Virtue, Emotion and Imagination in Law and Legal Reasoning

EDITED BY

Amalia Amaya
and Maksymilian Del Mar

VIRTUE, EMOTION AND IMAGINATION IN LAW AND LEGAL REASONING

What is the role and value of virtue, emotion and imagination in law and legal reasoning? These new essays, by leading scholars of both law and philosophy, offer striking and exploratory answers to this neglected question. The collection takes a holistic approach, inquiring as to the connections and relations between virtue, emotion and imagination. In addition to the principal focus on adjudication, essays in the collection also engage with a variety of different legal, political and moral contexts: eg criminal law sentencing, the Black Lives Matter movement and professional ethics. A number of different areas of the law are addressed (eg criminal law, constitutional law and tort law) and the issues explored include: the benefits and limits of empathy in legal reasoning; the role of attention and perception in judicial reasoning; the identification of judicial virtues (such as compassion and humility) and judicial vices (such as callousness and partiality); the values and dangers of certain imaginative devices (eg personification); and the interactive and social dimensions of virtue, emotion and imagination.

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1

New Horizons for the Study of the Legal Mind: Relating Virtue, Emotion and Imagination

AMALIA AMAYA AND MAKSYMILIAN DEL MAR*

I. Introduction

This collection aims to examine the relevance of virtue, emotion and imagination to legal reasoning and, more generally, to legal theory. The twelve chapters collected here bring to light the various ways in which these elements contribute to legal argument and explore the connections that there exist among them. The study of the interlocking roles that virtue, emotion and imagination play in law and legal reasoning is critical to developing a complex and nuanced account of the kinds of patterns of inquiry and deliberation that are involved in reasoning and decision-making in legal contexts. This book seeks to contribute to current work on virtue, emotion and imagination in legal contexts. It does so by foregrounding the relations between virtue, emotion and imagination, and thus treating them not in isolation, but as elements that jointly contribute to the development of a theory of legal reasoning that results in sound legal judgement. Before giving an account of the structure and content of the book, we shall place the present volume in the context of existing legal scholarship on virtue, emotion and imagination. We do so in four sections, exploring: (1) virtue, (2) emotion, (3) imagination, and (4), briefly commenting on relations between them. Following these sections, we then present an overview of the chapters in this collection and finish the introduction with suggestions for future research.

* We would like to express our thanks to the British Academy and the Newton Fund for funding this project, including the conference where almost all of the chapters in this volume were first presented. We also thank our respective universities – the National Autonomous University of Mexico and Queen Mary University of London – for their support of the project and its events.

II. Virtue, Legal Reasoning and Legal Theory

An exciting development in legal scholarship in recent years has been the development of virtue jurisprudence.[1] Virtue jurisprudence places the notion of virtue at the centre of legal analysis. The turn to virtue is not idiosyncratic of legal studies; rather, a vindication of virtue has taken place across different disciplines, most prominently, ethics, epistemology and political theory.[2] Virtue jurisprudence draws upon and feeds into a broader transdisciplinary movement that aims to recognise and study the different ways in which matters of character are key to a broad range of normative issues. A central feature of virtue theory – as much in law as everywhere else – is an inversion of the direction of analysis. Virtue theorists seek to explain the normative properties of beliefs, decisions, plans or actions in terms of the virtues (or their lack thereof) of agents, rather than the other way around. From this point of view, the question of which kind of agents we are and want to be becomes most important, for it provides the ground upon which one may begin to develop an account of which beliefs, decisions, plans or actions are to be positively assessed.

In recent decades, virtue theory has begun to establish itself as a main normative framework, alongside traditional deontological and consequentialist accounts. It has also progressively diversified as virtue theorists have begun to explore different views on virtue – in addition to the vastly influential Aristotelian theory – and have applied a number of virtue-based tools to address an increasing variety of problems. Similarly, virtue jurisprudence has gained both in relevance and visibility within legal scholarship; it has enlarged its scope of application as a growing number of fields of substantive law have been subjected to virtue analysis, and a great diversity of perspectives on virtue have begun to be employed in legal studies. The relevance of character to sound judicial reasoning has been one of the issues that has benefited the most from a virtue-based analysis. Judicial reasoning is also the main focus of the essays in this volume that primarily discuss virtue – as well as its connections with the judge's emotional dispositions and imaginative capacities.

The book makes a number of distinctive contributions to virtue jurisprudence, and especially to virtue-oriented work on judicial reasoning. First, the time has come for virtue jurisprudence to move from designing its general architecture to developing in detail specific aspects of the theory. An important way in which this may be done is by examining individual juridical virtues and vices. The chapters by Zipursky, Amaya and Elgin contribute to this aspect of theory development by analysing compassion, impartiality, humility, magnanimity and austerity. The analysis of individual virtues and vices is not only an important (and necessary)

[1] For a brief introduction to virtue jurisprudence, see Cimino (2018) and Solum (2015). The essays contained in Farrely and Solum (2008); Amaya and Ho (2012); and Amaya and Michelon (2018) may give a good sense of the kind of work done and the breadth of virtue-based approaches to law.

[2] See Snow (2018a) for an overview.

step towards developing a more thorough virtue-based theory of law and adjudication; it may also have a significant impact on virtue theory in domains other than law, where the investigation of individual virtues and vices is a growing area of research.

Second, a central topic for investigation in virtue jurisprudence (and virtue theory, more broadly) is the structure of virtue. How could virtue be more plausibly conceived? A number of competing models of virtue have been advanced in the literature. Prominent among those is the perceptual account of virtue, according to which virtue is first and foremost a highly refined perceptual capacity.[3] Regardless of the merits and drawbacks that this model might have in ethics, where it has been more forcefully defended, it faces severe objections as an account of judicial virtue, given the constraints of publicity and accessibility of reasons that have to be satisfied in the public domain. However, even if a thoroughgoing perceptual model may be in conflict with important legal commitments, perceptual abilities are still a core element of a virtuous judicial character. Chapters by Elgin, van Domselaar and White examine the perceptual dimensions of judicial virtue as well as some of the worries that may be raised against giving perception a broad role in legal argument.

