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## Morals, Ethics, and Laws: What Commonalities Remain?

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## ESSAY

### MORALS, ETHICS, AND LAWS: WHAT COMMONALITIES REMAIN?

*Judge John M. Tyson\**

#### I. INTRODUCTION

In his Farewell Address in 1796, President George Washington encouraged his fellow Americans to reflect and remember America's national unity and identity: "With slight shades of difference, you have the same religion, manners, habits, and political principles. You have in a common cause fought and triumphed together; the independence and liberty you possess are the work of joint counsels, and joint efforts of common dangers, sufferings, and successes."<sup>1</sup> This essay briefly analyzes the historical relationships of morals, ethics, and laws in America; reviews their current commonalities and authorities; and asserts the need for morals and ethics as standards of conduct for individuals and society beyond the constraints of the law.

"Ethics," "morals," and "laws" are concepts and expectations of "right" and "wrong" conduct. In communications and conversations related to "expected," "acceptable," or "sanctionable" conduct, some individuals may use the terms "moral," "ethical," and "legal" as if they are synonymous. In homogenous or tight-knit societies, these three concepts are closely aligned. Historically, refugees and immigrants escaping from political totalitarianism of despotic governments, cultures, and belief systems and economic collapse

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1. George Washington, *Washington's Farewell Address 1796*, YALE L. SCH.: THE AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/washing.asp](http://avalon.law.yale.edu/18th_century/washing.asp) (last visited Aug. 5, 2019).

learned the language, adopted the customs, obeyed the rules, and assimilated and “melted” into the American “pot.”<sup>2</sup>

More recently, individuals fleeing oppressive and decaying regimes and cultures to seek freedom and to gain entry into the United States are neither assimilating nor adopting traditional concepts prevalent in Western Civilization and Judeo-Christian practices present at America’s Founding. Today, the terms morals, ethics, and laws may have similar or overlapping meanings in particular patterns and contexts, but they are no longer regarded by the whole of American society as synonymous or controlling.

What makes something immoral, but not unethical? What conduct and actions are illegal, but not necessarily immoral? When and why can an individual be lawfully arrested, sued, or sanctioned for some things but not for others? What similarities or commonalities remain between morals, ethics, and law?

Each of these concepts encompasses spheres of influence and each or all may overlap slightly or completely:<sup>3</sup>

(1.) **Morals** embody an individual’s or group’s private internal principles, or “core being,” regarding right and wrong. These principles are based upon the history and teachings of human experience rooted in cultural expectations and religion. They may also spring from family traditions, historical knowledge, empirical observations and measurements, and observed consequences, which result from causation and outcomes. For the public, morals refine the duty an individual owes directly to other persons and to society overall.<sup>4</sup>

(2.) **Ethics** refers to a body or series of expectations provided to or imposed upon an individual or group by an external source (e.g., their profession, associations, society, office,

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2. Diana Eck, *God’s Melting Pot*, HARV. U.: THE PLURALISM PROJECT, <http://pluralism.org/encounter/historical-perspectives/gods-melting-pot/> (last visited Aug. 5, 2019) (“It was a Jewish playwright, Israel Zangwill, who popularized the metaphor of the ‘melting pot,’ evoking the image of the crucible of America’s great steel industry. His play, *The Melting Pot*, . . . opened in Washington D.C. in 1908 . . . . When President Theodore Roosevelt saw the play on its opening night . . . he said, ‘We Americans are children of the crucible.’”).

3. See Marina J. Lostetter, *Moral, Ethical, Legal: What’s the Difference?*, A LITTLE LOST (Mar. 14, 2012), <https://lostetter.wordpress.com/2012/03/14/14/moral-ethical-legal-whats-the-difference>. But see *Ethics vs. Morals*, DIFFEN, [https://www.diffen.com/difference/Ethics\\_vs\\_Morals](https://www.diffen.com/difference/Ethics_vs_Morals) (last visited Feb. 22, 2019).

4. See generally LON L. FULLER, *THE MORALITY OF LAW* (Yale U. rev. ed. 1969); Geoffrey C. Hazard, Jr., *Law, Morals and Ethics*, 19 S. ILL. U. L.J. 447 (1995).

status, or employment). The sources of these expectations can be public or private.

(3.) **Law** is a right or restraint enforced by the civil or criminal process, by which a court or administrative agency protects individual liberty and enforces a societal right to punish a crime, impose a penalty or sanction, or impose a judgment to compel resolution and remedy a civil dispute.

A. *Morals*

Morals instruct participants in both private and public interactions. “Moral” is defined as “[o]f or concerned with the judgment of right or wrong of human action and character.”<sup>5</sup> Personal restraint, religious and cultural teachings, imposed and accepted responsibility, accountability, and duty are the firewalls to prevent immoral behaviors and harms to self and others.

Violations of personal morality are generally no longer deterred by governmental sanction. Immoral acts can cause and result in severe personal consequences: If you cheat on your spouse, you may suffer the loss of a lifelong companion, a divorce, separation from children and family, or a “mortal” wound. However, these consequences may not necessarily cause additional impacts beyond the individual persons and their close sphere of family and friends. When looking into the mirror and self-contemplating after one’s personal morality is violated, no presumption of innocence arises, in contrast to protections provided in law.<sup>6</sup>

Public morality has been described as the minimum level of conduct owed to others in order to avoid imposing individual harm and societal costs.<sup>7</sup> Examples include the duty to avoid harm to others and render compensation for breach, as imposed by civil or criminal negligence, and to avoid trespass on the exclusive possession of another’s private property.<sup>8</sup>

Different social groups and cultures developed and maintain different standards of morality. A homogenous society and group will tend to agree, based upon traditions, shared history, internal values, or training, on a set of expectations for how members will interact internally with other group members and externally with outsiders.

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5. *Moral*, AM. HERITAGE DICTIONARY (5th ed. 2019), <https://www.ahdictionary.com/word/search.html?q=MORal>.

6. See generally John M. Tyson, *Presumed Guilty Until Proven Innocent: Using Results of Statistical or Econometric Studies as Evidence*, 10 ST. THOMAS L. REV. 387 (1998).

7. See FULLER, *supra* note 4, at 5–6.

8. See generally *id.*

Collectivist cultures emphasize the needs and goals of the group as a whole over the needs and desires of each individual. In such cultures, relationships with other members of the group and the interconnectedness between people play a central role in each person's identity. Cultures in Asia, Central America, South America, and Africa tend to be more collectivistic.<sup>9</sup>

Collectivist cultures diminish the sanctity and uniqueness of the individual and focus on maintaining the collective whole.<sup>10</sup> These cultures and societies are antithetical to the deeply held convictions of personal dignity, self-worth, and liberty cherished and preserved in individualistic societies.

