

REVIEW ESSAY

PRIVATE LAW, PUBLIC CONSEQUENCES, AND VIRTUE JURISPRUDENCE

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Virtue Jurisprudence (Farrelly and Solum eds., 2008)

ABSTRACT

Virtue Jurisprudence is an ambitious work which seeks to significantly reshape normative legal theory debate. Modern legal theory is typically undergirded by one of two foundational assumptions. On one hand, law-and-economics theory assumes that the goal of law is to maximize individual preferences. On the other, rights-based theory assumes that protecting autonomy or equality is the central purpose of law.

In *Virtue Jurisprudence*, Professors Farrelly and Solum reject this dichotomy. They contend that normative legal theory should be grounded in a neo-Aristotelian philosophy of virtue. Virtue is a relatively unfamiliar concept to legal academics, and *Virtue Jurisprudence* is the first extended work seeking to place the notion of virtue at the center of legal theory. *Virtue Jurisprudence* sets out to alter the course of normative theoretical debate in dramatic ways by suggesting that we may need to rethink how—and why—law works best.

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This Review Essay argues that before we can determine how well aretaic theory compares with law and economics and rights theory as the best normative basis for law, we need to know much more about how virtue influences law. My critique of *Virtue Jurisprudence* focuses particularly on one area largely ignored by the authors: what is typically called “private law.” In critiquing the work, I challenge the traditional distinction between “public” and “private” law. I assert generally that all law has public consequences, even “private law,” and I posit specifically that times of economic stress shine a bright light on the distributional (i.e., public) consequences of private law rules. I conclude that virtue theory offers an intriguing new approach to the law and theory of private exchange transactions. Finally I apply my ideas to two current problems in private law: the possibility of litigation arising out of the many questions implicated by A.I.G.’s decision to pay hefty bonuses to many of the company’s executives in the wake of the government bailout and many questions arising out of the federal government’s initiatives toward helping distressed homeowners reform or modify mortgage loans with their lenders.

*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**.¹*

INTRODUCTION

Everything we know about legal theory is wrong. Or at least, this is the claim made by Colin Farrelly and Lawrence Solum in their important new anthology, *Virtue Jurisprudence*. Specifically, Farrelly and Solum tell us that we are arguing over the wrong question. The *wrong* question is whether normative legal theory should rest on either law and economic notions of welfare and efficiency or on rights-based notions of liberty and equality. To Farrelly and Solum, the answer to this question is *neither*.

In *Virtue Jurisprudence*, Farrelly and Solum claim the right question to ask is whether aretaic theory, which is a theory based on neo-Aristotelian principles of virtue and excellence (*arête*), is a better normative basis for law than either economics or rights. As the title of the anthology suggests, the editors say yes. The resulting claim is that “the fundamental concepts of legal philosophy should *not* be welfare, efficiency, autonomy or equality; the

1. COLIN FARRELLY & LAWRENCE B. SOLUM, *An Introduction to Aretaic Theories of Law*, in *VIRTUE JURISPRUDENCE* 2–3 (Colin Farrelly & Lawrence B. Solum eds., 2008) (emphasis added).

fundamental notions of legal theory should be virtue and excellence.”² In other words, virtue should guide law, not economics or rights. Guided by virtue, the goal 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.”³

Anyone familiar with today’s central legal jurisprudential debates will realize that these are bold claims. This is heady stuff, and the anthology’s goals are lofty. Farrelly and Solum want to show, through a series of essays in various topics in law, nothing short of the idea that legal theory should be rebuilt on the norms of virtue.

That said, precisely *how* virtue influences (or should influence) law in order to promote human flourishing—to “create the conditions for the development of human excellence”⁴—is an open question, and a challenge to the overall success of the anthology. Another challenge is the theory’s newness as applied to law. While virtue as a source of law is an ancient and pedigreed philosophical concept, it is not well represented in contemporary *legal* theory. Indeed, in the modern legal academy, express considerations of virtue are nearly unknown.⁵ Further, the very idea of “virtue” seems intuitively too lofty, too vague, too ambiguous, and too indeterminate for law, and so legal theorists have left virtue largely unexamined in legal scholarship. Because the relevance of virtue to law is not presupposed in the legal academy, *Virtue Jurisprudence* should demonstrate it.

Before we can determine how well aretaic theory competes with deontology and consequentialism as the best normative basis for law, we need to know much more about the relationship of virtue to law. Indeed, the volume does not directly ask, and so cannot answer, some very important questions. One is how does (or should) virtue affect law? For example, should virtue be the source of substantive legal standards or rules, as at least one of the essays

2. *Id.*

3. *Id.* at 2.

4. Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 498 (2005) (“The move from virtue ethics to virtue jurisprudence is simply the translation of the aretaic turn in moral theory to the context of lawmaking and adjudication. For example, virtue jurisprudence postulates that the proper aim of legislation is the promotion of human flourishing through creation of the conditions for the development of human excellence.”).

5. Probably the most well-known writer in law and legal philosophy to take virtue seriously is Martha Nussbaum. See, e.g., Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, XIII MIDWEST STUD. PHIL. 32 (1988). Further, the most well-known writer in the specific area of virtue and contract law is probably James Gordley. See, e.g., JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

suggests? Or, as others suggest, should the process of reasoning in virtue theory serve as a guide to reasoning in legal theory? Or is this all just theoretical, with no practical application?

In taking on these questions, this Review Essay identifies common themes among the essays in the anthology, and from those themes, teases out three possible relationships that virtue could have to law. These relationships are that virtue could guide legal decision makers, virtue could inform how legal institutions are shaped, and virtue could give content to broad legal standards. These three relationships, I assert, begin to suggest answers to some of the anthology's questions.

Moreover, as will be developed in this Essay, the key to unlocking virtue's relevance to law could be virtue theory's method of analysis. That is to say, the method of reasoning inherent in virtue jurisprudence—in Aristotelian terms, *phronesis*, or “practical wisdom”—is quite different than the method of analysis of either of the two dominant theories. Specifically, unlike either consequentialism or deontology, virtue jurisprudence does not depend on a single core substantive principle or value to guide all reasoning: deontology is guided by (some measure of) rights or entitlement, and similarly, consequentialism is guided by (some measure of) utility. By contrast, virtue theory is guided by the process, or method, of *phronesis*. At its core, *phronesis* is characterized by rejecting formalism in favor of contextualism, and by embracing the mean between two extremes as the site of best decision-making. As will be further developed in this Essay, it could be that *phronesis* is the key to unlocking the relevance of virtue theory to law.

Another important question left open by the volume but taken up by this Essay concerns the theory's scope: Does aretaic theory apply to all of areas law, or only various subjects in law? The anthology begs this question because the essays in the anthology are, with only one exception, about topics in public law.⁶ In retrospect, the private law omission is unfortunate. For one, it suggests that virtue jurisprudence may not be relevant to private law. This is problematic. If virtue theory is relevant to public law, should it not also be relevant private law? If it is not, is it a complete theory? If not, is there a meaningful distinction between “public” and “private” law? This Essay

6. By “public law” I mean those subjects of law that concern the relationship of state to individual, usually thought of as criminal law, constitutional law, administrative law, and international law, and by “private law” I mean those subjects of law that govern the relationships between private actors, such as contracts, corporate law, most property law, etc. See, e.g., BLACK'S LAW DICTIONARY (abridged 6th ed. 1991).

challenges both the public/private distinction and the idea that virtue theory is not relevant to private law.

The omission of private law is particularly untimely. In the current economic crisis, when even economists have admitted failures in the market, the government has increasingly intervened in transactions that, in more prosperous times, are the coin of the realm of private law. Government intervention in otherwise private deals turns transactional rules into a matter of public policy. For example, consider the current controversies arising out of AIG's executive compensation contracts (and the government's desire to impose special taxes on those contracts to recoup public "bailout" money), and the federal government's recent initiatives to enable distressed borrowers to modify disadvantageous mortgage loan terms. Without any inquiry as to whether virtue theory applies to private law, the anthology has little to say about whether virtue theory may shed light on these pressing issues.

This Review Essay takes up that task, and concludes that, at the intersection of public and private law, virtue jurisprudence may in fact be more informative than the two traditional paradigms. Of course, an anthology is by definition a sampling; an anthology does not attempt to represent the last word on a subject (here, a theory). An anthology is meant to start a conversation, and indeed this one does. But as an introduction to a potentially paradigm-changing theory, this sampling turns out to be too thin; an interested reader wants more. And the times now demand it.

The Essay proceeds as follows. Part I more closely examines what the anthology *Virtue Jurisprudence* tells us about the normative approach it espouses. Part II teases out and critiques three possible relationships—suggested by common themes among the essays—between virtue and law. Part III applies virtue jurisprudence to two hybrid public/private law problems brought about by the current economic crisis.

