The Law of Duty and the Virtue of Justice

EKOW N. YANKAH

Introduction

It is a special pleasure to once again engage in conversation with George Fletcher. Besides being intellectually indebted to him both as a student and young scholar, Fletcher, in person and in work, constantly teaches by his love of ideas and willingness to engage others as partners in the intellectual enterprise. Most of all, Fletcher has gifted to students and colleagues alike the tremendous breadth and ambition of his curiosity. It is this trait that most powerfully shows in his newest project.

It is, furthermore, a fortunate time to have a searching mind re-examine some of the fundamental questions that continue to challenge our criminal law practices. After years of neglect, criminal law theorists have recognized that theories of criminal punishment cannot be conducted simply as an exercise in moral inquiry. Blameworthiness may be a matter of moral theory but legal punishment is a matter of political morality. On an interpersonal level we may be obligated to take into account the total moral situation of those we punish. For example, a friend's particularly strong will may make us condemn him or her all the more for giving in to temptation. In contrast, efforts to find guilt beyond a reasonable doubt, punish offenders equally and control the introduction of certain evidence are requirements of the relationship one has with the state.

It is this distinction Fletcher brings to the fore in his new text, *The Grammar of Criminal Law*.[1] First, Fletcher asserts that moral questions *simpliciter* become relevant in law only when the law directly references them—a claim that resonates within analytical jurisprudence.[2] Secondly, building on Kant's claim that an action must be autonomously willed to have moral

worth, Fletcher claims that the state cannot coerce a person to behave morally.[3] Fletcher cashes this out by asserting that the political must precede the moral. Last, and perhaps most important for him, Fletcher's project places the preceding claims into a unified structure of criminal law across a number of cultures. He creates, in other words, a universal grammar of criminal law. Together, Fletcher's contentions hint at an ambitious project, a project that appropriately delineates the boundaries between valid criminal law and morality across a broad cultural spectrum.

Fletcher's project comes at a particularly pregnant moment. The trench warfare in moral and political philosophy between deontological and consequentialist regimes has reached a stalemate (or perhaps just become stale), increasingly resulting in each side ignoring the other.[4] Furthermore, in light of what some have called a degenerating research program, there has been an explosion of legal theorists who offer a third way. Rather than focusing on longstanding fights between consequentialists and deontologists, aretaic or virtue theorists are now seeking to construct a legal theory by applying the insights of virtue ethics to law.[5] By insisting on the importance of virtue to the aims of law, these aretaic legal theories challenge the claims upon which Fletcher's project relies.

In its broadest strokes, virtue ethics argues that, unlike consequentialism or deontology, ethical decisions cannot be adequately described by a decision-making procedure. There is no singular or complex set of 'goods' that can be maximized to arrive at a correct moral decision. Nor is there any categorical imperative that will lead one through the thicket of thorny questions to morally correct solutions. Virtue ethics is committed, instead, to moral particularism, the view that correct solutions to moral challenges lie in the appropriate weighing of all the morally relevant features of that particular situation by one who is properly attuned. Connected to the importance of proper moral insight, virtue theory is also committed to weighing

---

Ekow N. Yankah is Assistant Professor and Richard W. and Marie L. Corman Scholar at the University of Illinois College of Law.

not only our actions or intentions but also our dispositions, standing goals and ends. Thus, for virtue theorists, our personal characters hold moral importance in a unique way. Ultimately, virtue theorists claim, the moral measure of particular actions, decisions, norms, habits, and law lies in the extent to which they contribute to the flourishing of persons and societies.[6]

Given its promise to bring our jurisprudential thinking into harmony with our moral intuitions, aretaic theory deserves serious attention. Elsewhere I have challenged aretaic legal theories on their descriptive fidelity and prescriptive attractiveness.[7] In particular, I have argued that character models of punishment lead us to dangerous punishment regimes that all too easily mix a view of permanently flawed character with our ugliest racial and class discriminations. Such pernicious approaches to punishment cannot be reconciled with our liberal commitments.[8] Instead, a jurisprudential model that highlights law's coercive nature restricts the nature of the reasons that can justify legal punishment and commits us to a robust and revitalized liberalism.[9]

Aretaic theory calls into question Fletcher's claim that the political precedes the moral.

Still, it is important to note the resources that virtue ethics may have to address these concerns. In particular, aretaic theory may have a particular role for rules that can handle our initial objections. Furthermore, if aretaic theory carves out a persuasive place for law then it may be that moral considerations cannot be fenced off in the way that Fletcher has proposed.

Virtue jurisprudence, then, poses a direct challenge to Fletcher's project. Because virtue jurisprudence both emphasizes moral particularism and claims human flourishing to be the ultimate premise and justification of law, it denies Fletcher's claim that morality can be relevant to the law only when positive law directly references it. Further, to the extent human flourishing is the ultimate good, it is questionable whether coercion necessarily precludes an action of moral worth. It may, after all, be possible to be forced into doing what is best for oneself. Put simply, aretaic theory calls into question Fletcher's claim that the political precedes the moral.

