ethics and virtue epistemology have relied heavily on literature and the arts to argue for their claims and have used methods other than the kind of conceptual analysis that is the landmark of analytic philosophy.[14] Thus, alongside 'conventional' or 'moderate' virtue approaches to ethics and epistemology,

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[11] Hursthouse (1999) is a prominent example of the use of the resources of virtue ethics to address traditional problems in moral philosophy. Some virtue approaches to traditional problems in moral epistemology contend that all judgements of rights are reducible to judgements of character, but that we can and should use deontic concepts, provided we remember that these are derivative from virtue concepts. As opposed to reductionist versions of virtue ethics, replacement views contend that we should get rid of the deontic notions altogether. For this distinction, see Watson (1997). Louden (1984) has argued against the thesis of explanatory primacy that underscores both reductionist and eliminativist versions of virtue ethics, ie, the claim that right conduct should be explained exclusively in terms of virtue, and has argued for a view of morality that coordinates irreducible notions of virtue alongside irreducible notions of duty.

[12] Some contributions to the virtue ethical critique of modern moral philosophy, initiated by Anscombe (1958) and MacIntyre (1980), include Nussbaum (1990) and Brewer (2009).

[13] For attempts to employ virtue notions in the service of traditional epistemology, see Sosa (1991) and (2007); Zagzebski (1996); Greco (2000) and (2010). Whereas some virtue epistemologists adopt a strong stance and define both knowledge and justification in terms of virtue, others endorse a weaker version of virtue epistemology, according to which the notion of virtue only plays a secondary or peripheral role within traditional epistemology. On the distinction between different versions of conventional virtue epistemology, see Baehr (2008) and (2011). For virtue approaches to epistemology that focus on issues different from those that are central to traditional epistemology, see Code (1987); Kvanvig (1992) and (2003); Montmarquet (1993); Hookway (1994) and (2003); and Roberts and Wood (2007). Within these approaches, strong and weak varieties may also be distinguished, depending on whether virtue approaches are viewed as complementing or replacing traditional epistemological concerns (see Baehr (2008) and (2011) and Greco (2011)).

[14] See eg Nussbaum (1990); Arpaly (2003); and Fricker (2007).

there are some 'alternative' or 'radical' approaches that counsel a departure from traditional questions, sources and methods.[15]

D. New Directions and Intersections

Virtue theory is currently a very active area of research. In ethics, new ways of developing virtue-based approaches to morality and of understanding virtue have been recently proposed.[16] The emergence of virtue ethics has had an invigorating effect on both deontology and utilitarianism, for it has stimulated work on virtue within the terms of these theories and prompted a revision of the way in which these traditions, particularly the Kantian tradition, should be understood.[17] There is also a growing literature that aims at exploring the relationship between Kantian Ethics and Aristotelian Ethics.[18] Current research on the moral significance of virtue has also generated an interesting dialogue between contemporary ethics and the Ancient Greek tradition as well as an increasing interest in Ancient Chinese Ethics.[19] Finally, recent years have seen increasing attention being paid to the role of virtues in applied ethics, educational theory, and moral and social psychology, and these seem to be areas of moral inquiry that may be expected to grow in the future.[20]

Virtue epistemology has also significantly changed the landscape of contemporary epistemology, enriching current debates on the value of knowledge and epistemic luck, and inspiring work on topics such as understanding, wisdom and the epistemology of emotions.[21] Another growth area in virtue epistemology is the investigation of individual intellectual virtues and their corresponding vices.[22] An important consequence of the revival of virtue approaches to normativity has been the cross-fertilisation between ethics and epistemology as well as the production of interesting work at the intersection of these fields.[23] The political implications of a

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[15] For the distinction between conventional and radical approaches to virtue ethics, see Solomon (2003). For an analogous distinction in the field of epistemology, see Baehr (2008); Battaly (2008: 640); Kvanvig (2010: 199); and Greco (2011).

[16] For references, see n 1 above.

[17] See O'Neill (1989) and Herman (1993). For consequentialist approaches to virtue, see Driver (2001) and Hurka (2003).

[18] See Engstrom and Whiting (1996); Sherman (1997); and Jost and Wuerth (2011).

[19] On the debate about the relationship between Greco-Roman and contemporary approaches to virtue, see Gill (2005). On Ancient Chinese Ethics and its relation to western virtue ethics, see Hutton (2002); Tan (2005); Van Norden (2007); Yu (2007) and (2010); Sim (2007) and (2011); and Tiwald (2010).

[20] On virtues and educational theory, see Carr and Steutel (1999). On virtue approaches to applied ethics, see Walker and Ivanhoe (2007) and Oakley and Cocking (2007). On the moral and social psychology of virtue, see Doris (2002); Miller (2009); and Sreenivasan (forthcoming).

[21] See, eg, Zagzebski (2001); Riggs (2006); Brun, Doğuoğlu and Kuenzle (2008); Haddock, Millar and Pritchard (2009) and (2010); and Brady (2010).