Critics who assert that morality is strictly based upon one's religion, and that religious tenets are irrelevant in the public arena or can be disregarded without consequence, are misinformed: "So to say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity. Our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition."<sup>11</sup>

Empirical and longitudinal observations of both human behavior and experience, and the millennia of religious tenets and practices of tribes and primitive societies, are the original bases of personal and public morality.<sup>12</sup> Swing your arm freely, but cause harm to another, and liability will be imposed through retribution, incarceration, or legal compulsion for redress and compensation in tort.<sup>13</sup>

While society can compel and punish individual conduct that is similar to conduct also required or proscribed by religious doctrines, society's morals are derived from a variety of sources and legacies: longitudinal history, empirical data, and the accumulation of human experience—not solely from

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9. Kendra Cherry, *Understanding Collectivist Cultures: How Culture Can Influence Behavior*, VERYWELL MIND, <https://www.verywellmind.com/what-are-collectivistic-cultures-2794962> (last updated Oct. 31, 2018).

10. *See id.*

11. Barack Obama, Keynote Speech at the Call to Renewal's Building a Covenant for a New America Conference in Washington, D.C., in *Obama's 2006 Speech on Faith and Politics*, N.Y. TIMES, (June 28, 2006), <https://www.nytimes.com/2006/06/28/us/politics/2006obama-speech.html>.

12. Benjamin Apel, *What is a Longitudinal Study?*, SURVEY GIZMO (Apr. 4, 2017), <https://www.surveygizmo.com/resources/blog/longitudinal-vs-cross-sectional-studies-whats-the-difference/>. *See* Robert Reich, *The Difference Between Public and Private Morality*, HUFFINGTON POST, [https://www.huffingtonpost.com/robert-reich/the-difference-between-pr\\_b\\_1344690.html](https://www.huffingtonpost.com/robert-reich/the-difference-between-pr_b_1344690.html) (last updated May 14, 2012).

13. *Tort*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/tort> (last visited Mar. 17, 2019).

religion.<sup>14</sup> Dogma or customs of a given group can emerge into a canon or form the practices of a cult.<sup>15</sup>

Society and government can legitimately encourage and protect or regulate and sanction conduct, which is similarly regulated by religion, without the protection or regulation being challenged or voided as being religiously based. As such, public morality is preserved and enforced, and is not subject to prohibitions or restrictions of the First Amendment's Establishment Clause.<sup>16</sup> As President Washington continued in his Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. . . . *Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.*

*It is substantially true that virtue or morality is a necessary spring of popular government.* The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?<sup>17</sup>

As American society fragmented and divided into identities and factions, the law increasingly became unhitched and separated from once prevailing morals that contributed to the common foundation to support the unity and cohesion of America's mutually reinforcing religious, social, fraternal, service institutional, and legal systems. As this separation of morals and laws widened, respect for—and enforcement of—moral precepts waned, and enforceable sanctions for deviations from traditional moral behaviors are

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14. See Reich, *supra* note 12.

15. *Canon*, AM. HERITAGE DICTIONARY (5th ed. 2019), <https://www.ahdictionary.com/word/search.html?q=canon>; *Cult*, AM. HERITAGE DICTIONARY (5th ed. 2019), <https://www.ahdictionary.com/word/search.html?q=cult>.

16. See U.S. CONST. amend. I. See also *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2090 (2019) (concluding that the Bladensburg Cross does not violate the Establishment Clause).

17. Washington, *supra* note 1 (emphasis added).

disappearing from legal compulsion. Civility, security, and freedoms decrease, while distrust, fragmentation, and polarization increase.

## B. *Ethics*

The American Heritage Dictionary defines “ethic” as “[a] set of principles of right conduct” or “[a] theory or system of moral values”<sup>18</sup> and “ethics” as “[t]he study of the general nature of morals and of the specific moral choices to be made by a person.”<sup>19</sup> A suitable definition of “ethical” in a business or professional setting is found in Webster’s New International Dictionary: “professionally right or befitting; conforming to professional standards of conduct.”<sup>20</sup>

### 1. Origins of Ethics

“[E]thics could have come into existence only when human beings started to reflect on the best way to live. This reflective stage emerged long after human societies had developed some kind of morality, usually in the form of customary standards of right and wrong conduct.”<sup>21</sup> Ethics, outside of a familial context, is civility and collegiality based upon altruistic behaviors and expected reciprocity, and has traditionally governed professional interactions, commercial or business transactions, and, more recently, public services.<sup>22</sup>

Shared group values emerged from apprenticeships, guildhalls, trade unions, professional associations, and commercial reputations. These expectations gave rise to uniform standards of weights, measurements, benchmarks, guarantees, and warranties (e.g., “satisfaction guaranteed or your money back” or “reeding” the edge of coins to maintain uniformity of values and prevent filing or shaving of precious metals).<sup>23</sup>

Ethics’ authority establishes and compels a mutual understanding and acceptance of the standards of workmanship and quality expected and

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18. *Ethic*, AM. HERITAGE DICTIONARY (5th ed. 2019), <https://www.ahdictionary.com/word/search.html?q=ethic>.

19. *Id.*

20. *Ethical*, WEBSTER’S NEW INT’L DICTIONARY (2d ed. 1949).

21. Peter Singer, *Ethics*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/ethics-philosophy> (last updated Aug. 12, 2019).

22. *See id.*

23. *See, e.g.*, Christopher Beam, *Does “Satisfaction Guaranteed” Actually Mean Anything? Yes. Or Your Money Back!*, SLATE (Dec. 19, 2008, 6:10 PM), <https://slate.com/news-and-politics/2008/12/does-satisfaction-guaranteed-actually-mean-anything.html>; Barbara Maranzani, *Why Do Coins Have Ridges?*, HIST. (Nov. 27, 2012), <https://www.history.com/news/why-do-coins-have-ridges>.

enforced within a profession or trade organization governing its products, interactions, or transactions. Professional, trade, labor, and fraternal organizations have agreed upon specific procedures and standards to govern admission or access to members and associates and the processes of certain transactions.<sup>24</sup>

The legal profession was late to address the professional ethics of its members. The American Bar Association established a committee in 1905 to study and report “upon the advisability and practicability of the adoption of a code of professional ethics by [the ABA].”<sup>25</sup> This committee presented a report, which found, in part, that changes occurring within the legal profession prompted the need for a professional code of ethics.<sup>26</sup> Growth in both the size of the nation and membership in the legal profession caused concerns over the growing commercialism and solicitation within the profession:

[T]he trend of many is away from the ideals of the past and the tendency more and more to reduce our high calling to the level of a trade, to a mere means of livelihood or of personal aggrandizement. . . . Once possible ostracism by professional brethren was sufficient to keep from serious error the practitioner with no fixed ideals of ethical conduct; but now the shyster, the barratrously inclined, the ambulance chaser, the member of the Bar with a system of runners, pursue their nefarious methods with no check save the rope of sand of moral suasion so long as they stop short of actual fraud and violate no criminal law.<sup>27</sup>

This committee further recommended that bar applicants should be required to subscribe to a written code of ethics in order to join and maintain

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24. See, e.g., National Association of REALTORS®, Code of Ethics and Standards of Practice of the National Association of REALTORS® (2019), <https://www.nar.realtor/sites/default/files/documents/2019-COE.pdf>; Royal Warrant Holders Association, <https://www.royalwarrant.org> (last visited Oct. 31, 2019) (“The history of the Royal Warrant can be traced back to medieval times, when competition for Royal favour was intense and the Monarch had the pick of the country’s best tradespeople.”).

