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Virtue and Contract Law

Introduction	704
I. The Blind Spots in Existing Contract Theories	707
A. Seeing the Logjam: The Efficient Breach Debate Between Economics and Rights Theorists	709
B. Getting Beyond the Blind Spots	711
II. What Is Virtue?	713
A. Virtue Theory: Dual Focus on Means and Ends	713
B. Virtue’s Focus on Intent: Modes of Practical Choice.....	714
C. Focus on the Virtues Uniquely Relevant to Law: The Intellectual Virtues and the Virtue of Justice	716
1. The Intellectual Virtues	716
2. The Virtue of Justice	717
D. What Virtue Is Not: Virtue Is Not Natural Law	719
III. A Renaissance of Virtue	720
A. Intellectual Historians and Aristotelian Influences	721
1. Political Historians	721
2. Legal Historians: Influences in Contract Law Doctrine	726
B. Contemporary Legal Theorists and Aristotelian Influences	727
C. Applied Law and Virtue or “Virtue Jurisprudence”	729
IV. Virtue Jurisprudence and Contract Law	731
A. A Means-Ends Approach Would Capture Both the Economic and Social Dimensions of Contract.....	732

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B. Capturing Both Dimensions of Contract Would Improve Analysis of Parties' Intent	734
C. Putting Means-Ends Intent Analysis to Work.....	736
1. Reasonableness Terms and Virtue Theory	736
2. Virtue Theory and the Covenant of Good Faith and Fair Dealing	741
Conclusion.....	742

In Justice is all Virtue found in sum.¹

“The line between legal and moral guidelines is a very blurry one in my mind,” commented one subject. “I don’t think a judge can clearly exercise one without the other having some bearing.”²

INTRODUCTION

For years, the legal academy has been obsessed with two dominant normative theories: law and economics and individual rights. From environmental law to criminal procedure, every debate seems to start and end there. This narrow perspective is particularly evident in private law fields, such as contract. In some sense, this obsession is not surprising—scholars across the social sciences and humanities struggle to break free of the same old debates between consequentialism (the philosophy on which law and economics is based) and deontology (the philosophy on which rights theories are based).³

¹ ARISTOTLE, THE NICOMACHEAN ETHICS 259 (E. Capps et al. eds., H. Rackham trans., 1926).

² Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 423 (2009).

³ Many scholars who make this observation credit it to Elizabeth Anscombe’s famous 1958 essay, *Modern Moral Philosophy*. See, e.g., G.E.M. Anscombe, *Modern Moral Philosophy*, in ETHICS 186 (Judith J. Thomson & Gerald Dworkin eds., 1968); Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in VIRTUE JURISPRUDENCE 1, 3 (Colin Farrelly & Lawrence B. Solum eds., 2008). Since that essay, scholars across disciplines, who do not identify primarily with either tradition, have noted the theoretical “logjam” and have been offering their own ideas about how legal theory can transcend it. *Id.* at 3–4 (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?: ESSAYS ON THE VIRTUES 1, 1–2 (Roger Crisp ed., 1996) (noting that Anscombe’s 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 an explanation).

But in the last few years, an old normative theory has begun to resurface: Aristotelian virtue. Though some may think that “virtue” went out with the ancient Greeks, virtue is both, in fact, alive and well and receiving increased attention from scholars of philosophy, history, and political science. Amongst law faculties, however, conversations about virtue theory have just begun.

Perhaps because it is so unfamiliar to legal theorists, the idea that “virtue” has any power to influence contemporary law, let alone contract doctrine, is bound to provoke strong intuitive reactions. On one hand, the notion of a viable, alternative normative basis to legal theory strikes a compelling chord.⁴ To that end, some legal scholars are so taken with the idea of virtue that they have claimed recently that “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.”⁵ Yet others are significantly more skeptical, especially as to private law. Indeed, outside of a few legal theorists who write about the philosophy of corrective justice,⁶ many private law scholars do not consider virtue theory at all.

This Article argues that legal scholars, and especially private law scholars, should be paying more attention to virtue theory. Unlike the two dominant normative theories, the analytical approach of virtue theory requires a symbiotic focus on both the means and ends of law. As will be explained below, neither of the two dominant theories account fully for both means and ends; instead, each privileges one over the other. By contrast, because of an inherent interrelationship between means and ends in virtue theory, this theory may offer a much more complete understanding of law, including private law, than the theories of either law and economics or individual rights.⁷

⁴ In contract, “pluralism” is one of these theories that attempts to transcend. See generally Nathan Oman, *Unity and Pluralism in Contract Law*, 103 MICH. L. REV. 1483 (2005). “Contractualism” is another. See Robin Bradley Kar, *Contractualism About Contract Law* 101 (Loyola, Law Sch. L.A., Legal Studies Paper No. 2007-29, 2008), <http://ssrn.com/abstract=993809>.

⁵ Farrelly & Solum, *supra* note 3, at 2–3.

⁶ See *infra* notes 65–73 and accompanying text. “Corrective justice” is the Aristotelian conception of justice that applies to interactions between private citizens, such as contract transactions. Its correlate is “distributive justice,” which is the conception of justice that applies to interactions between the state and its citizens.

⁷ By “private law,” this Article refers to those fields in which law regulates transactions between private citizens, such as tort, property, and contract. By “public law,” this Article refers to those fields in which law regulates the interaction between the government and its citizens. This Article focuses on one area of private law in particular: contract.

Specifically, contract law has challenges that virtue theory's means-ends approach is uniquely able to address. Those challenges arise from two basic facts about the institution of contract. First, a contract is both an economic and a social thing at once. Contract's economic dimension is obvious, but, as some scholars have recently reminded us, contract also has a social dimension: the process of exchange creates a relationship between the contracting parties. Second, although not always thought of in this way, contract law is based on intent: a foundational question in contract adjudication is "what did the parties intend?"⁸ Current theoretical frameworks are unable to fully account for contract's duality as both an economic *and* social institution, and, as a result, current approaches fail to fully capture parties' intent. Part I of the Article explains these limits of current theoretical approaches.

There are challenges to any conversation about virtue as a normative legal theory. A threshold challenge is that "virtue" is one of those broad-brush terms, which, on one hand, seem very familiar but, on the other hand, are hard to situate with precision. This lack of precision makes the discussion seem unusually daunting: "virtue" seems intuitively too lofty, too ancient,⁹ and too undefined for contemporary law. Yet, these challenges can be overcome by a more precise definition of "virtue" as a practical matter, which Part II provides.

After defining terms, Part III of the Article turns to the existing dialogues around virtue theory. These conversations may be relevant to law in many ways. For example, historians of political science and law are revisiting virtue. The historians' work is particularly useful to this project because the work exposes the hidden role of virtue in philosophical efforts, which are typically seen at odds with this approach. For example, although the precise nature of the relationship between Adam Smith's separate works on morality and economics is disputed, there are good reasons to believe the father of

⁸ See generally Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007) (arguing that the standard account of contract theory as predominately "objective" does not accurately account for what courts do, which is to work hard to find the parties' actual, subjective agreement).

⁹ See Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 33 (2007) ("To talk about Greek and Roman thought in the context of modern American law might seem oddly remote, and yet the historical sources of the modern ideas I discuss continue to be highly salient."). Of the continued relevance of such sources, see *infra* text accompanying note 107.

the “invisible hand” theory of the free market actually wrote *The Wealth of Nations* against a unifying backdrop of virtue theory.¹⁰ But historians are not the only scholars talking about virtue. Philosophers, political scientists, and even some constitutional law scholars are all taking virtue seriously. Some in the legal academy have recently coined the phrase “virtue jurisprudence” and are now applying virtue to concrete problems in law.

Part IV takes up the challenge of applying virtue to contract law. Although the applied law and virtue work has been done primarily in public law fields so far, it need not be so limited. In this Part, the Article returns to and explains the claim that contract law has two unique challenges virtue is well suited to address, namely that contract is a dual institution, both economic and social, and that contract is based on intent. The Article then probes further into how virtue theory might apply in contract, exploring how virtue theory can contribute to two routine areas of contract interpretation: “reasonableness” terms and the covenant of good faith and fair dealing. Part IV ends with a call for further research into other, more hotly debated topics in contract law. Finally, in Part V, the Article considers and answers several common objections to virtue as a basis for legal theory. None hold water.

In sum, the goal of this Article is to explore how virtue theory, as a normative basis for law, can be as good or better than either of the two currently dominant theories, consequentialism and deontology. It does not make the claim that any particular disposition is virtuous, or that the law should require that a party to a contract hold a particular disposition. Rather, it proposes that scholars begin to open their eyes to a new perspective in private law.

I

THE BLIND SPOTS IN EXISTING CONTRACT THEORIES

Everyone agrees that the current, dominant normative theories of contract are law and economics, which this Article takes as a form of consequentialist theory, and various strands of rights-based approaches, which this Article takes as forms of deontological (i.e.,

¹⁰ Peter Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, 64 CORNELL L. REV. 621, 622 (1979) (“More recently scholars have recognized that Smith’s various studies were parts of a single whole, the study of man in society. Smith organized this study around the moral virtues of prudence, justice, and benevolence. . . . At Smith’s death, the study remained incomplete, for he never published, as he intended to do, a third book exploring the virtue of justice.” (footnote omitted)).

moral) theory.¹¹ Consequentialism and deontology differ in a fundamental way: each theory approaches the question of, “Does a legal rule work?” or “Is a law good?” through a different lens. Each different lens leads to a different focal point.

As will be shown, consequentialist theories such as law and economics focus on the end of a rule: Does the rule result in a better position for each party to the contract? By contrast, deontological theories such as consent or autonomy, focus on the means of the rule: Does the rule obligate the parties to do what is morally required (or justifiable)? Thus, each theory proceeds from its own focal point. What falls out of either theory’s focus is left in a blind spot: this excess is either minimized or effectively assumed away.

The result is that many debates over important topics in contract law—e.g., the debates over whether breach should be encouraged if it is efficient, what measure of damages best accounts for the injured party’s expectation interest, and how (or even whether) the “willfulness,” i.e., bad intent, of the breaching party’s conduct should matter—happen in the shadows of these blind spots. When theorists from the two dominant approaches argue over an idea but fail to accredit and seriously engage with the other’s key premises, the effect is that of two “ships [passing] in the night.”¹² Often, contract theorists do not seem to realize they are arguing *in* the other’s blind spot; they just keep pressing their points. The result is something of a

¹¹ While this Article characterizes “law and economics” as a consequentialist approach to law, the author is familiar with the philosophical account of economics as “a science of means.” Anthony Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751, 1751 (1998) (“[Economics] describes the strategies people adopt to attain their goals at minimum cost It tells us how to achieve our ends in the least wasteful—the most economic—fashion”). Such accounts are not disputed here; indeed, the author agrees that the social science of economics can tell analysts what choice will most efficiently achieve a party’s underlying transactional goals in any particular contract. But if one understands a contracting party’s overarching legal goal as the most efficient attainment of underlying contractual goals—whatever these may be—then economic analysis of law starts to sound consequentialist. In other words, no matter what a party’s contractual goal is (e.g., sell a house, produce widgets, hire an employee), if that party wants to achieve a goal as efficiently as possible, then efficiency becomes the ultimate, or overarching, goal. Thus, any selection of “means” to achieve the “end” of efficiency is just that: a means to an end. In this conception, the end of efficiency is the highest priority. That is not to deny that the particular question of *how* one can best achieve this end in any given transaction is a question of means.