[22] See Fricker (2007); Roberts and Wood (2007); Baehr (2010) and (2011); Battaly (2010a); and Riggs (2010). Work on collective virtues nicely intersects with the emerging field of social epistemology. See Lahroodi (2007) and Fricker (2010).

[23] Some collections of essays bring together contributions to both virtue epistemology and virtue ethics. See eg DePaul and Zagzebski (2003); Brady and Pritchard (2003); and Battaly (2010b).

virtue approach to moral and epistemic issues have only begun to be explored, but the last few years have witnessed increasing interest in the subject.[24] In law, virtue theory has not had an impact comparable to the influence it has had in philosophical inquiry. Nonetheless, the concept of virtue is becoming increasingly important in various areas of legal study. It is to virtue theoretic approaches to law we now turn.

II. VIRTUE AND THE LAW

The amount of legal writing that examines virtue or that uses virtue as a framework is small compared to the amount of similar work in consequentialist and deontological legal theory. But virtue-centred scholarship in law has been growing in recent years.[25] This book is a contribution to the emerging field of 'virtue jurisprudence'. All but two of the chapters in this collection were written specially for a workshop on 'Virtues in Law' at the Twenty-Fourth World Congress on Philosophy of Law and Social Philosophy held in Beijing in September 2009. The two exceptions are the commentaries by Antony Duff and Frederick Schauer which were specially commissioned after the workshop.

Legal scholarship on virtue can pursue different aims and take a variety of forms and approaches. It need not adopt a (strictly) virtue-ethical approach to law. Just as it is possible for a philosopher to give an account of virtue without being a virtue ethicist,[26] it is possible for a lawyer to offer a study of virtue in the legal context without rooting it in virtue ethics.[27] A number of chapters in this volume fall into this category. For example, as Michelon makes clear, the focus of his essay is not on the relationship between virtue ethics and law as such but on the relationship of certain character traits, especially the virtue of practical wisdom, and the process of legal decision-making. Similarly, Clark's project, of which his contribution here forms part, does not involve the application of virtue ethics as a tool within law; instead, the aim is to establish connections between law, community character and human thriving.

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[24] See Tessman (2005); Nussbaum (2006); Slote (2010); and Gaskarth (forthcoming). For some pioneering discussion, see Nussbaum (1990); Macedo (1990); Hursthouse (1990–91) and (1993); Galston (1991); Chapman and Galston (1992); and Dagger (1997). Part V of this book may also be regarded as a contribution to the emerging field of 'virtue politics'.

[25] Farrelly and Solum (2008). For an earlier collection that deals mainly with political theory but has contributions on law and by lawyers, see Chapman and Galston (1992).

[26] On the scope and even need for an account of virtue *within* consequentialism and deontology, see Crisp (1996: 5–8); Hursthouse (1999: 3) and (2010) (distinguishing between 'virtue theory' and 'virtue ethics'); n 17 above and accompanying text.

[27] eg contrast Kronman (1993) (articulating the virtues of the professional ideal of the lawyer-statesman) with Hursthouse (2008) (taking an explicitly virtue-ethical approach to dealing with problematic issues of client confidentiality).

A. Reliance on Different Versions of Virtue Ethics

When lawyers rely on virtue ethics, they commonly draw on Aristotelian or neo-Aristotelian versions.[28] Other important sources or traditions of virtue ethics have not received equal attention. Various chapters in this collection seek to broaden our field of vision: Berges looks to Plato;[29] Wang and Solum (writing jointly) and Stępień turn to Confucianism; and Slote offers a sentimentalist version of virtue ethics based on empathy that was inspired by a variety of sources, including Hume.

B. Primacy of Virtue

What distinguishes virtue ethics from the other major ethical approaches is the *primacy* given to virtue.[30] Virtue may play only an auxiliary role in legal theory. To illustrate, a normative theory of judging[31] or legal ethics[32] that is not virtue-ethical will very likely require or presuppose certain character traits. These traits serve an instrumental role; the judge or lawyer has to be a certain kind of person to be able to comply effectively with the prescriptions of the theory in question, whatever they may be. Examples of a strong virtue-ethical approach to law can be found in Solum's pioneering work on virtue-centred theory of judging[33] and in Amaya's chapter in this volume on legal justification. Amaya contends that a legal decision is justified if and only if it is a decision that a virtuous legal decision-maker would have taken in like circumstances. On this theory, virtue is not merely an epistemic device or an aid to rule-application where the justification for the decision lies in some logically prior notion of a right decision. Instead, virtue (in the counterfactual sense) constitutes the justification for the decision.

C. Attention to Particulars

Virtue ethics rejects the possibility of what deontology and consequentialism offer, namely, a form of decision-procedure for ethics. Familiar examples of such a procedure include Kant's categorical imperative and the maximisation of utility or

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[28] On the relevance and impact of Aristotle's philosophy on law and legal theory, see Brooks and Murphy (2003) as well as the Proceedings of 'Aristotle and the Philosophy of Law' IVR Special Workshop (2007).

[29] See also Berges (2009).

