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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 Legal Realist paradigm—an interrelated cluster of theories about the nature of law. One version of Legal Realism is captured by the slogan of the critical legal studies (CLS) movement: “Law is politics.”¹ CLS and 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 welfarism² or deontology³) or a political ideology (of the

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Finally, I owe a very great debt to Philippa Foot for her courses and seminars at the University of California at Los Angeles; Professor Foot opened my eyes to the possibility of aretaic legal theory. But for her, there would be no virtue jurisprudence.

¹ 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).

² 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

left, right, or center).⁴ 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 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 ethics⁵ offers a third way—an alternative to the deontological and consequentialist approaches that dominated modern moral philosophy and contemporary legal theory 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. The paper focuses on a few aspects of virtue jurisprudence, including (1) a virtue centered theory of judging, (2) the relationship between law and justice, and (3) the naturalist foundations of aretaic legal theory. 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

Let’s begin with the big questions. What is virtue jurisprudence? What questions does it answer? Do we have any reason to turn our attention to yet another general normative theory of law?

A. What is an Aretaic Theory of Law?

Contemporary legal theory endeavors to answer at least two big questions of practical jurisprudence:⁶ First, *what is the aim of law?* Second, *how can legal institutions best do*

of utilitarianism—in the philosophical sense of that term—that takes has a preference-based conception of utility.

³ Deontological approaches to law typically emphasize the importance of moral rights. For example, Dworkin’s argument that judges may rely on arguments of principle (founded on rights) but not arguments of policy (based on consequentialism) would be a clear case of a deontological legal theory. See RONALD DWORKIN, *LAW’S EMPIRE* (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978).

⁴ On legal instrumentalism and its relationship to Legal Realism, see Brian Tamanaha, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (Cambridge University Press 2006).

⁵ For a short introduction to virtue ethics, see Rosalind Hursthouse, *Virtue Ethics*, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/ethics-virtue/> (visited February 17, 2005); Julia Annas, *Virtue Ethics* in *THE OXFORD COMPANION TO ETHICAL THEORY* (David Copp, ed. Oxford University Press 2007).

⁶ 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, legal positivism, and interpretivism as the three leading contenders

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*.⁷ On one hand, the aretaic turn represents a renewed concern with human excellence as a unifying normative and explanatory concept. On the other hand, the turn towards human excellence is a turn away from the reductive programs of both consequentialist and 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.

B. Why Should We Make 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.

1. Mediocrity and Politicization

Begin with the state of the law itself, focusing on the legal system of the United States as an example.⁸ No observer of contemporary American jurisprudence can feel satisfied

⁷ See “Aretaic Turn,” Wikipedia, http://www.wikipedia.org/wiki/Aretaic_turn.

⁸ The problems that are identified in the discussion that follows may or may not be unique to the United States. Legal cultures may vary in the degree to which they embrace Legal Formalism or Legal Instrumentalism.

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.⁹ From *Roe v. Wade*¹⁰ (abortion and choice) to *Bush v. Gore*¹¹ (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.¹²

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 will use their power to achieve the aims of high and low politics through judicial fiat.¹³ 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. 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.¹⁴

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

⁹ 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*, 5 U.S. (1 Cranch) 137 (1803). 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.

¹⁰ 410 U.S. 113 (1973).

¹¹ 531 U.S. 98 (2000).

¹² 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).

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

¹⁴ *See* Lawrence Solum, Downward Spirals Department, Legal Theory Blog, April 27, 2003, http://lsolum.typepad.com/legaltheory/2003/04/downward_spiral.html.

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 rationalize departure from the rules, and successfully to mask inconsistency. But these skills are worse than mere mediocrity—the Machiavellian “virtues” are not true 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.¹⁵ 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, other indirect payoffs, or direct bribes.

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 and equality; their loss would be a heavy cost indeed.

2. 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*.¹⁶ 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

¹⁵ On the distinction between high and low politics, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045 (2001).

¹⁶ 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).

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 between Twenty-First Century legal scholarship and 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 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. Even 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.¹⁷

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 article¹⁸ and later book,¹⁹ 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, Robert Cooter, Frank Easterbrook, Richard Posner, 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.²⁰ 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, James Fleming, Michael Moore, and countless 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.

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

¹⁷ 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.

¹⁸ Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961 (2001).

¹⁹ Kaplow & Shavell, *supra* note 2.

²⁰ RONALD DWORKIN, LAW'S EMPIRE, *supra* note 3; RONALD DWORKIN, A MATTER OF PRINCIPLE, *supra* note 3; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 3.

progressing towards a conclusion; instead we seem to be in a state of perpetual conflict (at best) or mutual disengagement (at worst).

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, for example, 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,²¹ 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 CLS 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—ideology, morality, 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 (or never) 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 dominated by

²¹ See, e.g., Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847 (2002); Brett H. McDonnell, *The Economists' New Arguments*, 88 MINN. L. REV. 86 (2003); David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351 (2002); Richard H. Fallon, Jr., *Should We All Be Welfare Economists?*, 101 MICH. L. REV. 979 (2003); Jules L. Coleman, *The Grounds of Welfare*, 112 Yale L.J. 1511 (2003). This is only a small sampling of the literature.

degenerating research programs, but there is surely reason for dissatisfaction. Things are not so hunky dory that contemporary legal theory should shut the door to alternative approaches. Just as virtue ethics has sparked progress in moral philosophy, so virtue jurisprudence might ignite productive debates in normative legal theory. 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, utilitarians, and deontologists. The only way to see 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.

III. 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.”²² 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.”²³ A variety of modern philosophers—including Kant and Hume—have important things to say about virtue as well. 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.

Virtue ethics has many different roots, reaching into a variety of intellectual traditions, but 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

²² Julia Annas, *supra* note 5.

²³ Rosalind Hursthouse, *supra* note 5.

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.²⁴

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 desirable for its sake. The human good that meets these three criteria is *eudaimonia*²⁵—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).²⁶ 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.

²⁴ See generally Richard Kraut, Aristotle's Ethics, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/ethics-virtue/> (visited February 16, 2005).

²⁵ *Eudaimonia* has two parts. The first, "eu," means "well" and the second, "daimon," means "divinity" or "spirit." H.G. LIDDELL & R. SCOTT, GREEK ENGLISH LEXICON (Oxford University Press, 9th ed. 1996). Literally, *eudaimonia* is living a life favored by the gods.

²⁶ ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 1097b22-1098a20 (J.A.K. Thomson trans., Hugh Tredennick rev., 1976) (pagination is to the German Bekker edition) [*hereinafter* NE].

In order to live a happy life, however, the virtues are 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.²⁷

The next question, then, is “What are the human excellences?” Aristotle contends that the virtues can be divided into two types, intellectual and moral.²⁸ 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.

There are at least two²⁹ 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.”³⁰ 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.

“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 mere occurrent

²⁷ The phrase “higher pursuits” may be misleading. On my account, rational activity is not restricted to “contemplation” or even systematic acquisition of knowledge. Politics is the paradigm case of a rational social activity that allows the expression of the human excellences, but other activities, for example, economic activity or certain forms of play (from sports to online gaming) could also be rational activities. To the extent that Aristotle is committed to the view that there is a single best activity, contemplation, I believe that he is mistaken. These issues are far outside the scope of the current essay.

²⁸ NE, 1103a1-10.

²⁹ I will bracket the question whether there are additional intellectual virtues (such as knowledge) for the remainder of this essay.

³⁰ NE, 1139a3-8.

states.³¹ 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 for the right reasons or from the right motives. 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.³²

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.³³ This claim marks a divide between Aristotle and (on at least some interpretations) 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:

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

³¹ *Hexis* is sometimes translated as state, but virtues are not merely occurrent states (that might come and go from one moment to the next. Rather, a virtue in the Aristotelian sense is a stable disposition (or a stable dispositional state).

³² See Annas, *supra* note 5.

³³ Cf. John Rawls, *Outline of a Decision Procedure for Ethics*, 60 *Philosophical Review* 177-197 (1951) republished in JOHN RAWLS, *COLLECTED PAPERS* (Samuel Freeman ed., Harvard University Press, 2001).

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.³⁴

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 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

³⁴ RICHARD KRAUT, ARISTOTLE (2002).

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.³⁵

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,³⁶ and Michael Slote a neoHumean variant.³⁷ In this essay, I will use Hursthouse's version of contemporary virtue ethics as a model.

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 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.³⁸ Or it might be argued that virtue ethics (although true) is not appropriate as the basis for jurisprudence in a modern pluralist democracy.³⁹ But given the claims made by virtue ethics, there are problems with any attempt to resist virtue jurisprudence if that attempt admits that the aretaic approach to ethics is the best one.

³⁵ Annas, *supra* note 5.

³⁶ See LAWRENCE BECKER, *A NEW STOICISM* (Princeton University Press 1998).

³⁷ See MICHAEL SLOTE, *MORALS FROM MOTIVES* (Oxford University Press 2003); MICHAEL SLOTE, *FROM MORALITY TO VIRTUE* (Oxford University Press 1992).