¹² Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 687 (Jules Coleman & Scott Shapiro eds., 2002).

theoretical logjam. The next section of this Article shines a light on the logjam and starts to suggest how virtue theory may break through.

*A. Seeing the Logjam: The Efficient Breach Debate Between
Economics and Rights Theorists*

Though law and economics has been very influential in contract law and theory over the past thirty years, the last ten years has seen strong growth in rights-based (deontological) approaches.¹³ Charles Fried's "contract-as-promise" approach is one of the leading rights-based theories;¹⁴ Randy Barnett's "contract-as-consent" theory is another.¹⁵ Promise theory holds that contracts should be honored because promises should be kept, and promises should be kept because not doing so impinges on the injured party's autonomy.¹⁶ Consent theory holds that contracts transfer entitlements obtained by individual consent and not honoring consent violates the injured party's autonomy.¹⁷ Protecting a party's autonomy is a deontological or moral concern: it is wrong to break a promise because in so doing the promise-breaker "uses" another person.¹⁸ To guard against this problem, courts should not be guided by economic norms; contracting parties should not *use* each other to accomplish their goals, regardless of efficiency.

To see how the theories argue in each other's blind spots, one can consider the debate over efficient breach. In this debate, the economists argue that breach is good and should be encouraged, if the breach leaves both parties to a contract better off than if the contract were to be performed. Seen through the law and economics theory lens, all contracts come with an option to perform or pay damages upon nonperformance. As long as the breaching party pays the price for nonperformance, then there is nothing wrong with breaching: everyone is better off as a result.¹⁹ The focus here is on the end

¹³ *Id.*

¹⁴ See generally CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981).

¹⁵ Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

¹⁶ See FRIED, *supra* note 14, at 16.

¹⁷ Barnett, *supra* note 15, at 294.

¹⁸ FRIED, *supra* note 14, at 16 (noting that breaking a promise "is like (but only like) lying: the abuse of a shared social institution that is intended to invoke the bonds of trust. A liar and a promise-breaker each *use* another person." (emphasis omitted)).

¹⁹ See Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1353–54 (2009). Of course neither "economics" nor its "law and economics"

result; how the parties get there is of secondary concern and out of the focal point of the law-and-economist's lens.

By contrast, in the efficient breach debate, deontological theorists stress both that contracts are promises to perform and that the institution of promise requires that the parties treat each other in a certain way. At the very least, this requirement includes not treating performance as optional.²⁰ The focus here is on the notion that promises are to be kept; what result befalls the parties (wealth maximization or not) is not the concern. End results are left largely to the side, in a blind spot.

Using the efficient breach debate as a frame, consider more broadly how each theory works. When reasoning through any question about the legitimacy of a law or a rule—such as whether the law encourages breach when breach is efficient—deontological theories focus on the means analysis. So, when confronted with the question, “Is X a good rule?” deontological theories will ask if following the rule is morally required or justified. If so, X is a good rule. A deontologist would then prescribe: “Follow rule X because it is morally required.” For the deontologist, following rule X inherently produces the right result. In this way, deontology focuses on the means—doing X—and the appropriate ends, the result, comes about derivatively.

By contrast, consequentialist theories focus on the ends of law. When asking, “Is X a good rule?” consequentialist theories will ask if following rule X produces a good result. If so, X is a good rule.

offshoot is to be conflated with any single moral philosophy. But, there is a link between the normative claims underlying the assertion that economics is productive as a tool for analyzing law and consequentialist-based moral philosophies. However, Judge Richard Posner does not find the language of moral philosophy necessary or helpful to law or the economic analysis of law. *See, e.g.,* Richard A. Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163, 166 (1990) (“I do not derive my economic libertarian views from a foundational moral philosophy such as the philosophy of Kant, or Locke’s philosophy of natural rights, or utilitarianism, or anything of that sort. I regard moral philosophy as a weak field, a field in disarray, a field in which consensus is impossible to achieve in our society. I do not think it provides a promising foundation for a philosophy of government.”). Not everyone agrees that law and economics can be quite so simply divorced from morality. *See* Robin Paul Malloy, *The Limits of Science in Legal Discourse—A Reply to Posner*, 24 VAL. U. L. REV. 175, 179 (“My last point of discussion in this brief reply to Judge Posner, is to point out that there was in his presentation, and I think there is in general, a mistaken portrayal of wealth maximization as not requiring moral decisions. Despite the lack of an express moral dialogue in wealth maximization discourse, the movement to a model or a metaphor of economics as a science incorporates within it many assumptions and many moral choices.”).

²⁰ *See* Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1552 (2009).

Accordingly, a consequentialist would prescribe: “Follow rule X because following the rule will produce better results than not following it.” For the consequentialist, following rule X is inherently the right thing to do. In this way, consequentialism focuses on the ends—producing better results—and the means, actually following X, come about derivatively.

On many levels, an economic approach to contract law makes a great deal of descriptive, normative, and intuitive sense: economics, as an analytical tool, responds very well to contract’s economic dimensions, and, despite whatever other dimensions contract has, it certainly has strong economic dimensions. But, of course, contract also has noneconomic sides. The noneconomic sides arise out of the fact that contract creates a relationship between the parties.²¹ Contracts scholars have previously studied the relationship between parties²² and are starting to do so again with a different emphasis.²³ These scholars note that in any contract, the parties must engage with each other in order to make the exchange happen, and so, contract law and theory should account for their engagement. And the scholars are right—parties do engage with each other and law should not be blind to that fact. Of course, the economists are right as well—at least one reason parties contract is to maximize wealth. In other words, both theories are right about that which they address.

B. *Getting Beyond the Blind Spots*

As noted above, the two dominant theoretical schools tend to talk and write past each other when it comes to contracts. But this is not just a theoretical problem—it also affects how courts analyze cases. This section explores this claim and suggests that virtue theory may help propel contract theory beyond the blind spots.

In practice, courts applying one or the other of the dominant normative approaches will make assumptions about the parties’ intent to agree based on the premises of the particular approach. The result is a sort of binary split in the case law on key questions in contract. For example, courts using a law and economics approach will assume that the parties had one single goal for the contract—maximizing each

²¹ Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1419–20 (2004).

²² For a very good account of the relational theory of contract, see Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1299–1304 (1990).

²³ See generally Markovits, *supra* note 21.

party's own financial welfare. Pursuant to this assumption, the norm of efficiency governs. Under the norm of efficiency, breach is desirable if it better maximizes wealth than performance would. Some courts have adopted this theory and apply it regularly.²⁴ Others either explicitly reject efficient breach theory or limit it in some way.²⁵ Similarly, some courts analyze cases as if the willfulness of the breaching party's conduct matters either to the breach analysis²⁶ or to damages.²⁷ Other courts find willfulness irrelevant; what matters is efficiency.²⁸

The missing piece in this system is that contract's two dimensions—economic and social—need not be approached as though they are mutually exclusive. There is no inherent rule of contract law or legal theory that requires analysts or courts to focus on either contract's economic side or contract's social/relationship side. The problem seems instead to be a failure of imagination: neither of the two dominant theories permits a dual-focused analysis.

An important foundational claim in this Article is that virtue theory reasons about means and ends in a fully symbiotic way. As a result, virtue theory may better account for contract's dual dimensions and the simultaneous desire, by many contracting parties, to seek wealth in a just fashion. As will be explained below, in virtue theory means and ends function as a single, interconnected, interrelated whole. In sum, virtue theory's symbiotic analysis of both means and ends has potentially potent explanatory power for law. Indeed, virtue theory has influenced theorists and historians in multiple disciplines across the academy, including law.

Before appreciating any of that, one must go back to first-order definitional questions. What does the term virtue *mean*?

²⁴ See *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750–51 (7th Cir. 1988).

²⁵ See Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 *FORDHAM L. REV.* 1085, 1105–06 (2000); *id.* at 1097–98 nn.76–79 (citing applicable cases).

²⁶ See, e.g., *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 890 (N.Y. 1921).

²⁷ See, e.g., *Am. Standard, Inc. v. Schectman*, 439 N.Y.S.2d 529, 532 (N.Y. App. Div. 1981) (citing *Groves v. John Wunder Co.*, 286 N.W. 235 (Minn. 1939)).

²⁸ See, e.g., *Patton*, 841 F.2d at 750 (“Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses.”).

II WHAT IS VIRTUE?

Aristotle wrote, “[A] wise man also is praised for his disposition, . . . and praiseworthy dispositions we term virtues.”²⁹ This Part explores more fully what virtue *means*. Section A explains virtue theory’s dual focus on means and ends, and section B explains how virtue provides concrete guidance, as a way of choosing right action. Section C focuses on two types of virtue that are highly relevant to any discussion of law and virtue: the intellectual virtues and the virtue of justice. Section D refutes a common objection raised when one puts “virtue” together with “law”: this section explains why virtue jurisprudence is not just “natural law all over again.”

A. *Virtue Theory: Dual Focus on Means and Ends*

Virtue theory is a normative account of how individuals should live their lives. It argues that humans can only reach their greatest happiness and fulfillment by making virtuous choices in life. At its broadest level, Aristotelian virtue causes human beings to be happy and function well.³⁰ *Eudaimonia*, or ultimate happiness, is achieved when people, through practice, make choices that constitute right action.³¹ Happiness is the “supreme good,” and a “happy man [is] one who ‘lives well’ or ‘does well.’”³²

Aristotle classified virtue into two types: moral (character traits)³³ and intellectual (reasoning traits).³⁴ A virtue is the moral and

²⁹ ARISTOTLE, *supra* note 1, at 69 (footnote omitted).

³⁰ ARISTOTLE, NICOMACHEAN ETHICS 1105b17 to 18, *reprinted in* ARISTOTLE: SELECTIONS 347, 371–72 (Terence Irwin & Gail Fine trans., 1995) (“It should be said, then, that every virtue causes its possessors to be in a good state and to perform their functions well”); *see also* PETER BERKOWITZ, VIRTUE AND THE MAKING OF MODERN LIBERALISM 8 (1999) (“In general, then, Aristotle understood virtue as a condition or state of a thing that enabled it to perform a designated task well.”).

³¹ *Eudaimonia* has been defined in various ways. This definition is representative: “[A] human life that is intrinsically good from the individual’s viewpoint and the general perspective as well.” Peter Koller, *Law, Morality, and Virtue*, in *WORKING VIRTUE: VIRTUE ETHICS AND CONTEMPORARY MORAL PROBLEMS* 191, 192 (Rebecca L. Walker & Philip J. Ivanhoe eds., 2007).

