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The Virtue of Mandatory Disclosure

Matthew A. Edwards

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THE VIRTUE OF MANDATORY DISCLOSURE

MATTHEW A. EDWARDS*

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INTRODUCTION

During the past fifty years mandatory disclosure has emerged as a dominant method of legal regulation in the United States.¹ Disclosure regulation, especially through forms of “targeted transparency,”² is par-

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1. See ARCHON FUNG, ET AL., *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 20–24 (2007); MARY GRAHAM, *DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM* 4 (2002) (discussing emergence of “government by disclosure. . . as a third wave of modern risk regulation”); Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 619 (1999) (“Mandatory disclosure was a central part of the rights revolution of the 1960s and 1970s, and it has become especially prominent in the 1980s and 1990s, largely as an alternative to command-and-control regulation.”).

2. Fung, Graham, and Weil refer to the “required disclosure of specific factual information, usually by corporations or other private organizations” as “targeted transparency.” Fung, et al., *supra* note 1, at xiii; *id.* at 5 (“Instead of aiming to generally improve public deliberation and officials’ accountability, targeted transparency aims to reduce specific risks or performance problems through selective disclosure by corporations and other organizations.”); see also Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 577–83 (2012) (discussing the rise of targeted transparency regulations). Rather than using the term “targeted transparency,” this Article uses the general terms mandatory or mandated disclosure, which are more common in the legal literature.

ticularly prevalent in the realm of consumer law,³ but there are examples in virtually every area of law⁴ “across regulatory areas as diverse as securities regulation, campaign finance, product safety, energy regulation, employment law, environmental law, and health law,”⁵ just to name a few.⁶ Carl Schneider and Lee Teitelbaum capture what might be seen by some as pathology in our political system:⁷

Are companies selling worthless stocks? Securities laws say, “Disclose!” Are creditors lending money usuriously? Consumer protection laws say, “Disclose!” Are manufacturers selling hazardous merchandise? Products-liability law says, “Disclose!” Are police bullying criminal suspects into waiving their rights? Miranda says, “Disclose!” Are spouses soliciting shady antenuptial contracts? Family law says, “Disclose!” Behold, then, disclosure, the sovereign remedy for all your ills.⁸

The turn to mandatory disclosure can be seen as the product of a political struggle (or compromise⁹) between those with libertarian leanings who favor *laissez faire* approaches to market regulation¹⁰ and progressives who desire stronger, more direct forms of government

3. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 659 (2011) (observing that “[f]inancial disclosures stretch to every domain of consumer protection”). The classic example is Truth in Lending disclosures in connection with the extension of consumer credit. See Truth in Lending Act, 15 U.S.C. §§ 1601–1667e (2006).

4. See Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1092 (2007) (“There are dozens, possibly hundreds, of regulatory schemes that use disclosure in whole or in part to accomplish their purposes.”); FUNG, ET AL., *supra* note 1, at 21–23, tbl. 2.1 (summarizing targeted transparency laws from 1996 to 2005).

5. Ho, *supra* note 2, at 577 (“Mandated disclosure to solve informational failures—and to empower parties to make informed decisions—has long been recognized as a theoretical matter. Examples of mandated disclosure abound across regulatory areas as diverse as securities regulation, campaign finance, product safety, energy regulation, employment law, environmental law, and health law.”) (footnotes omitted).

6. See Ben-Shahar & Schneider, *supra* note 3, at 650 (stating that “[m]andated disclosure is ubiquitous” and providing an extensive list of mandatory disclosure laws).

7. See Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL’Y 199, 200 (2005) (noting that the “preference for regulating through disclosure might be seen as either desirable public policy or evidence of pathology in the U.S. political system”); Edward L. Rubin, *Legislative Methodology: Some Lessons From the Truth-In-Lending Act*, 80 GEO. L.J. 233, 234–35 (1991) (“Our penchant for disclosure laws is . . . in part a collective neurosis.”).

8. Carl E. Schneider & Lee E. Teitelbaum, *Life’s Golden Tree: Empirical Scholarship and American Law*, 2006 UTAH L. REV. 53, 98 (2006).

9. See Rubin, *supra* note 7, at 234–35 (referring to penchant for disclosure laws as “in part a political compromise”).

10. See Dalley, *supra* note 4, at 1093 (“[D]isclosure-based regulation appeals to those with a promarket political orientation because it addresses market failure without disturbing other beneficial features of the market.”); see also Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027, 1073 (1996) (noting the “usual tendency of legislatures and of many commentators to reject market control solutions as antithetical to freedom of contract”).

intervention in the marketplace.¹¹ William Sage explains the point well: “Because disclosure laws influence private transactions without substituting direct government regulation, they illuminate all parts of the political spectrum, appealing equally to conservatives, who applaud ‘market facilitation’ and ‘bootstrapping,’ and to liberals, who favor ‘empowerment’ and the ‘right to know.’”¹² Another way to express this point is to state that the typical mandatory disclosure law is “expressively overdetermined” in that “it bears meanings sufficiently rich in nature and large in number to enable diverse cultural groups to find simultaneously affirmation of their values within it.”¹³

Although mandatory disclosure laws purportedly offer something to both libertarians and progressives, such regulation also generates criticism from across the political spectrum. Critics decry the administrative burdens and costs created by mandatory disclosure laws¹⁴ while opponents on the left would consider substantively regulating the terms of consumer contracts to protect the economically disadvantaged and disenfranchised.¹⁵ Both sides in such debates typically share one thing in common—a commitment to evaluating mandatory disclosure regulation instrumentally, based upon whether such disclosures achieve certain recognized public policy objectives. In many cases, this means that mandatory disclosure laws are evaluated by the extent to which such regulations facilitate market efficiency. The debate over disclosure thus tends to become empirical,¹⁶ as advocates fight over the efficacy of par-

11. See Ben-Shahar & Schneider, *supra* note 3, at 681 (observing that mandated disclosure is alluring because it serves both free-market and autonomy principles); Griffith L. Garwood, et al., *Consumer Disclosure in the 1990's*, 9 GA. ST. U. L. REV. 777, 780 (1993) (“[D]isclosure serves as an attractive alternative to the substantive regulation of agreements and conduct as a method of achieving a balanced relationship between the service provider and the consumer.”); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 261 (2002) (“Disclosure rules have an abiding appeal to lawmakers, judges, and scholars who are troubled by the adhesion contract problem, but are still wedded to a free market solution.”).

12. William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1825–26 (1999).

13. Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions?*, 84 TEX. L. REV. 2075, 2085 (2006) (citing Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 587 (2006)).

14. See Ben-Shahar & Schneider, *supra* note 3, at 651:

Although mandated disclosure addresses a real problem and rests on a plausible assumption, it chronically fails to accomplish its purpose. Even where it seems to succeed, its costs in money, effort, and time generally swamp its benefits. And mandated disclosure has unintended and undesirable consequences, like driving out better regulation and hurting the people it purports to help.

See also *id.* at 735 (“Whatever benefits mandated disclosures may offer, mandates are unjustifiable if their costs outweigh their benefits.”).

15. Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 831 (2006) (“Policymakers preferring a free market approach generally favor disclosure, and those favoring a paternalist approach generally favor substantive controls on terms.”).

16. The extent to which the empirical assertions on which policy recommendations are actually tested and established by the accepted methods of social science is another matter. See Schneider & Teitelbaum, *supra* note 8, at 99–100.

ticular disclosures and whether the benefits of disclosure outweigh the costs in various regulatory contexts.¹⁷ In short, the debates generally assume a consequentialist theory of mandatory disclosure.

In contrast to the dominant consequentialist perspective on mandatory disclosure, this Article will contend that mandatory disclosure laws, especially in the context of consumer credit regulation, can profitably be viewed through the lens of virtue ethics, a philosophical rival to the dominant consequentialist and deontological ethical traditions in modern moral theory. The incorporation of virtue ethics into legal theory is part of a vibrant, growing movement called “virtue jurisprudence,” which is devoted to shifting our focus within legal theory away from moral and ethical concepts such as duties, rights, welfare, and consequences, and towards examining the character traits or virtues necessary for people to achieve authentic human flourishing.

To better understand these related scholarly movements, Part I of this Article briefly surveys the rise of virtue ethics in modern moral and ethical theory as well as the emergence of the “virtue jurisprudence” movement in legal theory. Part II explores how virtue theory can enrich our understanding of mandatory disclosure laws. To make the discussion a bit more concrete, this Article uses the regulation of consumer credit as an example of this aretaic approach to mandatory disclosure. In particular, this Article addresses whether mandatory disclosure laws could be used to create the conditions necessary for consumers to achieve “eudaimonia,” or authentic human flourishing, by fostering virtues such as temperance and prudence. Part III then discusses the major objection to the use of law to inculcate virtue—the value pluralism objection. Basically, this boils down to the notion that the legislative promotion of virtue is incompatible with liberal commitments to individual autonomy—the right that we have to choose for ourselves what a good life entails. The Article concludes by arguing that value pluralism need not doom aretaic theories of mandatory disclosure, at least not in the case of mandatory disclosures that are specifically aimed at the promotion of virtues related to enlightened consumption, such as temperance and prudence, as opposed to more controversial virtues related to sexual and religious orthodoxy.

I. THE RISE OF “VIRTUE” IN MORAL AND LEGAL THEORY—A BRIEF SURVEY

A. *The Rise of Modern Virtue Ethics*

Modern moral theory often is viewed as a contest between two dominant approaches to normative ethics:¹⁸ consequentialism,¹⁹ which

17. See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); Ronald J. Mann, *Unsafe at Any Price?*, 157 U. PA. L. REV. PENNUMBRA 167 (2009).

18. See Eric R. Claeys, Response, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889, 894–97 (2009) (providing an excellent account of the deontology/consequentialism debate and the rise of virtue ethics).

is closely linked to welfare economics in modern economic theory,²⁰ and deontology, which is often taken to mean some form of Kantianism²¹ (though that need not be the case). In the middle of the twentieth century, however, discontent with both consequentialist and deontological moral theorizing was manifested in the publication of a path-breaking article by Elizabeth Anscombe, entitled *Modern Moral Philosophy*,²² which proposed “to look for moral norms not in duty concepts but within the virtues or traits of character that one needs to flourish as a human being.”²³ Anscombe is widely credited with launching a modern renaissance in aretaic²⁴ or virtue theory.²⁵ This revival of interest in virtue in modern moral theory has proceeded along several different paths. Some philosophers have sought to enrich existing deontological and consequentialist moral theories by incorporating the moral importance of good character and virtue into those theories.²⁶ Other philosophers, however, have a much more ambitious agenda. These theorists have called for a true philosophical alternative to consequentialism and deontology—a “genuinely *free-standing* ethics of virtue”²⁷ under the banner of “virtue ethics.”²⁸

19. Berys Gaut, *Consequentialism*, in CAMBRIDGE DICTIONARY OF PHILOSOPHY 176 (Robert Audi, ed. 2d ed. 1999) (defining consequentialism as “the doctrine that the moral rightness of an act is determined solely by the goodness of the act’s consequences”); see also Henry R. West, *Consequentialism*, in 2 ENCYCLOPEDIA OF PHILOSOPHY 460 (Donald Borchert, ed. 2d ed. 2006) (“As a name for any ethical theory or for the class of ethical theories that evaluate actions by the value of the consequences of the actions, ‘consequentialism’ thus refers to classical utilitarianism and other theories that share this characteristic”); see also Samantha Brennan, *Moral Lumps*, 9 ETHICAL THEORY & MORAL PRAC. 249, 250 (2006) (“Life is simple for the consequentialist. According to consequentialist moral theories, the right act is the act that brings about the most good overall.”).