25. *Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association, Held at Narragansett Pier, Rhode Island, August 23, 24 and 25, 1905*, 28 A.B.A. REP. 3, 132 (1905). See John M. Tyson, *A Short History of the American Bar Association’s Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Responsibility: 1908-2008*, 1 CHARLOTTE L. REV. 9 (2008).

26. *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 600–04 (1906).

27. *Id.* at 601.



membership into the bar.<sup>28</sup> The American Bar Association's House of Delegates adopted the proposed Canons at the 1908 meeting.<sup>29</sup> These Canons, though amended, superseded, and restated, remain relevant as both a source of expected professional ethical conduct and a benchmark for discipline for members of the bar.<sup>30</sup>

Business ethics are sub-groups of ethics that cover trade, enterprise, and other commercial interests. For example, those attending a conference are viewed as attending a professional event or associational meeting. Their group interactions are governed by ethics. Although the attendees may use colorful language or expletives when they feel excited or expressive, the ethics of a professional setting could categorize such colorful language or use of expletives as inappropriate and may lead to decreased interactions or disassociation.

Boorish or unprofessional behavior still carries consequences in the market. Reduced interaction or disassociation may result in avoiding or shunning colleagues or the termination of business or professional relationships as sanctions for otherwise lawful conduct and constitutionally protected speech. Within these voluntary associations and professions, the prevailing expectations are adherence to the prescribed standards, maintaining self-governance, mutual respect, reciprocity, and preservation of reputation.

Business organizations seek to maintain their reputations and regularly communicate their manner of doing business with their customers, employees, suppliers, shareholders, subcontractors, and others who come into contact or are associated with the organization. These communications may include both the company's internal and external codes of conduct.

A long-established and successful company in the business and professional world is Johnson & Johnson. Their *Credo* has guided the company's business environment, manners, and actions for over seventy-five years.<sup>31</sup> The *Credo* was initiated by General Robert Wood Johnson, son of the company's founder, during World War II and presented at the December 1943 board of directors meeting, just a few months before Johnson & Johnson became a publicly-traded company.<sup>32</sup>

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28. *Id.* at 602.

29. *Transactions of the Thirty-First Annual Meeting of the American Bar Association Held at Seattle, Washington August 25–28, 1908*, 33 A.B.A. REP. 3, 59–85 (1908); CANONS OF ETHICS, 33 A.B.A. REP. 575 (1908).

30. See Tyson, *supra* note 25.

31. Erika Janes, *8 Fun Facts About Our Credo—Johnson & Johnson's Mission Statement*, JOHNSON & JOHNSON (Feb. 5, 2018), <https://www.jnj.com/our-heritage/8-fun-facts-about-the-johnson-johnson-credo> (“2018 marks the 75th anniversary of Our Credo”).

32. *Id.*

The *Credo* is short, but comprehensive, and establishes the company's accepted ethical responsibilities to and manner of doing business with its customers, suppliers, employees, stockholders, and the community:

We believe our first responsibility is to the patients, doctors and nurses, to mothers and fathers and all others who use our products and services. In meeting their needs everything we do must be of high quality. We must constantly strive to provide value, reduce our costs and maintain reasonable prices. Customers' orders must be serviced promptly and accurately. Our business partners must have an opportunity to make a fair profit.

We are responsible to our employees who work with us throughout the world. We must provide an inclusive work environment where each person must be considered as an individual. We must respect their diversity and dignity and recognize their merit. They must have a sense of security, fulfillment and purpose in their jobs. Compensation must be fair and adequate and working conditions clean, orderly and safe. We must support the health and well-being of our employees and help them fulfill their family and other personal responsibilities. Employees must feel free to make suggestions and complaints. There must be equal opportunity for employment, development and advancement for those qualified. We must provide highly capable leaders and their actions must be just and ethical.

We are responsible to the communities in which we live and work and to the world community as well. We must help people be healthier by supporting better access and care in more places around the world. We must be good citizens — support good works and charities, better health and education, and bear our fair share of taxes. We must maintain in good order the property we are privileged to use, protecting the environment and natural resources.

Our final responsibility is to our stockholders. Business must make a sound profit. We must experiment with new ideas. Research must be carried on, innovative programs developed, investments made for the future and mistakes paid for. New equipment must be purchased, new facilities provided and new products launched. Reserves must be

created to provide for adverse times. When we operate according to these principles, the stockholders should realize a fair return.<sup>33</sup>

Companies and organizations, like Johnson & Johnson, which adopt and communicate codes of practices and conduct, provide a clear ethical direction and expectation for their employees and associates interacting with and responding to customers and suppliers. However, when a situation arises, the ethical aspirations and responsibilities in the *Credo* are not contained in a vacuum and must be interpreted and applied using subjective and objective reasoning within the *Credo's* aspirational framework and purpose rather than by solely resorting to excuses and legalisms.<sup>34</sup>

In an academic setting, the issue of expected ethical conduct is to study, attend class, complete assigned work, produce scholarship, and not plagiarize. If someone else writes your presentation or article as a “work for hire,” and you present it solely as your own work, you may not have illegally infringed upon anyone else’s legal rights. Without crediting for original work, the artist or author is denied their creative recognition, which may be viewed as both immoral and unethical. Plagiarism may not violate copyright laws, though copyright infringement may equal plagiarism.<sup>35</sup>

Plagiarizing another’s work and presenting it as your own in school or at work may lead to expulsion, revocation of degrees, or termination from employment, but the violator will not be arrested or fined. These actions are immoral and unethical, but are not illegal, unless another’s work is pirated without payment or attribution and intellectual property law is violated.<sup>36</sup>

The College of William & Mary proudly asserts its honor system is the nation’s oldest collegiate honor system.<sup>37</sup> Each student must agree to live by and support the spirit of the pledge: “As a member of the William & Mary Community, I pledge on my honor not to lie, cheat, or steal, either in my academic or personal life. I understand that such acts violate the Honor Code

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33. *Our Credo*, JOHNSON & JOHNSON, <https://www.jnj.com/credo/> (last visited Feb. 15, 2019).

34. *See id.*

35. Brian L. Frye, *Plagiarism is Not a Crime*, 54 DUQ. L. REV. 133, 137 (2016).

36. *Is Plagiarism Illegal?: What are the Legal Consequences?*, PLAGIARISM (Oct. 27, 2017), <https://www.plagiarism.org/blog/2017/10/27/is-plagiarism-illegal>.

37. *Honor Code & Honor Councils*, WM. & MARY, <https://www.wm.edu/offices/deanofstudents/services/communityvalues/honorcodeandcouncils/honorcode/index.php> (last visited Oct. 17, 2019) (“The Honor Code is an enduring tradition at the University with documented history that originates as far back as 1736.”).

and undermine the community of trust, of which we are all stewards.”<sup>38</sup> The William & Mary honor code governs both the students’ private and academic actions.

