Virtue and Contract Law (forthcoming 2010)

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Abstract for *Virtue and Contract Law*
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For years, legal theory scholars have been obsessed with two dominant normative accounts: law and economics and individual rights. Recently, however, an old normative theory has resurfaced. Virtue theory, grounded in Aristotelian practical philosophy, has begun to receive attention from both historians and legal philosophers. In the past year, a small group of theorists has made a dramatic move: they have attempted to apply virtue theory to problems in contemporary law, in the form of a new “virtue jurisprudence.” Thus far, virtue jurisprudence scholars have limited their work to public law subjects. This article makes a substantial new contribution by extending virtue jurisprudence to a central area of private law: contracts.

Why contract law? This article contends that several difficult challenges in contract jurisprudence remain unresolved because neither law and economics nor rights theorists have been successful in accounting for the actual desires of contracting parties. For example, current theoretical frameworks fail to fully explain contract’s duality as both an economic and social institution. They fail to account for parties’ interest in both wealth maximization and justice. Virtue jurisprudence accounts for these critical dualities better than either law and economics or individual rights. Accordingly, this article suggests that virtue jurisprudence may reframe how both theorists and courts think about “the parties’ intent,” which is a foundational concept in any contract case.

This article takes on several tasks. It explains virtue theory in ways that show its relevance to contract law. It lays out a historical case for the importance of virtue theory to political liberalism and free markets. It explores several sites where current theoretical approaches do not fully capture contracting parties’ intent. Finally, it shows how virtue jurisprudence may offer a superior descriptive, and normative, account of intent-based doctrines in contract law.
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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 isn’t surprising – scholars across the social sciences and humanities have been struggling to break free of the same dichotomy, between consequentialism (the philosophy on which law and economics is based) and deontology (the philosophy on which rights theories are based).³

¹ Aristotle, Nichomachean Ethics, V. i. 15-16.
³ Many scholars who make this observation credit it to Elizabeth Anscombe’s famous 1958 essay, “Modern Moral Philosophy.” See, e.g., Farelly and Solum, An Introduction to the Aretaic Theories of Law, in VIRTUE JURISPRUDENCE 3 (2008). Since that essay, scholars across disciplines who identify primarily with neither tradition have noted the theoretical “logjam,” and have been engaged in the project of offering their own ideas about how legal theory can transcend the dichotomy. Id. at 3 (noting that Anscombe’s work highlighted the seemingly irresolvable competition between the two leading normative philosophical theories, deontology and consequentialism); see also Roger Crisp, Modern Moral Philosophy and the Virtues, in HOW SHOULD ONE LIVE? at 1-2 (Roger Crisp ed., 1996) (noting that Anscombe’s 1958 essay charged moral philosophers to put aside rights and consequentialism until one could better explain the tenets of the two principles – “pleasure” and “intention” – and suggesting that virtue may be the key to such explanation). Understood that “law and economics” in the Posnerian sense is not a moral philosophy at all.
But in the last few years, an old normative theory has been begun to resurface: Aristotelian virtue. Though some may think that “virtue” went out with the ancient Greeks, virtue is in fact alive and well, and is 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, legal scholars have begun trying to find a way out of the dominant theoretical dichotomy, and so the notion that there may be a viable alternative normative basis to legal theory strikes a compelling chord. 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.” Yet others are significantly more skeptical, especially as to private law. Indeed, outside of a few theorists who write about the philosophy of corrective justice, many private law scholars do not consider virtue theory at all.

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5 Farrelly and Solum, An Introduction to Aretaic Theories of Law, in VIRTUE JURISPRUDENCE, supra note __, at 2 (emphasis supplied).

6 See notes __ - __, infra, 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 state and citizens.
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 to 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, virtue theory may offer a much more complete understanding of law, including private law, than either law and economics or individual rights.7

Specifically, contract law has challenges that virtue theory’s means-ends approach is uniquely able to address. Those challenges arise from two facts about the institution of contract. First, a contract is at once both an economic and a social thing. 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, though we don’t always think of it this way, contract law is intent based: a foundational question in contract adjudication is “what did the parties intend?” Current theoretical frameworks in contract 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

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7 By “private law” this article means those fields where law regulates transactions between private citizens, such as tort, property and contract. By “public law,” this article means those fields where law regulates interaction between the government and its citizens. This article will focus on one area of private law in particular: contract.
hand, seems very familiar, but on the other hand, is hard to situate with precision. This lack of precision makes the discussion seem unusually daunting: “virtue” seems intuitively too lofty, too ancient, too undefined, for contemporary law. Yet, these challenges can be overcome by a more precise definition of what “virtue” means 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 it exposes the hidden role of virtue in philosophical work typically seen at odds with this approach. For example, though the precise nature of the relationship between Adam Smith’s separate works on morality and economics is disputed, there are good reasons to believe that the father of the “invisible hand” theory of the free market actually wrote The Wealth of Nations against a unifying backdrop of virtue theory. But historians aren’t 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. Though the applied law and virtue work has so far been done primarily in public law fields, it need

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8 See Martha C. Nussbaum, Constitutions and Capabilities: “Perception” Against Lofty Formalism, 121 HARV. L. REV. 4, 33 (2007) [hereinafter Nussbaum, Constitutions and Capabilities] (“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 relevant.”). Of the continued relevance of such sources, see text accompanying note __, infra.

9 Peter Stein, Adam Smith’s Jurisprudence-Between Morality and Economics, 64 CORNELL L. REV. 621, 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 the time of his death, the study remained incomplete, for he never published, as he intended to do, a third book exploring the virtue of justice.”).
not be so limited. In this section, the article returns to and explains the claim that contract has two unique challenges that virtue is well-suited to address, namely that contract is a dual institution, both economic and social, and that contract is intent-based. The article then probes further into how virtue theory might apply in contract. This subsection explores how virtue theory can contribute to two routine sites of contract interpretation: “reasonableness” terms, and the covenant of good faith and fair dealing. The subsection 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 holds 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 dominant theories, consequentialism and deontology. It does not make the claim that any particular disposition is virtuous, or that the law should require a party to contract to hold a particular disposition. Rather it proposes that scholars begin to open their eyes to a new perspective in private law.

1. The Blind Spots In Existing Contract Theories

Everyone agrees that the dominant normative theories in contract theory today are law and economics, which is a form of consequentialism, and various strands of rights-based theories, which are deontological (i.e., moral). 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, law and economics focuses on the end of a rule – does the rule result in each party to the contract being better off as a result of the rule? By contrast, the deontology focuses on the means of the rule – does the rule require that the parties 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: it is either minimized, or effectively assumed away.

