Working Paper

THE RELATIONSHIP BETWEEN LAW AND MORALITY

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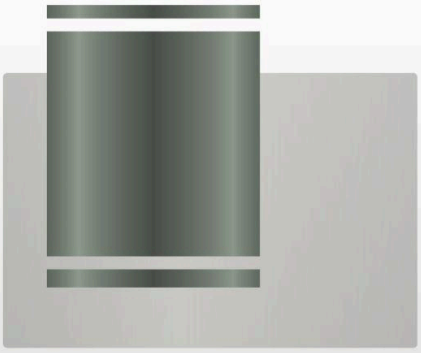
CONTENTS

Abstract	5
1. Introduction	5
2. What is Right?	6
2.1 The Science of Right	7
3. The Universal Principle of Right	10
3.1 The Categorical Imperative	10
4. The Law as Moral, Judicial, and Ethical	12
5. The Phenomenological Perspective	18
6. Concluding Thoughts	21
References	23



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Abstract

The relationship between law and morality has been dissected and studied by ancient scholars (Aquinas, 1265/1945; Socrates[1]; Kant, 1964, Holmes, 1897). It has been argued that the law is distinct from moral implications (Kant, 1964); that law can be devoid of/distinct from morality (Holmes, 1897); and, that an immoral law can be assessed through the lens of subjective convention (Protagoras[2]). It has also been argued that, in order for a law to be valid, it must first be moral (Aquinas, 1265/1945; Kant, 1964; Smith, 1759; Socrates[3]; Confucius[4]). The objective of this paper is to examine these polemics, in order to establish the meanings of both law and morality. To meet this objective, this paper will identify the differences, similarities, and (possible) intersectionalities between both concepts, and thereby, provide perspective on the nature of the relationship between morality and law.

1. Introduction

This paper posits that one's philosophy of morality (i.e., rules and actions one abides by) centers on one's foundational set of virtues (i.e., innate characteristics or intrinsic traits). Based on one's intrinsic self-awareness of what brings happiness, one is able to gauge the condition of others (with respect to one's own innate understanding of what brings happiness). Whilst Protagoras' Sophist perspective on morality borrows from relativism (Lombardo, 1992) – which centers on the idea that there are no universal or absolute truths – Aristotle viewed morality as an exercise in communal decision-making (Stanford Encyclopedia of Philosophy [SEP], 2001). For Aristotle, morality and community are inextricably linked: Our sense of morality is derived from communal existence – i.e., morality is the joint decision of peoples in communities; morality is a joint conception of what the people have decided it to be, thus whatever the members of a community believe to be so, is so. Confucius' (Lau 1963) conception of the connection between shame and morality finds similar threads in Protagoras' (see Lombardo, 1992) analyses: Virtuous people have a sense of shame; and, said sense of shame urges towards living harmoniously. What, then, is morality? And, how do we find consensus on its meaning?

According to the Kantian perspective, morality is deontological (duty-based); however, Kant also viewed morality as autonomous: He believed that human beings have the innate ability to self-legislate moral laws (see Morris, 1971). For Kant, ambiguity emerges when assessing whether an enacted law is inherently right – in and of itself – thus, the challenge becomes establishing a universal criterion by which right and wrong can be universally recognized (Morris, 1971).

[1] See Blyth (2000).
[2] See Lombardo (1992).
[3] Ibid. 1.
[4] See Lau (1963/2005).

2. What is Right?

Kant (1964) constrains the maxim of an act to being rooted in the categorical imperative of universality. Kant's prescription for the foundation of universal law is heavily dependent on realizability: Universal law is realizable, Kant posits, regardless of one's moral leanings; and, only to the extent that the law is indeed universally agreed upon. According to Morris (1971), the principle (law) of morality establishes the code of conduct every member of society must abide by to safeguard society – regardless of individual inclinations or desires. For Kant, *what is right* is based on what the laws of a certain place have to say at a certain time; however, uncertainty emerges when determining whether that which has been enacted by law is right – in and of itself – thus, the challenge becomes establishing a universal criterion by which right and wrong can be universally recognized (see Morris, 1971).

The concept of *what is right* is upheld by the external and practical relationship between an individual and their neighbor. Said differently, the idea of reciprocity is central to how members of society uphold what is right. Socrates equated *right* with intrinsic virtue (i.e., one's inherent character) – he believed that wrongful behavior is the result of a lack of knowledge; and he surmised that to harm another harms the offender more than the offended (Blyth, 2000). Holmes (1887) conditioned *what is right* on what is socially acceptable, and posits that a *right* is a state-enforced principle. According to Kant (1964), a *real right* is characterized as a right examined against the actions of every possessor of said right (Morris, 1971). In other words, a real right entitles an individual to claim an external object from anyone who may be in possession of or lay claim to it. A *real right* ensures the private use of a thing an individual is in possession of, and secures the ability to exclude every other individual from its private use (Kant, according to Morris 1971). Aquinas (1265/1945) equated *right* with justice – when an individual receives their dues, social consensus is the outcome, thus serving justice simultaneously.