[30] Farrelly and Solum (2008: 2–3) advocate the same approach to law, stating that '[t]he fundamental concepts of legal philosophy should not be welfare, efficiency, autonomy or equality; the fundamental notions of legal theory should be virtue and excellence . . . [J]urisprudence should turn from an emphasis on ideology, rights and utility to a focus on virtue'.

[31] Solum (2003: 167–69) and Duff (2003).

[32] Woolley and Wendel (2010). See also Dare (2009: 122).

[33] eg Solum (2003) and (2005a: 500–02). *cf* Duff (2003).

preference satisfaction. In contrast, virtue ethics insists on the need to attend to the relevant circumstances of individual cases. One must possess virtue to be able to perceive well the relevant circumstances and respond well to them. Moral decision-making cannot be controlled (completely) by general rules and abstract principles. The importance of attending to the particular circumstances of a given situation figures in a number of chapters in this volume.[34] Huigens argues that the assessment of criminal fault involves a particularistic assessment of the quality of the defendant's practical reasoning. The particularistic nature of legal fact-finding is highlighted by Ho and challenged by Schauer.[35]

D. Human Flourishing as the End

A third characteristic of virtue ethics is the conception of human flourishing (*eudaimonia*) as the end. In the legal context, this translates into the belief that the proper aim of law is to promote virtue and to prevent vice. This is, of course, putting it crudely. As Clark tells us, there are many ways in which law and politics 'intentionally or inadvertently' (can) shape our character. In the case of criminal law, no one can reasonably suggest that we should, even if we can, criminalise every vice or compel citizens to behave virtuously in every respect.[36] Thus, Yankah argues that, even if prostitution retards virtue in those who are involved in the trade, it does not necessarily follow that it should be criminalised; we also need to consider whether such criminalisation contributes as a whole to the flourishing of society and there are reasons to think that it does not.[37]

E. Other Relations Between Law and Virtue/Vice

Virtue is not limited in its role as the possible end or justification of law. There are many other possible connections between law and virtue, and between law and vice. The roles of virtue in legal reasoning – reasoning by judges and by fact-finders[38] – have already been noted. Additionally, it has been argued that virtue provides the content of the legal standards or norms in particular areas of law (such as negligence);[39] that 'justice' is a natural virtue and the conception of justice as lawfulness illuminates the natural law thesis on the essential connection between

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[34] For discussion on particularised judgement and the Aristotelian virtue of equity in the context of law, see Shiner (1994); Solum (1994); and Zahnd (1996).

[35] See Bowers (2010) (particularism in the exercise of the discretion to prosecute).

[36] On the extent to which the law may be used to promote virtue, see generally Koller (2007) and George (2008).

[37] Yankah (2011) takes a similar line of argument to the prohibition on the smoking of marijuana.

[38] On the role of virtue in legal fact-finding, see also Amaya (2008) and Ho (2008).

[39] eg according to Feldman (2000), the negligence standard embodies the virtues of prudence and benevolence.

law and justice;[40] that our relation to the law may be accounted for in virtue-theoretic terms, specifically by the claim that law-abidance is a virtue;[41] that citizens[42] and officials must possess the appropriate virtues for a legal system to function well (the virtues of the lawyer are considered by Kaptein[43] and those of the judge are examined by Michelon and Stępień in this collection, and also by Solum[44] and many others[45] elsewhere); that legal practices such as judicial review[46] and the appointment and election of judges[47] should be shaped by considerations of virtue; and that legal rules, processes and institutions both influence and manifest community character, and should be evaluated in terms of their tendency to promote civic virtue or vice (this is a thesis that Clark has pursued over the years).[48] Whether vice is the proper object of criminal liability is the topic of an exchange in this volume. Huigens, who is a leading proponent of a virtue-centred approach to criminal law, locates criminal fault in objectionable practical reasoning.[49] Duff, disagreeing with him, would go only so far as to allow that some excusatory defences, such as duress, may be interpreted and rationalised partly in virtue-theoretical terms.[50]

F. Fields of Virtue Theorising in Law

The transformative potential of virtue theory in law is indicated by the great diversity of substantive legal fields that have been critically re-examined through the lens of virtue. In 2005, Solum observed that there was a growing number of exceptions to the 'hegemony of deontological and utilitarian theories . . . among legal theorists', including 'work on antitrust law, bioethics, civil rights law, corporate law, criminal law, employment law, environment law, terrorism law and policy, torts, legal ethics, military justice, pedagogy and public interest law.'[51]

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[40] Solum (2006).

[41] Edmundson (2006).

[42] Koller (2007).

[43] See also Kronman (1993) (virtues of the ideal lawyer-statesman) and Cassidy (2006) (character of the virtuous prosecutor).

[44] eg Solum (2003) and (2006).

[45] Blasi (1988); Luban (1992); Shklar (1992); Scharffs (1998); Modak-Truran (2000); Sherry (2003); Siegel (2008); Horwitz (2009); Soeharno (2009); and Lund (2012).

[46] Farrelly (2008) offers a dialogical model of judicial review as a prescription of the relation between the legislature and the judiciary in a virtuous polity. See also Sherry (2003) and Gaebler (2011) (providing a neo-Aristotelian critique of judicial review).