20. See EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS AND MORALITY* 12 (2010) (explaining that welfare economics is “a consequentialist theory, as it evaluates the desirability of acts, rules, policies, projects, etc., solely according to their outcomes”); see also Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 329–30 (2008) (summarizing principles of welfare economics).

21. See Nancy (Ann) Davis, *Contemporary Deontology*, in A COMPANION TO ETHICS 205, 205 (Peter Singer ed., 1991) (noting a link between Immanuel Kant and modern deontological moral theories).

22. G.E.M. Anscombe, *Modern Moral Philosophy* 33 PHIL. 1 (1958).

23. Robert B. Loudon, *Virtue Ethics*, in 9 ENCYCLOPEDIA OF PHILOSOPHY 687 (Donald Borchert ed., 2d ed. 2006).

24. See CAMBRIDGE DICTIONARY OF PHILOSOPHY 43 (Robert Audi ed., 2d ed. 1999) (defining *arête* as “the ancient Greek term meaning ‘virtue’ or ‘excellence’”).

25. See Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 9 (2012) (tracing rise of virtue ethics to Anscombe); Rosalind Hursthouse, *Virtue Ethics*, in 6 NEW DICTIONARY OF THE HISTORY OF IDEAS 2421, 2421 (2004) (same); Loudon, *supra* note 23, at 687 (same).

26. See ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* 3 (1999) (noting that “some deontologists and utilitarians have reacted to virtue ethics by seeking to address it within their own theories”); Lawrence J. Jost, *Virtue and Vice*, in 9 ENCYCLOPEDIA OF PHILOSOPHY 678 (Donald Borchert ed., 2d ed. 2006) (citing consequentialists and Kantians that have incorporated virtue into their works).

27. Michael Slote, *Virtue Ethics*, in MARCIA W. BARON, PHILIP PETTIT & MICHAEL SLOTE, *THREE METHODS OF ETHICS: A DEBATE* 176 (1997).

28. A lucid overview of virtue ethics can be found in STAN VAN HOOFT, *UNDERSTANDING VIRTUE ETHICS* (2006). Major contributions to the field include ALASDAIR MACINTYRE,

The “bewildering variety of claims made by philosophers in the name of virtue ethics”²⁹ makes trying to sum up the core teachings of virtue ethics (or virtue theory, generally) a perilous business.³⁰ Nevertheless, as Heidi Li Feldman states with clarity: “What unites philosophers in the virtue ethics tradition . . . is their concern with the quality of human life and an effort to identify both what counts as a life of high quality or worth and the character traits it takes to achieve one.”³¹ In the interest of simplicity, I will focus here on the most influential strand of virtue ethics in legal theory, *neo-Aristotelian* virtue ethics,³² which, as one can tell by its name, is heavily indebted to Aristotle,³³ and his classic work, *Nicomachean Ethics*.³⁴ Neo-Aristotelian virtue ethics differs from deontology and consequentialism in that it “derives its justification from virtue as an end in and of itself: virtue promotes human excellence, and human excellence is an end of itself, not tethered either to the concepts of duty or welfare.”³⁵

But what, exactly, does such a theory entail? At the risk of gross oversimplification, we can note three core principles of contemporary, neo-Aristotelian virtue ethics. First, virtue ethics teaches us that “an action is right if and only if it is what an agent with a virtuous character would do in the circumstances.”³⁶ Second, virtuous agents have certain

AFTER VIRTUE: A STUDY IN MORAL THEORY (1981); PHILIPPA FOOT, NATURAL GOODNESS (2001); PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY (1978); ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999); MICHAEL SLOTE, MORALS FROM MOTIVES (2001); CHRISTINE SWANTON, VIRTUE ETHICS: A PLURALISTIC VIEW (2003). Collections include VIRTUE ETHICS: OXFORD READINGS IN PHILOSOPHY (Roger Crisp & Michael Slote eds., 1997); VIRTUE ETHICS: A CRITICAL READER (Daniel Statman ed., 1997); HOW SHOULD ONE LIVE?: ESSAYS ON THE VIRTUES (Roger Crisp ed., 1996).

29. Justin Oakley, *Varieties of Virtue Ethics*, 9 RATIO 128, 128 (1996).

30. Kyton Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 479 (2004) [hereinafter Huigens, *Aristotelian Criminal Law*] (“[A]retaic ethics is hardly a monolithic school of thought. On the contrary, it exhibits the variety and dissension of any young and healthy intellectual enterprise.”).

31. Heidi L. Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI-KENT L. REV. 1431, 1436 (2000).

32. Peter Simpson, *Contemporary Virtue Ethics and Aristotle*, in VIRTUE ETHICS: A CRITICAL READER, *supra* note 28, at 245 (“They are Aristotelians because they accept Aristotle’s fundamental ideas; they are neo-Aristotelians because they reject some of his conclusions, notably about manual labor, slavery and women.”).

33. See Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 70 (2006); Karen Stohr, *Contemporary Virtue Ethics*, 1 PHIL. COMPASS 22, 23 (2006). Aristotle in turn, was undoubtedly indebted to his teacher, Plato, and scholars even have noted that focus on virtue can be seen in earlier Eastern philosophy, as well as “later Greek and Christian writers [such as Sir Thomas Aquinas] who continued to emphasize the central importance of the virtues in human life.” Rosalind Hursthouse, *Virtue Ethics*, in 6 NEW DICTIONARY OF THE HISTORY OF IDEAS 2421, 2421 (2004).

34. For a new translation with commentary, see ARISTOTLE’S NICOMACHEAN ETHICS (Robert C. Bartlett & Susan D. Collins eds. & trans., 2011).

35. Chapin F. Cimino, *Private Law, Public Consequences, and Virtue Jurisprudence*, 71 U. PITT. L. REV. 279, 285 n.13 (2009).

36. Oakley, *supra* note 29, at 129; see also HURSTHOUSE, *supra* note 26, at 28 (similar formulation).

character traits known as virtues³⁷—“the core characteristics valued by moral philosophers and religious thinkers: wisdom, courage, humanity, justice, temperance and transcendence.”³⁸ Third, for many virtue ethicists, there is a vital relationship between the virtues and “eudaimonia,”³⁹ which “is a transliteration of the Greek word for prosperity, good fortune, wealth, or happiness.”⁴⁰

Before moving on to the rise of virtue in legal theory, two of the terms above, *virtue* and *eudaimonia*, require a bit of unpacking since they are essential for understanding neo-Aristotelian virtue ethics. We can turn to the concept of virtue first. Christine Swanton states: “A virtue is a good quality or excellence of character. It is a disposition of acknowledging or responding to items in the field of a virtue in an excellent (or good enough) way.”⁴¹ Virtue ethicists often view moral virtues⁴² as an ideal balance or mean between possessing too much or too little of a trait in a particular field of human endeavor.⁴³ A commonly used example is courage:

Aristotle argued that the moral virtues can be conceptualized as the mean between two opposing character deficiencies with respect to a morally neutral emotion. Courage, for example, is a mean between the opposing vices of cowardice and rashness; the morally neutral emotion is fear. Cowards are disposed to fear too

37. See HURSTHOUSE, *supra* note 26, at 29 (“A virtuous agent is one who has, and exercises, certain character traits, namely, the virtues.”); Rosalind Hursthouse, *Normative Virtue Ethics*, in VIRTUE ETHICS: OXFORD READINGS IN PHILOSOPHY, *supra* note 28, at 22–23.

38. CHRISTOPHER PETERSON & MARTIN E. P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION 13 (2004).

39. Not all versions of virtue ethics are eudaimonistic. See Christopher Cordner, *Three Contemporary Perspectives on Moral Philosophy*, 30 PHIL. INVESTIGATIONS 65, 80 (2007) (commenting on Christine Swanton’s rejection of eudaimonism); Ekow N. Yankah, *Virtue’s Domain*, 2009 U. ILL. L. REV. 1167, 1173 n.11 (“An Aristotelian view need not be aretaic. Such a view could conceivably be eudaimonistic or a non-eudaimonistic virtue theory.”) (crediting Larry Solum for this point).

40. See Scott Carson, *Eudaimonia*, in 10 ENCYCLOPEDIA OF PHILOSOPHY 10 (Donald Borchert ed., 2d ed. 2006).

41. Christine Swanton, *A Virtue Ethical Account of Right Action*, 112 ETHICS 32, 38 (2001).

42. Moral virtues are often contrasted with intellectual virtues. See George Bragues, *Seek the Good Life, Not Money: The Aristotelian Approach to Business Ethics*, 67 J. BUS. ETHICS 341, 345 (2006); Chapin F. Cimino, *Virtue and Contract Law*, 88 OR. L. REV. 703, 713 (2009) (distinguishing moral/character and intellectual/reasoning traits). One author explains:

Virtues are conventionally divided into two categories: intellectual virtues and moral virtues. The intellectual virtues perfect our reasoning faculties. Those intellectual virtues located in the speculative intellect are understanding, science, and theoretical wisdom; the intellectual virtues in the practical intellect are practical wisdom or prudence, and art. The moral virtues perfect our appetites and most prominently include justice, temperance, and fortitude.

Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism*, 80 FORDHAM L. REV. 1997, 2018 (2012) (footnotes omitted).

43. See Richard Kraut, *Aristotle’s Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2001), available at <http://plato.stanford.edu/entries/aristotle-ethics/> (“[E]very ethical virtue is a condition intermediate between two other states, one involving excess, and the other deficiency.”).

much; those who are rash are insufficiently sensitive to danger and fear too little. The courageous human is disposed to fear that is proportionate to the situation.⁴⁴

The notion of virtue, however, goes beyond mere action:

Virtues do not consist simply of acquired dispositions to engage in certain external actions. They are far deeper character traits that, in addition to manifesting themselves in specific actions, are bound up with a person's reasons for taking a particular action as well as her emotional state as she does so.⁴⁵

Accordingly, just as “[a] person who does the right thing for the wrong reasons is not virtuous,”⁴⁶ good habits alone are not virtues since they can be mindless.⁴⁷ Doing good is thus not the same as being virtuous. On the other hand, merely wanting to do good without effective execution also is not enough to constitute virtue. Olivia Bailey points out that “Aristotelian virtue ethics excludes the person with good intentions but a grossly erroneous understanding of how to realize them from being virtuous.”⁴⁸ To sum up, virtue means more than wanting to do the right thing or doing the right thing, instead “[t]he virtuous agent . . . does the right thing, undividedly, for the right reason, in the appropriate way—honestly, courageously, and so on.”⁴⁹

44. Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory*, 70 BROOK. L. REV. 475, 497 (2005) [hereinafter Solum, *Aretaic Turn*]; see also David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101, 1116 (2010) (“The traditional understanding of the moral virtues is Aristotle’s assertion that a virtue is the mean between two extremes—for example, courage is the mean between cowardice and recklessness.”).

45. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 864 (2009); see also Rosalind Hursthouse, *Virtue Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Edward N. Zalta, ed., 2003), available at <http://plato.stanford.edu/entries/ethics-virtue>. Hursthouse writes:

A virtue such as honesty or generosity is not just a tendency to do what is honest or generous, nor is it to be helpfully specified as a “desirable” or “morally valuable” character trait. It is, indeed a character trait—that is, a disposition which is well entrenched in its possessor, something that, as we say ‘goes all the way down’, unlike a habit such as being a tea-drinker—but the disposition in question, far from being a single track disposition to do honest actions, or even honest actions for certain reasons, is multi-track. It is concerned with many other actions as well, with emotions and emotional reactions, choices, values, desires, perceptions, attitudes, interests, expectations and sensibilities. To possess a virtue is to be a certain sort of person with a certain complex mindset.