Concerning equity (when discerning what is right), Kant (1964) viewed equity, not as a claim to the moral duty of benevolence, but as a right – in his purview, anyone who insists on anything on the grounds of equity has the *right* to equity (see Morris, 1971). Socrates viewed equity as a structural component of justice (Blyth, 2000). Protagoras viewed equity as a virtue heavily dependent on the concept of *universal distribution* – a (socially) distributive characteristic of justice, without which society cannot exist (see Lombardo, 1992). Aquinas (1265/1945) viewed equity through the lens of the law; a virtue whose application upholds both justice and the greater good. For Confucius, equity hinges on morality: Equity is a moral, righteous duty of the noble person; and, it guarantees social safety (see Lau, 1963/2005).

Confucius further posited that equity should be guided by benevolence; he echoed the principle of benevolence as illustrated by the Golden Rule: Luke 6:31: "*Do to others as you would have them do to you*." (King James Bible, 1760/2006; Lau, 1963/2005).

2.1 The Science of Right

According to Morris (1971), the *science of right* is the core *principle* of all laws, and it can be put into effect by external legislation. Socrates did not make a distinction concerning the science of right, instead, he viewed the pursuit of what is *right* as an ongoing discovery, with roots traceable to an individual's inherent traits of wisdom and virtue (Blyth, 2000). Aquinas (1265/1945) viewed the science of right as synonymous with objective morality: For Aquinas, that which is right is objectively just, and that which is just encapsulates the direct function of the virtue of justice.

A system upholding the principles through which all laws are both canonized and enacted is a system of *positive* right and law (Morris, 1971). Protagoras viewed positive law as crucial for survival: Positive law is the foundational reference point for reverence and justice – both necessary components for humankind to function without descending into mayhem, and ultimately, extinction (see Lombardo, 1992). Whilst Confucius (Lau, 1963/2005) recognized the importance of positive law in safeguarding the status quo, he viewed the concept of positive law as inferior to both virtue and morality – he believed that virtue and morality supersede heavy reliance on law and punishment. For Morris (1971), positive law and empirical cases are both concepts that belong to the *science of right* — thus epitomizing the philosophical and systemic knowledge of the principles of natural right (court systems). By extension, a natural law is an external law an individual is obliged to abide by because reason (not external legislation) compels said individual to comply (Morris, 1971).

For Kant (1964), positive law is law that is not obligatory (i.e., an extant law functioning without actual external legislation). External law, on the other hand, is obligatory law for which external legislation is possible: From this purview, one can conceptualize the idea of a *maxim,* as defined by Kant. According to Kant, a maxim is a principle that makes a certain action a duty (see Morris, 1971) – i.e., a practical law that has applicability to the context of morality. Rules that an individual subjects him/herself to, based on his/her own intrinsic principles, are also called maxims. Thus, even when the law is clear, the maxim of an individual may be very different (Kant, 1964; Morris, 1971).

Based on the Kantian perspective, maxims rooted in subjectivity do not comply with maxims based on objectivity; as such, reason is the only notion capable of prescribing supreme law as an absolute *imperative* (Kant, 1964). Reason is identified as the ultimate test of a principle or maxim because *reason* asks the individual to think of himself in connection with his/her actions, and then to assess whether or not said actions can be applied to everyone else – as a *universal law* (Morris, 1971).

Concerning the applicability of one's actions, vis-à-vis the rest of society, Kant (1964) emphasizes the *principle of duty* as that which reason objectively lays down in the form of a command – i.e., how an individual ought to act when duty-bound. Kant considered *human will* as the faculty or powerhouse of *moral principles*: Generally speaking, under the *will*, the volitional act of *choice* is housed – thus, the act of *choice* that can be determined by pure *reason* is the act of *free will* (Morris, 1971). Kant bases the concept of free will on reason: He posits that, in and of itself, a choice is not pure when it is separated from *reason* because the *will* controls our actions; and, our actions/choices are guided/determined by a combination of *impulse* and *reason.* Kant's rationale is that the choices we make as humans are affected by sensuous impulses/stimuli, but are not *determined* by them. When the will partners with pure reason, we are truly free – this is the *positive* conception of free will: The positive conception of free will is, thus, only possible if the maxim of every action is subjected to the same condition or *universal law* (which is both the supreme law of and determining principle for the will) (Morris, 1971). On the other hand, Kant conceptualizes negative free will as the freedom to act on volitional choice (or the will to choose) based on sensuous impulses – sensuous impulses are, therefore, the *negative* conception of free will (Morris, 1971). Kant considered irrational choice as an *act* that is sensuous/impulsive (1964).

Kant (1964) explains that "the will is absolutely good if it cannot be evil – that is, if its maxim, when made into a universal law, can never be in conflict with itself" (p. 104). Further, the Kantian morality perspective is that good will is embodied in the acts that one believes are morally upright. Said differently, Kant believed that it is the moral demands of a situation that determine good will – and, a will is good if it is based on duty, rather than an inherent sense of virtue. This finds parallel to Aquinas' (1265/1945) statement that: "...since justice regulates human operations, it is evident that it renders man's operations good, and, as Tully declares (De Officiis i, 7), good men are so called chiefly from their justice, wherefore, as he says again (De Officiis i, 7) "the luster of virtue appears above all in justice."" (Question 58, Article3).

