

Law and Virtue

Author : Sean Coyle

Date : March 30, 2017

Kimberley Brownlee, [What's Virtuous About the Law?](#), 21 *Legal Theory* 1 (2015).

In this interesting and clearly argued [article](#), [Kimberley Brownlee](#) investigates the extent to which the law can serve as a model of virtue. She rightly points out that many ethicists understand law deontologically, as a set of principles that determine rights and duties: in other words, that for law to embody a morality, this morality must be essentially law-like. The article observes that the law's various concerns cannot be entirely reduced to deontology (P. 5), but there is in any case room for dissatisfaction with the idea that deontology and "virtue ethics" are opposing conceptions of morality. Aquinas, for example, devotes the entire *secunda-secundae* of the *Summa Theologiae* to a discussion of the virtues, but does not hesitate to identify duties to be performed (including the human being's duties to God).¹

One interesting observation at the outset of the article is that the law "tends toward injustice." This is a very arresting comment, and it is a shame that there is no discussion of it. For one thing, it runs contrary to the much-repeated idea of Lon Fuller that the law "works itself pure," that is, tends toward justice over time, or to the classical common law philosophies of writers such as Hale or Coke, which regarded the law as the accumulation of reason. One could also point to the natural law content of positive law: the suppression and punishment of criminality, maintenance of the inner tranquility of the state, the restraint of fraud, sexual crimes and civil wrongs, regulation of contracts and so forth. In all such cases the tendency of the law seems to be toward justice rather than its contrary.

The article discusses five ways in which the law can model virtue, the most significant of which is that of the Virtuous Person, the person who is "a purported ideal of immutable, full, and perfect virtue." (P. 6.) The discussion touches upon the "pluralism objection," that if "morality is fundamentally pluralistic, then 'full and perfect virtue' is impossible." (P. 7.) This rejects the classical Aristotelian doctrine of the unity of virtue (P. 6), that in order to possess one of the virtues, it is necessary to possess all of them. (*N.B.* this doctrine relates only to the so-called cardinal virtues.) Both Aristotle and Plato—and later Aquinas—regard virtues as mutually reinforcing, unlike the merely pleasurable interests of the masses which vie with and undo one another.² The underlying principle, that the truth harmonizes with all data, whereas falsehoods clash and contradict one another, is not there defended by Aristotle, although a defense is available.

There are five ways in which the law can "model" virtue, of which I shall mention here only two: first at the level of specific laws and policies (e.g. "open-mindedness" in allowing individuals freely to choose and pursue their own ends), and secondly at the level of the law's foundational structures. (Pp. 10-11.) Here there are two problems, the "poisoning problem" and the "emulation problem." The poisoning problem is that the coercive properties of the law appear to model non virtuous modes of behavior: "The law necessarily calls on its members, as officials and citizens, to do things such as threaten people, attack people, make laws that harm people, lie to people, detain people, isolate people, charge people with offences, make judgments on people's guilt, sentence people to be punished, impose punishments on people, deprive people of their resources, and perhaps, in extreme cases, incarcerate and possibly kill people." (P. 15.) I did not entirely follow the reasoning here. Of this list, some—such as the punishment and incarceration of criminals—are not contrary to virtue, and others (such as determining guilt) *are* virtues (here the virtue of prudence). But it would be useful to have examples of other members of this list, such as occasions when the law requires one to lie. This latter Aquinas would regard as an unjust law to which one is bound in conscience to disobey, as being contrary to virtue. (and duty!)

The emulation problem is that if one acts virtuously for the sake of the law, one is not acting virtuously for the right

reasons (and thus technically not acting virtuously); but if one acts for the right reasons, the law is not serving as a model of virtue. (P. 15.) It is probably true to say that certain branches of law fall foul of this objection. Where it acts successfully as a deterrent, the criminal law does not instill virtue into would-be criminals, but the majority of people do not need the deterrent and are thus unaffected by the law as far as virtue is concerned. But there are other areas of law where the law does appear to be a guide to virtue: tort law is one such example, since an ordinary lay person may wish to do the right thing but without knowing what the right thing is.

There are two respects in which the article could have gone further. In the first place, it could have considered the Thomist doctrine that the law seeks to bring people to virtue, but not all at once,³ and that the function of law is not to require the practice of all the virtues.⁴ Consequently, there is an important difference between the good *citizen* and the good *person*. (A good citizen pays her taxes even if resentfully, whereas a good person does so willingly.) In the second place, the article could have given a longer and systematic discussion of the law's two most important virtues: justice and prudence.

In a comment of this length it is impossible to recount and discuss many of the article's arguments and analyses, and I would encourage anyone interested in jurisprudence to read the full article, and in doing so gain a sense of its many virtues.

1. For further evidence of the compatibility of duty and virtue, see e.g. Terence Irwin, 2 *The Development of Ethics* (Oxford, 2007).
2. See e.g. Aristotle, *Nicomachean Ethics*, I.8.1099a.
3. *Summa Theologiae*, I-II.96.2 ad 2.
4. *Id.* at I-II.96.3c.

Cite as: Sean Coyle, *Law and Virtue*, JOTWELL (March 30, 2017) (reviewing Kimberley Brownlee, *What's Virtuous About the Law?*, 21 **Legal Theory** 1 (2015)), <https://juris.jotwell.com/law-and-virtue/>.