

Amalia Amaya and Ho Hock Lai (ed.)

Law, Virtue, and Justice (Oxford and Portland, Oregon: Hart Publishing, 2013), 328 pp. isbn 9781849461757 (hbk). £65.00.

Towards the end of the last century there has been a revival of interest in virtue theory among moral philosophers and this has had a specific impact on legal theory. What are the implications of Aristotle's theory of a virtue centered approach to morality for the law?

This book has a total of 17 essays. The diversity of articles from each section is a testament to the richness of the subject matter. In what follows, I will offer a very brief sketch of each article and pay particular attention to the last section that is devoted to Michael Slote's view of empathy as the foundation for legal and social justice.

In the first essay, Claudio Michelon discusses the plausibility of legal decision-making being carried out by public officials only when those officials possess certain virtues of character. In Michelon's view, the greatest hindrance to assigning virtues a distinct role in legal decision-making is the "fear of subjectivity in decisions taken by public officials" (31).

Amalia Amaya makes important distinctions between the ways in which one might give virtue a role in a theory of legal justification. She argues for a significant "counterfactual" aretaic approach to legal justification that says that a legal decision is justified iff it is a decision that a virtuous legal decision-maker would have taken. This essay exemplified a rare combination of clarity and provocative insight.

In the last essay of part I, Sandrine Berges defends the objection against Plato that a Platonic version of virtue jurisprudence inevitably falls prey to the pitfalls of paternalism. On Plato's view, although laws concerning education should aim at helping citizens to cultivate wisdom, his proposal is too narrow, since only a minimal proportion of the population should actually receive the needed education.

Part II, containing three chapters, treats the connections between law, virtue, and character while conjoining western and eastern perspectives on the subject. First, Sherman J Clark argues towards an aretaic theory of law-making by identifying particular traits of character that are crucial to human thriving in the democratic free market society.

In chapter 6, Linghao Wang and Lawrence Solum defend a Confucian aretaic theory of law. They begin with an overview of Confucian social and ethical thought and describe the following four important Confucian concepts: i) *Li*, rules of conduct; ii) *Ren*, the cardinal virtue that unifies the particular moral excellences; iii) *Yi*, the trait related to the motivational attitude to abide by

social norms (107), and iv) *name*, an ethical concept that illuminates the nature of the practice of correcting names.

In the last chapter of Part II, Mateusz Stępień provides an analysis of three different models of judicial decision-making in the interest of the judge's professional self-development. These include: i) the formal-positivist model, ii) the responsive model, and iii) the aretaic model. According to the formal-positivist model, a judge's decision is guided strictly by legally binding norms. However, he argues that this model fails to stimulate judges to cultivate judicial virtues.

Part III, made up of three chapters, is about virtue theory and criminal law. First, Kyron Huigens argues that we have sufficient basis for an assessment of the "quality of the defendant's practical reasoning for the purpose of determining criminal fault and moral desert for legal punishment" (166). He defends this by focusing on i) intentional actions that reflect a range of motivations, and ii) the assessment of the quality of the defendant's practical reasoning.

Ekow N Yankah discusses a virtue-based account of the law specifically related to our ability to make progress on the important legal question of the prohibition of prostitution. I found this essay particularly stimulating and perhaps my favorite of the collection.

The last chapter of Part III is an article by RA Duff in response to both Huigens' and Yankah's essays. Duff explains two kinds of roles that ideas of virtue and vice might play in the criminal law: i) if the state or political community has an interest in the moral character of its citizens then it can use the criminal law as one means towards that end, and ii) it concerns the proper objects of criminal liability rather than the further goods that criminal law might bring. Duff argues that virtue is not necessary to the avoidance of criminal liability and nor is vice sufficient for liability.

Part IV treats legal fact-finding from aretaic perspectives. Hendrik Kaptein begins with an essay on lawyer-client confidentiality. On Kaptein's view, the confidentiality we extend in order to prevent "future harm" should not be extended to a "past wrongful harm" when "the main facts of the case leading to justice come to light in no other way" (237). The virtuous lawyer will exert practical wisdom in determining whether secrecy will lead to "better realization of material law and right" (236).

Ho Hock Lai argues that intellectual and epistemic virtues provide standards of excellence for the fact-finder's conduct of deliberation; indeed, they are required for *excellence* in verdict deliberation. Lai highlights the two connected virtues, "justice as humanity" and "empathic care", and the virtue of practical wisdom (249). Justice as humanity enriches our relations with others in which we respect other's "intrinsic worth and dignity" (250).

In the last essay of Part IV, Frederick Schauer comments on Lai's article. According to Schauer, Lai makes the mistake of moving from the claim that *some* generalizations are objectionable to the conclusion that verdict deliberation should not be based on *any* generalizations (272). Schauer argues that the virtuous legal deliberator may not be required, and in some cases be required not to be particularistic.

The final section of the book is devoted to the provocative relationship between law, empathy, and justice. Michael Slote begins by arguing for a distinctive sentimentalist version of care ethics, which he claims, is a form of virtue ethics. He argues, essentially, that empathic concern for others can function as the *entire* basis for a plausible understanding of legal and social justice.

In his commentary to Slote's essay, John Deigh makes an important distinction between two types of empathy: i) empathy as a cognitive state and ii) empathy as a vicarious affective state. Deigh relies on empathy as a cognitive, as opposed to Slote who relies heavily on empathy as an affective state. According to Deigh, for Slote's theory to be convincing he would need to offer some clear explanation of normativity. In response to Deigh, Slote directs attention to a number of misunderstandings.

In the last commentary, Susan Brison agrees with Slote that empathy is necessary for justice but she disagrees that it can function as the *entire* basis for legal and social justice. Let me say that I think Brison is right about this. It seems to me that empathy is significant and necessary for justice, but it also seems implausible that empathy is the foundation for legal and social justice. Slote argues that the assumption of empathy is relevant to normative morality because it helps us to give an account of why certain moral conclusions are true. For instance, he refers to Peter Singer's famous pond thought experiment to illustrate: "the meta-ethical hypothesis that empathy enters into our moral concepts would help us to explain why the fact that ignoring the child drowning right in front of one goes more against the grain of empathy than not helping the distant child is relevant to our belief that the former is morally worse than the latter" (312). However, although this reaction may be phenomenologically accurate, it doesn't show us that our affective state is the *grounds* for what is the morally right thing to do, since our proximity to the child may not be relevant with respect to our responsibility to the extreme poor that are dying from a distance. Perhaps I am missing the thrust of Slote's argument, but Brison seems correct in her assessment of the potential error of each stage of Slote's position on empathy. Brison continues by offering an example of a scenario where women are worse off than men, yet express higher levels of satisfaction with their lives: "empathy with what they are feeling is not an adequate guide to what justice requires in our treatment of them" (306). Slote's

position is provocative and raises interesting proposals, but at the end of the day it raises more questions concerning empathy and virtue jurisprudence than it answers.

Slote replies by clarifying the empathic concern criteria. In response to Brison, he argues that lack of empathy towards women is partially the cause of adaptive preference formation and contentment: such treatment shows a “lack of empathy for the ideas and aspirations, for the points of view, of girls or women” (313). He claims that if we understood morality in terms of empathy then we could see that in these cases women are being treated unjustly.

This was a fascinating book to read, and I can hardly do justice to all of its arguments here. For those who work in philosophy of law as well as virtue ethics, this is a worthwhile collection of complex essays. Overall the book makes a valuable contribution to a virtue-oriented approach to legal theory.

Jason Cruze

Arete Preparatory Academy

Jason@areteprep.org