Third, (neo-)Aristotelian virtue theory is the most influential approach in contemporary virtue theory across disciplines. However, in recent years, increasing attention has been paid to other varieties of virtue theory within Western philosophy as well as to Eastern perspectives on virtue. Likewise, in virtue jurisprudence, the resources of traditions of virtue theories other than Aristotelian ethics have been recently explored, most prominently, Plato's theory of virtue, Confucian views on virtue, sentimentalist virtue theory, as well as natural law approaches.[4] The chapters by van Domselaar and Amaya contribute to this trend towards enlarging the philosophical landscape of virtue jurisprudence by examining the relevance of Murdoch's ethics and exemplarist virtue ethics, respectively, to judicial decision-making.

Fourth, a thriving area of research in contemporary virtue theory is virtue education. An attractive feature of this body of work is that it is highly interdisciplinary, as it engages philosophers, psychologists and scholars working in education theory. Law, however, has not yet fully joined this movement towards virtue education. The training of character is a topic that has received far too little attention in both virtue jurisprudence and legal education scholarship.[5] Kind's, van Domselaar's and Amaya's chapters emphasise the importance of the cultivation of virtue and contribute to the examination of the developmental aspects of judicial virtue as well as the different educational strategies that might be employed to inculcate

[3] See Snow (2018b).

[4] See Annas (2018); Wang and Solum (2012); Slote (2012); Solum (2012); and Amaya (forthcoming).

[5] There are, of course, some exceptions – but generally, much more work remains to be done. See Scharffs (2001); McGinnis (2011); and see Sherletics (2017) and the references therein.

virtuous traits of character within the judiciary. The literature on virtue education intersects with work on professional role ethics. Thus, a focus on virtue acquisition in legal scholarship may also open up a productive collaboration among scholars working in virtue jurisprudence and legal education, as well as in legal ethics.

Finally, virtue jurisprudence has some features that seem problematic such as its focus on agents – and their inner psychology – rather than on (external) actions; the blurring of the distinction between the private and the public realm; the centrality of the notion of virtue, which, in some views, is highly dependent on culture; its reliance (in the dominant Aristotelian version) on a concept of the good life; the fuzziness of the guidelines for action it provides; and its emphasis on a fine-tuned situational appreciation as a critical element for good judgment. These characteristics give rise to doubts as to whether virtue jurisprudence is a framework that is compatible with current liberal legal orders – which are committed not to trespass into the private realm, to responsiveness to the facts of value pluralism, to neutrality among conceptions of the good, and to respectfulness of the rule of law and principle-of-legality virtues, like certainty, publicity and generality. Several chapters in the volume (see the chapters by Elgin, Zipursky, van Domselaar and Kind) discuss the tensions between virtue jurisprudence and the main tenets of liberal legal orders, thereby contributing to addressing the foregoing concerns.

III. Law, Emotion and the Affective Sciences

An important body of literature aims to explore the impact on law of the affective sciences, which have experienced spectacular growth in the last decades.[6] Within contemporary legal theory, law and emotion scholarship began to form as a distinct field of inquiry in the mid-1990s.[7] The aim, at first, was to challenge deep-rooted assumptions about emotions being forces that are contrary to reason and ought not to play a role in law and legal reasoning. The next phase of inquiry moved from examining the legitimacy of emotions in law, to the analysis of which kinds of emotions operate in legal contexts and what roles they play. Later work has engaged in a more normative type of analysis, exploring the dynamics of the relationship between law and emotion – how the emotions bestow law with value, as well as the ways in which the law may channel, shape and transform the emotions of individuals and groups. In very recent years, the literature has expanded rapidly to cover a wider range of areas of substantive law and including a rich number of perspectives in the affective sciences. It is also a very active area of scholarship within legal history.

[6] See for an overview Abrams and Keren (2010).

[7] Of course, reflections on relations between law and emotion stretch much further back, especially within the rhetorical tradition. In addition, some important and neglected work on law and emotion was done by early legal realists, eg Leon Petrazycki.

Despite the theoretical work already done in legal scholarship, the dichotomised picture of reason and emotion, together with the view of law and legal reasoning as a purely cognitive enterprise that should be divested from any emotional influence, still has a strong hold among legal practitioners and scholars.[8] This attitude is out of keeping with findings in psychology, neuroscience, sociology and other relevant disciplines, which show the pivotal contribution of the emotions to reasoning and rationality. The project that law and emotion scholars have ahead is, as Abrams and Keren have argued, threefold.[9] First, it seeks to illuminate the assumptions about emotions upon which law relies. Second, it aims to determine the accuracy of these assumptions in light of relevant empirical findings. And, finally, an important objective of law and emotion scholarship is to advance a number of normative goals: the proposal of doctrinal revisions, the development of institutional design, and the advancement of policies that are responsive to the best available knowledge we have about the nature and role of emotions.

This volume aims to contribute to challenge what has proved to be a highly sticky conception of legal rationality as impervious to emotion, and to show that emotions are not only ineliminable but also a vital component of a sound theory of law and legal reasoning. On Maroney's useful taxonomy, law and emotion scholarship falls under six main categories: an *emotion-centred approach*, which seeks to analyse specific emotions and their impact in law; an *emotional phenomenon approach*, which centres on analysing particular emotion-driven phenomena, such as empathy or affective forecasting, in the law; an *emotion-theory approach*, which focuses on a given theory of emotion and its potential applicability to the legal domain; a *legal doctrine approach*, which seeks to analyse how an area of law incorporates the emotions; a *theory-of-law approach*, which examines the relationship between theories of emotion and different theories of law; and a *legal-actor approach*, which explores how emotions influence or should inform assigned legal functions.[10] This volume advances law and emotion scholarship by making a number of contributions to these different theoretical approaches.

The *emotion-centred approach* has mostly focused on analysing 'negative' emotions, such as shame, disgust, fear and anger, but it is important to explore the role that a wider range of emotions play in law. White's and van Domselaar's chapters emphasise the relevance of positive emotions, such as wonder, curiosity and awe, to judicial decision-making and Amaya's chapter discusses in detail the relevance of the positive emotion of admiration to the development of judicial virtue.

