

The Impact of the Law: On Character Formation, Ethical Education, and the Communication of Values in Late Modern Pluralistic Societies. Edited by John Witte Jr. and Michael Welker. Eugene: Wipf and Stock, 2022. Pp. 288. \$35.00 (paper). ISBN: 9781666750621.

Edward A. David

McDonald Postdoctoral Fellow in Christian Ethics and Public Life, Christ Church, Oxford, UK

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In *The Impact of the Law: On Character Formation, Ethical Education, and the Communication of Values in Late Modern Pluralistic Societies*, edited by John Witte Jr. and Michael Welker, readers are invited to reflect on the ways in which *law*—variously understood as state laws, court opinions, or legal practice—influences the moral vision of individuals and communities in “late modern liberal societies” (Witte, 15).

Part of Wipf and Stock’s The Impact Series, the ethical focus of the contributed essays covers the transmission or teaching of values and the formation of character. Its particular jurisdictional contexts include Germany, the United States, South Africa, and Australia—four “distinct liberal nations” (Witte, 15). As Witte notes in the introduction, the volume’s seventeen contributors address the *whether*, *how*, and *where* of the law has an impact on values and character. But Cathleen Kaveny, in the book’s second chapter, captures the essence of what the volume achieves: “a ... nuanced account of law’s [moral] pedagogical function” (44).

To be clear, there is no single account that the volume intentionally offers. Nevertheless, there are discernable themes that cut across its chapters. Three such themes—character, ethics, and values—illustrate the volume’s underlying moral pedagogy of law.

An important theme pertains to character and, in particular, to different notions of what character means vis-à-vis the “normative power of law” (Parkinson, 34). Indeed, while

there is debate about whether law actively shapes character (for instance, through coercion) or passively responds to it (that is, reflecting a social ethos), the contributors appear unanimous that law has *some* kind of moral function. The exact type of function depends, in part, upon the distinct notions of character that the volume's contributors assume. For instance, Brian Bix discusses legal coercion in relation to *moral character*, with moral character involving an individual's "inclinations to do the right thing" and an underlying ability to endorse "freely and genuinely" what the law commands (57). More so than Bix, Jean Bethke Elshtain expresses a distrust of law in some moral contexts: "legal overreach," she says, "makes people weak; removes responsibility and an appropriate level of culpability" (73).

A different type of character discussed in the volume is not personal per se, but social or collective. *Custom* or *social character*, as Kaveny points out, "has the force of a law" (45); and while it may not legally coerce behavior as a matter of fact, it may "communicate moral values" on a societal level and inculcate "morally significant habits" (46). As the contributors collectively suggest, custom comes in many forms. It may, for instance, apply to the entire legal profession. (The values of "partisanship," "procedural morality," and "procedural moral accountability"—as Reid Mortensen suggests—should apply, by custom, to lawyers and the "liberal peoples" they serve [221].) Custom may also be theologically understood. Allen Calhoun describes the Christian practice—or custom—of celebrating the Lord's Supper. The simple act of breaking bread inspires redistributive acts that meet "the needs of the poor" (190). The Lord's Supper thus fosters charity, bringing about a profound characterological change on a social and individual level.

To the editors' credit, no single type of character—understood in terms of the personal or social—receives more focus than the other: there appears to be a good balance between them. This evenhandedness invites analysis of law's pedagogy from social and cultural

perspectives (pertaining to customs and social character) and from the specific fields of public, private, and penal law (the focal areas of the volume's second part, where discussion of moral character and legal coercion—through antidiscrimination laws, contract enforceability, and sex crimes, for instance—comes to the fore).

A second theme of the volume concerns ethics. Ethics, of course, is related to character: it helps differentiate personal from social character, for instance, by providing conceptual resources to distinguish personal from collective responsibility; it also helps differentiate what is held to be good from bad character by offering specific norms to assess character in its individual and social manifestations. Indeed, as Bix notes, “[w]hen we think about law’s impact on character, one obvious complication is that there is frequently no consensus as to what counts as good character” (62). Why that is the case pertains, in large part, to the existence and tension between different ethical worldviews. As a whole, the volume gives voice to a variety of moral positions—primarily from secular philosophical and Christian theological perspectives. But, perhaps unsurprisingly, given the series’ focus on “late modern [pluralistic] societies” (Witte, 15), the contributions weigh heavily on liberal commitments. In other words, its underlying ethical vision is liberal. The exact kind of liberal ethic is up for debate, but certain features of that ethic—whatever it ultimately is—can be identified.