³⁸ See John Rawls, *The Independence of Moral Theory*, 48 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION 5-22 (1975) *republished in* JOHN RAWLS, *COLLECTED PAPERS* (Samuel Freeman ed., Harvard University Press, 2001).

³⁹ Cf. Lawrence Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006).

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 a 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.⁴⁰ 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.

IV. AN ARETAIC (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 Uncontested Judicial Virtues (the Easy Stuff)

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.⁴¹ This practical

⁴⁰ Although my focus is on a theory of “judging,” the account that is offered here is actually more general. First, the account extends to all dispute resolution by neutral decision-makers, and hence to arbitration, mediation, and other nonjudicial forms of adjudication and alternative dispute resolution. Second, the account can be applied with only minor adjustments and modifications to law abidance in nonadjudicatory contexts, such as the interpretation of the law by lawyers and officials “outside the courts” or “in the shadow of the law.” What I call an aretaic theory of judging might be restyled as an aretaic theory of legal interpretation or an aretaic theory of dispute resolution.

⁴¹ 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 (or virtues) on which there is likely to be widespread agreement.

What is called for is a *theory* of the uncontested judicial virtues.⁴² “Uncontested” 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 general human virtues that are relevant to judging and any particular virtues that are associated with the social role of judge.

1. Judicial Incorruptibility and Judicial Sobriety

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.

Even the most zealous advocate of ideological judicial selection is likely to accept the conclusion that judicial corruption is a vice. Of course, it is possible that some judges might accept bribes or political favors in a way that systematically favors a particular political ideology or that advances the interests of a particular political party. But the partisans of ideological judging would have good reason to think that even a corrupt judge who “votes the right way” is a bad judge. *Why?* Two reasons. First, corrupt judges are not reliable ideological allies—precisely because their decisions are for sale, they can be lured to the side of one’s ideological opponents by a “better offer” or more attractive bribe. Second, there is always a risk that corruption will be exposed, and when exposed, a corrupt decision that favors one’s cause may actually be counterproductive—delegitimizing the ideology that it seemed to serve. Of course these two prudential reasons are likely to be supplemented by the obvious reason of principle—corrupt decisions are morally wrong. We have no reason to believe that the partisans of ideological judging would not condemn corruption on moral grounds.

If we accept the conclusion that judicial corruption is a vice, then what is the corresponding virtue? This question could become complex—because there are a variety of character flaws that might lead to corruption. One such flaw is greed (or *pleonexia*) may be an underlying cause of corruption—because a desire for more than one’s share

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

⁴² In prior work, I have used the terms “thin” and “thick” to describe the difference between “uncontested” and “contested” judicial virtues. See Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003) reprinted in MORAL AND EPISTEMIC VIRTUES (Michael Brady & Duncan Prichard eds., Blackwell Publishing 2003).

(or entitlement) could lead a judge to accept bribes. All humans are at risk of mistaking wealth (which can only be a means) for a final end (something worth pursuing for its own sake). Some judges may resent the fact that they receive compensation that is sometimes only a fraction of that provided their peers in private legal practice—some of whom may be less talented.

We do not need to identify all of the possible vices that could lead to corruption in order to see that *incorruptibility* is an uncontested judicial virtue. There is no real controversy over the proposition that judges should be disposed to resist the temptations that lead to corruption. We call this disposition the “judicial virtue of incorruptibility,” even if it turns out that this virtue encompasses a variety of particular virtues each of which corresponds to a particular human vice that could lead to corruption.

There is another vice that is closely related to corruption but is distinct from greed. Judges can become corrupted because their desires are not in order—because they crave pleasure or the status (and corresponding envy) conferred by the possession of fine things. Judges, like the rest of us, can be corrupted by a taste for designer shoes, fast cars, loose companions, or intoxicating substances. More subtly, a judge could be corrupted by a desire for 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.

Let us use some old fashioned terminology and call the vice of disorderly desire “intemperance”—recognizing that modern ears may not be able to hear that word without summoning up an image of drunkenness caused by a craving for the pleasures of strong drink. Can a case be made that intemperance is not a judicial vice? One might argue that intemperance is a purely private vice—that a judge’s preference for a third cosmopolitan, the latest from Jimmy Choo or Manolo Blahnik, or the company of good looking youthful companions is her own business and hence irrelevant to the question whether she is an excellent judge. Of course, a proportionate and well-ordered desire for such things is simply not a vice—or at least not an *uncontested* vice.⁴³ But a disposition to disproportionate desires for such pleasures can lead to more than corruption. Most obviously, a judge who is intoxicated (or high) on the bench is likely to be prone to error, for obvious reasons. The inordinate pursuit of less intoxicating pleasures can also impair judicial performance—by focusing the a judge’s attention and energy away from judicial tasks.

There is a counter argument. It is a common human experience to have a friend, colleague, or acquaintance who is intemperate, but nonetheless “gets the job done”—even performs brilliantly at times. Who hasn’t encountered the lawyer who is a star by day, but a lush in the wee hours or the friend whose life at work still holds together despite a drug problem? So, the argument goes, intemperance is not a *judicial vice*—at least not until it interferes with the performance of judicial duty. Even if the intemperate judicial candidate is a disaster at home, her intemperance should not disqualify her from judicial office if she performs at the office. This counter argument is ultimately unpersuasive. Of course, an intemperate judge can get lucky and “get away with it,”

⁴³ One might believe that a desire for strong drink, flashy clothes, or younger companions reflects bad taste without believing that such desires express vice.

either appearing to do well or even actually doing well despite disordered desires. But in such cases “getting away with it” is a matter of luck; an intemperate judge is simply not reliable. A really damaging misstep is always just one cosmopolitan away.

The virtue that corresponds to the vice of intemperance could be called *temperance*, in the classical sense that encompasses the ordering of all the natural desires. But I propose that we use another term to refer to the judicial form of temperance. 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.”

2. Judicial Courage

Fear is one of the most powerful and familiar of the emotions. For Aristotle, the virtue of courage relates to the morally neutral emotion of fear. Following the pattern of the moral virtues, courage represents a mean between a vice of excess—cowardice—and a vice of deficiency, which we might call “rashness” or “recklessness.” We can agree that cowardice is a judicial vice, and judicial courage is a virtue.

We might usefully subdivide the virtue courage into two parts—which I shall call “physical courage” and “civic courage.” That judges need physical courage in order to be excellent *as judges* is a lamentable fact in many societies. We have been reminded of this fact recently by the tragic experiences of federal district judge, Joan Lefkow, who was threatened by one defendant and whose husband and mother were murdered by a party to another case.⁴⁴ A judge who could be intimidated by threats of physical violence could not reliably do justice in our society—much less under conditions where violence (or threats of violence) was even more prevalent—as may be the case where narcoterrorism or violent ethnic conflict is pervasive.

Judicial courage has a second dimension. Judges, like most humans, care about their reputations and social standing. Like the rest of us, judges seek the approval and companionship of their fellows. So in addition to physical danger, judges may fear consequences of their actions that involve threats to status and social approval. This is because the law may require judges to make unpopular decisions. A judge who ordered school integration in the South might be shunned socially. In societies where the judicial branch wields significant power in cases involving hot button issues (abortion, end of life disputes, and so forth), there will be occasions where doing what the law requires may be profoundly unpopular. For this reason, 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

⁴⁴ Pam Hartman, How anger turns to 'social rage', *Mobile Reigster*, 2005, <http://www.al.com/opinion/mobileregister/index.ssf?/base/opinion/1112545146171620.xml> (visited October 1, 2007) (discussing murders caused by anger at judges); Susan Estrich, Now is a tough time to be a judge, *The Sun News*, March 25, 2005, <http://www.myrtlebeachonline.com/mld/sunnews/news/opinion/11226003.htm> (stating “everyone was shaken up by what happened to the Lefkow family in Chicago, the cold-blooded murder of a judge’s husband and aged mother.”).

note be tempted to sacrifice justice on the altar of public opinion. A civically courageous judge understands that the good opinion of others is worth having if it flows from having done justice and that social approval for injustice is an impermissible motive for judicial action.

3. *Judicial Temperament and Impartiality*

Like fear, anger is an emotion both familiar and powerful.⁴⁵ Judges like the rest of us may be hot tempered or cool and collected. And like the rest of us, judges are likely to find themselves in situations where a hot temper could produce intemperate actions. This is especially true of trial judges, who are given the task of maintaining order in what may become emotionally charged circumstances. Litigants may ignore judicial authority or act with disrespect. Some lawyers may deliberately attempt to provoke the judge in order to elicit legal mistakes or “on the record” behavior that displays animus towards a party and serve as the basis for an appeal. In the face of such provocations, a judge with an “anger management problem” 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.

Aristotle identified *proates* or “good temper” as the corrective virtue for the vice of bad temper. In the judicial context, this virtue is so important that we have a phrase that expresses the virtue as a distinctively judicial form of excellence—“judicial temperament.” This phrase reflects our sense that the virtue of “good temper” is essential for good judging.