The result is that many debates over important topics in contract – like the debates over whether breach should be encouraged if it is efficient, over what measure of damages best accounts for the injured party’s expectation interest, and over 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.” 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 theoretical logjam. The next section shines a light on the logjam, and starts to suggest how virtue theory may break through.


Though law and economics has been very influential in contract law and theory over the past thirty years, in the last ten years rights-based (deontological) approaches have been growing stronger. Charles Fried’s “contract-as-promise” is one of the

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11 *Id.*
leading rights-based theories;¹² Randy Barnett’s “contract-as-consent” is another.¹³

Promise theory holds that contracts should be kept because promises should be kept, and promises should be kept because not keeping promises impinges on the injured party’s autonomy.¹⁴ Consent theory holds that contracts transfer entitlements obtained by individual consent, and not honoring consent violates the injured party’s autonomy.¹⁵ Protecting a party’s autonomy is a deontological (moral) concern: it is wrong to break a promise because in so doing the promise breaker “uses” another person.¹⁶ To guard against this problem, courts should not be guided by economic norms; contracting parties should not use each other to accomplish their goals, even if doing so is efficient.

To see how the theories end up arguing in each other’s blind spots, consider the debate over efficient breach. In this debate, the economists tell us that breach is good, and should be encouraged, if breach leaves both parties to a contract better off than if the contract were to be performed. Seen through the law and economics lens, all contracts come with an option to perform or pay damages upon non-performance. As long as the breacher pays the price for non-performance, then there is nothing wrong with breaching: everyone is better off as a result.¹⁷ The focus here is on the end result; how the parties get there is left largely to the side, in a blind-spot.

By contrast, in the efficient breach debate, deontological theorists stress that contracts are promises to perform, and that the institution of promise requires that the

¹² Charles Fried, CONTRACT AS PROMISE (Harvard Univ. Press, 1982).
¹⁴ Fried, supra note ___, at ____.
¹⁵ Barnett, supra note ___, at 294.
¹⁶ Fried, supra note ___, at ___ (noting that “breaking a promise is like lying (but only like): abuse of shared social institution that is intended to invoke the bonds of trust…A liar and a promise breaker each use another person.”).
parties treat each other in a certain way. At the very least, this includes not treating performance as optional.\textsuperscript{18} The focus here is on the requirement 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, “should the law encourage 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 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 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. Accordingly, a consequentialist would prescribe: “Follow rule X because following the rule will produce better results than not.” 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 doing X, come about derivatively.

At present, the consensus in contract theory is that law and economics is "winning." On some level, this makes intuitive sense: economics as an analytical tool responds very well to contract’s economic dimensions, and, whatever other dimensions contract has, it certainly has strong economic dimensions. But of course contract also has non-economic sides. The non-economic sides of contract arise out of the fact that contract creates a relationship between the parties. Contracts scholars have previously studied the relationship between parties and are starting to do so again with a different emphasis. 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 of course, they 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 wealth maximize. 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 the 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 at the end that virtue theory may help propel contract beyond the blind spots.

In practice, courts applying one or the other of the dominant normative approaches will make assumptions about parties’ intent based on the premises of the

19 Law and economics approaches have been described by one commentator looking for an alternative theoretical approach to contract law as “particularly robust” as compared to “deontological rivals.” Robin Bradley Kar, Contractualism About Contract Law v.2, Loyola-LA Legal Studies Paper No. 2007-29, available at SSRN: http://ssrn.com/abstract=993809 (forthcoming).
21 By this I mean to refer to the relational theory of contract. For a very good account of that theory, see Jay M. Feinman, The Significance of Contract Theory, 58 U. CIN. L. REV. 1283, 1299-1304 (1990).
particular approach. The result is a sort of binary split in the cases on key questions in contract. For example, courts using a law and economics approach to contract will assume that the parties had one single goal for the contract – that each party would maximize her own financial welfare. Under this assumption, the norm of efficiency governs. Under the norm of efficiency, breach is desirable if it better maximizes wealth than performance. Some courts have adopted this theory and apply it regularly. Others either explicitly reject efficient breach theory, or limit it in some way. Similarly, some courts analyze cases as if the willfulness of the breaching party’s conduct matters to the breach analysis, or to damages. Other courts find willfulness irrelevant; what matters is efficiency.

The missing piece seems to be that contract’s two dimensions – economic and social – need not be approached as though they were mutually exclusive. There is no inherent rule of contract law or legal theory that requires that analysts or courts focus on either contract’s economic side or contract’s social/relationship side. The problem seems to be instead 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 accounts for reasoning about means and ends in a fully symbiotic way. As a result, virtue theory may

\[\textit{Patton v. Mid-Continent Systems}, 841 F.2d 742 (1988).\]
\[\textit{See, e.g., Jacob & Youngs v. Kent, 129 N.E. 889 (1921).}\]
\[\textit{See, e.g., Patton, 841 F.2d at 750 (“Even if a breach is deliberate, it is not necessarily blameworthy. The promisor may have simply discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee’s actual losses.”). The debate about damages rules are embodied in these other two disputes: some courts measure expectation differently if the breaching party’s conduct is willful (hence morally bad), or opportunistic (hence not efficient); others don’t. See infra notes \_
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\_ and accompanying text.}\]
better account for contract’s dual dimensions, and the simultaneous desire, by many contractors, to seek wealth in a just fashion. As will be explained below, in virtue theory means and end 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, as described infra, virtue theory has influenced theorists and historians in multiple disciplines across the academy, including in law.

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

II. What is Virtue?

Aristotle wrote, “A wise man is praised for his disposition, and praiseworthy dispositions we term virtue.” This section explores more fully what virtue means. Section A explains virtue theory’s dual focus on means and ends; 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; and section D refutes a common objection raised when one puts “virtue” together with “law”: 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 ought to live their lives. It argues that humans can only reach their greatest happiness and fulfillment by making virtuous choices in life. At its most broad level, Aristotelian virtue is what allows human

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28 Nicomachean Ethics, I. xiii. 20.
beings to be happy, by functioning well.\textsuperscript{29} \textit{Eudemonia}, or ultimate happiness, is achieved when humans, through practice, make choices that constitute right action.\textsuperscript{30} Happiness is the “supreme good,” and a “happy man is one who ‘lives well’ or does well.”\textsuperscript{31}

Aristotle classified virtue into two types: moral (character traits)\textsuperscript{32} and intellectual (reasoning traits).\textsuperscript{33} A virtue is the moral and intellectual disposition, as opposed to a feeling or a capacity, which lead a person to choose right action.\textsuperscript{34} In practical terms, virtues motivate an individual’s choices about her behavior in particular situations.\textsuperscript{35}