Empathy has been a key topic in the *emotional phenomenon approach*, and it is also a central theme in this volume. The book contributes to the understanding of empathy and its relevance to law by examining the connections between empathy

[8] See Maroney (2018).
[9] Abrams and Keren (2010).
[10] See Maroney (2006).

and attention (in White's chapter), empathy and intimacy (in Hansberg's chapter), empathy, sympathy and compassion (in Hansberg and Zipursky's chapters), and empathy and imagination (in Kind's chapter) as well as by analysing the role of empathy in a number of constitutional law cases (Zipursky's chapter). In addition to empathy, the book also advances the *emotional phenomenon approach* by discussing (in Morton's chapter) the legal implications of the difficulties associated with the attribution of mental states, such as affective states and motives.

While there is no attempt in this volume to articulate and/or defend a particular theory of emotion for the law, the volume advances the *theory of emotion approach* insofar as it discusses a range of ways in which emotions may be evaluated, communicated and nurtured, which are only plausible under the view that emotions include an important cognitive component.

Brady's chapter on the role of emotions in the justification of punishment, as well as Morton's chapter on the ascriptions of states of mind, including emotions, contribute to a core research field in the *legal doctrine approach*, namely, criminal law, and it also expands the scope of this area of study by discussing emotion-related problems that are relevant to constitutional law (in Zipursky's and Kind's chapters) as well as family law and medical law (in Hansberg's chapter).

The *theory-of-law approach* is advanced in this volume by exploring the connections between virtue and emotion and thus the important synergies that there are between virtue jurisprudence and the law and emotion movement.

Finally, most work in the *legal-actor approach* has focused primarily on juries; judge's emotions have comparatively received less attention. Several chapters in this volume focus on judicial reasoning, with an emphasis on the emotional capacities that may improve the quality of their decisional processes and outputs (see the chapters by van Domselaar, White, Elgin, Kind and Zipursky). Particular attention is paid to the epistemic, motivational and expressive roles that emotions may play in judicial decision-making. In addition, the contributions to this volume also broaden the repertoire of relevant legal actors by examining the appropriateness of the police's emotional outlooks (Blum), educational strategies for training the emotions of law students (Amaya), as well as the emotional engagement that is distinctive of intimacy relationships that are relevant to law, such as lawyer-client, doctor-patient and victim-victimiser relationships (Hansberg).

IV. Imagination, Language and History

As with the other key concepts in this collection, the history of theoretical reflection on imagination is rich and deeply contested. Perhaps even more so than virtue and emotion, imagination has swung from being presented as foundational for the mind – it is enough to mention Aristotle, Hume and Kant to get a sense of the historical variety and sweep of such a claim – to it being said to be the very obstacle to and the very enemy of reason and knowledge. Telling a history

of the scholarship on imagination is further complicated by the entanglement of many issues concerning imagination with certain features of language, including what are often called figurative or rhetorical features. Finally, any such history is also complicated – though, in turn, enriched too – by being spread across a whole range of different disciplines, extending considerably beyond philosophy to include psychology, literary theory and history, philosophy and history of science, and much else besides.

In the legal context, although some attention has been paid to imagination – especially amongst twentieth century scholarship in law and literature (James Boyd White's *The Legal Imagination* being, of course, the pioneering and stand-out example)[11] – it is only relatively recently that the imagination has attracted more sustained theoretical attention. There is, certainly, a long and rich tradition of rhetorical theories of law and legal language, and, given the close relationship between certain features of language and processes of imagination, this is highly relevant and important. Work on rhetoric, for instance, has included theorising the role of mental imagery – including the quality of vividness that characterises certain experiences of seeing with the 'mind's eye'.[12] Further, and, as one would expect from the rhetorical tradition, this attention to imagination, and certain related qualities of language, is combined with sophisticated treatment of the relations between advocacy, the audience and judgement. It is often within the rhetorical tradition, rather than in philosophical work, that one encounters the most subtle analyses of, for example, the uses by advocates and effects on audiences of metaphor, metonymy, synecdoche, parable and personification.[13] In addition, given the importance of both virtue and emotion to the rhetorical tradition, there is much to mine within this tradition for examining relations between the three key concepts in this book. Finally, there have been some important studies on the relations between rhetoric and reasoning in particular areas of legal practice, most especially equity.[14]

As important, and underestimated in contemporary legal theory, as the rhetorical tradition is,[15] those who pursue systematic philosophical treatment of imagination may not always find what they are looking for there. Apart from reference to rhetoric, and related work in law and literature – which has often been connected to work on the moral imagination, as for instance in Martha Nussbaum's body of scholarship – the other domain within legal scholarship that has contributed to theorising imagination is cognitive legal studies. Recent decades have seen a burst of legal scholarship in this vein, and much of it is highly relevant to any student of the legal imagination. Some of this scholarship began on the back of the

[11] White (1973).
[12] Eg, see Webb (2009).
[13] See eg Perelman and Olbrechts-Tyteca (1969).
[14] See Watt (2009) and Eden (1986).
[15] With some exceptions, of course: eg generally the work of Peter Goodrich (eg Goodrich, 1987); see also Lowrie and Ludemann (2015).

rise of interest in metaphor and metaphorical cognition, thanks especially to Mark Johnson and George Lakoff's *Metaphors We Live By*.[16] A standout example within legal scholarship in this respect is Steven Winter's *A Clearing in the Forest: Law, Life and Mind*.[17] Further important work in cognitive legal studies has been done by Jerome Bruner, Ellen Spolsky and Linda Berger.[18] This work is important, in part, because, as with all second-generation cognitive studies, it pays close attention to the relations between mind and body, and thus investigates the embodied character of the imagination. In doing so, it also often relates imagination and emotion together.

In addition to the above, there has been important work in the legal context on particular kinds of processes of imagination, with their related features of language. A good deal of this has focused on metaphor and narrative.[19] However, some scholars have also looked at personification, and the use of imaginary figures in legal thought (as one would expect, there is an especially large literature on the Reasonable Person).[20] In addition, there is the scholarship on legal fictions, and, more broadly, fictionality in legal discourse and legal reasoning.[21] What perhaps is missing from this wealth of literature is systematic theoretical reflection on imagination in a legal context. Just what is common to all these processes – for example in metaphorical or figural cognition? Why do these processes – if they do – all deserve to be placed under the canopy of imagination?