[47] Solum (1988), (2005b) and (2005c) and Failinger (2004) and (2005).

[48] See his essay in this book and also Clark (1999), (2004), (2005) and (2006).

[49] For a selection of his other writings on virtue and criminal law, see Huigens (1995), (1998), (2002), (2003) and (2009). On virtue ethics and criminal punishment, see also Gelfand (2004) and Schaeffer (2010). For a survey of character-based theories of punishment and an argument against such theories, see Yankah (2004). On the influence of moral character on blame judgements, see Nadler (2012).

[50] See also Duff (2006). For an earlier exchange between the two writers, see Duff (2008) and Huigens (2008).

[51] Solum (2005a: 494–95); see footnotes, ibid, for citations of the relevant literature.

Since then, new writing has appeared[52] and virtue scholarship in law has become even more wide-ranging. The approach has been applied to other subjects, notably, contract law,[53] property law,[54] intellectual property law,[55] constitutional law,[56] corporate governance,[57] medical law,[58] theory of adjudication[59] and international criminal justice.[60]

G. Objections to Virtue Legal Theories

This 'aretaic turn' – the adoption of virtue, in lieu of consequences and moral rules, as the primary basis of normativity – can yield, and has yielded, important new insights. But it also faces many criticisms. For example, it is sometimes said of this approach generally or of a particular theory taking this approach that it cannot give adequate action-guidance;[61] that it is paternalistic (an objection addressed by Berges in her chapter); that it intrudes excessively into the 'private' realm and is illiberal (a charge made by Duff in this volume and elsewhere);[62] that it undermines the 'rule of law';[63] and that it is at odds with our interest in having reasons given for judicial decisions to the extent that it allows judges to cite their own virtue as justification for their decisions.[64] Advocates of virtue legal theory have responded to these criticisms either by way of denying the charges or by pointing to aspects of their theories which, they claim, refute these criticisms. That there is still much left in the debate on these issues, and much else on which to debate, are indications of the richness of the field. It is our hope that this book will excite thoughts on both the potential and limitations of virtue-centered legal scholarship.

[52] eg in legal ethics see Graham (1995–96); Milde (2002); Saguil (2006); Cassidy (2006); Oakley and Cocking (2007); Hursthouse (2008); Markovits (2008); Dare (2009); and Cordell (2011); in criminal law, see Schaeffer (2010); and in environmental law, see Anon (2010).
[53] Cimino (2009); Katz (forthcoming).
[54] Lametti (2003) and (2010b); Alexander (2009); Peñalver (2009) Alexander and Peñalver (2012), ch 5. cf Claeys (2009) and Wyman (2009).
[55] Lametti (2010a), (2010b), and (forthcoming), Opderbeck (2007). For a philosophical perspective, see Benkler and Nissenbaum (2006).
[56] Solum (2005a) and Strang (2012).
[57] Mescher and Howieson (2005); McConvill (2005); and Colombo (2012).
[58] Discussion of virtue ethics has found its way into textbooks and monographs on medical law: eg, Maclean (2008) and Pattinson (2011).
[59] Barzun (2010: 1167–71) (interpreting Jerome Frank's account of adjudication as a virtue theory of adjudication).
[60] Gaskarth (forthcoming).
[61] Contesting this in the context of tort law: Feldman (2000: 1449–1500).
[62] eg Duff (2003). See also Yankah (2009).
[63] This criticism has been directed at virtue theories that (on the critic's reading) (i) supposedly allow judges to decide cases according to their own lights (for responses to this, see section IV(b) of the chapter by Amaya and section III of the chapter by Stępień in this volume) and (ii) urge lawyers to be guided by their personal moral convictions in the discharge of their professional duties (Dare (2009)).
[64] Duff (2003: 207). *cf* Amaya's chapter in this volume.

III. AN OVERVIEW OF THIS BOOK

This book is divided into five parts. Part I ('Law, Virtue and Legal Reasoning') examines some issues concerning the role of virtue in law-making and law-application. It begins with a chapter by Claudio Michelon, the aim of which is to contribute to the plausibility of the thesis that legal decision-making by public officials can only be carried out properly if those officials possess certain virtues. In Michelon's view, the greatest obstacle to assigning virtues a major role in legal decision-making is the fear of subjectivity in decisions taken by public officials. However, argues Michelon, once we replace an oversimplified, 'topological' view of subjectivity by a more complex, 'relational' conception, we may come to see that this fear is misplaced and, thus, that subjectivity may plausibly play a promi-nent role in legal decision-making. With a view to advancing an acceptable account of how the decision-maker's subjectivity could come into play in legal decision-making, Michelon provides an analysis of practical wisdom, particularly, of its perceptive aspects. Next, he argues that an appropriate use of the kind of perception that is constitutive of practical wisdom requires the possession of cer-tain moral virtues. Consequently, in Michelon's view, the possession of certain moral virtues is necessary for practical wisdom and, thus, for proper legal deci-sion-making. This chapter concludes by contrasting this picture of legal decision-making with some methodological-deontological approaches to practical wisdom and to the role it plays in legal contexts.[65]