Aquinas (1265/1945) attaches the idea of virtue to justice chiefly to emphasize the notion that a good judge is a virtuous person who has vocational training as a priest. Aquinas argues that that which is right (morality) *is* the object of justice (law). In Question 57, Article 1, Objection 1, we read:

> It would seem that right is not the object of justice. For the jurist, Celsus says [Digest. i, 1; De Just. et Jure 1] that "right is the art of goodness and equality." Now art is not the object of justice, but is by itself an intellectual virtue. Therefore right is not the object of justice…I answer that, It is proper to justice, as compared with the other virtues, to direct man in his relations with others.

In other words, even though what is right can be viewed as the culmination of goodness and equality, what is right is not (in and of itself) the object of justice. Justice exists – on its own – as an intellectual virtue, and one both discerns and derives the value of justice based on one's relationship with others. This reflects the Golden Rule, as stated in Matthew 7:12: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets" (King James Bible, 1760/2006).

The fundamental rule of skepticism is that judgment should be based on experience – this is a direct rejection of dogma. Smith (1759) represents the Skeptic Tradition in his work – The Theory of Moral Sentiments [TMS] – and posits that individuals develop moral standards by way of empathy. The Skeptic Tradition further disaggregates moral standards based on actions: The actions of oneself (and the actions of others) are judged by moral standards. Morris (1971) posits that reason commands how we ought to act, even if we have no experience or example of how the act should be carried out. Thus, reason has an advantage over experience because reason allows us to accrue knowledge about how to act, in any given situation, without having first experienced the situation.

Based on Morris' (1971) interpretation of Kant's *Universal Principle of Right*, an action is right if it can co-exist with the free will of all engaged in the action. So, if an individual's actions can co-exist with the freedom of every other person, then anyone who hinders said individual from the performance of this action (of freedom) wrongs the individual in question, in accordance with Kant's universal law (see Morris, 1971). For Kant, the laws of freedom are moral laws (as distinguished from the laws of nature) (1964).

According to Morris (1971), when the laws of freedom refer to the lawfulness of external actions, they are called juridical laws. When the laws of freedom require that, as codified laws, they determine the *principles* of our actions, then they become ethical laws (Morris, 1971).

3. The Universal Principle of Right

Morris extends this interpretation of the *Universal Principle of Right* to an individual's rights against an unjust enemy: An unjust enemy is identified as one who publicly expresses their will (in word or deed) to betray a maxim, which, if taken as a universal rule, would make peace impossible. This brings to fore the concept of the *right of necessity*, which Kant describes as the right an individual possesses, when in danger of losing his or her own life (see Morris, 1971).

The right of necessity also examines the question of an individual using violence against someone else who has used none against said individual. This right of necessity is to be understood subjectively: Morris (1971) states – arguably – there can be no criminal law against a man who, during a shipwreck, throws a man from a plank to save his own life. Morris' rationale is that the punishment afforded by the law would not be greater than the fear and suffering the person in this predicament would have experienced. Therefore, between individuals, the state of peace is guaranteed when laws that have been mutually agreed upon (by all parties involved) can be combined into a constitution rooted in clear "rules", derived from a union of men, functioning under the same set of general public (universally agreed upon) principles.

Essentially, for society (and according to Kant) the best constitution is that in which, not men, but laws establish power because, if an idea becomes law (through a process of gradual reform and fixed principles), then said idea could produce the highest political good (i.e., good in the interest of all), which could eventually engender perpetual peace (Morris, 1971).

3.1 The Categorical Imperative

The *categorical imperative* highlights the notion that we must act in such a way that the maxim of our act, the guiding principle associated with an action, must have universal applicability – regardless of how we feel or what we would prefer to do (Kant, 1964; Morris, 1971). Kant conceptually surmises the categorical imperative as an obligation: To ascribe to a categorical imperative is to behave/act in accordance with a maxim that can be adopted as a universal law (see Morris, 1971). Kant further defines the categorical imperative as a supreme principle — i.e., an act based on a maxim that can be applied as universal law. Thus, it appears that, according to Kant, it is from the categorical imperative that good will is derived (Morris, 1971). For Kant, good will is, in and of itself, the only thing that is good (1964).

Anything short of good will does not derive from the categorical imperative. So, within the constraints of the maxim of an act, and rooted in the categorical imperative of universality, Kant prescribes the foundation for universal law, which is that universal law is realizable—regardless of one's moral leanings—and only to the extent that it is universal.

We can find threads of Kant's (1964) categorical imperative in Aquinas' (1265/1945) conceptions of rectitude and justice:

> And so a thing is said to be just, as having the rectitude of justice, when it is the term of an act of justice, without taking into account the way in which it is done by the agent: whereas in the other virtues nothing is declared to be right unless it is done in a certain way by the agent. For this reason justice has its own special proper object over and above the other virtues, and this object is called the just, which is the same as "right." Hence it is evident that right is the object of justice (Question 57, Article 1, Objection 1).

