

# VIRTUE JURISPRUDENCE: AN ARETAIC THEORY OF LAW\*

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## I. INTRODUCTION

Contemporary legal theory in the United States has been dominated by the realist paradigm. The extreme version of realism is captured by the slogan of the critical legal studies movement: “Law is politics!”<sup>1</sup> Other heirs to the realist tradition (including normative law and economics, the legal process school, legal pragmatism, and so forth) coalesce around what we might call *the instrumentalist thesis*—the point of legal institutions (especially courts) is to use the law as an *instrument* to achieve the goals of some normative theory (such as welfarism<sup>2</sup> or deontology<sup>3</sup>) or a political ideology (of the left, right, or center).<sup>4</sup> There are, of course, opposing tendencies in contemporary legal theory. Some neoformalists emphasize the duty of adjudicators to follow the law and give the parties what they are due; in a rough and ready sort of way, these neoformalists

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<sup>1</sup> See, e.g., Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256, 256-57 (1989); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-14 (1979); Peter Gabel, *What It Really Means to Say "Law is Politics": Political History and Legal Argument in Bush v. Gore*, 67 Brook. L. Rev. 1141 (2002).

<sup>2</sup> By “welfarism” I mean to refer to normative law and economics. See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002). Simplifying somewhat, we can say that welfarism is a form of utilitarianism—in the philosophical sense of that term—that takes has a preference-based conception of utility.

<sup>3</sup> Deontological approaches to law typically emphasize the importance of rights. See, e.g.,

<sup>4</sup> For an explicit acknowledgement of an ideological approach to law, see [cite to Tushnet on constitutional interpretation & socialism].

adopt a deontological perspective on legal theory that competes with the consequentialism of contemporary neorealists.

In this paper, I sketch an alternative direction for contemporary legal theory, an approach that I call “virtue jurisprudence.” My core idea is quite simple. In moral theory, virtue ethics<sup>5</sup> offers a third way—an alternative to the deontological and consequentialist approaches that dominated modern moral philosophy until very recently. What would happen if we transplanted *virtue ethics* into normative legal theory? This paper offers the sketch of an answer to that question.

Before I go any further, I ought to say that the version of virtue jurisprudence offered in this paper is hardly full blown. I will focus on one aspect of virtue jurisprudence—a virtue centered theory of judging. That leaves a good deal of territory unmapped. In particular, I only skim the surface of the implications of virtue jurisprudence for the ends of law. That topic is an important one, but I leave an extended treatment for another day.

## II. THE ARETAIC TURN IN LEGAL THEORY

Contemporary legal theory endeavors to answer at least two big questions of practical jurisprudence.<sup>6</sup> First, *what is the aim of law?* Second, *how can legal institutions best do their job of resolving disputes?* Virtue jurisprudence offers distinctive answers to these questions.

For virtue jurisprudence, the final end of law is not to maximize preference satisfaction or to protect some set of rights and privileges: the final end of law is to promote human flourishing—to enable humans to lead excellent lives. Second, the best way to improve the ability of legal institutions to resolve disputes is not to populate the bench with economists or moral philosophers from either the left or the right; instead, achieving an excellent judiciary requires the selection of judges who possess the judicial virtues—civic courage, judicial temperament, judicial intelligence, wisdom, and, above all, justice. These answers to the big practical questions are unified by a central thesis: *the fundamental concepts of legal philosophy should not be welfare, efficiency, autonomy, or equality; the fundamental notions of legal theory should be virtue and excellence.* Thus, the proposal of the essay is that jurisprudence should turn from an emphasis on ideology, rights, and utility to a focus on virtue.

What is the aretaic turn in legal theory? The word for virtue or excellence in classical Greek was *arête*, from which we derive the English word aretaic, of, or pertaining to, excellence or virtue. Virtue jurisprudence is one way that legal theory can execute a move already made by moral philosophy and epistemology—the *aretaic turn*.<sup>7</sup> On one hand, the aretaic turn translates into a renewed concern with human excellence as a unifying normative and explanatory concept. On the other hand, the turn towards excellence is a turn away from the reductive programs of both consequentialist and

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<sup>5</sup> For a general introduction to virtue ethics, see Rosalind Hursthouse, *Virtue Ethics*, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/ethics-virtue/> (visited February 17, 2005).

<sup>6</sup> I do not mean to imply that these two questions exhaust the tasks of contemporary legal theory. For example, a perennial question for legal theory concerns the nature of law—with natural law theory and legal positivism as the two leading contenders. Virtue jurisprudence can enter into that debate as well, although its contribution is outside the scope of this Article.

<sup>7</sup> See “Aretaic Turn,” [http://www.wikipedia.org/wiki/Aretaic\\_turn](http://www.wikipedia.org/wiki/Aretaic_turn).

deontological legal theory. Virtue jurisprudence offers a rich and fruitful account of the nature, means, and ends of law that simultaneously dissolves old problems and poses a new set of challenges for legal theorists. The aretaic turn in legal theory moves away from degenerating research programs that disconnect the academy from the bench and bar and moves towards the reintegration of legal theory and practice.

### III. MOTIVATING THE ARETAIC TURN

Why virtue jurisprudence? The real answer to this question lies in the power of the theory itself; the proof is in the pudding. But before I put the pudding on the table, I sketch (in this Part of the Paper) the defects of the contemporary fusion of theory and practice. If all were well with modern jurisprudence, legal theorists would lack motivation to make the aretaic turn. But all is not well. Contemporary legal theory and practice are in serious trouble. Here's why.

#### *A. Mediocrity and Politicization*

Begin with the state of the law itself, focusing on the legal system of the United States as an example.<sup>8</sup> No observer of contemporary American jurisprudence can feel satisfied with the current state of the judiciary. Although there are many judges who are both fine and fair, the overwhelming impression conveyed by a broad survey of the bench is that it faces two substantial and interrelated dangers: politicization and mediocrity.

The danger of politicization is a perennial one—shared to some extent by all legal systems. In the United States that danger is currently especially acute for a variety of reasons. Perhaps the chief among these is the American system of judicial review, which places the ultimate power of decision about almost any conceivable question in the hands of the United States Supreme Court.<sup>9</sup> From *Roe v. Wade*<sup>10</sup> (abortion and choice) to *Bush v. Gore*<sup>11</sup> (the outcome of a Presidential election), the modern Supreme Court has made good on Toqueville's observation that in America almost every issue of consequence end up in the Courts.<sup>12</sup>

The power of final decision creates temptation. On one hand, the political branches are tempted to use power of judicial selection to stack the bench with political hacks who

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<sup>8</sup> The problems that are identified in the discussion that follows may or may not be unique to the United States. Personal observation suggests that the

<sup>9</sup> The ultimate power of decision is a function of the fact that the Supreme Court has the final say in the cases it decided. It is true that the jurisdiction of the Supreme Court is limited by Article Three of the United States Constitution to "cases and controversies" involving federal questions, admiralty, diversity of citizenship, and several other categories. *See* UNITED STATES CONSTITUTION, Art. III, Sec. 2. But the Supreme Court has the power to decide the extent of its own jurisdiction, *see Marbury v. Madison*, \_\_\_ U.S.. \_\_\_ (1802). It is also true that the Congress has the power to impeach Justices of the Supreme Court, but this is, at best, a difficult and time consuming process.

<sup>10</sup> 410 U.S. 113 (1973).

<sup>11</sup> 531 U.S. 98 (2000).

<sup>12</sup> ALEXIS DE TOCQUEVILLE ON DEMOCRACY, REVOLUTION, AND SOCIETY: SELECTED WRITINGS (John Stone & Stephen Menell eds., 1980); TOCQUEVILLE'S AMERICA: THE GREAT QUOTATIONS (Frederick Kershner ed., 1983).

will use their power to achieve the aims of high and low politics through judicial fiat.<sup>13</sup> On the other hand, judges themselves are tempted to use their power to substitute their own judgment about how cases should come out and what the law should be, for decision according to the rules laid down. Each temptation reinforces the other. Politicians who see judges substituting their own political ideology for the rule of law (but who disagree with the results) are naturally tempted to balance the books by selecting new judges who will counteract the ideology of incumbents with ideological decisions of a different stripe. Judges who start on the bench without an ideological agenda may come to see their neutrality as self-defeating when ideological appointees do not share their restraint.<sup>14</sup> If this cycle is not broken, it can become a downward spiral of politicization, with the political parties and judicial incumbents engaged in a race to the bottom.<sup>15</sup>

Politicization breeds judicial mediocrity. If judges are selected for their loyalty to an ideological agenda, then they are not being selected for fidelity to the rule of law, for being learned in the law, for practical wisdom, or judicial integrity. Quite the contrary, judges who are learned, smart, wise, and independent are highly unlikely to be predictable votes in the contest for control of the judiciary. This is not to say that politicization makes every skill irrelevant. The most effective politicized judge may need rhetorical skill, the sophist's ability to make the better case appear the worse, to

<sup>13</sup> Mark Tushnet, *Constitutional Hardball*, 37 J. Marshall L. Rev. 523 (2004).