Is judicial temperament also required for judges who do not supervise trials? Appellate judges work in a cooler environment—provocative behavior by appellate lawyers is rare although not unknown. The parties to an appellate proceeding frequently do not appear, and if they do, they sit in the audience without any formal participation in the appellate process itself. Some appellate courts proceed almost entirely on the basis of the briefs, dispensing with oral argument and hence with the opportunity for “live and in person” provocations. Nonetheless, good temper is essential for excellence in appellate judging. Appellate judges hear cases in panels or en banc—creating opportunities for friction among the judges themselves. Hot tempers can destroy collegiality and with it the opportunity for compromise and mutual understanding. Moreover, even a brief can elicit anger, and if anger becomes rage, it can have a blinding effect, depriving the judge of the ability to recognize the merits of an argument or a weakness in the judge’s own conception of the legal issues in a case.

If excessive anger is a vice, then what about its opposite? Is there a vice of deficiency with respect to anger? The Stoics are famous for answering this question in the negative:

⁴⁵ My view of the virtue of temperance has been improved by recent work by Nancy Sherman. See 2.2. Nancy Sherman, *Aristotle, the Stoics, and Kant on Emotions*, <http://asweb.artsci.uc.edu/philosophy/news/colloqPresentations/Sherman.pdf> (visited October 1, 2007); see also Nancy Sherman, *Stoic Warriors: The Ancient Philosophy behind the Military Mind* (Oxford University Press 2005).

we might say that for the Stoics, the disposition to feel any anger in any circumstances is a vice.⁴⁶ The contrary view is that proportionate anger serves a valuable function—alerting us to wrongs and motivating us to respond to them. A simple way of framing the issue is to ask which character from the 1960s television series *Star Trek* would make the best judge—Captain Kirk, Dr. McCoy, or Mr. Spock. Mr. Spock resembles the Stoic sage—he feels no anger and acts only on the basis of logic; we imagine Judge Spock reacting with equanimity to even the most severe courtroom provocations. Dr. McCoy is hot tempered; we imagine him flying off the handle in response to outrageous behavior by the lawyer for a greedy corporation. Captain Kirk represents a mean between these two extremes; we imagine Judge Kirk as appropriately outraged by bad behavior and injustice, but nonetheless remaining “in control,” angered by the right things and responding with in an appropriate manner. The virtue of judicial temperament consists in having appropriate anger—anger for the right reasons on the right occasions with a clear understanding of the consequences of its expression.

More concretely, when a party flouts the law or disrespects the participants in a legal proceeding, 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.

One reason that anger is an especially dangerous vice for judges is that anger can produce bias. For this reason, the virtue of judicial temperament is closely related to another judicial virtue, “judicial impartiality.” This virtue is a familiar feature of our conception of good judging. We want judges to be neutral arbitrators. A judge should be open to the law and evidence and not biased in favor of one side or another. Such impartiality should extend not just to the parties but should also encompass the causes, movements, special interests, and ideologies that may be associated with those parties. When a judge takes the bench or lifts her pen to write an opinion, she should put aside her allegiance to left or right, liberal or conservative, religiosity or secularism.

It is a mistake, however, to view impartiality as synonymous with disinterest. The virtue of impartiality is not cold-blooded. This is because the role of judge requires insight and understanding into the human condition. A good judge perceives the law and facts from a human perspective. Some facts are hot—charged with emotional salience. Some legal rules are righteous—engaging our sense of moral indignation when juxtaposed with violative behavior. So the impartial judge is not cold blooded; she is not *indifferent* to the parties that come before her. Rather, the judge with the virtue of judicial impartiality has 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

⁴⁶ See Plutarch, *Moralia, On the Control of Anger*; Seneca, *On Anger*.

both sympathy and empathy without taking sides or favoring the legitimate interests of one side over those of the other.⁴⁷

4. Diligence and Carefulness

Judging is hard work, involving its share of drudgery. Some trials are long and boring. Some opinions require long hours of research and even longer hours of careful drafting. The temptation to shirk this work is accentuated by the fact that judges are not (and should not be) closely supervised. And the lack of supervision is compounded in jurisdictions that grant judges life tenure or long terms in office. It is hard enough to remove a judge for outright corruption; one doubts that any American judge has been removed on the basis of sloth alone. But slothful or lazy judges can do real harm. They are tempted to delegate too much responsibility to judicial clerks, substituting the judgment of the clerk for the judge's own intellectual engagement with the case. Another temptation is to shape one's decision in order to minimize one's own workload. If granting the summary judgment motion takes a case off one's docket, the slothful judge might grant the motion for that reason alone, sacrificing justice on the altar of expediency.

What is the virtue that corresponds to the vice of sloth? We might call it diligence. The diligent judge has the right attitude towards judicial work, finding judicial tasks engaging and rewarding. But more than a good attitude is required. An excellent judge must have an appropriate "energy level"—a product of both physical and mental health. The combination of these traits should translate into a judge who is capable of hard work when hard work is required. Such a judge will put in the required hours and sweat out the difficult tasks. Such a judge will not hesitate to make the right decision, even if that makes more work for the judge. Nowadays, encouraging settlements may be an appropriate activity for judges, but a diligent judge will aim for just and efficient settlements and not for resolutions that serve the judge's own convenience.

Carefulness is closely related to diligence. No one can sensibly doubt that judicial carelessness is a vice. Careless decisions, careless drafting, careless research—any of these can lead to substantive injustice. Carefulness is especially important in the context of judging, because excellent judging frequently requires meticulous attention to details. The lazy judge may shirk the unpleasant task of mastering the structure of a complex statute or avoid the painstaking task of making sense of tangled body of precedent. Likewise, it requires diligence and care to draft an opinion in which each and every sentence is worded with careful appreciation of the importance of precision and accuracy. An excellent judge has an eye for detail and a devotion to precision.

5. Judicial Intelligence and Learnedness

Can anyone doubt that stupidity is a judicial vice? All humans need intelligence to function well—but some tasks require greater intelligence on more occasions. Judging is

⁴⁷ The discussion of this issue has benefitted from comments by Richard Posner on prior work.

the kind of task that sometimes requires extraordinary intelligence. Both law and facts can be complex. Only a judge with intelligence will be able to sort out the complexities of the rule against perpetuities or penetrate the mysteries of a complex statute. But more than intelligence is required. A truly excellent judge must also be learned in the law, because one cannot start from scratch in each and every case and because there is at least some truth to the notion that the law is a seamless web. To put these same points the other way round: stupid and ignorant judges will be error prone, likely to misunderstand and misstate the law and unlikely to make findings of fact that are correct.

The need for judicial intelligence and learnedness is accentuated rather than diminished in an adversary system. It is true that good lawyering makes a judge's job easier; the lawyers can identify the relevant issues and call the judge's attention to the best arguments on each side of those issues that are in dispute. But in an adversary system, successful advocates will try to make "worse case appear the better," by deploying sophistry and rhetoric. Intelligent and learned judges can "see through" the obfuscation and look past the appeals to prejudice and preconception.

6. Craft and Skill

So far, our investigation has focused on what Aristotle called the moral and intellectual virtues. These are dispositions of character and mind that make for human excellence. Good judging requires more than good character and intellectual ability. That is because judging includes elements of craft, and therefore a good judge must possess a skill set—the particular learned abilities that are to good judging what good bowing technique is to archery or good draftsmanship is to architecture. A full account of judicial craft is far beyond the scope of this Essay, but one particular aspect of judicial craft and skill cries out for attention. Excellence in judging (especially good appellate judging) requires particular skill in the use of language. Good judges must be good communicators. This aspect of judicial skill includes at least two parts—oral and written. It is obvious that trial judges need good oral communication skills; they 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 skills are especially important for appellate judges in a common law system, because of the doctrine of *stare decisis*. Because appellate opinions set precedent, a badly written opinion can misstate the law or state the law in a misleading way. A really well drafted opinion, on the other hand, can clarify the obscure and illuminate the meaning of murky legal texts.

Good communication skills are also important to judges when they mediate between the parties to a dispute. A skilled judge can gain the trust and cooperation of the parties—resorting to the threat of sanctions only in those rare cases when force is truly necessary. In this way, good communication skills can increase the efficiency of judicial proceedings, allowing the judge to focus her attention on those issues and cases where settlement and cooperative processes are unavailing.

B. The (Mostly) Contestable Judicial Virtues (the Hard Stuff)

One advantage of a theory of judicial excellence is that it reveals a large zone of agreement. For all practical purposes, we can agree that judges should be incorruptible, courageous, good tempered, diligent, skilled, and smart. But these (mostly uncontested) virtues do not tell the whole story about judicial excellence. Even if we agree in our judgments about who the very worst judges are—the corrupt, ill-tempered, cowardly, lazy, incompetent, and stupid ones—there are strong and persistent disagreements about who the best judges are. The partisans of Lord Coke may deride the accomplishments of Lord Mansfield; the admirers of Justice Breyer may be among the critics of Justice Scalia. This section investigates the source of these disagreements about judicial excellence.