I. WHAT IS VIRTUE JURISPRUDENCE, ANYWAY?

a. A Short Sketch

The idea that there may be a viable normative basis to legal theory other than the two predominant theories, being economics (utilitarianism, consequentialism) and rights (primarily Kantian, deontological) certainly strikes a chord.⁷ Indeed, one could say that the consequentialism vs. rights

7. As used in this essay, I do not mean to equate or conflate the terms "economics" or "law and

dichotomy permeates legal scholarship today, in both public and private law subjects. Farrelly and Solum are not the first scholars to note the need for another approach—and most who do credit it to Elizabeth Anscombe’s famous 1958 essay, “Modern Moral Philosophy.”⁸ Indeed, just as Anscombe revolutionized ethical theory with a virtue approach, Farrelly and Solum seek to do the same thing with law.⁹

As a potential rival, aretaic theory is based on virtue.¹⁰ “Virtue” is one of those broad-brush terms, which, on one hand, seems very familiar, but on the other hand, is hard to situate with precision. In her essay *Normative Virtue Ethics*, philosopher Rosalind Hursthouse identifies two conceptions of virtue, each of which helps to define virtue. First, she identifies the Humean notion of virtue as “a character trait (of human beings) that is useful or agreeable to its possessor or to others (inclusive ‘or’ both times).”¹¹ She then identifies the “standard neo-Aristotelian [notion] claims that a virtue is a character trait a human being needs for *eudaimonia*, to flourish or live well.”¹² There are multiple conceptions of virtue based on various normative approaches within

economics,” each of which is based on the social sciences, with the moral philosophies of consequentialism or utilitarianism. However, I do mean to capture a link between also suggested by Heidi Li Feldman, *infra* note 89, at 51: that law and economics (as probably the most well-known strand of “neoclassical welfare economics”), is the “public policy counterpart” to certain consequentialist-based moral philosophies, including utilitarianism.

8. FARRELLY & SOLUM, *supra* note 1, at 3 (noting that Anscombe’s work highlighted the seemingly irresolvable competition between the two leading normative philosophical theories, deontology and consequentialism); *see also* Roger Crisp, *Modern Moral Philosophy and the Virtues*, in *HOW SHOULD ONE LIVE?* 1–2 (Roger Crisp ed., 1996) (noting that Anscombe’s 1958 essay charged moral philosophers to put aside rights and consequentialism until one could better explain the tenets of the two principles—“pleasure” and “intention”—and suggesting that virtue may be the key to such explanation).

9. Thanks to Dennis Patterson for emphasizing this parallel.

10. When I mean virtue theory specifically as applied to law, I will try to use the phrase “virtue jurisprudence.” But when I am describing virtue theory generally, I will use “aretaic theory” and “virtue theory” interchangeably, and sometimes just “virtue” for short. Virtue theory has a specific meaning:

Virtue theory is the area of enquiry concerned with the virtues in general; virtue ethics is narrower and prescriptive, and consists primarily in the advocacy of the virtues. Plato and Aristotle engaged in both simultaneously, but many modern philosophers have written on the virtues from positions of neutrality or even hostility.

Crisp, *supra* note 8, at 5.

11. Rosalind Hursthouse, *Normative Virtue Ethics*, in *HOW SHOULD ONE LIVE?*, *supra* note 8, at 23.

12. *Id.*

virtue theory—neo-Aristotelian is just one.¹³ The anthology adopts the neo-Aristotelian perspective.

In *Nichomachean Ethics*, Aristotle defines virtue as that which allows human beings to be happy: “[s]ince happiness is an activity of the soul expressing complete virtue, we must examine virtue.”¹⁴ There are two types of virtue and they are acquired differently: virtue of thought (acquired through teaching, and so “needs experience and time”), and virtue of character (acquired through habit, and so need to be “activated”).¹⁵ Each will be described more fully.

As applied to law, the intellectual virtues are particularly important. The intellectual virtues are exercised in two ways, both by doing (through practical judgment) and by thinking (through contemplation).¹⁶ Phronesis, or practical wisdom, is street-smarts: wisdom both grand and gritty. Practical wisdom is required for flourishing, because without it, one cannot determine right action.¹⁷

Practical wisdom receives a good deal of attention in the literature, in part because phronesis seems to capture the interrelationship of means and ends. Practical wisdom is the result of experiences built up over time. These experiences in combination allow a person to exercise wisdom, though at the unconscious or intuitive level, which in turn leads to an appropriate judgment about how to respond to a practical dilemma.¹⁸ Aristotle defines practical wisdom as “a true and reasoned state of capacity to act with regard to the things that are good or bad for men.”¹⁹

13. There are numerous normative approaches to virtue theory. *See, e.g.*, ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981) (virtue theory is justified because it helps citizens adhere to duty); *cf.* Julia Driver, *The Virtues and Human Nature*, in *HOW SHOULD ONE LIVE?*, *supra* note 8, at 116 (noting “the consequentialist basis for our judgments of virtue.”). By contrast to either of these approaches, neo-Aristotelian virtue theory derives its justification from virtue as an end in and of itself: virtue promotes human excellence, and human excellence is an end of itself, not tethered either to the concepts of duty or welfare.

14. ARISTOTLE, *SELECTIONS* bk. 1, ch. 13, 1102a5, at 363 (Terrence Irwin & Gail Fine trans., 1995) (translating ARISTOTLE, *NICHOMACHEAN ETHICS*).

15. *Id.* bk. 2, ch. 1, 1103a15-34, at 366.

16. PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* 9–10 (1999).

17. Lawrence B. Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, in *VIRTUE JURISPRUDENCE*, *supra* note 1, at 157 (“Phronesis is the ability to respond appropriately to the particular situation.”).

18. *Id.* at 157–58 (discussing phronesis and judging).

19. Chapin F. Cimino, *Virtue and Contract law*, 88 OR. L. REV. (forthcoming 2010). *See also* ARISTOTLE, *supra* note 14, bk. 1, ch. 13, 1140a24-b21.

The virtues of character are also relevant to law. A character virtue is a “state,” as opposed to a feeling or a capacity.²⁰ Aristotle wrote that “every virtue causes its possessors to be in a good state and to perform their functions well”²¹ When one performs her functions well, she is exhibiting virtuous traits. Said another way, a virtuous trait is the state of one’s character that produces a choice about an act or behavior that leads to a highly functional result. The trick is to identify the virtuous choice in any given situation.

To identify the virtuous choice, one must first identify a baseline, which is the “mean” trait between two extremes. The baseline allows one to measure whether any single trait (and so the resulting action that will be produced) is virtuous or not. In this way, one can then begin to imagine how the notion of virtue can provide action guidance.²² Indeed, in any given context, “doing the right thing” requires an analysis of the choices available at each extreme in any given situation.²³ Consistent with the mean, the “right” thing is defined by the right choice by the right person at the right time.²⁴ Moreover, virtues may need to be conditioned.²⁵ If one lacks the habit, one should be trained.²⁶ Further, virtues do not always benefit the agent, but rather, they benefit the

20. *Id.*, bk. 2, ch. 5, 1106a12-14, at 371.

21. *Id.*, bk. 2, ch. 6, 1106a17-18, at 371-72.

22. Defending virtue ethics from the charge that it does not and cannot provide any guidance as to right action, as opposed to consequentialism and deontology, for example, is the thesis of the Hursthouse essay, *Normative Virtue Ethics*. See text accompanying note 34, *infra*. This charge is raised in support of the claim that virtue ethics is in fact not a normative rival to either consequentialism or deontology, which Hursthouse most assuredly believes it is.

23. The origin of the baseline is this: “[i]n everything continuous and divisible we can take more, less and equal, and each of them either in the object itself or relative to us; and the equal is some intermediate between excess and deficiency.” ARISTOTLE, *supra* note 14, bk. 2, ch. 6, 1106a27-29, at 372. The notion of the “equal” becomes the baseline: “[the] scientific expert avoids excess and deficiency and seeks and chooses what is intermediate-but intermediate relative to us, not in the object.” *Id.*, NE bk. II, chap. 6, 1106b6-8. In other words, “[v]irtue, then, is a mean, insofar as it aims at what is intermediate.” *Id.*, bk. 2, ch. 6, 1106b6-8, at 372.

24. ARISTOTLE: THE NICOMACHEAN ETHICS 191-93 (E. Capps, T.E. Page & W.H.D. Rouse eds., H. Rackham trans., 1926).

25. “The virtues arise in us neither by nature nor contrary to nature; we are naturally receptive of them, but we are completed through habit.” T.H. Irwin, *The Virtues: Theory and Common Sense in Greek Philosophy*, in *HOW SHOULD ONE LIVE?*, *supra* note 8, at 40-41 (quoting NICHOMACHEAN ETHICS 1103a23-6).

26. Aristotle believed that the state should educate its citizens in the virtues. The state would do this in part to make up for the gaps in the family’s ability to do so and in part to equip citizens to resist the inclination toward baseness that all humans are subject to. As such, virtue takes on a political cast—educating in the virtues is part of what the state should do for its citizens. See, e.g., Robert F. George, *The Central Tradition*, in *VIRTUE JURISPRUDENCE*, *supra* note 1, at 26 (“Making men moral, Aristotle supposed, is a—if not *the*—central purpose of any genuine political community.”).

“other,” and so can require action disadvantageous to the agent.²⁷ The notion of the mean as the baseline for virtuous decision making in any given context is one of the keys to virtue theory analysis, and virtue jurisprudence applies these concepts to law.

b. Preliminary Questions

At this point, one may ask again: is not the idea of “virtue” too indeterminate to be useful in any practical way? Because context matters so much, is not virtue theory too relative to yield any practical guidance to legal decision-makers? This is a serious charge.

Martha Nussbaum has written about what she identifies as the non-relativity inherent in virtue analysis. Nussbaum has written that, to identify specific traits that lead to virtuous actions, Aristotle “isolated a sphere of human experience that figures in more or less any human life, and in which more or less any human being will have to make *some* choices rather than others, and act in *some* way rather than some other.”²⁸ The virtue is “the name . . . of whatever it is to choose appropriately in that area of experience.”²⁹ Some of the universal spheres of human experience, with the corresponding virtue in parentheses, include: appetite (moderation), distribution of limited resources (justice), and fear (courage).³⁰

According to Nussbaum, this approach is non-relative in that every human will have some of these experiences from time to time. One cannot be human and also avoid these experiences. In the midst of such an experience, each person will have to make a choice about an act or behavior.³¹ Aristotle wrote

27. Irwin, *supra* note 25, at 38–39. For more on how virtue is act-centered, see Hursthouse, *supra* note 11, at 19–36 (defending against the charge that because virtue is about how to “be” it does not provide guidance for the question of how to “act.”).