<sup>14</sup> From a game theoretic point of view, we might deploy the following simple model:

		Judge One	
		Decide Ideologically	Decide Neutrally
Judge Two	Decide Ideologically	Judge One wins some and loses some Judge Two wins some and loses some No rule of law benefits	Judge Two wins all the time No rule of law benefits
	Decide Neutrally	Judge One wins all the time No rule of law benefits	Judge One wins some and loses some Judge Two wins some and loses some Rule of law benefits

If Judge One moves first and plays ideologically, then Judge Two has an obvious incentive to play ideologically as well. If Judge Two moves first and plays neutrally, then Judge Two also has an incentive to play ideologically, assuming that the benefits of winning all the time are greater than the benefits of the rule of law. Given that Judge Two will play ideologically whatever Judge One does, Judge One has an incentive to play ideologically. So in this simple model, both judges play ideologically even though both would prefer that they had both played neutrally. Of course, the simple model needs to be modified in a variety of ways to capture the complexities of actual judicial practice. In the real world, there are many different courts and appellate courts have multimember benches. Extension of the model would require consideration of the interaction between the judges on a multimember court, between trial and appellate courts, and among courts of different jurisdictions. I am particularly indebted to Kent Greenawalt for discussion on this point.

<sup>15</sup> [Cite to downward spirals discussion on LTB].

rationalize departure from the rules, and successfully to mask inconsistency. But these skills are worse than mere mediocrity—the Machiavellian “virtues” are not real excellences; rather, they are the enablers of the worst kind of judicial vice—the perversion of justice.

The downward spiral of politicization and its sibling the descent into mediocrity have not yet reached bottom. There are still many judges of integrity and intelligence, and even the most political judges may adhere to the rule of law if the political stakes are sufficiently low. But there is no guarantee that the uneasy balance of power between politics and the rule of law will long endure. Many would argue that one important line—between the so-called “high politics” of the New Deal and Warren Courts—and the polemically dubbed “low politics” of *Bush v. Gore* has already been breached.<sup>16</sup> If the judiciary is already moving from the politicized interpretation of equal protection and due process to the manipulation of election results, then the next steps are small ones. Every dispute is an opportunity for patronage and rent seeking—because in every case, either the parties or their lawyers are potentially the source of rents in the form of campaign contributions or other indirect payoffs.

And the cost of a thoroughly politicized judiciary is very high indeed. Human flourishing is at risk in a society with a corrupt judiciary. The rule of law is a prerequisite for transparent markets and the protection of basic human rights. At the very bottom of a downward spiral of politicization, the rule of law is no more. At the bottom, the very great goods that the rule of law makes possible cannot long persist. Those goods are prosperity and liberty, the preconditions for human flourishing; their loss would be a heavy cost indeed.

### *B. Modern Moral Philosophy and Contemporary Legal Theory*

There is a striking parallel between the state of contemporary legal theory after the turn of the millennium and the situation of modern moral philosophy in 1958, when Elizabeth Anscombe wrote her famous essay *Modern Moral Philosophy*.<sup>17</sup> Modern moral philosophy, Anscombe argued, has involved a competition between two great families of moral theories, consequentialism and deontology. Both views face severe difficulties and each provides a powerful critique of the other. Consequentialism has the advantage of providing a method that, in principle, is capable of resolving moral disputes, but purchases its discriminatory power by leaving no room for inviolable human rights and independent consideration of fairness. Deontology has the disadvantage of an uncertain method, and at least sometimes seems to exclude consideration of consequences that seem either relevant to or dispositive of the choice that must be made.

And what of the state of contemporary legal theory? Most readers will recognize the eerie parallels with Anscombe’s sketch of the predicament of modern moral philosophy. Contemporary legal theory is characterized by two antinomies: *the antinomy of rights and consequences* and *the antinomy of realism and formalism*. Each antinomy captures a

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<sup>16</sup> On the distinction between high and low politics, see Levinson and Balkin.

<sup>17</sup> Elizabeth Anscombe, *Modern Moral Philosophy* in VIRTUE ETHICS: OXFORD READINGS IN PHILOSOPHY, at 26-44 (originally 33 PHILOSOPHY (1958), *reprinted in* RELIGION, ETHICS, AND POLITICS, 3 THE COLLECTED PAPERS OF G.E.M. ANSCOMBE (1981) and in ETHICS (Judith Thompson & Gerald Dworkin, eds. 1968).

persistent controversy in contemporary legal theory that has proven resistant to resolution (or even clarification) through the practice of reasoned argument. In the less theoretical corners of the legal academy, many believe that legal scholars choose their position with respect to these antinomies on the basis of an *existential leap* as opposed to reasoned argument. In the pages of learned journals and in the introduction to learned monographs, readers may limn the contours of a struggle where rhetorical flourish and name calling take the place of careful scholarly analysis.<sup>18</sup>

The antinomy of rights and consequences is the legal form of the modern philosophical debate between consequentialists and deontologists. In the legal academy, the flag of consequentialism is borne by the normative law and economics movement. An especially prominent and trenchant example is found in *Fairness versus Welfare*, a monumental law review article<sup>19</sup> and later book,<sup>20</sup> by Louis Kaplow and Steven Shavell of Harvard Law School, but normative law and economics has a long and distinguished pedigree, prominently including work by Ronald Coase,<sup>21</sup> Robert Cooter,<sup>22</sup> Frank Easterbrook,<sup>23</sup> Richard Posner,<sup>24</sup> and many others.

If the flag of consequentialism is borne by normative law and economics, then surely the most prominent standard bearer for a rights-based approach to normative legal theory is Ronald Dworkin.<sup>25</sup> Dworkin's theory, law as integrity, emphasizes the idea that the parties have preexisting rights that oblige judges to decide cases on the basis of principle rather than policy. Of course, Dworkin is only one of many who carry the flag for deontology in the legal academy. Deontological approaches are associated with such prominent legal theorists as Jules Coleman,<sup>26</sup> James Fleming,<sup>27</sup> and many others. It is especially important to realize that deontological approaches to legal theory are not the monopoly of the left wing of the legal academy. Legal libertarianism has been defended on deontological grounds, including, for example, the natural rights theory advanced by Randy Barnett.<sup>28</sup>

When I describe the lay of the jurisprudential landscape as an antinomy of rights and consequences, I mean to make a bold assertion about the state of debate between the partisans of consequence and the advocates of rights. This debate does not seem to be progressing towards a conclusion; instead we seem to be in a state of perpetual conflict (at best) or mutual disengagement (at worst).

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<sup>18</sup> I may be incautious, but I am not fool. Even the most vigorous protestations of law review cite checkers are insufficient to force me to name names. You know who you are.

<sup>19</sup> Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961 (2001).

<sup>20</sup> Kaplow & Shavell, *supra* note 2.

<sup>21</sup> Coase.

<sup>22</sup> Cooter.

<sup>23</sup> Easterbrook.

<sup>24</sup> Posner.

<sup>25</sup> RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

<sup>26</sup> Coleman.

<sup>27</sup> Fleming.

<sup>28</sup> Barnett.

Let me explain. On the one hand, there is considerable evidence for the proposition that normative legal theory is fragmenting. Normative law and economics has sufficient momentum so that it is institutionally feasible to proceed as if there were no deontological critique of the moral foundations of welfarism. Likewise, deontologists can debate among themselves, with egalitarians and libertarians arguing for the own preferred version of rights-based normative legal theory. Genuine dialog is rare. Genuine progress is even rarer. Kaplow and Shavell's *Fairness versus Welfare* certainly reignited the debate between the partisans of consequence and the advocates of rights,<sup>29</sup> but I do not think it can fairly be said that much progress was made. Kaplow and Shavell's critics declared victory, but the normative law and economics movement proceeded as if nothing had happened.

If the *antinomy of rights and consequences* is characterized by perpetual warfare or mutual disengagement between two more or less equally matched forces, the *antinomy of realism and formalism* is reflected in a more fractured and less crystalline pattern of legal discourse. We can remind ourselves of the dialectic with a sweeping historical survey: the original legal realist movement of the 20s and 30s gave way to the law and process synthesis of the 50s and 60s, which in turn was challenged by the indeterminacy thesis advanced by the critical legal studies movement in the 80s. CLS gave way to a blistering critique of implausible claims about radical indeterminacy in the 90s, only to see realist cynicism reach a new zenith in the wake of the United States Supreme Court's decision in *Bush v. Gore*. Contemporary legal theory is of two minds about realism and formalism. The practitioners of legal theory have incorporated the standard realist moves into the conceptual toolbox. Who hasn't written an article or taught a class where one shows that a formal legal distinction masks decision making that is really driven by other considerations—politics, policy, economics, or something else? We are all realists. But legal formalism is surprisingly resilient to attempts to declare its demise. Once formalism is rescued from the realist caricature of a self-contained system of pure deduction, it is hard to deny that (1) there are easy cases and (2) while the law may underdetermine judicial decision making, it is rarely radically indeterminate. And neoformalism, in various forms, is on the rise. Originalism, textualism, and plain meaning—these are the watchwords of the neoformalists, a group which makes up in prominence and attention what it may lack in numerosity.