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, because acting in a way consistent with moral virtue (character) requires “right reason,” and because the “perfection of reason depends upon the cultivation of the virtues of character.”\textsuperscript{36} In a sentence which beautifully captures this important symbiosis of means and ends, 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

\begin{footnotes}
\item[29] Terence Irwin and Gail Fine, \textit{ARISTOTLE, SELECTIONS} 366 (1995) (NE Book II, Chap 6, 1106a17-18) (“It must be said that every virtue causes its possessors to be in a good state and to perform their functions well...”). \textit{See also} Berkowitz, \textit{supra} note __, at 8 (“In general, then, Aristotle understood virtue as a condition or state of a thing that enable it perform a designated task well.”).
\item[30] Eudaimonia has been defined in various ways. Representative is this definition: “A human life that is intrinsically good from the individual’s viewpoint and the general perspective as well.” Peter Koller, \textit{Law, Morality, and Virtue}, in \textit{WORKING VIRTUE} 192 (Walker & Ivanhoe eds., 2007).
\item[31] Nichomachean Ethics I. vii. 8 (“happiness, therefore, being found to be something final and self-sufficient, is the End at which all actions aim”); \textit{id.} at I. viii. 4 (“our definition accords with the description of the happy man as one who ‘lives well’ or ‘does well.’”).
\item[32] 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; gentleness (observance of the mean in relation to anger); agreeableness; “sincerity toward one’s own merits”; wittiness; and justice. Nichomachean Ethics, II.vi.15. The moral virtues are set out from Book III through Book V.
\item[33] There are five intellectual virtues: Art/Technical Skill; Scientific Knowledge; Prudence; Wisdom; and Intelligence. Nichomachean Ethics, VI, iii. 1 – 2.
\item[35] Koller, \textit{supra} note __, at 191.
\item[36] Berkowitz, \textit{supra} note 2, at 10.
\end{footnotes}
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 the end.”

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 they are not the same. Rather, choice is a critical idea here: “No action is counted as virtuous in any way, unless it is mediated by a person’s own thought and selection.”

It is entirely possible for two 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 following the right rule, a right result (end) is thereby produced. Having virtue means that you choose the right action because you have internalized the value that leads you to choose that action in that situation.

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

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37 Nichomachean Ethics, VI, v., 1 – 2.
38 Nichomachean Ethics, VI, xii. 6.
40 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.”).
Draft; do not cite

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 that the most proper and central role of government was to make its citizens virtuous.41 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 its citizens against bad habits and destructive tendencies” that governments tended to, intentionally or not, cultivate in its citizens.42 Aristotle believed that, for any government to survive, its citizens needed “qualities of mind and character” that allowed them to effectively hold power in check.43 For these thinkers, 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 action-guidance.44

For Aristotle, most decisions involve choices along a spectrum. On occasion, a person is faced with a clear choice between good and bad, but mostly, a person must make more nuanced choices. Virtue involves making a choice between two extremes –

42 Berkowitz, supra note 2, at 11-12.
43 Berkowitz, supra note ___, at 12.
44 Defending virtue ethics from the charge that it does not and cannot provide any guidance as to right action, as opposed to consequentialism and deontology, for example, is the thesis of the Hursthouse essay, Normative Virtue Ethics. See text accompanying note __, infra. This charge is raised in support of the claim that virtue ethics is in fact not a normative rival to either consequentialism or deontology, which Hursthouse most assuredly believes it is.
one of excess, and of deficiency.\textsuperscript{45} A virtue is not a single, universal good in opposition to a single, universal bad (a vice). For example, take bravery. Bravery is the right choice (or the mean) between two different opposites along the spectrum of fearfulness. At one end is cowardice, which is the state of having too much fear (excess), but the other is “rashness,” which is the state of having too little fear (a deficiency).\textsuperscript{46} 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.\textsuperscript{47} Similarly, in an economic exchange, the virtue of justice refers to the mean state of each side having no more, and no less, than what is theirs as a result of the transaction.\textsuperscript{48}

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 them. 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, one must consider others also implicated by the problem.

i. The Intellectual Virtues

The intellectual virtues are exercised in two ways, both by doing (through practical judgment) and by thinking (through contemplation).\textsuperscript{49} \textit{Phronesis}, or practical

\textsuperscript{45} Irwin & Fine, \textit{supra} note __, at 366 (NE Book II, Chap 6, 1106b29) (“[v]irtue, then, is a mean, insofar as it aims at what is intermediate.”).
\textsuperscript{46} THE CAMBRIDGE COMPANION TO ARISTOTLE 217 (J. Barnes, ed., 1995).
\textsuperscript{47} Irwin & Fine, \textit{supra} note __, at 366 (NE Book II, Chap 6, 1106a27-29) (“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.”).
\textsuperscript{48} See notes __ - __, \textit{infra}, and accompanying text.
\textsuperscript{49} Berkowitz, \textit{supra} note 2, at 9-10.
wisdom, is street-smarts: wisdom both grand and gritty. Practical wisdom is required for flourishing, because without it, one cannot determine right action.\(^50\)

Practical wisdom receives a good deal of attention in the literature, in part because *phronesis* seems to capture the interrelationship of means and ends. Practical wisdom is the result of experiences built up over time. These experiences in combination allow a person to exercise wisdom, though at the unconscious or intuitive level, which in turn leads to an appropriate judgment about how to respond to a practical dilemma.\(^51\)

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.””\(^52\)

ii. 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.”\(^53\)

Justice is about two different ideals: lawfulness and fairness or equality (in the sense of reciprocity, not dignity).\(^54\) An unjust person is one who “breaks the law or takes more than his due.”\(^55\) As to the ideal of lawfulness, justice refers to laws which produce and preserve happiness of the community.\(^56\) As to the ideal of fairness/equality, “taking more than one’s due” may mean taking a larger share of a good thing than to which one is

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\(^{50}\) Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, in *VIRTUE JURISPRUDENCE*, supra note __, at 157 (“Phronesis is the ability to respond appropriately to the particular situation.”).


\(^{52}\) *Oxford Companion*, supra note __, at 207 (quoting NE 1140a24-b21).

\(^{53}\) Nichomachean Ethics, V. i. 15 -16. Aristotle also writes that Justice is “the chief of virtues, and more sublime or than the evening or the morning star...” *Id.*

\(^{54}\) Nichomachean Ethics, V. i. 8 - 9. 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.” Lawrence B. Solum, *Natural Justice: An Areteiac Account of the Virtue of Lawfulness*, in *VIRTUE JURISPRUDENCE*, supra note __, at 191.