The next chapter, by Amalia Amaya, explores the possibility of developing a virtue theory of legal justification. After distinguishing different ways in which one might give virtue a role in a theory of legal justification, Amaya argues for a strong aretaic approach to legal justification according to which a legal decision is justi-fied if and only if it is a decision that a virtuous legal decision-maker would have taken in like circumstances. This counterfactual analysis of legal justification in terms of virtue, claims Amaya, avoids some of the problems affecting causal approaches to legal justification, which make justification depend on the virtue of the causal process that actually lead to the legal decision. The proposed account of justification, she argues, also has the resources to meet a number of potential objections that may be addressed against virtue approaches to legal justification. The chapter concludes by examining some implications of a virtue theory of legal justification or discussions about the nature and scope of reason in law.[66]

In the last essay of this Part, Sandrine Berges examines the prospects of devel-oping a virtue-based theory of the ends of law according to which laws should promote and protect virtue that does not fall prey to the objection from paternal-ism. Plato, argues Berges, might be claimed to provide an answer to the problem of paternalism in virtue jurisprudence. If virtue ethicists can limit their claim to

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[65] See also Michelon (2006).
[66] Elaborated in Amaya (2011).

the idea that laws should promote wisdom, as Plato seems to do, then the threat of paternalism disappears, for wisdom may be promoted without endangering autonomy. However, despite appearances to the contrary, a Platonic Virtue Jurisprudence, claims Berges, fails to avoid the pitfalls of paternalism. First, although Plato seems to believe that laws concerning education should aim at helping citizens to develop wisdom, on his proposal only a small proportion of the population should receive the necessary education. Secondly, the education Plato proposes is not merely wisdom promoting but is also concerned with promoting temperance and courage. Nonetheless, she concludes, the teaching of temperance and courage alongside wisdom is not as objectionable as the teaching of these virtues without wisdom, for it could be argued that courage and wisdom are part of what it takes to be autonomous. Thus, at the end of the day, the teaching of courage and wisdom may be at the service of a virtue jurisprudence that is paternalistic only in the minimal sense of being wisdom promoting.[67]

Part II explores the relationships between 'Law, Virtue and Character', bringing together western and eastern perspectives on this subject. Sherman Clark's chapter explores the connections between law, character, and human thriving.[68] More specifically, he addresses two main questions: first, how does the law impact on or influence the kind of people we become; and second, what sort of people should we try to become if we hope to thrive, that is, to live a full and satisfying human life. With a view to answering the former question, Clark discusses six ways in which law and politics have an influence on people's character, namely, by requiring or forbidding conduct which is thought to display traits of character; by requiring or prohibiting conduct that might engender such traits; by facilitating or hindering institutions that promote the construction of traits of character; by providing or precluding opportunities for exemplars to flourish; by providing contexts for argument about what sort of people we are or would like to be; and by facilitating or obstructing public discussion about character and thriving. In response to the latter question, Clark identifies four traits of character as crucial to human thriving in a modern democratic society: courage, temperance, wisdom, and, most critically, a trait of character that corresponds to the classical term of 'piety', but for which Clark uses the term 'aspiration', that is, the willingness and ability to strive for higher, better, things than we can precisely define. Aspiration, argues Clark, is an essential vehicle for human thriving, and as lawyers and academics we may help to develop this fundamental capacity through our public policy advocacy, scholarship and teaching.

Wang Linghao and Lawrence Solum's essay offers a sketch of Confucian virtue jurisprudence, an aretaic theory of law that is rooted in the tradition of Confucian thought.[69] The chapter is divided into two parts. The first part provides an overview of Confucian social and ethical thought and describes in detail the following

[67] On paternalism and a virtue-based approach to the function of laws modelled on Plato's virtue theory, see further Berges (2007) and (2009).

[68] See also references in n 48 above.

[69] See also Greer and Lim (1998).

four concepts: *Li*, that is, rules of conduct; *Ren*, the cardinal virtue that unifies the particular moral excellences and, in a narrower sense, the virtue of benevolence; *Yi*, that is, a character trait related to the motivational attitude to abide by *Li*; and the concept of *name* and the associated practice of correcting names. These concepts are the building blocks of the Confucian virtue jurisprudence that the authors develop in the second part of the chapter. From a Confucian perspective, the fundamental question of legal theory is the aim of law. Law's proper function, argue the authors, is the creation of a social order on the basis of coordinative harmony and autonomous harmony. The former kind of harmony is related to the social coordinative function of *Li*: everyone has a proper position in the community regulated by *Li*. The latter kind of harmony is related to the expressive function of *Li*: individuals can express their emotions or exercise their virtues with the help of *Li* and follow their desires without creating a breach of *Li*. Thus, the end of law is to create harmony in both the society and the individual by establishing a social order that rests on norms that can be internalised by autonomous agents who possess certain virtues.