The point of adumbrating the two antinomies—rights and consequences, realism and formalism—is to convey the sense that contemporary normative legal theory, despite its vibrancy and sophistication, is stuck in certain recurring patterns of irresolvable argument. One hesitates to say that contemporary legal theory is a degenerating research program, but there is surely reason for dissatisfaction. Things are not so hunky dory that contemporary legal theory should shut the door to alternative paradigms.

### *C. Why Virtue Jurisprudence?*

Why not? Virtue ethics has hardly vanquished deontology or consequentialism, but there has been a flowering of aretaic approaches in moral philosophy and productive dialog between virtue ethicists, utilitarian, and deontologists. The only way to see

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<sup>29</sup> [Add cites to critics of Kaplow & Shavell.]

whether virtue jurisprudence has something useful to say is to give it a whirl and see what develops. Giving it a whirl is the point of this paper.

#### IV. VIRTUE ETHICS

To get virtue jurisprudence off the ground, we need a basic understanding of its moral sibling—virtue ethics. This section provides a brief history of virtue ethics, maps the contours of contemporary virtue ethics, and then sketches an argument for virtue jurisprudence from moral philosophy.

##### *A. Aristotle's Ethical Theory*

Contemporary virtue ethics has deep roots—in the western philosophical tradition and elsewhere. In the west, the virtue ethics might be said to originate with Plato and Aristotle and the aretaic tradition includes the Stoics and Thomism. Indeed, as Julia Annas puts it: “In the tradition of Western philosophy since the fifth century B.C., the default form of ethical theory has been some version of what is nowadays called virtue ethics; real theoretical alternatives emerge only with Kant and with consequentialism.”<sup>30</sup> As Rosalind Hursthouse has written, “[Virtue ethics] suffered a momentary eclipse during the nineteenth century but re-emerged in the late 1950's in Anglo-American philosophy. It was heralded by Anscombe's famous article "Modern Moral Philosophy" . . . which crystallised an increasing dissatisfaction with the forms of deontology and utilitarianism then prevailing.”<sup>31</sup> A variety of modern philosophers—including Kant and Hume—have important things to say about virtue as well. Nonetheless, Although contemporary virtue ethics draws mostly on ideas and arguments from the western philosophical tradition, traditional Chinese philosophy, especially Confucius, might also be characterized as a form of virtue ethics.

Although virtue ethics has many different roots, reaching into a variety of intellectual traditions, Aristotle's moral philosophy has played a key role in the development of aretaic moral philosophy and serves as a model for important contemporary versions of virtue ethics. For these reasons, Aristotle's moral theory provides an excellent starting point for an investigation of virtue ethics. Of course, even a brief exposition of Aristotle's moral theory is outside the scope of this Article; nonetheless, we can explore the broad outlines of his views and introduce the key terms in his conceptual vocabulary.<sup>32</sup>

One place to start a survey of Aristotle's ethics is with Aristotle's investigation of the questions, “What ends or goals are most choice worthy for humans?” or “What is the highest humanly achievable good?” The answer to these questions, Aristotle argued, will possess three characteristics: first, the highest good will be desirable for itself, second, it will not be desirable for the sake of some other end, and third, every other goods will be

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<sup>30</sup> Julia Annas, *Virtue Ethics*, forthcoming in *The Oxford Companion to Ethical Theory*, edited by David Copp; <http://www.u.arizona.edu/~jannas/forth/coppvirtue.htm> (visited February 17, 2005).

<sup>31</sup> Rosalind Hursthouse, *Virtue Ethics*, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/ethics-virtue/> (visited February 16, 2005).

<sup>32</sup> See generally Richard Kraut, *Aristotle's Ethics*, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/ethics-virtue/> (visited February 16, 2005).

desirable for its sake. The human good that meets these three criteria is *eudaimonia*<sup>33</sup>—translated imperfectly as “happiness.” It is important at the outset to distinguish the concept of *eudaimonia* from modern interpretations of the idea of happiness. *Eudaimonia* is not a pleasurable feeling or sense of well being—that is, it is not merely a desirable psychological state. Rather, it is *eu zên* or “living well.”

That happiness is good in itself seems obvious—the danger is not that happiness lacks intrinsic good, but rather that this conclusion is a mere tautology. Similarly, it seems clear that happiness is not pursued for instrumental reasons. Try completing the sentence, “I want to be happy in order to . . .” No other good seems appropriate as the further end for which the sake of which happiness is pursued. Finally, Aristotle argues that every other human end—wealth, health, and other resources—is pursued for the sake of happiness. I will not recapitulate Aristotle’s argument for these conclusions here, but I do claim that Aristotle’s position on the status of happiness is intuitively plausible and consistent with widely shared beliefs or intuitions.

If Aristotle’s views about the choiceworthiness of happiness are intuitively plausible but abstract, his views about the nature of happiness are both more concrete and contestable. Aristotle develops his conception of happiness with one of the most famous arguments in all of moral philosophy—the function argument. That is, Aristotle answers the question, “What is happiness?” by posing another question, “What is the function (*ergon*) of a human being?” He argues that the characteristic function of humans is rational activity in accordance with the human excellences (or virtues).<sup>34</sup> So happiness consists in “using reason well over the course of a full life” Why “using reason”? Because humans are rational beings; rationality is part of human nature and it is what makes us distinctively human. Why “in accordance with the human excellences”? Because, in general, doing something well requires the appropriate excellences or virtues; hence doing human things well requires the human excellences. Why “over the course of a full life”? Because human lives can be spoiled by unredeemed tragedy; the appropriate vantage point for judging the happiness of a human life is from the end, looking backwards over the whole.

In order to live a happy life, however, the virtues are a necessary but not sufficient conditions. Other goods are required to enable a life of excellent rational activity. Misfortune (a terrible accident) or extreme poverty (a lack of resources) can prevent humans from realizing their potential for living a life of rational activity in accord with the virtues. A life of exhausting physical toil and drudgery unrelieved by periods that offer the opportunity for higher pursuits does not offer opportunities for virtuous rational activity and hence cannot be a happy life.

The next question, then, is “What are the human excellences?” Aristotle contends that the virtues can be divided into two types, intellectual and moral.<sup>35</sup> The intellectual virtues are excellences of mind or intellect—what Aristotle calls the rational part of the soul; the moral virtues pertain to character and emotion—the part of the soul that cannot itself reason but is nonetheless capable of following reason.

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<sup>33</sup> *Eudaimonia* has two parts. The first, “eu,” means “well” and the second, “daimon,” means “divinity” or “spirit.” [Cite to Liddell] Literally, *eudaimonia* is living a life favored by the gods.

<sup>34</sup> NE, 1097b22-1098a20.

<sup>35</sup> NE, 1103a1-10.

There are two intellectual virtues. The first is theoretical wisdom or *sophia*—think of the kind of excellence characteristic of a theoretical physicist, logician, or mathematician. The second intellectual virtue is practical wisdom or *phronesis*—think of the quality that we describe as “good judgment” or “common sense.”<sup>36</sup> Aristotle offers a long (and nonexhaustive list) of moral virtues—these include characteristics such as courage, temperance, and so on. He believed that each of the moral virtues was a mean with respect to a morally neutral emotion—although at least one of the moral virtues—justice—does not easily fit this pattern.<sup>37</sup>

“A mean with respect to a morally neutral emotion”—that’s quite a mouthful. We can unpack Aristotle’s claim by looking at each of the component ideas in the context of an example. Let’s use the virtue of courage—but you should be forewarned that this may be the best and cleanest example for Aristotle. The emotion that is associated with courage is “fear.” When Aristotle says that courage is a “mean” with respect to fear, he points to the relationship between fear and two opposing vices—which we might call cowardice and rashness. Cowardice is the vice that is associated with a disposition to excessive fear; humans with this vice will characteristically overreact to danger. Rashness is the vice with a disposition to insufficient fear; humans with this vice will characteristically be insufficiently alert to and evasive of various risks. Courage is the disposition to fear that is proportionate to the situation, neither too much nor too little but rather the mean that lies between excess and deficiency. Another point has been implicit in the discussion so far—the moral virtues are dispositions (*hexis*) and not states. There is no particular amount of fear that is virtuous; the virtue of courage is the disposition to fear that is appropriate to the situation.

One more idea is important to Aristotle’s understandings of the virtues. For Aristotle it is not sufficient that one’s behavior is in accord with the virtues. Rather, the virtuous agent acts on the basis of the virtues. The virtuous agent acts in conformity with courage and does the courageous act because it is courageous. But this does not mean that the virtuous agent must strain or act contrary to her emotions when she acts courageously. For the virtuous agent, virtuous action comes naturally—it does not require strength of will to overcome natural impulses to the contrary. For the fully virtuous agent, reason, emotion, and desire work together in harmony—they are not at war.<sup>38</sup>

I’ve barely skimmed the surface of Aristotle’s ethics, but before I turn to contemporary virtue ethics, I want to make one more point. One of Aristotle’s most important claims is that there is no decision procedure for ethics.<sup>39</sup> This claim marks a divide between Aristotle and modern moral philosophers, such as Kant and Bentham. The categorical imperative and the utilitarian calculus do aim to provide decision procedures for making moral judgments: “Act so as to maximize utility!” or “Act so that the maxim of your action could be willed as universal law of nature!”—both of these formulas attempt to provide a method for acting in conformity with the requirements of morality. Here is Richard Kraut’s clear and elegant description of Aristotle’s position:

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<sup>36</sup> NE, 1139a3-8.