\(^{55}\) Nichomachean Ethics, V. i. 8 - 12.

\(^{56}\) Nichomachean Ethics, V. i. 12 – 14.
entitled, but it could also mean taking less of a bad thing.\textsuperscript{57} Justice is unique among the moral virtues because, while the many virtues can benefit others, justice alone always involves another person.\textsuperscript{58} 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.\textsuperscript{59} Universal justice is broad, meaning “the practice of virtue in general toward someone else.”\textsuperscript{60} Particular justice is more specific, meaning proper distribution of goods, honor, or other objects that might bring others pleasure or pain. It has two components: distributive and corrective justice. Distributive justice refers to distribution of public benefits and burdens, and corrective justice refers to interactions between persons. Corrective justice applies to both voluntary interactions (which seem to correspond roughly with our modern idea of contract law)\textsuperscript{61} and involuntary interactions (which would seem to correspond with our modern idea of criminal law).\textsuperscript{62}

To Aristotle, corrective justice requires a certain kind of equality in the transaction, called “‘arithmetic proportion.’”\textsuperscript{63} Simply stated, arithmetic proportion

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\textsuperscript{57} Nichomachean Ethics, V. i. 10 -11.
\textsuperscript{58} Nichomachean Ethics, V. i. 17 – 19 (“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.”).
\textsuperscript{59} Nichomachean Ethics, V. ii. 6 – 7.
\textsuperscript{60} Nichomachean Ethics, V. ii. 10.
\textsuperscript{61} 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, letting for hire.” \textit{Nichomachean Ethics}, V. ii. 13. One the subject of different economies and what to make of that fact, see Scott Meikle, \textsc{Aristotle’s Economic Thought} 2-4 (2002) (writing that the Greeks did not have a market economy, but what to make of this fact is subject to debate in economic theory; that there are comparatively few texts from that time to help sort it out (Aristotle’s writing in Book V of \textit{The Ethics} is some of the most prolific of such literature); that on one side of the debate are the “modernists,” who take the position that the ancient Greek economy is not dissimilar to ours in kind, only in scale, and so we should study it using concepts familiar to us today; that on the other side are “primitivists” who argue that what economic activity there was in ancient times was in fact different in kind than what we have today, and so the attempt to study it using the tools of our market economy cannot succeed.).
\textsuperscript{62} Nichomachean Ethics, V. ii. 12 - 13.
\textsuperscript{63} See Benson, \textit{supra} note __, at 538; \textit{see also} Weinrib, \textit{supra} note __, at 136 (noting that modern contract law requires “correlative justice”: “because breach of the defendant’s duty is an infringement on the
Draft; do not cite

generally means that private voluntary transactions result in “an equality of quantities.”64 At the end of a transaction, each side’s quantity must be the quantity that is rightly hers as a result of the transaction.65 The relative worthiness (by whatever criterion could be thought relevant) of the parties does not matter.66 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 a quantity that is hers, and end with a quantity that is hers -- no more, no less. In other words, “equality is a mean because the parties have neither more nor less than what is theirs.”67

Aristotle’s conception of equality is not to be taken literally; it is more a form than a formula.68 Corrective justice is not satisfied if, at the end of a transaction, each party does not have what rightfully belongs to him.69 Corrective justice requires that a quantity wrongfully possessed by another at the end of a voluntary transaction be returned.70 In this way, Aristotle’s notion of “quantitative equality captures a basic feature of private law,” which is that “the defendant’s unjust gain is correlative to 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.”

67 Weinrib, *supra* note __, at 63.
68 Weinrib, *supra* note __, 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 Weinrib, *supra* note __, at 62.
plaintiff’s unjust loss.” The point seems to be that for Aristotle, corrective justice “ensures that transactions between two individuals do not introduce new inequalities.”

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 that human beings have a particular nature, or that law or human action must be justified by reference to some single, higher authority. Notwithstanding this commonly held misconception, Aristotle was not a “natural law” philosopher.

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.” In natural law, the term “natural right” denotes an appeal to a higher standard against which to measure the judgments made by the members of the community. By contrast, Aristotle uses the term “natural right” to mean something different. Aristotelian natural right is not an appeal to a higher substantive authority. Instead it is a process right: it means that “members of political communities make judgments about justice.”

Two virtuous

71 Weinrib, supra note __, at 63-64 (correlativity of modern contract law).
72 THE CAMBRIDGE COMPANION TO ARISTOTLE 222 (J. Barnes, ed., 1995).
73 Berkwoitz, supra note __, at 8.
76 Yack, supra note __, at 231 (“Aristotle does not appeal to nature as a final standard against which to measure the justice of our laws and political judgments….”).
77 Bernard Yack, Natural Right and Aristotle’s Understanding of Justice, 18 POLITICAL THEORY 216, 230 (1990). 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 ways 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 natural gives to human beings; their capacity to receive the training that promotes moral virtue and practical wisdom.” Id. at 222. That Aristotle does make problematic judgments about who is entitled to participate in political communities is widely noted and subjects Aristotle to right criticism. Martha Nussbaum attributes these judgments to a bereft conception of the requirement of human dignity in Aristotelian philosophy. Martha Nussbaum, Constitution and...
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.78

III. A Renaissance of Virtue

As discussed infra, 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 disciplines are revisiting virtue theory, and the conversations are robust, important, and gaining momentum. Part A shows that intellectual historians are revisiting the work of 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.

Part B shows that contemporary theorists and philosophers like Martha Nussbaum are debating the return to virtue as moral and political theory. As they relate to law, these conversations focus on traditionally public law subjects, such as constitutional law and political legitimacy.

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78 See, e.g., Rosalind Hursthouse, Two Ways of Doing the Right Thing, in VIRTUE JURISPRUDENCE, supra note __, at 236-255 (describing how virtue theory can help lawyers reason through situations in which it appears that there is no single “right” choice to be made).
Part 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 Collin Farrell, these writers apply virtue theory to various problems in contemporary law, such as criminal law, constitutional law, tort, and the law of lawyering. Applied virtue jurisprudence is the newest of the conversations about virtue.⁷⁹

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 has made some powerful conclusions about virtue and law.

i. Political Historians

Intellectual historians interested in virtue theory have revisited the political and philosophical ideas of the thinkers that influenced and 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 turns out to have masked the residual importance of virtue in these 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. Several of these writers contend that we are missing a complete understanding of how important virtue was to these thinkers.  

For example, in his book *Virtue and the Making of Modern Liberalism*, Peter Benkowitz demonstrates that we have lost track of the importance and influence that virtue had for these thinkers, 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 do no more without virtue than a person on a diet can survive without food and drink.