Here, legal scholars may find it helpful – as some already have (see eg the chapters by Stern and Del Mar in this volume) – to draw on the recent burst of philosophical interest in imagination. One of the pioneers here has been Amy Kind, who also contributes to this volume. Through her own writing, but also editorially,[22] Kind has done much to revive this topic on the contemporary philosophical agenda. Another contemporary pioneer – though via a different philosophical tradition and connecting also to the important work on the role of imagination in science[23] – is Catherine Elgin, who has also contributed to this volume. Important contemporary philosophical work has also been done on the relations between imagination and emotion – and two philosophers who have been leading this debate, Adam Morton and Michael Brady, are also included in this volume. There are, however, a great many more connections to be made, for instance, by reference to the flowering of work on thought experiments in philosophy,[24] as well as to more general treatments of the structure or architecture of imagination.[25]

[16] See Lakoff and Johnson (1980).
[17] See Winter (2001).
[18] See Bruner (1986); Spolsky (2015); and Berger and Stanchi (2018).
[19] See, recently, Hanne and Weisberg (2018).
[20] See Moran (2003).
[21] See eg Petroski (2019); Del Mar and Twining (2015).
[22] See Kind and Kung (2016); Kind (2016); as well as her blog (*The Junkyard of the Mind*).
[23] See Godfrey-Smith and Levy (forthcoming).
[24] See, recently, Stuart, Fehige and Brown (2017).
[25] See Currie and Ravenscroft (2002); Nichols (2006).

There are many ways to cut the cake of theoretical issues on imagination. Here, we shall mention only three, which also connect strongly to what is examined in this volume: first, the value and danger of the imagination; second, the social character of imagination; and, third, the importance of theorising imagination historically.

A number of the chapters in this volume directly confront issues concerning the role and value, but also the dangers and risks, of imagination in the legal context. Of course, as noted above, attacks on imagination are not new and come in various shapes and sizes: one of them is that imagination belongs on the discovery side of the traditional divide between discovery and justification (see eg Elgin's chapter in this volume). It is then said that, as important as it might be to discovery, imagination does not contribute to the practices of justification. This view also results in a certain division of labour – imagination can be studied by psychologists, who are interested in the causes of judicial decision-making, but is not especially relevant to philosophers, who are more interested in reasons than in causes. On this view, although there is some role and value of imagination, it is a very restricted one. This is an important issue for anyone confronting the topic of imagination in legal scholarship. What is the connection between reason-giving and imagination? Or, is that the wrong question, and ought we instead to loosen the hold of the traditional conceptual divide, with related division of labour, between contexts of discovery and justification? For instance, when Elgin in this volume speaks of using imagination to broaden one's 'conception of what qualifies as someone's home', why is this not closely related to the practice of reason-giving – at least more closely than a strict divide between discovery and justification might suggest? Similarly with the uses of personification examined by Morton and Stern in this volume – are the imaginary figures in legal thought not also part of the legal tests for liability, and thus used by judges as justifications for decisions? Do judges not say that such-and-such a defendant is negligent because the defendant did not do what the Reasonable Person would have done? In what sense is this not a justification – or a practice of reason-giving? As Del Mar argues in his chapter, similar challenges to the orthodox view (which make imagination irrelevant, or marginal, to justification) can be made via the use of legal fictions, metaphors and scenarios (or hypothetical narratives).

Even if, however, one does defend the view that there is a closer relation between imagination and justification than has been previously thought, one might still think there are certain dangers and risks of the imagination. As Morton discusses in his chapter, we may not be especially good at imagining – for instance, the experiences of others (a topic that arises across many chapters of this volume, including in van Domselaar's, Blum's, Zipursky's, Kind's and Hansberg's). Imagination is replete with biases, as with all cognition, but one could ask: does imagining actually enhance the prospects of persons being biased, or does it decrease it? Are there better or worse uses of imagination? If so, what does it mean to imagine well? A lot may be said to hang on these questions for the status of imagination in legal scholarship.

A second issue is that of the social character of the imagination. Arguably, imagination is most commonly approached as a matter for individual minds. However this is further specified – as the process of, say, constructing mental imagery without immediate sensory feedback, or of supposing something is so (as in so-called propositional imagining), or of simulating another person's perspective and experience (how they might have felt in such-and-such a situation), or constructing counter-factual alternatives to what happened – imagination is routinely identified with processes in individual minds. However, when one looks more closely – and this is perhaps especially evident in the legal context, within the pragmatics of adjudication – imagining is something that persons often do together. Thus, for example, advocates and judges engage together, interactively, with hypothetical narratives or with the counterfactual actions of imaginary figures. If we keep in view the relations between imagination and certain features of language, then we can see that imagining is often spread out over time and distributed across a much wider range of persons. After all, to give just one example, the use of metaphor (and metaphorical cognition) is often not a one-off occasion but is instead alive within legal discourse for considerable periods of time, being imagined and re-imagined on multiple occasions, by multiple audiences. In this volume, Del Mar, and to an extent also Stern, make the argument that we need to examine the legal imagination at multiple levels: the individual one remains important, but this alone is insufficient; we need also to pay attention to the interactive and communal dynamics of imagining and its related uses of language.

A final, third, issue is that of the importance of theorising imagination historically. This is most explicitly prominent in Stern's contribution to this volume. In part, the importance of the historical view connects to the above-mentioned point as to the social dimensions of imagination and associated features of legal language. As Stern shows, once introduced, the device of personification is copied and imitated by other legal actors: the prudent man, for instance, travels across many areas of the law – from commercial law (eg the law of bailment) to criminal law and beyond. These are travels across time, and thus any sophisticated engagement with any process of imagining and any related feature of language will track not only the degree of popularity of those processes and features, but also how they change over time (even if one sticks to surface-level descriptions, these can be fascinating, eg the shift in language from the 'prudent man' to the 'reasonable person'). Certain dynamics may only come into view when looked at historically: for example the politics of imagining, with its gender and racial dimensions, may be best seen over time.[26] Further, there are clearly important links between practices of imagination and the general culture: for example with respect to the reasonable person, there are fascinating connections to be mined between such devices in legal thought and their uses in literary production (ie in the history

[26] See eg Robin Stacey's (2018) work on imagination in medieval Wales, with attention, eg to the politics of relations between England and Wales.

of personhood, agency and character in works of literature).[27] Devices like the reasonable person are often said to be some of the most public-facing aspects of legal language and legal thought – indeed, some of them (like the reasonable person) may have been introduced with the public literally in mind (ie as devices that are jury-friendly). It is likely, then, that there is much to explore here as to the historical links between the legal and the popular imagination.