<sup>37</sup> Justice is discussed below in Part

<sup>38</sup> See Annas, *supra* note 30.

<sup>39</sup> Cf. John Rawls, *Outline of a Decision Procedure for Ethics*, 60 *Philosophical Review* 177-197 (1951); [add cite to version in *Collected Works*].

So far from offering a decision procedure, Aristotle insists that this is something that no ethical theory can do. His theory elucidates the nature of virtue, but what must be done on any particular occasion by a virtuous agent depends on the circumstances, and these vary so much from one occasion to another that there is no possibility of stating a series of rules, however complicated, that collectively solve every practical problem. This feature of ethical theory is not unique; Aristotle thinks it applies to many crafts, such as medicine and navigation (1104a7-10). He says that the virtuous person "sees the truth in each case, being as it were a standard and measure of them" (1113a32-3); but this appeal to the good person's vision should not be taken to mean that he has an inarticulate and incommunicable insight into the truth. Aristotle thinks of the good person as someone who is good at deliberation, and he describes deliberation as a process of rational inquiry. The intermediate point that the good person tries to find is "determined by logos ("reason," "account") and in the way that the person of practical reason would determine it" (1107a1-2). To say that such a person "sees" what to do is simply a way of registering the point that the good person's reasoning does succeed in discovering what is best in each situation. He is "as it were a standard and measure" in the sense that his views should be regarded as authoritative by other members of the community. A standard or measure is something that settles disputes; and because good people are so skilled at discovering the mean in difficult cases, their advice must be sought and heeded.<sup>40</sup>

With this final point in place, let's turn from Aristotle's ethical theory to contemporary virtue ethics.

### *B. Contemporary Virtue Ethics*

Aristotle viewed his ethical theory as continuous in an important way with his biology. Just as a biologist might ask what are the characteristics of a well-functioning antelope or lion, so Aristotle's ethics can be seen as asking the question, "What are the characteristics of a well functioning human?" And his politics extends this question to, "What are the characteristics of a well functioning community of humans?" Aristotle's naturalism poses many questions for our assessment of his theory, but one of those questions is this: since we now reject much of what Aristotle had to say about human biology and psychology, doesn't this undermine his account of the virtues? I am not going to answer that question, because contemporary virtue ethics provides a way for the project of virtue jurisprudence to avoid it. In a sense, the point of contemporary virtue ethics is to ground our understanding of the virtues in contemporary biology and psychology. Here is how Julia Annas explains this idea:

Contemporary virtue ethics with the ambitions of the classical theories, of which the most powerful example is that of Hursthouse, does in contemporary terms what the classical theories do in theirs. It looks at human nature as we find out about that from the best contemporary science. Here the relevant sciences are biology, ethology and psychology, studies of humans and other animals as parts of the life on our planet. When we look at other species it has long been clear that we can

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<sup>40</sup> Kraut, *supra* note 32.

discern patterns of flourishing particular to the species. There has been reluctance to extend this to humans, on the grounds that we, unlike other animals, can choose and create different patterns of living, and evaluate them, sometimes rejecting and changing them as a result. It is only recently that it has been realized that this is not a reason for rejecting naturalism. For this fact about our species is, precisely, a fact about our species. It is because we are rational beings that we can create and evaluate different ways of living, rather than carrying on in the set patterns that members of other species follow. And this is a fact about us of the same sort as the facts about other species on the basis of which we study them. Human rationality is not something which cuts us off from the rest of the biological universe; it is just what is most distinctive about us as a species. If we take this point seriously, then a naturalistic account of humans needs to come up with patterns of flourishing as we do for other species, but specific to humans, thus taking account of the way that our life patterns are dominated by the fact that we are rational beings. Virtue theory takes advantage of the fact that human rationality has been the subject of scientific study by psychologists for quite some time now, though it has only recently been recognized that it is this, rather than some outdated Aristotelian ideas, which form the basis of a naturalistic support for virtue theory.<sup>41</sup>

In other words, one important agenda of contemporary virtue ethics is to develop an account of the virtues that is consistent with modern science. And this grounding may entail some important divergence between contemporary theories and Aristotle's account.

Contemporary virtue ethics takes on a variety of forms. Because the contemporary forms of virtue ethics are relatively new by comparison with modern moral philosophies (consequentialism, deontology) and with ancient virtue ethics, these theories are still at a relatively early stage of development. Indeed, one gap in contemporary virtue ethics is the lack of a comprehensive treatments of the virtue of justice—a topic that this Article addresses in some depth. There are many prominent variants of contemporary virtue ethics. On this occasion, I will not attempt a survey, but I will venture a short list. Philippa Foot and Rosalind Hursthouse have both offered neoaristotelian variants of virtue ethics—although Foot does not see her own work as belonging in the same camp as Hursthouse. Lawrence Becker has developed a neostoic virtue ethics,<sup>42</sup> and Michael Slote a neohumean variant.<sup>43</sup> In this essay, I will use Hursthouse's version of contemporary virtue ethics as a model; Solumonic virtue jurisprudence is decidedly Hursthouseian.

### *C. The Argument from Virtue Ethics*

If virtue ethics is the best available moral theory, then it seems quite likely that virtue jurisprudence must, in some sense, provide the best account of normative legal theory. Of course, stated at this level of generality and abstraction, the connection between virtue ethics and virtue jurisprudence certainly does not rise to the level of entailment. It might be the case that normative legal theory is independent of moral theory. The arguments

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<sup>41</sup> Annas, *supra* note 30.

<sup>42</sup> See LAWRENCE BECKER, *A NEW STOICISM* (Princeton University Press 1998).

<sup>43</sup> See MICHAEL SLOTE, *MORALS FROM MOTIVES* (Oxford University Press 2003); Michael Slote, *From Morality to Virtue* (Oxford University Press 1992).

for such independence might parallel those offered by John Rawls in his very famous essay, “The Independence of Moral Theory,” which claims that normative ethics does not shake out from metaethics.<sup>44</sup> Or it might be argued that virtue ethics (although true) is not appropriate as the basis for jurisprudence in a modern pluralist democracy.<sup>45</sup> But given the claims made by virtue ethics, there are problems with any attempt to resist virtue jurisprudence that admits that the aretaic approach to ethics is the best one.

On this occasion, however, I will not pursue the argument for virtue jurisprudence from virtue ethics—what might be called the *top-down strategy*. Pursuing that strategy would require that I make the case for virtue ethics and against deontology and consequentialism. That case might rely on arguments from both metaethics and normative ethics. The next step would be move from virtue ethics to virtue politics, arguing that an aretaic approach to political philosophy is superior to its consequentialist and deontological rivals. Finally, one could try to show that acceptance of virtue ethics and virtue politics entails or supports acceptance of virtue jurisprudence.

The top-down strategy won’t work in short talk, or even a long talk for that matter. So I propose to proceed quite differently. I will begin with what I believe is the core of virtue jurisprudence—an aretaic (or virtue-centered) theory of judging. If we put such a theory on the table, we can compare it with the theories of judging offered by deontological and consequentialist legal theories. This approach enables us to get down to brass tacks without an impossibly long wind up. I am asking you to go along for the ride; to forgo objections to virtue ethics for the purpose of getting virtue jurisprudence on the table.

## V. A VIRTUE-CENTERED THEORY OF JUDGING

Here is how I will proceed. I will start with the easy stuff—an account of the judicial virtues on which we can mostly agree. I will then try something a bit harder—an account of the virtue of justice, a topic both tricky and controversial. And I will then move to a topic that is even more controversial—an aretaic or virtue centered theory of judging. Of course, you may decide to get off the train at any one of the three stops, but I hope that you will come along for the ride—at least for the limited purpose of getting virtue jurisprudence off the ground as a topic for discussion.

### A. *The Thin Judicial Virtues*

There is disagreement about the qualities that make for good judging. That disagreement is reflected in recent controversies about the selection of federal judges. Because judicial selection has largely been driven by the preference of political actors for certain outcomes on key issues (abortion, affirmative action, and so forth), political ideology has played a major role in the judicial selection process.<sup>46</sup> This practical

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<sup>44</sup> See John Rawls, *The Independence of Moral Theory*, 48 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 5-22 (1975) [add cite to version in collected works].

<sup>45</sup> Cf. [Add cites to public reason literature].

<sup>46</sup> With respect to ideology, judicial selection is arguably a zero sum game. That is, pro-choice political actors (especially interest groups that focus on the issue) have little to gain from the appointment of a pro-life judge who possesses other fine qualities. And vice versa: pro-life political actors have little to gain from the appointment of pro-choice judges, even if they have many other virtues. Of course, abortion is not

disagreement is reflected in legal theory as well. Legal scholars disagree on the criteria for a good legal decision, and hence they are likely to disagree about which judges are excellent as well. Nonetheless, it may be possible to identify a set of judicial excellences on which there is likely to be widespread agreement.