In other words, the core objective of justice is to deliver *right* to the wronged. Although Aquinas (1265/1945) leaves out the notion of reciprocity, here, the premise of his argument is that we can categorize the relationship between two people as equal. Since the relationship is equal, it can only be judged externally, i.e., by another person – because absent of a third party, two equals cannot judge whether or not a relationship is truly equal. Thus, for Aquinas, justice is assigned an objective, measurable quality, void of moral demands. In Question 58, Article 3, Aquinas implies that justice is a virtue with the following statement: "A human virtue is one "which renders a human act and man himself …and this can be applied to justice"" [Ethic. ii, 6].

Aquinas (1265/1945) introduces the idea that if justice is interpreted a virtue, then justice cannot be considered the same as all other forms of virtue: "Justice is specified or enumerated with the other virtues, not as a general but as a special virtue (Question 58, Article 5, Reply to Objection 1). The idea here is that it is solely the virtue of justice that is the common good. Aquinas viewed injustice is a vice: "Wherefore legal justice, in so far as it directs to the common good, may be called a general virtue: and in like manner injustice may be called a general sin", which is at odds with the modern conception of justice and criminal sentencing, since criminal sentences are handed down for violations of the law, and are not handed down for trespasses against one's own conscience – unless such a trespass violates the laws of both God and man.

Further on the issue of whether someone who performs an injustice sins mortally, Aquinas (1265/1945; Article 59, Question 4) writes:

> When we were treating of the distinction of sins, a mortal sin is one that is contrary to charity which gives life to the soul. Now every injury inflicted on another person is of itself contrary to charity, which moves us to will the good of another. And so since injustice always consists in an injury inflicted on another person, it is evident that to do an injustice is a mortal sin according to its genus.

This, again, is in contrast to the reigning viewpoint on modern law which separates sin from injustices that violate the law.

Aquinas (1265/1945) believed that a priest (implicitly deemed a virtuous person) is the ideal judge because judgments would come from the priest's inner convictions:

> Judgment properly denotes the act of a judge as such. Now a judge [judex] is so called because he asserts the right [jus dicens] and right is the object of justice…The spiritual man, by reason of the habit of charity, has an inclination to judge aright of all things according to the Divine rules; and it is in conformity with these that he pronounces judgment through the gift of wisdom (Question 60, Article 1).

However, the expectation of society is not that a judge be perfect, but rather that he/she execute judgment in a manner that is both accountable (to society) and just.

4. The Law as Moral, Judicial, and Ethical

Socrates believed that "true belief and knowledge, guide correctly… if a man possesses these he gives correct guidance… that which guides correctly is both useful and good" (Blyth, 2000, p. 99a). Socrates viewed moral excellence as a characteristic that is divinely bestowed – moral excellence cannot be learned through acculturation or parental nurturing:

> Pericles, a man of such magnificent wisdom…brought up two sons…did he not want to make them good men? I think he did, but this could not be taught… if virtue could be taught he would have found the man who could make his sons good men… goodness does not come by nature… virtue is a good thing… virtue would be neither an inborn quality nor taught, but comes to those who possess it as a gift from the gods (pp. 86-92).

This is opposite to Aquinas (1265/1945), who believes that one must be trained both in law and virtue:

> …legal justice is not essentially the same as every virtue, and besides legal justice which directs man immediately to the common good, there is a need for other virtues to direct him immediately in matters relating to particular goods: and these virtues may be relative to himself or to another individual person (Question 58, Article 7).

This echoes the perspective of Holmes (1897), who viewed law as "a well known profession" that has been "entrusted to the judges" (para. 1).

To Smith (1759), moral sentiments are synonymous with sympathy; and, sympathy is reliant on the law of reciprocity, wherein the observer (through imagination) endeavors to discern and show empathy for the plight of the observed:

> Of this kind is pity or compassion, the emotion we feel for the misery of others, when we either see it, or are made to conceive it in a very lively manner. That we often derive sorrow from the sorrows of others…The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it (TMS, I.I.1).

Thus, for Smith (1759), our moral sensibilities are dependent upon the law of reciprocity.

Legalists believed that piety and the virtues of tradition and humanity – embodied in noble tenets of education and ethical precepts, crafted to improve upon the human condition – were not only futile but also prevented governing agents from being objective (Lau, 1963/2005). For the legalist, the belief is that government can only remain objective if the agentic arm of the government refrains from the deceptions of piety, and instead, rule over the people with strong, painstakingly crafted codified law; and, a policing force that is exacting and impartial with enforcing said laws, punishing even the most minor infractions with an iron fist (Lau, 1963/2005).

At the level of social interactions, Smith (1759) posits that the fear of death is a "great restraint upon the injustices of mankind" because death "afflicts and mortifies the individual [yet] guards and protects the society" (TMS, I.I.2). Said differently, when considering individual-level interactions, death can be seen as a behavior modifier, and behavior modification at the individual level can be seen as a social sentinel.