³² ARISTOTLE, *supra* note 1, at 31 (“Happiness, therefore, being found to be something final and self-sufficient, is the End at which all actions aim.”); *id.* at 37–39 (“[O]ur definition accords with the description of the happy man as one who ‘lives well’ or ‘does well’”).

³³ The moral virtues include: courage, temperance, liberality (meaning the observance of the mean in relation to giving and getting wealth), magnificence (meaning the observance of the mean as regards spending wealth), “great-souled man,” proper ambition,

intellectual disposition, as opposed to a feeling or a capacity, that leads a person to choose right action.³⁵ In practical terms, virtues motivate an individual's choices about behavior in particular situations.³⁶

Virtue refers at once to those features of personhood that allow for deliberation about right ends and about right means, symbiotically. In virtue theory, means and ends are interrelated both because acting in a way consistent with moral virtue or character requires "right reason," and because the "perfection of reason depends upon the cultivation of the virtues of character."³⁷ In a sentence beautifully capturing this important symbiosis, Aristotle wrote that a prudent person is one who is "able to deliberate well about what is good and advantageous for himself . . . as a means to the good life in general."³⁸ As such, in Aristotelian theory, the moral virtues are not and cannot be disaggregated from the intellectual virtues. Both are bound up together in one complete circle of means and ends. As Aristotle wrote, "Virtue ensures the rightness of the end we aim at, Prudence ensures the rightness of the means we adopt to gain that end."³⁹

B. Virtue's Focus on Intent: Modes of Practical Choice

Virtues are not simply character traits. Virtues allow a person to choose the best action in any given situation. It is immediately tempting to overwrite the concept of virtue with the concept of morality or duty, but the concepts are not the same. Rather, choice is a critical idea here: "[N]o action is counted as virtuous in any way, unless it is mediated by a person's own thought and selection."⁴⁰

It is entirely possible for two separate people to make the same decision, while only one exhibits virtue. A person who makes a good decision out of a mere duty has not exhibited virtue. Duty means making a choice to follow a rule because following the rule is the right thing to do: following the rule is the right means, and by

gentleness (observance of the mean in relation to anger), agreeableness, "sincerity toward one's own merits," wittiness, and justice. *Id.* at 153–323.

³⁴ There are five intellectual virtues: "Art or technical skill, . . . Scientific Knowledge, Prudence, Wisdom, and Intelligence." *Id.* at 331–33 (footnote omitted).

³⁵ ARISTOTLE, *supra* note 30, at 371.

³⁶ See Koller, *supra* note 31, at 191.

³⁷ See BERKOWITZ, *supra* note 30, at 10.

³⁸ ARISTOTLE, *supra* note 1, at 337.

³⁹ *Id.* at 367.

⁴⁰ Nussbaum, *supra* note 9, at 33.

following the right rule, a right result is thereby produced. Having virtue means that the choice of the right action occurs because a person has internalized the value that led to choosing that action in that situation.⁴¹

A cynic might contend that the distinction between duty and virtue is irrelevant. The difference appears entirely private and inherently personal. It is tempting to dismiss an inherently personal ideal as irrelevant to law. In this view, law simply focuses on outcomes—not modes of choice. Yet philosophers of virtue have long contended that this highly personal mode of choice is critical to law and self-governance.

Aristotle believed the most proper and central role of government was to make its citizens virtuous.⁴² This was a practical belief: Aristotle did not view education in virtue as a way to “perfect men’s souls.” Instead, he believed it necessary “to preserve actual imperfect regimes by fortifying citizens against the bad habits and destructive tendencies” that governments tended to, intentionally or not, cultivate.⁴³ Aristotle believed that citizens needed “qualities of mind and character” that allowed them to effectively hold power in check for any government to survive.⁴⁴ The only way citizens could consistently make right choices was to be trained in a virtuous mode of choice.

At first blush, virtue may not appear to provide any guidance in the exercise of choice. Aristotle, however, imagined that virtue required decision makers to seek out the “mean” in any given situation. The mean is a baseline that makes it possible for virtue to provide practical guidance for action.⁴⁵

⁴¹ See 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.”).

⁴² Robert P. George, *The Central Tradition—Its Value and Limits*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 24, 26.

⁴³ BERKOWITZ, *supra* note 30, at 11–12.

⁴⁴ *Id.* at 12.

⁴⁵ Defending virtue ethics from the charge that it does not and cannot provide any guidance as to right action, as opposed to the guidance provided by consequentialism and deontology, is the thesis of many scholars. *E.g.*, Rosalind Hursthouse, *Normative Virtue Ethics*, in HOW SHOULD ONE LIVE?: ESSAYS ON THE VIRTUES, *supra* note 3, at 19, 19–36. This charge is raised in support of the claim that virtue ethics is, in fact, not a normative

For Aristotle, most decisions involve choices situated along a spectrum. On occasion, a person is faced with a clear choice between good and bad, but mostly an individual must make more nuanced choices. Virtue involves making a choice between two extremes—one of excess and one of deficiency.⁴⁶ A virtue is not a single, universal good in opposition to a single, universal bad. An example is bravery. Bravery is the right choice or the mean between two opposite choices along the spectrum of fearfulness. At one end is cowardice, which is the state of having too much fear (an excess), but the other end is rashness, which is the state of having too little fear (a deficiency).⁴⁷ Bravery is the state in the middle. So, a virtue is “just the right amount” of a particular trait, at a particular time, in a particular situation.⁴⁸ Similarly, the virtue of justice in an economic exchange refers to the mean state in which each side has no more, and no less, than what is theirs as a result of the transaction.⁴⁹

C. Focus on the Virtues Uniquely Relevant to Law: The Intellectual Virtues and the Virtue of Justice

Intellectual virtue shares the Aristotelian stage with moral virtue, and justice is unique among all of the virtues. Both the intellectual virtues and the virtue of justice are highly relevant to any discussion of virtue and law: the intellectual virtues embody how virtuous people should reason about problems, and justice requires that when one reasons about problems, consideration must be given to others also implicated by the issue.

1. The Intellectual Virtues

The intellectual virtues are exercised in two ways, both by doing, through practical judgment, and by thinking, through contemplation.⁵⁰ *Phronesis*, or practical wisdom, is street smarts—

rival to either consequentialism or deontology, which Hursthouse most assuredly believes is the case. *Id.*

⁴⁶ ARISTOTLE, *supra* note 30, at 373 (“Virtue, then, is a mean, insofar as it aims at what is intermediate.”).

⁴⁷ D.S. Hutchinson, *Ethics*, in THE CAMBRIDGE COMPANION TO ARISTOTLE 195, 217 (Jonathan Barnes ed., 1995).

⁴⁸ ARISTOTLE, *supra* note 30, at 372 (“In 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.”).

⁴⁹ See *infra* notes 65-74 and accompanying text.

⁵⁰ See BERKOWITZ, *supra* note 30, at 9-10.

wisdom both grand and gritty. Practical wisdom is required for flourishing because without it one cannot determine right action.⁵¹

Practical wisdom receives a good deal of attention in literature partly 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.⁵² 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.’”⁵³

2. *The Virtue of Justice*

The virtue of justice is at once a moral virtue and all of moral virtue. Aristotle quotes a proverb to explain this special quality: “In Justice is all Virtue found in sum.”⁵⁴

Justice encompasses two different ideals: lawfulness and fairness or equality, in the sense of reciprocity rather than dignity.⁵⁵ An unjust person is one who “breaks the law” or “takes more than his due.”⁵⁶ As to the ideal of lawfulness, justice refers to laws that produce and preserve happiness of the community.⁵⁷ As to the ideal of fairness or equality, “taking more than [one’s] due” may mean taking a larger share of a good thing than one is entitled, but it could also mean taking less of a bad thing.⁵⁸ Justice is unique among the moral virtues because, while the many virtues can indirectly benefit

⁵¹ Lawrence B. Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, in *VIRTUE JURISPRUDENCE*, *supra* note 3, at 142, 157 (“*Phronesis* is the ability to respond appropriately to the particular situation . . .”).

⁵² *Id.* at 157-58 (discussing *phronesis* and judging).

⁵³ Hutchinson, *supra* note 47, at 207.

⁵⁴ ARISTOTLE, *supra* note 1, at 259. Aristotle also writes that justice is “the chief of the virtues, and more sublime ‘or than the evening or the morning star’ . . .” *Id.*

⁵⁵ *Id.* at 257. Lawrence Solum has written about the dual nature of justice and concluded that justice as lawfulness (as opposed to fairness) is the “best contemporary expression of the natural law thesis that there is an essential connection between law and justice.” Solum, *supra* note 51, at 191.

⁵⁶ ARISTOTLE, *supra* note 1, at 257.

⁵⁷ *Id.* at 259.

⁵⁸ *Id.* at 257.

others, justice alone always involves another person.⁵⁹ In this way, justice always has a social aspect to it.

In Aristotelian thinking, there are two kinds of justice—universal justice and particular justice.⁶⁰ Universal justice is broad, meaning “the practice of virtue in general towards someone else.”⁶¹ Particular justice is more specific, meaning the proper distribution of goods, honor, or other objects that might bring others pleasure or pain. Particular justice has two components: distributive and corrective justice. Distributive justice refers to the distribution of public benefits and burdens, and corrective justice refers to interactions between persons. Corrective justice applies to both voluntary interactions, which correspond roughly with our modern idea of contract law,⁶² and involuntary interactions, which correspond with our modern idea of criminal law.⁶³

For Aristotle, corrective justice requires a certain kind of equality in the transaction, called “arithmetic proportion.”⁶⁴ Simply stated, arithmetic proportion means that private voluntary transactions result in “an equality of quantities.”⁶⁵ At the end of a transaction, each side’s quantity must be the rightful one resulting from the

⁵⁹ *Id.* at 261. (“Justice alone of the virtues is ‘the good of [the] others,’ because it does what is for the advantage of another, either a ruler or an associate.”).

⁶⁰ *Id.* at 263.

⁶¹ *Id.* at 265.

⁶² Despite the fact that the ancient Greek economy and our own are quite different, Aristotle’s list of representative transactions subject to the idea of corrective justice actually seems current: “selling, buying, lending at interest, pledging, lending without interest, depositing, [and] letting for hire.” *Id.* at 267. For the subject of different economies and what to make of that fact, see SCOTT MEIKLE, *ARISTOTLE’S ECONOMIC THOUGHT* 2–4 (1995), which notes the following: the Greeks did not have a market economy, but what to make of this fact is subject to debate in economic theory; there are comparatively few texts from that time to help sort it out (Aristotle’s writing in Book V of *The Nicomachean Ethics* is some of the most prolific of such literature); and the two sides of the debate are the “modernists,” who take the position that the ancient Greek economy is not dissimilar to ours in kind but only in scale and, thus, we should study the Greek economy using modern concepts and the “primitivists,” who argue that economic activity in ancient times was, in fact, different in kind than ours and, thus, the attempt to study the Greek economy using the tools of our market economy cannot succeed.