28. Nussbaum, *supra* note 5, at 35 (emphasis in original).

29. *Id.* at 36.

30. *Id.* at 35.

31. *Id.* at 36. Nussbaum observes that Aristotle identified ten spheres of experience. They, and the corresponding virtue of “appropriate” response, are: fear of death (courage); bodily appetites and their pleasures (moderation); distribution of limited resources (justice); management of one’s personal property where others are concerned (generosity); management of one’s personal property where hospitality is concerned (expansive hospitality); attitudes and actions toward one’s own worth (greatness of soul); attitudes toward slights and damages (mildness of temper); ‘association and living together and the fellowship of words and actions’ (truthfulness); truthfulness in speech (easy grace, as contrasted with coarseness, rudeness, insensitivity); social association of a playful kind (a kind of friendliness, contrasted with irritability and grumpiness); attitude toward the good and ill fortune of others (proper judgment, contrasted with enviousness, spitefulness, etc.); intellectual life (the various intellectual virtues, such as perceptiveness, knowledge, etc.); planning one’s life and conduct (practical wisdom). *Id.* at 35–36

that all humans in any society are trying to find answers to what is “good” within these spheres of experience, and as these are the problems that all humans encounter with each other by their nature of being human, the good is universal.³²

Yet, virtue is not just “natural law all over again,” which is the objection (understandably) lodged upon mention of a universal good. Virtue theory and natural law do overlap, yet they are not the same. Both virtue theory and natural law share a commitment to some justification other than mere positive authority, and as such they differ from positive law. Yet, while the two schools share a view that a universal good exists, each defines it quite differently—natural law defines the universal good by reference to a higher authority,³³ while virtue theory defines it as a process of political communities reaching right judgments.³⁴ Thus, Aristotelian “natural right” is a process right in which “members of political communities make judgments about justice,” while natural law accounts for natural right by reference to a higher standard against which the community’s judgments are measured.³⁵

Further, in Aristotelian philosophy, recall that the mean is always contextual: what might be the right amount of bravery in one situation may be an excess, or a deficiency, in other. That Aristotelian right action is highly contextual may open aretaic theory to the charge of relativism (see above), but it shields the theory from the charge of natural-law-all-over-again-ism.³⁶

Finally, virtue theory may sound like deontology restated: If virtue is about doing the right thing, ultimately virtue theory is a version of deontology. Yet it is not. Virtue is related to both morality and ethics, but is the same as neither one. From the neo-Aristotelian perspective, virtue ethics is about

(quotation in original).

32. *Id.* at 38–39.

33. Specifically, a first principle of natural law theory on the question of true and right standards of conduct is “no ought from is,” meaning that law is not justifiable until it is justified (by “some higher ought-premise”). John Finnis, *Natural Law: The Classical Tradition*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 3, 4 (Jules Coleman & Scott Shapiro ed., 2002). For a related idea, see also Solum, *Natural Justice: An Aretaic Account of the Virtue of Lawfulness*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 188 (“At the center of [the natural law] tradition . . . is the idea that *unjust laws are not true laws—lex injusta non est lex*”) (italics in original).

34. Bernard Yack, *Natural Right and Aristotle’s Understanding of Justice*, 18 POL. THEORY 216, 232 (1990).

35. *Id.* at 230. Moreover, natural law represents “the articulation of some basic human goods or needs that any system of positive law must respect, promote, or in any case protect.” Russell Hittinger, *Natural Law and Virtue: Theories at Cross-Purposes*, in NATURAL LAW THEORY 42 (Robert George ed., Oxford 1992). By contrast, Aristotelian natural right does not.

36. Yack, *supra* note 34, at 231 (“Aristotle does not appeal to nature as a final standard against which to measure the justice of our laws and political judgments . . .”).

making choices about courses of action based on what acts will best help each actor become her best self (or “flourish”), not to follow rules.³⁷

This section has provided just a short summary of subjects on which volumes and volumes have been written, which is what the term virtue connotes, and has anticipated some preliminary confusions and objections. This section is not (and could not be) an exhaustive account of either, yet necessary to put the anthology and its contributions into context. It is to the anthology that I now turn.

II. VIRTUE APPLIED: *VIRTUE JURISPRUDENCE*, THE ANTHOLOGY, AND THE ESSAYS

a. The Anthology as a Whole

As noted, the anthology does not “make the case” for virtue jurisprudence. Rather, in the introduction, the editors specify two relevant points: first, that virtue can affect the content of law (what should the aim of law be?) and second, that virtue can affect the way law is implemented (what should legal institutions look like?).³⁸ But beyond this, nothing further is said directly on the question of how virtue is to “create the conditions for human flourishing” through law. The editors refer to this strategy as a “bottom-up” approach.³⁹

One consequence of this approach is that the contours of the relationship between law and virtue are left murky. But, these contours must be clarified before the theory’s practical application and predictive power can be evaluated. The fundamental questions are: What are the ways in which law should account for virtue? At a systematic level, *what* is it that virtue aims to do for law? And *how* will this happen? There are many possibilities, and the answers shed light on what is at stake in the conversation: How virtue affects (or should affect) law provides information about what the practical applications of the theory are. In other words, when one says, “the end of law

37. STAN VAN HOOFT, *UNDERSTANDING VIRTUE ETHICS* 17 (2006) (“[W]hereas duty ethics conceives of moral motivation or practical necessity as obedience to rules, virtue ethics conceives of moral motivation or practical necessity as responsiveness to values. An honest person values truth and if she finds herself in a situation where she might tell the truth or tell a lie to advantage herself, she will respond to the value that the truth holds for her.”).

38. FARRELLY & SOLUM, *supra* note 1, at 2.

39. *Id.* at 6.

should be to promote human flourishing,” what does one mean, exactly? What can citizens expect if courts and lawmakers were to “adopt” virtue theory?⁴⁰

These are critical questions and must be acknowledged before the theory can be assessed overall, because without at least asking the questions, the theory’s practical applications are obscured. In order to know what virtue *can do* for law, one must know how virtue *relates* to law. As noted, the possibilities seem endless, and while each essay provides a discrete example of a specific application of virtue to law, the anthology as a whole makes no attempt to unify or synthesize the contributions. This Essay does that, by identifying three common themes among the individual essays.

b. Two Essays Lay the Foundation for the Work

Nine essays make up the anthology. Two of these are not examples of virtue jurisprudence, but foundational to the overall project. The first, by Robert P. George, *The Central Tradition—Its Value and Limits*, outlines what could be called the first-order principles of virtue jurisprudence. The essay traces the views of two of the earliest and most influential virtue ethicists, Aristotle and St. Thomas Aquinas.

George’s essay stresses Aristotle’s belief that the state had a duty to encourage virtuous citizens.⁴¹ Aristotle believed that the state, through law, should educate its citizens in the virtues that would prepare them to counter and defend against non-virtuous citizens and political regimes.⁴² George writes that “[m]aking men moral, Aristotle supposed, is a—if not the—central purpose of any political community.”⁴³ According to George, Aristotle believed that men were prone to “act on passionate motives,” which is not preferable to acting on the basis of reason. And, to encourage good individual decision-making, law “must first settle people down if it is to help them to gain some appreciation of the good, some grasp of the intrinsic value of

40. For example, one wonders: Should new laws be passed that incorporate virtuous rules or standards? Are rules inherently too determinate to incorporate indeterminate notions like virtue? Should virtue then inform broad, open-ended standards? Should future lawmaking, either by legislation or adjudication, be guided by or based on virtue? If so, how? Is the goal of law ultimately to encourage virtuous conduct? If so, would virtue over time eventually reduce the need for law—is virtue ultimately libertarian? If so, should law encourage virtuous conduct of only legal decision-makers, and/or ordinary citizens? How? Can legal institutions be structured virtuously? Or, should legal institutions be structured so they promote virtuous conduct of the people who utilize them? If so, how?

41. George, *supra* note 26, at 24–50.

42. BERKOWITZ *supra* note 16, at 11 (1999).

43. George, *supra* note 26, at 26.

upright choosing, some control by their reason of their passions.”⁴⁴ According to George, Aristotle believed this cooling was a job not just for the family, but also for the state, through law. George notes that Aristotle believed that “the paternal command . . . has not the required force or compulsive power . . . but the law has compulsive power, while it is at the same time a rule proceeding from a sort of practical wisdom and reason.”⁴⁵ Aquinas accepted Aristotle’s philosophy but approached it from a Christian perspective, which added another reason in support of law’s enforcement of morality: that of “getting everyone to heaven.”⁴⁶ This goal required the King to encourage men to lead virtuous lives, both for the King’s sake and the citizens’.⁴⁷

George does not embrace the traditions of Aristotle and Aquinas without critique, but he does recognize the need for, and support, state intervention as to education in virtue. He critiques Aristotle’s views as insufficiently attentive to diversity in human good, and as elitist, and recognizes critiques of Aquinas as in some ways limiting, instead of promoting, religious freedom.⁴⁸ But in the end, George supports the view that the state is justified in taking the lead in passing “morals legislation” to implement basic principles of what he calls the “perfectionist tradition”:

[L]aws that effectively uphold public morality may contribute significantly to the common good of any community by helping to preserve the moral ecology which will help to shape, for better or worse, the morally self-constituting choices by which people form their character, and in turn affect the milieu in which they and others will in future have to make such choices.⁴⁹

The second of the two foundational pieces is Professor Solum’s essay *Natural Justice: An Aretaic Account of the Virtue of Lawfulness*. In this piece, Solum argues that justice is a natural virtue, and in so doing, explains the *philosophical* relationship between justice and virtue.