The University of Virginia maintains the nation’s oldest *student-run* collegiate honor system.<sup>39</sup> The standard honor pledge at the University of Virginia reads: “On my honor as a student, I have neither given nor received aid on this examination (or assignment).”<sup>40</sup> “Appended to an assignment or examination, the pledge is a signed reaffirmation of the student’s commitment to academic integrity.”<sup>41</sup>

As their own defined and insular communities, the military academies maintain strict codes of honor, which include morality and ethics. West Point’s *Cadet Honor Code* reads simply: “A cadet will not lie, cheat, steal, or tolerate those who do.”<sup>42</sup> The United States Air Force Academy *Honor Code* is similar to West Point’s and adds: “I resolve to do my duty and to live honorably, (so help me God).”<sup>43</sup>

The United States Naval Academy’s *Honor Concept* is more descriptive:

Midshipmen are persons of integrity: They stand for that which is right. They tell the truth and ensure that the truth is known.

**They do not lie.**

They embrace fairness in all actions. They ensure that work submitted as their own is their own, and that assistance received from any source is authorized and properly documented.

**They do not cheat.**

They respect the property of others and ensure that others are able to benefit from the use of their own property.

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38. *Id.*

39. D. Bruce Carter, *Honors, Honor Codes, and Academic Integrity: Where Do They Converge and Diverge?*, J. NAT. COLLEGIATE HONORS COUNCIL, Spring 2008, at 15.

40. *Honor System and Faculty*, U. VA., <https://provost.virginia.edu/academic-policies/honor-system-and-faculty> (last visited April 25, 2019).

41. *Id.*

42. LTC Todd Messitt, *United States Military Academy Cadet Honor Code & System*, WEST POINT ASS’N OF GRADUATES, <https://www.westpointaog.org/netcommunity/document.doc?id=621> (last updated Aug. 15, 2007).

43. *The Academy Experience: Honor Code*, U.S.A.F. ACAD., <https://www.academyadmissions.com/the-experience/character/honor-code/> (last visited Feb. 15, 2019).

**They do not steal.**<sup>44</sup>

Prescribed communal standards of ethical behavior and codes of conduct are more closely aligned with morality and civility, far exceeding the minimum expected level of conduct proscribed by law.

C. *Law*

Law governs applicable jurisdictions and regulates interactions involving people, family members, business colleagues, governmental organizations, public and private entities, and total strangers. Law, as a traditionally minimum restraint on personal liberty and freedom, lies at the lower end of the expectations spectrum from moral and ethical conducts and regulates everything from personal and public duty to the governance of society.

## 1. Defining “Law”

Unlike the recipients of personal moral transgressions or ethical lapses, a victim of a legal violation is entitled to recourse to the compelled assistance and authority of others, specifically public officials, in seeking to induce the transgressor to provide redress. The law requires of each person a minimum duty. Deviation from and breach of that duty is enforced through public authority to protect those individuals and organizations harmed by a breach of that duty.<sup>45</sup>

Christopher F. Mooney has asserted that laws alone are poor substitutes for moral or ethical conduct: “three affirmations about law as a standard for public morality: first, it is a minimum standard; second, minimum though it is, law is nonetheless a necessary standard; third, because it is both minimum and necessary, law as a [moral or ethical] standard is incomplete.”<sup>46</sup>

In societies with higher priorities for protecting personal freedom and defending individual rights, legal restraint or compulsion imposes the minimum standard of expected conduct—the “least restrictive means” to compel behaviors or to accomplish societal expectations.<sup>47</sup> Examples of how law is the minimum restraint on conduct or activity include the common law

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44. *Honor Concept*, U.S. NAVAL ACAD, <https://www.usna.edu/About/honorconcept.php> (last visited March 30, 2019).

45. See Geoffrey C. Hazard, Jr., *Law, Morals, and Ethics*, 19 S. ILL. U.L.J. 447, 448–50 (1995).

46. Christopher F. Mooney, *Public Morality and Law*, 1 J.L. & RELIGION 45, 45 (1983).

47. *Least Restrictive Means Test*, WEST’S ENCYCLOPEDIA OF AM. LAW (Thompson Gale 2d ed. 2002) (“If the government enacts a law that restricts a fundamental personal liberty, it must employ the least restrictive measures possible to achieve its goal. This test applies even when the government has a legitimate purpose in adopting the particular law.”).

presumption of innocence, which imposes a burden of proof by the applicable standard upon the accuser,<sup>48</sup> and the rule of lenity, which requires “interpretative doubts [to be interpreted] in favor of the defendant.”<sup>49</sup>

While colonists were gaining independence from the king’s yoke of tyranny, and later at both the Founding and Framing, skepticisms and expectations of hard-won personal liberty and freedom demanded governmental restraints to regulate sovereign individuals at the lowest levels of tolerated conduct: “a wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government.”<sup>50</sup> Even then, to achieve ratification of the Constitution of the United States, the cession of power from “We the People” and the thirteen former colonies, states, and commonwealths was conditioned upon the express inclusion and preservation of individual liberties and protections of personal property as enumerated in the Bill of Rights to be reserved to the People and their states and commonwealths.<sup>51</sup>

## 2. Enforcement of the Law

In times past, transgressing the morals of the family, church, and community could lead to far worse private and public consequences for the violator than criminal sanctions. Parents and families, schools and teachers, parishioners and churches, and fraternal, service, and veteran organizations mutually reinforced the expected behaviors, supported patriotism, and sanctioned violators. The punishments within the home or school could be worse than what was imposed by the courts for similar conduct.

The decline in enforcement of moral and ethical violations has shifted expectations of laws. Law, as a cession of power by the People to regulate and

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48. See Tyson, *supra* note 6.

49. Mike C. Materni, *The 100-Plus-Year-Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)*, 18 NEW CRIM. L. REV. 331, 366–67 (2015).

50. Thomas Jefferson, *Jefferson’s First Inaugural Address*, YALE L. SCH.: THE AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/jefinau1.asp](http://avalon.law.yale.edu/18th_century/jefinau1.asp) (last visited Dec. 5, 2019); see also THOMAS PAINE, COMMON SENSE 2 (3d ed. 1776) (“Society in every state is a blessing, but government even in its best state is but a necessary evil; in its worst state an intolerable one; for when we suffer, or are exposed to the same miseries *by a government*, which we might expect in a country *without government*, our calamity is heightened by reflecting that we furnish the means by which we suffer. Government, like dress, is the badge of lost innocence; the palaces of kings are built on the ruins of the bowers of paradise.” *Id.* (emphasis in original)).