V. Virtue, Emotion and Imagination in Law and Legal Reasoning

A key theme of this collection is that virtue, emotion and imagination are not isolated from each other in legal argument but are instead elements that mutually reinforce each other. There are important connections between all three elements, some of which are highlighted in the chapters contained in this volume.

First, virtue and emotion are closely related dimensions of legal argument. Virtue is both a way of acting and a way of feeling. Virtue requires one not only to act in an appropriate way but also to have the right sort of emotional response. Emotional engagement is thus critical to virtuous legal deliberation. The constitutive link that there is between virtue and emotion (and which is discussed in several chapters of this volume) also obtains between vice and emotion. As argued by Blum in this book, some vices are partly constituted by emotions (or their lack thereof). In addition, emotional involvement is also essential to enhance the perceptual abilities that virtue partly consists of. Both emotional and perceptual capacities are at the core of virtuous behaviour, but these two elements are not isolated. Rather, the perceptions of the virtuous judge are emotionally loaded; emotions improve the quality of the deliverances of the fine-tuned perceptual abilities that are the mark of virtue. They are also central to bringing about the kind of focused attention that results in virtuous legal reasoning and judgement (on this, see van Domselaar's, Brady's and Kind's chapters). Finally, emotions are not only constitutively linked to virtue, but there is also a developmental link, as discussed by Amaya, between them. Virtue education requires nurturing appropriate emotional dispositions, and some emotions, like admiration, play a central role in the acquisition of virtue.

Second, there are close connections between emotion and imagination as well. Imagination is linked to emotion in that part of what is distinctive about some feelings (what it is like to feel them) is that they involve certain sort of imaginings (eg what we imagine about those whom we are scared of or love is part of our feeling scared or in love). There is also a causal relationship between emotion and imagination, as imaginative engagement triggers the generation of emotions.

[27] See eg Frow (2014); Zittoun and Glaveanu (2018).

Imagining certain sorts of emotional objects and events gives rise to a range of corresponding emotions – a point that is of consequence to discussions on criminal punishment, as argued in Brady's chapter in this volume. Imagination is also key to some emotional phenomena like empathy. Empathy can be understood as requiring the sharing of feelings and the embracement of a perspective oriented towards the other, both of which crucially depend on the empathiser's capacity to imagine the other person's subjective experience (see Hansberg's chapter). The capacity to imagine others' emotional reactions is also an important tool for the education of the emotions.[28]

Third, imagination is also intimately connected with virtue. To begin with, the development of imaginative abilities goes hand-to-hand with the acquisition of virtue. Virtue is most efficiently inculcated by imitation, and the process of emulation, as discussed in Amaya's chapter in this volume, critically involves the exercise of imagination. The imaginative participation in the exemplar's ethical experience is necessary for successful imitation. One needs to be able to put oneself in the situation of the exemplar in order to understand how she behaved the way she did, what motivations she had, what her attitudes and feelings were, and what she was responding to. Only after has one gained an adequate understanding of the exemplar's character, is one able to grasp what virtue requires in new circumstances. Thus, imagination is central to fully comprehending exemplary characters and putting that understanding into practice. In addition, imagination is also central in virtuous legal deliberation. When deliberating in the legal context, one needs to rehearse in imagination various competing possible decisions and how the different alternatives are likely to impact the development of the law as well as the parties involved (as Del Mar notes in his chapter, this can be done, for instance, via hypothetical narratives). Virtuous deliberation critically requires a detailed description of the situation of choice faced by the legal decision-maker, prior to any decision that she might take. The exercise of imagination, as argued in van Domselaar's chapter, is necessary for correctly undertaking the description of cases that, from a virtue perspective is a critical part of legal reasoning. A number of the chapters in this volume suggest that there is a close relationship between imagination and the construction and re-construction of the significance and relevance of facts and patterns of facts (see the chapters by Elgin, Kind, Del Mar and Stern). Finally, it might even be the case – as Kind and Morton suggest – that imagination may be profitably understood as a judicial virtue, this being a tighter connection that deserves to be more thoroughly explored.

Thus, virtue, emotion and imagination are mutually reinforcing elements, rather than independent contributors to legal argument. Virtuous judgement requires emotional involvement and imaginative engagement. A central aim of this volume is to provide an analysis of the ways in which these three elements relate to each other within a full-blown theory of legal reasoning. In order to

[28] See Maxwell and Reichenbach (2007).

accomplish this aim, the volume employs a variety of methodological tools and sources beyond those of conceptual analysis that are traditionally used in the field of legal theory, such as literature and the arts (as in Amaya and van Domselaar's chapters), history (see Del Mar and Stern's chapters) and mass media communication (in Blum's chapter).

In addition, this collection deploys a highly interdisciplinary methodology. The development of a theory of legal reasoning that includes virtue, emotion and imagination as main components raises questions and overlaps with the concerns of other fields of philosophical inquiry, such as ethics and epistemology, as well as with topics dealt with in contemporary work on the affective sciences, social psychology, education theory, and cognitive science. Thus, several chapters in this volume draw on bodies of literature and use methods other than those that are the landmark of contemporary analytic jurisprudence. As a result, this volume, we hope, can also show the ways in which the recognition and study of allegedly peripheral elements in law and legal reasoning, such as virtue, emotion and imagination, may also have an impact on legal scholarship at a methodological level, expanding the modes of analysis employed in legal theory and contributing to the cross-fertilisation between law and other disciplines.