What is called for is a *thin theory* of the judicial virtues. “Thin” in this context reflects the notion that these virtues are based on uncontroversial assumptions about what counts as good judging and on widely accepted beliefs about human nature and social reality. By “virtue,” I mean a dispositional quality of mind or will that is constitutive of human excellence, and the “judicial virtues” include both the human virtues that are relevant to judging and any particular virtues that are associated with the social role of judge.

### *1. Incorruptibility and Judicial Sobriety*

If there is disagreement about what qualities make for the most excellent judges, there is widespread consensus on some of the features that make judges truly awful. One judicial vice on which there is likely to be near universal agreement is “corruption.” Judges who sell their votes undermine the substantive goals of the law, because corrupt decisions are at least as likely to be wrong as they are to be substantively correct. Moreover, corrupt decisions undermine the rule of law values of productivity and uniformity of legal decisions and likewise undermine public respect for the law and public acceptance of the law as legitimate.

If corruption is a vice, then incorruptibility is a virtue. We want judges who will be able to resist the temptations of corruption in its many forms, both subtle and blatant. The virtue of incorruptibility summarizes a variety of particular virtues each of which corresponds to a particular human vice that could lead to corruption.

One such vice is graspingness (or *pleonexia*), the defect of wanting more than one deserves. Judges (like the rest of us) can suffer from the human failing of mistaking wealth (which can only be a means) for a final end (a good that is worth pursuing for its own sake). Once this mistake is made, it is all too easy for humans of great talent and ability to become resentful if their income and wealth is not as great as their peers who are less talented. This vice may take on a special poignancy for judges, who frequently forgo the opportunity for large incomes in order to take the bench. The particular virtue of *incorruptibility* is the corrective for the vice of *pleonexia*.

But not all corruption is motivated by the desire for undeserved wealth as a final end. A judge whose desires are not in order—who lacks the virtue of temperance—might become corrupt in order to support the taste for designer shoes, fast cars, loose companions, or intoxicating substances. Or more prosaically, such a judge might want the finer things of life, for example, a magnificent home, the ability to confer lavish gifts upon one’s children, or the opportunity for luxurious travel. Thus, *temperance*, in the classical sense that encompasses the ordering of all the natural desires, is a virtue for judges. We have a saying that captures the intuitive sense that judges must have their desires in order: we say of a temperate human that she or he is “sober as a judge,” and this suggests that we name this virtue “judicial sobriety” (although “judicial temperance” would also capture the sense of this virtue).

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the only issue, but many such issues cluster together, making a simple left-right model of political ideology both useful both analytically and empirically.

## 2. Civic Courage

Judges are sometimes faced with physical danger, and so, like all humans, they need the virtue of courage. But judges are more frequently faced with a different sort of threat that induces a different kind of fear. Judges are sometimes required to make decisions that are unpopular—that will trigger the disapprobation and even wrath of their fellow citizens in general or the wealthy and the powerful in particular. Judges, like most humans, care for the opinion of their fellows. One wants to be well liked, and to receive the benefits of human sociability that follow from a good reputation. When justice conflicts with the desires and opinions of one's fellows, this creates a temptation—to act unjustly in order to preserve good opinion. And this temptation is especially dangerous in the case of judges—who are given the power to make decisions (sometimes final and binding decisions) as to the rights and obligations of their fellow citizens.

Such judges need the virtue of civic courage—the disposition to put the regard of one's fellows in proper place and to take it into account in the right way on the right occasions for the right reasons. A judge with this virtue will not be tempted to sacrifice justice on the altar of public opinion. A courageous judge does not see the good opinion of his fellows as a relevant reason in the context of making a judicial decision.

## 3. Judicial Temperament and Impartiality

Anger is one of the most powerful of human emotions, and a force for both good and evil. Judges frequently find themselves in situations in which a hot temper could produce intemperate actions. *Why is this so?* In an adversary system, conflict is inevitable. Many litigants and attorneys engage in provocative conduct. In part, this is a result of the fact that many humans have what might be called “an anger management problem.” In addition, some lawyers may deliberately provoke the judge in order to elicit legal mistakes or an “on the record” display of animus that might form the basis of an appeal. Moreover, some lawyers and litigants may not show proper deference to and respect for judicial authority and as a consequence may engage in behavior that is properly regarded as insulting. In the face of such provocations, a hot tempered judge may “fly off the handle.” Intemperate judicial behavior may lead the judge to misapply the law—misinterpreting the applicable legal standards in “the heat of anger.” Moreover, a hot-headed judge may become partial—pulling against the party who is the object of anger and displaying favoritism to that party's opponent.

The corrective for bad temper is the temperateness, and we traditionally call the judicial form of this virtue “judicial temperament,” reflecting the role of judges as paradigms or exemplars of this virtue. This does not mean that excellent judges do not experience anger—they do and they should. Rather, the virtue consists in having appropriate anger—anger for the right reasons on the right occasions with the right consequences. When a party displays disrespect for the judge or for the rules of procedure and evidence, anger may be appropriate. Such appropriate anger alerts the judge to the existence of a “situation that must be dealt with.” In some circumstances, the judge will properly display such anger, giving a lawyer, party, or witness “a stern warning.” When a lawyer, party, or witness persists in bad conduct, sanctions may be warranted; in such cases, an appropriate sanction is the right way to act on the basis of appropriate anger. But judges with the virtue of a judicial temperament will not display

their anger by ruling against an offending party on issues that are close or exercising discretion on incidental matters so as to disfavor the anger-provoking party.

Because anger can produce bias, the virtue of judicial temperament is closely related to another judicial virtue, which we might call “judicial impartiality.” Judges need to be impartial, both with respect to the parties that appear before them and as to the causes, movements, special interests, and ideologies that may be associated with those parties. Sometimes this virtue of impartiality is portrayed as cold. The impartial judge, it might be thought, is like Mr. Spock of the original *Star Trek* series. The cold-blooded Mr. Spock was contrasted to the hot-blooded Dr. McCoy. Of these two, it might be thought that Mr. Spock is the appropriate role model for a judge. But that is a mistake.

Judges should neither be cold-blooded nor hot-tempered. This is because the role of judge requires insight and understanding into the human condition. The impartial judge is not *indifferent* to the parties that come before her. Rather, the virtue of impartiality requires even-handed sympathy for all the parties to a dispute. When we say, “Impartiality is not indifference,” we mean that the virtue of impartiality requires both sympathy and empathy without taking sides or favoring the legitimate interests of one side over those of the other.

#### *4. Diligence and Carefulness*

In systems where judges are given life tenure and a guarantee against diminished compensation (as in the United States federal system), judges may be tempted by the vice of sloth. Slothful or lazy judges are tempted to take the easy way out. Such a judge might delegate too much to judicial clerks, substituting the judgment of the clerk for the judge’s own intellectual engagement with the case. Or such a judge might be tempted to rule in ways that reduce the judge’s workload—choosing the ruling that requires the lesser rather than the greater effort. The slothful judge might also be tempted to put inappropriate pressures on the parties to a dispute to enter into a settlement agreement.

The dangers of judicial sloth are readily apparent. Judicial clerks can provide helpful research, act as a sounding board, and may even be capable of drafting a judicial opinion with guidance, but since clerks are usually hired directly out of law school, they usually lack both the knowledge of the law and the sound practical judgment that is required for good decision making. Over reliance on clerks is likely to lead to poor decisions. When a judge rules so as to avoid work, then there is a real danger that the easy decision will be the wrong decision, working a substantive injustice to one or more of the parties to the dispute. And substantive injustice can also be the result of inappropriate settlement pressures.

The corrective for the vice of judicial sloth is diligence. Ideally, this virtue is reflected in the attitude of the judge towards judicial work. Excellent judges should enjoy their work; they should find judicial tasks engaging and rewarding. This attitude combined with an appropriate “energy level” results in diligence. The diligent judge will be hard working, putting in the required hours and sweating out the difficult tasks. Such a judge will not over-rely on clerks or assistants and will put in the effort required to insure that her decisions and opinions are the product of her own judgment and not the judgment of

subordinates.<sup>47</sup> Such a judge will not hesitate to make the right decision, even if that makes more work for the judge. It may well be appropriate for judges to attempt to facilitate settlement, but a diligent judge will not do this for the wrong reason. Aiming for just settlements is one thing; aiming for convenient settlements is another.

Closely related to diligence is carefulness, the corrective for the vice of judicial carelessness. The slothful judge is tempted to cut corners and avoid the burdens of meticulous attention to details. Thus, a slothful judge will be tempted to avoid the unpleasant task of mastering the structure of a complex statute or plunging into the painstaking task of making sense of tangled body of precedent. Likewise, a slothful judge may avoid the labor-intensive enterprise of drafting an opinion in which each and every sentence is worded with careful appreciation of the importance of precision and accuracy. The careful judge must be meticulous, with an eye for detail and devotion to precision.