51. See, U.S. CONST. amends 1–10. See also, e.g., CAROL BERKIN, THE BILL OF RIGHTS: THE FIGHT TO SECURE AMERICA’S LIBERTIES 28 (Simon & Schuster ed., 2015).

sanction to the collective, is now viewed and enforced as the expected level of conduct, rather than the lowest-tolerated level of conduct. This de-regulation of previously prohibited conduct, and the expansion of the scope and application of laws to ever-encompassing ranges of previously unregulated conduct, creates a dilemma and shortfall in ethical and moral behaviors. The compulsion inherent in law is elevated and substituted for aspirational and altruistic goals and is asserted as a ceiling, not as a floor, to compel the maximum desired individual and entity conduct within a particular ideology.<sup>52</sup>

D. *Commonalities Between All Three Concepts*

Since criminal conduct and civil tort liability traditionally defined the minimum level of acceptable conduct tolerated by society, these historical regulations and common law restraints were easily taught and understood, and often contained within single volumes.<sup>53</sup> As Presidents Washington and Adams noted, a free and orderly society relies upon shared morality and ethics, above the minimum regulation of law, to preserve a shared national unity and cohesion and to restrain detrimental individual behaviors.<sup>54</sup> Responsible individuals are expected to behave morally and ethically. If they do so, their behaviors and conduct are virtually always lawful.

More recently, an immoral action may not necessarily be considered either unethical or illegal. If someone acts unethically, those actions may not also be sanctioned as illegal or immoral. Consequences still result from each action and breach of expectations. Sometimes, the consequences of immoral actions can be far worse for an individual than sanctions of an illegal action.<sup>55</sup> In contrast, immoral or unethical actions can lead to professional or personal ruin, while leaving both personal liberty and monetary assets unscathed.

[L]aw never has been, and never will be, the salvation of any society. The values of a reasonably just society . . . will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously

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52. See Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (1979).

53. See, e.g., WILLIAM BLACKSTONE, COMMENTARIES.

54. See Washington, *supra* note 1; Adams, *infra* note 88.

55. For example: chronic and fatal diseases, and death.

observed.<sup>56</sup>

Sometimes, moral imperatives and aspirations must rise above enacted laws. Christopher L. Mooney cites Alexander Solzhenitsyn's remarks at a Harvard University Commencement:

I have spent all my life under a Communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is not quite worthy of man either. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man's noblest impulses.<sup>57</sup>

Viewed hierarchically, morality encompasses greater spheres of expected conduct and restraint than either ethics or law. Ethics tends to cover a wider range of expected conduct than legal rules, which historically enforced deviations from the minimum standards of conduct. Finally, there is conduct which falls under the governance and sanction of all three spheres.

If someone murders another human being without justification, that act is simultaneously regarded as immoral, unethical, and unlawful. If the murder is premeditated, for profit, or occurs during the commission of other felonious acts, the legal penalty can be death.<sup>58</sup> Transgressions that fall under the governance of all conceptions of morals, ethics, and law reinforce the strength of the standards and severity of legal prohibitions and sanctions imposed.

If a married person engages in an extra-marital affair with his or her neighbor, that action qualifies as immoral and a breach of covenant and vows,<sup>59</sup> but if the neighbor has nothing to do with the other person professionally, some individuals may not view this conduct as unethical. In a

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56. Mooney, *supra* note 46, at 47 (citing GRANT GILMORE, *THE AGES OF AMERICAN LAW* 160 (1976)) (internal quotation marks omitted).

57. *Id.* at 53–54 (quoting *TIME MAG.*, June 19, 1978, at 33).

58. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

59. Eighty-nine percent (89%) of individuals surveyed between May 1-12, 2019 believed married men and women having an affair was morally wrong, and eighty-three percent (83%) of respondents voted the overall state of moral values in America was only fair or poor. See *Moral Issues*, GALLUP, <https://news.gallup.com/poll/1681/moral-issues.aspx> (last visited July 30, 2019).



great majority of states, adultery is also no longer a crime nor does it subject one to civil liability.<sup>60</sup>

However, some states, including North Carolina, retain and enforce criminal conversation and alienation of affections as civil torts to allow the injured spouse a means of redress and recovery for the wrong and damage done by others to their covenant and contract of marriage.<sup>61</sup> These criminal conversation and alienation civil actions are similar to the civil tort of tortious interference with a contractual relationship, where a third party maliciously interferes in an existing business contract or economic relationship, which causes damages and economic loss, just like the destruction of familial relationships, unity, and the economic consequences of divorce.<sup>62</sup>

In 2017, the North Carolina Court of Appeals unanimously upheld the constitutionality of criminal conversation and alienation of affections torts and statutes, ruling: “the State has a legitimate interest (indeed, a substantial interest) in protecting the institution of marriage, ensuring that married couples honor their vows, and deterring conduct that would cause injury to one of the spouses.”<sup>63</sup> The Supreme Court of North Carolina declined further review.<sup>64</sup> Though these torts have been unfairly criticized as treating a “wife as property,” wives suing other women for “husband stealing” is also the basis of these actions.<sup>65</sup>

Though critics may question whether infidelity should be sanctioned by the law, fidelity and exclusiveness are the expectations and vows exchanged in most marriages. The great majority of married couples believe fidelity is important to protect themselves, their children, and preserve their nuclear family.<sup>66</sup> It is something they have vowed to each other and publicly to

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60. 3 DAN B. DOBBS, *THE LAW OF TORTS* § 442, at 1246 (West Group ed., 2000); see G. Edgar Parker, *Tort Claims for Alienation of Affections and Criminal Conversation are Alive and Well in North Carolina*, 24 N.C. ST. B.J., no. 2, Summer 2019, at 18.

61. Sherry H. Everett, *The Law of Alienation of Affections after McCutchen v. McCutchen: In North Carolina, Breaking up Just Got Harder To Do*, 85 N.C. L. REV. 1761, 1761 n.3 (2007).

62. Lance McMillian, *Adultery as Tort*, 90 N.C.L. REV. 1987, 1993–94 (2012).

63. *Malecek v. Williams*, 804 S.E.2d 592, 596 (N.C. Ct. App. 2017), *discretionary review denied*, 807 S.E.2d 574 (N.C. Dec. 7, 2017).

64. *Malecek*, 807 S.E.2d 574.

65. Jacob M. Appel, *Hate the Husband? Sue the Mistress!*, HUFFINGTON POST (Mar. 18, 2010, 5:12 AM), [https://www.huffingtonpost.com/jacob-m-appel/hate-the-husband-sue-the\\_b\\_3111419.html](https://www.huffingtonpost.com/jacob-m-appel/hate-the-husband-sue-the_b_3111419.html) (last updated May 25, 2011).

66. Lydia Saad, *Gallup Vault: Fidelity, Respect Rated Keys to Marital Bliss*, GALLUP (May 18, 2018), <https://news.gallup.com/vault/234593/gallup-vault-fidelity-respect-rated-keys-marital-bliss.aspx>.

maintain. Infidelity is generally considered as immoral.<sup>67</sup> Shock and hurt results where one party does not view the marriage and protection of the family as an exclusive relationship and the other party does.<sup>68</sup> Trust, intimacy, monogamy, mutual support for each other and the children, and freedom from heightened risks of sexually transmitted diseases or other diseases are legitimate expectations in a covenant of marriage.<sup>69</sup>

1. Unlawful, but Not Immoral, or Unethical

Actions proscribed as unlawful might not also be considered immoral or unethical. The authority of common law police power regulation can be traced back to the Sovereign.<sup>70</sup> For example, a driver is traveling down a road in a wide-open area where there is no other traffic for miles. The driver has not been drinking and is alone. The road is a straightaway. Visibility is unobstructed for miles. The speed limit is seventy miles per hour, but the vehicle is traveling at eighty.