VI. Plan of the Book

This book has three parts. Each of these parts includes chapters that focus on one of the target elements of this volume – virtue, emotion or imagination – while keeping the other two elements in the background and examining relations between them in the course of the argument.

The first part 'Virtue – and Emotion, Imagination' contains four chapters that contribute to virtue jurisprudence as well as advance the knowledge of how virtue connects to emotion and imagination. The first chapter, 'Admiration, Exemplarity and Judicial Virtue' by **Amalia Amaya**, explores the relevance of the emotion of admiration to the development of judicial virtue. A critical venue for the development of the traits of character that are virtues in the context of the judicial role is the imitation of exemplary judges. Admiration, argues Amaya, plays a central role in this process as it disposes those who admire to emulate the exemplar in the admired respect. In addition to triggering a process of emulation that results in the acquisition of judicial virtue, admiration also brings with it a number of beneficial social effects for the judiciary at both the individual and the collective level. The chapter concludes by vindicating the importance of cultivating a virtuous disposition to admire in legal education.

The second chapter, 'Impartiality and Legal Reasoning' by **Catherine Elgin**, argues for an understanding of legal judgment as an 'impartial judgment'. Unlike impersonal judgments and virtuous judgements, impartial judgements, claim Elgin, satisfy two core principles that any viable legal system should respect,

namely, the principles of consistency and publicity. Virtue, emotion and imagination are valuable elements in judicial decision-making, but their role, contends Elgin, should be constrained by consistency and publicity.

In 'Austerity, Compassion and the Rule of Law' **Benjamin Zipursky** claims that austerity, that is, a cultivated dispassionateness, sometimes conflicts with the requirements imposed by the rule of law. His argument for this claim relies on a detailed analysis of the US Supreme Court decision in *PLIVA v Mensing*, which eliminated 'failure to warn' claims for all generic prescription drugs. The analysis of this case provided in the minority opinion, written by Justice Sotomayor, often regarded as an empathetic and compassionate judge, was, argues Zipursky, strongly supported by principle-of-legality virtues. This shows, according to Zipursky, that compassion – and the emotional dispositions it involves – is not only in tension with the rule of law, but may in fact sometimes enable better compliance with the values it embeds and protects.

The last chapter in this part, 'All Judges on the Couch? On Iris Murdoch and Legal Decision-Making', by **Iris van Domselaar**, puts forward a Murdochian approach of judicial reasoning. Central to this account is the idea that the judge's vision and her perceptual capacities play a critical role in judicial decision-making. Such perception is affectively-loaded: good judging requires, on this view, an emotional maturity on the part of the judge as well as an attitude of loving kindness and empathy towards the parties. After describing the main features of a Murdochian approach to legal reasoning and the vision-based account of judicial virtue which it underwrites, van Domselaar discusses a number of problems that need to be further explored in order to show the feasibility and legitimacy of this account in a liberal legal order.

Part II, 'Emotion – and Virtue, Imagination', revolves around the place of emotion in law and legal reasoning and its connections with virtue and imagination. The first chapter, 'On Emotions and the Politics of Attention' by **Emily Kidd White**, argues that judges must practice a certain politics of attention, that is to say, a conscious effort to pay attention and distribute it in a principled way. Emotions, claims White, play critical roles in motivating and facilitating this kind of attention, of which empathy is a facet. White identifies a number of ways in which judicial efforts at paying attention to the claimant may go wrong. When seeking to pay attention, judges may obscure, co-opt, selectively empathise with the claimant, or claim the space that is rightfully theirs. Despite these tendencies towards error, argues White, there are important reasons for judges to cultivate a politics of attention. Legal commitments to equality and respect require a practice of judicial reasoning that properly reflects such politics.

In '"Black Lives Matter": Moral Frames for Understanding the Police Killings of Black Males', **Lawrence Blum** examines the absence, amongst police officers, of a particular emotional attitude, namely caring about the life of a human being unknown personally to oneself. Looking closely at five killings of black males in the US, and especially at failure by police officers to come to the aid of subjects after they were shot or taken down, Blum emphasises the importance of attending

to the affective dimension of the moral failures in question. These moral failures, he argues, are not captured by, for instance, reference to stereotyping, implicit bias, or failure to recognise the right of black people. Neither is it sufficient to examine simply the behaviour of police of officers. Rather, what is required is a sophisticated approach to the emotions involved, which were so markedly, and tragically, absent in the police officers in the cases above. There is, Blum insists, an irreducible 'vice of emotional character' in failing to value (black) lives. This vice, he adds, is not solely an individual one: it is also one that can, and ought to, be studied as a social and cultural phenomenon.

The next chapter, 'Suffering and Punishment', by **Michael Brady** continues Blum's examination of the affective dimensions of crime. It focuses specifically on judicial practices of punishment of criminal offenders. Here, Brady argues in defence of the imposition of suffering (in the form of hard treatment) by the judiciary. Words, he says, may not be enough for censure and condemnation – what may be required for punishment (when, of course, it is considered appropriate) is that the offender actually experiences suffering. Wrongdoing, Brady says, merits a certain emotional response from the state, but mere words will often not be effective enough. Defending, in particular, Antony Duff's communicative theory of punishment against objections from Matt Matravers, Brady argues that this theory can explain how the imposition of suffering (in the form of hard treatment) by the state can be legitimate. Brady, then, contributes further to this volume's interest in the social – including institutional – contexts of the emotions.

The last chapter of this part, 'Empathy and Negative Intimacy', by **Olbeth Hansberg**, zooms in on one of the most discussed, and contested, concepts in this volume, namely empathy. Hansberg examines this concept in the particular context of intimate relations. Hansberg's general claim is that empathy is necessary for intimate relations, in part because it is necessary, in intimate relations, to see the other as 'minded'. The principal focus of the chapter is what is meant by empathy in this context. Here, Hansberg helpfully distinguishes empathy from nearby emotional states – such as sympathy and compassion – and also shows how certain empathy-related process, such as emotional contagion, emotional matching and imitation, are not quite fully fledged forms of empathy. Although empathy – understood in its more fully-fledged character as a cognitive and affective-imaginative process – may not always be positive, it is nevertheless necessary for intimate relations.