Specifically, while these “prominent spokesmen” rejected multiple aspects of Aristotelian philosophy, including 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 uncontrollable self-interest. For example, while Hobbes (a “protoliberal”) believed that the state should promote the power of sovereign over all, he also recognized that securing peace and order

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80 To be fair, it is no accident that some scholars have overlooked the connections between Enlightenment thinkers and virtue, as the philosophers themselves consciously distanced themselves from other aspects of Aristotelian thinking. *See, e.g.*, Michael Oakeshott, *The Concept of a Philosophical Jurisprudence*, III *POLITICA* 345, 349 (1958) (“Philosophers (Hobbes, for example) … appear anxious to detach themselves from a 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.”).

81 Berkowitz adopts Judith Sklahr’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 __, at 4-5 (quoting Sklahr).


83 *See* Berkowitz, *supra* note __, at 33 (“In sum, liberal democracy rests on an unstable equilibrium between the healthy liberal impulse to economized on virtue and the inescapable demand for some minimum of good character in citizens and officeholders.”); *see also* Gordley, *infra* note __, at 112 (Hobbes and Locke rejected Aristotelian metaphysics, including that objects had “a substantial form and a final cause or end.”).

84 Berkowitz, *supra* note __, at 106.
required virtuous citizens.85 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.86

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 a state.87 Nonetheless, he understood that virtues, both social and intellectual, were necessary for “the preservation of political order.”88 Virtues required for public life included self-denial, liberality, justice, courage, civility, industry and truthfulness.89

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 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

85 Berkowtiz, supra note __, at 36. For example, Hobbes, who 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 were the virtues of “‘justice, gratitude, modesty, equity, and mercy, and the rest of the laws of nature.’” Id. at 38 and note 19 (quoting Hobbes, Leviathan, Chapter 16, p. 100).
86 Berkowitz, supra note __, at 38-39 (Thus, “how 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.”).
87 See, e.g., Berkowitz, supra note __, at 4 (in the Enlightenment, virtue was rejected as the goal for politics: “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 ground that is both more attainable and more just than the promotion of virtue.”).
88 Berkowitz, supra note __, at 75-76.
89 Berkowitz, supra note __, at 105.
‘social virtues,’” and, consistent with Aristotle, “argues that the primary means for preserving a political regime is through education in the virtues.”

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 – that of the “invisible hand” theory of the free market. Indeed, Smith’s reputation for 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.” According to the standard account, the state’s only concern was with maximizing individual freedom (all 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 that he also believed that markets had to be fair to work properly. 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.” Smith thought the common good depended on just markets, and governments justifiably regulated markets when they operated unjustly.

Further, Smith expressly equated virtue with excellence. Perhaps most surprisingly, Smith believed that the common good was a priority in a well-ordered

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90 Berkowitz, supra note __, at 137.
91 Peter Stein, Adam Smith’s Jurisprudence-Between Morality and Economics, 64 CORNELL L. REV. 621, ___ (1979)
92 DiMatteo, supra note __, at 878 (“Adam Smith’s properly functioning free market was one that not only produced economic efficiency, but one that ensured fairness and justice.”).
93 DiMatteo, supra note __, at 878 (quoting Leonard Billet, Justice, Liberty and Economy, in ADAM SMITH AND THE WEALTH OF NATIONS 102 (Fred. R. Glahe ed., 1978)).
94 DiMatteo, supra note __, at 878.
95 DiMatteo, supra note __, at 880 (noting that in The Theory of Moral Sentiments, Smith wrote, “Virtue is excellence.”).

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society, and that the economic man is also a social man. In fact, Adam Smith opens *The Theory of Moral Sentiments* by observing economic man’s cooperative “tendencies toward 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.’”

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 civic education in character or morals when it came to matters of self-governance – because of 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 in financial markets in the same way without some civic education in virtue -- because of misalignment of incentives. To gain financially, people 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”: “The 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.”

96 DiMatteo, *supra* note ___ at 879-80.
99 Melzer, *Rousseau and the Modern Cult of Sincerity, supra* note ___, at 9-10 (Rousseau was concerned about hypocrisy generated by economic life, not by political life).
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 was to St. Augustine, what contemplation was to Plato, sincerity is to Rousseau.”  

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

Legal historians have capitalized on the work done by the 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.  

For example, in *The Philosophical Origins of Modern Contract Doctrine*, Gordley looks at the ancient historical antecedents to modern contract in search of the role of virtue. 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.  

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100 Melzer, *Rousseau and the Modern Cult of Sincerity*, supra note ___, at 15.  
101 See, e.g., James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991); see also DiMatteo, *supra* note ___ (though DiMatteo seems to use Aquinas’s work as his jumping off point, and so characterizes much of the Aristotelian influences as natural law).  
103 *Id.*
critical, virtue-based premises embedded in our contemporary contract law.104 Gordley contends that various virtue-based principles have survived largely intact in the law through a long history of doctrinal evolution,105 but that 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 period, contract theory was left with many gaps – gaps which contemporary contracts theorists are still trying to fill.106 One problem is that, without historical mooring, contemporary theorists fill these gaps with competing philosophical ideas, which only exacerbate the gaps.107 Gordley seems to suggest that if contemporary theorists better understood the connection between current contract law and its Aristotelian origins, 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.108 Gordley’s work traces this fundamental premise of contract interpretation to the Aristotelian concept that obligations have “natural terms.”109 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.110 On Gordley’s view, existing gaps

104 Gordley, supra note __, at 108. This is consistent with DiMatteo’s conclusion that Aristotelian influences in modern common law of contract can be traced to two primary ideas: that of just exchange, and that of contractual essence. See DiMatteo, supra note __.

105 Gordley, supra note __, at 69-111 (accounting for precisely what principles 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) (Chapter 4, Synthesis).

106 Gordley, supra note __, at 121 (noting that this severance of philosophy from doctrine is part of the reason that today’s doctrine seems to lack philosophical coherence).

107 Gordley, supra note __, at 230-231.

108 Gordley, supra note __, at 161-162.

109 Gordley, supra note __, at 102-111. The idea of natural terms was itself based on the Roman law practice of classifying obligations into various types, each of which had different rules to determine at what point in time the obligation became binding. 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 the obligation undertaken. Id. at 30-31, 61-65.