⁶³ ARISTOTLE, *supra* note 1, at 267.

⁶⁴ See Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 538 (1992); see also ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 136 (noting that modern contract law requires corrective justice “[b]ecause a breach of the defendant’s duty is an infringement of the plaintiff’s right, the law requires the defendant, through expectation damages or specific performance, to place the plaintiff in the same position he or she would have been in if the contract had been performed”).

⁶⁵ WEINRIB, *supra* note 64, at 62.

transaction.⁶⁶ The relative worthiness (by whatever possibly relevant criterion) of the parties does not matter.⁶⁷ Moreover, corrective justice does not require an exchange of equivalents in value because corrective justice does not require that a transaction affirmatively produce some measure of equality *between* the parties. Rather, a party should start with an owned quantity and end with an owned quantity—no more, no less. In other words, “equality is a mean because the parties have neither more nor less than what is theirs.”⁶⁸

Aristotle’s conception of equality is not to be taken literally; it is more a form than a formula.⁶⁹ Corrective justice is not satisfied if, at the end of a transaction, each party does not have what rightfully belongs to it.⁷⁰ Corrective justice requires that a quantity wrongfully possessed by another at the end of a voluntary transaction be returned.⁷¹ In this way, Aristotle’s notion of “quantitative equality captures the basic feature of private law,” which is that “the defendant’s unjust gain [is] correlative to the plaintiff’s unjust loss.”⁷² The point seems to be that, for Aristotle, corrective justice “ensures that transactions between two individuals do not introduce new inequalities.”⁷³

D. What Virtue Is Not: Virtue Is Not Natural Law

At this point, given the use of such terms as “moral virtue” and “right reason,” it may appear that virtue depends on the idea either that human beings have a particular nature or that law or human action must be justified by reference to some single, higher authority.⁷⁴ Notwithstanding this commonly held misconception, Aristotle was not a “natural law” philosopher.

⁶⁶ *Id.* at 62–63.

⁶⁷ Benson, *supra* note 64, at 538–39.

⁶⁸ WEINRIB, *supra* note 64, at 63.

⁶⁹ *Id.* at 61 (“Aristotle’s identification of justice in holdings with equality does not imply that everyone’s holdings ought to be the same in quantity or value. His point is formal. Like equality, justice in holdings orders the relationship between distinct entities; like equality, justice in holdings is disturbed by excess or shortfall. In maintaining that in every just arrangement the parties are equals, Aristotle is not committed to any particular set of holdings or to any particular criterion of equality. Equality is merely a way of representing the norm that injustice violates.”).

⁷⁰ *Id.* at 63.

⁷¹ *Id.* at 62.

⁷² *Id.* at 63–64 (discussing the correlativity of modern contract law).

⁷³ Hutchinson, *supra* note 47, at 222.

⁷⁴ BERKOWITZ, *supra* note 30, at 8.

Natural law requires “the articulation of some basic human goods or needs that any system of positive law must respect, promote, or in any case protect.”⁷⁵ In natural law, the term “natural right” denotes an appeal to a higher standard against which the judgments made by the members of the community are measured.⁷⁶ By contrast, Aristotle uses the term “natural right” to mean something different. Aristotelian natural right is not an appeal to a higher substantive authority.⁷⁷ Instead, it is a process right: it means that members of political communities make judgments about justice.⁷⁸ Two virtuous people may reach different conclusions in the same situation, but both will engage in a particular decision-making process that features common intellectual and moral traits.⁷⁹

III

A RENAISSANCE OF VIRTUE

As discussed below, virtue jurisprudence—legal theory built on virtue—is a new idea. In other parts of the academy, however, there is an existing buzz about virtue. Scholars from across various

⁷⁵ Russell Hittinger, *Natural Law and Virtue: Theories at Cross Purposes*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS 42, 42 (Robert P. George ed., 1992).

⁷⁶ Bernard Yack, *Natural Right and Aristotle's Understanding of Justice*, 18 POL. THEORY 216, 230 (1990).

⁷⁷ *Id.* at 231 (“Aristotle does not appeal to nature as a final standard against which to measure the justice of our laws and political judgments . . .”).

⁷⁸ *Id.* at 230. Yack writes:

The naturalness of Aristotelian natural right lies in the kind of judgment it describes rather than in the particular standards that it contains. . . . Natural right is natural in the same way that the political community is natural. Like the polis, it develops, for the most part, when free and relatively equal individuals come together. Moreover, judgments about natural right, like the political community itself, reflect and develop the highest practical capacity nature gives to human beings: their capacity to receive the training that promotes moral virtue and practical wisdom.

Id. at 222 (footnote omitted). That Aristotle does make problematic judgments about who is entitled to participate in political communities is widely noted and subjects Aristotle to right criticism. *See id.* at 230. Martha Nussbaum attributes these judgments to a bereft conception of the requirement of human dignity in Aristotelian philosophy. Nussbaum, *supra* note 9, at 37 (“One of the great defects of Aristotle’s thought lies here. . . . What Aristotle seems to lack is the basic idea of human equality, of a worth all humans share across differences of gender, class, and ethnicity.”).

⁷⁹ *See, e.g.*, Rosalind Hursthouse, *Two Ways of Doing the Right Thing*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 236, 236–55 (describing how virtue theory can help lawyers reason through situations in which it appears that there is no single “right” choice to be made).

disciplines are revisiting virtue theory, and the conversations are robust, important, and gaining momentum. Section A shows that intellectual historians are revisiting the work of the canonical political philosophers *least* identified with virtue—Hobbes, Locke, Mill, and Smith, for example. While these philosophers categorically rejected the idea that the goal of a political state was, as Aristotle believed, promoting excellence through virtue, they believed that virtue was critical to maintaining political order and, later, freedom. As understood by these thinkers, virtue is entirely consistent with what we now understand as political and economic liberalism. Legal historians are joining the fray as they reveal spaces in law, both public and private, that are the direct intellectual descendants of Aristotle.

Section B shows that contemporary theorists and philosophers like Martha Nussbaum are debating the return to virtue as moral and political theory. When discussing law, these conversations focus on traditional public law subjects, such as constitutional law and political legitimacy.

Section C, however, shows that in the last two years a new community of virtue theorists has surfaced. These legal scholars view virtue with a decidedly practical eye, seeking to apply virtue theory to contemporary law. This is the self-titled “virtue jurisprudence” movement. Led by scholars like Lawrence Solum and Colin Farrelly, these writers apply virtue theory to various problems in areas of contemporary law, such as criminal law, constitutional law, tort law, and the law of lawyering. Applied virtue jurisprudence is the newest of the conversations about virtue.⁸⁰

A. *Intellectual Historians and Aristotelian Influences*

Historians are taking up the call to explore Aristotelian influences on law. Historians writing about virtue come in two stripes: those joining the conversation about political theory and those writing about doctrine in the legal academy. Each group has made some powerful conclusions about virtue and law.

1. *Political Historians*

Intellectual historians interested in virtue theory have revisited the political and philosophical ideas of the thinkers who influenced and

⁸⁰ Rebecca L. Walker & Phillip J. Ivanhoe, *Introduction* to WORKING VIRTUE: VIRTUE ETHICS AND CONTEMPORARY MORAL PROBLEMS, *supra* note 31, at 1, 2.

shaped contemporary liberalism, such as Hobbes, Locke, Mill, Smith, and Rousseau. In the traditional reading of political philosophy, these thinkers were entirely opposed to any role for virtue in public life. Indeed, they were quite explicit in rejecting the Aristotelian idea that the most important function of the state was to promote virtue. Yet this traditional reading masked the residual importance of virtue in these thinkers' works. Recently, several historians have revisited the role of virtue in these classic works, concluding that each author assumed that virtue would continue to play an important background role in effective citizenship. These historians contend that a complete understanding of how important virtue was to these thinkers is missing.⁸¹

For example, in his book *Virtue and the Making of Modern Liberalism*, Peter Berkowitz demonstrates that we have lost track of the importance and influence that virtue had for these thinkers,⁸² concluding that liberalism *depends* on virtue and always has:

Indeed . . . the liberal tradition, through a variety of prominent spokesmen, affirms that maintenance of a political order capable of securing the personal freedom of all depends upon citizens and representatives capable of exercising a range of basic virtues. Liberalism . . . can no more do without virtue than a person on a diet can survive without food and drink.⁸³

Specifically, while these “prominent spokesmen” rejected multiple aspects of Aristotelian philosophy, including the notion that promotion of virtuous citizens was a proper goal of a liberal state, they did recognize and understand that a properly functioning state could not be maintained without virtues that would temper otherwise

⁸¹ To be fair, it is no accident that some scholars have overlooked the connections between Enlightenment thinkers and virtue, as even the philosophers consciously distanced themselves from other aspects of Aristotelian thinking. *See, e.g.*, MICHAEL OAKESHOTT, *THE CONCEPT OF A PHILOSOPHICAL JURISPRUDENCE: ESSAYS AND REVIEWS 1926–51*, at 182 (Luke O’Sullivan ed., 2007) (“[P]hilosophers (Hobbes, for example) . . . appear anxious to detach themselves from the philosophic tradition; but Blake is as impossible without Shakespeare and Milton and much that he himself had never read, as Hobbes without Aristotle, Epicurus and Aquinas.”).

⁸² Berkowitz adopts Judith Shklar’s definition of liberalism, “as a political doctrine the primary goal of which is ‘to secure the political conditions that are necessary for the exercise of personal freedom.’” BERKOWITZ, *supra* note 30, at 4–5 (quoting JUDITH N. SHKLAR, *The Liberalism of Fear*, reprinted in *POLITICAL THOUGHT AND POLITICAL THINKERS* 3, 3 (Stanley Hoffmann ed., 1998)).

⁸³ *Id.* at 4.

uncontrollable self-interest.⁸⁴ For example, while Hobbes (a “protoliberal”⁸⁵) believed that the state should promote the power of sovereign over all, he also recognized that securing peace and order required virtuous citizens.⁸⁶ This aspect of Hobbes’s thinking is quite often overlooked and, when it is uncovered, tends to be rather surprising. One does not readily associate the man of authoritative, draconian *Leviathan* with squishy-sounding personal ideals like virtue. Yet, though most scholars have overlooked this aspect of his work, Hobbes’s writing shows that in his view, state order was at least partially dependent on the state’s citizens having internalized the virtues of peace.⁸⁷

John Locke serves as another example. Unlike Hobbes, Locke believed the basis of the state’s authority was the consent of the governed. But like Hobbes, Locke believed that promoting virtue was not the proper end of state action.⁸⁸ Nonetheless, he understood that virtues, both social and intellectual, were necessary for “the preservation of a political order.”⁸⁹ Virtues required for public life include “self-denial, liberality, justice, courage, civility, industry, and truthfulness.”⁹⁰

Even John Stuart Mill, the author of *On Liberty*, was not a libertarian when it came to virtue. It is true that he rejected virtue as

⁸⁴ See *id.* at 33–34 (“In sum, liberal democracy rests on an unstable equilibrium between the healthy liberal impulse to economize on virtue and the inescapable demand for some minimum of good character in citizens and officeholders.”); see also JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 112 (1991) (stating that Hobbes and Locke rejected Aristotelian metaphysics, including the idea that objects had “a substantial form and a final cause or end”).