The task of this essay is to flesh out the contentions noted above. Does aretaic theory commit us to a particular model of what counts as valid law and, if

so, how does that model affect the way in which we understand the interaction between the moral and the political? How does a Kantian legal framework contrast with an aretaic jurisprudence? What does it mean to put the political above the moral? Put plainly, I will explore the important challenges put forth by aretaic theory and defend the sort of positivist legal claims that Fletcher forwards. In so doing, I do not hope to prove that aretaic theory is unworkable but rather that its inability to address appropriately the interaction between coercion and autonomy should give serious pause.

Because even sketching an answer to these questions is complex, it is important that we be clear about the path ahead. We will first address Fletcher's contention that moral questions are not relevant to law unless the law references them. This question is similar to the long-running debate in analytical jurisprudence about the role that legal principles or natural law play in determining a valid rule of law. Although sophisticated versions of virtue jurisprudence give morality an indirect role in the justification of law, ultimately they cannot successfully exclude morality from determinations of legal validity. Virtue jurisprudence is committed to a theory that makes morality explicit in determining what counts as law.

By incorporating morality into the validity conditions of law, virtue jurisprudence fails to provide the most convincing picture of what constitutes a valid law or does so by surrendering its aretaic commitments. Specifically, virtue jurisprudence ignores the importance of coercion in isolating the normative system best described as law. Thus, I will argue, a positivist conception of law is both more convincing than and incompatible with aretaic models of law.

Although the questions that virtue jurisprudence poses for analytical jurisprudence are novel and interesting, they will not be the main focus of my inquiry. One of the problems of analytical jurisprudence has been its failure to address the normative implications of adopting different competing and plausible models of law. Ignoring the normative payout of our analytical jurisprudence has lead to the increasing isolation (or abandonment) of analytical jurisprudence. My main focus will therefore center on contrasting the normative implications of deontic and aretaic models of law. Specifically, I will argue that the model of law suggested by aretaic jurisprudence cannot adequately resolve fundamental tensions between aretaic theory and liberalism. Though the most advanced models of aretaic theory are respectful of liberal concerns, they ultimately fail to respect the liberalism Fletcher champions.

Of course, a committed aretaic reader may simply respond that that is all the worse for liberalism. Indeed, it is important to note that at base virtue theory represents an alternative to classical liberalism. In the hope of countering this dismissive response, I will argue that failing to meet our liberal commitments renders aretaic legal theories illegitimate. Such illegitimacy does not depend merely on the classic liberal tenet of the uncertainty of a particular conception of the good. Aretaic theories of law remain illegitimate even when we are certain that we have good moral reasons (outside of the law) to desire the goods they promote. It is in this particular way that we will give content to Fletcher's contention that the political must precede the moral.

I   Morality and Virtue in Law

I will not risk losing the reader's attention with a long exploration of the debate surrounding legal positivism, Dworkinian interpretivism, natural law and the role morality plays in legal validity.[10] Suffice it to note that, in its most muscular form, legal positivism holds that legal norms do not depend on morality, as such, for their validity.[11] That is not to assert that law is hermetically sealed or that morality cannot play a role in legal reasoning.[12] It is rather to assert that in cases in which a law incorporates a moral virtue, such as fairness, into the conditions of a contract, the law's validity turns not on whether the contract is in "moral fact" fair but on brute facts—that the law is so defined by the appropriate social forces.

The debate surrounding the various versions of legal positivism has occupied generations of legal philosophers. To the well-worn debates among positivism, interpretivism and natural law, virtue jurisprudence adds its own distinctive view. Yet, as is often the case in a developing field, the shape of virtue jurisprudence is not fixed, with different theorists adopting very different models. The question we must now address concerns the role that various moral norms play in determining legal validity in a virtue jurisprudence. Can a virtue jurisprudence find some role for moral norms that defeats the positivists' claim and thus undermines Fletcher's contention that morality is relevant to law only when referenced?

Criminal law theorist Kyron Huigens, who has done much to advance the work on aretaic theory in punishment, recently examined the relationship between virtue jurisprudence and analytical jurisprudence.[13] Given virtue jurisprudence's premise of human flourishing as the end of human society, Huigens concedes that virtue theory would be most obviously at home in natural law theory in which legal validity is tied in some way to moral validity and the common good.[14] Surprisingly, however, Huigens rejects this option, grounding his virtue jurisprudence instead on other features in Aristotelian ethics.

In constructing "the specification model" of aretaic punishment, Huigens grounds legal validity on considerations of practical reasonableness and the moral particularism of virtue theory.[15] Huigens argues that criminal prohibitions are generalizations about how to employ practical reason—how to reason well about what one ought to do in a general set of cases. Thus criminal fault is premised on the finding that an offender's practical reasoning is deficient in some way. The offender's failure of practical reason goes beyond this deficiency, however, and extends to a failure in the offender's standing motivations, desires and goals—in short, the offender's character. Punishment for the act that reveals deficient practical reasoning may be connected to any of the various rationales that underlie punishment, whether it be deterrence, retribution, social expressions of condemnation, or some other.