46. Peñalver, *supra* note 45, at 864.

47. See Julia Annas, *Virtue Ethics*, in THE OXFORD HANDBOOK OF ETHICAL THEORY 515, 516 (2006). Good habits can eventually lead to virtue, however. See also Colombo, *supra* note 25, at 14 (“[V]irtue has been commonly defined as the ‘habit’ of doing good, and habits are learned via repeated doing.”) (footnote omitted) (citing Leslie Stephens, *Virtue-Based Ethical Systems*, in ETHICAL THEORY, CLASSIC AND CONTEMPORARY READINGS 318 (Louis P. Pojman ed., 2d ed. 1995)).

48. Olivia Bailey, *What Knowledge Is Necessary for Virtue?*, 4 J. ETHICS & SOC. PHIL. 1, 13 (2010).

49. Annas, *supra* note 47, at 516. See also Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 CONST. COMMENT. 97, 149 (2009) (“The virtues are both ‘character traits’ and, more deeply, ‘excellences of character.’ They involve not merely a disposition to act in

The second term in virtue ethics that requires further discussion is the concept of eudaimonia.⁵⁰ Although eudaimonia can be translated as “happiness,”⁵¹ modern virtue ethicists prefer to translate eudaimonia as “flourishing,” to avoid the implication that eudaimonia entails subjectively experienced, hedonistic pleasure.⁵² As Sherman Clark puts it quite colorfully, happiness in the virtue ethics tradition is “not the satiation of a glutton, or the grinning contentment of an idiot.”⁵³ In contrast, modern virtue ethicists posit that eudaimonia is intimately connected with virtue⁵⁴ and authentic human flourishing demands more than the mere satisfaction of individual preferences, or the maximization of utility or wealth.⁵⁵ We will return to the concept of eudaimonia or flourishing below in the context of mandatory disclosure and objections to virtue inculcation.

B. *The Aretaic Turn in Legal Theory: The Emerging Virtue Jurisprudence*

The rise of virtue ethics in moral theory has not gone unnoticed in the legal academy, where scholars have begun to investigate the benefits of applying the teachings of virtue ethics to law and legal institutions, in a burgeoning movement that has been termed “virtue jurisprudence.”⁵⁶ Just as virtue ethics offers a third way in the debate

particular ways, but without particularly virtuous reasons for doing so, but actually acting virtuously and for virtuous reasons.”) (footnotes omitted).

50. See generally Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 761–72 (2009) (discussing human flourishing in great detail).

51. See Carson, *supra* note 40.

52. See Annas, *supra* note 47, at 520; Hursthouse, *supra* note 45 (observing that “virtue ethicists claim that a human life devoted to physical pleasure or the acquisition of wealth is not *eudaimon*, but a wasted life”); Carson, *supra* note 40, at 10 (“In philosophical contexts the Greek word ‘eudaimonia’ has traditionally been translated simply as ‘happiness,’ but a number of contemporary scholars and translators have tried to avoid this rendering on the grounds that it can suggest unhelpful connotations in the mind of the uncritical reader.”).

53. Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 BUFF. L. REV. 757, 772 (2005).

54. See Hursthouse, *supra* note 45 (“All standard versions of virtue ethics agree that living a life in accordance with virtue is necessary for eudaimonia.”); Carson, *supra* note 40, at 10 (“As is well known, Aristotle agreed that virtue is a necessary condition for eudaimonia but held that it is not sufficient.”); Loudon, *supra* note 23, at 688 (“Traditionally, moral virtues have been defined as traits that human beings need to live well or flourish.”); Peñalver, *supra* note 45, at 864 n.169 (“While the virtues are conducive to human flourishing, their possession is no guarantee that the virtuous individual will in fact flourish.”); Statman, *Introduction to Virtue Ethics*, in STATMAN, *supra* note 28, at 8 (“Virtues are viewed as necessary conditions for, or as constitutive elements of, human flourishing and well-being.”).

55. See Ronald J. Colombo, *Buy, Sell, or Hold? Analyst Fraud from Economic and Natural Law Perspectives*, 73 BROOK. L. REV. 91, 140–41 (2007) (contrasting law and economics view of efficiency and wealth maximization with natural law notion of eudaimonia or true human flourishing).

56. The first book devoted to the subject was VIRTUE JURISPRUDENCE (Colin Farelly & Lawrence B. Solum eds., 2008).

between consequentialists and deontologists in moral theory,⁵⁷ virtue jurisprudence provides an alternative in the stalemate between prevailing schools of deontological and consequentialist thought in normative legal theory.⁵⁸

The virtue jurisprudence program is still in a relatively early stage of development, though the literature is growing at a remarkable rate⁵⁹ with scholars analyzing and evaluating the value of virtue theory in a range of different substantive areas of law.⁶⁰ One does not want to reduce aretaic legal theory to the level of slogans, nevertheless, Colin Farrelly and Lawrence Solum sum up the virtue jurisprudence movement as follows:

57. See Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137, 1183 (2012) (“Virtue ethics are seen as a ‘third way’ around the eternal battle between the consequentialists and the deontologists.”) (citing Christopher Miles Coope, *Modern Virtue Ethics*, in VALUE AND VIRTUES: ARISTOTELIANISM IN CONTEMPORARY ETHICS 37–38 (Timothy Chappell ed., 2006)).

58. The debate is often conceived of as a between rights-based deontological theories often indebted to Kant and law and economics theories with a grounding in welfare economics. For a particularly lucid discussion of this debate, see Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449 (2006); see also Colin Farrelly & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in FARRELLY & SOLUM, VIRTUE JURISPRUDENCE, *supra* note 56, at 3–6. This state of affairs has led Colin Farrelly and Larry Solum to conclude that “contemporary normative legal theory, despite its vibrancy and sophistication, is stuck in certain recurring patterns of irresolvable argument.” *Id.* at 6.

59. A major contribution to the emerging virtue jurisprudence literature was a recent special issue of the *Cornell Law Review* that concerned whether property law ought to incorporate the teachings of virtue ethics. The lead articles were Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009). Responses included Eric R. Claeys, Response, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009); Jedediah Purdy, Response, *A Few Questions About the Social-Obligation Norm*, 94 CORNELL L. REV. 949 (2009); Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009); Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 CORNELL L. REV. 991 (2009). Alexander’s reply to the responses to his lead article can be found in Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063 (2009).

60. See Solum, *supra* note 43, at 494–95 (citing works in many fields of law). One leader of this movement is Larry Solum, who has done important work on virtue ethics, judging, and constitutional theory. See Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centred Theory of Judging*, 34 METAPHILOSOPHY, 178 (2003). [hereinafter Solum, *Theory of Judging*]; Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 S. CAL. L. REV. 1735 (1988). [hereinafter Solum, *Judicial Selection*]; Solum, *Aretaic Turn*, *supra* note 43. Another scholar at the vanguard is Kyron Huigens who has been the leading proponent of an explicitly aretaic approach to criminal law. See Darryl K. Brown, *What Virtue Ethics Can Do For Criminal Justice: A Reply to Huigens*, 37 WAKE FOREST L. REV. 29, 29 (2002) (noting that Huigens has produced a “series of innovative, trenchant articles . . . developing a virtue ethics approach to criminal law”). Huigens’s works include Kyron Huigens, *On Aristotelian Criminal Law: A Reply to Duff*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 465 (2004); Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97 (2002) [hereinafter Huigens, *Homicide in Aretaic Terms*]; Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 425 (2002); Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1237 (2000); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000) [hereinafter Huigens, *Dead End of Deterrence*]; Kyron Huigens *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431 (1998); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995).

For virtue jurisprudence, the final end of law is not to maximize preference satisfaction or to protect some set of rights and privileges: the final end of law is to promote human flourishing—to enable humans to lead excellent lives . . . *the fundamental concepts of legal philosophy should not* be welfare, efficiency, autonomy, or equality; the fundamental notions of legal theory should be virtue and excellence.⁶¹

Even more directly, Solum states: “Writ large, virtue jurisprudence is the view that the proper aim of legislation is the promotion of human flourishing through creation of the conditions for the development of human excellence—the distinctively human virtues and vices.”⁶²

By now, the reader may have questions about whether virtue ethics is a suitable alternative to the prevailing deontological or consequentialist schools of moral and ethical theory, and whether, and exactly how, the concepts of virtue and eudaimonia can fruitfully be incorporated into legal discourse. The next section will explore how virtue jurisprudence might be applied to mandatory disclosure laws, which may partially answer such questions, though the discussion is also likely to raise deep concerns regarding the role of virtue in lawmaking.

II. VIRTUE ETHICS AND MANDATORY DISCLOSURE

A. *Shifting the Perspective to Virtue and Human Flourishing*

Why do we have mandatory disclosure laws? It may be difficult to generalize regarding a legal phenomenon that exists in myriad distinctive and different regulatory environments.⁶³ The conventional consequentialist or utilitarian perspective assumes, however, that compelling firms or individuals to make disclosures will produce good consequences. From a consequentialist perspective, it would be absurd to require disclosures (which entail a social cost) unless we believed that the provision of information will change behavior in some way that we, as members of society deem beneficial. The precise nature of the good consequences depends on the area of law in which the disclosures are mandated:⁶⁴ more efficient and fraud-free securities markets (securities disclosure laws), more efficient and fraud-free consumer credit markets (truth in lending laws), better-informed and presumably healthier eating choices (nutritional labels), less smoking (cigarette labels), and so on. In each regulatory realm, presumably, regulators have determined that the mandated disclosures will produce good consequences that outweigh the costs of these disclosures.⁶⁵ If such a calculation has not been done, or it turns out to be incorrect, then the disclosure regime

61. Colin Farrell & Lawrence B. Solum, *An Introduction to Aretaic Theories of Law*, in VIRTUE JURISPRUDENCE, *supra* note 56, at 2–3 (emphasis in original).

62. See Solum, *supra* note 44, at 478.

63. See *supra* notes 1–3 and accompanying text.

64. See Dalley, *supra* note 4, at 1120 (noting that often “regulatory disclosure schemes are intended to produce a particular *result* in a market”) (emphasis in original).

65. *Id.* at 1129 (suggesting that regulators identify non-pretextual regulatory goals for disclosure schemes).

may fail from a consequentialist perspective.⁶⁶ In contrast, a deontological perspective on mandatory disclosure would ask whether people have some “right” to certain information or whether a firm has a moral obligation to provide certain information, irrespective of whether or not providing this information will actually produce good consequences. Even more radically, a mandatory disclosure deontologist might argue that people have the right to certain information even if providing this information produces bad consequences.⁶⁷

Virtue jurisprudence compels us to view mandatory disclosure from a different perspective than the dominant consequentialist vantage point. Recall how Larry Solum, one of the movement’s intellectual leaders, describes the basic idea of virtue jurisprudence: “Writ large, virtue jurisprudence is the view that the proper aim of legislation *is the promotion of human flourishing through creation of the conditions for the development of human excellence*—the distinctively human virtues and vices.”⁶⁸ In the context of mandatory disclosures, instead of merely asking whether consumer or individual “rights” to obtain certain information are being protected (standard deontological concerns) or whether market failures are impeding the utilitarian satisfaction of individual consumer preferences (the classic law and economics/consequentialist perspective), virtue jurisprudence asks us instead to consider the connection between mandated disclosures, the virtues, and eudaimonia or human flourishing. More specifically, a virtue ethicist might question whether mandatory disclosure laws can contribute to human flourishing by fostering certain virtues in consumers or citizens. To figure out what those virtues might be, it is helpful here to note two aspects of human flourishing identified by Gregory Alexander and Eduardo Peñalver:

First, human beings develop the capacities necessary for a well-lived, and distinctly human life only in society with, indeed, dependent upon, other human beings. To put the point even more directly, living within a particular sort of society, a particular web of social relationships, is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish.