⁸⁵ BERKOWITZ, *supra* note 30, at 106.

⁸⁶ *Id.* at 36. For example, Hobbes, who is easily characterized as downright anti-Aristotelian, did recognize that if the goal of the state was nothing other than maintenance of peace and order, then the way to peace was the virtues of “[.]justice, gratitude, modesty, equity, mercy, and the rest of the laws of nature.[.]” *Id.* at 38, 38 n.19 (emphasis omitted) (quoting THOMAS HOBBS, *LEVIATHAN* 117 (Barnes & Noble Books 2004) (1651)).

⁸⁷ *Id.* at 39 (“[Thus,] how the moral virtues arise and what can be done to foster them comes into focus as more critical to his thought than the questions that have recently preoccupied so many scholars concerning political obligation or how the laws of nature can be binding.”).

⁸⁸ See, e.g., *id.* at 4 (explaining that virtue was rejected as the goal for politics in the Enlightenment: “Instead of seeking through politics to promote human perfection, the liberal tradition came to understand the goal of politics as the protection of personal freedom. The liberal tradition embraces freedom as the aim of politics on the grounds that it is both more attainable and more just than the promotion of virtue.”).

⁸⁹ *Id.* at 77.

⁹⁰ *Id.* at 105.

an explicit aspiration of government. But Mill's writing "explicitly calls attention to those lesser qualities of mind and character necessary to the maintenance of political society, qualities that Mill refers to as 'social virtues,'" and, consistent with Aristotle, "argues that the primary means for preserving a political regime is through education in the virtues."⁹¹

Perhaps the most surprising historical work focuses on another of liberalism's founding fathers, Adam Smith. Adam Smith may be best known as the father of the principle of freedom of contract—emerging from the "invisible hand" theory of the free market. Indeed, Smith's reputation as an economic libertarian is so ubiquitous that it has been said "some . . . seem to believe [Adam Smith] is alive and well and living in retirement at the University of Chicago."⁹² According to the standard account of Smith, the state's only concern is maximizing individual freedom (in service of wealth maximization), but this reputation is based on incomplete information.

What is less well-known about Smith, but arguably just as important, is the fact that he also believed markets had to be fair to work properly.⁹³ Free markets were not an end in and of themselves; instead, free markets were desirable because they produce "[*]greater individual and social utility, wealth, efficiency and fairness[—] . . . [a free market] is a *just institution*."⁹⁴ Smith thought the common good depended on just markets and governments properly regulated markets when they operated unjustly.⁹⁵

Further, Smith expressly equated virtue with excellence.⁹⁶ Perhaps most surprisingly, he believed that the common good was a priority in a well-ordered society and that the economic man is also a social man.⁹⁷ In fact, Adam Smith opens *The Theory of Moral Sentiments* by observing the economic man's cooperative "tendencies toward

⁹¹ *Id.* at 137.

⁹² Stein, *supra* note 10, at 621.

⁹³ Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 878 (1999) ("Adam Smith's properly functioning free market was one that not only produced economic efficiency, but one that ensured fairness and justice.").

⁹⁴ *Id.* (quoting Donald J. Devine, *Adam Smith and the Problem of Justice in Capitalist Society*, 6 J. LEGAL STUD. 399, 406 (1977)).

⁹⁵ *Id.*

⁹⁶ *Id.* at 880 (noting that in *The Theory of Moral Sentiments*, Smith wrote, "Virtue is excellence").

⁹⁷ *Id.* at 879–80.

sympathy and benevolence: ‘How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.’”⁹⁸

Work of this sort has also uncovered insights into another Enlightenment political theorist, Jean-Jacques Rousseau. Rousseau is known for the social-contract ideal: people could be trusted to cooperate without any civic education in character or morals when it came to matters of self-governance—because of a *natural alignment* of incentives. People must cooperate to self-govern; without cooperation, self-governance is not possible. Their interests are naturally aligned. But, what is less well-known about Rousseau is that he also thought that people could not be trusted to conduct themselves properly in financial markets in the same way without some civic education in virtue—because of a *misalignment* of incentives.⁹⁹ To gain financially, people necessarily must not cooperate. If they cooperate, they will lose out. Their interests are naturally misaligned.

Rousseau’s worry was the modern market economy would produce a “society of smiling enemies.”¹⁰⁰ “[T]he modern commercial republic, generating sociability from selfishness, necessarily creates a society of smiling enemies, where each individual pretends to care about others precisely because he cares only about himself.”¹⁰¹ Rousseau was so concerned about the harm that could result from this tendency of human nature that he placed an extremely high value on sincerity, finding it critical to self-actualization: “Rousseau argues that sincerity is the highest good in life because it is the essential path to genuine selfhood and self-realization. What piety is for St. Augustine, what contemplation is for Plato, sincerity is for Rousseau.”¹⁰²

⁹⁸ Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 51, 62.

⁹⁹ See Arthur M. Melzer, *Rousseau and the Modern Cult of Sincerity*, HARV. REV. PHIL., Spring 1995, at 7–8.

¹⁰⁰ *Id.* at 10.

¹⁰¹ *Id.* (noting that Rousseau was concerned about hypocrisy generated by economic life, not by political life).

¹⁰² *Id.* at 15.

2. *Legal Historians: Influences in Contract Law Doctrine*

Legal historians have capitalized on the work done by political historians to add to our understanding of the law. For example, James Gordley has written extensively on the ways in which contract law is indebted to classical virtue theory.¹⁰³ The insights he uncovers are certainly provocative and warrant further attention from scholars, especially in light of the chorus of scholarly voices starting to emerge around the subject of virtue.

For example, in *The Philosophical Origins of Modern Contract Doctrine*, Gordley looks at the ancient historical antecedents to modern contract law in search of the role of virtue.¹⁰⁴ He argues that the modern common law of contract is, at its core, based on the work of the late scholastics, who fused what would become the basis of the modern European civil codes and the common law with classical Greek and Thomistic philosophies.¹⁰⁵ For Gordley, this synthesis shows that there are little understood, but critical, virtue-based premises embedded in our contemporary contract law.¹⁰⁶ Gordley contends that various virtue-based principles have survived largely intact in the law through a long history of doctrinal evolution,¹⁰⁷ but the Aristotelian ideas on which the law was based fell away in the Enlightenment. Gordley argues that when the philosophy was severed from the doctrine in this time period, contract theory was left with many gaps—gaps that contemporary contracts theorists are still trying to fill.¹⁰⁸ One problem with this effort is, without historical mooring, contemporary theorists fill these gaps with competing

¹⁰³ See, e.g., GORDLEY, *supra* note 84; see also DiMatteo, *supra* note 93, at 840–43 (characterizing much of the Aristotelian influences as natural law seemingly by using Aquinas’s work as a jumping-off point).

¹⁰⁴ GORDLEY, *supra* note 84, at 3 (asserting the thesis and defining “late scholastics” as a “small group of theologians and jurists” in Spain during the sixteenth and early seventeenth centuries).

¹⁰⁵ *Id.* at 107–08.

¹⁰⁶ *Id.* at 108. This is consistent with DiMatteo’s conclusion that Aristotelian influences in the modern common law of contract can be traced to two primary ideas: just exchange and contractual essence. See DiMatteo, *supra* note 93, at 847, 860–61.

¹⁰⁷ See GORDLEY, *supra* note 84, at 69–111 (accounting for precisely what aspects of contract law were absorbed into various doctrines and principles, including the binding force of promises, offer and acceptance, duress, mistake and fraud, equality in exchange, type of contract, and natural terms).

¹⁰⁸ *Id.* at 121 (noting that this severance of moral philosophy from legal doctrine is part of the reason that current contract theory seems to lack philosophical coherence).

philosophical ideas, which only serve to exacerbate the holes.¹⁰⁹ Gordley seems to suggest that if contemporary theorists better understood the connection between current contract law and its Aristotelian origins, then contract theory's gaps would naturally close.

For example, Gordley argues that the principle that contracts should be interpreted to effectuate what the parties themselves actually intended originated with Aristotelian philosophy.¹¹⁰ Gordley's work traces this fundamental premise of contract interpretation to the Aristotelian concept of obligations having "natural terms."¹¹¹ For Aristotle, the contracting parties' intent was furthered by holding the parties to the terms "natural" to the type (or essence) of obligation they assumed.¹¹² On Gordley's view, existing gaps between the various theories of contract interpretation could be narrowed by recalling the doctrine's Aristotelian origins.¹¹³

B. Contemporary Legal Theorists and Aristotelian Influences

Much of the nascent legal theory work in virtue focuses on constitutional law. One legal philosopher writing in the field of law and virtue is Martha Nussbaum. Nussbaum promotes a capabilities

¹⁰⁹ *Id.* at 230–31.

¹¹⁰ *Id.* at 161–62.

¹¹¹ *Id.* at 102–11. The idea of natural terms was itself based on the Roman legal practice of classifying obligations into various types, each of which had different rules to determine at what point in time the obligation became binding. *Id.* at 30–31. In Roman law, different types of obligations could be identified according to their ends; an obligation was classified as one type or another based on the purpose for which it was undertaken. *Id.* at 61–65.

¹¹² *Id.* at 108.

¹¹³ Some legal historians have reached conclusions about the doctrine that are consistent with Gordley's thought. See, e.g., DiMatteo, *supra* note 93, at 892, 895 (writing that "[e]quitable contract is in essence the implementation of Aristotelian corrective justice and Thomistic commutative justice," and that Thomistic natural law philosophy is embedded in equitable principles of unconscionability doctrine, in principles of contract interpretation, and in the concept of promissory estoppel, among other places). Some differ. See, e.g., Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 952 (1974) ("The entire conceptual apparatus of [the will theory of] modern contract doctrine—rules dealing with offer and acceptance, the evidentiary function of consideration, and canons of construction and interpretation—arose to articulate the will theory with which American doctrinal writers expressed the ideology of a market economy in the early nineteenth century."). Horwitz thinks that modern contract law arose to express the ideology of the new market economy, and so presumably, this area of law is organized accordingly. See *id.* To the extent that law and economics is the dominant theoretical paradigm in contract, Horwitz's version of the narrative is more generally accepted as the standard account.

approach (CA) to constitutional law and theory.¹¹⁴ The CA derives its intellectual power largely from the Aristotelian tradition.¹¹⁵

Under the CA, the goal of a constitution and the government interpreting it is to empower citizens to make choices that will allow them to secure a life “worthy of human dignity . . . in areas of central importance to human life.”¹¹⁶ The idea is that “many of the most central human capabilities, given their enormous importance to basic social justice, should be placed beyond majority whim through constitutionally protected status.”¹¹⁷

Indeed, in her historical account of the CA, Nussbaum writes that it was the product of John Stuart Mill and T.H. Green, who themselves were “strongly influenced by Aristotelian ideas.”¹¹⁸ These thinkers believed in the Aristotelian ideal that government should “aim at producing capabilities or opportunities” for citizens to make choices leading to a flourishing life.¹¹⁹ Like Aristotle, these thinkers believed that government should *not* require that its citizens perform certain “desirable activities.”¹²⁰ Instead, Mill and Green believed that a person is only virtuous (and so can only flourish) when making choices about right action, and so the government’s highest function is to make laws that best position citizens to make those choices when opportunities arise.¹²¹ Similarly, a government that enables its citizens to be able to achieve the “good life” is at the heart of the contemporary CA.