Is the driver's action immoral? No. Unethical? No, unless this driving is part of the driver's profession. Has the law been broken, and can sanctions be imposed? Yes. What public interest is society seeking to protect through enacting and enforcing these laws?

The speed limit, like many other uniform police power regulations, exists both as an ancient power of the Sovereign and as a reflection of society's interest in safety, fairness, and reducing costs—whether or not individuals agree with its application in a particular situation. How does society justify sanctioning the failure to wear a seat belt with expectations of personal liberty or penalizing alcohol consumption for those under the age of twenty-one, where ages of consent, military service, adulthood, and liability are lower? Both of these actions remain illegal and are examples of situations in which the societal costs avoided by the legal restraints trump the freedom of personal choice unburdened by sanctions or public consequences.<sup>71</sup> Under

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67. See *supra* note 59; Jacob Poushter, *What's Morally Acceptable? It Depends on Where in the World You Live*, PEW RES. CTR. (Apr. 15, 2014), <http://www.pewresearch.org/fact-tank/2014/04/15/whats-morally-acceptable-it-depends-on-where-in-the-world-you-live/>.

68. Parker, *supra* note 60, at 18.

69. *Id.* at 19. Some couples may agree to an "open" marriage. For them, interacting intimately with multiple partners is neither immoral, unethical, or illegal. To be morally, ethically, and legally compliant, if one person expects an "open marriage," full disclosure of this expectation must be made and agreed upon by both parties prior to the marriage. See Mooney, *supra* note 46.

70. N.C. GEN. STAT. § 4-1 (2017).

71. See, e.g., Hazard, *supra* note 45.

feudal law, every person held potential value to the Sovereign and was regarded as an asset to the Crown.<sup>72</sup>

Many laws criminalize conduct and actions that sizable segments of the population argue should be legalized. For example, suicide, marijuana and other illegal drugs, prostitution, and gambling remain illegal in many states.<sup>73</sup> Society, and more specifically, the families and friends of the individuals engaging in these activities, bears the costs and consequences when these actions are legalized. Empirical observations of human experience have shown these actions impose detrimental and long-term negative impacts upon the individuals engaging in those behaviors and their families.<sup>74</sup> Decriminalizing previously illegal and detrimental actions further debases and coarsens the culture.

Societal good is decreased and societal costs are increased. Productive lives are debilitated or destroyed. Contributing members of society who avoid these activities may object to and resent being compelled to support the added costs to the legal, correctional, medical, and entitlement systems—through taxation, increased insurance premiums, and risks—to address the consequences of these activities.

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72. Feudalism conventionally denotes the type of society and the political system originating in western and central Europe and dominant there during the greater part of the Middle Ages. However, the term is also applied to other societies and systems of government with similar characteristics, in antiquity. In modern times in the Marxist usage it refers to a type of society and economy characterized by serfdom, generally succeeding the economic systems based on slavery and preceding capitalism. See *Feudalism*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/environment/encyclopedias-almanacs-transcripts-and-maps/feudal-system> (last visited July 30, 2019).

73. GEORGE F. COLE & CHRISTOPHER E. SMITH, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 14 (Thomson Wadsworth 11th ed. 2007).

74. See generally Alex Berenson, *Marijuana, Mental Illness, and Violence*, 48 *IMPRIMIS* 1 (Jan. 2019), <https://imprimis.hillsdale.edu/marijuana-mental-illness-violence/>; See also Dr. Kenneth L. Davis and Dr. Mary Jeanne Kreek, *Marijuana Damages Young Brains, States That Legalize It Should Set a Minimum Age of 25 or Older*, N.Y. TIMES (June 16, 2019), <https://www.nytimes.com/2019/06/16/opinion/marijuana-brain-effects.html> (“Researchers who tracked subjects from childhood through age 38 found a consequential I.Q. decline over the 25-year period among adolescents who consistently used marijuana every week. In addition, studies have shown that substantial adolescent exposure to marijuana may be a predictor of opioid use disorders.”); Jennifer Oldham, *Potent Pot, Vulnerable Teens Trigger Concerns in First States To Legalize Marijuana*, WASH. POST (June 16, 2019), [https://www.washingtonpost.com/national/potent-pot-vulnerable-teens-trigger-concerns-in-first-states-to-legalize-marijuana/2019/06/15/52df638a-8c9a-11e9-8f69-a2795fca3343\\_story.html](https://www.washingtonpost.com/national/potent-pot-vulnerable-teens-trigger-concerns-in-first-states-to-legalize-marijuana/2019/06/15/52df638a-8c9a-11e9-8f69-a2795fca3343_story.html) (“As more than a dozen states from Hawaii to New Hampshire consider legalizing marijuana, doctors warn of an urgent need for better education—not just of teens but of parents and lawmakers—about how the products being marketed can significantly affect young people’s brain development.”).

## 2. Separating Law from Morality

The removal of the overarching morals and ethics behind avoiding and discouraging detrimental activities, and not enforcing such laws, leaves society poorer and coarser, with unfilled gaps in its guiding principles. Furthermore, removing legal restraints on detrimental activities imperils minors who are unprepared to avoid these negative influences that their parents might not condone.

When striking down long-standing laws and practices or arbitrarily substituting the compulsion of laws, which are contrary to generally-accepted morality or ethics, advocates attempt to compel results, which are neither objectively true nor enjoy majority support. Even more particularly, public resentment arises when the legalization of these activities is accomplished by judicial fiat, and not by legislative enactment by majority vote of elected representatives.

When activists substitute and impose overly restrictive laws or loosen protections and punishments, which are contrary to or extinguish long-accepted morals and ethics of the society, individuals impacted lose respect for the law and are less likely to respect and obey it. Those affected will passively resist or openly oppose and defy these notions. These changes, forced through undemocratic processes, are divisive and erode confidence in the ability of a representative-republican majoritarian form of government to function and preserve individual freedoms.

Another example of the rejection of controlling laws is the sworn juror's disregard of the evidence admitted and instructions provided by the judge.<sup>75</sup> Jury nullification has been described as a jury's knowing and deliberate rejection of the evidence, or its refusal to apply the law as instructed by the court.<sup>76</sup> The jury either wants to send a message about some social issue or express dissatisfaction that is larger than the facts or the parties before it, or because the results dictated by law are contrary to the jury's sense of justice, morality, or fairness.

Jury nullification is a discretionary act—a usurpation—and is not a legally sanctioned function of the jury.<sup>77</sup> It is inconsistent with the jury's sworn duty to return a verdict based solely upon the evidence and the judge's instruction of the law. The jury does not have a right to nullify the lawful outcome, and

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75. See Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389, 390 (1989).