The second characteristic of human flourishing to be stressed is that human flourishing must include at least the capacity to make meaningful choices among alternative life horizons, to discern the

66. See Ben-Shahar & Schneider, *supra* note 3, at 735 (“Whatever benefits mandated disclosures may offer, mandates are unjustifiable if their costs outweigh their benefits.”); Dalley, *supra* note 4, at 1127 (noting that “the costs of any particular disclosure scheme may outweigh its benefits”).

67. There may be situations where more information in the marketplace ironically produces “bad” outcomes because consumers do not respond to the additional information as policymakers would have hoped. See, e.g., Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 131 (2006) (noting, in the credit card context, that “by putting the government into the fray, there is always the risk that debiasing will take the form of rebiasing, by overstating credit card risks to individuals who would do well to have them”).

68. See Solum, *supra* note 44, at 478 (emphasis added).

salient differences among them, and to deliberate deeply about what is valuable within those available alternative choices. This is what authentic, robust freedom must involve.⁶⁹

Accordingly, assuming that the proper social environment exists for fostering eudaimonia, those virtues that facilitate meaningful decision-making may facilitate (or embody, depending on our view) human flourishing. But which virtues might those be? The first virtue that comes to mind is the classic virtue of temperance,⁷⁰ which is “the virtue of control over excess.”⁷¹ Louke van Wensveen summarizes this virtue as follows:

Aristotle considered the rule of mind over desire a virtue, called *sôphrosunê*, which we usually translate as “temperance” Specifically, he argued, temperance preserves practical wisdom from influence of undue manifestations of desire Consequently, the equanimity resulting from temperance contributes to the cultivation of virtue in general. Moreover, the moderation of desire contributes to the attainment of personal flourishing.⁷²

To return to the concept of virtue as a mean,⁷³ Van Hooft explains: “[T]he central meaning of temperance for Aristotle is that it is the mean between being too preoccupied with pleasure (licentiousness) and having too little interest in it (insensibility). For Aristotle, then, not being attracted to the pleasurable things in life is just as much an ethical failure as indulging them to excess.”⁷⁴

Peterson and Seligman, who approach virtue from the perspective of positive psychology, subdivide the strength of temperance into four positive traits: (1) forgiveness and mercy; (2) humility and modesty; (3)

69. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 135 (2009).

70. At times, aspects of this virtue are referred to as frugality. See Antonio Argandoña, *Frugality*, 4 (IESE Business School, University of Navarra, Working Paper No. 873, 2010), available at <http://www.iese.edu/research/pdfs/DI-0873-E.pdf> (“Frugality, as a combination of temperance and prudence, demands . . . that all the effects of human action be taken into account: the effects on the agent and the effects on others (including the environment, which will affect others now and in the future).”); James A. Nash, *Toward a Revival and Reform of the Subversive Virtue: Frugality*, in CONSUMPTION, POPULATION AND SUSTAINABILITY: PERSPECTIVES FROM SCIENCE AND RELIGION 167, 174 (Audrey R. Chapman, et al., eds. 2000) (suggesting that frugality can be “understood as the economic subspecies of temperance”); Louke van Wensveen, *Attunement: An Ecological Spin on the Virtue of Temperance*, 8 PHIL. IN THE CONTEMP. WORLD 67, 68–69 (2001) (discussing connections between temperance and frugality).

71. Peterson & Seligman, *supra* note 38, at 38.

72. Van Wensveen, *supra* note 70, at 67 (citing Aristotle’s NICOMACHEAN ETHICS, II.2, 1104a25, and VI.5, 1140b11–20) (footnote omitted); Sherman Clark, *Neoclassical Public Virtues: Towards an Aretaic Theory of Law-Making (and Law Teaching)* 19, (Michigan Law School, Public Law and Legal Theory Working Paper Series, Working Paper No. 189, 2010), available at <http://ssrn.com/abstract=1552413> (“A temperate person . . . is one who can enjoy but is not enslaved to pleasure or prestige.”).

73. See *supra* notes 43–44 and accompanying text.

74. VAN HOOFT, *supra* note 28, at 61; see also Bragues, *supra* note 42, at 346 (“[S]elf-control regulates our attraction to pleasure. It is a mean between the licentiousness or self-indulgence entailed by having too much pleasure, or delighting in the wrong things, and the insensibility of taking too little enjoyment from life.”).

prudence; and (4) self-regulation.⁷⁵ The latter two—prudence and self-regulation—seem to bear some connection to the type of meaningful decision-making noted above by Gregory Alexander and Eduardo Peñalver. Self-regulation is “how a person exerts control over his or her responses so as to pursue goals and live up to standards.”⁷⁶ More specifically, self-control,⁷⁷ “allows people to override responses that hinder happiness or health and, further, to substitute or develop more adaptive responses.”⁷⁸ We can thus see why, in Peterson and Seligman’s view, self-control is “a vital psychological strength that is crucial to personal well-being”⁷⁹ that “should be amply cultivated and fostered.”⁸⁰ Although Peterson and Seligman see few drawbacks to possessing self-control⁸¹ they acknowledge that “the emphasis on consumption in modern American society undermines the value of self-control, despite the fact that hard work and self-reliance are cornerstones of the American dream.”⁸² They comment, “During the 20th century, American culture shifted away from its traditional emphasis on self-denial toward active promotion of self-indulgence and immediate gratification, stimulated in part by advertising and economic realities, and it is plausible that such shifts have reduced the overall level of self-control in American culture.”⁸³

Prudence is the other aspect of temperance that bears some connection with frugality. Despite its modest, modern connotations, in virtue ethics, “prudence” is of immense importance. Prudence in virtue theory is synonymous with “practical wisdom” or *phronēsis*,⁸⁴ which can be thought of as the intellectual virtue that unites all of the other virtues.⁸⁵

The centerpiece of aretaic ethics is thus an exemplary practical rationality or practical wisdom—in Greek, “*phronesis*.” *Phronesis* is the ability to deliberate on and frame an overall conception of the good life—that is, the flourishing life—and to integrate one’s particular choices into this all-encompassing conception. The per-

75. PETERSON & SELIGMAN, *supra* note 38, at 430–44.

76. *Id.* at 500.

77. *Id.* (“The term *self-control* is sometimes used as a synonym for self-regulation, but other writers use it more narrowly to refer specifically to controlling one’s impulses to behave in a moral fashion.”) (emphasis in original).

78. *Id.* at 516.

79. *Id.*

80. *Id.*

81. *Id.* at 508 (observing that self-control could be used “in the service of dastardly and anti-social aims”).

82. *Id.*

83. *Id.* at 513.

84. VAN HOOFT, *supra* note 28, at 66.

85. *Phronēsis* can be contrasted with another intellectual virtue, *sophia*, which is usually translated as theoretical wisdom. See Stefan Kapsch & Peter Steinberger, *The Impact on Legislative Committees and Legislative Processes of the Use of the Initiative in the American West*, 34 WILLAMETTE L. REV. 689, 696 (1998) (“*Phronēsis* is defined largely in negative terms; it is not the same as *sophia* or theoretical wisdom, which is a matter of scientific knowledge (*epistēmē*) and insight (*nous*). *Sophia* is about immutable facts in the world, things that cannot be other than they are.” (footnotes omitted)).

son possessed of phronesis, the phronimos, is a person of mature judgment who has the capacity to identify and pursue the good amid the contingencies of practical human affairs.⁸⁶

From a positive psychological perspective, Peterson and Seligman define prudence in a way that should have apparent relevance for mandatory disclosure laws:

Prudence is a cognitive orientation to the personal future, a form of practical reasoning and self-management that helps to achieve the individual's long-term goals effectively. Prudent individuals show a farsighted and deliberative concern for the consequences of their actions, successfully resist impulses and other choices that satisfy shorter term goals at the expense of longer ones, have a flexible and moderate approach to life, and strive for balance among their goals and ends.⁸⁷

Prudence may seem a bit like the concept of expected utility theory in rational choice theory,⁸⁸ under which individual "decision makers conduct an explicit or implicit cost-benefit analysis of competing options and select the optimal method of achieving their goals."⁸⁹ For virtue ethicists, however, the notion of prudence is a morally richer and thicker concept than expected utility theory. We can see this point in this discussion of the virtue ethics decision process:

Confronted with an irreducibly complex moral world populated by a plurality of values, the wise person is the one who is consistently able to reconcile them and discern the correct course of action. But the exercise of wisdom does not involve the arithmetic application of a simple cost-benefit formula. Or, as Rosalind Hursthouse puts it, virtue ethics does not aim at generating an "algorithm for life' independent of judgment." Instead, judgment, understood as constitutive of the virtue of practical wisdom, plays a central, organizing role.⁹⁰

Prudence in the virtue ethics tradition, therefore, goes well beyond the notion of identifying and employing the means most likely to help a person achieve her desired ends, whatever they might be. In virtue ethics, as opposed to some forms of economic analysis, which treat a person's preferences as beyond critique,⁹¹ a person's ends and means are

86. Kyron Huigens, *Nietzsche and Aretaic Legal Theory*, 24 CARDOZO L. REV. 563, 573 (2003) (citing Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1455–56 (1995)).

87. PETERSON & SELIGMAN, *supra* note 38, at 478.

88. See Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 325–28 (2008) (summarizing rational choice theory); THOMAS S. ULEN, *Rational Choice Theory in Law and Economics*, in ENCYCLOPEDIA OF LAW AND ECONOMICS 790 (Boudewijn Boukert & Geert de Geest eds., 2000).

89. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1051, 1063 (2000).

90. Peñalver, *supra* note 45, at 887 (citing HURSTHOUSE, *supra* note 26, at 54).

91. See Louis E. Wolcher, *Senseless Kindness: The Politics of Cost-Benefit Analysis*, 25 LAW & INEQ. 147, 155 (2007) (arguing that Cost-Benefit Analysis "fails to address the question of whether individual preferences are well-grounded in ethics, morality, or some other

both subject to close examination and moral evaluation.⁹² One scholar explains: “The prudent individual consistently makes the right decision to further every facet of a good life for him or herself, making sure to maintain their health, finances, social relationships, and, most importantly of all, their moral virtue.”⁹³ Accordingly, a person is not truly prudent if he selects means that are well-suited to achieve ends that do not embody virtue or do not constitute or contribute to human flourishing.⁹⁴ Chapin Cimino, who asserts that, “phronesis seems to capture the interrelationship of means and ends,”⁹⁵ puts the point well:

Virtue refers at once to those features of personhood that allow for deliberation about right ends and about right means, symbiotically. In virtue theory, means and ends are interrelated both because acting in a way consistent with moral virtue or character requires “right reason,” and because the “perfection of reason depends upon the cultivation of the virtues of character . . . [I]n Aristotelian theory, the moral virtues are not and cannot be disaggregated from the intellectual virtues. Both are bound up together in one complete circle of means and ends.”⁹⁶

If we accept the basic teachings of neo-Aristotelian virtue ethics,⁹⁷ consumers who possess virtues such as the classic virtue of temperance and the master virtue of phronesis (practical wisdom) have a greater chance of achieving eudaimonia or authentic and true human flourishing than consumers who lack such virtues. In fact, a virtue theorist might argue that those without temperance and prudence are more likely to make consumptive choices that interfere with the achievement of eudaimonia. Mandatory disclosures, especially in the realm of consumer law, therefore, may facilitate meaningful decision-making by promoting or creating the conditions under which these virtues can be freely exercised. The next subsection will provide a brief illustration of how legally mandated information can be viewed from an aretaic, rather than consequentialist perspective by looking at the field of consumer credit.

normative system: as an empirical social science, CBA is configured in such a way that it lacks any mechanism for adjudicating the validity of people’s preferences.”).