As each individual modifies his/her behavior – restraining injustices against each other – society, as a whole, will benefit because the outcome of restraint and behavior modification at the individual level will be a well-guarded society (as individuals will likely exercise caution in their interactions).

Lao Tzu, on the other hand, associates moral authority with the role of government — in his view: “When people don't feel threatened by power, a greater power follows. Don't squeeze people's lives. Don't oppress them. If they are not oppressed, they will not resist” (see Lau 1963/2005, p. 1). To some extent, this echoes Smith’s (1759) view that if an individual’s position within society remains in synch with the role assigned to said individual by the laws of society, then this state of harmony is “the most powerful [of] remedies for restoring the mind to its tranquility” (TMS, I.I.39). However, if the roles assigned to an individual is in disharmony with the laws of society, then disorder ensues and society, as a whole, will feel dejected:

> Whatever is the passion which arises from any object in the person principally concerned, an analogous emotion springs up, at the thought of his situation, in the breast of every attentive spectator…The passions, upon some occasions, may seem to be transfused from one man to another, instantaneously and antecedent to any knowledge of what excited them in the person principally concerned…joins…terrors for the unknown consequences of…disorder; and out of all these, forms…sorrow, the most complete image of misery and distress” (TMS, I.I.4 - I.I.12).

Here, Smith (1759) illustrates the driving force behind the modern concept of groupthink – wherein, according to Kretchmar (2019) cohesive groups are prone to make suboptimal decisions as a shared consensus-seeking mindset hinders critical thinking, and overrides individuality in thought processes. The desire for unanimity within the group stifles the objective, realistic appraisal of alternative thoughts/beliefs (Kretchmar, 2019).

Protagoras (see Lombardo, 1992) views morality from the Sophist perspective. Sophism borrows from relativism concerning the idea that there are no universal or absolute truths. Protagoras believed that “man is the measure of all things” (152a). Aristotle’s (SEP, 2001) view of morality centers on the virtuous person’s ability to “[see] the truth in each case, being as it were a standard and measure of them” (1113a32–3; as cited in SEP, 2001).

The virtuous person, by way of *logos* (reason), determines the truth through 'standards and measures' applied to each situation. Once the truth is determined, the virtuous person's viewpoint becomes legitimate – legitimate because the virtuous person is so difficult to find that, once found, his/her viewpoint of the truth is legitimized by the community. This echoes the notion that our sense of morality is derived from living in communities: Morality is decided on by people in communities, it is a joint conception of what the people have decided it to be — whatever the members of a community believe to be so, is so. Concerted beliefs remain valid at all times, for as long as the members of society hold to said beliefs. Thus, if people find common ground on what should be codified as law, then that codified decision becomes the law.

We find a similar argument in Aquinas' (1265/1945) view of the law: "The human will can, by common agreement, make a thing to be just provided it be not, of itself, contrary to natural justice, and it is in such matters that positive right has its place. Hence Aquinas believed (Ethic. v, 7) that "in the case of the legal just, it does not matter in the first instance whether it takes one form or another, it only matters when once it is laid down" (1265/1945, Question 57, Article 2, Objection 2). In other words, once a problem is identified, the approach to rectifying the situation – and how the rectification is codified – depends on the people. However, once the people have decided on the codification (i.e., the codification has become consistent with a positive right), then the law is "laid down"/set in stone (and becomes natural justice). For Kant, *natural law* is an external law that members of society are obliged to abide by because reason (not external legislation) compels one to be law abiding (Morris, 1971).

Nevertheless, Aquinas' (1265/1945) view of the law is distinct from Protagoras' (see Lombardo, 1992), in the sense that, Aquinas viewed the law as an objective standard that does not depend on reciprocity, whereas Protagoras' viewpoint was that there are principled acts that can only be acceptable if they embody the law of reciprocity. Protagoras employed both mythical and social analyses in detailing that which Socrates (see Blyth, 2000) denies as the basis of morality — which is that our sense of shame (and our willingness to learn from each other) shapes our sense of morality. Protagoras' purview is in contrast to Socrates' belief that morality is divinely apportioned.

Confucius' conception of the connection between shame and morality finds similar threads in Protagoras' (see Lombardo, 1992) analyses: In Part 2 of the Analects, Confucius explains that if adhering to the law for the sake of avoiding punishment is the only motivation of the people, then a sense of shame will not likely be developed: "Lead the people with administrative injunctions and put them in their place with penal law, and they will avoid punishments but will be without a sense of shame" (Hall & Ames, 1998, para. 2).

However, if the people are virtuous, then not only will they have a sense of shame, but the connection between the sense of shame and having a moral compass will see to it that abiding by the law becomes the default position: “Lead them with excellence and put them in their place through roles and ritual practices, and in addition to developing a sense of shame, they will order themselves harmoniously” (Hall & Ames, 1998, para. 2). This implies that Confucius saw a healthy symbiosis between law and morality.