76. *Id.*

77. *Id.* at 390–91.

counsel is not permitted to present the concept of or urge jury nullification.<sup>78</sup> However, jury verdicts of acquittal are unassailable, even where the verdict is inconsistent with the weight of the evidence and instruction of the law.<sup>79</sup>

This example of rejection illustrates it is impossible to change objective and universal truths gained through divine revelation, the entirety of human experiences, and empirical observations, with contrary “laws.”<sup>80</sup> Attempting to deny or change universal truths with the compulsion and sanction of arbitrary “laws” is inconsistent with longitudinal observations of human experiences, the foundations of morality, and ethics.<sup>81</sup>

## II. SUMMARY

By reducing or abandoning morality and ethics as a societal benefit, the law is the only constraint left, outside of revenge, retribution, or vigilantism, to hold individuals accountable for their actions. The lack of timely resolution of legal disputes and delayed justice denies finality and compensation to victims, which leads to victims either cowering in fear or resorting to self-help and retribution.

Overreliance on the legal process to resolve disputes disrupts an orderly society and severely overburdens the already crowded and creaky social services and legal systems. As Solzhenitsyn observed: “The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man’s noblest impulses.”<sup>82</sup> “In Hell there will be nothing but law, and due process will be meticulously observed,”<sup>83</sup> unless you get a recalcitrant jury.

With the diminution of our mutually reinforcing institutions of family, church, schools, and fraternal and service organizations, and the removal of the moral basis and national cohesion present at America’s Founding, our national unity and society is left with a fragmented and diluted system of restraining and controlling “norms.” Into this vacuum, at the turn of the Twentieth Century, and particularly after Watergate in 1973, codes of ethics emerged as aspirational substitutes for morals to establish, monitor, and

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78. *Id.* at 391.

79. Scott, *supra* note 75; *see, e.g.* United States v. Thomas, 116 F.3d 606, 625 (2d Cir. 1997).

80. *See* Brian Z. Tamanaha, *Necessary and Universal Truths about Law?* 30 RATIO JURIS. 3 (2017).

81. *Id.*

82. Mooney, *supra* note 46, at 53–54 (quoting TIME MAG., June 19, 1978, at 33).

83. *Id.* at 47 (quoting GRANT GILMORE, THE AGES OF AMERICAN LAW 160 (1976)).

sanction professional obligations, and to define corruption by and undue influence on public offices.<sup>84</sup>

The sequestration and cabining of morals and ethics away from the compulsion and sanctions inherent in the law raises new questions of how a society, which shifts personal responsibility away from the individual and onto the collective, while also demanding extreme notions of personal autonomy, should and can function and survive. If nothing replaces morality, ethics, objective truths, and immutable facts to ground the law and to protect and encourage respect for the individual, who accepts and acts with personal responsibility, what substitutes will motivate people to respect others and their belongings and obey restraints?

In *Robin v. Hardaway*, Founding Father George Mason argued against a slavery statute in 1772 before the General Court of Virginia:

All acts of legislature apparently contrary to natural right and justice are, in our laws, and must be in the nature of things, considered as void. The laws of nature are the laws of God; Whose authority can be superseded by no power on earth. A legislature must not obstruct our obedience to him from whose punishments they cannot protect us. All human constitutions which contradict his laws, we are in conscience bound to disobey. Such have been the adjudications of our courts of Justice.<sup>85</sup>

Nearly 175 years later in 1945, Mason's admonition would be resurrected. Article 8 of The Charter of the International Military Tribunal for the war crimes trials in Nuremberg provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."<sup>86</sup>

Expounding on the theme of objective truths and immutable facts, the Reverend William J.H. Boetcker published the *Ten Cannots* in 1916, which equates individual responsibility to personal liberty in a free society:

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84. See John W. Dean & James Robenalt, *The Legacy of Watergate*, 38 LITIG. 19, 19 (2012); see also Scott, *supra* note 75.

85. Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 556 (1989) (quoting 2 Va. (2 Jefferson) 115 (1772)).

86. *Nuremberg Trial Proceedings Vol. 1: Charter of the International Military Tribunal*, art. 8, YALE L. SCH.: THE AVALON PROJECT, <https://avalon.law.yale.edu/imt/imtconst.asp> (last visited Oct. 17, 2019); see also NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 294 (2019).

1. You cannot bring prosperity by discouraging thrift.
2. You cannot help small men by tearing down big men.
3. You cannot strengthen the weak by weakening the strong.
4. You cannot lift the wage earner by pulling down the wage payer.
5. You cannot help the poor man by destroying the rich.
6. You cannot keep out of trouble by spending more than your income.
7. You cannot further brotherhood of men by inciting class hatred.
8. You cannot establish security on borrowed money.
9. You cannot build character and courage by taking away man's initiative and independence.
10. You cannot help men permanently by doing for them what they could and should do for themselves.<sup>87</sup>

President John Adams summed up the appropriate role and limitations of government and confirmed the need for morality in society in a speech to the Massachusetts military in 1798: “[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.”<sup>88</sup>

When civility and expectations of personal restraint, self-reliance, responsibility, and accountability, inherent in morals and ethics, are not taught and enforced, dependency, ignorance, and immaturity increase. Individuals will act selfishly, demand less of themselves, become more dependent upon productive members of the public, and destroy the charity and social safety nets designed to provide for those who are unable to care for themselves. *New York Times* journalist, David Brooks, recently recognized this unraveling of civility and common behavioral standards, although either disagreeing with or blind to the divisive and root sources of these causes:

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87. WILLIAM J.H. BOETCKER, THE TEN CANNOTS (1916), reprinted in Ann Landers, *It's Not Lincoln, But It's Still Memorable*, CHI. TRIB., July 29, 1995, <https://www.chicagotribune.com/news/ct-xpm-1995-07-29-9507290050-story.html> (numbering added). The *Ten Cannots* are often misattributed to President Abraham Lincoln. *Id.* Arthur Schlesinger Jr., *The History of Those Words Lincoln Never Said*, WASH. POST., Aug. 28, 1992, <https://www.washingtonpost.com/archive/opinions/1992/08/28/the-history-of-those-words-lincoln-never-said/2f0d2273-a3f7-457b-8bf8-733e9550f1da/>.

88. John Adams, *To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts*, in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Francis Adams ed., 1854).

Centuries ago our founders created a system of laws and not men. In our system of government there are procedures in place, based on certain values—impartiality, respect for institutions, the idea that a public office is a public trust, not a private bauble.

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. . . We are being threatened in a very distinct way. The infrastructure of the society is under threat—the procedures that shape government, the credibility of information, the privacy rules that make deliberation possible.

It is as if somebody is inserting acids into a body that eats away at the ligaments and the tendons.