92. Cimino, *supra* note 35, at 285 (“[P]ractical wisdom is the result of experiences built up over time. These experiences in combination allow a person to exercise wisdom, though at the unconscious or intuitive level, which in turn leads to an appropriate judgment about how to respond to a practical dilemma.”).

93. Bragues, *supra* note 42, at 353.

94. R.J. Araujo, S.J., *Thomas Aquinas: Prudence, Justice, and the Law*, 40 *LOV. L. REV.* 897, 908 (1995) (“[P]rudence directs us to specify that action which we must take in particular circumstances to do that which is good and avoid that which is evil in every day life.”).

95. Cimino, *supra* note 42, at 717.

96. *Id.* at 714.

97. Despite the explosion of interest in virtue ethics and virtue jurisprudence, it seems fair to say that consequentialism and deontology remain the dominant modes of ethical discourse today.

B. *An Illustration: Consumer Credit Disclosures*

Consumer credit has obvious social benefits. In general, “[f]rom an economist’s perspective, credit . . . allows consumers to smooth consumption over time, meaning that they borrow from future good times to help make it through current tough times.”⁹⁸ Although an efficient credit market⁹⁹ can facilitate borrowing that increases consumer welfare, severe information asymmetries between borrowers and lenders can impede credit market efficiency. In addition, according to some scholars “a growing body of psychological evidence suggests that borrowers have behavioral impulses that lead them into making decisions that are counter to their own best interests.”¹⁰⁰ Put simply, some borrowing serves to enhance consumer welfare, while other borrowing may diminish consumer welfare. Accordingly, within the consumer credit market, lawmakers seek regulatory tools that will minimize severe information asymmetries and limit suboptimal consumer decision-making, with the overall goal of maximizing consumer welfare, however this is measured.¹⁰¹ The basic idea is to protect the welfare-enhancing properties of credit cards, home loans, and other forms of consumer credit, while ameliorating the negative effects on individual consumers and society as a whole that ill-advised consumer borrowing can cause.¹⁰²

98. Paige Marta Skiba, *Regulation of Payday Loans: Misguided?*, 69 WASH. & LEE L. REV. 1023, 1026 (2012).

99. See Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. LAW & ECON. REV. 168, 170 (2002) (“In a perfectly competitive market the interest rate will reflect the time value of money, inflation, and the risk of default.”); Jinkook Lee & Jeanne M. Hogarth, *The Price of Money: Consumers’ Understanding of APRs and Contract Interest Rates*, 18 J. OF PUB. POL’Y & MARKETING 66, 66 (1999) (“In a perfectly efficient financial market, the price of a loan is a function of its risk.”).

100. Christopher L. Peterson, “Warning: Predatory Lender”—A Proposal for Candid Predatory Small Loan Ordinances, 69 WASH. & LEE L. REV. 893, 910 (2012) (collecting sources, including Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1373–76 (2004); Karen E. Francis, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 TEX. L. REV. 611, 627–31 (2010); Patricia A. McCoy, *A Behavioral Analysis of Predatory Lending*, 38 AKRON L. REV. 725, 725–39 (2005); Debra Pogrud Star & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL’Y & L. 85, 85–131 (2010); Willis, *supra* note 15).

101. See Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 984 (2012) (suggesting “a multidimensional framework for studying debt that incorporates study of how debt may affect elements of welfare, such as education, health, work, housing, and the ability to participate in social life”).

102. For example, many (though by no means all) commentators would place payday loans in the category of harmful credit. See Adair Morse, *Payday Lenders: Heroes or Villains?*, 102 J. FIN. ECON. 28 (2011) (surveying the debate); Michael A. Stegman, *Payday Lending*, 21 J. ECON. PERSP. 169, 176 (2007). The debate over payday loans can be summed up as follows: “Industry insiders contend that transaction costs are high due to the short-term, high-risk nature of bridge loans. Consumer advocates argue that payday lenders prey on those that are so financially illiterate or unsophisticated that they are willing to take up such expensive loans.” Marianne Bertrand & Adair Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66 J. FIN. 1865, 1865–66 (2011). Payday loans work as follows: For every \$100 borrowed on a payday loan, payday lenders charge around \$10–\$20, which is “equivalent to a 260%–520% annualized percentage rate (APR)

In the United States, it is fair to say that mandatory disclosure is the dominant form of regulation when it comes to consumer borrowing.¹⁰³ There are, of course, special cases where policymakers directly intervene into consumer credit markets or regulate the specific terms of consumer credit contracts.¹⁰⁴ Usury laws are the classic case of such intervention, and more recently the Federal Credit CARD Act,¹⁰⁵ responded to allegedly egregious credit provider practices by limiting specified interest rate changes and certain credit card fees.¹⁰⁶ But the substantive rules imposed by the Credit CARD Act were a clear change from the regulatory norm in the field.¹⁰⁷ For the most part, regulators avoid substantive interference into the consumer credit market and instead choose to regulate through mandatory disclosure. The rationale for this regulatory approach is stated by Cass Sunstein: “Traditionally, information production and disclosure have been considered an appropriate regulatory response to market failures that stem from asymmetric or inadequate information. Properly designed disclosure requirements can significantly improve the operation of markets, leading consumers to make more informed decisions.”¹⁰⁸ In sum, the argu-

on a two-week loan.” Skiba, *supra* note 98, at 1027. Given the astronomical appearance of these annualized interest rates, it is not surprising that payday loans inspire loathing in consumer rights advocates, who view them, like many other fringe credit products, as cases where the benefits of consumer borrowing are far outweighed by the costs. *Id.* Despite this negative attention, payday loans remain a multi-billion dollar business in the U.S. See Bertrand & Morse, *supra*, at 1865 (repeating news estimates that “[i]n 2007, Americans paid an estimated \$8 billion in financial charges to borrow \$50 billion from payday lenders.”).

103. Dee Pridgen, *Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act of 2010*, 24 LOY. CONSUMER L. REV. 615, 619 (2012) (“Until recently, despite its shortcomings, disclosure remained a preferred approach to problems in consumer credit, with various attempts being made over the years to continue to improve the timing, formatting and wording so as to make the disclosures more useful to consumers.”).

104. Payday loans are an example where consumer advocates often press legislators to go beyond disclosure regulation. See Skiba, *supra* note 98, at 1027 (noting that for payday loans there are many potential regulatory approaches that legislators can take including “outright bans, interest rate caps, limits on rollovers/renewals, information disclosure rules, regulations specific to military personnel, ceilings and floors on loan amounts, and restrictions on loan duration”).

105. Credit CARD Act of 2009, Pub. L. No. 111–24, 123 Stat. 1734.

106. See Joseph U. Schorer, *The Credit CARD Act of 2009: Credit Card Reform and the Uneasy Case for Disclosure*, 127 BANKING L.J. 924 (2010) (surveying substantive and disclosure changes implemented by the Credit CARD Act of 2009).

107. See Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 1002 (2012) (“Traditionally, disclosure mandates were the regulatory technique that dominated credit card regulation. The CARD Act stays the course in this regard, retaining the historical focus on disclosure. But it also moves beyond disclosure, restricting—even banning—certain practices.”) (footnotes omitted); Zachary J. Luck, *Bringing Change to Credit Cards: Did the Credit Card Act Create a New Era of Federal Credit Card Consumer Protection?*, 5 HARV. L. & POL’Y REV. 205, 205 (2011) (“In the Credit CARD Act, Congress turned away from more than thirty years of primarily disclosure-only regulation of credit cards.”).

108. Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1366 (2011) (footnotes omitted); see also Dalley, *supra* note 4, at 1108 (asserting that most forms of disclosure regulation “are intended either to reduce information asymmetries in an existing market or to change someone’s behavior”).

ment is that better disclosures can improve consumer decision-making, which in turn may produce good consequences overall for consumers and society.¹⁰⁹

Of course, this may not actually be the case. Mandatory disclosures can fail for many reasons,¹¹⁰ not the least of which is the dreaded “information-overload.”¹¹¹ But whether or not information overload—whatever the term means¹¹²—impairs rational consumer decision-making¹¹³ or, more generally, whether mandatory disclosure laws are indeed effective is not my point here—though those are extraordinarily important issues. The discussion in this Article merely hopes to demonstrate that the philosophical underpinning of most mandatory disclosure laws, especially in the consumer credit market, is consequentialist, and that the vast majority of scholarship in the field explicitly adopts this consequentialist, market-perfecting approach to analyzing consumer credit regulation and disclosure.¹¹⁴ A quote from an article by Professor Oren Bar-Gill and (now U.S. Senator) Elizabeth Warren captures the flavor of this discourse:

109. See Dalley, *supra* note 4, at 1109 (stating that “requiring the disclosure of information can reduce search costs in economic transactions, improve the efficiency of markets, and provide other social benefits as a consequence of these economic benefits”); Melissa B. Jacoby, *Dodd-Frank, Regulatory Innovation, and the Safety of Consumer Financial Products*, 15 N.C. BANKING INST. 99, 102 (2011) (stating that the recently enacted Dodd-Frank Act, which created the Bureau of Consumer Financial Protection “aims to facilitate a credit marketplace where borrowers can clearly understand the full costs of products and engage in better comparison shopping”).

110. See Ben-Shahar & Schneider, *supra* note 3, at 665 (“The great paradox of the Disclosure Empire is that even as it grows, so also grows the evidence that mandated disclosure repeatedly fails to accomplish its ends.”); see also *id.* at 679 (“Mandated disclosure is not doomed to fail, but it rarely succeeds.”).

111. Roland E. Brandel & Jeremy R. Mandell, *Preemption Under The Consumer Financial Protection Act of 2010*, 64 CONSUMER FIN. L.Q. REP. 307, 309 (2010) (“The growing wisdom of decades, born of multiple empirical studies, is that information-overload can be detrimental to consumers and that additional disclosure may provide lesser rather than greater consumer protection.”); Christopher L. Peterson, “Warning: Predatory Lender”—A Proposal for Candid Predatory Small Loan Ordinances, 69 WASH. & LEE L. REV. 893, 916 (2012) (“Research shows that consumers tend to reduce the amount of effort they expend on making sound decisions when those decisions become more complex—a phenomenon known as information overload.”).

112. The exact meaning of information overload can be less than crystal clear. See Jeffrey M. Kuhn, *Information Overload at the U.S. Patent and Trademark Office: Reframing the Duty of Disclosure in Patent Law As a Search and Filter Problem*, 13 YALE J.L. & TECH. 90, 112 (2010) (observing that “[t]he concept of ‘information overload’ has been treated by such various disciplines as organizational science, behavioral economics, consumer research, and information science” and thus “there is no universally agreed-to definition for the term”).