When a jury finds a person at legal fault, it evaluates the offender's practical reasoning by comparing his reasoning in a particular set of circumstances with the reasons underlying the general prohibition. The specification account is meant to resolve the tension between the fair warning given by law and the over- and under-inclusiveness inherent in rule making. Specification is thus grounded on distinctly legal concerns rather than justified solely by the offender's failure of practical reason.[16]

Though the offender's failure in practical reasoning remains an important part of the justification, Huigens describes his specification account as distinctly legal because it evaluates the offender's failure of practical reasoning only in terms of the criminal prohibition. The justification for punishing the offender is the same as that which originally led to the generalization of the prohibition. Because the jury verdict, once rendered, is a legal decision, Huigens argues that its validity does not turn on the underlying moral considerations that led to its rendering.[17] That is to say, as positivists before him have argued,

the decision represents a legal judgment that does not turn on its underlying moral reasons. Thus Huigens builds a virtue theory that insulates the law from morality.

It is difficult to know how to respond to Huigens's sophisticated attempt to reconcile virtue jurisprudence with a positivist model of law. A first concern is that it is internally inconsistent. Huigens argues that a legal verdict is evaluated only in terms of the criminal prohibition and thus excludes the moral reasons on which it is based.[18] Yet that verdict specifies a failure of practical reason, and practical reason, as Huigens notes, cannot be cabined to the offense, even if the offense is defined broadly.[19] Why, if the jury is charged with judging whether an offender's actions displayed sound practical reasoning in a particular situation, should the moral variables by which this is determined suddenly become inaccessible?

Notice that in a classic positivist account, such as Joseph Raz's, the reason that moral reasons are excluded from legal decisions is tied to the nature and function of law. If the function of law is to mediate between the persons and their many conflicting reasons for action, then the law must authoritatively determine those reasons in order to play that mediating role. By contrast, there seems to be no reason for Huigens to hold that when assessing whether a person behaved or reasoned correctly one is required to exclude the moral variables that determine whether he or she has behaved correctly. Indeed one may think quite the opposite.

More worrying is the weight that specificity bears in Huigens's account. It is possible that the inherent over- and under-inclusiveness of rules requires fine tuning in a way that the particularism of virtue theory is well-suited to address. But it is the rule itself that must be justified prior to one's concern that it be precisely applied. Consequently, it seems unsatisfactory to assert that the specification is justified by the reasons that justified the rule in the first place. Even if we grant Huigens's argument that there is more to a theory of punishment than its justification, justifying punishment practices nevertheless demands our attention. And it is just these conflicting and sometimes mutually exclusive justifications (and the rules that they shape) which competing theories of punishment may legitimize or undermine.

To this point, Huigens has argued that the particularism of virtue jurisprudence includes deliberations and character traits as they relate to the offender's heeding of legal norms.[20] Thus Huigens can be read as asserting that the virtue that is affirmed in specification is the virtue of obeying rules or internaliz-

ing norms. Specification serves then to ensure that one has correctly applied, obeyed, and internalized norms. The problem, of course, is that this is no justification at all. Without more—specifically, without the moral values of the norms or at least of norm obedience generally—one cannot evaluate whether a specification model could be justified. And, the worry goes, this cannot be done without turning to the moral values that underpin it, that is, without elevating the moral above the political. Finally, if Huigens were to continue asserting that norm deference is by itself justificatory, perhaps for the reasons that will later be advanced by normative positivism, one worries that the specification model relegates the aretaic portion of virtue ethics to a small corner indeed—its role being simply to ensure that one has properly internalized rules.[21] Moreover, one may wish to know if there is something distinctly aretaic or virtue centered in the moral goods that norm internalization seeks to capture. After all, one may internalize consequentialist or deontic moral norms as well as virtue.

If Huigens's model of virtue theory seeks to exclude moral considerations from determining what constitutes law, Lawrence Solum is committed to finding a place for morality within a distinctively aretaic model of law. In doing so, Solum is conscious that membership in a diverse political community restricts the way in which moral considerations can be brought to bear on the law. For Solum, the way to reconcile the moral and the political is by highlighting the role of lawfulness in Aristotle's virtue of justice.

There is widespread and deeply held disagreement about the conditions for human flourishing.

Solum begins with the aretaic tenet that the end of justice, and thus the end of law, is human flourishing.[22] Legislatures and judges ought to aim at producing and adjudicating law in ways that promote human flourishing; thus, one might think they ought to aim at the moral (or ethical, depending on the language you prefer).[23] The problem, of course, is that there is widespread and deeply held disagreement about the conditions for human flourishing. Thus each judge or legislator acting on his or her conception of fairness or morality would lead to endless clashes between competing moral perspectives.[24]

This would clearly be a disaster. A society in which legal sources were unrestricted in prosecuting warring visions of the moral good would be one that produced instability rather than flourishing. Such lawmakers and laws could not provide the guidance and stability needed for communities to flourish. Thus, an aretaic jurisprudence cannot be committed to allowing judges to make decisions based on their personal first order decisions about what is morally desirable. Instead, Solum proposes that the virtue of justice in an aretaic theory be governed by lawfulness—that is, by a judge's recognition and internalization of publicly held decisions on controversial issues.[25] These public conclusions need not only include legal decisions. Rather, these public decisions are the *nomoi*, the widely shared and publicly available laws, norms, and customs of the society. An aretaic jurisprudence thus turns on legal actors being *nomimoi*, persons who have properly internalized the shared laws and customs of their community and whose legal decisions are based on *nomos* rather than on their personal views of what is fair or moral. For Solum, a law is a valid instantiation of law only to the extent that it comports with the community's *nomos*.[26]

Solum's lawfulness conception of the virtue of justice is distinct from Huigens's. Although Solum's conception prevents aretaic legal actors from acting on their personal moral preferences, it does not attempt to cabin morality in the way that Huigens's model does. Remember, the ultimate end of law is human flourishing.[27] Thus, to the extent that the community laws and norms are directly opposed to human flourishing—for example, laws of racial subjugation—they may not qualify as true *nomoi*.[28] Moreover, the virtue of justice is only one part of human flourishing. To the extent that lawfulness conflicts with human flourishing, the aretaic law-giver must re-examine the value of lawfulness in her society. Above all, the aretaic law-giver must be sensitive to the conditions that allow for human excellence. In Aristotle's language, a virtuous law-giver must display *phronesis,* practical wisdom; the law-giver must be *phronimos* as well as *nomimos*.