¹¹⁴ She is not an Aristotelian herself but is an expert in the subject. See Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *THE QUALITY OF LIFE* 242, 244 (Martha C. Nussbaum and Amartya Sen eds., 1993). As noted below, her work reconciles the relativist objection to Aristotle’s work. See *infra* note 168 and accompanying text.

¹¹⁵ Nussbaum, *supra* note 9, at 33.

¹¹⁶ *Id.* at 7.

¹¹⁷ *Id.* at 56.

¹¹⁸ *Id.* at 8. Nussbaum writes,

The political and ethical thought of Aristotle is the primary source for the CA.

...

Because choice is all-important for Aristotle—no action is counted as virtuous in any way, unless it is mediated by a person’s own thought and selection . . . he does not instruct politicians to make everyone perform desirable activities. Instead, they are to aim at producing capabilities or opportunities.

Id. at 33 (footnotes omitted).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 33–34.

Another legal theorist currently applying Aristotelian ideals to constitutional law is Lawrence Solum. In his recent piece, *The Aretaic Turn in Constitutional Theory*,¹²² Solum concludes that the contemporary Supreme Court is too driven by politics and insufficiently driven by principle.¹²³ He argues that the best way to restore principle to constitutional law is to make “an aretaic turn” in constitutional theory.¹²⁴ Like Nussbaum, Solum believes both that Aristotelian principles are the best normative basis for constitutional law and that, as a matter of description, these principles are already embedded in the best law and legal theory.¹²⁵

Examples of this kind of theory work are starting to emerge in other places in the legal academy as well. For example, one writer has examined the phrase “you should have known better,” which is suggested by much legal reasoning, from three normative perspectives instead of the usual two: corrective justice (Aristotelian), Kantianism (deontological), and utilitarianism (law and economics).¹²⁶ These examples demonstrate that legal theorists are now beginning to take note of Aristotelian theory and to account for that theory in their analyses.

C. Applied Law and Virtue, or “Virtue Jurisprudence”

Thus far, this Article has explained the developing importance of virtue in the fields of political and legal history and theory. Other than the historical effort on doctrine, this work is expressly designed to operate at a high level of abstraction. But law is ultimately played out in particular doctrinal spaces. Until recently, virtue theory had never been applied practically to contemporary law. Several legal scholars collaborated precisely on that project: developing an applied

¹²² Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475 (2005).

¹²³ *Id.* at 477.

¹²⁴ *Id.* at 477–78.

¹²⁵ *Id.* at 478; Nussbaum, *supra* note 9, at 56–73 (describing constitutional law decisions that utilize an approach similar to CA in their reasoning, including the following: *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (free exercise); *Loving v. Virginia*, 388 U.S. 1 (1967) (equal protection and race); *United States v. Virginia*, 518 U.S. 515 (1996) (equal protection and gender); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural due process and termination of welfare benefits); and *Plyler v. Doe*, 457 U.S. 202 (1982) (education)).

¹²⁶ Bailey Kuklin, “You Should Have Known Better,” 48 U. KAN. L. REV. 545, 576 (2000); see also Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247 (2008).

“virtue jurisprudence.” Thus far, this work has been embodied in a single anthology, *Virtue Jurisprudence*,¹²⁷ which features nine essays applying virtue theory to different areas of law. Colin Farrelly and Lawrence Solum assert, in an introductory essay, that virtue can affect the content of law (what should the aim of law be?) and that virtue can affect the way law is implemented (what should legal institutions look like?).¹²⁸

Unfortunately, *Virtue Jurisprudence* leaves many questions unanswered. The various authors do not systematically address *how* virtue is to “create the conditions for human flourishing” through law.¹²⁹ As the volume seems to be the only one of its kind addressing virtue jurisprudence, the contours of the relationship between law and virtue remain murky. What are the ways in which law should account for virtue? At a systematic level, what does virtue theory do for our understanding of law? What can society and citizens expect if courts and lawmakers were to “adopt” virtue theory? A starting point in the answer is, of course, that virtue jurisprudence is not thought control.¹³⁰ However, in order to know what virtue can do for law, one must know how virtue relates to law.

The existing applied law and virtue analysis does not explicitly take up the relationship question. The virtue jurisprudence scholarship does suggest common themes, among them the ideas that virtue can provide guidance to legal decision makers, including lawyers and judges;¹³¹ that virtue can help shape legal institutions;¹³²

¹²⁷ See generally VIRTUE JURISPRUDENCE, *supra* note 3.

¹²⁸ Farrelly & Solum, *supra* note 3, at 2.

¹²⁹ *Id.* at 6 (referring to this strategy as a “bottom-up” approach).

¹³⁰ Koller, *supra* note 31, at 197 (writing that virtue theory does *not* support the notion that law should be used to enforce or control “inner convictions, attitudes, and virtues[, as] using [law] for this purpose unavoidably would turn it into an instrument of terror”).

¹³¹ There are three examples of this relationship in *Virtue Jurisprudence*. One is Suzanna Sherry’s essay. See generally Suzanna Sherry, *Judges of Character*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 88. The second is Lawrence Solum’s essay. See generally Solum, *supra* note 51. These two essays 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. A third example examines the relationship between virtue and law from the perspective of practicing lawyers. In *Two Ways of Doing the Right Thing*, Rosalind Hursthouse focuses on how good lawyers faced with only bad choices can do the virtuous thing. See generally Hursthouse, *supra* note 79.

¹³² Legal institutions can and should be structured around norms of virtue. In *Civic Liberalism and the “Dialogical Model” of Judicial Review*, Colin Farrelly argues that judicial review should be remade to resolve the “Madisonian dilemma”—the tension between a desire for limited government (liberalism) and for self-government (constitutionalism)—and that virtue is the normative basis for the overhaul. See generally

and that virtue can help courts give content to broad legal standards.¹³³ The next Part begins the process of explaining what virtue jurisprudence might mean in a context no author has yet explored: contract law. Taking a cue from those scholars who christened the field, the next Part focuses on one particular sort of “action advice”: how virtue might help courts give content to broad legal standards in contract law.

IV

VIRTUE JURISPRUDENCE AND CONTRACT LAW

Building a practical legal theory on virtue may seem like a lofty goal. The new virtue jurisprudence scholarship attempts to do just that. While virtually all existing virtue jurisprudence work has focused on public law concepts—constitutional law, criminal law, the law of lawyering, tort law (as a quasi-public, quasi-private subject)—this Part makes a new move, applying this approach to the private law of contracts.

The initial focus on public law is intuitively comfortable. As shown in the historical accounts, virtue has been most considered—sometimes accepted, sometimes rejected—in the context of public institutions. For example, Aristotle believed that a person’s highest and best function, participating in the *polis*, required virtue and that the state should therefore actively educate its citizens in virtue.¹³⁴

Colin Farrelly, *Civic Liberalism and the “Dialogical Model” of Judicial Review*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 107.

¹³³ There are three examples of this relationship in *Virtue Jurisprudence*. First, in *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, Heidi Li Feldman writes that virtue currently exists in the reasonable person standard used in negligence law. Feldman, *supra* note 98, at 51. Her thesis is that reasonableness is only one part of a three-part standard, which incorporates virtues of due care (prudence) and caring (benevolence). *Id.* 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.

Id. Second, on the subject of virtue and the theory of criminal law, Antony Duff and Kyron Huigens offer competing answers to the question of whether virtue can explain or justify punishment. Compare Antony Duff, *Virtue, Vice, and Criminal Liability*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 193, 193–213, with Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 214, 214–35.

¹³⁴ See *supra* notes 43–45 and accompanying text.

Even the scholars who explicitly rejected virtue as the primary function of the state thought that, without virtuous citizens, the state could not function well.

Notwithstanding the intuitive attraction of applying virtue to public law, there are good reasons to introduce and consider it in the private law context also. As suggested above, contract has certain features that virtue is particularly well suited to address: contract is a dual institution, both economic and social, and contract is based on intent. Virtue theory is better suited to analyze the dual dimensions of the institution of contract because, unlike consequentialism and deontology, this theory has an analytical focus on both the means and ends of law. Precisely because of the match between virtue theory's dual nature and contract's dual dimensions, virtue theory will better capture the single most foundational concept in contract: the parties' intent. This Part returns to that claim to explore it in more depth.

A. A Means-Ends Approach Would Capture Both the Economic and Social Dimensions of Contract

Legal scholars often divide law into two types of fields, private and public. Public law involves all those doctrines that regulate an individual's relationship with the state. Private law includes doctrines that regulate individuals' relationships with each other. Contract is often considered the paradigm of private law. In this reductionist scheme, many legal scholars overlook the public dimensions of private law institutions, like contract. One of the public dimensions of contract is that the process of exchange creates a relationship between the contracting parties. To be sure, most contracts are not designed to create a social relationship—most contracts are entered into primarily to maximize wealth through a process of exchange.

Recently, some contract theorists, such as Daniel Markovits and Rob Kar, have returned to contract's social aspects.¹³⁵ The social aspects of contract arise merely from the fact that any private transaction creates some form of relationship between the contracting parties.¹³⁶ Given this recent renewed attention on contract's social dimensions, it seems like the right time to begin talking about how virtue theory might apply to contract.

¹³⁵ See *supra* notes 4, 21 and accompanying text. Contract's "relational" aspects were first studied seriously beginning with the "relational" theory of the late sixties and early seventies. See Feinman, *supra* note 22, at 1299–1304 (describing relational theory).

¹³⁶ Markovits, *supra* note 21, at 1419–20.

The reason that virtue theory is an appropriate lens for thinking about contract is that the theory may help courts identify the parties' intent in contract better than either economics or rights analysis alone. A key premise here is that contracting parties may have intent as to both the means *and* the ends of their deals. Yet, existing approaches privilege one over the other, leaving courts unable to fully account for the totality of the parties' intent.

For example, consider intent as to "ends" in contract. The parties' intent as to the end of the deal will often be that the parties intended the deal to leave both better off than if there were no exchange. This is a highly individualist approach to thinking of contract and conceives of contract as a purely economic institution. This is also familiar territory: law and economics approaches to contract law are built on this idea.