Once again, my strategy is to examine the judicial virtues. In particular, I shall argue that disagreements about judicial excellence are typically rooted in two interrelated disagreements about the nature of judicial virtue. The first disagreement is about the nature of the virtue of justice. The second disagreement concerns the role of equity and practical wisdom. On the one hand, some disagreements about judicial excellence turn out to be disagreements about and within conceptions of the virtue of justice—qualities that some call “justice,” others see as “unjust.” On the other hand, other controversies hang on differences in the understanding of the role of practical wisdom in judging: some believe that wise judges will range far from the rules in the name of equity, while others believe that equity should be tightly constrained by the rule of law.

Although there are important disagreements about the virtues of justice and practical wisdom, there are certainly agreements as well. When stated at a high level of generality and abstraction, these virtues will command near universal assent. Almost everyone will agree that an excellent judge must be just (rather than unjust) and wise (rather than foolish). Let’s borrow the concept/conception distinction.⁴⁸ We might say that there is agreement on the proposition that the concept of the virtue of justice is required for judicial excellence, but that there is disagreement about which conception of the virtue of justice is best (or correct or most adequate). And likewise, with the virtue of practical wisdom—we agree on the concept, but disagree about which conception of the virtue and its relationship to justice is the best one.

1. Competing Conceptions of the Virtue of Justice

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.⁴⁹ But what does the virtue of justice require? In this section, I will examine

⁴⁸ See W. B. Gallie, *Essentially Contested Concepts*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167 (1956); John Rawls, A THEORY OF JUSTICE 4-5 (Harvard University Press rev. ed. 1999); RONALD DWORKIN, LAW’S EMPIRE 70-72 (Harvard University Press 1986).

⁴⁹ 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

two different conceptions of the virtue of justice: *justice as lawfulness* and *justice as fairness*. (For short, I will use the phrases “the fairness conception” and “the lawfulness conception” to refer to these ideas.) I shall argue that conceptualizing the virtue of justice as fairness necessitates intractable disagreements about which judges are excellent, and that the competing conception, emphasizing the idea that excellent judges are lawful opens the door to possible agreement in judgments about who is just. My investigation begins with the fairness conception of the virtue of justice and then moves to the notion of justice as lawfulness.

a) Justice as Fairness

One influential conception of the virtue of justice is based begins with the premise that the just and the lawful are (or should be) separate and distinct. Of course, the view is not that all laws or unjust or that no just norms are law. Rather, the idea is that there is no necessary connection between legality and justice.⁵⁰ If this were so, then the most plausible conception of the virtue of justice might be articulated as follows:

The Virtue of Justice as Fairness: A judge, J, has the virtue of justice as fairness, V(j-f), if and only if J is disposed to act in accord with the best conception of fairness, F, in situations, S, where F provides salient reasons for action.

One might think that a judge who possessed *V(j-f)* would act solely on the basis of fairness⁵¹ with reference to the law, but this is not the case. If this were true, it would provide the basis for a devastating objection to the fairness conception—because it would require each judge to substitute her private judgments about what fairness requires for the duly enacted constitutions, statutes, and rules.⁵² Although I shall not provide the argument here, it seems plain that this would be a recipe for chaos.⁵³

positivism might maintain that the justice of a legal outcome is irrelevant to its legality. The legal formalist 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* or *law abidance* but that a wider virtue of *justice* simply is not required. Cf. William A. Edmundson, *The Virtue of Law Abidance*, <http://www.trinitinture.com/documents/edmundson.pdf>.

⁵⁰ This conception of the virtue of justice bears an affinity to the separation thesis—a central tenet of legal positivism. Cf. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1997) (discussing legal positivism and the separation thesis, but not in the context of the virtue of justice). The literature on positivism is vast, including important contributions by Joseph Raz, Jules Coleman, and many others. For an overview, see Leslie Green, *Legal Positivism*, *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/legal-positivism/>.

⁵¹ For our purposes, the content of fairness does not need to be specified. The content of fairness could be provided by consequentialist, deontological, or aretaic theories.

⁵² For an example of the reasoning behind the fairness conception, see Elena Kagan, *Confirmation Messes: Old and New*, 62 *U. Chi. L. Rev.* 919, 933-34 (1995):

More important, an investigation of moral character will reveal very little about the values that matter most in the enterprise of judging. What makes the Richard Posner different from the Stephen Breyer different from the Laurence Tribe is not moral character or behavior, in the sense

But a defender of the fairness conception need not admit that a judge who acted on the basis of fairness would disregard the law entirely. *Why not?* Because the existence of legal norms will frequently give rise to considerations of fairness that will transform the moral landscape, creating salient reasons of fairness that motivate a judge who has $V(j-f)$ to act in accord with the law. An example may help to clarify and illustrate this point. Suppose there is a dispute between Ben and Alice over Greenacre—a vacant and unimproved parcel of land. The law gives Ben title to Greenacre, which he has purchased, but Alice has begun to use Greenacre by planting a garden. In the absence of the institution of property law, it might be the case that Ben would have no claim on Greenacre—how would he acquire such a claim without some use or improvement of the land?—but that given the existence of property law, Ben would have a claim of fairness, because he has paid for Greenacre and has reasonably relied on the legal institution of property. If this is so, then the law has created a claim of fairness that otherwise would not exist and a judge with $V(j-f)$ would decide in favor of Ben—assuming, of course, that there were no other circumstances that created an overriding reason of fairness to decide in favor of Alice.

Nonetheless, the fairness conception faces a formidable objection because of the role that private judgment plays for judges with $V(j-f)$. To articulate this objection, we need to highlight the distinction between two questions about fairness—which I shall call “first order” and “second order” questions of fairness. A first order question of fairness is simply the question, “Which action is fair given the circumstances?” A second order question of fairness concerns whose judgment about first order questions will be taken as authoritative. Thus, the question, “Given the fact of disagreement about the correct answer to a first-order question of fairness, whose judgment should be taken as authoritative?” is a second order question of fairness. One possible answer to a second-order question of fairness is that one ought to rely on one’s own *private* judgment about what action is fair. A quite different answer is that one should rely on some source of *public* judgment. For example, one might rely on duly-enacted and public laws.

The fairness conception implicitly requires judge’s to exercise private judgment about first-order questions of fairness. In exercising that judgment, the judge may conclude

meant by [Stephen] Carter; I am reasonably sure that each of these persons is, in his personal life and according to Carter’s standard, a morally exemplary individual. What causes them to differ as constitutional interpreters is something if not completely, then at least partly, severable from personal morality: divergent understandings of the values embodied in the Constitution and the proper role of judges in giving effect to those values. Disagreement on these matters can cause (and has caused), among the most personally upright of judges, disagreement on every concrete question of constitutional law, including (or especially) the most important. It is therefore difficult to understand why we would make personal moral standards the focal point of a decision either to nominate or to confirm a person as a Supreme Court Justice.

Kagan’s discussion is framed in terms of character generally and not the virtue of justice in particular, but her point would carry over to justice with only superficial adjustment.

⁵³ Of course, there may be some theorists who believe that judges do and should act on the basis of their sense of fairness rather than the law. Moreover, those who adhere to the radical or strong indeterminacy thesis contend that the law never constrains the choices of judges. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

that expectations generated by reasonable reliance on the law provide reasons of fairness—as in the case of Ben, Alice, and Greenacre—but this is a conclusion of private judgment. One judge might conclude that Ben’s reliance on property law was reasonable, and hence that fairness required a decision for Ben. A different judge might conclude that no one could reasonably rely on property law in cases in which they were allowing valuable land to lie fallow when others could make productive use of the land—and therefore decide for Alice. Yet a third judge might conclude that because of pervasive economic inequalities, the whole institution of property is unjust and award the land to a third-party, Carla, who was in greater need than either Ben or Alice. Because each judge makes a private judgment about the all-things-considered fairness of following the law in each case, these judgments can (and we expect will) differ with the political, moral, religious, and ideological views of the particular judge.

The objection to the fairness conception of the virtue of justice is that disagreements in private judgments about fairness would undermine the very great values that we associate with the rule of law. Because the fairness conception requires each judge to exercise her own private judgment about what fairness requires—all things considered—and because such judgments will frequently differ, the outcome of disputes adjudicated by judges with *V(j-f)* will be systematically unpredictable. If this were the case, then the law would be unable to perform the function of coordinating behavior, creating stable expectations, and constraining arbitrary or self-interested actions by officials. How bad this would be is a matter of dispute. A Hobbesian answer to this question is *very bad indeed*—in the absence of coordinating authority, life would be “solitary, poore, nasty, brutish, and short.”⁵⁴ A Lockean answer is that reliance on private judgment leads to “inconveniences,”⁵⁵ but even a optimistic realist would surely concede that the inconvenience of a society that cannot secure the rule of law would be serious.

We are now in a position to apply what we have learned about the fairness conception to judicial selection. If the fairness conception were correct, then the excellent judges are those who have the right beliefs about fairness and who are disposed to act on those beliefs. If we agreed on the content of the right beliefs about fairness, this would not be a problem, but we do not agree. So the fairness conception leads to disagreement about who has the virtue of justice. We can provide a crude translation of this point into the language of political ideologies of the left and right. For the left, only left-wing judges are just; because only left-wing judges have what the left considers true beliefs about what fairness requires. And of course, for the right, the left-wing judges are unjust precisely because they have what the right considers false beliefs about fairness. Even the uncontested virtues—such as incorruptibility or courage—become problematic once the fairness conception has been accepted. For the left, an intelligent, diligent, and courageous right wing judge may be worse than a similar judge who lacks a keen intellect, is somewhat lazy, and who will succumb to the pressures of public opinion. And vice versa for the right.