113. See Dalley, *supra* note 4, at 1115–16 (discussing information overload); Amy J. Schmitz, *Access to Consumer Remedies in The Squeaky Wheel System*, 39 PEPP. L. REV. 279, 309–10 (2012) (“[A]dvertising and disclosure laws generally fail to correct for imperfect information, especially when disclosures add to the information overload that already clouds consumers’ abilities and inclinations to read and understand their contracts.”) (citing Debra Poggrund Star & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL’Y & L. 85, 86–95, 113–26 (2010)).

114. See generally Bar-Gill & Bubbb, *supra* note 108.

The market for consumer credit is not operating *efficiently*. Evidence abounds that consumers are sold credit products that are designed to obscure their risks and to exploit consumer misunderstanding. Ordinary market mechanisms, such as competition and expert advisers, cannot fully correct these deficiencies. *Without regulatory intervention, market distortions and inefficiencies will continue to grow, imposing substantial costs on American families and on the economy.*¹¹⁵

This quote illustrates the manner in which the discussion, even from the left side of the political spectrum, proceeds. Note the highlighted terms—the credit market is not operating “efficiently,” and that there are “distortions and inefficiencies” that impose “costs” on families and the economy.¹¹⁶ This language of consequentialist, economic discourse dominates the debate. One rarely hears deontological justifications for mandatory disclosure,¹¹⁷ though the consumers’ “right to know” is sometimes used rhetorically in an instrumental sense.¹¹⁸ Within this consequentialist, market-perfecting paradigm, one of the big questions of the day is whether and how behavioral economics can be used to improve mandatory disclosures. For example, Oren Bar-Gill and Ryan Bubba recently proposed new mandatory credit card disclosures that “are designed with the imperfectly rational cardholder in mind,” that “can also reduce the cost of collecting information for the perfectly rational cardholder” and will not “stand in the way of efficient risk-based pricing.”¹¹⁹ This analysis evidently is part of a dialogue intended for those who have accepted an economic, consequentialist view of mandatory disclosure law.

Virtue jurisprudence provides legal scholars with a different moral vocabulary when discussing matters of law and public policy—one that can be a refreshing alternative to neo-classical economic language, which tends to focus on efficiency, wealth maximization, and cost-benefit analysis, or neo-Kantian talk about “rights.”¹²⁰ As noted above, virtue theory tells us that we should not simply take consumers’ preferences as unquestioned exogenous variables, as in neo-classical

115. Bar-Gill & Warren, *supra* note 17, at 100 (emphasis added).

116. *Id.*

117. As stated above, a deontologist would ask whether consumers have a right to certain disclosures, regardless of whether the costs of such disclosures would outweigh the benefits to consumers or even society as a whole. Put differently, a deontologist would ask whether values such as truth or autonomy create a moral obligation to provide certain information to borrowers even if the benefits of disclosure are not outweighed by the costs. A purely deontological argument for particular consumer credit disclosures might strain credulity. Cf. Rubin, *supra* note 7, at 283–84 (questioning the connection between “Truth,” with a capital “T” and annual percentage rate disclosure).

118. That is, I might say that you have the right to know the APR so that you can compare shop and get a better interest rate, which will make the mortgage market more efficient and should be better for society. This is plainly a consequentialist, not deontological, argument.

119. See Bar-Gill & Bubba, *supra* note 107, at 1002.

120. See Clark, *supra* note 72, at 16 (arguing that “the ways in which lawyers and legal academics argue about law and policy, conduct our research, represent our clients, and teach our students” can bolster virtues).

economics,¹²¹ nor should we view consumers simply as victims of myriad forms of pernicious exploitation with bundles of rights that might be violated. A virtue ethicist would not merely ask whether the available sources of credit are properly priced according to the risks posed by particular borrowers and whether additional or superior disclosures will eliminate market failures (the classic law and economics consequentialist perspective) or whether borrowers have the “right” to certain specific information regarding the transaction at issue (standard deontological concerns). In stark contrast, virtue jurisprudence asks us to consider whether consumers in various credit markets are truly flourishing and whether the dominant forms of legal regulation, such as mandatory disclosure, are contributing to this authentic human flourishing by promoting virtues such as temperance and prudence (phronesis). A virtue ethicist accordingly would ask whether the existing legal regime—with its fetishistic obsession on detailed disclosures—is retarding or interfering with consumers’ eudaimonia. Would different types of disclosures be more likely to promote consumer virtue? What might such disclosures look like in the field of consumer credit or elsewhere? These are matters that scholars and regulators have not considered.

Even more controversially, a virtue ethicist would ask whether the borrowing itself and the ultimate consumption for which the borrowing is intended are likely to contribute to the consumer’s flourishing or whether the borrower ought to use his financial resources in a different way altogether. In short, for a committed virtue ethicist, mandatory disclosure might be used as a legislative tool to override ill-conceived consumer preferences that do not embody virtue and are unlikely to contribute to or constitute authentic human flourishing. This suggested use of mandatory disclosure might seem quite radical given the normal discourse on consumer regulation, and the next section addresses the obvious objections to this potential turn to virtue.

III. THE VALUE PLURALISM OBJECTION TO VIRTUE INCULCATION

A. *General Objections to Virtue Inculcation*

Even if we agree that virtue ethics is suitable for evaluating or directing individual decision-making or that certain virtues are normatively desirable, it is not clear whether lawmakers ought to attempt to foster virtue through legislative means.¹²² Ekow Yankah is right on

121. See Owen D. Jones, et al., *Economics, Behavioral Biology, and Law*, 19 SUP. CT. ECON. REV. 103, 123 (2011) (“Economists are mostly concerned with the ‘how’ questions—such as how people are likely to respond to particular costs and benefits—given assumptions about their preferences. In other words, and ignoring important exceptions, economists usually treat preferences as exogenous, and are often loathe to explore either those preferences or their sources.”).

122. See Claeys, *supra* note 18, at 946–47 (pointing out that “in virtue ethics and in political-philosophy scholarship, scholars still regard it as an open and extremely important question whether the prescriptions of virtue ethics can be transplanted seamlessly from the field of ethics back to the field of politics”); Yankah, *supra* note 39, at 1175 (“The attractiveness of virtue ethics as a moral theory . . . does not determine the attractiveness of virtue jurisprudence . . .”).

point when he states: "Virtue theory insists we meet the fundamental questions of political philosophy squarely. Can the law legitimately seek to inculcate virtue?"¹²³ Traditional virtue ethicists, such as Aristotle and Aquinas, answered this question in the affirmative.¹²⁴ In fact, Robert George notes that "the belief that law and politics are rightly concerned with the moral well-being of members of political communities . . . distinguishes the central tradition from its principal rivals."¹²⁵ In short, traditional virtue ethics endorsed the use of law to shape private morality.

Many modern theorists, however, are skeptical. The notion that law can be used effectively as a tool to inculcate virtue can be challenged on at least three philosophical or psychological grounds.¹²⁶ The first objection to legal virtue inculcation questions the psychological underpinnings of virtue theory: it simply is not clear whether it is possible to foster "stable dispositions" in human beings.¹²⁷ This objection thus is connected to the challenge raised by "situationalism," to dispositionism.¹²⁸ Situationalism "[i]n simple terms . . . is the view that human behavior is caused by the situations in which humans find themselves as opposed to human character traits."¹²⁹ The situationist/dispositionist divide pervades legal discourse and it cannot be lightly evaded.¹³⁰ Obviously, if people do not have stable character traits, it might be futile to use the law, or any other instrument, to shape their character.¹³¹ The case for virtue jurisprudence is weakened considerably if virtue ethics turns out to be premised on an inaccurate understanding of human behavior. Whether and to what extent people have stable character traits, whether virtuous or not, is likely to be a persis-

123. Yankah, *supra* note 39, at 1169.

124. See Colombo, *supra* note 25, at 25–28 (discussing traditional virtue ethics views of virtue inculcation through law).

125. See Robert P. George, *The Central Tradition—Its Value and Limits*, in VIRTUE JURIS. 24 (Colin Farrelly & Lawrence B. Solum eds., 2008).

126. This article will mostly deal with the third objection, but it is valuable to note briefly the other two objections since they are likely to be raised any time there are calls for using law to inculcate virtue.

127. See Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 CORNELL L. REV. 991, 1000–1002 (2009) (citing, inter alia, KWAME ANTHONY APPIAH, EXPERIMENTS IN ETHICS (2008)).

128. See generally Jon Hanson & David Yosifon, *The Situation: An Introduction to The Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004).

129. Lawrence B. Solum, *Judicial Selection: Ideology Versus Character*, 26 CARDOZO L. REV. 659, 673 n.36 (2005).

130. See Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 314 (2008) (noting a "divide . . . based on two attributional approaches: the dispositionist approach, which explains outcomes and behavior with reference to people's dispositions (i.e., personalities, preferences, and the like), and the situationist approach, which bases attributions of causation and responsibility on unseen or unappreciated influences within us and around us").

131. On the other hand, a situationist who desires certain public policy ends might use the law to create the context or situations in which people are more likely to make socially advantageous choices, even if these choices do not arise out of altered character.

tent question asked of virtue theorists. A full treatment of this psychological question is simply beyond my scope and capacity here, though I do not want to minimize its importance—talk about implementing policies that affect character can always be met by questions about whether stable character itself exists.

The second objection to virtue ethics is connected to the role of choice in moral theory.¹³² One might ask whether it is truly “moral” (however that term is defined) for a person to make correct choices solely because she fears legal sanctions.¹³³ Many moral theorists and laypeople alike would bristle at this idea of morality. As Robert George has stated: “Laws cannot make men moral. Only men can do that; and they can do it by freely choosing to do the morally right thing for the right reason.”¹³⁴ Nevertheless, George points out that while “[m]oral goods cannot be realized by direct paternalism,”¹³⁵ law can reinforce positive moral teachings¹³⁶ and prevent “the bad impact of [further] involvement in the vice on . . . character.”¹³⁷ Furthermore, there is the effect that law can have on what George calls the “moral ecology” or moral environment:

[L]aw . . . is poorly suited to dealing with the complexities and details of individual’s moral lives. Law can forbid the grosser forms of vice, but certainly cannot prescribe the finer points of virtue. Nevertheless, laws that effectively uphold public morality may contribute significantly to the common good of any community by helping to preserve the moral ecology which will help to shape, for better or worse, the morally self-constituting choices by which people form their character, and in turn affect the milieu in which they *and others* will in future have to make such choices.¹³⁸

132. See George, *supra* note 125, at 29.

133. ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 44 (1993) (“Someone who refrains from vice merely to avoid being caught and punished under the law prohibiting the vice realizes no moral good (though he may avoid further moral harm.”); see also Colombo, *supra* note 25, at 24 (“[A]lthough law and regulation can do a good job of compelling people to mimic virtuous behavior, they do a poor job (according to [Robert] George) of directly making people virtuous.”).

134. GEORGE, *supra* note 133, at 1; George, *supra* note 125, at 44 (“Moral goods are ‘reflexive’ in that they are reasons to choose which include choice in their very meaning; one *cannot* participate in these goods otherwise than by acts of choice, that is internal acts of will, and the internal disposition established by such choices. As internal acts, they are beyond legal compulsion.”).

135. GEORGE, *supra* note 133, at 46.

136. George, *supra* note 125, at 31 (explaining that Aristotle implies that “making men moral is not for the *polis* alone: political communities should do what they can to encourage virtue and prevent vice, while other institutions should do what they can to complement the work of the *polis*”); GEORGE, *supra* note 133, at 46 (“As Aristotle and Augustine rightly held, a community’s laws will inevitably play an important educative role in the life of the community. They can powerfully reinforce, or fail to reinforce, the teachings of parents and families, teachers and schools, religious leaders and communities, and other persons and institutions who have the leading roles in the moral formation of each generation.”).