For Smith (1759), morality hinges on virtue, and virtue stems from four principles: justice, prudence, benevolence, and self-command:

> …judicious conduct, when directed to greater and nobler purposes…is frequently and very properly called prudence...Prudence is…combined with many greater and more splendid virtues, with valour, with extensive and strong benevolence, with a sacred regard to the rules of justice, and all these supported by a proper degree of self-command (TMS, VI. I. 16).

Smith (1759) argued that the cardinal virtue is self-command, which is “…the utmost perfection of all the intellectual and of all the moral virtues. It is the best head joined to the best heart. It is the most perfect wisdom combined with the most perfect virtue” (TMS, VI. I. 16). Self-command, this superior virtue of prudence, not only allows one to reign in passions rooted in one’s own selfish desires, but also “enable[s] us upon all occasions to act according to the dictates of prudence, of justice, and of proper benevolence” (TMS, VI. III. 4), in the interest of others. The “perfectly innocent and just man” relishes in the “sacred and religious regard not to hurt or disturb in any respect the happiness of our neighbour, even in those cases where no law can properly protect him” (TMS, VI. II. 2). In other words, the cardinal virtue of self-command safeguards the happiness of one’s neighbour by ensuring that the individual self-adheres to the “sacred and religious” – which acts as moral guideposts for how one is to treat his/her neighbour.

In a state that honors “natural jurisprudence” anyone subject to the authority of the state, who ‘hurts or disturbs the happiness of another,’ shall be prosecuted by the rules “establishe[d] for this purpose, [and which] constitute the civil and criminal law…The principles upon which [these] rules either are, or ought to be founded, are the subject of a particular science, of all sciences by far the most important…that of natural jurisprudence” (TMS, VI. II. 2). This implies that Smith (1759) expected natural law (God’s law) to regulate man-made laws.

Smith saw injustice as any act that violates the happiness of one's neighbor, thereby deserving of punishment according to the laws of justice: "Injustice…is the only motive which…can justify our hurting or disturbing in any respect the happiness of our neighbor. To do so…is itself a violation of the laws of justice, which force ought to be employed either to restrain or to punish" (TMS, VI. II. 2). Even though Smith expected natural law to regulate man-made laws of justice, he did not expect that morality can be disaggregated and then apportioned to a set of natural laws (1759).

Concerning virtue, Smith (1759) focuses on the propriety of an act, even though he realizes that propriety does not sufficiently account for the diversity of sentiments that embody virtue:

> There is no virtue without propriety, and wherever there is propriety some degree of approbation is due. But still this description is imperfect. For though propriety is an essential ingredient in every virtuous action, it is not always the sole ingredient...None of those systems account either easily or sufficiently for that superior degree of esteem which seems due to such actions, or for that diversity of sentiment which they naturally excite (TMS, VII. II. 54).

This implies that Smith believed the propriety of an act does not supersede the virtue of said act. He posits that, although propriety is an essential component of virtue, it is not the sole component – esteem also plays a pivotal role.

Smith (1759) further posits that capturing the sentiments associated with vice is no different from sentiments that embody virtue because, more often than not, impropriety against a neighbor can be categorized as an injustice, and injustice will stir up feelings of revenge, resentment, and a desire to see the perpetrator punished. However, Smith posits that none of these feelings fully capture the true, raw range of emotions that are felt when an injustice is experienced:

> Neither is the description of vice more complete. For, in the same manner [that propriety is an essential ingredient for every virtue]…impropriety is a necessary ingredient in every vicious action, [but] it is not always the sole ingredient…Deliberate actions, of a pernicious tendency to those we live with, have, besides their impropriety…deserve, not only disapprobation, but punishment…

> …not…dislike merely, but…resentment and revenge: and none of those systems easily and sufficiently account for that superior degree of detestation which we feel for such actions" (TMS, VII. II. 54).

Thus, as aforementioned, Smith (1759) did not believe that the complete essence of virtue (or vice) can fully be captured by the "essential ingredients" – i.e., propriety (in the case of virtue) and impropriety (in the case of vice) – that belie both vice and virtue as aggregate concepts of what we consider to be moral.

5. The Phenomenological Perspective

Smith (1759) is of the Skeptic tradition, which aligns with the belief that experience can be collectively agreed upon based on observed phenomena. Smith believed that phenomenology is rooted in morality. Through the process of phenomenology, communal agreements are formed – communal agreements concerning that which is observed becomes the basis of moral judgements; essentially because moral judgements are not predicated upon unseen phenomena. Rather, moral judgments are made concerning practical, real-world problems – seen phenomena. Considering the legal aspect, public policy agreements are forged on the basis of need-based agreements – the common agreement made by the people (and based on a shared experience) stems from common discussion of said experience, as opposed to dogma.

Smith (1759) explains that we form rules about morality based on our experience of particular incidents, which then guide our reactions towards future incidents of a similar nature: "...our natural sense of merit and propriety are founded upon experience of what, in particular instances, our moral faculties, our natural sense of merit and propriety, approve, or disapprove of" (TMS, III. I. 95). Thus, from the phenomenological perspective, Smith (1759) contends that:

> …the general rules of morality are formed…[and] ultimately founded upon experience of …our moral faculties. We do not originally approve or condemn particular actions; because, upon examination, they appear to be agreeable or inconsistent with a certain general rule…[which] is formed, by finding from experience, that all actions of a certain kind, or circumstanced in a certain manner, are approved or disapproved of" (TMS, III. I. 95).