Because Solum does not attempt to shut out the underlying moral reasons for law, his account does not suffer from the internal tension that I identified in Huigens's argument. Solum's aretaic model of law finds a place for morality that, in opposition to Fletcher's claim, makes morality relevant regardless of whether it is referenced by the law itself. According to Solum's model, a law is valid when it conforms with the stable norms and customs of a society. Nevertheless, those norms must themselves promote or, at a minimum, not directly undermine the conditions of human flourishing.[29]

In addition, virtue jurisprudence undermines Fletcher's claim that law must elevate the political above the moral. Virtue jurisprudence puts the moral above the political by incorporating human flourishing into the validity conditions of law. Remember that the person of practical wisdom, the *phronimos*, recognizes that justice is only one virtue and not the sole end of law. In order for something to be *nomos* it must be capable of being internalized by the wise (that is, humans with all the virtues including practical reason). The model is an integrated one. In order for a law to be valid, it must ultimately be aimed at human flourishing. The moral is primary to the political. If one finds the aretaic picture of law persuasive, then both of Fletcher's claims—that the law must reference morality before the latter is relevant and that the political must precede the moral—fall.

Virtue jurisprudence puts the moral above the political by incorporating human flourishing into the validity conditions of law.

The first of Fletcher's points, that morality is relevant to law only when referenced, invites us to examine virtue theory's interesting take on longstanding issues of analytical jurisprudence. Though related, by most accounts, to natural law theory, it is important to note that modern virtue theorists construct a distinct role for law in virtue theory. The specification model, in which a verdict applies a general prohibition to a specific case, is meant to foreclose further reliance on the moral considerations underlying a prohibition. Rather, the specification model trades on virtue jurisprudence's moral particularism. Furthermore, the specification model is justified by the virtue of paying heed to the law. This model, however, cannot relegate away the moral justification of law. If the moral justification for punishment is the same justification that gave rise to the prohibition, then that moral justification cannot be excluded. Further, given that our laws are hardly coherent, such justifications will not only be unclear but will sometimes conflict with each other and with a theory based in virtue ethics. Finally, the specification model cannot be justified simply by virtue of deferring to law without an argument as to why deferring is itself a moral good.[30]

By contrast, the justice-as-lawfulness model finds a place for morality in legal considerations by subordinating a lawmaker's individual morality to the stable mores, norms and customs of a community. Solum grounds this model on the importance of securing the advantages of the rule of law. Most importantly, Solum places justice within a deeper aretaic framework in which it plays a part, but only a part, in securing the conditions for overall human flourishing. This justification is ultimately a constitutive one; to the extent that the norms of a community do not encourage human flourishing, they are not the proper source of law.

II   Virtue Jurisprudence and Legal Validity

Although virtue jurisprudence presents a coherent model of legal validity, its persuasiveness will depend on one's position in long-standing jurisprudential debates. Positivist models, of the kind to which Fletcher alludes, exclude morality from determining what constitutes law.[31]   According to most positivist conceptions, a free-standing role for morality in determining legal validity would undermine the ability to determine what is valid law and for the law to serve its function of settling disputes authoritatively.

Why would an aretaic account of law be less accessible than a positivistic account? One reason could be that ascribing law to a social fact or social source seems to exclude controversial or metaphysically inaccessible variables, as in "X promotes human flourishing." According to positivist models, the law remains accessible because it is tied only to social facts that can be readily determined as "Judge Y has entered order Z."

But this is surely too simple a view of the positivist's account of law. Legal obligations, even when determined by social sources, are often complex and difficult to ascertain. Any lawyer can attest, more convincingly than a philosopher, to the difficulty of finding one's way through a thicket of codes and contracts only to arrive at plausible arguments for several different answers to a legal problem. Thus, Raz notes that factual questions may be as complex as moral ones.[32] Furthermore, the aretaic models explored here are sensitive to the accessibility of law. It is for this reason that Huigens's model seeks to exclude the underlying moral reasons that ground an adjudicated verdict. Solum's model is particularly sensitive to conceptions of lawfulness—he relies on widely held and stable community norms and customs, and his model provides no reason to believe that the model will collapse due to the inaccessible nature of underlying moral norms. Indeed, it is this inaccessibility that the justice-as-lawfulness model is well-suited to handle. Thus, it cannot be inaccessibility due to moral complexity that offers the most persuasive positivist reason to reject the aretaic conception of legal validity.[33]