137. GEORGE, *supra* note 133, at 46.

138. *Id.* at 47 (emphasis in original).

To sum up this second objection to legislating virtue, one might claim that taking a good or right action solely because the action is compelled by law should not truly count as moral or ethical behavior. Even if we accept this premise, though, it does not mean that the law cannot help to create the conditions or moral ecology in which it will be more likely that people would make choices for the right reasons.¹³⁹ To use an example from academia, a student who refrains from cheating solely because she is afraid of an institutional penalty may not be considered “moral” or virtuous by some observers when she decides not to cheat. On the other hand, this does not mean that an institution’s rules and regulations regarding academic integrity cannot help to create an environment in which it is more likely, in the long run, that students will act properly for reasons other than a fear of direct sanctions.¹⁴⁰

B. *The Value Pluralism Objection*

Even if we accept that people do have stable character traits and that law can help inculcate morality perhaps through shaping the moral ecology or some other indirect means, we run into the chief objection to any virtue inculcation project: *value pluralism*. The notion that promotion of virtue of any kind is a legitimate goal for lawmakers or legislation is a controversial proposition in a liberal democratic society because such a project might be, as Katrina Wyman observes, “in tension with the idea animating our pluralistic society that individuals have wide leeway to pursue their own ways of life.”¹⁴¹ To understand Wyman’s point, we need to return once again to the concept of eudaimonia, which seems to embody two very different notions:

139. This does not mean that law is enough. See George, *supra* note 125, at 46 (“Of course, it is a mistake to suppose that laws by themselves are sufficient to establish and maintain a healthy moral ecology. It is equally a mistake to suppose, however, that laws have nothing to contribute to that goal.”).

140. This may start to sound a bit like some strands of legal expressivism. See Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 ARIZ. L. REV. 673, 714 (2012) (“[L]egal rules can work as anchors, causing individuals to eventually internalize the preferences embodied in the legal rule. Individuals comply with legal commands (e.g. do not smoke in public, clean up after your dog) not merely because of the fear of possible sanctions, but because individuals either internalize the preferences stated in the law or hold the belief that others have done so.”); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 151 U. PA. L. REV. 579, 664-66 (2004) (“Expressive law, which is a further evolution of the field of law and social norms and behavioral economic scholarship, explores the question of how law shapes individual preferences by changing one’s taste for specific outcomes, beyond the traditional effect of sanctions, through altering behavior. This can be because the new law either carries a symbolic social meaning, or because it affects the way individuals mediate that symbolic social meaning. What is crucial to this analysis is the nexus between law, norms, and social meaning. When designed appropriately, law can cause individuals to alter their own behavior because either the law induces them to change their tastes (internalization), creates a fear of bearing social sanctions (second order sanctions), or because of pressure brought to bear upon them through societal sanction (third order sanctions).” (citations omitted)).

141. Wyman, *supra* note 128, at 1005.

“[E]udaimonia” seems in Aristotle’s writings to fill two roles: on the one hand, it appears to be a rough synonym of “well-being” or “flourishing,” a notion that concerns what benefits a person; this is pretty much the conventional understanding of the term. On the other hand, it is claimed to represent whatever it is that would constitute an ideal life, a life that is most choiceworthy, and thus occupies a role akin to the broad understanding of “good life.”¹⁴²

Accordingly, there appears to be an aspect of eudaimonia that is “overtly and explicitly seeking . . . substantive content of norms by recourse to a transcendental domain—a metaphysical idea about the ‘well-lived life’ or what ‘human flourishing’ might mean.”¹⁴³ To the extent that legislation grounded in virtue ethics or virtue jurisprudence imposes a specific conception of the good life upon us, such theories can conflict with our liberal commitments to individual autonomy. One need not be a libertarian to find this troubling:

Even those who have more sympathy with some species of communitarianism, or “perfectionist” liberals who deny that the law can or should be wholly neutral between competing conceptions of the good, may be disturbed by the thought that the law might make the promotion of virtue, and in consequence the elimination of vice, part of its aim: we surely should not trust so crude and potentially oppressive a mechanism as the law to discharge so sensitive a task.¹⁴⁴

Taken to an extreme, the idea of legislating virtue may remind readers of the religious and social controls exercised by the Taliban in Afghanistan (who actually had a Ministry of Promotion of Virtue and Prevention of Vice)¹⁴⁵ or the religious police in Saudi Arabia, which polices public morality.¹⁴⁶ Frightful examples such as these may be why Peter Koller contends that attempts to use legal force to form moral virtues “unavoidably leads, at best, to public hypocrisy, or even more

142. Daniel M. Haybron, *Well-Being and Virtue*, 2 J. ETHICS & SOC. PHIL. 1, 20 (2007).

143. Yishai Blank, *The Reenchantment of Law*, 96 CORNELL L. REV. 633, 652 (2011).

144. R.A. Duff, *The Limits of Virtue Jurisprudence*, 34 METAPHILOSOPHY 214, 215 (2003) (footnote omitted).

145. Thomas Barfield, *Culture and Custom In Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347, 368 (2008) (footnotes omitted) (citing KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON: AFGHANISTAN 1994–1999* (1999) “[T]he Taliban’s only innovation in government was the creation of a powerful new and Saudi Arab-inspired Ministry of Promotion of Virtue and Prevention of Vice. This ministry was home to the religious police who forced people to pray, checked that men had long enough beards, and beat women who violated Taliban rules on dress or movement. The Taliban’s religious controls extended to bans on music, dance, films, kite flying, chess playing, card games, and other forms of popular entertainment.”).

146. In Saudi Arabia, “the religious establishment plays a central role in the country’s governance and has broad influence over many aspects of everyday life.” HUMAN RIGHTS WATCH, *PERPETUAL MINORS: HUMAN RIGHTS ABUSES STEMMING FROM MALE GUARDIANSHIP AND SEX SEGREGATION IN SAUDI ARABIA* 11 (2008), available at http://www.hrw.org/sites/default/files/reports/saudiArabia0408_1.pdfIn particular, it handles “the policing of ‘public morality’ through the Commission for the Promotion of Virtue and the Prevention of Vice (the religious police, al-hisba).” *Id.*

likely, a total repression of free thought.”¹⁴⁷ Or in slightly less feverish terms, Eric Claeys states: “When politics is about legislating virtue and not about securing rights, it tempts sectarian believers to gain political power to compel subjects to be virtuous as defined by the teachings of their particular sect.”¹⁴⁸

As an abstract matter, the value pluralists have a point when they object to the imposition of virtue under threat of government sanctions. Certainly no one wants a melding of politics, law, and virtue that “encourages factious citizens to use ‘virtue’ as a political and ideological bludgeon to help their own factions acquire dominancy and to subordinate rival factions.”¹⁴⁹ Such a possibility should give any sensible scholar or policymaker pause before advocating the legal regulation of virtue and vice. Furthermore, many people believe that individual autonomy entails the right to choose what type of life we want to lead and the right to define “flourishing” for ourselves. It makes us squeamish to think that a particular conception of the good life might be imposed upon us by law. Like the vigorous debates over the role of behavioral economics in policymaking, a turn to virtue is likely to run up against objections based on anti-paternalism. How do we know when a consumer is living “the good life?” Who is going to tell us how or what to consume? Are government bureaucrats going to override our preferences and set standards for consumption? How thrifty or frugal is thrifty or frugal enough?¹⁵⁰ Can consumers be *too* thrifty or frugal?¹⁵¹ Although these concerns are well-founded, the remainder of the Article aims to convince the reader that the value pluralism objection need not be fatal, at least not in the case of regulation through

147. Peter Koller, *Law, Morality, and Virtue*, in *WORKING VIRTUE* 191, 199 (Rebecca L. Walker & Philip J. Ivanhoe eds., 2007).

148. Claeys, *supra* note 18, at 926.

149. *Id.* at 922.

150. See Argandoña, *supra* note 70, at 12 (asserting that “[w]hat constitutes frugal behavior cannot be determined on the basis of extrinsic criteria such as the absolute amount of a person’s expenditure, or a person’s expenditure as a percentage of his income, or one person’s expenditure compared to that of other people in similar or less privileged circumstance”); David A. Crocker, *Consumption and Well-Being*, in AUDREY R. CHAPMAN, ET AL., *CONSUMPTION, POPULATION AND SUSTAINABILITY: PERSPECTIVES FROM SCIENCE AND RELIGION* 207, 208 (2000) (pointing out that any consumption norm that presumes to set precise limits would be “arbitrary, even dictatorial” but that “we require . . . general principles that will allow each of us to make choices appropriate to the distinctive character of our individual circumstances”).

151. This would seem to be the ideal spot to include the stock reference to what economists term the “paradox of thrift.” See JOHN BLACK, NIGAR HASHIMZADE, & GARETH MYLES, *A DICTIONARY OF ECONOMICS* 300 (4th ed. 2012) (“The basis of the argument is that in a depressed economy attempts to save more from present incomes reduce consumption and thus income levels. The fall in incomes then discourages investment, so that ex post savings and investment actually fall: this is the paradox of thrift.”); Mechele Dickerson, *Vanishing Financial Freedom*, 61 ALA. L. REV. 1080, 1118 (2010) (“Reasonable amounts of household savings are needed to foster economic stability and keep the economy strong. But saving too much and having too little household debt harms the economy by reducing the demand for goods and services and—as we are seeing now—by making bad recessions even worse.”).

mandatory disclosure laws when the objective of such laws is the promotion of virtues such as temperance and prudence.

C. *Overcoming the Value Pluralism Objection in the Case of Mandatory Disclosure*

This final subsection aims to show that the value pluralism objection, as potent as it is, need not be fatal, depending on the type of virtue that we seek to inculcate and the precise legal method that we use for this inculcation. First, let us discuss the types of virtue before us. Not all virtues are the same. Some virtues and vices are more controversial than others. Even those with libertarian leanings acknowledge that law, in some manner, is a proper tool for the inculcation of certain morally uncontroversial virtues. For example, Eric Claeys uses the virtues mentioned in the Virginia Declaration of Rights as examples as these widely-praised and accepted virtues:¹⁵² “Governments may encourage and inculcate virtues, but only the lowest-hanging fruits on the virtue tree. The Declaration covers *moderation, temperance, frugality*, but not religious orthodoxy, speculative excellence, the excellences of farming, business, or the martial life, or other rivalrous individual virtues.”¹⁵³

Thus, a distinction can be drawn between the state trying to inculcate controversial religious and sexual virtues¹⁵⁴ and the types of virtues that enable citizens to thrive economically—virtues such as moderation, temperance, and frugality. Claeys explains: “By transferring maximal control over wealth-creating resources to individuals, the liberal commonwealth encourages citizens to practice and acquire virtues of industry, self-mastery, and moderation.”¹⁵⁵ Regardless of whether we fully accept Claeys’s perspective about the proper role of government in a liberal society, it seems hard to dispute that virtues such as temperance and prudence, which may contribute to individual economic prosperity or even authentic human flourishing, can be placed in a different category than those moral virtues that are primarily connected to religious or sexual orthodoxy. Encouraging people to save money for retirement or to take out a mortgage that fits their financial needs is a bit different from telling people that they may not read certain types of books or engage in specified sexual acts in private.