Last, Mateusz Stępień's chapter provides an analysis of judges' professional self-development. Three different models of judicial decision-making are distinguished: the formal positivist model, in which decision-making is mostly a matter of rule-application; the responsive model, which gives a prominent role to consequentialist reasoning; and the aretaic model, in which decisions are grounded on the judicial virtues. Judges' professional self-development may be understood, argues Stępień, as a transition that goes from the formal positivist model, though the responsive model, to the aretaic model of judicial decision-making. Confucian virtue theory, claims Stępień, provides valuable guidance as to how judges may pursue the path of professional self-development and, ultimately, acquire the judicial virtues. Different stages of professional self-development call for different models of legal decision-making, that is to say, there should be a match between the stage of self-development of the judge and the model of judicial decision-making that is to be applied. Thus, in Stępień's view, no single model of legal decision-making best serves the goals of adjudication, but any normative (as well as descriptive) theory of adjudication should make room for all three approaches.

Part III of this book, 'Virtue Theory and Criminal Law', applies virtue theory to various issues in criminal law. According to an aretaic theory of punishment, the determination of criminal fault consists of an assessment of the quality of the defendant's practical reasoning. Against this theory, it has been objected that the commission of a criminal offence provides too little information for an assessment of the quality of the defendant's practical reasoning for the purpose of determining criminal fault and moral desert for legal punishment. In his chapter, Kyron Huigens develops two responses to the 'inadequate basis' objection. The first reply is that intentional actions reflect a wide range of motivating intentions, beyond the simple intention that corresponds to intentional action – wide enough to facilitate an evaluation of the quality of the defendant's practical reasoning that is sufficient to find legal punishment morally justified. The second reply draws on

the idea of specification: an assessment of the quality of the defendant's practical reasoning requires an inquiry into the defendant's deliberation about ends and this may be done by tracing the courses of reciprocal specification of conflicting ends. This explanation of intentions and ends shows that the adjudication of offences entails an evaluation of the defendant's practical reasoning broad enough to justify the imposition of legal punishment.

The second chapter of this Part of the book, by Ekow Yankah, is devoted to examining one example where ignoring virtue-based intuitions hinders our ability to make progress on important legal questions, namely, the prohibition of prostitution. According to Yankah, current decriminalisation arguments have not succeeded in promoting legal reform because they disregard core intuitions about the moral wrongness of prostitution that are central to its prohibition. Indeed, argues Yankah, there are good reasons, whether one accepts a Kantian or an Aristotelian moral theory, which support the commonly held intuition that prostitution is morally wrong. From this, however, it does not follow that the law ought to prohibit it. Though both Kantian and Aristotelian philosophical traditions view prostitution as morally wrong, these traditions are cautious about translating this moral wrong into a legal prohibition. This philosophical agreement does not mean, however, that there should be a complete absence of regulation; rather it provides valuable guidance as to the kind of regulation that is justified. Critically, this agreement shows that arguments in favour of decriminalisation and regulation do not need to assume either that prostitution is morally harmless or the commands of liberalism: one may support legal reform, from a wide range of philosophical positions – including virtue theory – despite viewing prostitution as morally wrong.

Antony Duff's chapter provides a commentary to both Huigens' and Yankah's essays. These chapters, argues Duff, exemplify two kinds of role that ideas of virtue and vice might play in criminal law: first, a view of the further goods that criminal law should aim to achieve and, second, a view of the proper objects of criminal liability. While Yankah's chapter illustrates the former role, Huigens' illustrates the latter. Duff's commentary on Yankah's chapter focuses on the suggestion, which is presupposed in his discussion, that a virtue theorist will or should see reason to criminalise conduct (eg, prostitution) on the grounds that it hinders virtue. A virtue theorist, argues Duff, need not make such an unqualified claim, but she can instead embrace a liberal distinction between the public and the private realm and hold that the state, and thus criminal law, has an interest only in the subset of virtues or vices that properly count as civic. Duff's discussion of Huigens' chapter is concerned with his general claim that a court's retrospective assessment of criminal fault consists of a particularist evaluation of the defendant's practical reasoning. According to Duff, while we can typically infer some deficiency in an agent's practical reasoning from the commission of a criminal offence, and some legal excuses can be most plausibly interpreted in virtue terms, that is not true of justificatory defences, and this undermines the claim that criminal liability is grounded on vice.

Part IV ('Legal Fact-Finding: Aretaic Perspectives') begins with a chapter by Hendrik Kaptein on lawyer-client confidentiality.[70] Legal adjudication typically involves the 'undoing' of '*past* wrongful harm' as broadly conceived. For example, where the defendant has committed a tort (a 'wrongful harm') against the plaintiff, the award of damages for the loss she has suffered aims to 'undo' the harm through 'restoration of the plaintiff's original position.'[71] Client confidentiality prevents a past wrongful harm from being undone in this sense when it keeps away from the court evidence that is necessary for the proof of the plaintiff's case. Kaptein suggests that the '"undoing" of a harmful past is analogous to preventing harm in the future . . . [P]ast and future are symmetrical from a legal point of view.'[72] There is 'broad consensus' that the lawyer's duty of confidentiality should not apply to '*future* wrongful harm'; disclosure may be permitted or obligatory where the client is about to wrongfully harm someone. According to Kaptein, just as we accept that confidentiality should give way in order to prevent a 'future harm', we should not extend confidentiality to a 'past wrongful harm' when 'the main facts of the case leading to justice [can] come to light in no other way.'[73] However, the virtuous lawyer will not necessarily make disclosure in such cases. 'Professional silence' can be virtuous in the circumstances, as where 'openness on facts' will produce even greater injustice, or where one is faced with 'mala fide opponents', 'incompetent courts' or 'wrongful law and legal procedure'. The virtuous lawyer will exercise practical wisdom in determining whether, all things considered, 'secrecy [will lead] to better realisation of material law and right'.[74]