⁵⁴ THOMAS HOBBS, *LEVIATHAN* 76 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1668).

⁵⁵ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 276 (Peter Laslett ed., Cambridge University Press 1988) (1694).

It gets worse for the fairness conception. Anyone who holds the fairness conception is naturally tempted to apply a double standard of judicial excellence. The double standard works like this:

For judges with whom I agree, the fairness conception supplies the content of the virtue of justice. Right-thinking judges are excellent when they act on the basis of their convictions about what is fair. But when it comes to judges with whom I disagree, a different standard applies. Wrong-thinking judges are excellent when they stick to the rules. For them, the lawfulness conception provides the standard for the virtue of justice.

You may say, “That’s ludicrous, no one could hold such a blatantly inconsistent set of positions about the meaning of justice.” In reply, I suggest that you pay careful attention to the political rhetoric that attends debates about judicial role and judicial selection.

b) Justice as Lawfulness

If the fairness conception of the virtue of justice is unsatisfactory, is there an alternative? In the *Nicomachean Ethics*, Aristotle suggests an alternative understanding of justice as lawfulness, but to understand Aristotle’s view, we need to take a look at the Greek word *nomos* which is usually translated as “law.” For the ancient Greeks, *nomos* had a broader meaning that does “law” in contemporary English. Richard Kraut, the distinguished Aristotle scholar, explained the difference as follows:

[W]hen [Aristotle] says that a just person, speaking in the broadest sense is *nomimos*, 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.⁵⁶

We can restate this last point by using our distinction between types of judgments (first and second order, private and public). If judges rely on their own private, first-order judgments of fairness as the basis for the resolution of disputes, then it follows inexorably

⁵⁶ Kraut, *supra* note 34, at 105-06.

that their judgments will be decrees (*psēphismata*) and not decisions on the basis of a second order, public judgment—in other words, not on the basis of a *nomos*. In other words, a judge who decides on the basis of her own private judgments about which outcome is fair—all things considered—is making decisions that are tyrannical in Aristotle’s sense.

“How can this be?,” you may ask. “Aren’t decisions that are motivated by fairness the very opposite of tyranny?” But framing the question in this way obscures rather than illuminates the point. Of course, if there were universal agreement (or even a strong consensus) of first-order private judgments about fairness, then decision on the basis of such judgments would be *nomoi* and not *psēphismata*. But our private, first-order judgments about the all-things-considered requirements of fairness sometimes do not agree. So in any given case, a decision that the judge believes is required by fairness will be seen by others quite differently. At best, the decision will be viewed as a good faith error of private judgment about fairness. More likely, those who disagree will describe the decision as a product of ideology, personal preference, or bias. At worst, the decision will be perceived as the product of arbitrary will or self interest. In no event, will a decision based on a controversial first order private judgment of fairness be viewed as outcome of a *nomos*—a publicly available legal norm.

We are now in a better position to appreciate why rule by decree (*psēphismata*) is typical of tyranny. Decision on the basis of private, first-order judgments about fairness is the rule of individuals and not of law. From Aristotle’s point of view, a regime that rules by decree does not provide the stability and certainty that is required for human communities to flourish.⁵⁷ 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 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 brining it about that one’s community possesses this stable system of rules and laws.⁵⁸

And with that point in place, we can now formulate the lawfulness conception of the virtue of justice:

The Virtue of Justice as Lawfulness: A judge, J, has the virtue of justice as lawfulness, V(j-l), if and only if J is disposed to act in accord with the nomoi (positive laws and stable customs and norms), N, in situations, S, where N provide salient reasons for action.

⁵⁷ *Id.* at 106.

⁵⁸ *Id.*

On the lawfulness conception, the virtue of justice does not require action in conformity with one's private, first-order judgments of fairness. Justice as lawfulness is based on a second order judgment that judges (or more generally, citizens) should rely on public judgments. The content of the public judgments are the *nomoi*—the positive laws and shared norms of a given community. Someone with the virtue of justice is disposed to act on the basis of the *nomoi*. In other words, the lawfulness conception holds that the excellent judge is a *nomimos*, someone who grasps the importance of lawfulness and is disposed to act on the basis of the laws and norms of her community. A judge who is *nomimos* cares about the laws and norms of her community. She is disposed to do that which is lawful, because she respects and internalize the *nomoi* of her community.

Finally, we are now in a position to compare the fairness conception and the lawfulness conception. Which of these offers a more satisfactory conception of the virtue of justice? On the surface, it might appear that the fairness conception is more satisfactory—after all, who can deny that we ought to do what fairness requires—all things considered? Although there is much more to be said in a full account of these matters, the argument advanced here provides good reasons to doubt that the fairness conception can offer a satisfying account of the virtue of justice. A view of justice must take into account the distinctions between first and second order judgments and between public and private judgments. Once these distinctions are introduced, the need for second order agreement on a public standard of judgment becomes clear. The lawfulness conception of the virtue of justice answers to this need; the fairness conception does not.

2. *Competing Conceptions of Equity and Practical Wisdom*

But the virtue of justice may not be exhausted by the lawfulness conception. Even if we concede that in ordinary cases justice requires adherence to the law, there question remains whether there are extraordinary cases—cases in which excellent judges would depart from the law (or, to put it differently, decide that the law does not really apply). Even if first order private judgment cannot do the work of filling in the content of a general conception of the virtue of justice, that does not necessarily imply that the judge's sense of fairness has no role to play. One reason we might doubt the adequacy of the lawfulness conception as the whole story about the virtue of justice flows from the fact that the positive law is cast in the form of abstract and general rules; such rules may lead to results that are unfair in those particular cases that do not fit the pattern contemplated by the formulation of the rule. If lawfulness were the whole story about the virtue of justice, then an excellent judge would apply the rule “come hell and high water” even if the rule led to consequences that were absurd or manifestly unjust. But this implication of the lawfulness conception seems odd and unsatisfactory. Another way of putting this concern is to distinguish between two styles of rule application, which I shall call “mechanical” and “sensitive.”

Does the excellent judge apply the rules in a rigid and mechanical way? Or does a virtuous judge correct the rigidity of the lawfulness conception with equity? The classic discussion of these question provided by Aristotle in Book V, Chapter 10 of the *Nicomachean Ethics*:

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.⁵⁹

This is the *locus classicus* for Aristotle's view of *epieikeia*, which is usually translated as "equity," but can also be translated as "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."⁶⁰

But there is a problem with supplementing the lawfulness conception of the virtue of justice with the notion of equity. Understanding the problem begins with the fact that the virtue of equity seems to require the exercise of first-order private judgments of fairness. Once such judgments are admitted to have trumping force—to have the power to override the second order judgment to rely on the public judgments embodied in the law, the question becomes how the role of private judgment can be constrained. Without constraint, private judgment threatens to swallow public judgment and we are on a slippery slope that threatens to transform the lawfulness conception into the fairness conception.

The trick is to constrain equity while preserving its corrective role. To put the point metaphorically, we need an account of equity that provides enables us to get navigate the slope while providing sufficient traction to avoid slipping or sliding.

An Aristotelian account of the virtue of equity gives us three points of traction. The first point of traction is provided by the distinction between the equitable correction of law's generality and the substitution of private first order judgments for the *nomoi*. Equity is not doing what the judge believes is fair when that conflicts with the law; rather, equity is doing what the spirit of the law requires, when the expression of the role fails to capture its point or purpose in a particular factual context. The second point of traction is provided by the virtue of justice itself. A judge who is *nomimos* simply isn't tempted to use equity to avoid the constraining force of the law. A *nomimos* has internalized the normative force of the law; such a judge wants to act in accord with the animating purposes of the system of social norms and positive law.

The third point of traction is provided by Aristotle's understanding of the intellectual virtue of practical wisdom or *phronesis*—think of the quality that we describe as "good judgment" or "common sense."⁶¹ A judge with virtue of practical wisdom, a *phronimos*,

⁵⁹ NE, 1137^b9-1137^b24.

⁶⁰ See Roger Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L.REV. 1245, 1260-61 (1994).

⁶¹ NE, 1139a3-8.

has the ability to perceive the salient features of particular situations. In the context of judging, we can use Llewellyn's phrase, "situation sense,"⁶² or by way of analogy to the phrase "moral vision,"⁶³ we can say that a sense of justice requires "legal vision," the ability to size up a case and discern which aspects are legally important. The *phronimos* can do equity because she grasps the point of legal rules and discerns the legally and morally salient features of particular fact situations.