Furthermore, assuming that virtues such as temperance and prudence are inoffensive or appropriate virtues to inculcate, the method of

152. Claeys, *supra* note 18, at 932 (“[N]o free Government, or the Blessings of Liberty, can be preserved to any People but by a firm Adherence to Justice, Moderation, Temperance, Frugality, and Virtue, and by frequent Recurrence to fundamental Principles.”) (citing VA. DECLARATION OF RIGHTS art. XV (June 12, 1776)).

153. *Id.* (emphasis added). It is worth noting that several state constitutions also echo the Virginia Declaration of Rights and mention frugality. See, e.g., N.H. CONST. pt. 1, art. XXXVIII; VA. CONST. art. I, § 15; VT. CONST. ch. 1, art. XVIII; WIS. CONST. art. I, § 22.

154. See Koller, *supra* note 147, at 199 (arguing that “the law must not enforce *eccentric moral ideals*, such as the prohibition of soft drugs or the prevention of homosexual relationships”) (emphasis added).

155. Claeys, *supra* note 18, at 933.

virtue inculcation is also relevant. One of the leading proponents of virtue ethics in law, Kyron Huigens, has made the bold claim that “the justifying purpose of the *criminal law* is the inculcation of sound practical judgment—a quality which is also known as virtue.”¹⁵⁶ This Article has used regulation of consumer finance as a vehicle for exploring the virtue jurisprudence project. The idea of using the criminal law to inculcate temperance and prudence naturally calls to mind sumptuary laws,¹⁵⁷ which have a long and controversial history.¹⁵⁸ Such laws were a prominent feature of the American colonial legal landscape,¹⁵⁹ and even were praised by luminaries such as John Adams (though the future President acknowledged that they were controversial):

The very mention of sumptuary laws will excite a smile. Whether our countrymen have wisdom and virtue enough to submit to them I know not. But the happiness of the people might be greatly promoted by them, and a revenue saved sufficient to carry on this war forever. *Frugality is a great revenue, besides curing us of vanities, levities and fopperies which are real antidotes to all great, manly and warlike virtues.*¹⁶⁰

It is fairly well-accepted today, however, that laws which enforce a society’s “sumptuary codes”¹⁶¹ were used as a means of class and social control:¹⁶²

Societies have regularly imposed such controls when their governing classes come to believe that too much of their society’s

156. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1237 (2000) (emphasis added) (footnotes omitted); Huigens, *Solving the Apprendi Puzzle*, *supra* note 60, at 445 (“[T]he inculcation and maintenance of the capacity for sound practical reasoning (virtue in its correct, technical sense) is a prominent objective of punishment that can justify punishment.”) (citations omitted). See *supra* note 60 for citations to Huigens’ many valuable, provocative works applying virtue theory to topics in criminal law.

157. Black’s Law Dictionary defines sumptuary law as “[a] statute, ordinance, or regulation that limits the expenditures that people can make for personal gratification or ostentatious display,” and “[m]ore broadly, any law whose purpose is to regulate conduct thought to be immoral, such as prostitution, gambling, or drug abuse.” BLACK’S LAW DICTIONARY 1574 (9th ed. 2009).

158. For a valuable summary of the history of sumptuary laws, see Lucille M. Ponte, *Echoes of the Sumptuary Impulse: Considering the Threads of Social Identity, Economic Protectionism, and Public Morality in the Proposed Design Piracy Prohibition Act*, 12 VAND. J. ENT. & TECH. L. 45, 52–65 (2009). One of the seminal works on the subject is ALAN HUNT, *GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW* (1996).

159. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 16 (1985) (“In America, every colony exercised the power of passing sumptuary legislation, though in their extreme forms such laws were uncommon except in New England and though in all of their forms their applicability varied with the social status of the individual.”).

160. John Adams, *Thoughts on Government, Applicable to the Present State of the American Colonies*, in JOHN ADAMS, *REVOLUTIONARY WRITINGS: 1775–1783* (Gordon Wood, ed., 2011) (emphasis added). Adams’s quote is from April 1776.

161. See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 812 (2010) (“A society’s sumptuary code is its system of consumption practices, akin to a language . . . by which individuals in the society signal through their consumption their differences from and similarities to others.”) (footnotes omitted).

162. Nash, *supra* note 70, at 177 (discussing the misuse of frugality as a tool to keep the poor in their place).

wealth is being wasted on conspicuous or decadent forms of consumption or that their society's system of relative consumption no longer operates reliably to differentiate and distinguish—if not to discipline—the various members of the society. This latter problem—the breakdown of a society's consumption-based system of social distinction—has typically occurred when formerly rare commodities or their equivalents suddenly become abundant or when lower-status social groups gain the economic power to consume goods that formerly only upper-status social groups consumed.¹⁶³

It is not surprising therefore that sumptuary laws—especially in their purest forms as direct limits on consumption¹⁶⁴—have few (if any) defenders today.¹⁶⁵ Furthermore, as a more general matter, aretaic theories of criminal law and punishment, such as those espoused by Huigens, are quite controversial. Many of the most forceful arguments against virtue jurisprudence focus on the use of criminal law to punish the lack of moral virtue.¹⁶⁶

There is good reason to believe that even sophisticated aretaic theories of law and punishment cannot be squared with a liberal conception of government, particularly with the central place of autonomy within liberalism. This may not be fatal to adopting an aretaic theory; we can, after all, give up on liberalism but irreconcilable tension with our liberal commitments gives good reason to pause.¹⁶⁷

The general objection to aretaic theories of criminal punishment or specifically our historical distaste with sumptuary laws or other direct limits on consumption are not fatal to the virtue inculcation project. Nothing written here (or indeed, anywhere) suggests that consumers today should be punished or made criminally liable for their lack of temperance or prudence. No one is calling for a revival of sumptuary laws in any form or a new type of debtor's prison.¹⁶⁸ This Article is not

163. Beebe, *supra* note 161, at 813 (footnotes omitted).

164. *Id.* at 812 (“Historically, laws seeking to govern a society's system of consumption-based distinction have most commonly taken the form of direct controls on consumption . . .”).

165. See Katya Assaf, *Brand Fetishism*, 43 CONN. L. REV. 83, 122 (2010) (claiming that there is no place for sumptuary laws that control how people dress in modern Western society). Arguably the aims of sumptuary laws are pursued through other legal means, such as intellectual property regulation. See Beebe, *supra* note 161.

166. See generally Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019 (2004).

167. Yankah, *supra* note 39, at 1192; see also Brown, *supra* note 60, at 49 (concluding that virtue ethics does not offer “a substantially more helpful method to either to the public or to government officials with regard to criminal justice administration” than consequentialism or deontology).

168. See Dickerson, *supra* note 151, at 1090 (discussing brutal conditions imposed upon debtors who were imprisoned in colonial America, not always in free-standing debtor's prisons) (citing BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 85–90 (2002); Bruce H. Mann, *Tales from the Crypt: Prison, Legal Authority, and the Debtors' Constitution in the Early Republic*, 51 WM. & MARY Q. 183, 185, 198 (1994)).

arguing that consumers who are not sufficiently prudent in personal financial matters should be punished criminally by the state for their lack of virtue. Instead, this Article is merely suggesting that we need to investigate the potential for using mandatory disclosure laws to influence character “indirectly, by encouraging or discouraging conduct that might indirectly cultivate traits of character,”¹⁶⁹ or by “encouraging or facilitating the development of other institutions through which traits are articulated or developed.”¹⁷⁰ Indirect means of virtue inculcation, such as well-designed mandatory disclosure laws, are less likely to offend our liberal ethos, especially with respect to relatively uncontroversial virtues such as temperance and prudence.

Admittedly, if regulators were inclined to operationalize this aretaic approach in the field of mandatory disclosure, much more work would need to be done regarding what constitutes eudaimonia in consumer markets.¹⁷¹ If we are going to judge disclosures according to whether they help to inculcate virtues that lead to eudaimonia, we need to have a pretty thick understanding of authentic consumer flourishing. This part of the virtue jurisprudence project is certainly in its embryonic stage. But I believe that Sherman Clark is right that we need not agree on “precise account of ultimate good” in order to “begin thinking about how to help ourselves and one another continue seeking it.”¹⁷² Regardless of the precise boundaries of human flourishing, there is likely to be a great deal of overlapping consensus as to what does and does not constitute eudaimonia or human flourishing when it comes to consumption, especially in the case of consumer credit. This overlapping consensus can allow the virtue inculcation project to move forward even if there are disagreements at the margins.

CONCLUSION

Mandatory disclosure is one of the dominant forms of legal regulation, especially within the realm of consumer finance. Legal discourse over mandatory disclosure is dominated by consequentialist theorizing, with most regulators and scholars committed to evaluating mandatory disclosure regimes instrumentally by evaluating the extent to which such regulation serves well-established public policy objectives such as

169. Clark, *supra* note 72, at 8.

170. *Id.* at 9; *see also* Koller, *supra* note 147, at 199 (discussing acceptable ways in which legal order may foster virtues, including positive incentives, such as tax benefits for charity).

171. Perhaps it has something in common with Mechele Dickerson’s invocation of the concept of “financial freedom.”

In general, people have financial freedom if they can plan for future spending decisions, or can make reasonable predictions about their future ability to spend money or make purchases. A person would lack economic or financial freedom if he cannot make spending decisions or choices because of monetary limitations or restrictions, or if an external factor or process prevents him from being able to control his spending decisions.

Dickerson, *supra* note 151, at 1083. This is an interesting starting point for defining consumer eudaimonia, though it probably does not go nearly far enough.

172. *See* Clark, *supra* note 72, at 18–19.

market efficiency. In contrast to this approach, virtue ethics and its brethren in legal theory, virtue jurisprudence, proposes an alternative vantage point. Virtue jurisprudence suggests that it would be valuable to consider whether consumers possess virtue, in the philosophical meaning of the term, and whether mandatory disclosure laws could help to create the conditions necessary for consumers to achieve eudaimonia or authentic human flourishing. This Article has argued that some forms of temperance and prudence (phronesis) might be considered virtues for consumers to possess, and that to the extent that mandatory disclosure laws can encourage such virtues, such regulation may help to foster human flourishing. At the very least, the inclusion of an explicitly aretaic perspective on consumer law and regulation will enrich the legal scholarship and policymaking discourse in the field by allowing us to discuss in a deeper and more meaningful way how law affects both the means and ends of consumer decision-making.

In closing, it is worth reiterating that efforts at legislative virtue inculcation are likely to be met with assertions that such paternalistic laws are impermissible in a liberal society such as ours because these types of regulation violate individual autonomy and the right to define for ourselves our own conception of the good life. There is no doubt that value pluralism is a potent objection to efforts at legislating virtue. Nevertheless, this Article has argued that objections to virtue inculcation based on value pluralism are unlikely to carry the day in this context, given the indirect method of virtue inculcation discussed in this Article (mandatory disclosure laws, rather than criminal law) and the relatively uncontroversial nature of the virtues sought to be inculcated (temperance and prudence, as opposed to virtues related to religious and sexual orthodoxy). That being said, those who truly support libertarian approaches to legal regulation are likely to have concerns about any efforts to use the legal system to infuse virtue in consumers.¹⁷³ It seems unlikely whether such deep-seated libertarian concerns can be allayed, though that is a question best left for the future.

173. Similar concerns have been raised against regulation inspired by the teachings of behavioral law and economics. See Douglas H. Ginsburg & Joshua D. Wright, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 *Nw. U. L. Rev.* 1033 (2012).