I have argued elsewhere that interpretivism, Ronald Dworkin's influential view that legal norms are valid to the extent that they present the most morally attractive model of the principles that fit and explain a particular legal system, cannot persuasively describe law.[34] Such theories fail not because of the complexity or inaccessibility of moral facts but because they lack the ability to conceptually isolate the normative system that constitutes law. Specifically, without understanding that law is not only normative and authoritative but also inherently coercive, interpretivism (and, by extension, aretaic theories) lacks the conceptual granularity to delineate law from other normative systems.[35]

An example clarifies the point. If one examined two systems of norms in a society, one of which represented stable community norms or was elegantly tailored to promote human flourishing and another group of norms that claimed authority and was coercively enforced, it would be the coercive norms that most would recognize as law.[36] Nor would it be sufficient for a virtue theory simply to layer coercive sanctions as a further necessary condition. To see why, one can imagine two normative systems, P (positivist) and V (virtuous) which, though emanating from different sources, are coextensive. They differ only in that the source that monitors norms P has a police force to enforce those norms and the group that monitors V does not. Because the norms are coextensive, the difference is admittedly negligible. Yet it is P, I argue, that most persuasively constitutes the laws of that society. Indeed, this would become clear were the norms ever to diverge,[37] indicating that the coercive force is the variable that is doing the work. So, my argument goes, P is recognized as law even where it now enforces norms that do not promote virtue. Moreover, the fact that the law can be coercively enforced is itself the social fact that is constitutive of

legal validity. This is the meaning of the positivist claim that even where moral claims are incorporated into law they are incorporated by virtue of a social source.[38] This is the most successful way of redeeming Fletcher's claim that moral questions become relevant only when the law references them.

Finally and most importantly, it is by understanding the coercive dimension of law that we remind ourselves not only that law is in constant need of justification but also of the shape of the reasons that may justify the law. Of course, those committed to an aretaic theory can simply deny that a positivist view that highlights coercion is the most persuasive picture of law. Aretaic theory may grant that law is coercive but deny that this is of primary importance in determining what counts as law. Whether there are important normative reasons to adopt the positivist picture is a question to which we will return.

To summarize, I have argued that the picture presented by Solum's justice-as-lawfulness model fails to properly characterize law. This is not simply because determining the conditions for human flourishing is difficult but rather because it fails to recognize that law is inherently coercive. Without recognizing that law is coercive, a virtue jurisprudence is insufficiently fined-grained to distinguish law from other normative systems. Nor can virtue jurisprudence simply graft on coercion as an additional variable, for whether a law is coercively enforced is a social fact of the kind critical to positivism. Most importantly, a model of law that gives coercion a constitutive role restricts the kinds of reasons that may justify the law.

III   Virtue Jurisprudence, Justice and Liberalism

Analytical jurisprudence is inherently interesting. Law is among the most important human institutions and so it is no surprise that many have been driven to delineate its borders. Nonetheless, it has too often been forgotten that jurisprudence is not merely an intellectual exercise. Clarifying the most convincing concept of law allows us to extrapolate the normative implications of law. Plainly, a legal system based on a virtue jurisprudence will require and permit very different legal goals from one based on a consequentialist or deontic theory of law. This is the all-too-often-ignored payoff of analytical jurisprudence: our jurisprudential model embeds important normative commitments.

By constructing a special role for rules, aretaic theorists have attempted to build a virtue jurisprudence sensitive to political considerations. In so doing, aretaic theorists are cognizant of the controversial nature of moral claims. What is less clear is whether merely recognizing moral claims as controversial meets Fletcher's claim that the political must precede the moral. Fletcher's claim is best read not as asserting that moral requirements are difficult to determine but as a reminder that requirements of political morality must dominate our desire to attend to every moral claim.[39] Thus we must ask whether the role of rules in virtue jurisprudence is successful in mediating between our moral and political requirements. Put another way, can virtue jurisprudence meet Fletcher's charge to place the political ahead of the moral?

One way to answer Fletcher is to deny that legal or political claims do anything but require moral behavior. This is to deny, as John Gardner does, Fletcher's Kantian premise that one cannot be forced to behave morally.[40] For example, when the law requires one not to violate another's rights, it requires a morally valuable action. Fletcher, then, cannot claim that one cannot be forced to behave morally or that political demands can meaningfully precede moral obligation.

Despite the validity of this objection, it seems to me that it opposes a position that Fletcher could not, in fact, hold. Fletcher cannot hold this position because he explicitly adopts the Kantian distinction between law's focus on perfect duties—duties that prohibit external actions that impose on others' freedom—and morality's concern with the purity of an actor's will. So Fletcher need not deny that one meets a moral obligation even when this is not reflected in the praiseworthiness of the actor's will. Fletcher's claim that the political must precede the moral cannot be equated with the position that the law may not prohibit certain immoral actions.[41]

Perhaps virtue jurisprudence respects the political by containing first-order moral judgments in the way explored earlier. As Solum argues, the justice-as-lawfulness model constrains an adjudicator to rely on stable public mores and norms. Such a mandate respects the political role of law over general moral claims because it recognizes that the community and individual goods that are uniquely secured by the rule of law would be sacrificed by a system that encouraged judges to advance individualistic, conflicting perceptions of moral goods.