110 Gordley, supra note __, at 108.
between the various theories of contract interpretation could be narrowed by recalling the doctrine’s Aristotelian origins.\textsuperscript{111}

\textbf{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 approach (or “CA”) to constitutional law and theory.\textsuperscript{112} The CA derives its intellectual power largely from the Aristotelian tradition.\textsuperscript{113}

Under the CA, the goal of a constitution and the government interpreting it is to empower citizens to be able to make choices that will allow them to secure a life “of human dignity” in “areas of central importance to human life.”\textsuperscript{114} The idea is that “many of the most central human capabilities, given their enormous importance to social justice, should be placed beyond majority whim through constitutionally protected status.”\textsuperscript{115}

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

\textsuperscript{111} Some legal historians have reached conclusions about the doctrine that are consistent with Gordley’s. \textit{See}, e.g., Larry A. DiMatteo, \textit{Embedded Influences}, 60 U. PITT. L. REV. 839, 892, 895 (1999) (writing that “[e]quitable contract is in essence 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. \textit{See}, e.g., Horowitz, \textit{supra} note __, at 952 (“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.”). Horowitz thinks that modern contract law arose to express the ideology of the new market economy, and so presumably, is organized accordingly. \textit{See id.} at 952. To the extent that law and economics is the dominant theoretical paradigm in contract, his version of the narrative is probably more generally accepted as the standard account.

\textsuperscript{112} She is not an Aristotelian herself, but she is an expert in the subject. Nussbaum, \textit{Constitutions and Capabilities, supra} note __, at ____ (“Now the fact that Aristotle believed something does not make it true (though I have sometimes been accused of holding that position!).” As noted \textit{infra}, her work reconciles the relativist objection to Aristotle’s work. \textit{See} notes ____- ____ and accompanying text.

\textsuperscript{113} Nussbaum, \textit{Constitutions and Capabilities, supra} note __, at 56.

\textsuperscript{114} \textit{Id.} at 7.

\textsuperscript{115} \textit{Id.} at 56.
by Aristotelian ideals.” These thinkers believed in the Aristotelian ideal that
government should “aim at producing capabilities or opportunities” for citizens to make
choices that will lead them to a flourishing life. Like Aristotle, these thinkers believed
that government should not require that its citizens perform certain “desirable
activities.” Instead, like Aristotle, these thinkers believed that a person is only
virtuous (and so can only flourish) to the extent that she makes her own choices about
right action, and so the government’s highest function is to make laws that best position
the citizens to be able to make those choices when opportunities arise. Similarly, a
government which enables its citizens to be able to achieve the “good life” is at the heart
of the contemporary capabilities approach.

Another legal theorist currently applying Aristotelian ideals to constitutional law
is Lawrence Solum. In his recent piece, The Aretaic Turn in Constitutional Theory,
Solum concludes that the contemporary Supreme Court is too driven by politics and
insufficiently driven by principle. Solum concludes that the best way to restore
principle to constitutional law is to make “an aretaic turn” in constitutional theory.
Like Nussbaum, Solum believes that Aristotelian principles are both the best normative

116 Id. at 8, 9. In that section, 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.
117 Nussbaum, Constitutions and Capabilities, supra note ___, at 33.
118 Nussbaum, Constitutions and Capabilities, supra note ___, at 33.
119 Nussbaum, Constitutions and Capabilities, supra note ___, at 33.
121 Solum, The Aretaic Turn in Constitutional Theory, supra note ___.
122 Solum, The Aretaic Turn in Constitutional Theory, supra note ___.
basis for constitutional law, and also that, as a matter of description, these principles are already embedded in our best law and legal theory.123 Examples of this kind of theory work are starting to pop up 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 utilitarian (law and economics).124 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 work 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. Recently, however, several legal scholars collaborated precisely on that project: developing an applied “virtue jurisprudence.” Thus far, this work has been embodied in a single anthology, *Virtue Jurisprudence*,125 which features nine essays applying virtue theory to different areas of law. Collin Farrelly and Lawrence Solum assert in an introductory essay that virtue can

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123 *Solum, The Areteic Turn in Constitutional Theory, supra note ___; Nussbaum, Constitutions and Capabilities, supra note ___, at 56-73 (describing constitutional law decisions that utilize something like the capabilities approach in their reasoning, including *Wisconsin v. Yoder* (free exercise), *Loving v. Virginia* (equal protection, race), *United States v. Virginia* (equal protection, gender), *Goldberg v. Kelly* (procedural due process, termination of welfare benefits), and *Plyler v. Doe* (education)).
125 *VIRTUE JURISPRUDENCE* (Collin Farrelly and Lawrence Solum, eds., 2008)
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?).

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. 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 citizens expect if courts and lawmakers were to “adopt” virtue theory? A starting point is, of course, that virtue jurisprudence is not thought-control. 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 work does not explicitly take up the relationship question. The virtue jurisprudence scholarship does suggest common themes, among them that virtue can provide action guidance to legal decision makers, including lawyers and judges; that virtue can help shape legal institutions; and that virtue can

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127 Farrelly and Solum, *Introduction to Aretaic Legal Theories*, in *VIRTUE JURISPRUDENCE*, supra note __, at 6 (referring to this strategy as a “bottom-up” approach.).
128 Peter Koller, *Law, Morality, and Virtue*, in *WORKING VIRTUE*, supra note ___, at 197 (writing that virtue theory cannot mean 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.”).
129 There are three examples of this relationship in the Farrelly/Solum volume. One is Suzanna Sherry’s essay, *Judges of Character*, and the second is Lawrence Solum’s essay, *A Virtue-Centered Account of Equity and the Law*. 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 Sherry, *Judges of Character*, in *VIRTUE JURISPRUDENCE*, supra note __, at 88-106; Solum, *A Virtue-Centered Account of Equity and the Law*, in *VIRTUE JURISPRUDENCE*, supra note __, at 142-166; see Hursthouse, *Two Ways of Doing the Right Thing*, in *VIRTUE JURISPRUDENCE*, supra note __, at 236-255.
130 Legal institutions can and should be structured around norms of virtue. In *Civic Liberalism and the “Diaological Model” of Judicial Review*, Collin Farrelly argues that judicial review should be remade to
help courts give content to broad legal standards. The next section 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 section 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, law of lawyering, tort (as a quasi-public, quasi-private subject) – this section 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

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131 There are three examples of this relationship in the Farrelly/Solum volume. First, in *Prudence, Benevolence and Negligence: Virtue Ethics and Tort Law*, Heidi Li Feldman writes that virtue exists currently in the reasonable person standard in negligence law. Her thesis is that reasonableness is only one part of a three-part standard, which incorporates virtues of due care (prudence) and caring (benevolence). Feldman’s idea is that “[t]ort law assesses negligence according to the conduct of a reasonable person of ordinary prudence who acts with due care for the safety of others. . . It is mistaken to reduce negligence to reasonableness or to try to understand the sense of reasonableness contemplated by the negligence standard without reference to the virtues of prudence and benevolence.” See Feldman, *Prudence, Benevolence and Negligence: Virtue Ethics and Tort Law*, in VIRTUE JURISPRUDENCE, supra note __, at 51 – 87.