### *5. Judicial Intelligence and Learnedness*

Humans need intelligence to flourish. Judges in particular need to be able to comprehend complexity in both the law and the facts. “Stupidity” is surely a judicial vice, because unintelligent judges are likely to make decisions that are incorrect. In an adversary system, judicial intelligence plays a particularly important role, because intelligent advocates will try to make the “worse case appear the better,” by deploying sophistry and rhetoric. Excellent judges can “see through” such attempts, and hence, can make findings of fact that true (or best supported by the evidence) and conclusions of law that are correct, even in the face of powerful attempts at obfuscation.

Mere intelligence is not sufficient for intellectual excellence in judging. A virtuous judge must be learned as well as smart. This means that good judges must have a good legal education and must immerse themselves in the law, reading widely and deeply in the fields of law that are relevant to their jurisdiction. Whether “the law is a seamless web,” or not, may be controversial, but it seems likely that wide and deep legal knowledge is likely to result in better comprehension of the law and the avoidance of mistakes about what the law actually requires.

### *6. Craft and Skill*

So far, I have been discussing what Aristotle called the moral and intellectual virtues, dispositions of character and mind that make for human excellence. Good judging also requires craft and skill—the particular learned abilities that are to good judging what good bowing technique is to archery or good draftsmanship is to architecture. A treatise on judicial craft and skill could consume volumes and is certainly outside the scope of

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<sup>47</sup> Judging is not primarily a managerial task. Good judges are not expected to hire good clerks and then manage them efficiently. Such delegation may be appropriate for other officials. Executives and even legislators may well deserve praise for delegation of responsibility to others. But judges are expected to exercise sound practical and legal judgment on the issues they are required to decide. Of course, some tasks may be delegated, and research is the paradigm case of proper delegation. Even here, however, diligence may require that the judge actually read the key sources and form her own independent judgment as to their proper interpretation.

this Essay. Nonetheless, one particular aspect of judicial craft and skill deserves special comment.

Good judges (and especially good appellate judges) need to be skilled in the use of language. This aspect of judicial craft can be further subdivided. Oral communication is especially important for trial judges, who must deliver a variety of oral instructions to the various participants in both trial and pre-trial proceedings. Among these, jury instructions are particularly important. Written communication is especially important for appellate judges in a common law system, because of the doctrine of *stare decisis*. Appellate opinions set precedent, and a badly written opinion can fail to communicate the intended decision in a manner that will provide clear guidance to parties in future litigation. A really well-written opinion, on the other hand, can do tremendous good—illuminating the law where it was murky and settling questions that were up in the air.

Excellence in communication also plays a role when judges act as mediators or negotiators, aiding the resolution of various disputes and conflicts that arise in the course of the litigation process. An effective judge has the knack of gaining the voluntary cooperation of the parties in the common enterprise of dispute resolution, resorting to force and coercions only when a heavy hand is appropriate to the situation. Undoubtedly, there are many other aspects of judicial craft and skill that would be included in a comprehensive account of judicial excellence.

### *B. The Thick Judicial Virtues*

Up to this point, we have been dealing with the thin judicial virtues—those qualities that make for good judges, but which are uncontroversial. Judicial selection is a task for practical politics. We cannot, *a priori*, rule out the possibility that an adequate account of judicial selection will require that we move beyond the zone of easy agreement and into disputed territory. That is, we must consider the possibility that we need to move beyond a thin theory of judicial virtue and examine the implications of a thick theory.

In this Section, I will lay out the case for two thick judicial virtues. The first of these is justice; the second is practical wisdom. Although these virtues may be the subject of *wide agreement*, they push beyond the boundaries of the uncontroversial. Moreover, the justice and practical wisdom are likely to win assent at a fairly high level of abstraction. When these virtues are applied to particular cases, ambiguities in their abstract formulation are likely to be exposed and hence judgments about their contours are likely to diverge. There may be widespread agreement on the concept of justice or the concept of practical reasons, but particular conceptions of these virtues will provoke disagreement.

#### *1. The Virtue of Justice: The Judge as Nominos*

An excellent judge is just; a judge who lacks the virtue of justice has a serious defect. At this level of abstraction, the virtue of justice is likely to be the object of widespread agreement.<sup>48</sup> But what does the virtue of justice require?

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<sup>48</sup> I want to make room for the possibility that some may get off the boat before the virtue of justice is taken on. It is possible, for example, that some combination of legal formalism and exclusive legal positivism might produce the assertion that judges do not need to the virtue of justice. The exclusive legal positivism might maintain that the justice of a legal outcome is irrelevant to its legality. The legal formalist

In the language of virtue jurisprudence, we might say that the good judge must have the virtue of fidelity to law and concern for the coherence of law. Let us call this “justice as lawfulness.” In conceptualizing the idea that justice as lawfulness is a virtue, it is helpful to examine Aristotle’s account of the relationship between justice and lawfulness. To begin, we need to say a bit about the Greek word *nomos* which is translated as law. The eminent Aristotle scholar, Richard Kraut explains:

[W]hen [Aristotle] says that a just person, speaking in the broadest sense is *nomios*, he is attributing to such a person a certain relationship to the laws, norms, and customs generally accepted by some existing community. Justice has to do not merely with the written enactments of a community’s lawmakers, but with the wider set of norms that govern the members of that community. Similarly, the unjust person’s character is expressed not only in his violations of the written code of laws, but more broadly in his transgression of the rules accepted by the society in which he lives.

There is another important way in which Aristotle’s use of the term *nomos* differs from our word ‘law’: he makes a distinction between *nomoi* and what the Greeks of his time called *psēphismata*—conventionally translated as ‘decrees’. A decree is a legal enactment addressed solely to present circumstances, and sets no precedent that applies to similar cases in the future. By contrast a *nomos* is meant to have general scope: it applies not only to cases at hand but to a general category of cases that can be expected to occur in the future.<sup>49</sup>

Rule by decree, Aristotle believed, was typical of tyranny—the rule of individuals and not of law; a regime that rules by decree does not provide the stability and certainty that is required for human communities to flourish.<sup>50</sup> Kraut continues:

We can now see why Aristotle thinks that justice in its broadest sense can be defined as lawfulness, and why he has such high regard for a lawful person. His definition embodies the assumption that every community requires the high degree of order that comes from having a stable body of customs and norms, and a coherent legal code that is not altered frivolously and unpredictably. Justice in its broadest sense is the intellectual and emotional skill one needs in order to do one’s part in bringing it about that one’s community possesses this stable system of rules and laws.<sup>51</sup>

The excellent judge is a *nomios*, someone who grasps the importance of lawfulness and acts on the basis of the laws and norms of her community.

## 2. *The Virtue of Judicial Wisdom: The Judge as Phronimos*

But the virtue of justice is not exhausted by the idea of lawfulness. Even if we concede that in ordinary cases, justice requires adherence to the law, there are surely

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might argue that the law should not grant judges discretion to do justice in any circumstances. The combination of these two positions might produce an argument that judges need a very narrow virtue of *fidelity to law*, but that a wider virtue of *justice* simply is not required.

<sup>49</sup> RICHARD KRAUT, ARISTOTLE 105-06 (2002).

<sup>50</sup> *Id.* at 106.

<sup>51</sup> *Id.*

extraordinary cases—cases where we think of justice *not as lawfulness* but instead *as fairness*. One version of this objection simply rejects the idea of justice as lawfulness *tout court*. That is, it might be argued that judges should never follow the law when the law conflicts with the judge’s own sense of fairness. Whatever the merits of this argument in the context of a society where there was very little disagreement about what fairness requires, it is a nonstarter in the context of a society—like our own—which is characterized by deep and persistent pluralism about fairness. In such a society, if each judge follows her own notions of fairness, then law will simply not be able to do the job of coordinating behavior and avoiding conflict. Judges will disagree about the content of the law; hence that content will be uncertain and unpredictable.

But the objection to the claim that justice is exhausted by lawfulness can be expressed more modestly. One version of this objection might focus on the idea that the law is cast in abstract and general rules which may lead to results that are unfair in particular cases. A virtuous judge—the objector might argue—needs to have a keen sense of fairness, so as to be able to do justice in the cases where simply following the rules laid down would lead to absurd and unintended consequences.

But of course, this version of the objection to justice as lawfulness was anticipated by Aristotle. In V.10 of the *Nicomachean Ethics*, Aristotle wrote:

What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is nonetheless right; because the error lies not in the law nor in the legislator but in the nature of the case; for the raw material of human behavior is essentially of this kind.<sup>52</sup>

This is the core of Aristotle's view of *epieikeia*, usually translated as equity or fair-mindedness. As Roger Shiner puts it: “Equity is the virtue shown by one particular kind of agent—a judge—when making practical judgments in the face of the limitations of one particular kind of practical rule—those hardened customs and written laws that constitute for some societies the institutionalized system of norms that is its legal system.”<sup>53</sup>

### *C. A Virtue Centered Theory*

We now have an account of judicial virtue on the table. My next step is simply to transpose that account into a theory of judging. I do this by borrowing the approach adopted by Rosalind Hursthouse.<sup>54</sup> For the sake of simplicity and clarity, I shall formulate a virtue-centered theory of judging in the form of five definitions:

- *A judicial virtue* is a naturally possible disposition of mind or will that when present with the other judicial virtues reliably disposes its possessor to make

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<sup>52</sup> ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 1137<sup>b</sup>9-1137<sup>b</sup>24 (J.A.K. Thomson trans., Hugh Tredennick rev., 1976) (pagination is to the Bekker edition).