For one, there is evidence of an anti-perfectionist perspective regarding all human affairs, including the formation of individual and social character. Attributing this perspective to Saint Augustine, Elshtain notes that “one cannot eradicate *superbia* (pride) or the *libido dominandi* (the lust to dominate) ... on any and every level” (80). Robert Cochran Jr. echoes the realism of this sentiment when he acknowledges that “[a]lmost all decisions made in the law office will benefit some people at the expense of others” (241). A practical implication of anti-perfectionism relates to freedom—the freedom to make “uncoerced choices among

alternatives,” as Bix notes (57). Bound by rules, Kantian perfectionism—the “tormentor of humanity” (Elshtain, 76)—is not endorsed by any contributor to the volume.

Another feature of the volume’s tacit ethical vision is its preference for incremental social change. No contributor is a card-carrying revolutionary. Incrementalism is most clearly seen in the contributions of James Fleming and Linda McCain. With regards to objections concerning same-sex marriage, both authors would grant religious exemptions as a “prudential remedy,” given “out of respect for and deference to those [with] religious objections” (Fleming, 96). That said, they “hope that the need for such exemptions will [eventually] wither away along with religious objections to such marriage” (Fleming, 96). In short: they insist that a change in ethical vision must happen gradually. This insistence finds support in Patrick Parkinson’s general claim regarding the “moral authority” of law: “[t]o have moral power, the law must be believed in,” he says (42). The time when *all* religious believers accept same-sex marriage may not be now (or ever?). But as this volume tacitly suggests (or even hopes for), that time may arrive in due course. An incremental (and thus somewhat conservative) moral approach may help usher it along.

A third feature of the underlying theme of ethics involves common moral denominators. Ute Mager remarks that “liberal democracy must keep open space for value orientations of the most diverse kind[s]” (149)—for example, concerning marriage. Nevertheless, Mager stresses that “value orientations ... must have a common denominator to assure compatibility” (149). This is well and good, but what might a common denominator look like in actual fact? One option suggested in the volume involves “objective ... morals” (Pfeiffer, 175): Thomas Pfeiffer says that “we can live best if the legal understanding of ‘acceptable’ or ‘good’ is, to a very large extent, understood as a normative, rule-based concept,” objectively and philosophically defined (175). If this option is too perfectionist for some, then E. Allan Farnsworth offers a more open, yet no less normative alternative: look to

“principal goals” or characteristic virtues of particular areas of law (164). For instance, the “[p]rincipal goals of contract law,” he says, “are predictability and certainty” (164). No master rule is here needed (as is suggested in Pfeiffer’s rule-based account). Instead, one needs to understand the practical goals of certain areas of law (such as contracts) and to determine what general moral conditions (or ethical postures) are required to fulfill its goals. Perhaps these discrete conditions—whether conceived as virtues or rules or consequences—is morally sufficient. Perhaps they might serve as common denominators that support a liberal and incremental ethics of law, or a liberal and incremental legal pedagogy.

A third theme is values. Given its general understanding of character (focusing not too narrowly upon personal moral character or upon social ethos and structures), and given its liberal ethical vision, the volume as a whole operates as a liberal “value proposition” (to borrow a term from marketers) for readers. In other words, it proposes—just short of explicitly—that law *should* have liberalizing effect upon “character formation, ethical education, and the communication of values” (areas featured in the book’s subtitle). One wonders, then, about the extent to which the volume may be aligned with an Augustinian anti-perfectionism. Legal and political philosophers have, of course, long recognized that liberalism has, or can have, perfectionist tendencies. So, perhaps the perfectionist nature of the volume’s liberal values may sit along a spectrum. Readers would do well to figure this out through a careful reading of each essay, discerning each contribution’s implications for the moral pedagogy of law. Such an exercise is well worth the effort—as the contributors and editors did a standup job in compiling a coherent volume filled with morally intriguing “creative tensions” (Witte, 16).

Acknowledgments and Citation Guide

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