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. See Duff, *Virtue, Vice and Criminal Liability*, in VIRTUE JURISPRUDENCE, supra note __, at 193-213; see Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, in VIRTUE JURISPRUDENCE, supra note __, at 214-235.
state should therefore actively educates its citizens in virtue. 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 virtue in the private law context as well. 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 intent-based. Virtue theory is better suited to analyze the dual dimensions of the institution of contract because, unlike consequentialism and deontology, virtue theory has a dual 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 section 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 the 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 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

132 See supra notes ___ - ___ and accompanying text.
maximize wealth through a process of exchange. That said, an important aspect of the exchange process is that it creates a relationship between the contracting parties.

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

The reason that virtue theory is an appropriate lens for thinking about contract is that virtue theory may help courts identify parties’ intent in contract better than either economics or rights 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 parties’ intent.

For example, consider intent as to “ends” in contract. The parties’ “intent as to the end the deal” will often be that the parties intended the deal should 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 are built on this idea.

Now consider “intent as to means”. “Intent as to means” refers to those intentions about the parties’ conduct – how contracting parties intended to treat each other. For example, the parties might have intended that each would treat the other respectfully, or

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133 See infra, notes __ - ___ and accompanying text (Markovits, collaboration theory; Kar, contractarianism). Contract’s “relational” aspects were first seriously studied beginning of “relational” theory in the late sixties and early seventies. See Feinman, supra note __, at 1299-1304 (describing relational theory).
Draft; do not cite

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 without recognizing that an important part of the contracting
relationship is that parties contract 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 much traction in scholarly debates about contract law.

As a result, neither theory allows for complete consideration of intentions. Current approaches do not allow for the kind of nuanced analysis of means and ends that
would account for intentions as to both means and ends, 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). This, in turn,
may allow for a more complete accounting of contract as both an economic and a social
institution.

b. Capturing Both Dimensions of Contract Would Improve Analysis of
Parties’ Intent

“What the parties intended” is a foundational question in contract law. Questions
over what the parties intended are often litigated, and they surface around the issues of
contract interpretation and implied terms. Issues in contract interpretation arise when
the parties choose a term but later realize they didn’t agree as to what the term meant.

135 If the parties intend something else, they are always free to say so.
136 See infra ____.
137 See, e.g., George Cohen, *Implied Terms and Interpretation in Contract Law*, in *Encyclopedia of Law and Economics* 78, 79 (Boudewijn Bouckaert & Gerrit de Gesst eds., 2007) (noting that “in some sense, all contract disputes involve questions of interpretation or implied terms.”).
Draft; do not cite

Issues around implied terms arise when the parties fail to include a term that becomes relevant later.

Courts applying analytical tools of law and economics assume that the parties’ intent will be found by applying the norm of efficiency.\(^{138}\) To do so, courts use various economic interpretive tools and methods, including “contextualism,” which requires courts to assume that the relevant community provides insight into what these specific parties intended, and joint maximization, which requires courts to assume that what the parties wanted was a bigger piece of the pie for themselves.\(^ {139}\) On the other hand, courts inclined to follow a rights-based approach will assume that the parties’ intent to values other than efficiency, such as the value of the promise as a promise for performance, or because the parties consented to the promise.\(^ {140}\) 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 real-world 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? We shouldn’t be surprised if contracting parties have a more complex idea about contractual intent than we currently assume.\(^ {141}\) Adam Smith

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\(^{139}\) See, e.g., Cohen, Implied Terms and Interpretation in Contract Law, supra note __, 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.

\(^{140}\) See, e.g., Cates Const., Inc., v. Talbot Partners, 980 P.2d 407 (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.”).

believed that a free market was not an end in itself; rather, a free market was desirable because it was free and just.\textsuperscript{142} Perhaps contracting parties have similarly-nuanced ideas about contractual intent: perhaps parties want to maximize wealth, justly.

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 non-deontological) legal scholars, but the idea resonates with non-lawyers. In a recent empirical study designed to test whether lay persons associate breach of contract with moral culpability, subjects were given different sets of facts describing more or less morally-culpable breaching behavior.\textsuperscript{143} For example, 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”).\textsuperscript{144} In another part of the study, subjects were told a party breached a contract in order to avoid unanticipated loss (“breach to avoid loss”).\textsuperscript{145} Despite being instructed that the law would not differentiate between these two situations, subjects nonetheless adjusted damages award upward in the breach to gain situation, relative to the breach to avoid loss situation.\textsuperscript{146} Subjects also adjusted damages awards upward when they were told that the breaching party failed to give the other side

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\item \textsuperscript{142} See infra notes \_ - \_ and accompanying text.
\item \textsuperscript{145} Tess Wilkinson-Ryan and Jonathan Baron, \textit{supra} note \_, at \_.
\item \textsuperscript{146} Tess Wilkinson-Ryan and Jonathan Baron, \textit{supra} note \_, at \_.
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warning, and so failed to provide the other side an opportunity to discuss next steps, before the breach.\footnote{This research concludes that non-lawyers 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 breaching defaulting party discussed the pending default with the other side first.\footnote{This result as not entirely “rational,” the idea apparently makes sense to lay people.\footnote{If it makes sense to lay people, it presumably make sense to contracting parties themselves, who are often business-people untrained in law.\footnote{To be sure, economics does not utterly fail to account for the ways in which 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 you do what is efficient, you will be doing the right thing. In that way, economics 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

\footnote{Tess Wilkinson-Ryan and Jonathan Baron, supra note ___, at __.}
\footnote{Tess Wilkinson-Ryan and Jonathan Baron, supra note ___, at __.}
\footnote{Tess Wilkinson-Ryan and Jonathan Baron, supra note ___, at __.}
\footnote{See, e.g., Baumer and Marschall, supra note __.}}}}\footnote{See, e.g., Baumer and Marschall, supra note __.}}}
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 must often routinely engage with the idea of parties’ intent: filling in “reasonableness” terms, and the implied covenant of good faith and fair dealing.

i. Reasonableness Terms and Virtue Theory

One place where virtue theory could enrich analysis of parties’ intent in contracts cases is at the point when the court must define the open-ended term “reasonable.” This subsection considers that when courts must give content to a “reasonableness” term, three tools of virtue theory could help courts 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 of virtue theory, though no courts explicitly couch their analysis in the terms of virtue theory.