The third part of the book, 'Imagination – and Emotion, Virtue' examines the role of imagination in law and legal reasoning and its relations to virtue and emotion. The first chapter, 'Empathy, Imagination and the Law', by **Amy Kind** connects neatly to the final chapter of the second part, by also confronting the concept of empathy. Ultimately, Kind argues that empathy may not be the best concept for an inquiry into judicial decision-making. Rather, Kind says, we should work with the concept of imagination. In developing and defending this argument, Kind addresses the highly-charged debate in the US context as to models of the judicial role. The two models that have featured in this debate are the umpire

model and the empathy model. For Kind, however, neither of these two models appropriately captures what are the admirable and desirable qualities amongst judges. It is not, says Kind, empathy, or empathic resonance, that we want judges to exhibit, but instead understanding, which is best cultivated by what Kind calls 'imaginative projection'.

Adam Morton's chapter, 'Imagining Motives', confronts some of the dangers and risks of imagining. In particular, as his title suggests, Morton is concerned with the abilities of persons to imagine the motives of others. Morton is generally sceptical about these abilities – although persons may be good at some aspects of imagining the motives of others (eg whether someone is inclined to help or not), persons are generally not good at, say, 'matching combinations and compromises between all the potential motives' within the actions performed by others. Most attributions of the motives of others is the result of 'shallowly conceptualised expectations of what a person will do and how they might react to what oneself does', and these expectations often mislead us about, for instance, depression, social panic, or the long-term effects of damaging experiences. Given the frequency with which persons in the legal context need to imagine the motives of others, this scepticism about our abilities to imagine them raises serious questions – for instance, as to the impartiality of legal systems.

In 'The Legal Imagination in Historical Perspective', **Simon Stern** is also concerned with how, in the legal context, the actions of others are understood and evaluated. Stern pursues this interest by examining the history of personification – the invention of imaginary figures, whose actions are imagined as part of the application of certain legal tests. Stern's focus is on the introduction of the figure of the reasonable man in the nineteenth century, and especially on one neglected chapter in this story, ie its unsuccessful spell in the law of negotiable instruments. Stern theorises the device of personification – and its related processes of imagining – historically, and he therefore asks: why was it introduced in the first place? How was it deployed over time? Why was it eventually rejected? Stern's analysis is not confined to the area of the law of negotiable instruments; helpfully, he also shows how the device was copied and how it thus travelled across different areas of the law. By examining these travels – some more successful than others – one can also better see the limits of the utility of certain devices and related processes of imagination. And this, in turn, better helps us appreciate the various constraints under which imagination operates in the legal context.

The last chapter, 'The Legal Imagination: Individual, Interactive and Communal', by **Maksymilian Del Mar**, turns to another arguably neglected aspect of theories of the legal imagination, namely its social dimension. Del Mar recognises the importance of the individual level of imagination, and he discusses how, at that level, imagination has an important role to play, including making a contribution to the practices of justification in legal decision-making. However, the role and value of imagination is not limited to the individual level. Imagining is something that people often do together, both interactively in the course of a

trial, as well as collectively and over time. Paying attention also to the relations between processes of imagination and certain features of language, Del Mar offers four examples that, he argues, to be appreciated, ought to be examined at all three levels, ie the individual, the interactive and the communal. These four examples are: fictions, metaphors, figures and scenarios. Some of the role and value of these can, at each level, be expressed via their relations with emotion and virtue (including the affective dynamics of interaction, or collective epistemic virtues).

We hope that this volume will stimulate further research on the ways in which virtue, emotion and imagination may jointly contribute to sound legal argument. In the next section, we suggest some lines for future research.

VII. Future Research

A first area of research that would greatly advance the study of the role that virtue, emotion and imagination play in legal argument is the investigation of vice, rather than virtue, its associated emotions, and the way in which vices may impinge on the legal imagination. In this collection, Zipursky discusses the vice of austerity; Amaya's chapter also briefly touches upon the vices of obsequiousness and arrogance, and Blum examines unconcern and indifference towards other's suffering as a kind of vice that is partly emotional in nature. Important progress could be made by thoroughly investigating the traits of character that are vicious in different legal roles. It would also be necessary to clarify the conditions under which emotions are vicious or which kind of emotional dispositions are involved in vice. In his discussion of indifference, Blum argues that the vice in question consists in a lack of the appropriate emotions, rather than the presence of distinct vicious emotions. Careful analysis of the relationships that may be established between vice and emotional dispositions (or their lack thereof) would advance the understanding of the relevance of character and emotions to sound legal judgement. There is scope here, too, for relating vices with not only emotion, but also imagination. For instance, the absence of imagination – or the inability or unwillingness to imagine something (ie imaginative resistance), for example the suffering of another – is a good example of a vice that matters greatly to adjudication. If one thinks that certain kinds of language – for example metaphorical – are better than others in inviting persons to imagine, and if, again, one thinks that the absence of imagination can be a vice in adjudication, then one can also argue that legal language ought to contain more qualities that invite legal reasoners to imagine.

As mentioned earlier, most work in law and emotion focuses on negative emotions. The emotional register that is relevant to law and legal reasoning is, however, much richer. The emotion of admiration, as a positive emotion, is discussed in detail in this collection, and some attention is paid to other positive

emotions, such as awe, satisfaction and pride, as well as to epistemic emotions, like wonder, curiosity and surprise.[29] A lot of work needs to be done with a view to exploring the role that emotions other than negative ones play in law and legal argument. Such research will greatly benefit and contribute to current research on social and epistemic emotions, which is a growth area in both emotion studies and (virtue) epistemology. Central to the analysis of the variety of emotions that are relevant in law is the study of how they contribute to virtuous legal inquiry and deliberation as well as the way in which they enhance and are bolstered by artefacts of legal imagination. There is, indeed, a potentially very close relationship between certain artefacts of legal language, related processes of imagination, and certain epistemic emotions. Arguably, part of the affective phenomenology of metaphorical imagining is a mixture of wonder (at, say, the semantic incongruity set up by a metaphor), as well as desire to resolve that incongruity. Put more strongly, it is difficult to see how one could properly investigate the role of epistemic emotions without attention to imagination.