I have argued elsewhere that we have reasons to hold fast to a positivist conception that highlights law as inherently coercive.[42] One important feature of a positivistic theory which describes coercion as an intrinsic feature of law is that it deeply commits the law to deontic as opposed to aretaic moral duties. The reason can be explained briefly. We have already noted several times that there are deeply held disagreements regarding the actions that morality requires. Though some issues may allow for disagreement, say the aesthetic (moral) quality of free jazz, others demand that we as a society come to some agreement. It simply will not do for everyone to hold to their own conceptions of when it is fair for one party to inherit property over another.[43] Moreover, because many believe that rights claims may be insisted upon and enforced, these deeply held disagreements are likely to become voracious and violent.[44] As Jeremy Waldron argues, there are good normative reasons to adhere to a positivist view of law.

> *We have reasons to hold fast to a positivist conception that highlights law as inherently coercive.*

Waldron's article, however, insightful as it is, does not illustrate a clear advantage for positivism over a virtue jurisprudence. Even if I grant that positivism describes what one *ought* to view as law, it is not clear that anything follows in terms of one's obligation to obey the law.[45] Although law may be well-suited to arrive at a communal solution for a moral dispute, in cases where that solution is gravely unjust it may also be true that I ought to disobey the law or become a revolutionary.[46] What gives Waldron's positivism its greatest normative bite is not Kantian positivism but rather Kant's authoritarianism.[47] Lastly, the problem of moral controversy is just the problem the justice-as-lawfulness model is well-suited to handle. The reason then that positivism commits us to rejecting a virtue theory is not found in moral controversy but in the conceptual point that law is partially defined by its purposeful coerciveness.

Why does this model of positivism lead to a deontic conception of legal duties—elevating, in Fletcher's words, the political over the moral? Legal coercion is purposeful interference with another's autonomy and stands in need of justification.[48] It is not a viable

argument against one's autonomously chosen acts to claim that forcing one to do otherwise is for their own good. This is simply to deny the claim of autonomy all together. Pointing out, however, that one's exercise of freedom interferes with another's is to engage the claim of autonomy in a way that can potentially justify coercion. Thus, noticing that coercion is inherent in law leads to understanding that law can be justified only by adhering to Kantian duties of external freedom as opposed to aretaic duties of human flourishing.

In contrast, the role of law in virtue jurisprudence is to promote the flourishing of humans and their societies. According to this view, first, laws and norms, no matter how broadly defined, are justified by their promotion of human good; second, justice, and the respect for rules that it entails, is one virtue among many and where it is in tension with other requirements of human flourishing, justice must give way.[49] Because legal coercion, a matter of political morality, must be limited to deontic duties to be justified, aretaic theory finally fails to place the political ahead of the moral.[50]

Placing this much weight on autonomy may lead one to question its importance. If the purpose of autonomy is not (only) to attain human flourishing, then what good is it? Given the amount that has been written on the subject, it would be foolhardy of me to pretend to offer anything new as to its worth. For Kant, the preservation of freedom was the only reason rational persons would recognize the right of others to coerce them. For others, autonomy is a first principle for which it is impossible to give supporting reasons. In addition, restricting a person's autonomy only when it clashes with the autonomy of another may be one way in which the state commits to respecting all citizens equally.[51]

Let me offer one more component to what is surely a complex matrix of reasons for valuing autonomy. Without the ability to ascribe to ourselves choices on which we act, we cannot ascribe to ourselves responsibility as agents.[52] It is that moral agent, that person, that stands before the state and demands equal respect and consideration for their choices. It is as the persons they are and not as persons that they could be to whom the state owes its duties.[53]

It is important to acknowledge that there are many ways in which this conclusion is an unhappy one. This brand of liberalism can be fairly accused of being too thin, ignoring much that persons and societies require for a good life. A conception of law limited to deontic duties will allow many to pursue morally harmful or degraded lives when it does not impose

on the freedom of others. Law, on this view, will sacrifice important moral goods that we wish to promote in order to respect the claim of right against the state. This is what Fletcher means when he notes that the political must precede the moral.

This sacrifice is not something about which I am pleased. But if we have limited the law's domain to exclude the realm of virtue, we can take heart in the realization that law is but a small part of our communal landscape. We are embedded in family, friendships, careers, civic clubs and churches. If law only permits rather than compels a life of greater virtue, the other relationships in our lives ought to criticize, cajole and pressure us to live lives of human excellence.

Conclusion

Let us now step back and examine the picture that Fletcher's argument has prompted (or that I have foisted upon him). Fletcher asserts that morality is relevant to law only when referenced. I have fleshed out this statement by connecting it to a positivistic model of law. This model holds that law is normative, authoritative and coercive, and that its status as law is not affected by the fact that it does not promote virtue and human flourishing.

Fletcher further argues that the political must precede the moral. The best way to make sense of this is not to view it as a claim that law cannot force people to exhibit moral actions. Rather, to approach it as an argument wherein, because law is coercive, law must be justified by reasons that are responsive the locus of coercion—our autonomy. Because a law that respects autonomy is one that protects impositions on the freedom of others rather that the moral goodness of their choices, a deontic model of law elevates our political commitments above other moral claims.

The preceding summary fits remarkably well with Fletcher's ambitious project by isolating conceptual claims about the nature of law and their normative implications. Fletcher gives a "grammar" of what is required to legitimate law across a spectrum of cultures. In those cultures in which citizens can and do conceptualize claims of autonomy, Fletcher suggests a set of political requirements that can be universally applied.