Whereas Kaptein examines the virtues of the lawyer, Ho Hock Lai explores the virtues of the fact-finder. He contends that how well deliberation is conducted can be evaluated independently of the truth in the finding of fact that is made. Legal fact-finding invariably involves judgement and the exercise of discretion, and Ho shows how epistemic virtues provide standards of excellence for the conduct of deliberation. The chapter discusses in detail a selection of those intellectual virtues and vices that are or partake of a moral character. First, the author examines the connected virtues of 'justice as humanity' and 'empathic care' for the accused person (and for others who stand to be affected by the court's judgment); these virtues give the trial its humane quality and bear on the way that the fact-finder approaches the evidence and reaches the criminal verdict.[75] The chapter then moves on to discuss the vice of 'prejudice' and its virtuous counterparts. Drawing on the work of Miranda Fricker, Ho highlights instances of testimonial injustice and hermeneutical injustice in the trial setting. Epistemic virtues such as intellectual humility and open-mindedness are needed to prevent these kinds of injustice. Lastly, the chapter addresses the virtue of

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[70] For another valuable virtue-ethical analysis of lawyer-client confidentiality, see Hursthouse (2008).
[71] This volume, at 228.
[72] ibid.
[73] ibid at 237.
[74] ibid at 236.
[75] See also Ho (2008: 78–84).

'practical wisdom' and the various important roles it plays in virtuous verdict deliberation.

Frederick Schauer offers a commentary on Ho's chapter. He addresses a question that he finds 'almost entirely absent in the entire virtue ethics literature': is it possible to be virtuous without being particularistic? Schauer suggests that 'the virtuous legal deliberator may not only not be required to be particularistic, but may also, at times, be required not to be particularistic'.[76] Schauer disputes Ho's (descriptive) claim that fact-finding deliberation is inescapably discretionary and non-rule-based. The 'process of finding the defendant guilty' and the application of 'legal rules to individual conduct' are sometimes 'mechanical and algorithmic.' According to Schauer, Ho is best understood to be making the different claim that particularism is desirable in criminal law and, on Schauer's reading, Ho makes the mistake of moving from the premise that some generalisations are objectionable to the conclusion that verdict deliberation should not be based on any generalisations at all. Although generalisations may be imperfect, not all of them are objectionable. The law, including the law of evidence, is 'replete with generalisations and it is hard to imagine how it could be otherwise'.[77] While it is indeed wrong to base a legal judgment or rule on a bad stereotype, the 'wrong lies in the content of the generalisation and not in the very idea of generalisation'.[78] In the context of verdict deliberation, the virtue of humility may require the decision-maker to follow rules (laid down by others) rather than make an all-things-considered particularistic judgement.

Finally, Part V of this book is devoted to a discussion of the relationship between 'Law, Empathy and Justice'. In the opening essay, Michael Slote sets out his views on the subject. This is followed by commentaries from John Deigh and Susan Brison. In the closing chapter, Slote replies to both of them.

Slote is the proponent of a distinctive sentimentalist version of care ethics that he considers to be a form of virtue ethics.[79] Care ethics is 'not based on rational consideration or arguments'. It measures morality according to how caringly one treats others. The disposition to care altruistically for others is driven by empathy. One acts wrongly if the act reflects or exhibits a lack of fully developed empathic caringness. In his essay, Slote focuses on extending his theory of moral sentimentalism beyond matters of personal morality to the realms of legal and political justice.[80] He claims that 'empathy and empathic concern for others can function as . . . the entire basis . . . for a plausible understanding of legal and social justice (as . . . they do for personal morality).'[81] This expansion into the public/political sphere rests on the recognition that morally decent people will not only care about

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[76] This volume, at 226.
[77] ibid at 271–2.
[78] ibid at 272.
[79] *cf* Held (2006: 550). She differs from Slote: 'Virtue ethics focuses especially on the states of character of individuals, whereas the ethics of care concerns itself especially with caring relations. It is caring relations that have primary value.'
[80] See further Slote (2007).
[81] This volume, at 280.

family and friends but will also be capable of having some (generally lesser) measure of empathic concern for people they are not personally acquainted with. We can think of the laws, institutions and customs of a society as like the actions of those members who are responsible for making or sustaining the same.[82] Slote argues that 'laws, institutions and social customs are just (and consistent with our basic rights) only if they don't manifest a lack of fully empathic concern for (groups of) other people on the part of those who promulgate, maintain, or participate in them.'[83] He then proceeds to apply his theory to issues of religious freedom, political rights, distributive justice and legal adjudication.[84]