The implication here is that one develops general rules of morality based on both experience and based on innate moral faculties: The more exposure (through experience) one has to certain actions, the more one is able assess said actions as either agreeable or disagreeable.

The same phenomenological concept of experience-based morality can be applied to scenarios that do not align with our "original anticipations of nature" or that involve occurrences we disapprove of: "The general rule, on the contrary, which he might afterwards form, would be founded upon the detestation which he felt necessarily arise in his own breast, at the thought of this, and every other particular action of the same kind." (TMS, III. I. 95). In other words, even if one is not inherently inclined to disapprove of an action, experience-based morality kicks in, and supersedes one's 'original anticipations of nature': When disapproving of an action one is not naturally inclined to disapprove, experience-based morality overrides the natural inclination.

Smith (1759) also explains that virtue is closely linked to our ability to adjust to the sentiments of others. Our moral sensibilities depend on reciprocity: "Of this kind is pity or compassion, the emotion we feel for the misery of others, when we either see it, or are made to conceive it in a very lively manner. That we often derive sorrow from the sorrows of others…The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it." (TMS, I.I.1).

However, what is virtuous in one scenario may not be the case in a different scenario:

> …our moral faculties…[are] the supreme arbiters of all our actions…superintend all our senses, passions, and appetites, and…judge how far each of them was either to be indulged or restrained…moral faculties are by no means…endowed with no more right to restrain these last, than these last are to restrain them...Love does not judge of resentment, nor resentment of love. Those two passions may be opposite…but cannot, with any propriety…approve or disapprove of one another (TMS, III. I. 104).

Smith (1759) believed that, although morality is relative – and even, situational – what we theorize about the phenomenological characteristics of morality should be used as foundational guides in terms of moral *practice*:

> But...the peculiar office of those [moral] faculties…may be considered as a sort of senses of which those principles are the objects....Each of those senses judges in the last resort of its own objects....It belongs to our moral faculties…to determine when the ear ought to be soothed, when the eye ought to be indulged, when the taste ought to be gratified, when and how far every other principle of our nature ought either to be indulged or restrained" (TMS, III. I. 104).

Holmes (1897) believed that morality and law are separate and not connected:

> The first thing for a businesslike understanding of the matter is to understand its limits, and…dispel a confusion between morality and law…a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law (para. 8).

Holmes (1897) explains that an unethical man can be law abiding:

> A man who cares nothing for an ethical rule which is…likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can…If you want to know the law and nothing else…look at it as a bad man, who cares only for the material consequences…not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience (para. 8, 10).

To Holmes (1897), the distinction seems to be more about the individual's state of mind and the material consequences of their actions, rather than an ingrained sense of morality.

In contrast with Smith (1759) – who believed that natural law regulates man-made law – Holmes (1897) contends that man-made law has no basis in natural law:

> In regard to the law, it is true, no doubt, that an evolutionist will hesitate to affirm universal validity for his social ideals, or for the principles which he thinks should be embodied in legislation. He is content if he can prove them best for here and now. He may be ready to admit that he knows nothing about an absolute best in the cosmos, and even that he knows next to nothing about a permanent best for men (para. 24).

Holmes (1897) posits that "…it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words" (para. 24). Here, he underscores the importance of codification in maintaining civilized rule. Holmes echoes Kant's (1964) notion that only a rational being can act in reverence for the law; and, signals the kingdom-of-ends-idea that a "systematic union of different rational beings [exist] under common laws" (p. 100). In other words, different as human beings may be, a union of rational beings can co-exist under an agreed-upon set of laws.

Concerning the practice of law, for Holmes (1897), professional lawyers are the oracle of legalism, not natural law:

> When we study law we are not studying a mystery but a well-known profession…The means of the study are a body of reports, of treatises, and of statutes…extending back for six hundred years, and now increasing annually by hundreds. In these sibylline leaves are gathered the scattered prophecies of the past...These are what properly have been called the oracles of the law (para. 4, 5).

The implication here is that law is a profession based on historical evidence and that also "[makes] inquiries…[and] look[s] toward[s] answer[s] [to] questions based on science for the first time" (para. 27). Holmes (1897) viewed jurisprudence as the science of law "…retaining only the facts of legal import, up to the final analyses and abstract universals of theoretic jurisprudence" (para. 5). Holmes explains that:

> One of the many evil effects of the confusion between legal and moral ideas…is that theory is apt to get the cart before the horse, and consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward (para. 5).

Here, Holmes asserts that the law is duty-based – he makes a distinction between law and morality, and emphasizes that law is not devoid of or independent from the consequences of a moral breach of said law. This idea that there is a distinct difference between law and morality is also reflected in the Kantian perspective that morality is duty-based. Kant believed that an act can only be classified as *good will* if the actor is motivated by a sense of duty, or reverence for the law (see Morris, 1971).