Work on virtue, emotion and imagination, as much as the broader field of legal reasoning, focuses on the individual, rather than on the social dimensions of legal argument. The last years have witnessed an increasing attention to the social aspects of the production of knowledge and the processes of reasoning and decision-making. Likewise, a social turn would be necessary in the study of virtue, emotion and imagination in legal contexts. As far as virtue is concerned, there is an array of important questions, some of which are posed in Del Mar's chapter, that are in need of further study: which traits of character improve the quality of social interactions in legal settings? Which virtues foster genuine and productive group deliberations? Do groups and institutions, such as the jury, a multi-member court or an agency, possess virtues? Similarly, the social dimensions of emotions give rise to a host of interesting questions, some of which are only touched upon in this volume. Amaya discusses the social effects within the judiciary of the emotion of admiration; Brady argues for the possibility of attributing emotions to groups and collectives, such as the state; and van Domselaar, White and Hansberg examine the emotional texture of social relationships in legal contexts – such as intimate relationships, relationships between the judge and the parties, and relationships between the judge and counsel. A detailed examination of emotions and its impact on the social dynamics in law would draw from and contribute to current work on the social psychology of emotions. Finally, collective processes of imagination in the legal domain are still largely unexplored – although there is some important work on social imaginaries in philosophy and sociology, little of it has made its way into legal scholarship. When this is tackled, it would be important that the communal imagination is investigated by reference to its relations to the social dimensions of virtue and emotion (as urged, in a preliminary way, in Del Mar's chapter).

[29] See eg Brun, Doguoglo and Kuenzle (2008).

An important aspect that will deserve to be carefully investigated in the future is the impact that social structures, more importantly, legal institutional structures, have on fostering processes of decision-making that are virtuous, emotionally engaged, and enhanced by imagination. As suggested in Blum's chapter, social structures are at the origin of some (individual) vices and vicious sentiments and their remedy depends not only on individual transformation but also in social reform. How do social structures – especially legal institutions – influence, hinder or promote virtue among the different legal actors? Which kinds of emotional demeanour and, more broadly, emotional communication, are encouraged, banned or accepted in legal settings? How could legal institutions and legal culture be transformed so that they can benefit from more genuine and open forms of emotional expression, which would importantly affect the moral quality of the decision-making processes? How could legal institutions best channel and shape the emotions that are likely to be present in legal contexts? And how may legal deliberations be structured, and legal rules and procedures designed, so that they may put in motion the powers of imagination that lie in both individuals, in interactive dynamics, and in communities? Which architectural and spatial designs foster the engagement of virtue, emotion and imagination in legal decision-making? Further work on virtue, emotion and imagination that is responsive to the institutional structure in which these elements operate in legal settings is likely to have a significant impact on legal institutional design and reform.

Another important practical implication of work on virtue, emotion and imagination in law and legal argument is legal education. A principal objective of this book has been the vindication of the critical role that these three elements play in legal reasoning, thereby also contributing to dismantling some deep-seated assumptions in this field. Virtue is not merely a desirable feature for legal actors to have, but is instead an indispensable element in sound legal reasoning; the emotions are not forces contrary to reason, but ineliminable and valuable elements in legal cognition; and imagination, far from being an element alien to law, is a fertile resource for legal argument. If, as argued in this book, virtue, emotion and imagination are core elements in law and legal reasoning, then it seems imperative to rethink and revise the core curricula at the law schools and professional legal training with a view to inculcating virtuous traits of character among law students and practitioners, educate their emotional dispositions, and cultivate their imaginative capacities. Although some important work has been done – especially within law and literature scholarship – on the vital role of imagination in law schools,[30] and some also on the importance of affective pedagogy in legal contexts,[31] there is much that awaits further research.

One final possible topic for future research would begin with recognising the many varieties of imagination and seek to then explore connections between

[30] See, recently, van Klink, van Rossum and de Vries (2019).
[31] See Maughan and Maharg (2011).

these different varieties and virtue and emotion. Philosophers have proposed, for example, distinctions between sensory and cognitive imagination, with the latter not requiring the construction of any mental imagery, but being restricted to say, supposing, conceiving or entertaining something.[32] Others have proposed a distinction between dramatic and hypothetical imagination, with the emphasis in the first being on rehearsal of possibilities, also including the simulation of affect and mental imagery, and being much more self-involving, with the second not involving any such simulation or self-involvement.[33] As Richard Moran says, 'different kinds of imagining involve different kinds of effort, draw on different kinds of resources within the person, and thus may require such things as being receptive in the right way, or having had certain experiences'.[34] Moran also suggests that there may be different standards as to what it is to imagine well in different kinds of imagining. Further, recently, philosophers have been questioning whether the above distinctions are so straightforward, and in particular considering whether there are connections between cognitive (also called propositional) or hypothetical imagining and our affects. Thus, for example, Margherita Arcangeli argues that supposition – which she includes under the canopy of imagination – does connect to our affects, even if less strongly and not as directly as with sensory or dramatic imagination.[35] Whether one accepts these distinctions or not, there is considerable scope here for further interdisciplinary work on varieties of imagining in legal thought, including exploring the connections between these and emotion and virtue. After all, legal thought appears to require both sensory (or dramatic) and propositional (or hypothetical) imagining, and possibly also kinds of imagining in between (such as supposition).

Work on these, among other topics, will only advance legal studies if undertaken in a highly interdisciplinary fashion. As most work on virtue, emotion and imagination in domains other than law shows, understanding how these notions contribute to reasoning and rationality requires a collaborative effort among experts from different disciplines. Broadening the horizon of legal reasoning – and thereby putting forward a complex view of what legal reasoning involves, which appropriately recognises the roles of virtue, emotion and imagination – requires expanding the kind of methods that may be profitably used in legal analysis and embracing an inclusive academic community that trespasses disciplinary frontiers. The collaboration between philosophers and legal scholars that this book is a result of is, we hope, a first step in the direction of integrating work on law, the humanities, and sciences that will further elucidate the interplay of the characterial, affective and imaginative dimensions of legal argument.

[32] For a recent overview, see Stuart (2019).
[33] See Moran (2017).
[34] Ibid, 13.
[35] See Arcangeli (2018).