This account of equity can be contrasted with two rivals. On the one hand, we can imagine a conception of judging as pure equity—the idea that the judge would simply do the right thing in each particular fact situation. This conception of equity is simply a more particularistic version of the fairness conception of the virtue of justice. On the other hand, we can imagine a conception of judging that limits equity to the vanishing point—perhaps to those cases where the application of the rule is truly absurd. Neither of these two alternatives offers a fully satisfactory account of the virtue of equity. The first alternative sacrifices the very great goods created by the rule of law. The second alternative pays too a high price for those goods, require more rigidity than is necessary. A constrained practice of equity done by judges who are both *nomimos* and *phronimos* combines the values of the rule of law with the flexibility to bend the rules to fit the facts when that is required by the purposes of the rules themselves.

C. A Virtue Centered Theory (the Hardest Stuff)

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.⁶⁴ 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 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.⁶⁵ The

⁶² KARL LLEWELLYN, THE COMMON LAW TRADITION 59-61, 121-57, 206-08 (1960).

⁶³ See NANCY SHERMAN, THE FABRIC OF CHARACTER (1989).

⁶⁴ See ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 25-42 (1999).

⁶⁵ 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.

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, but because the simplicity of the case makes it apparent that bias or self-interest is the source of disagreement, this fact confirms rather than complicates judgments about simple cases.

There are cases where the justice of a decision is not so obvious as in simple 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.⁶⁶ 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.

V. 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 “low conflict cases.” These are cases in which the outcome required by the legal rules is in full (or almost full) accord with our

⁶⁶ 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.

sense of fairness. The second sort of case, I shall call “high conflict cases.” High conflict cases involve situations in which the outcome dictated by the rules of law alone is relatively distant from our understanding of what is fair in a wider sense.

A. Low Conflict Cases

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.⁶⁷ 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 an uncontested 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; 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

⁶⁷ See Kraut, *supra* note 34, at 117.

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.⁶⁸ 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.⁶⁹

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.

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

⁶⁸ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* s. 1 (G.E.M. Anscombe trans., 1968).

⁶⁹ 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.”).

outcomes in the very same case could both be legally correct.⁷⁰ 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.⁷¹

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.⁷² 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 “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

⁷⁰ 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.

⁷¹ Although I embrace assumption of 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.

⁷² See Solum, *supra* note 53, at 473 (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).

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.⁷³

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.⁷⁴ 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.

⁷³ 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.”).

⁷⁴ 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”).

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 “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. High Conflict Cases

The distinctive contribution of a virtue-centered theory is even clearer in the second category of high-conflict 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.⁷⁵ 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 be 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.⁷⁶ Rather, the solution is to entrust decision to virtuous judges who can craft a decision to fit the particular case.

No theory limited to the uncontested judicial virtues 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.⁷⁷ But Aristotle is right about rules; no set of rules can do

⁷⁵ See Roger Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245 (1994).

⁷⁶ 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).

⁷⁷ 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.

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.

Before we leave the category of high conflict cases, I should not that we have not (so far) discussed an important type of high conflict case—cases that involve evil laws or regimes. This type requires and deserves separate treatment and we shall return to it in the next Part of the Essay.

VI. METAJURISPRUDENCE: NATURAL JUSTICE

Virtue jurisprudence offers a distinctive normative theory of law. In the Part, I address what we might call a question of “metajurisprudence” (a neologism that borrows from the similar term “metaethics): what view of normativity grounds virtue jurisprudence? My approach to that question will be via an inquiry into the nature of the virtue of justice. I shall argue that justice is a natural and not an artificial virtue. That is, I shall claim that well-functioning humans are naturally just, as are well-ordered human societies. As we have already seen this means that in a well-ordered society, just humans internalize the laws and social norms (the *nomoi*)—they internalize lawfulness as a disposition that guides the way they relate to other humans. In societies that are mostly well-ordered, with isolated zones of substantial dysfunction, the *nomoi* are limited to those norms that are not clearly inconsistent with the function of law—to create the conditions for human flourishing. In a radically dysfunctional society, humans are thrown back on their own resources—doing the best they can in circumstances that may require great practical wisdom to avoid evil and achieve good. These three types of societies—well-functioning, mostly well-functioning, and radically defective—illustrate and give content to the general claim that justice is naturally good for humans—it is part and partial of human flourishing. These are natural ethical facts.

There is much to be said about the question whether goodness or justice are natural. A full discussion would properly be the subject of a long monograph or series of monographs, far exceeding the limitations on this Article. My approach will begin with the idea of “natural goodness,” as it has been developed by Philippa Foot⁷⁸ and Michael Thompson,⁷⁹ and then proceed to the application of those ideas to justice.

⁷⁸ Philippa Foot, *Natural Goodness* (Oxford: Oxford University Press, 2003).

⁷⁹ Michael Thompson, “The Representation of Life,” in *Virtues and Reasons*, ed. Rosalind Hursthouse, Gavin Lawrence, and Warren Quinn (Oxford: Clarendon Press, 1995), corrected version available at <http://www.pitt.edu/~mthomps/1LIFE.doc>; “The Living Individual and its Kind,” *Behavioral and Brain Sciences* 21 (1998) 591-92; “Apprehending Human Form,” *Modern Moral Philosophy*, ed. A. O’Hear, (Cambridge: Cambridge University Press, 2004), 47-74., available at <http://www.pitt.edu/~mthomps/ansco652.doc>; Michael Thompson, “Three Degrees of Natural Goodness,” <http://www.pitt.edu/~mthomps/three.doc>.

A. *Natural Goodness*

Is goodness natural? In the introduction, we glanced briefly at Hume's discussion of the derivation of "ought" from "is" and Moore's open question argument. Having set those arguments to the side, let us go straight for the affirmative case for the thesis that human flourishing is a natural good. This case is not my own—it is borrowed from the account offered by Philippa Foot in her book *Natural Goodness*.

One entry point into Foot's argument is this observation: "Judgements of goodness and badness can have, it seems, a special 'grammar' when the subject belongs to a living thing, whether plant, animal, or human being."⁸⁰ A word of clarification here—when Foot uses the word "grammar," she means it in its Wittgensteinian sense:⁸¹ this is "conceptual grammar" or "depth grammar" and not the agreement of nouns with verbs. Michael Thompson's explanation of the distinctive grammar of statements about living creatures is particularly perspicuous:

"They have four legs," we say of cats or of cat-form; "They bloom in spring," we say of cherries or of cherry-form. "It has four legs," we say of this cat *hic et nunc*; "It bloomed last spring" we say of the cherry tree in the garden. The properties expressed by these predicates may be said to "characterize" the life forms cat and cherry respectively; we may say, by contrast, that they "hold of" the individual cat or cherry tree in question. The predicates may of course fail to hold of many individual bearers of the life forms they characterize; it may even, in suitable cases, fail to be true of most of them. Where the characterizing predicates do fail to hold -- where a cat has three legs or a cherry does not bloom -- we have natural defect, a failure of elementary "natural goodness." Thus judgments of goodness and defect make implicit reference to the species or life form that the individual bears.⁸²

Of course, we humans are not cats or cherries. Among our characteristics as a species are the following:

- Humans are social creatures.
- Humans use language.
- Humans engage in deliberative practical reasoning.

As with cats, so with humans. Not all humans are social, language-using, or engage in practical deliberation, but these activities are characteristic of the species. Well-functioning humans have these characteristics; when an individual lacks these capacities, that individual lacks a form of natural goodness. There is much more to say about Foot and Thompson's position, but this very brief discussion is sufficient to give a lively sense of the line they have taken.

⁸⁰ Foot, *supra*, note 78, 28.

⁸¹ See, e.g., Ludwig Wittgenstein, *Philosophical Investigations*, ed. G.E.M. Anscombe and R. Rhees, trans. G.E.M. Anscombe (Oxford: Blackwell, 1953), ¶¶ 371, 373; see also Anat Biletzki and Anat Matar, "Ludwig Wittgenstein," *Stanford Encyclopedia of Philosophy* (Summer 2005 Edition), ed. Edward N. Zalta, URL: <http://plato.stanford.edu/archives/sum2005/entries/wittgenstein/> (visited September 26, 2006).

⁸² Thompson, "Three Degrees," *supra*, note 79, 2.

How does this view connect up with virtue ethics and virtue jurisprudence? Michael Thompson puts it this way: “[T]he traditional table of virtues provides an apt characterization of the specifically human form of practical rationality. . . . [C]onsiderations of justice, benevolence and prudence are among those a well-reasoning human being will act upon, even where they conflict with other objectives.⁸³” In other words, the virtues are natural for humans—they are characteristic of well-functioning humans as social, communicative, and rational beings. Human beings need the virtues to function well. Intemperate, stupid, foolish, cowardly, and bad tempered humans do not—characteristically—do well in life. Or to put the point from an Aristotelian perspective, the virtues are required for a flourishing human life, that is, for human happiness.

B. Natural Justice

And that brings us to justice. Is justice an aspect of natural goodness for humans? My discussion of this question will proceed in three steps. First, I shall lay out the intuitive idea—that justice is a natural virtue for rational social creatures. Second, I shall identify some problems with the intuitive idea. And third, I shall address the question, “In what sense is justice as lawfulness a natural virtue?”