In his commentary on Slote's chapter, John Deigh draws a distinction between empathy as a cognitive state and empathy as a vicarious affective state. Unlike Slote who (according to Deigh) uses empathy in the affective sense and as a term of ethics, Deigh relies on the cognitive meaning of empathy and treats it as a term of positive psychology. He contends that moral judgements of the kind Kant identified as categorical imperatives require the exercise of (cognitive) empathy. Using the case of *Ledbetter v Goodyear Tire & Rubber Co*[85] as an example, Deigh shows how such empathy is also essential to sound legal judgments.[86] He points out that, in this respect, sentimentalist ethics and rationalist ethics are not as different as Slote seems to think they are. Deigh also questions Slote's thesis that his ethics of care has reintroduced into ethics a powerful version of Hume's moral sense theory. On Hume's subjectivism, 'a personal trait is a virtue or vice because one who regards its exercise from a general view takes a certain pleasure or displeasure in it and not the other way around'.[87] As Deigh sees it, there is no need to incorporate this position in an ethics of care and doing so saddles it unnecessarily with all the difficulties Humean subjectivism faces. Caring for others cannot have value merely because 'a sober judge of moral matters feels a certain way about these acts or about the kindheartedness and responsiveness they manifest'.[88] For Slote's theory to be persuasive, some explanation of normativity must be offered.

In his reply, Slote refers to a number of misunderstandings. First, while the kind of empathy on which his theory rests involves affect or feeling, it is not entirely or simply an affective state. Secondly, his position is different from the standard reading of Hume's; for Slote, sentiment fixes the reference of moral claims but is not their subject matter, and his theory supports rather than denies the objective validity of morality. Thirdly, on the point of normativity, Slote's

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[82] On the attribution of virtues to social collectives and institutions, see Beggs (2003); Lahroodi (2007); and Fricker (2010).

[83] This volume, at 282.

[84] For an ethics of care approach to criminal punishment that relies on Slote's work, see Gelfand (2004).

[85] 550 US 618, 127 S Ct 2162 (2007).

[86] More fully see Deigh (2011). On the role of empathy in legal decision-making, see also Henderson (1987); Bandes (2009) and (2011), the latter is published with responses by Hasnas (2011), Leben (2011) and Franks (2011); Abrams (2010); Rollert (2010); Wardlaw (2010); Merriam (2011); and West (forthcoming).

[87] This volume, at 298.

[88] ibid at 299.

answer is that 'empathy enters into our moral concepts' and that 'empathy is essential to normative morality through being essential to meta-ethics'.[89]

In the second commentary, Susan Brison agrees with Slote that empathy is necessary for justice but is doubtful that it is sufficient for justice. On her analysis of Slote's account of empathy, X's empathising with Y's pain involves three stages: (1) X feels pain as a result of X's awareness that Y is feeling pain; (2) X judges that Y views feeling the pain as desirable or undesirable; and (3) X's feeling Y's pain prompts a moral sentiment that (typically) is (or leads to) a correct moral judgement (provided X has a sufficiently developed and appropriately exercised capacity for empathy). Brison points out that it is possible for error to occur at each of these three stages: (1) Y may not in fact be feeling pain; (2) Y may, contrary to what X thinks, desire (or not) the pain; and (3) X may arrive at the wrong moral judgement. On the last point, Brison cites a situation where women in a particular region have their assessment of well-being distorted by adaptive preference formation and have higher levels of satisfaction with their lives even though they are worse off than men in the region. Here, '[e]mpathy with what [these women] are feeling is not an adequate guide to what justice requires in our treatment of them.'[90] Another difficulty is that the development of empathy varies among different people and can be thwarted; we therefore 'need an independent standard to determine when empathy is sufficiently developed' for the purposes of Slote's theory.[91] Even if our empathy is fully developed, empathy for different groups of people may pull us in different directions. A judge who let her decision be influenced by 'greater empathy for members of her own ethnic group than for other similarly-situated persons of different ethnicities would not be acting justly'.[92]

In his reply, Slote accepts that our empathy can be misleading. But 'the non-culpable ignorance that is involved [in such cases] doesn't affect our moral judgement'.[93] Slote finds Brison too uncritical of the idea of adaptive preference formation and contentment. Many women who become preferentially adaptive have been treated with lack of empathy (for their aspirations and desires) and hence treated unjustly; further, it is doubtful that such women are really contented. Slote is not persuaded that a theory of objective welfare is needed to supplement empathy as a criterion for acting morally and justly. While he agrees that empathy can lead us astray, his criterion for morally acceptable action is a 'fully-empathic' concern for others and it is this 'fuller, wider, deeper empathy' that is a sufficient condition for acting morally. Brison is right that (fully developed) empathy can tug us in different directions. But this is a problem only if there is a definite moral obligation in one specific direction. For Slote, more than one course of action may be morally acceptable in such situations.

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[89]   ibid at 312. Elaborated in Slote (2010).
[90]   This volume, at 306.
[91]   ibid at 307.
[92]   ibid.
[93]   ibid at 313.

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