6. Concluding Thoughts

From the Kantian perspective, *what is right* is encapsulated by that which the laws of a certain place have to say at a certain time, however, uncertainty emerges when determining whether that which has been enacted by law is right – in and of itself – thus, the challenge then becomes establishing a universal criterion by which right and wrong can be universally recognized (see Morris, 1971). Kant (1964) constrains the maxim of an act as being rooted in the categorical imperative of universality. Kant's prescription for the foundation of universal law is heavily

dependent on realizability: Universal law is realizable—regardless of one's moral leanings—only to the extent that the law is indeed universally agreed upon.

Aquinas (1265/1945) equated right with justice – when an individual receives their dues, social consensus is the outcome.

Confucius saw a healthy symbiosis between law and morality: He believed that if people are virtuous, then not only will they have a sense of shame, but the connection between the sense of shame and having a moral compass will see to it that abiding by the law becomes the default position. Holmes' assertion was that the law is duty-based – he separates law from morality, emphasizing that law is not vacuous of or independent from the consequences of a moral violation of said law. For Socrates, moral excellence is a characteristic that is divinely bestowed – moral excellence cannot be learned through acculturation or parental nurturing.

For Smith (1759), impropriety against a neighbor can be categorized as an injustice, and injustice will stir up feelings of revenge, resentment, and a desire to see the perpetrator punished, however, none of these feelings fully capture the true, raw range of emotions that are felt when an injustice is experienced. Whilst Protagoras' (see Lombardo, 1992) Sophist perspective on morality borrows from relativism, which centers on the idea that there are no universal or absolute truths, Aristotle [SEP, 2001] viewed morality as a derivative of virtue: The virtuous person, through a set of standards and measures, derives the truth from any given situation. His/her discovery is then upheld – legitimized as an exercise in communal decision-making. For Aristotle, our sense of morality is derived from virtue, and established through community. Smith (1759) equated moral sentiments with sympathy – sympathy is reliant on the law of reciprocity, wherein the observer (through imagination) endeavors to discern and show empathy for the plight of the observed. Smith viewed moral sensibilities as heavily dependent on the law of reciprocity.

Based on the works examined in this study, it is evident that, within the literature, there is need for consensus on the true nature of the relationship between law and morality. One notion that is a common thread in most of the treatises on law and morality explored in this paper is the idea that what is codified as law is decided by the community. As such, the laws a society adopts is a reflection of said society's (moral) conscience — what is codified as law, and those acts that are punishable by law – are a mirror into the virtues to which members of a society ascribe. Concerning the moral application of the law, from Aquinas, we learn that the expectation of society is not that a judge be perfect, but rather that he/she executes judgment in a manner that is both accountable (to society) and just.

References

Aquinas, Summa Theologiae (1265-1273), I-II, 90.4, in The Basic Writings of St. Thomas Aquinas, ed. Anton C. Pegis (New York: Random House, 1945).

Blyth, D. (2000). Socrates' Trial and Conviction of the Jurors in Plato's Apology. *Philosophy and Rhetoric, 33*(1), 1-22.

Hall, D., Ames, R. (1998). Confucius and Confucianism. In Chinese philosophy. In The Routledge Encyclopedia of Philosophy. Taylor and Francis. Retrieved from: https://www.rep.routledge.com/articles/overview/chinese-philosophy/v-1/sections/confucius-and-confucianism. doi:10.4324/9780415249126-G001-1

Holmes, O W. (1897). The Path of the Law. *10 Harvard Law Review 457*. Retrieved: https://opencasebook.org/casebooks/361-criminal-law-spring-2016-wu/resources/2.3.6-oliver-wendell-holmes-jr-the-path-of-the-law/

Kant, E. 1964. Groundwork of the Metaphysics of Morals. Harper Collins.

King James Bible. (2026). King James Bible Online. https://www.kingjamesbibleonline.org/King-James-Version/ (Original work published in 1769).

Kretchmar, J. (2019). Groupthink. *EBSCO*. Retrieved from: https://www.ebsco.com/research-starters/social-sciences-and-humanities/groupthink#full-article

Lau, D. C. (1963). "Glossary." Lao-Tzu: The Tao Te Ching. NY: Penguin Books.

Lombardo, S. Karen Bell, trans. (1992). *Plato: Protagoras*. Indianapolis: Hackett Pub Co.

Morris, C. (1971). *The Great Legal Philosophers*. Pittsburg: U of Pittsburg Press.

Plato. Plato in Twelve Volumes, Vol. 12 translated by Harold N. Fowler. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1921.

Smith, Adam. (1759). The Theory of Moral Sentiments. Library of Economics and Liberty. Retrieved December 13, 2016 from: http://www.econlib.org/library/Smith/smMS1.html

Stanford's Encyclopedia of Philosophy (SEP). (2001). Aristotle's ethics. Retrieved from: https://plato.stanford.edu/entries/aristotle-ethics/