Of course, one must admit these suggestions are grossly incomplete. A model of criminal law cannot remain at this level of abstraction. Work must be done to determine how these principles guide our punishment practices, our model of excuses and countless other details of criminal punishment, as well as where the principles provide no guidance at all. Nonetheless, Fletcher has gathered a wonderful set of guideposts, and, once again, invigorated criminal law thinkers everywhere with a grand project.

NOTES

1 George Fletcher, *The Grammar of Criminal Law: American, Comparative, and International*, vol. 1: *Foundations* (New York: Oxford University Press, 2007).

2 *Id.*, 152-54, 296-97, 341.

3 *Id.*, 153-54, 177-82, 201-8.

4 It is also troubling that consequentialists have engaged in debates about punishment as though they were pure moral theory. Even where institutional considerations make an appearance in consequentialist arguments, the prime concern is the rule-utilitarian consideration of the consequences of adopting rules that appear to violate moral and political rights. It is not clear that special considerations of a political nature are weighed. See John Rawls, "Two Concepts of Rules," *The Philosophical Review*, 64 (1955): 3-32; R. M. Hare, "Ethical Theory and Utilitarianism," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge, UK: Cambridge University Press, 1982), 23-38.

5 See Lawrence B. Solum, "Natural Justice," *American Journal of Jurisprudence* 51 (2006): 65-105; and Colin Farrelly and Lawrence Solum (eds.), *Virtue Jurisprudence* (Basingstoke: Palgrave Macmillan, 2007).

6 This is to give a very brief overview of a complex subject. For a richer exploration of the subject, see Solum, "Natural Justice"; Farrelly and Solum, *Virtue Jurisprudence*; Kyron Huigens, "Homicide in Aretaic Terms," *Buffalo Criminal Law Review* 6 (2002): 97-146; Kyron Huigens, "Aristotelian Criminal Law—A Reply to Duff," *Notre Dame Journal of Law, Ethics, and Public Policy* 18 (2004): 465, 468; Stephen Darwall (ed.), *Virtue Ethics* (Oxford: Blackwell, 2002); Roger Crisp and Michael Slote (eds.), *Virtue Ethics* (Oxford: Oxford University Press, 1997); Ekow N. Yankah, "Virtue's Domain" (manuscript on file with author).

7 Yankah, "Virtue's Domain."

8 *Id.* See also, Ekow N. Yankah, "Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment," *Cardozo Law Review* 25 (2004): 1019-68.

9 *Id.* See also, Ekow N. Yankah, "The Force of Law: The Role of Coercion in Legal Normativity," *University of Richmond Law Review* 42 (2008): 1195-1255.

10 The texts in this debate are so well-known that citing them is almost unnecessary. However, a short and incomplete list of texts for the interested reader would include: H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); Joseph Raz, *Practical Reasons and Norms* (London: Hutchinson, 1975); Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon, 1994); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980); Hans Kelsen, *Pure Theory of Law* (Berkeley, CA: University of California Press, 1967).

11 I am putting aside for the present important discussions regarding inclusive legal positivism which give morality a role in legal validity to the extent that legal sources reference moral terms. See Jules Coleman, *The Practice of Principle* (New York: Oxford University Press, 2001). It is unclear whether Fletcher means to adopt a position somewhere between exclusive and inclusive legal positivism.

12 Yankah, "The Force of Law," 1250-52; Raz, *Ethics in the Public Domain*, 213-15, 231, 234.

13 Kyron Huigens, "Law and Morality: Criminal Law: The Jurisprudence of Punishment," *William and Mary Law Review* 48 (2007): 1793-1829.

14 *Id.*, 1814-15.

15 *Id.*, 1816-19.

16 *Id.*, 1821-22.

17 *Id.*, 1824-26.

18 *Id.*

19 *Id.*, 1817. Huigens notes: "This assessment of the quality of the defendant's practical reasoning is not limited to his reasoning in connection with the offense—even if 'in connection with' is given a very broad construction. It extends, in addition, to an assessment of the defendant's set of standing motivations, or ends—to their acquisition, development, maintenance, and ultimate issuance in the alleged offense. From an opposite perspective, criminal fault is an aspect of criminal wrongdoing."

20 *Id.*, 1826. Huigens argues: "A virtue ethics theory of punishment posits that guidance by criminal prohibitions and the ex post normative evaluation of behavior subject to a prohibition is particularistic in this way. But this particularistic norm guidance is neither distinctively moral nor distinctively legal. The specification account of criminal fault is an instance of this particularistic account of norm guidance, but it does not, for this reason, introduce morality into legal guidance in a way that detracts from legal authority."

21 Admittedly, to the extent that rule internalization (guid-

ance) and determination (specification) are virtues, Huigens is a virtue theorist. Elsewhere, I have expressed my doubts that a model which focuses on such circumscribed virtues could be sufficiently embedded in an aretaic jurisprudence to retain its distinctive character. Yankah, "Virtue's Domain." This may not be a problem for Huigens, who, I suspect, is self-consciously seeking an eclectic theory that only borrows from portions of classic neo-Aristotelian virtue theory.

22 Solum, "Natural Justice."

23 As will become clear, because, for Solum, adjudicators defer to public norms, they need not aim directly at flourishing.