Solum builds this piece on top of what seem to be five tenets of virtue theory. First, justice is best explained as the virtue of lawfulness (as opposed to fairness).⁵⁰ Second, justice as lawfulness includes the requirement that

44. *Id.* at 29.

45. *Id.* at 30 and n.16 (quoting NICOMACHEAN ETHICS x. 9. 1180a).

46. *Id.* at 32–33.

47. *Id.* (writing that Aquinas’s peculiarly Christian perspective “of course, never would have occurred to Aristotle.”).

48. *Id.* at 38–42.

49. *Id.* at 47.

50. Solum, *supra* note 33, at 174 (noting the philosophical debate between two conceptions: justice as fairness, or justice as lawfulness).

people should be governed by what Solum calls the *nomoi*, which is an Aristotelian concept and means “the positive laws and shared norms of a given community.”⁵¹ Third, in well-ordered societies, the *nomoi*, or just laws and social norms, are those that “create the conditions for human flourishing.”⁵² As we have seen, human flourishing is the goal of law in aretaic theory. Fourth, when citizens (including judges) function best, they are acting “in full possession of human excellences [i.e., the virtues].”⁵³ When a society functions at this level, its citizens, including judges and lawmakers, are exercising the virtues of both practical and intellectual reason. And, when citizens function this way (virtuously), we say those citizens are *phronimoi*.⁵⁴ Fifth, one who is *phronimoi* would not accept unjust norms or laws as *nomoi*.⁵⁵

Solum’s thesis builds on the idea that justice is “a natural virtue for rational social creatures,” and that such creatures function best when they cooperate to engage in complex tasks.⁵⁶ This is important because as Solum notes, “complex cooperation is only possible with stable expectations about social practices such as promising and legal practices such as contracting.”⁵⁷ In other words, stable expectations about social practices promote flourishing, which is the goal of law in aretaic legal theory. Thus, justice, or encouraging citizens to act justly, is a proper (though not the only) aim of law.⁵⁸ And, the five tenets show that citizens must internalize the *just laws* and norms of their society to act justly.⁵⁹ This is a critical piece in the anthology as it shines light on the two Aristotelian concepts of *nomoi* and *phronimoi*, which shed light on the nuances of practical reasoning and practical wisdom.

51. *Id.* at 167.

52. *Id.*

53. *Id.* at 190. *Phronimoi* derives from the concept of *phronesis*, or practical wisdom: “*phronesis* is the ability to respond appropriately to a particular situation; a *phronimos* is able to respond appropriately because he or she has the experience to discern what is morally relevant about the situation.” *Id.* at 157.

54. *Id.*

55. *Id.* In aretaic theory, “just” positive laws (and so consistent with natural law) are those that are either “congruent” with social norms, or are “supported” by social norms. As unjust social norms and legal rules are not true *nomoi*, and could not be accepted by *phronimoi*, unjust norms and laws are not “true law” in the natural law conception of justice. *Id.* at 188–90.

56. *Id.* at 182–83.

57. *Id.* at 183.

58. *See id.* at 186 (“Justice does not need to do all the work in an aretaic legal theory. The end of law is not justice: it is human flourishing. . . . Of course, justice is one of the virtues. So the law should aim at lawfulness. . . .”).

59. *See id.* at 190.

c. Common Themes: Three Relationships of Virtue to Law

The remaining seven essays, though each a discrete project, cohere around three common themes. These themes in turn suggest three concrete ways that virtue could affect law. These three relationships are: first, that virtue—through both the intellectual virtues and the virtues of character—can guide legal decision-makers; second, that virtue theory can shed light on how legal institutions should be shaped, and third, that the virtues may help give content to broad legal standards.

i. Virtue Can Provide Action-Guidance to Legal Actors

Three essays suggest the first relationship that I have identified; that is, that virtue can provide action-guidance to legal decision-makers. “Legal decision-makers” as I have used it here refers chiefly to lawyers and judges, but could perhaps include policy makers.

This relationship turns out to be both concrete and persuasive, in part because it relies most clearly on what strikes me as the biggest strength of virtue jurisprudence: its analytic method. In other words, each of these three essays is a lesson in how a legal actor who reasons from the perspective of virtue theory—reasoning with *phronesis*, from practical wisdom—can improve reasoning about problems in law. These three essays highlight what Aristotle called the intellectual virtues of practical judgment and contemplation.⁶⁰ The essays also show how the virtues of character—which are inherently bound up in the analytic method—can affect legal reasoning.

The three essays include first, Suzanna Sherry’s *Judges of Character*, second, Lawrence Solum’s *A Virtue-Centered Account of Equity and the Law*, and third, Rosalind Hursthouse’s *Two Ways of Doing the Right Thing*. Sherry and Solum focus on the need for judges to make decisions based on norms of virtue, which are universal, and not based on politics, which is relative. Hursthouse focuses on how good lawyers faced with only bad choices can do the virtuous thing.

As to judges, Suzanna Sherry argues that to judge virtuously requires having those character traits “that allow an individual to make judgments where intellect runs out.”⁶¹ Because virtue is the mean between two

60. See *supra* Part I.a.

61. Suzanna Sherry, *Judges of Character*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 89 and n.3 (citing Anthony Kronman, *Practical Wisdom and Professional Character*, in PHILOSOPHY OF LAW 203, 208 (Jules Coleman & Ellen Frankel Paul eds., 1987)).

inappropriate extremes (referencing the analytic method of virtue reasoning), Sherry asserts that good judicial temperament is that between temperamental extremes.⁶² She highlights two traits, humility (contrasted with arrogance) and courage (contrasted to timidity).⁶³

Sherry first demonstrates “the need for judicial humility by showing that its absence produced bad constitutional decisions.”⁶⁴ Her examples are *Dred Scott v. Sandford*⁶⁵ and *Bush v. Gore*,⁶⁶ citing both as examples where institutional arrogance caused the Court, with disastrous results, to attempt inappropriately to “save a nation in crisis.”⁶⁷ Second, Sherry asserts that “a good judge, because he/she is humble about his/her own role and abilities, is especially likely to fear being wrong.”⁶⁸ Consequently, “[i]n the face of such a fear, it is easier not to act than to act: sins of omission never seem as frightening when the alternative is to take a bold step that might be mistaken. Thus, judicial courage entails acting despite the uncertainty, born of humility, about the correctness of one’s actions.”⁶⁹ Her examples include decisions where judges have been too “diffident,” including *Korematsu v. United States*⁷⁰ and *Poe v. Ullman*.⁷¹

In these examples, Sherry writes about character, but notes that the idea of the best character trait in any given context is uniquely bound up with the idea of aretaic analytic method. That is to say, the appropriate character trait (the one that will produce the best result) is honed by a process of reasoning (and if reason is faulty, then by practice, and finally, by habit) to reach the mean between two extremes. This way of thinking about judicial temperament allows for the possibility that “good” judicial temperament is not static. In other words, from the aretaic perspective, a good judge does not arrive at the doorstep of the courthouse with a fixed set of personality traits (or political predilections) that are either “better” or “worse” for judging. Instead, from the

62. Drawing on Aristotelian conception of virtue as middle ground between extremes. See text accompanying notes 17–19.

63. Sherry, *supra* note 61, at 91.

64. *Id.* at 92.

65. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

66. *Bush v. Gore*, 531 U.S. 98 (2000).

67. Sherry, *supra* note 61, at 93.

68. *Id.* at 91.

69. *Id.*

70. See *Korematsu v. United States*, 323 U.S. 214 (1944) (demonstrating inappropriate deference to the legislature).

71. See *Poe v. Ullman*, 367 U.S. 497 (1961) (demonstrating inappropriate refusal to hear a challenge on justiciability grounds). A third example was the Court’s refusal to grant certiorari in any case presenting the merits of educational affirmative action, which is now no longer so. Sherry, *supra* note 61, at 88, 98–99.

perspective of aretaic theory, a judge arrives with a set of dispositions, and series of decisions to make. It is up to each judge to assume the appropriate state of character called for by any given context, and to reason her way through the issues presented to reach the best (most virtuous) decision given all the circumstances. This is an entirely new way of thinking about judicial temperament.

Solum's essay, *A Virtue-Centered Account of Equity and the Rule of Law*, further illustrates this idea, but from the lens of one particular tool in the judicial toolbox: equity. Solum argues that the exercise of equity in particular cases is consistent with "the rule of law" generally if equity is exercised by virtuous judges *acting* virtuously, as opposed to ideologically. He claims that "equity can (or should) be done only by a *phronimos*, by a person of practical reason."⁷² In aretaic legal theory, to be *phronimos*, or, in other words, to act virtuously (meaning with required practical reason), one must act with wisdom and integrity.⁷³ Thus, it is the very act of reasoning with wisdom and integrity that makes one "virtuous," not any single personality trait. Solum's essay extends that basic claim to a particularly knotty area of jurisprudence, which is the question of whether equity can ever be consistent with the rule of law. Solum concludes that in the hands of virtuous judge, one reasoning from a state of *phronimos*, the answer is yes.