1. The Intuitive Idea: Justice as a Natural Virtue for Language-Using Rational Social Creatures

Because humans are social creatures, they need to get along with one another in order to flourish. At a minimum getting along requires us to avoid injury and interference. Because we are vulnerable creatures, we can kill and injure one another. Because we engage in complex projects, interference can frustrate our aims. Beyond the minimum, both the satisfaction of basic needs and the completion of complex projects require cooperation. Complex cooperation is only possible with stable expectations about social practices such as promising and legal practices such as contracting. Social norms and legal rules ground stable expectations and hence enable complex cooperation. And the virtue of justice—the internalization of social norms and legal rules—is required for all of this to work. Humans who lack the virtue of justice will interfere with the flourishing of others and undermine their own flourishing. I take it that these points are not controversial, because they rely on very “weak” (where “weak” means “uncontroversial”) premises. The instrumental value of justice for human flourishing is a well-established social fact, beyond serious argument.

Much more could be said about the function of justice, but if we can (tentatively) be satisfied with this very abstract sketch, we shall then be able to get to the thorny problems that appear near the surface of any attempt to naturalize justice.

⁸³ *Ibid.*, 5.

2. Four Problems with Natural Justice

So what are the problems for a naturalistic account of justice? Let's begin with what I shall call "the objection from artificiality."

a) *The First Problem for Natural Justice: The Objection from Artificiality*

Is justice really a natural human excellence? One problem is that justice does not fit the pattern that Aristotle lays out for the other natural virtues. Courage is a disposition with respect to the morally neutral emotion of fear, as is good temper with respect to anger. The disposition to too much fear is cowardice; the disposition to too little fear is rashness. Courage is the disposition to fear that is proportionate to the circumstances. We can easily see how virtues like courage can be viewed as "natural": although the moral virtues may require cultivation and education they are natural capacities of the human animal. But justice does not fit this pattern. There is no morally neutral emotion that relates to justice as does fear to courage. Unlike the other moral virtues, justice does not seem to be a mean with respect to corresponding vices of deficiency and excess (as is courage with respect to rashness and cowardice).

This problem was famously explored by Bernard Williams in his essay, "Justice as a Virtue." Williams suggests that the notion of a just action or outcome "is prior to that of a fair or just person. Such a person is one who is disposed to promote just distributions, look for them, stand by them, and so on."⁸⁴ "The disposition of justice," Williams continues, "will lead the just person to resist unjust distributions—and to resist them *however they are motivated*."⁸⁵ On Williams's account, then, it might seem that some theory of fairness is prior to the virtue of justice. To be just, is to have the right views about fairness and to be disposed to act upon those views.

We can take this objection one step beyond Williams. Here is the way it might go. Having the right views about fairness—it could be argued—is to have the true, correct, or best theory of fairness. But theories of fairness—the argument continues—are not natural attributes of humans as members of the species. Theories of fairness are constructions (or inventions) of human reason. The capacity for reason and deliberation may be natural—so the argument goes—but the products of this capacity are artificial. So justice is artificial—just as other products of human reason (novels, the theory of natural selection, or automobiles) are artificial.

And this objection seems equally potent when applied to justice as fairness and justice as lawfulness. If justice is fairness, then the virtue of justice is the disposition to act in accord with some theory of fairness and that theory is a human artifact. If justice is lawfulness, then the virtue of justice is the disposition to act in accord with the positive laws and social norms of a particular human culture, and those laws and norms are human artifacts. In either case, justice is an artificial virtue.

⁸⁴ Bernard Williams, "Justice as a Virtue," in *Essays on Aristotle's Ethics*, ed. Amélie Oksenberg Rorty (Berkeley, CA: University of California Press, 1980), 196-97.

⁸⁵ *Ibid.*, 197 (emphasis in original).

The answer to this objection rests on a strategy of confession and avoidance. Confession first. Justice does not fit the pattern of the other moral virtues—it is not a mean with respect to a morally neutral emotion. And yes, positive laws and theories of fairness are human artifacts. So there is a sense in which the virtue of justice could be said to be an artificial virtue—its operation depends on the products of human reason and those products can sensibly be characterized as artifacts.

Now for the avoidance. Nonetheless, the virtue of justice is a natural virtue. A well functioning human is naturally *nomimos*. It is natural for humans to act in accord with the shared social norms and positive laws of their cultures. Of course, not all humans share this disposition to lawfulness. Some humans are outlaws—they prey on the lawful, usually in ways that are ultimately self injuring. But this is not different than any other natural quality of humans or other species. Not all larks can fly. Not all humans have normal intelligence. Moreover, the natural capacity for lawfulness will not develop in all possible humans circumstances. In conditions of extreme deprivation or in radically dysfunctional societies, many or most humans may never develop this natural capacity. Indeed, in radically dysfunctional societies, the victims of oppression should not become *nomimos*. But once again, the same is true for the other virtues—such as courage or good temper.

My claim—that justice as the capacity for a disposition to lawfulness is natural—is, of course, an empirical claim about the human species. And like any empirical claim it can be contested on the basis of relevant evidence. In this case, it might be argued that observable human behavior in well-ordered human societies does not support the idea of a natural capacity for a disposition to lawfulness. Or it might be argued that biology (or evolutionary biology) demonstrates that there is no possible mechanism for such a capacity. In this essay, I shall put these issues to the side, and simply assume, for the sake of argument, that there is good evidence that humans have a natural capacity for lawfulness—or, in the alternative, that there is no decisive evidence against the existence of such a capacity.

One further qualification is in order. I am not claiming that “positive law” is natural in the same sense as is the virtue of justice as lawfulness. Constitutions, statutes, rules, regulations, and opinions—all of these are artifacts. Although positive law may be a “natural solution” to the inherent limitations on unwritten or customary social norms, this is not the same kind of naturalness that I claim for the virtue of justice itself. Moreover, the content of particular positive laws will be non-natural in the sense that a variety of different laws or legal regimes can be compatible with a well-ordered society of flourishing humans.

b) The Second Problem for Natural Justice: The Uneasy Relationship between Lawfulness and Fairness

There is a second problem with the interpretation of natural justice as a virtue of lawfulness. If lawfulness is a virtue, then what do we say about fairness? This problem seems particularly acute given the strong association in contemporary moral and political theory between justice and fairness. Indeed, one important political philosopher, John

Rawls, called his theory “justice as fairness.” And Aristotle recognizes a connection between justice as fairness—offering theories of both distributive and corrective justice (as fairness) in Book V of the *Nicomachean Ethics*. Even if justice is partially or even primarily a virtue of lawfulness, mustn’t it be the case that fairness enters into the picture in some way—supplementing or constraining lawfulness?

Moreover, there is another difficulty with justice as lawfulness. Viewed from the point of the lawmaker, it might be thought that “justice as lawfulness” fails to fulfill an important function of an account of justice. Shouldn’t our theory of justice tell us what the law should be? If the lawmaker wishes to know which laws are just, she doesn’t want to know which laws are lawful. She wants to know which laws are fair.

What can we say about the uneasy relationship between lawfulness and fairness? The first point that we should make is that justice does not need to do all the work in an aretaic theory of legislation. The end of law is not justice: it is human flourishing. More particularly, the aim of law should be to create the conditions for the development, sustenance, and exercise of human excellence. The idea that justice is the primary or sole criterion for good laws may have some currency for certain variants of deontological normative legal theory, but virtue jurisprudence need not (and should not) take this idea on board. Of course, justice is one of the virtues. So the law should aim at lawfulness—the very great values of the rule of law. And to the extent that fairness is part of the virtue of justice, legislation should aim at fairness as well.

So what is the role of fairness in the virtue of justice? Fairness is not the primary end of law, but it is a supplement to and constraint on the content of the laws. The idea of fairness as a supplement to lawfulness is taken up in connection with the third problem for natural justice, which immediately follows this discussion.

c) The Third Problem for Natural Justice: The Tension between Particularism and Rules

Virtue ethics is famous for embracing “particularism”—the notion that judgments about particular cases take priority over abstract principles.⁸⁶ One way of understanding particularism is via the “priority of the particular.” In a modest version, this slogan expresses the idea that our judgments about particular cases play a more powerful role in moral deliberation than do abstract principles and general rules. The strongest version of moral particularism might endorse the claim that general rules and principles should play no role in practical deliberation. In either case, particularism seems to bump against the virtue of justice as lawfulness. On the lawfulness conception, rules and principles seem to play an important role in moral deliberation: because virtuous humans are *nomimos*, they have internalized the *nomoi* and hence act on the basis of social norms and the positive law.

How can the lawfulness conception of justice be reconciled with particularism? We should begin with the observation that virtue ethics does not reduce morality to justice—

⁸⁶ See generally *Moral Particularism*, ed. B.W. Hooker and M. Little (Oxford: Oxford University Press, 2000).

justice is one virtue among many and it orders only a subset of human interaction. This means that the lawfulness conception of justice has a much different notion of the role of rules than that associated with some forms of deontology.