Now consider "intent as to means." "Intent as to means" refers to how contracting parties intended to treat each other through their conduct. For example, the parties might have intended that each would treat the other respectfully or that a promise should be kept under certain conditions but could be excused under different conditions. Deontological approaches focus the intent analysis here; as such, the ends of the contract become merely a derivative matter. But it is hard to imagine talking about contract law without recognizing that an important part of the contracting relationship is that parties agree in order to increase their wealth; otherwise, there would be no deal. Perhaps this is why deontological theories have had such a hard time getting traction in scholarly debates about contract law.

As a result, neither theory allows for the complete consideration of intentions.¹³⁷ Current approaches do not allow for the kind of nuanced analysis of means and ends that would account for intentions as to both, but virtue theory does. Virtue theory does not prioritize means over ends or vice versa. It requires an interrelated analysis of both (at its core, this is the requirement of practical wisdom).¹³⁸ This, in turn, may allow for a more complete accounting of contract as both an economic and a social institution.

¹³⁷ If the parties intend something else, they are always free to say so.

¹³⁸ See *infra* Part IV.C.1.

B. Capturing Both Dimensions of Contract Would Improve Analysis of Parties' Intent

“What did the parties intend?” is a foundational question in contract law. Questions over what the parties intended are often litigated, and these questions surface around the issues of contract interpretation and implied terms.¹³⁹ Issues in contract interpretation arise when the parties choose a term but later realize they did not agree as to what the term meant. Issues around implied terms arise when the parties fail to include a term that becomes relevant later.

Courts applying the analytical tools of law and economics assume that the parties' intent will be uncovered by applying the norm of efficiency.¹⁴⁰ To do so, courts use various economic interpretive tools and methods, including “contextualism,” which requires a court to assume that the relevant community provides insight into what these specific parties intended, and joint maximization, which requires a court to assume that what the parties wanted was a bigger piece of the pie for themselves.¹⁴¹ On the other hand, courts inclined to follow a rights-based approach assume that the parties' intent will be found in values other than efficiency, such as the value of the promise either as a promise for performance or because the parties consented to the promise.¹⁴² Notably, under both of the dominant approaches, courts assume that the parties intended either efficiency or promise keeping, but not both.

This binary approach may not capture what is actually happening between contracting parties. What if actual contracting parties are as likely, if not more likely, to imagine that they are contracting by reference to norms of both efficiency and promise keeping at the same time? It should not be surprising if contracting parties have a more complex conception about contractual intent than currently

¹³⁹ See, e.g., George M. Cohen, *Implied Terms and Interpretation in Contract Law*, in 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 78, 79 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (noting that “[i]n some sense, all contract disputes involve questions of interpretation and implied terms”).

¹⁴⁰ See, e.g., *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 750–51 (7th Cir. 1988).

¹⁴¹ See, e.g., Cohen, *supra* note 139, at 83 (noting that there are two presumptions that courts apply to incomplete contracts: contextualism, which refers to a standard external to the contract, and joint maximization, which refers to what rational, hypothetical parties would have intended under low transaction costs).

¹⁴² See, e.g., *Cates Constr., Inc. v. Talbot Partners*, 980 P.2d 407, 431 (Cal. 1999) (Mosk, J., dissenting) (“But when a contract exists primarily to provide one party certainty and security in a risky enterprise, the other party's bad faith breach cannot be efficient, because it negates the very purpose of the contract.”).

assumed.¹⁴³ Adam Smith believed that a free market was not an end in itself; rather, a free market was desirable because it was free and *just*.¹⁴⁴ Perhaps contracting parties have similarly nuanced ideas about contractual intent: perhaps parties want to justly maximize wealth.

The idea that contracting parties could have “two heads” about what they want out of their deals—an increase in wealth, justly—may sound odd to lawyers and, at least, to nondeontological legal scholars, but the idea resonates with nonlawyers. In a recent empirical study designed to test whether laypersons associate breach of contract with moral culpability, subjects were given different sets of facts describing more or less morally culpable breaching behavior.¹⁴⁵ In one part of the study, subjects were told that a party breached a contract in order to take advantage of another, more profitable opportunity (“breach to gain”).¹⁴⁶ In another part of the study, subjects were told a party breached a contract in order to avoid unanticipated loss (“breach to avoid loss”).¹⁴⁷ Despite being instructed that the law would not differentiate between these two situations, subjects nonetheless adjusted damages awards upward in the breach to gain situation, relative to the breach to avoid loss situation.¹⁴⁸ Subjects also adjusted damages awards upward when they were told that the breaching party failed to give the other side warning and, thus, failed to provide the other side an opportunity to discuss next steps before the breach.¹⁴⁹

This research concludes that nonlawyers attribute different levels of moral culpability to breach based on the breaching party’s conduct in the relationship: study participants were concerned about both the reason given for the breach and whether the defaulting party discussed the pending default with the other side before the breach.¹⁵⁰ This conclusion means that the moral intuition about why a contract

¹⁴³ See generally, e.g., David Baumer & Patricia Marschall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?*, 65 TEMP. L. REV. 159 (1992) (cited in Perillo, *supra* note 25, at 1105 (noting that “[t]he business community rejects efficiency as an excuse for willful breaches”).

¹⁴⁴ See *supra* notes 93–97 and accompanying text.

¹⁴⁵ Wilkinson-Ryan & Baron, *supra* note 2, at 405.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 420–21.

¹⁴⁹ *Id.* at 421.

¹⁵⁰ See *id.* at 413–17.

was breached (do the means fit the ends and vice versa?) matters to laypeople. Though the study's authors dismissed this result as not entirely "rational," the idea apparently makes sense to laypeople.¹⁵¹ If it makes sense to laypeople, it presumably makes sense to contracting parties themselves, who are often business people untrained in law.¹⁵²

To be sure, economics does not utterly fail to account for the ways that parties treat each other, nor do rights theories utterly fail to account for the desire to make money. Law and economics scholars would probably say that the right way to treat each other is by respecting the norm of efficiency: if a party does what is efficient, the party will be doing the right thing. In that way, economics theory privileges the end of efficiency; the means are derivative of the ends. The same could be said in reverse as to deontological theories: rights-based contract theories do not absolutely preclude the idea that parties intend to maximize welfare when they enter a contract, but deontological approaches seem to privilege the norm of promise keeping in a way that marginalizes efficiency. Virtue theory, with its symbiotic emphasis on both means and ends, has the capacity to better capture both.

C. Putting Means-Ends Intent Analysis to Work

There are two spaces in contract law where courts routinely engage with the idea of parties' intent: filling in "reasonableness" terms and the implied covenant of good faith and fair dealing.

1. Reasonableness Terms and Virtue Theory

One place where virtue theory could enrich the analysis of parties' intent in contracts cases occurs when the court must define the open-ended term "reasonable." This subsection argues that when courts must give content to a "reasonableness" term, three tools of virtue theory could help better capture parties' intent as to both means and ends of the deal than current theories allow. These tools are practical reason, the notion of the mean, and corrective justice. Indeed, in some instances, it seems that some courts are already using the ideas behind these tools, though no court explicitly couches their analysis in the terms of virtue theory.

¹⁵¹ *Id.* at 420–23.

¹⁵² *See, e.g.,* Baumer & Marschall, *supra* note 143, at 160–61.

Sometimes in a contract, parties expressly agree to an open-ended “reasonableness” term (i.e., “we agree that delivery should be made within a reasonable time”), but later dispute what they meant by “reasonable.” Other times, contract law directs the court to fill a gap in an agreement with a “reasonable” term (e.g., although the parties failed to specify a delivery date, the court determines that the parties did intend an enforceable agreement).¹⁵³ Giving content to a reasonableness term, whether the term is express or implied, is an interpretive challenge for courts.¹⁵⁴

Under an economics approach, the court assumes the essence of a contract is the end of wealth maximization.¹⁵⁵ Cases decided under this approach make it seem as though there is no room for debate over that idea.¹⁵⁶ Similarly, under a rights-based approach, the court assumes that the essence of a contract is the means of promise keeping.¹⁵⁷ Virtue theory would require that a court first inquire into the totality of the parties’ intent before analyzing intent as to any specific term. In other words, a court would begin any inquiry into the meaning of any specific “reasonableness” term by inquiring into the parties’ goals *for both* the means and the ends of the contract. Virtue theory would allow—indeed, require—courts to be open to either possibility or to a combination of both.

This kind of inquiry would put the Aristotelian principle of contractual “essence” to work. Courts would fill gaps and resolve ambiguities by reference to the terms that would be “natural” to the essence of the contract. Basically, courts today are doing a version of this—determining ultimately what the parties would have intended but basing the analysis on what seems “reasonable,” not on what seems “natural.”¹⁵⁸ Yet under either of the two dominant approaches,

¹⁵³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 202(5) (1981) (“Wherever reasonable . . . consistent with each other and with . . . usage of trade.”); *id.* § 204 (“When the parties . . . have not agreed . . . a term which is reasonable . . . is supplied by the court.”); *id.* § 204 cmt. d (“But where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.”); *id.* § 209 (“[R]easonably appears to be a complete agreement”); *id.* § 222 (“[U]sage of trade”); U.C.C. § 2-309 (2002) (“The time for shipment or delivery . . . shall be a reasonable time.”).

¹⁵⁴ See Cohen, *supra* note 139, at 82–83.

¹⁵⁵ See *infra* notes 24–28 and accompanying text.

¹⁵⁶ See generally Patton v. Mid-Continent Sys., Inc., 841 F.2d 742 (7th Cir. 1988).

¹⁵⁷ See *supra* notes 25–27 and accompanying text.

¹⁵⁸ Some private law scholars in other areas have suggested robust definitions of reasonableness that are consistent with virtue theory. For an example in tort, Gregory Keating defined reasonableness as “fair cooperation” as opposed to the dominant frame of

courts start the intent analysis by assuming the answer to the very question that virtue theory would ask first. The Aristotelian approach would not radically change the way courts analyze parties' intent as to reasonableness terms. It would simply open the possibility that the parties may have harbored intent as to both the means and the ends of the contract, which, in turn, could help courts better understand what any specific term, like a "reasonable delivery date," meant.

Virtue theory abounds with tools that could enrich our understanding of the dual nature of parties' intent, including the means-ends approach of practical reason. This approach contends both that virtues are modes of practical choice tied to the concept of the mean and that corrective justice requires that the parties not introduce new inequalities into the existing relationship.

For an example, one can consider practical reason. "[V]irtue ethicists associate practical wisdom . . . with the identification and efficacious pursuit of ordinary goals such as wealth or prosperity, convenience, and saving time—the sort of goals that animate our everyday acts"¹⁵⁹ A court considering how to give specific content to an open-ended reasonableness standard would assume only that the parties each had some intent about both the ends of the contract as well as the means.¹⁶⁰ A court considering how to give specific content to an open-ended reasonableness term would therefore analyze two inquiries: what was the intent as to ends, and what was the intent as to how those ends would be pursued. In other words, the court would consider how the relationship should function (i.e., the means) in order to achieve "wealth or prosperity, convenience, and saving time." In this way, under a virtue theory approach, a court could more explicitly account for the parties' intent as to means, as well as ends, of the contract. Of course, as with any question of parties' intent, the party with the burden of proof on a particular matter has to meet it through competent evidence—courts do not become roving truth commissions under a virtue theory approach any more than under an economic or rights-based approach.