Similarly, Rosalind Hursthouse argues that by reasoning like a virtuous person, a lawyer can make the best of a bad situation. Reasoning as a virtuous person allows a lawyer to be confident that the result was reached not out of intuition, but rather from reason: Virtuous reasoning allows for virtuous people to be lawyers who must on occasion choose between two otherwise non-virtuous courses of action. Hursthouse notes that a lawyer's "role-obligations" frequently generate moral dilemmas and conflicting moral obligations. In the face of such conflicts, Hursthouse urges effective moral decision-making to produce moral actions.⁷⁴

72. Lawrence B. Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 142, 157.

73. *Id.* at 157–60. Solum differentiates his notion of judging with *phronimos* from an approach that may sound similar: that of Dworkin's ideal judge, Hercules. To Solum, under a virtue-oriented approach, judicial choices are particularized to each case, while Hercules consults grand ideals for each choice. Solum argues that when judging from (with?) *phronimos*, grand theory building may be appropriate at times, and so a virtuous judge may at times reason as Hercules would, but then again a virtuous judge may be required to depart from "general rules and principles on the basis of their legal and moral perceptions of the facts of a particular case."

74. Rosalind Hursthouse, *Two Ways of Doing the Right Thing*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 236, 240–42.

Hursthouse admits that her concept of virtuous decision-making might often result in the same decision that a normal agent would make, but Hursthouse's virtuous agents choose the "right thing to do" based on good moral reasons, not as a simple knee-jerk reaction. A virtuous agent, and under appropriate role-obligations a virtuous lawyer, considers all choices presented by a serious dilemma, deliberates on the severity of each choice, considers alternate options, and selects the least-terrible option only after careful consideration.⁷⁵ Even after selecting the lesser of the two evils, the virtuous lawyer will act to mitigate the harm stemming from her "immoral" action and will not publicize or highlight her choice: "the virtuous are not content with being blameless and able to justify themselves They look around for a way or ways to make the best of it."⁷⁶

The key to all three pieces is understanding how virtue theory operates as an analytic method. That is to say, virtue theory is about making a practical choice that is the best of all choices in any given situation. As noted, virtue theory connotes a particular kind of reasoning: that of "practical wisdom." Practical wisdom requires a decision-maker to consider both the context of a particular situation, and to examine the mean between two extremes presented by that situation. It is there—at the mean point between two extremes—that virtuous decisions are made.

ii. Virtue Theory Can Shape Institutions

On an apparently different tact, one essay suggests the second of the relationships that I have identified: that institutions can and should be structured around norms of virtue. This relationship of virtue to law is at first blush less concrete than the first, yet, upon reflection, provides one of the most powerful examples in the volume. It clearly illustrates how the analytic method of virtue jurisprudence would enhance legal reasoning when the analytic method of the either of the two dominant theories would not.

In *Civic Liberalism and the "Dialogical Model" of Judicial Review*, Farrelly argues that judicial review should be remade to resolve the classic "Madisonian dilemma"—the tension between a desire for limited government (liberalism) and also for self-government (constitutionalism)—and that virtue should be the normative basis for the overhaul.⁷⁷ This is a critically important

75. *Id.* at 244–47.

76. *Id.* at 246, 248.

77. Colin Farrelly, *Civic Liberalism and the "Dialogical Model" of Judicial Review*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 107, 109.

essay in the volume because it demonstrates the adeptness of virtue theory at accommodating seemingly irreconcilable differences between competing claims, including competing claims to distributive justice.

Farrelly begins with the observation that citizens in liberal democracies are vulnerable to loss of employment, of health, to crime, etc. These inevitable vulnerabilities yield claims for justice (I want my job back, someone should help me pay for health care, someone should punish the criminal and restore what I lost), and behind these claims are “claims of distributive justice.”⁷⁸ Farrelly writes: “Distributive justice concerns the fair division of the benefits and burdens of social cooperation. But what ‘terms of agreement’ would constitute fair terms of social cooperation among members of large, pluralistic, unequal liberal democracies . . . ?”⁷⁹ To Farrelly, the answer lies with virtue theory.

Farrelly rejects the predominant “principle-oriented” theories of distributive justice (Rawls et al.) in favor of a virtue-oriented approach, which he calls “civic liberalism.”⁸⁰ According to Farrelly’s conception of civic liberalism, “the justness of a society is measured by the extent to which it exercises *the virtues of fair social cooperation*.”⁸¹ These virtues are toleration, civility and fairness, and the “public philosophy” that takes toleration, civility and fairness “seriously” should also “embrace a ‘dialogical model’ of judicial review.”⁸² Taking the competing moral and pragmatic demands of toleration, civility and fairness seriously entails embracing, and not rejecting, the Madisonian dilemma.⁸³

Farrelly believes that a principle-oriented political theory cannot resolve the tension between these two ideals because by its nature, a principle-oriented theory has as its reference point, the appeal to a rule or principle—singular—which then points in the direction of either liberalism *or* constitutionalism, but can not accommodate both.⁸⁴ Farrelly believes that by

78. *Id.*

79. *Id.*

80. *Id.* at 111 (noting that unlike George, his conception is non-perfectionist).

81. *Id.* at 110 (emphasis in original).

82. *Id.* at 111. Farrelly admits that the virtues of toleration, civility and fairness are “elusive and indeterminate,” in part given their “multi-track” nature. Farrelly notes: “one cannot completely describe, in the abstract, what the demands of these virtues are. It is only when we consider the context of a particular situation that one can begin to give some concrete life to these elusive virtues.” *Id.* at 125. The example he uses is how to handle, after 9/11, competing demands for heightened governmental protection against terrorism vs. demands for protections of individual liberties. *Id.* at 123.

83. *Id.* at 112.

84. *Id.* at 117.

contrast, a virtue-oriented approach to judicial review could account for the competing demands of the needs for both toleration and civility, and his essay sets about outlining what that approach would look like in practice.

Farrelly's virtue-oriented political theory is built on three premises:

First, "an action or policy is right if and only if it is what a virtuous agent (e.g. parent, spouse, country, legislature, judiciary) would do in the circumstances. Second, "a virtuous agent is one who acts in accordance with *reasons* no one could reasonably reject." Third, "a virtue is a character trait that an agent needs in order to demonstrate *respect* for both herself and others (e.g. family, compatriots, humanity)."⁸⁵

From these premises, Farrelly constructs a new model of judicial review, importing two ideas from the Canadian constitution.⁸⁶ Specifically, he draws upon Section 1 of the Canadian Charter, which "recognizes a plurality of values," as opposed to a unitary principle-oriented approach, which is "uncompromising."⁸⁷ Virtue theory has shown the necessity for accounting for a plurality of ideals, and Farrelly asserts this provision effectively accounts for this need. He also draws upon Section 33, which is a legislative override of judicial declaration of unconstitutionality, and which Farrelly asserts "coheres with the moral demands of civility"⁸⁸ Such a provision effectively removes judicial supremacy, which, Farrelly asserts, virtue theory has shown is a danger to a pluralistic society. The end result is a "dialogical" model that, based on virtue, reconceptualizes judicial review to solve the Madisonian dilemma and account for the multiple values expressed in a pluralistic society: accommodating both liberalism (characterized by the virtue of toleration) and constitutionalism (characterized by the virtue of civility).

Finer points of political theory aside, this essay is intriguing because it illustrates another way in which virtue jurisprudence may in fact better account for competing (and apparently irresolvable) interests than other jurisprudential theories. Though focused on a particular issue, this essay has broader impact. In this essay, Farrelly shows how, in contrast to principle-oriented theories, virtue theory privileges not a single core value or principle but a *process*—that of practical reasoning. As such, the essays suggest that, as an analytical method, virtue jurisprudence may be better able to account for

85. *Id.* at 119.

86. *Id.* at 129–36 (describing the origins of "dialogical judicial review" within the Canadian Charter).

87. *Id.* at 120.

88. *Id.* at 134.

pluralistic values or ideals, which, in a pluralistic democracy, are sure to characterize any legal debate. The essay thus offers a taste of an important new analytical approach to “stand-off” questions in legal theory, and shows that the approach is worthy of further consideration to test its mettle.

iii. Virtue Can Give Content to Broad Legal Standards

Finally, three essays suggest the third relationship I have identified, which is that virtue can give content to broad legal standards. The essays include: first, Heidi Li Feldman’s *Prudence, Benevolence and Negligence: Virtue Ethics and Tort Law*; second, Antony Duff’s *Virtue, Vice, and Criminal Liability*; and third, Kyron Huigens’s *On Aristotelian Criminal Law: A Reply to Duff*. Each of these essays takes on the project of redefining the content of some aspects of current law based on virtue.

The three essays are a mixed bag of success and questions. On one hand, the idea that virtue can somehow give substantive content to law is somewhat intuitive: When one first hears the phrase “virtue jurisprudence,” one might naturally think that the phrase must mean law should be based on some “virtuous” rules or standards. Yet upon reflection, this idea is revealed to be relatively marginal: As the other essays in the anthology show, virtue jurisprudence turns out to be much less about virtue as a substantive *source* of law than it is about a method of reasoning *about* law.

That said, this project does succeed in a particular space, which is how virtue theory informs the legal standard of “reasonableness.” In *Prudence, Benevolence and Negligence: Virtue Ethics and Tort Law*, Heidi Li Feldman writes that virtue theory currently informs the reasonable person standard in negligence law.⁸⁹ Her thesis is that reasonableness is only one part of a three-part standard, which incorporates virtues of due care (prudence) and caring (benevolence).

Feldman’s idea is that

[t]ort law assesses negligence according to the conduct of a reasonable person of ordinary prudence who acts with due care for the safety of others It is mistaken to reduce negligence to reasonableness or to try to understand the sense of reasonableness contemplated by the negligence standard without reference to the virtues of prudence and benevolence.⁹⁰

89. See generally Heidi Li Feldman, *Prudence, Benevolence and Negligence: Virtue Ethics and Tort Law*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 51.