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 they 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 (the parties failed to specify a delivery date, but the court determines that the parties did intend an enforceable agreement).\(^{151}\) Giving content to a reasonableness term, whether the term is express or implied, is an interpretive challenge for courts in contracts cases.\(^{152}\)

\(^{151}\) See, e.g., Restatement (Second) of Contacts § 202(5): wherever reasonable….consistent with each other and with …usage of trade; supplying an omitted essential term: “When the parties … have not agreed … a
Under an economic approach, the court assumes the essence of a contract is the end of wealth maximization.\textsuperscript{153} Cases decided under this approach make it sound as though there is no room for debate over that idea.\textsuperscript{154} Similarly, under a rights-based approach, the court assumes that the essence of a contract is the means of promise-keeping.\textsuperscript{155} 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 them.

This kind of inquiry would put the Aristotelian principle of contractual “essence” to work. Courts would fill gaps and resolve ambiguities by reference to what terms would be “natural” to the essence of the contract. Essentially, 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.”\textsuperscript{156} But, as noted, under either of the two dominant approaches, 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

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\textsuperscript{152} See Cohen, Implied Terms and Interpretation in Contract Law, supra note \_, at 82-83.
\textsuperscript{153} See infra notes \(-\)_ and accompanying text (Patton).
\textsuperscript{154} See infra notes \(-\)_ and accompanying text (Patton).
\textsuperscript{155} See infra notes \(-\)_ and accompanying text (Groves; Perillo article).
\textsuperscript{156} Some private law scholars in other areas have suggested robust definitions of reasonableness, which are consistent with virtue theory. For example, in tort, Gregory Keating defined reasonableness as “fair cooperation” as opposed to the dominant frame of “rationality.” Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311 (1996).
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 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 example, 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 . . . ” 157 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. 158 A court considering how to give specific content to an open-ended reasonableness term would therefore analyze “the parties’ intent” by analyzing two questions: 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 would 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 the parties’ intent as to ends, of the contract. Of course, as with any question of parties’

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158 Parties that did not could explicitly say so in the contract, and thus opt-out of virtue jurisprudence.
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 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. 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 do now) industry standards and customary practices.

Indeed, Solum’s interpretation of the virtue of justice as lawfulness (as opposed to fairness) 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,” justice as lawfulness requires that fully virtuous citizens in any society (phronimoi), must be able to internalize all the society’s social norms and positive laws

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159 See, e.g., Nicomachean Ethics, IV. i. 12 (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 fulfill all the other conditions of right giving.”).
160 Solum, Natural Justice: An Aretaic Account of the Virtue of Lawfulness, in VIRTUE JURISPRUDENCE, supra note __, at 167 – 191 (essay identifying the virtue of justice with the “lawfulness” conception).
161 See notes __ - ____ and accompanying text (two separate conceptions of the virtue of justice as 1) lawfulness and 2) fairness).
(law as legal norm). 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.” 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.

This should make sense in thinking about contract analysis: context-driven inquiries are very familiar in contract. Karl Llewellyn’s theory of “situation-sense” led to the Uniform Commercial 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 indeterminacy inherent in practical reasoning because of the importance of context could actually be a strength of virtue jurisprudence, especially in contract law. Courts practice contextual analysis in contract already.

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164 *Id.*

165 See, e.g., Lawrence Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 478 (2004-2005) (noting that “one of the advantages to 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 our world outruns our ability to make rules, excellence in judging requires practical wisdom.”).

166 One objection to virtue theory generally is that it is indeterminate. The indeterminacy objection has a counter-objection: relativity. Some contemporary ethicists think that the contextual nature of Aristotelian reasoning means “there can be no transcultural norms, justifiable by reference to reasons of universal human validity.” Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *Quality of Life* 243 (Nussbaum and Sen, eds., 1993). Nussbaum has responded that, by contrast, Aristotle certainly did believe in a single conception of the human good, based on virtues that each “isolated a sphere of human experience that figures in more or less any human life, and in which more or less any human being will have to make some choices rather than others, and act in some way rather than some other.” *Id.* at 245 (emphasis in original). 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 own context; and the person who so attends and who chooses accordingly is making, according to Aristotle, the humanly correct decision, period.” *Id.* at 257.

167 See, e.g., Lawrence Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 478 (2004-2005) (noting that “one of the advantages to a character-driven approach is the way it responds to a
Finally, consider the Aristotelian idea of corrective justice: that the transaction not introduce new inequalities. This idea 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. 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. 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. 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. 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 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 our world outruns our ability to make rules, excellence in judging requires practical wisdom.”.

168 See Weinrib, supra note ___, at 136.
169 The basic premise is stated in Morton Horowitz, The Historical Foundations of Modern Contract Law, 87 HARY. L. REV. 917, 920-23 (1974) (asserting that when the common law finally rejected the “title theory of contract” at the end of the 18th century, courts no longer assessed damages by equitable doctrines which required reference to the fairness of the underlying exchange).
170 See Weinrib, supra note __ 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.”). By “approximately equal,” Weinrib simply seems to mean something like less-than-unconscionable. But see DiMatteo, supra note __, at 839 (asserting that “fairness of the exchange has progressively become a focus of judicial inquiry.”).
171 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 79 (adequacy of consideration; mutuality of obligation: “if the requirement of consideration is met, there is no additional requirement of … equivalence in values exchanged. …”)
interpretation of that term would introduce new inequalities into the relationship. If so, it would cast doubt that the parties actually intended that side’s interpretation.

ii. **Virtue Theory and The Covenant of Good Faith and Fair Dealing**

A second site in contract interpretation where contract interpretation could be enriched by virtue theory analysis is the covenant of good faith and fair dealing. 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, when the term is litigated, it is because 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, but some of the Official Comments to the Restatement sound like 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”; this seems to refer to both the ends of the agreement (the common purpose) and the means (faithfulness to the common purpose, and consistency with justified expectations of the other side). These comments seem to suggest that

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172 Restatement (Second) of Contracts § 205 (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement.”); U.C.C. §103 (“‘Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”).


174 *Comment: a. Meanings of “good faith.”* 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
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 mean to accomplish by this contract? What were their joint goals? Once we know what they are, we 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.

V. Conclusion

Our discussion will be adequate if the degree of clarity fits the subject matter; for we should not seek the same degree of exactness in all sorts of arguments alike, any more than in the products of different crafts…Each of our claims ought to be accepted in the same way, since the educated person seeks exactness in each area 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.175

At the turn of the twenty-first century, normative debates in the legal academy have narrowed. Law and economics accounts 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, 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 can inform the social aspects of private law. Moreover, virtue theory can respond to what is in all likelihood (empirical research could confirm) 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

175 Nicomachean Ethics, I. iii. 1-4.
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.