But even if virtue jurisprudence embraces only modest particularism and even if the role of rules required by the fairness conception of justice is contained, a tension remains so long as virtue jurisprudence retains a central role for the virtue of practical wisdom or *phronesis*. This tension will not exist in every case, of course. In most cases in a well-ordered society, adherence to the law will be in accord with both justice as lawfulness and the judgments of the *phronimos*. Let me restate that a bit differently: ordinarily, the *phronimos* will see that the action in accord with a salient legal rule is best.

But even if we concede that in ordinary cases justice requires adherence to the law, the question remains whether there are extraordinary cases—cases in which the *phronimos* (e.g., a fully virtuous judge) would depart from the law. Even if first order private judgment cannot do the work of filling in the content of a general conception of the virtue of justice, that fact would not necessarily imply that the judge's sense of fairness has no role to play. The positive law is cast in the form of abstract and general rules; such rules may lead to results that are unfair in those particular cases that do not fit the pattern contemplated by the formulation of the rule. If lawfulness were the whole story about the virtue of justice, then an excellent judge would apply the rule “come hell and high water” even if the rule led to consequences that were absurd or manifestly unjust. But this implication of the lawfulness conception seems odd and unsatisfactory. Another way of putting this concern is to recall the distinction between two styles of rule application, which I have called “mechanical” and “sensitive.”

Does the excellent judge apply the rules in a rigid and mechanical way? We have already seen that need not be the case. Because the excellent judge has internalized the *nomoi* and possesses practical wisdom, the excellent judge has the capacity to depart from the letter of the rule in the limited set of particular cases where the function of the rule is inconsistent with the application of its letter.

d) The Fourth Problem for Natural Justice: Evil Laws

It might be argued that the account of justice-as-lawfulness that I have embedded in virtue jurisprudence cannot offer an adequate account of our relationship to laws that are evil or radically defective. Can it really be the case that just humans internalize *all* laws? What about laws that establish slavery or apartheid? What about the laws of Nazi Germany? Or the laws of South Africa under apartheid? Isn't the fairness conception of justice required in order to account for the problem of evil laws?

One way to investigate this objection is to consider the relationship between virtue jurisprudence and the natural law tradition. At the center of that tradition, the argument might go, is the idea that *unjust* laws are not *true* laws—*lex injusta non est lex*. This idea, it might be argued, commits the natural law tradition to the fairness conception of the virtue of justice. That is, it might be thought that each human is obligated to act in accord with her own first-order private judgments of fairness. If this were so, it would not establish that the idea of a virtue jurisprudence or of a natural virtue of justice is

inconsistent with the natural law tradition. Rather, it would establish that the versions of virtue jurisprudence that are compatible with the natural law tradition are ones that incorporate the fairness conception of the virtue of justice.

Nonetheless, I shall claim that a virtue jurisprudence that incorporates the lawfulness conception of the virtue of justice can be reconciled with the natural law tradition. There are two steps to this reconciliation. The first step focuses on the relationship between the social norms and positive law. The second step focuses on the relationship between the status of a norm as a *nomos* and the relationship of the norm to human flourishing.

The virtue of justice as lawfulness is a disposition to act lawfully—to internalize the *nomoi* the social and legal norms of a given human society. Up to this point, I haven't said much about the relationship between social norms and legal norms. There are at least three possible relationships that are relevant to the issue at hand:

- First, the content of a legal norm can be congruent with content of a social norm (or set of norms).
- Second, a legal norm can be supported by a social norm (or set of norms) that recognizes the legitimate authority of institutions with the power to create, modify, or extinguish legal rules.
- Third, a legal norm can be inconsistent with a social norm (or set of norms), either because of conflict between the content of the two norms or because the institutions that are the source of the legal norm lack legitimate authority given relevant social norms.

Each of these three relationships requires some explanation.

The first relationship is that the content of a legal norm can be congruent with content of a social norm (or set of norms). For example, the legal rule prohibiting and punishing murder is congruent with a social norm. Congruence is not the same as identity. The social norm may be vague or underspecified in comparison with the legal norm. For example, the social norm may sanction or require punishment for murder, but the legal norm may specify a particular punishment, such as imprisonment or execution. Congruence requires that the legal norm express the social norm in a way that enables the internalization of the social norm to provide direct support for the legal norm.

The second relationship is that a legal norm can be supported by a social norm (or set of norms) that recognizes the legitimate authority of institutions with the power to create, modify, or extinguish legal rules. For example, it is possible that there would be no social norms that govern speed limits on the highway or the times that one may use a public park. If this were the case, these legal norms might nonetheless be internalized on the basis of a more general social norm that recognized the legitimate authority of the legislative body that promulgated the norm. Of course, the first and second relationships may coexist—that is, a given legal norm may have content that is congruent with the content of a social norm and also be supported by a social norm that grounds the legitimate authority of the source of the legal norm.

The third relationship obtains when a legal norm is inconsistent with social norms. That inconsistency can take one of two different forms. The first form of inconsistency is based on content. For example, if there were a legal norm that prohibited driving at more than 55 mph, but a social norm against driving less than 60 mph, the content of legal

norm would be inconsistent with the content of the social norm. Likewise, if there were a legal norm authorizing arbitrary murder by the secret police, but a social norm against such murders, the two would be inconsistent. The second form of inconsistency is based on illegitimate authority. For example, if a coup or foreign invasion were to result in the institution of a government with coercive power but without legitimate authority, there could be a social norm that disapproved of the internalization of the content of laws issued by the government.

With these three relationships in mind, let's return to the natural-slogan, "an unjust law is not a true law." On the lawfulness interpretation of the virtue of justice, it might appear that this slogan expresses a very odd idea. If we substitute "unlawful" for "unjust," we get "an unlawful law is not a true law." Is the notion of an "unlawful law" an oxymoron? Not necessarily. That expression could refer to a statute that was not enacted through the processes prescribed by law or a statute that was inconsistent with the constitution. But this is not what natural lawyers mean by their slogan. There is, however, another way in which we can interpret the slogan, once we recall that the lawfulness conception of the virtue of justice is based on the *nomoi* rather than positive law. On this interpretation, the phrase "true law" refers to positive laws that stand in one of the two right relationships to social norms—either congruence or socially recognized legitimate authority. Positive laws that have content that is inconsistent with the content of social norms or that are promulgated by institutes that lack legitimate authority are not true laws.

There is another sense in which a virtue jurisprudence that embraces the lawfulness conception of the virtue of justice can incorporate the natural law slogan that an unjust law is not a true law. This sense derives from the notion that it is a condition for a norm to count as a *nomos* that the norm must be such that it could be internalized by any fully virtuous human. That is, the norm must be internalizable by any fully virtuous agent—in possession of the intellectual and moral virtues. For short, we can might say that for a norm to be a *nomos* it must be such that it could be embraced by the *phronimoi*—by those humans in full possession of the human excellences. Social norms or positive laws that clearly hinder rather than enable human flourishing could not be internalized by a fully virtuous agent who has grasped the *telos* or proper end that *nomoi* serve.

When these two restrictions on the content of law are conjoined, it becomes apparent that the lawfulness conception of the virtue of justice gives a distinctive interpretation of the natural law slogan that an unjust law is not a true law. First, a positive law that is inconsistent with social norms is not a *nomos*. Second, social norms and positive laws that could not be internalized by the *phronimoi* are not *nomoi*. The lawfulness conception of the virtue of justice entails that a fully virtuous agent is *nomimos*—disposed to act in accord with the *nomoi*. But a fully virtuous agent is not disposed to act in accord with social norms that would undermine human flourishing; nor is a fully virtuous agent disposed to act in accord with positive laws that have content that is inconsistent with social norms or that lack legitimate authority. In this sense, a fully virtuous agent with the virtue of justice as lawfulness will not be disposed to act in accord with unjust positive laws or social norms. From a virtue theoretic perspective, that is the

cash value of the slogan, “an unjust law is not a true law.” The virtue jurisprudential version of the slogan is, “defective norms are not true *nomoi*.”

C. In What Sense is Justice as Lawfulness Natural?

We have examined the idea that natural justice can be understood on the model of natural goodness and that this idea can be given content by the lawfulness conception of the virtue of justice, suitably qualified by the complimentary idea that a fully virtuous judge is both *nomimos* and *phronimos*—and hence that justice as lawfulness can be tempered by the practice of equity. In what sense is this conception of the virtue of justice “natural”? A deep answer to this question would require an explication of the concepts of the natural and naturalness—but that enterprise cannot be undertaken on this occasion. The shallow answer to the question that was outlined above was that the virtue of justice as fairness can be seen as a condition for the flourishing of humans and their communities. It might be argued, however, that the criteria for naturalness are provided by science in general and evolutionary biology in particular. So it might be argued that the naturalness of the virtue of justice as lawfulness can only be established by sociobiology—that is, by a showing that the disposition to internalize social norms is the product of human evolution and is, in some sense, “hard wired.” For the purposes of this essay, I shall simply put that argument to the side. I do not mean “natural” in that sense. My claim is that the virtue of justice as lawfulness is natural in an ordinary and pretheoretical sense of the term “natural.”

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; the elaboration of an aretaic theory of law has only just begun.