90. *Id.*

Further, according to Feldman, “[t]he full negligence standard—set by the conduct of a person who is not only reasonable but also duly prudent and careful—advances a more fulsome conception of moral personhood, one that sets as the legal standard a figure who is not only reasonable but also prudential and careful.”⁹¹

In this way, Feldman argues that courts and commentators should explicitly account for the role of virtue in the negligence standard.⁹² Feldman asserts the last 50 years of tort scholarship and case law have been dominated by either Kantianism or utilitarianism (“and its public policy counterpart, neoclassical welfare economics”).⁹³ Feldman suggests that the influence of both the two dominant schools of thought have eclipsed other ideas, and that these ideas are 1) based on neo-Aristotelian conceptions of virtue, and 2) are relevant to tort law today, both descriptively and normatively.

By contrast, Antony Duff and Kyron Huigens debate a hot topic in criminal law theory: why we punish. In these two essays, Duff and Huigens offer competing answers to the question of whether virtue can explain or justify punishment. Specifically, Duff and Huigens each recognize some role for virtue in criminal law, but they disagree on the extent of the virtue’s power. The site where they seem to agree is again around the idea of reasonableness, as it relates to the criminal law defense of duress.

Huigens’s thesis is broader than that, however. Huigens argues that virtue is immensely important to any theory of why we punish.⁹⁴ In short, Huigens’s account is that in a well-functioning society, law is not a means, law is instead an end.⁹⁵ Part of acting virtuously, or, in other words, with *phronesis*, is the practice of reasoning well about ends.⁹⁶ Huigens asserts simply that crimes happen not when a person’s character is bad, but rather when reasoning fails. In other words, when a citizen fails to deliberate on the end of law, crime happens.⁹⁷ Thus, to Huigens, the answer to why we punish is at least in part

91. *Id.* at 52.

92. *Id.* at 51.

93. *Id.* at 52.

94. Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, in *VIRTUE JURISPRUDENCE*, *supra* note 1, at 215.

95. *Id.* at 222.

96. *Id.* at 223–24.

97. Huigens asserts

In a virtue ethics theory of punishments, responsibility for one’s character and for the quality of one’s practical reasoning—including one’s deliberation on ends—is portrayed as essential to just punishment. People do not commit crimes because they fail to fit means to ends. They commit crimes because their ends are wrong. The failures of reasoning that lead people to commit crimes are not instrumental errors confined to the immediate circumstances of the

because the criminal in her criminal act failed to reason, and that failure led to the criminal act.

Duff, on the other hand, insists that virtue jurisprudence has little to say about criminal law because such a theory would require either that the law punish the agent for lack of character, or that the law punish the act for lack of character.⁹⁸ As noted, Duff accepts that virtue may be relevant to the duress defense.⁹⁹ However, he believes it only applies through the narrow lens of reasonableness: If a reasonable person could have resisted and defendant did not, he will be liable.¹⁰⁰ He also argues that the duress defense should not set an unreasonably high standard above the reasonable person standard: “[the defendant] is then excused if and because resistance would have required a greater degree of courage or commitment than the law can properly demand of us.”¹⁰¹

The criminal pieces differ from the tort piece in that they are more directly about legal theory than doctrine. (And I suspect that how persuasive one finds the application of virtue theory to criminal law theory correlates highly to one’s pre-existing views of the answer to the question “why do we punish.”) That said, the two essays do provide another example of virtue theory giving content to a legal standard.

Indeed, it strikes me that the broad legal standard of “reasonableness” is a rich site for further analysis and research from the perspective of virtue jurisprudence.¹⁰² Reasonableness cuts across many areas of law (including contract, for example) and necessarily requires a contextual judgment—a hallmark of virtue theory reasoning. In certain areas of doctrine, it is possible to imagine that Aristotelian virtues of character, each of which is derived from a separate “sphere of human experience,” will touch what we know today as a broad legal standard of conduct, such as negligence. In that case, the Aristotelian conception of what makes a life “good” in any sphere of human

offense. Crimes are manifestations of callousness, persistent immaturity, narcissism, greed, lack of empathy, impulsiveness, uncontrolled anger, and so on—failures in the rational constructions of an agent’s motivations, including the standing motivations that make up a character. We hold people responsible for failures of character in ordinary morality, and when failures of this kind result in a violation of a criminal prohibition, we hold people responsible by punishing them.

Id. at 224–25.

98. Antony Duff, *Virtue, Vice, and Criminal Liability*, in VIRTUE JURISPRUDENCE, *supra* note 1, at 206–08.

99. *Id.* at 203–06.

100. *Id.* at 205.

101. *Id.*

102. See generally Cimino, *supra* note 19.

experience is still relevant. Feldman has squarely identified one such site; the criminal pieces suggest another. Though the possibilities are not limitless, there surely are other such spaces in legal doctrine. Further scholarship on the question could yield surprising answers.¹⁰³

In sum, then, the nine essays in the anthology taken together suggest at least three different relationships of virtue to law: virtue can provide action-guidance to legal decision-makers; virtue can shape legal institutions; and virtue can give content to legal doctrine and shape theory. The most successful of these are built on the idea that what makes virtue theory different and promising is the concept of *phronesis*.

III. VIRTUE AND PRIVATE LAW

So far the discussion of virtue theory as applied to law has been limited mostly to topics in public law (constitutional theory, criminal law, professional responsibility, jurisprudence). But if *phronesis* is indeed a key to unlocking virtue theory's relevance to law generally, then there should be no reason to limit that theory to public law jurisprudence. There is nothing inherently "public" about *phronesis*. Indeed, though the majority of the essays in the anthology take on public law subjects, one rather successful piece is about a semi-private law subject (Feldman's piece on tort).¹⁰⁴

For the sake of argument, taking a conservative position, one might assume that virtue jurisprudence may be relevant to public law because public law is largely based on distributive justice, while private law requires corrective justice.¹⁰⁵ One might assume that virtue theory, interpreted as a political theory, can better inform the former. These would not be unreasonable assumptions, but they would be incomplete. This Section shows why.

In Part A, this Essay challenges the distinction between public and private law. This Part shows, as one example of private law, the public aspects of contract law. The public aspects of private law (such as contract) are made plainer during a crisis in economic or public policy, but are present even in times of economic prosperity. Part A also shows that the more public aspects of contract law are under-theorized, leaving a gap in the literature around

103. *Id.* Another is the reasonableness standard in contract law. As I have written elsewhere, this doctrinal space could be another where virtue could give content to law.

104. Feldman, *supra* note 89.

105. Distributive justice allocates social and political benefits and burdens between citizens, while corrective justice rights wrongs between private parties.

these issues. In Part B, the Essay puts these ideas to the test and explores more fully how the problems of the A.I.G. bonus contracts and the federal mortgage modification program might be approached from the perspective of virtue jurisprudence.

a. Contract Is a Private Law Subject That Has Public Consequences

It has been said that there are “too many theories” of contract.¹⁰⁶ And this may be true. But it isn’t often that an entirely new theory makes an entrance onto a scholarly stage, and so when that happens, the entrance is noteworthy. Beyond noteworthiness, however, is a deeper intuition. The intuition is that virtue theory is particularly well-suited to engage with a particular set of issues in contract theory. Those issues arise out of an under-theorized aspect of contract law, contract’s public side.¹⁰⁷ The public consequences of contract are not often noted, but exist, are important, and are under-theorized.

While contract is a private institution—private parties transfer or exchange private property—the institution of contract also has public consequences, even in the absence of an economic crisis. These consequences are both social and political. First, the social: Any private transaction creates some form of relationship between the contracting parties.¹⁰⁸ Second, the political: Contract rules do have distributional consequences.¹⁰⁹ Moreover, as courts refine the common law of contract through the process of enforcing some private bargains and not others, private adjudication produces public policy effects.¹¹⁰ In these ways, contract is not only economic, or “private,” it is social and political, or “public.”¹¹¹ So, while contract certainly does allocate private resources among private parties, contract also has important public consequences.

As set forth above, private law’s public consequences are made more obvious in times of economic stress. In times of economic serenity, scholars and commentators, journalists and pundits are more comfortable ignoring the public aspects of private law than in times of economic stress. In times of

106. Todd D. Rakoff, *Too Many Theories*, 94 MICH. L. REV. 1799 (1996) (reviewing MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (Harvard University Press 1993)) (“We thus see in contract scholarship what we see in legal scholarship generally these days—a proliferation of theories.”).

107. *Id.* at 1799 (“Contract law aspires both to state the law governing social interactions—buying, hiring, leasing, and licensing—and to depict an ideal society—the market free and just.”).

108. Daniel Markovits, *Contact and Collaboration*, 113 YALE L.J. 1417, 419–20 (2004).

109. Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 473 (1980).

110. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933).

111. Markovits, *supra* note 108, at 1419–20.

crisis, we lose this luxury. That said, most (but not all) contract theorists are interested primarily in the private side of contract. While there are some theorists who explicitly take up contract's social aspects,¹¹² in the main, contract theory is still framed in large part by concerns over contract's private side. As will be explained *infra*, virtue theory seems particularly well-suited to address the under-theorized public consequences of private law, including contract law.

i. The Social Aspects of Contracting

One face of contract's public side is social: the relationship or the engagement between the parties that arises out of their dealing. Though under-theorized, this side of contract has received attention recently from legal scholars. For example, both relational theorists and communitarians have taken up this project.