Additionally, consider the nature of the mean in Aristotelian thinking. As with practical reasoning, contract analysis requires contextual judgment. In Aristotelian philosophy, the mean is always

"rationality." Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 379 (1996).

¹⁵⁹ Feldman, *supra* note 98, at 59.

¹⁶⁰ Parties that did not have this intent could explicitly say so in the contract and, thus, opt out of virtue jurisprudence.

contextual: what might be the right amount of bravery in one situation may be an excess, or a deficiency, in other. Consistent with the mean, the “right” is defined by the making of the right choice at the right time.¹⁶¹ In this way, the court would not presume there is one single “right” choice, no one single “right answer” that just needs to be “found.” Instead, the court would consider the choice the party made in light of the available alternatives. If the open-ended term is, as suggested above, a “reasonable delivery date,” the court would consider what the options were as to possible delivery dates, including—as courts consider now—industry standards and customary practices.

Indeed, Solum’s interpretation of the virtue of justice as lawfulness¹⁶² (as opposed to fairness¹⁶³) suggests that this reference to—indeed, dependence on—context is actually a strength, not a weakness, of virtue theory. According to Solum’s study of justice as “a natural virtue,”¹⁶⁴ justice as lawfulness requires that fully virtuous citizens in any society (*phronimoi*) must be able to internalize all society’s norms and positive laws.¹⁶⁵ Thus, a “fully virtuous agent with the virtue of justice as lawfulness will not be disposed to act in accord with unjust positive laws or social norms.”¹⁶⁶ The converse is that a *phronimoi* in any society will not be able to internalize, and thus act in accord with, those social norms and positive laws that are not just in any given society. In other words, aretaic legal theory requires contextual *judgments*, which is a good thing.¹⁶⁷

This should make sense in thinking about contract analysis: context-driven inquiries are very familiar in contract. Karl

¹⁶¹ See, e.g., ARISTOTLE, *supra* note 1, at 191–92 (describing the virtue of “liberality,” which is the virtue of giving, and saying that a person gives virtuously when he gives “rightly, for he will give to the right people, and the right amount, and at the right time, and fulfil all the other conditions of right giving”).

¹⁶² Lawrence B. Solum, *Natural Justice: An Aretaic Account of the Virtue of Lawfulness*, in VIRTUE JURISPRUDENCE, *supra* note 3, at 167, 167–91 (identifying the virtue of justice with the “lawfulness” conception).

¹⁶³ See *id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 190.

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., Solum, *supra* note 122, at 478 (noting that “[o]ne of the advantages of a character-driven approach is the way it responds to a fact that is intractable for many other theories: there is no ‘decision procedure for judging’—no rule, complex or simple, that, if diligently followed, would magically produce the correct outcome in every case. Because the complexity of the world outruns our ability to make rules, excellence in judging requires practical wisdom.”).

Llewellyn's theory of "situation-sense" led to the creation of the Uniform Commercial Code (Code), which is full of highly context-dependent standards (such as what is "reasonable"). Indeed, the Code is celebrated for its pragmatism. As such, any indeterminacy¹⁶⁸ inherent in practical reasoning could actually be a strength of virtue jurisprudence because of the importance of context, especially in contract law.¹⁶⁹ Courts practice contextual analysis in contract already.

Finally, consider the Aristotelian idea of corrective justice: that the transaction should not introduce new inequalities. This theme is consistent with contemporary corrective justice in contract law. First, duty and right in modern contract law are said to be "correlative," which corresponds to the Aristotelian conception of corrective (as opposed to distributive) justice.¹⁷⁰ Second, and perhaps more importantly (as it is more likely to be misunderstood), there is no requirement of substantive equivalent in exchange in either ancient Greek or contemporary corrective justice.¹⁷¹ In contract, subject to the limit of the unconscionability doctrine, modern courts do not set aside transactions simply because they seem in some way unequal.¹⁷²

¹⁶⁸ One general objection to virtue theory is that it is indeterminate. The indeterminacy objection has a counterobjection: relativity. Some contemporary ethicists think the contextual nature of Aristotelian reasoning means there can be no "transcultural norms, justifiable by reference to reasons of universal human validity." Nussbaum, *supra* note 114, at 243. Nussbaum has responded that, by contrast, Aristotle certainly believed in a single conception of the human good, based on virtues that "isolate[d] 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." *Id.* at 245. She notes that contextual reasoning within each sphere is a part of every life: "It is right absolutely, objectively, anywhere in the human world, to attend to the particular features of one's context; and the person who so attends and who chooses accordingly is making, according to Aristotle, the humanly correct decision, period." *Id.* at 257.

¹⁶⁹ See generally Solum, *supra* note 162.

¹⁷⁰ See WEINRIB, *supra* note 64, at 136.

¹⁷¹ The basic premise is stated in *The Historical Foundations of Modern Contract Law*. Horwitz, *supra* note 113, at 920–23 (asserting that when the common law finally rejected the "title theory of contract" at the end of the eighteenth century, courts no longer assessed damages by equitable doctrines that required reference to the fairness of the underlying exchange).

¹⁷² See WEINRIB, *supra* note 64, at 138 (noting that courts do not enforce unconscionable obligations made unenforceable due to "urgent need or inexperience.") "From the standpoint of corrective justice, the basic idea behind this doctrine is that, unless one party intends to bestow an unrequited benefit on the other, the value of what they exchange should be approximately equal." *Id.* By "approximately equal," Weinrib simply seems to mean something less than unconscionable. Cf. DiMatteo, *supra* note 93,

Instead, courts usually find that the requirements of consideration are met unless the inequality of the exchange is so great that it suggests the transaction is not a real exchange—that it is instead a fraud, sham, or gratuitous.¹⁷³ Both of these aspects of Aristotelian corrective justice are consistent with modern corrective justice in contract. As such, the principle that would guide courts in giving content to an open-ended reasonableness term is whether a party's proffered interpretation of that term would introduce new inequalities into the relationship. If so, the interpretation would cast doubt that the parties actually intended that side's interpretation.

2. *Virtue Theory and the Covenant of Good Faith and Fair Dealing*

A second site where contract interpretation could be enriched by virtue theory analysis is the covenant of good faith and fair dealing.¹⁷⁴ Sometimes parties include an express good faith or best efforts term; sometimes parties fail to specify such a term but the court implies one. In either situation, the term is litigated when the parties disagree as to the content of the duty. The court's job is to figure out what the parties would have intended, had they considered it. Current literature reflects different approaches,¹⁷⁵ but some of the Official Comments to the *Restatement (Second) of Contracts* show the standard actually already embodies virtue theory.

Specifically, the comment to section 205 indicates that the covenant requires “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party”;¹⁷⁶ this refers to both the ends of the agreement (the common purpose) and the means (faithfulness to the common purpose and consistency with

at 842 (asserting that “*fairness of the exchange* has progressively become a focus of judicial inquiry” (footnote omitted)).

¹⁷³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981) (“If the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged . . .”).

¹⁷⁴ RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”); U.C.C. § 2-103 (2002) (“‘Good faith’ means honesty in fact and the observance of reasonable commercial standards of fair dealing.”).

¹⁷⁵ Compare Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980), with Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982).

¹⁷⁶ RESTATEMENT (SECOND) OF CONTRACTS, § 205 cmt. a (1981).

justified expectations of the other side).¹⁷⁷ These comments seem to suggest that courts should consider both the means and ends of the parties' agreement. Using the tools of virtue theory analysis could help courts give content to these requirements.

For example, the requirement of "faithfulness to an agreed common purpose" could be better defined by applying the Aristotelian idea of contractual essence, that the parties to an obligation had a particular "end" in mind when they contracted. What did the parties hope to accomplish by this contract? What were their joint goals? Once known, courts can better ask whether a particular action improperly frustrated those goals, in violation of the covenant of good faith and fair dealing. Further, the requirement of "consistency with the justifiable expectation of the other side" draws on the notion, explained above, that corrective justice requires that the parties "not introduce new inequalities" via the transaction. Finally, the comment specifically requires the court to consider what is "reasonable" in terms of "community standards of decency, fairness, or reasonableness," so much of the reasonableness analysis above would apply here.

In sum, two doctrinal spaces—reasonableness and the implied covenant of good faith and fair dealing—illustrate the mechanics of a new idea: applying virtue theory to contemporary contract law. There are certainly other, more intense spaces where this work could go next.

CONCLUSION

Our discussion will be adequate if its degree of clarity fits the subject-matter; for we should not seek the same degree of exactness

¹⁷⁷ *Id.* ("Good faith is defined in Uniform Commercial Code § 1-201(19) as 'honesty in fact in the conduct or transaction concerned.' 'In the case of a merchant' Uniform Commercial Code § 2-103(1)(b) provides that good faith means 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.' The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.").

in all sorts of arguments alike, any more than in the products of different crafts.¹⁷⁸

Each of our claims, then, ought to be accepted in the same way, . . . since the educated person seeks exactness in each area to the extent that the nature of the subject allows; for apparently it is just as mistaken to demand demonstrations from a rhetorician as to accept . . . persuasive arguments from a mathematician.¹⁷⁹

At the turn of the twenty-first century, normative debates in the legal academy have narrowed. Law and economics viewpoints argue that law is about maximizing wealth and welfare. Deontologists argue that law should remain faithful to morality to give credence to individual rights. Nowhere has this dichotomy been as stark as in private law—and particularly in contract law. Yet the world is not so simple. Legal theory should reflect that greater complexity.

Virtue theory offers one new way to imagine the role of law. While lofty, virtue theory is a *practical* philosophy. And, contrary to most contemporary intuitive notions, virtue was quite important to our original conceptions of political and economic liberalism. It is an encouraging sign that scholars across the academy are gradually rediscovering virtue—its potential, its pockets of influence, and its power to shape theory and answer questions about doctrine.

In contract, current approaches seem ill-equipped to account for the institution's dualities and complexities. By contrast, virtue theory fits well not only with public law, but also with the social aspects of private law. Moreover, virtue theory can respond to what is, in all likelihood, a practical reality—that parties do harbor intent as to both how their relationship with their contracting partner should work, and what the contract should ultimately produce. In these ways, virtue theory can help courts better account for parties' intent in such well-worn doctrinal spaces as reasonableness and good faith and fair dealing. And, because virtue can embrace both utility and individual rights, it also may provide a solution to a twenty-first century theoretical logjam. Further work—theoretical, doctrinal, and empirical—on virtue in the area of private law may eventually propel this quietly elegant theory back to the mainstream.

¹⁷⁸ ARISTOTLE NICOMACHEAN ETHICS 1094b12 to 14, *reprinted in* READINGS IN ANCIENT GREEK PHILOSOPHY: FROM THALES TO ARISTOTLE 832, 833 (S. Marc Cohen et al. eds., 3d ed. 2005).

¹⁷⁹ *Id.* at 834.