These forces are motivated by self-interest, but their common feature is an operational nihilism [and radical autonomy]. They are trying to sow disorder at the foundation of society. The goal is not really to convert anybody to a cause; it is to create cynicism and disruption that will open up the space to grab what you want to grab. They rig the system and then tell everybody, “The system is rigged!” And therefore, all values are suspended. Everything is permitted.<sup>89</sup>

The *General Social Survey* is the most analyzed source of information in the social sciences after the U.S. Census.<sup>90</sup> Recent results and reports show the erosion in our nation’s civility and society’s common moral and religious heritage: “[T]he percentage of Americans who profess no religious beliefs is actually higher [than] those who are part of the country’s largest faith traditions.”<sup>91</sup> “No religion” is now at 23.1%, with Catholics at 23%, and

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89. David Brooks, *It’s Not the Collusion, It’s the Corruption*, N.Y. TIMES (Apr. 18, 2019), <https://www.nytimes.com/2019/04/18/opinion/mueller-report-corruption.html>.

90. *General Social Survey (GSS)*, NORC AT THE UNIV. OF CHI., [http://www.norc.org/Research/Projects/Pages/general-social-survey.aspx](http://www.norc.umd.edu/research/projects/pages/general-social-survey.aspx) (last visited Apr. 25, 2019).

91. Joe Saunders, *After Schools, Leftists Try To Remove God, ‘No Religion’ Becomes Largest Religion in US*, W.J., <https://www.westernjournal.com/ct/schools-leftists-try-remove-god-atheism-becomes-largest-religion-us/> (last updated Apr. 22, 2019).



Evangelicals at 22.5%.<sup>92</sup> The negative social effects from this erosion of common moral and religious standards are palpable and costly:

One in six Americans takes antidepressant drugs, a 65% surge over just fifteen years. The problem is particularly acute among younger Americans. While depression diagnoses have increased 33% since 2013, that number is up 47% among Millennials and 63% among teenagers. Coincidentally, suicide rates among American teenagers have increased by 70% since 2006. American life expectancy declined again last year, as Americans continue to drug and kill themselves at record rates.<sup>93</sup>

Societal progress depends upon the integrity, judgment, and innovation of individuals within a respective society. As such, when moral and ethical values are separated from legal standards, costs are marginally increased and burdens are misallocated. Burdens are imposed upon the productive and responsible members of a society to support those who are capable but choose to be unproductive and become dependent. An internal rot develops at the moral, ethical, and legal core of a society, which ultimately leads to its collapse.

The history of the world is filled with revolutions and even elected governments leading to mass murder, depravations, and anarchy: the Bolshevik Revolution in Russia, the Fascist Revolution in Italy, the French despoliation of the monarchy, and the rise of the Nazi Party in Germany. When the collective implodes, as recently observed in Greece and France, and now in Venezuela, those suckling on the collective teat, funded by productive and responsible members of society, have no reserves, no self-reliance or restraint, and no concept of personal worth or survival.

The loss of civility and morality in a society results in chaos, anarchy, rioting, genocide, migration, and famine. What made the outcome of the American Revolution different from all other revolutions and popular uprisings, which came before or since, as President Adams said, was common unity and “human passions [ ]bridled by morality and religion.”<sup>94</sup>

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92. *Id.* (citing Jack Jenkins, ‘Nones’ Now as Big as Evangelicals, Catholics in the US, NAT’L CATH. REP. (Mar. 22, 2019), <https://www.ncronline.org/news/people/nones-now-big-evangelicals-catholics-us>).

93. *Id.* (quoting Michael Knowles, *God Help Us: Atheism Becomes Largest Religion in U.S.*, DAILY WIRE (Apr. 7, 2019)).

94. Adams, *supra* note 88, at 229.

In Plato's *Allegory of the Cave*, individuals are chained inside a dark cave.<sup>95</sup> One prisoner manages to break free, climb out, and discover a bright light.<sup>96</sup> He reaches the "light at the end of the tunnel," so to speak, and discovers a world of freedom with responsibility, in stark contrast to the dark shadows in the cave and squalor from which he has escaped.<sup>97</sup>

The "moral" of this story is that the natural state of human existence without morals, ethics, and supporting laws is depravation, darkness, and ignorance. As with Plato's prisoner, individuals must walk out of the dark shadows of the collective cave, which is filled with societal costs of increasing laws and decreasing morals and ethics, in order to live in the light of liberty and thrive in a place of freedom and self-respect.<sup>98</sup>

### III. CONCLUSION

In 1853, the Reverend Theodore Parker said, "I do not pretend to understand the moral universe, the arc is a long one, my eye reaches but little ways. I cannot calculate the curve and complete the figure by the experience of sight; I can divine it by conscience. But from what I see I am sure it bends towards justice."<sup>99</sup> Equal justice and freedom parallel with personal responsibility, humility, acceptance of liability, and consequences. Homogenous cultures and civilizations preserve a common national unity and cohesion. Laws are enacted and enforced consistently with the retained liberties and moral and ethical expectations of the People, which ensures fairness, mutual reinforcement, and stability. Justice is equally enforced, swift and certain, which fosters peace, security, respect, and self-restraint.

Forty years ago, the author observed a sign in a London Underground "Tube" station, which exclaimed: "There must be standards!" Who and what will be the source of the standards? What will be the application of these standards: specific or universal, objective or subjective, equal or selective? What force will define and protect freedoms, compel obedience and compliance?

What bedrock bases, controlling expectations, and authority for human behaviors will students be taught in schools, universities, and law schools, if the separation of laws from morals and ethics, objective and universal truths, and immutable facts continues? What foundational and controlling

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95. PLATO, *REPUBLIC* 193–98 (Allan Bloom trans., Basic Books 2d ed. 1968).

96. *Id.*

97. *Id.*

98. *Id.*

99. THEODORE PARKER, *Of Justice and the Conscience*, in *TEN SERMONS OF RELIGION*, 84–85 (1853).

precedents will govern our rules, benchmarks, standards, procedures, and professional interactions? What will future lawyers learn?

As lawyers practice in an increasingly moral and ethical vacuum, how will our profession survive and function? How will we defend or challenge the restraints and enforce the rules to meet client expectations and protect their rights? Will future members of the legal profession be characterized as champions of individual liberties, guardians of freedom, defenders of right, and protectors of equal justice? Will future lawyers be reduced and doomed to labor incessantly in dark caves as compliance and enforcement cogs in the collective bureaucratic wheel?

We must remember the admonishments of Presidents Washington, Adams, and Jefferson, of George Mason, Thomas Paine, and the other Founding Fathers, who risked all to ensure the idea of America would survive.<sup>100</sup> According to Dr. James McHenry, one of Maryland's delegates to the Constitutional Convention of 1787, Benjamin Franklin was asked at the end of the Convention: "What have we got, a republic or a monarchy?" Franklin replied, "A republic, if you can keep it."<sup>101</sup> Can we keep it?

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100. See Washington, *supra* note 1; Adams, *supra* note 88; Jefferson, *supra* note 50; PAINE, *supra* note 50; Rice, *supra* note 85.

101. Dr. James McHenry, *Papers of Dr. James McHenry on the Federal Convention of 1787*, YALE L. SCH.: AVALON PROJECT (1787), [http://avalon.law.yale.edu/18th\\_century/mchenry.asp](http://avalon.law.yale.edu/18th_century/mchenry.asp). (last visited Jan. 15, 2020). See also NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 21 (2019) ("As Franklin said, we have been given a republic, *if* we can keep it.") (emphasis in original).