The relational theorists study the ways in which the relationship that develops between repeat contracting players eclipses law as a source of contract regulation. These theories have been criticized as being insufficiently doctrinal; the critique is that they rely too purely on context, and pure context cannot produce determinate legal rules.¹¹³ Additionally, communitarian scholars note that the very fact of a promise or contract creates "relations" between actors, and so any theory of contract needs to account for these relations.¹¹⁴ Specifically, communitarians criticize both consequentialist and entitlement theories as being overly individualistic. They offer instead a theory that is built on the notion that through both promise and contract, people engage with each other, and the rules of contract need to account for this engagement.¹¹⁵ Finally, a new school of "contractarians" take up the question of what contract law should be from the perspective of how individuals should treat each other.¹¹⁶ Unlike communitarians, contractarian theory is individualistic. It is also a form of deontology: The question for

112. See, e.g., *id.* at 1419.

113. TREBILCOCK, *supra* note 106, at 141–42 ("Macneil's approach, no matter how accurately it describes reality, does not yield determinate legal principles for governing the allocation of unassigned risks . . .").

114. Markovits, *supra* note 108, at 1419.

115. *Id.* at 1420 (advancing the ideal that a contract creates between the parties a "respectful community").

116. Robin Bradley Kar, *Contractualism about Contract Law* (Loyola Legal Studies Working Paper No. 2007-29, 2007), available at <http://ssrn.com/abstract=993809>.

communitarians is what are the principles to which contracting parties must adhere in order to contract.¹¹⁷

ii. The Political Aspects of Contract Law

The other public aspect of contracting is the effect that private law adjudication has on public policy. There are two significant public policy effects. First, consider the truism that contract is a body of law that brings state enforcement power to bear on private parties.¹¹⁸ Contracts, by their very nature, *are* law; the corpus of private contract law becomes public law through adjudication. Second, and perhaps more importantly, contract law comes loaded with distributional consequences, whether we (as citizens of a liberal political and economic society) want it to or not.¹¹⁹ Indeed, scholars have noted that certain contract rules are primarily distributional. For example, Anthony Kronman has written that minimum wage laws, regulating how little an employer can agree to pay an employee, are an example of “contractual regulation” that has significant redistributional consequences.¹²⁰ Though these consequences are not often analyzed, either by courts or commentators, they exist.¹²¹

These consequences are more pronounced as citizens’ vulnerabilities to losses occasioned by or affected by private law rules increase and are exploited. As Collin Farrelly noted in his essay on judicial review, citizens in liberal democracies are vulnerable to losses of jobs, decreases in health, and

117. *Id.*

118. Cohen, *supra* note 110, at 586 (“From this point of view the law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.”).

119. *See, e.g.*, Kronman, *supra* note 109, at 474 (asserting that the “non-distributive conception of contract law cannot be supported on either liberal or libertarian grounds, and defend[ing] the view that rules of contract law should be used to implement distributional goals whenever alternative ways of doing so are likely to be more costly or intrusive.”).

120. *Id.* at 499.

121. Moreover, one could also say that, like any unifying theory, contract theory is inherently political. Contract theory asks, why and when do we enforce contracts? As with any theory, different theories of contract have different political foundations and consequences. For example, the will theory of contract, where it is said that courts enforce contracts because, and only to the extent that, contracts are the product of each party’s will, is rooted in the same Enlightenment political philosophy valuing personal freedom which informed our Jeffersonian Bill of Rights. And as theory informs doctrine, the rules themselves take on a political cast. This is observable even at the most meta-level of contract doctrine, tracing the evolution of the common law from pre-classical contract, to the First Restatement (individualism and will theory), to the Second Restatement and the U.C.C. (both more objective, more reliant on community standards and judgments about “reasonableness”).

increases in crime, and more. Exploitation of vulnerabilities produce “claims for justice,” and behind these claims are “claims of distributive justice;” for example, she who loses her job claims “I should have it back.”¹²² Indeed, the news cycle of the past year has been chock full of claims of distributive justice arising out of issues of private law, in turn traceable to personal economic vulnerability.

One prominent example is whether A.I.G. shareholders—and, after the bailout, U.S. taxpayers—should be entitled to some form of restitution of \$165 million in bonuses paid to A.I.G. executives in the wake of receiving \$170 billion in federal bailout money.¹²³ These bonuses were paid because of the contracts between the company and the executives. Another prominent and current example is whether unwise, unlucky, or understandably uninformed mortgage borrowers should be entitled to relief from extremely disadvantageous loan terms in their contracts with their lenders.¹²⁴ When questions such as these dominate daily discussions in boardrooms, lunchrooms, and classrooms, one is hard-pressed to deny the distributional consequences of private law, including contract law.

iii. Contract's Public Consequences Are Under-Theorized

Despite the public aspects of contract, most theorists engage with the economic or private aspects of contracting. This does not include only law and economics scholars, but includes all scholars who tend to overlook contract's public consequences, which, in times of economic prosperity, includes most scholars. Specifically, in times of economic serenity, contract's social and distributional consequences are less pronounced, not as apparent, and certainly not part of the daily news cycle, than in times of economic stress. For example, in the past 30 years—a time of relative (not absolute) economic serenity—contract law and legal theory has been significantly influenced by law and economics scholarship.¹²⁵

Yet, as noted, the economic times are changing. As the anthology demonstrated virtue jurisprudence's relevance to issues of public law, this

122. FARRELLY & SOLUM, *supra* note 1, at 109.

123. Posting of The Editors to THE NEW YORK TIMES Room for Debate Blog, <http://roomfordebate.blogs.nytimes.com/2009/03/17/when-bonus-contracts-can-be-broken/> (Mar. 17, 2009, 18:25 EST) [hereinafter Posting of The Editors].

124. Posting of Randy Cohen to THE NEW YORK TIMES Moral of the Story Blog, <http://ethicist.blogs.nytimes.com/2009/04/21/thy-neighbors-mortgage/> (Apr. 21, 2009, 7:00 EST).

125. Kar, *supra* note 116, at 103 (observing that, as compared to its deontological rivals, economic theories of contract have proved “particularly robust”).

essay claims that virtue theory is equally well-suited to take up issues arising out of the public aspects of contract law and theory. The reason is *not* that virtue theory is more “right” about law (either public or private) than the two dominant theories. The reason is that virtue theory is about the reasoning process, while the two dominant theories are each about a core value. Law and economics is, at bottom, about incentivizing rules that maximize welfare or utility. Deontology is, at bottom, about incentivizing rules that respect pre-existing rights or entitlements. Virtue theory, at bottom, at least as applied to law, seems to be about bringing practical wisdom to bear on particular problems. Practical reasoning does not presuppose a core value; it presupposes only a method of reasoning that is contextual rather than formal, and which has the potential to accommodate a plurality of values.

b. Practical Application: Virtue in Private Law?

In the remainder of this Essay, I consider more practically the question of how virtue might impact private law. Drawing on some of the possible relationships of virtue to law that I have observed embedded within the essays, I revisit two concrete questions of private law from the perspective of virtue jurisprudence.

i. A.I.G.’s Bonus Contract Kerfuffle

Several important legal issues have arisen out of A.I.G.’s executive compensation contracts over the past year. One issue was whether or not the contracts themselves—contracts for bonuses paid to high-level executives, many of whom worked in the very divisions that ended up doing the most damage to the company (and arguably the national economy)—were enforceable as a matter of contract law. As was widely reported in the media, A.I.G. first responded to criticism of its compensation payouts by invoking the “contract defense,” claiming the company had no choice but to pay the bonuses that they were obligated by contract to pay.¹²⁶ What validity is there to the contract defense? Ought the contracts be honored, or should they be modified? A newer issue is that, to the extent the company has chosen to honor those contracts, whether the federal government may impose special taxes or fees on those payments.¹²⁷

126. Posting of The Editors, *supra* note 123.

127. *See, e.g.*, The New York Times Dealbook, Geitner Urges Bank Fees to Recoup A.I.G. Bonuses,

As to the first issue, contract law experts point to various theories, yet reach different conclusions. Some experts argue that the contracts are utterly unenforceable (or else modifiable),¹²⁸ while others argue that the contracts should be enforced as written, as enforcement is best for the institution of contract law, the company, and the national economy. Along the way are differing viewpoints as well about what doctrines of contract law might apply to the issues: frustration of purpose applies,¹²⁹ frustration of purpose does not apply,¹³⁰ unconscionability applies,¹³¹ unconscionability does not apply. In short, experts have yet to reach any consensus.

Perhaps the most intellectually honest answer to the contract defense question is that, if the goal is to obtain some form of rescission of the compensation contracts, then there are many strategies, both legal and common business-sense, that can be employed.¹³² But that does not actually answer the question; it only begs it. Given all the circumstances, what should be done? Of course there is no easy answer, and I do not pretend that virtue theory is the magic bullet that solves the problem for once and for all. But I do think that because of its unique analytic method, virtue theory may offer insights that may help shed a different light on the problem, and as a result, may suggest alternative ways of approaching a resolution.

One reason that current approaches may fail to yield consensus is that mostly, viewpoints on contract (as with all law) stem from one of the two dominant normative approaches, either some version of consequentialism (law and economics) or some version of deontology (rights). As I have written elsewhere, each of these approaches comes with its own set of blind spots, yet because of its symbiotic emphasis of both means and ends, virtue jurisprudence does not.¹³³ So, a consequentialist might argue that the contracts

Feb. 24, 2010 (available online at <http://dealbook.blogs.nytimes.com/2010/02/03/geithner-urges-bank-fees-to-recoup-aig-bonuses/?scp=2>).

128. Posting of Tom Baker to THE NEW YORK TIMES Room for Debate Blog, <http://roomfordebate.blogs.nytimes.com/2009/03/17/when-bonus-contracts-can-be-broken/> (Mar. 17, 2009, 18:25 EST) (“Contracts get repudiated, renegotiated, modified, delayed, worked out, managed—pick your euphemism—all the time. A.I.G. knows this.”).

129. Posting of Charles Fried to THE NEW YORK TIMES Room for Debate Blog, <http://roomfordebate.blogs.nytimes.com/2009/03/17/when-bonus-contracts-can-be-broken/> (Mar. 17, 2009, 18:25 EST).