24 Solum, "Natural Justice," 87.

25 *Id.*, 89-91.

26 To the extent that Huigens's specification model seems ultimately to turn on the virtue of norm guidance that is displayed in heeding the law, Solum's model is related. True, the *nomoi* in Solum's model are broader than written legal norms. Still, because an aretaic judge is given to the moral particularism of virtue ethics, she is willing to use equity, not to undermine the law, but to rule in the spirit of the law to avoid absurd results. Solum, "Natural Justice," 98-100. This is strikingly similar to the examples that Huigens gives to illustrate a fact finder's "interpretation" of a legal prohibition as an examination of whether an offender deferred to the spirit of the underlying legal norm. Huigens, "Law and Morality," 1818.

27 Solum, Natural Justice," 97-98.

28 In order to be *nomos*, the norms and customs must be capable of being internalized by a person of practical wisdom, a *phronimos*. Because such a person could never internalize a norm that acted to suppress human flourishing, such norms could never qualify as *nomoi*.

29 In this sense, the virtue model is not dissimilar from Dworkinian interpretivism, with the important addition of the promotion of human flourishing as a built-in validity condition.

30 In so justifying the need to defer to law, a virtue theorist must be careful not to make the theory derivative of underlying Kantian or consequentialist concerns. See Yankah, "Virtue's Domain,"

31 For the moment, I will put aside the dispute between inclusive and exclusive legal positivism. I believe, however, that the points that follow are equally applicable to inclusive legal positivism.

32 Raz, *Ethics in the Public Domain*, 231.

33 One could argue that this misconceives inaccessibility—that moral "facts" are not simply epistemologically inaccessible but are by their nature indeterminable. But I see no reason to tie positivism to any particular view on moral realism much less a skeptical one.

34 Yankah, "The Force of Law."

35 *Id.,* 1232-44.

36 *Id.*

37 *Id.*, 1238-39. If the P norms were not deeply held or widely shared or could not be internalized by just persons, they

would not qualify as *nomoi* for Solum. The fundamental move in Solum's model is to shift the conversation from "what is law?" to "what does the virtue of justice require?"

38 Raz, *Ethics in the Public Domain*, 211.

39 Fletcher, *Grammar of Criminal Law*. See also Leo Katz, "Villainy and Felony," *Buffalo Criminal Law Review* 6 (2002): 451, 455-61.

40 John Gardner, "Prohibiting Immorality," *Cardozo Law Review* 28 (2007): 2613. For Kant, forced actions can not be truly moral because actions display moral worth only when they are done *for* the autonomous moral reasons. But this does not show that an action may not be morally valuable even where that value does not lie in our ascribing it to the will of the actor. *Id.*, 2621, 2626-28. As Gardner points out, one can distinguish between the moral value of an act and the moral measure of the actor performing it.

   Although I do not agree with Gardner as to why an actor is more admirable when acting for reasons other than moral will, we do agree that one can distinguish between the moral value of an action and the moral measure of the actor performing the act.

41 Further, I suspect that virtue theory has no advantage in this regard. Virtue ethics is not opposed to forcing others to behave morally. Nor did Aristotle believe that all persons were capable of fully internalizing virtuous reasons for action. Thus, some may always have their moral actions guided by the fear of punishment. Aristotle, *Nicomachean Ethics*, in *The Basic Works of Aristotle,* ed. Richard McKeon (New York: Random House, 1941), 1179b20-1180a12. Aristotelian theories of the kind that Gardner prefers focus not only on intentions or will but also on an actor's dispositions, motivations, and standing ends—in short, her character. Aristotle, after all, viewed the regulation of law as an important form of moral education necessary to leading one to internalize the correct moral norms. The point of such norm guidance is to train the well-formed actor to be able independently to determine the morally correct course of action. Ultimately, both models can separate the moral worth of an action from the moral judgment of the actor.

42 Yankah, "The Force of Law."

43 Jeremy Waldron, "Kant's Legal Positivism," *Harvard Law Review* 109 (1996): 1535-66.

44 *Id.*, 1538-40, 1554-57; Immanuel Kant, *Metaphysical Elements of Justice*, trans. J. Ladd (1797; Indianapolis: Bobbs-Merrill Co., 1965), 35-36.

45 It is one of the great moral claims surrounding positivism that its separation of law from morality allows greater space to describe the law as we see it, to subject it to moral criticism, and to question its hold over us. See H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593.

46 Waldron, of course, argues that some of the same reasons that one has for adopting a positivist position— fundamental disagreement over rights, in conjunction with our important moral reasons for settling disputes—provide a reason to adopt a commonly accepted procedure for settling our disputes that displays equal respect for all rights holders. Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

47 Waldron, "Kant's Legal Positivism," 1544-45.

48 See Yankah, "Force of Law." Here "autonomy" is used in its common rather than in its strictly Kantian sense.

49 Solum, "Natural Justice," 97-98.

50 For a fuller exposition, see Yankah, "Virtue's Domain.*"*

51 Yankah, "Good Guys and Bad Guys."

52 Though we may still imagine that we retain moral worth in other, perhaps aesthetic, senses. See Thomas Nagel, *Mortal Questions* (New York: Cambridge University Press, 1991).

53 Jeremy Waldron, "Theoretical Foundations of Liberalism," in *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), 62.