<sup>53</sup> See Roger Shiner, *Aristotle’s Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1260-61 (1994).

<sup>54</sup> See ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 25-42 (1999).

just decisions. The judicial virtues include but are not limited to temperance, courage, good temper, intelligence, wisdom, and justice.

- *A virtuous judge* is a judge who possesses the judicial virtues.
- *A virtuous decision* is a decision made by a virtuous judge acting from the judicial virtues in the circumstances that are relevant to the decision.
- *A lawful decision* is a decision that would be characteristically made by a virtuous judge in the circumstances that are relevant to the decision.<sup>55</sup> The phrase “legally correct” is synonymous with the phrase “lawful” in this context.
- *A just decision* is identical to a *virtuous decision*.

The central normative thesis of a virtue-centered theory of judging is that judges ought to be virtuous and to make virtuous decisions. Judges who lack the virtues should aim to make lawful or legally correct decisions, although they may not be able to do this reliably given that they lack the virtues. Judges who lack the judicial virtues ought to develop them. Judges ought to be selected on the basis of their possession of (or potential for the acquisition of) the judicial virtues.

How does this abstract theory work out in practice? One way to approach this question is to examine how a virtue-centered theory of judging would handle simple cases and complex cases.

Let’s begin with *simple cases*. Some decisions will obviously be just. Even persons who have incomplete legal knowledge or who have obtained only an incomplete degree of virtue will be able to recognize the justice of the decision. Such cases involve legal rules that are easy to grasp and fact situations in which the salience and application of the rule can be comprehended even by judges who are not especially wise or learned. Of course, even in simple cases, someone who is thoroughly blinded by self-interest might not concur in a widely shared judgment about what outcome is just.

There are cases where the justice of a decision is not so obvious as in easy cases. The second context might be called *complex cases*. When the law is complex, a high degree of legal intelligence may be required to recognize the legally correct result. When the facts are complex, other intellectual skills, e.g., a highly developed situation sense, may be required to see what even relatively simple legal rules require. Thus, in complex cases, it may be the case that only someone with sufficient legal knowledge and in possession of a high degree of judicial virtue will be able to fully grasp which outcome is just and why this is so.<sup>56</sup> Although we might say that a just decision is independent of the virtue of the particular judge who made the decision, it is not the case that the justice of the decision is independent of judicial virtue. There are cases in which the just outcome can only be recognized by a virtuous judge.

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<sup>55</sup> The distinction between virtuous and correct decisions is introduced to distinguish between a fully virtuous decision (made by a virtuous judge acting from the virtues) from a merely correct decision (made for the wrong reasons). In order to be legally correct, a decision need only be the decision a virtuous judge would have made under the circumstances. Thus, a legally correct decision could be made for vicious reasons. For example, a corrupt judge could accept a bribe to render the same decision that a virtuous judge would have made.

<sup>56</sup> In such cases, I am inclined to say that any virtuous person could be brought to see which result is just and why this is so, but the process of bringing about such an understanding may involve quite a lot of explanation.

## VI. THE ADEQUACY OF A VIRTUE-CENTERED ACCOUNT

Does virtue jurisprudence offer an adequate theory of judging? I shall answer this question with respect to two contexts, illustrating both the way in which a virtue-centered theory of judging can capture the insights of its rivals and the way in which it might differ from them. The first context, I shall call cases of “justice as lawfulness.” These are cases in which the outcome required by the legal rules is in full accord with our sense of fairness. The second sort of case, I shall call “justice as fairness.”<sup>57</sup> Cases of justice as fairness involves the situation in which the outcome dictated by the rules of law alone is not consistent with our understanding of what is fair in a wider sense.

### *A. Justice as Lawfulness*

Can a virtue-centered theory of judging offer an adequate normative account of cases, either *easy* or *complex*, in which the legal rules determine the lawful outcome? The answer is surely yes. For the most part, a virtue-centered theory of judging will be in accord both with common sense and with other normative theories of judging with respect to the question as to what constitutes the just outcome in such cases. The virtue of justice ordinarily requires decision in accord with the letter of the law.<sup>58</sup> Of course, the reasons offered by various normative theories of judging are likely to differ even in easy cases. Utilitarians will emphasize the good consequences that justify the rules and the bad consequences that would result if judges undermined the predictability and certainty created by the laws by failing to adhere to them. Deontologists might emphasize the rights that legal rules protect and the unfairness of failing to follow legal rules once they become a source of legitimate expectations.

The rivals of a virtue-centered theory of judging can agree on the idea that judges ought to possess the judicial virtues insofar as these are required for judges to reliably follow the law. No plausible normative theory of judging is inconsistent with a thin theory of the judicial virtues. No sensible theory would be indifferent to judges who are avaricious, cowardly, bad tempered, stupid or foolish, and no sensible theory would claim we should not prefer temperate, courageous, good tempered, intelligent, and wise judges. How then does a virtue-centered account differ from accounts that do not focus on the virtues?

#### *1. Virtue Is Required to Explain Decisions According to Legal Rules*

Unlike other theories of judging, a virtue-centered theory makes the claim that virtue is an ineliminable part of the explanation for and justification of the practice of judging. According to a virtue-centered theory, the whole story about what the rules of law require in particular cases includes the virtues. If they were to be left out, the story would be incomplete. Moreover, a virtue-centered theory suggests that it may require judicial virtue to recognize the legally correct result. The rules do not apply themselves;

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<sup>57</sup> This locution is only coincident with “justice as fairness” in Rawls’s sense. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed. 2001).

<sup>58</sup> See Richard Kraut, *ARISTOTLE: POLITICAL PHILOSOPHY*, *supra* note 49, at 105-08, 117.

judgment is always required for a general rule to be applied to a particular case. Practical wisdom or good judgment is required to insure that the rules are applied correctly.

The necessity for practical wisdom in rule application can be discerned by imagining an appellate judge and her interlocutor discussing the appellate review of a trial judge's finding of fact. "Why was the trial judge's finding of fact clearly erroneous?" the interlocutor asks. "Because it was not sufficiently supported by evidence on the record," answers the judge. "Why do you conclude that the support was insufficient?" asks the interlocutor. "Because a reasonable finder of fact could not move from that evidence to the conclusions that judge drew," answers the judge. "But why couldn't a reasonable finder of fact make the necessary inferences?" asks the interlocutor. Imagine that the interlocutor responds to each explanation with a demand for definite criteria for application of the clearly erroneous standard. At some point, the answers must stop. If the questioner were still unsatisfied, the judge would be forced to explain her lack of further justifications by saying, "because that's the way I see it, and I am a competent judge. I cannot say any more than that." Explanations must come to an end somewhere.<sup>59</sup> The clearly-erroneous rule provides a particularly perspicuous example of the bottom-line role of practical judgment in rule application, because it is widely acknowledged that no criteria can be provided for sorting errors that are clear from those that are not.<sup>60</sup>

In the end, agreement and disagreement about what rules mean and how they are applied are rooted in practical judgments. Even with respect to some easy cases and more frequently with respect to complex cases, articulated reasons will not suffice to explain why, in cases of bottom-line disagreement about the application of a rule to the facts, one judgment is legally correct and competing judgments are not.

Indeed, a virtue-centered account allows us to appreciate the fact that explanations or justifications of legal decisions play more than one role. In some cases, when a judge explains a decision, the intention is to lay bare the premises and reasoning that moved the judge from accepted premises about the law and the facts to some conclusion about what result is legally correct. There are other cases, however, where explanations play a different role. When the decision of a case is based on legal vision or situation sense—that is, when the decision is based on the virtue of judicial wisdom of *phronesis*—then the point of an explanation is to enable others to come to see the relevant features of the case. Such explanations do not recreate a decision procedure; rather, they are aimed at enabling others to acquire practical wisdom.

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<sup>59</sup> See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* s. 1 (G.E.M. Anscombe trans., 1968).

<sup>60</sup> See *United States v. Aluminum Co. of America.*, 148 F.2d 416, 433 (2d Cir. 1945) (opinion by Learned Hand, J., stating, "It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded."); see also Edward H. Cooper, *Civil Rule 50(A): Rationing and Rationalizing The Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988). A virtue-centered theory also accounts for the observation that the clearly erroneous rule is applied with an eye to the virtues of the trial court judge. See FLEMING JAMES & GEOFFERY HAZARD, *CIVIL PROCEDURE* § 12.8, at 668 (3d. ed. 1985) ("[A]n appellate court's inclination to accept a trial judge's findings depends. . . . on the court's unstated degree of confidence in the trial judge's fair-mindedness.').