130. Posting of Frank Snyder to THE NEW YORK TIMES Room for Debate Blog, <http://roomfordebate.blogs.nytimes.com/2009/03/17/when-bonus-contracts-can-be-broken/> (Mar. 17, 2009, 18:25 EST).

131. Posting of James P. Tuthill to THE NEW YORK TIMES Room for Debate Blog, <http://roomfordebate.blogs.nytimes.com/2009/03/17/when-bonus-contracts-can-be-broken/> (Mar. 17, 2009, 18:25 EST).

132. Posting of Glenn Greenwald to THE NEW YORK TIMES Room for Debate Blog, <http://roomfordebate.blogs.nytimes.com/2009/03/17/when-bonus-contracts-can-be-broken/> (Mar. 17, 2009, 18:25 EST).

133. Cimino, *supra* note 19. Virtue theory requires equal consideration of both the means *and* ends

should be enforced because, in the end, everyone is better off if these executives stay in their seats long enough to unwind the tricky products and investments that caused all the trouble in the first place.¹³⁴ In contrast, a deontologist (in contract law, a promise theorist) might assert that, while it is important to keep promises, a change in underlying assumptions, in the form of bankruptcy in the absence of government bailout, might well have voided the obligations.¹³⁵ Both arguments have merit, and the challenge is how to resolve competing interests while not sacrificing what is valid within each position. Virtue theory may be a better normative approach than either law and economics or deontology in a situation like this because virtue theory is particularly adept at sorting out competing interests and accommodating pluralistic values.

In other words, as noted above, each of the dominant normative perspectives proceeds as if there is a single right answer, a single value to be pursued, or a single set of substantive norms to follow to guide decision-making. Virtue theory does not make such an assumption. In virtue theory there is no single virtuous value or norm to guide decision-making. Instead, as demonstrated in the Collin Farrelly essay, one of the strengths of virtue theory is its ability to account for seemingly irreconcilable differences, or pluralities, in values. I believe that the reason that virtue theory has this strength is that it is not, to use Farrelly's term, a "principle-oriented" theory. Rather, one could say that virtue is a process-oriented theory—the process of *phronesis*, or practical reasoning. In sum, elevating the value of the reasoning process itself over a particular substantive principle may liberate our thinking about problems such as those presented by the A.I.G. compensation contract conundrum. So liberated, we may see new approaches, or even new resolutions, that may have been obscured by the two dominant (principle-oriented) theoretical frameworks.

of any particular problem. The two dominant normative theories, by contrast, each privilege one over the other: deontology privileges the means over the ends, and consequentialism privileges the ends over the means. As I have written elsewhere, virtue analysis is symbiotic: its reasoning embraces both means and ends fully and equally, and so virtue jurisprudence does not suffer from "blindspots" as do both law and economics and rights-based theories.

134. Andrew Ross Sorkin, *The Case For Paying Out Bonuses at A.I.G.*, N.Y. TIMES, Mar. 17, 2009, at B1.

135. Fried, *supra* note 129.

ii. Mortgage Foreclosure Crisis and Federal Loan Modification Program

The Treasury Department recently announced a \$75 billion program to assist troubled homeowners trying to resist foreclosure and keep their homes in the face of mortgage terms and obligations the homeowners cannot meet.¹³⁶ The program is comprehensive. In part, it requires that borrowers and lenders attempt to work toward affordable payments through a loan modification program, and if that fails, the program empowers judicial modification of troubled loans during bankruptcy proceedings.¹³⁷

Some critics object, on the basis of law and policy. The legal objection is that absent fraud, mistake, changed circumstances, or some other recognized defense or doctrine of excuse, there is no basis to modify a validly made deal. If the consumer simply did not understand the extent of her obligation, then she should have asked for an explanation before proceeding. In short, this argument rests on the idea that, as “strict liability,” contract law requires that once a deal is validly formed, it can not be undone simply because the distributive effects of the deal are grossly inequitable. The policy objection is not dissimilar: the risk of moral hazard should prevent the government from bailing out borrowers who were just too unsophisticated to make the deals they did.¹³⁸ The argument is that the taxpayers should not have to “pick up the tab” for others’ carelessness and personal irresponsibility.

On the other hand is the practical notion, cited by the U.S. Treasury Department, that the economy simply cannot afford to absorb the effects a purely unmitigated mass of foreclosures would cause.¹³⁹ Again the question is, without getting bogged down in *political* principles (big government is good; big government is evil), how do we justify this new level of government

136. U.S. DEP’T OF THE TREASURY, MAKING HOME AFFORDABLE: UPDATED DETAILED PROGRAM DESCRIPTION (2009), http://www.treas.gov/press/releases/reports/guidelines_summary.pdf.

137. U.S. DEP’T OF THE TREASURY, *supra* note 136, at 7 (describing new requirement that “all financial institutions receiving Financial Stability Plan financial assistance going forward” to “implement loan modification plans consistent with Treasury Guidelines.” The goal of the mandatory modification program is to prevent foreclosures from happening in the first place, and is to apply first to loans issued by Fannie Mae and Freddie Mac, and then to be implemented “across the mortgage market.”).

138. Cohen, *supra* note 124.

139. U.S. DEP’T OF THE TREASURY, *supra* note 136, at 1 (“The deep contraction in the economy and in the housing market has created devastating consequences for homeowners and communities throughout the country The present crisis is real, but temporary. As home prices fall, demand for housing will increase, and conditions will ultimately find a new balance. Yet in the absence of decisive action, we risk an intensifying spiral in which lenders foreclose, pushing areas home prices still lower, reducing the value of household savings and making it harder for all families to refinance. In some studies, foreclosure on a home has been found to reduce the prices of nearby homes by as much as 9%.”).

intervention in private transactions? How do we think through what the new institution of the federal “Making Home Affordable” program should look like, both on a practical level (a job for policy makers, and potentially, if litigated, courts) and a theoretical level (a job for academics, economists, policy makers, and informed citizens of all stripes)?

Drawing on lessons from the Farrelly essay, virtue theory could be one way to think about this new institution. The program explicitly purports to reconcile competing interests.¹⁴⁰ Thus, the public debate over the program will surely be marked by the plurality of values suggested above, from personal responsibility and the risk of moral hazard, to the role of government in ensuring the social “safety net,” catching failing homeowners and shoring up fragmenting communities.

At this point, there is no litigation over the program itself, though such litigation is certainly imaginable. When it arrives, courts will be forced to confront the competing and pluralistic values that underlie the legal rules applicable to the specific issues presented in any particular case. Moreover, even before that day arrives, each specific bankruptcy proceeding will be a micro-forum in which these same issues will surface. Lenders will argue to bankruptcy courts that any modification be as modest as possible, thus best respecting the original terms that had been agreed to by the lender and borrower (an argument from a deontologic perspective). Borrowers, on the other hand, will assert that any modification be as generous as possible, in order to give homeowners the best chance to continue ownership and prevent foreclosure and all its consequences for communities (an argument from a consequentialist perspective).

As with the A.I.G. compensation issue, there are surely no easy answers or magic bullets to be discovered. No single anthology or theory could claim otherwise. Instead, the claim is more modest. The claim, at least, is that with the introduction of a new theoretical perspective on law, we can step back and perhaps see new arguments or new perspectives, which in turn could lead to new possibilities for resolution. With time, scholarship, debate and thought, it is not unimaginable that Virtue Theory may become an important source of this kind of new perspective.

140. U.S. DEP'T OF THE TREASURY, *supra* note 136, at 3–4. The program materials state that the goal is to reconcile these interests by “bring[ing] together lenders, investors, servicers, borrowers, and the government, so that **all stakeholders share in the cost** of ensuring that responsible homeowners can afford their monthly mortgage payments—helping to reach up to 3 to 4 million at-risk borrowers in all segments of the mortgage market, reducing foreclosures, and helping to avoid further downward pressures on overall home prices.” *Id.* at 3 (emphasis in original).

Indeed, for all the reasons outlined in this Essay, there are many reasons to think virtue theory might be quite relevant to these issues. That is to say, precisely *because* there is no single answer to the competing claims arising out of this new and expansive federal program, there is little reason to think that a normative theory that depends on single core value or principle might better resolve the controversies than a theory that requires reasoning over both means and ends, and starts from the premise that the “right” result is probably found at the mean between two extremes. Those are the hallmarks of virtue jurisprudence.

IV. CONCLUSION

Virtue Jurisprudence as both a theory and an anthology are significant contributions with as yet unknowable potential to influence normative legal theory. Whether the theory can compete with deontology and consequentialism remains to be seen—it will in all likelihood take years of writing and debate to fully realize the theory’s potential. Yet it is true that as an introduction, the volume has significant gaps: there is little consideration of private law and no explicit discussion of any unified vision of practical application.

It could be that the newness of idea left the editors with little choice in these matters. It could be precisely because virtue theory as applied to law is such a novel idea that it will necessarily take time and experience in order to better learn how virtue is relevant to law, and what the ultimate relationship between law and virtue is or should be. It could be that the only way to answer that question is to continue to apply virtue to law, concept by concept, and not until the conversation is more robust can any one theorist step back and try to offer the unifying principles that right now, the work lacks.

That said, the very act of bringing virtue explicitly back into conversations about law is an immensely significant contribution. Now that virtue theory has been introduced to jurisprudence, legal theorists should take it seriously. With time and attention, theorists will eventually uncover the specifics of the theory’s potential impact on law. A good time to start that work is now, and a good set of issues to launch that project is unfolding before our eyes, in newspapers, in boardrooms, in town halls, and in conversations among ordinary citizens, every day.