## 2. A Virtue-Centered Account of Lawful Judicial Disagreement

At this point, one could object that a virtue-centered account fails for a different reason. It might be argued that a virtue-centered account requires that two inconsistent outcomes in the very same case could both be legally correct.<sup>61</sup> As we shall see, this apparent objection to a virtue-centered theory of judging actually illuminates one of its greatest strengths. A virtue-centered theory allows us to account for the fact that there are frequently cases in which more than one outcome would count as legally correct.

The objection begins with a premise that we shall call *the multiplicity of virtuous decisions*. The core idea of this premise is quite simple: there are cases in which different virtuous judges would make different decisions with respect to a given issue and a given set of facts. The second premise shall be called *the uniqueness of legally correct decisions*. The idea of this premise is that given a particular issue and a given set of facts, only one decision of the issue can be legally correct. Call the claim that a decision is legally correct if and only if it is the decision that would be made by a virtuous judge under the relevant circumstances, *the identity of virtue and legality*. The shape of the argument should now be clear. From *the uniqueness of legally correct decisions* and *the multiplicity of virtuous decisions*, it would seem to follow that some virtuous decisions are incorrect. If these premises are true, it follows that *the identity of virtue and legality* is false.

The first premise, *the multiplicity of virtuous decisions*, asserts that two different virtuous judges could reach different decisions in the same case. This claim seems plausible. Different virtuous judges are likely to differ in ways that might affect their decisions. They will have different experiences and beliefs, and those differences could easily affect the decision on a variety of legal issues. The multiplicity of virtuous decisions seems especially likely in so-called hard cases, in which there are good legal arguments on both sides of the issue.<sup>62</sup>

However, the second premise, *the uniqueness of legally correct decisions*, is false. There are a variety of situations in which more than one outcome is legally correct. This is true for a variety of reasons. First, it is sometimes the case that the preexisting legal rules underdetermine the outcome of a particular case.<sup>63</sup> In the United States, a frequent pattern involves the situation where an issue of law has been resolved differently by different circuits of the United States Court of Appeal. This phenomenon is called a

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<sup>61</sup> I am very grateful to Phillip Pullman for his forceful presentation of this objection and to Linda Zagzebski for her assistance in working out the answer that is presented here.

<sup>62</sup> Although I concede the multiplicity of virtuous decisions, I should note that this premise might be attacked in a variety of ways. For example, we might argue that although different partially virtuous judges might decide the same issue in the same case differently, that only one decision could and would be made by the fully virtuous judge. Put another way, we might say that the various decisions made by different judges who possess the virtuous to different degrees converge on a single decision as the degree of virtue increases. This picture may fit some kinds of issues and cases, but I shall demonstrate that there are issues and cases that do not fit into the picture of increasing virtue converging on a unique outcome.

<sup>63</sup> See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 473 (1987) (distinguishing indeterminate from underdeterminate). This assertion is, of course, controversial. I have not here addressed the important and persuasive arguments made Ronald Dworkin. See RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in A MATTER OF PRINCIPLE 119-44 (1985).

“circuit split.” Unless the Supreme Court resolves the split, inconsistent results can be correct in different circuits. In a circuit that has not decided the issue, two different trial judges can reach different outcomes and neither judge has rendered a decision that is legally incorrect. In this first sort of case, however, one might argue that there is a sense in which the inconsistent decisions are only correct provisionally or temporarily. If the Supreme Court resolves the split, then one line of cases is approved and the inconsistent line becomes “bad law.”

Of course, there are times when a circuit split is best explained as a competition between a correct line of authority and another position that is badly reasoned or that ignores relevant authority. But there are other times when both results are plausible. Because the Supreme Court leaves many circuit splits unresolved (for years, decades, or even permanently), the best description of the situation is that two inconsistent positions on the same issue of law are both correct, neither line of authority can be said to be bad law.

Second, it is sometimes the case that the law itself commits a decision to the discretion of the judge. A paradigm case of such discretion can be found in the power of trial judges to manage the mechanics of a trial. Trial court judges have discretion to decide how long a trial will last, how many witnesses each side can present, and how long the examination of a witness will be permitted to take. If a virtuous judge makes such a decision, then it is legally correct, even though another virtuous judge would have made a different decision. If, however, the decision was the product of judicial vice, e.g. it was a product of corruption, then the decision is in error—even though the very same decision would have been legally correct if it had been the product of virtue rather than vice. The law of procedure captures this phenomenon in the standard of appellate review for discretionary decisions. The relevant standard is called “abuse of discretion,” and given an abuse-of-discretion standard is settled law that inconsistent decisions of the same issue on identical legally relevant facts can both be legally correct.<sup>64</sup>

Moreover, some legal standards sanction more than one legally correct outcome on a particular set of facts. A clear example of this is the “best interests of the child” standard in child custody disputes. Although formulated as a rule of law, this legal standard requires the application of practical judgment to a particular fact situation. As a consequence, an appellate court will affirm a trial court’s decision to award custody, even when the appellate judges would have made a different decision.<sup>65</sup> In such a case, each of two inconsistent decisions (awarding primary custody to one parent versus the other) can be legally correct. Although “best” is superlative and therefore suggests a unique outcome, the best-interests-of-the-child standard is understood by courts to permit a multiplicity of outcomes in the large range of cases in which both parents have good claims that they would provide the best for the child.

A virtue-centered theory of judging explains and justifies this feature of our judicial practice. There are circumstances in which two or more different (and in one sense

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<sup>64</sup> See, e.g., *Jones v. Strayhorn*, 159 TEX. 421, 321 S.W.2d 290 (1959) (“The mere fact or circumstance that a trial judge may decide a matter within his discretionary authority in a manner different from what an appellate judge would decide if placed in a similar circumstance does not demonstrate that an abuse of discretion has occurred.”).

<sup>65</sup> See *Ford v. Ford*, 68 CONN. APP. 173, 187, 789 A.2d 1104, 1112 (2002) (indicating that a difference of judgment does not justify reversal of a child custody decision absent “abuse of discretion”).

“inconsistent”) outcomes are legally correct. A virtue-centered theory explains this on the ground that two different virtuous judges could each make different decisions, even though each was acting from the virtues. In cases in which the judge was not acting from virtue, but was acting from vicious motives, such as corruption, willful disregard of the law, or bias, then a discretionary decision may be legally incorrect—even though the very same outcome would have been acceptable if it had been made by a virtuous judge.

### *B. The Virtue of Equity*

The distinctive contribution of a virtue-centered theory is even clearer in the second category of cases, those in which the result required by the legal rule is inconsistent with our notion of what is fair. In these cases, a virtue-centered theory suggests that the virtuous decision is guided by the virtue of equity, or justice as fairness, distinguished from justice as lawfulness.<sup>66</sup> As we have already seen, the key to a virtue-centered account of equity is the virtue of practical wisdom or *phronesis*.

A virtue-centered theory of judging offers a distinctive approach to cases that involve considerations of equity. Here is one way to put it. Other normative theories of judging have difficulty explaining why there should be a distinctive practice of equity. If an exception ought to be made to a legal rule, then amend the rule. (This is the approach favored by theories of statutory interpretation that require strict adherence to plain meaning.) Of course, sometimes rules should be amended, but a virtue-centered theory of judging stakes out the claim that there will always be cases in which the problem is not that the rule was not given its optimal formulation. Rather, the problem is that the infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules. The solution is not to attempt to write the ultimate code, with particular provisions to handle every possible factual variation. No matter how long and detailed, no matter how many exceptions, and exceptions to exceptions, the code could not be long enough.<sup>67</sup> Rather, the solution is to entrust decision to virtuous judges who can craft a decision to fit the particular case.

No thin theory of judicial virtue can incorporate the virtue of equity. Indeed, I shall stake the claim that only a virtue-centered theory offers a fully adequate explanation of equity.<sup>68</sup> But Aristotle is right about rules; no set of rules can do justice in every case. Thus, virtue jurisprudence offers a normative and explanatory theory of judging that explains and justifies the practice of equity, but many other theories of law stumble at precisely this point.

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<sup>66</sup> See Roger Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245 (1994).

<sup>67</sup> Even if the code could be long enough, it wouldn't be a good idea to make it “complete,” where by “complete” we mean the code is sufficiently particularistic so as to provide, in theory, a guide to decision making in every possible case. The complete code would be so long and so complex that it would be of no practical use as a guide to decision. Cf. Lawrence B. Solum, *The Boundaries of Legal Discourse and the Debate over Default Rules in Contract*, 3 S. CAL. MULTIDISCIPLINARY L. REV. 311, 324-27 (1993) (arguing for analogous thesis in context of notion of a complete contract).

<sup>68</sup> Of course, a defense of this claim requires an examination of all the alternative normative theories of judging. Because this task goes beyond the scope of this paper, I can only offer a promissory note on this occasion.

## VII. CONCLUSION

Well I've done something that I myself don't much like. I've begun this paper with a sweeping indictment of contemporary legal theory and then made only a modest contribution to the development of an alternative. I hope you will forgive me for that. The reason for the sweeping indictment was to give you a sense of my own unease with the state of normative legal theory in the early twenty-first century. The reason for the modest contribution is that the development of a full account of virtue jurisprudence is a very large task. Nonetheless, I hope to have persuaded you that virtue jurisprudence is worthy of further investigation.