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Aaron Walayat

THE PROJECT OF LAW AS A RECTIFICATION OF NAMES

AARON J. WALAYAT*

Passages from Confucius indicate that he was pessimistic about the use of law in moral development because it would not provide the proper motivation needed to cultivate virtue. However, acknowledging law's other functions is necessary to understand the role that law can play in moral development. This article argues for a wider conception of law, possessing both the traditional function as well as a "communicative" function. Beyond sanctions, law highlights the values of a society required to operate within the law, and therefore, the community. Part I introduces the argument. Part II discusses Aristotle's thoughts on the role law can play in moral habituation. Part III examines a "communicative" function of law, arguing that law serves as a form of moral communication. Part IV compares the communicative function of law discussed in Part III with the Confucian concept of "li," arguing that Confucian li helps illustrate the communicative function. Part V describes the Confucian concept of "zhengming," or the "rectification of names," analogizing them with the project of law-making. Part VI argues that the United States Supreme Court's decision in Nix v. Hedden is comparable to the rectification of names. Finally, Part VII provides observations on how Confucian thought can offer a broader vision of the nature of law.

I. INTRODUCTION

Aristotle and Confucius originate from completely different philosophical traditions and historical contexts. Yet, it is interesting that both philosophers identify education as a process central to moral development.[1] Philosopher Joel Kupperman recognizes this

* Aaron J. Walayat is an Associate Attorney at Tucker Arsenberg, P.C. in Pittsburgh, Pennsylvania. He is also an Adjunct Professor of Law (2021-2023) at the University of Pittsburgh School of Law. I would like to thank the UIC Law Review staff for their courage in editing an article about something esoteric, and special thanks to my wife, who inspires me to think esoterically.

1. *See e.g.*, JOEL J. KUPPERMAN, LEARNING FROM ASIAN PHILOSOPHY 39 (2009). In considering the moral cultivation of children, Kupperman notes that Aristotle "insists that what are required are right *laws*." *Id.* (emphasis in

overlapping interest in his book, *Learning from Asian Philosophy*.[2] However, Kupperman specifies one particular divergence between Aristotle and Confucius, a distinction he considers fundamental.[3] Aristotle, unlike Confucius, advocated for good laws to aid in moral development.[4] Kupperman contrasts this assertion with Confucius, who is notably pessimistic about the efficaciousness of law in moral development.[5] For example, in Confucius' *Analects*, there are numerous passages which indicate that while Confucius never rejected systems of legal punishments outright, he saw legal systems as a "seldom-used tool of last resort."[6] Kupperman writes matter-of-factly in his determination that "Aristotle deviates most sharply from what Confucius almost certainly would have said."[7] Specifically, Kupperman asserts that "it is well known that Confucius did not place emphasis on law as a contributing factor in social harmony or ethical development."[8] At face value, Kupperman is correct. Confucius expressly discouraged the use of punishment as the sole instrument of moral enforcement.[9] This was because motivation from the threat of punishment alone would not properly lead to the internal moral development that Confucius advocated.[10]

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original). This deviates from Confucius, who Kupperman describes as being skeptical of law "as a contributory factor in social harmony or ethical development." *Id*.

2. *See id. at* 36-51 (discussing the divergence between Aristotle and Confucius on the effect of laws on moral habituation).

3. *Id*. at 39.

4. *Id.*; *see also* ARISTOTLE, THE NICOMACHEAN ETHICS 200-01 (David Ross trans., Ox. Univ. Press New Ed. 2009) (comparing good laws in a political community with the good habits of the father in a household).

5. KUPPERMAN, *supra* note 1, at 39.

6. *Id.*

7. *Id.*

8. *Id*.

9. *Id.* at 39-40; *see* Wei Zheng, CHINESE TEXT PROJECT, ctext.org/analects/wei-zheng?searchu=if%20the%20people%20be%20led%20by%20laws&searchmode=showall#n1120 [perma.cc3/RR3-FJ2N] (utilizing the 1862 translation by James Legge to analyze the *Analects*) (last visited Dec. 7, 2022); *see also* KARYN LAI, AN INTRODUCTION TO CHINESE PHILOSOPHY 11 (2d ed. 2017). Confucius lived in a period known as the "Hundred Schools of Thought" in ancient China, a time of political upheaval. *Id.* As such, many philosophers of this era "deliberated on the institutions, methods, and processes that could help establish a more stable and peaceful existence." *Id.* To achieve this societal harmony, Confucian thinkers "saw good relationships as fundamental to social stability" with institutions "established according to the wisdom of a benevolent…sage king." *Id.* However, to maintain such a government, Confucius recognized the special administrative role of literate officials. *Id.* at 30. To realize a model of ethical governmental administration, these officials would need a system of moral education that would "cultivat[e] … an ethically and ritually disciplined life." *Id.*

10. KUPPERMAN, *supra* note 1, at 39-40. It seems that Confucius believed that a system of education for the cultivation of an "ethically and ritually

Admittedly, Kupperman acknowledges that Confucianism is compatible with systems of law and punishment and Confucius' pessimism with law is by no means a rejection of law and punishment outright.[11] It is clear that Confucius did not completely reject law, as Confucianism has long co-existed with the historical legal systems throughout China's many dynasties.[12] Nevertheless, Kupperman is overly hasty to demarcate law as the point of divergence between Aristotle and Confucius on the topic of moral development. Rather than being a distinction between the two, both Aristotle and Confucius recognize key instances in which law can aid in moral development. Law can play an important role in Confucian moral education, not merely by the typical function of levying punishments, but through a broader, communicative function. This communicative function provides a way of speaking by which a community constitutes itself and communicates self-understanding. In this way, law provides the moral language necessary for moral development. Thus, it is comparable to the Confucian concept of "*zhengming*," or "the rectification of names."[13]

This article will attempt to describe the role law can play in moral development. Law plays this role not through its traditional functions, but through its communicative function, by providing the constitutive understanding of what the legal community is and how

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disciplined life" was necessary, and a harmonious society could not simply benefit from legal accountability from these officials. As Kupperman elaborates, Confucius "did not place emphasis on law as a contributory factor in social harmony or ethical development. *Id.* at 39. Indeed, a famous passage in the *Analects* provides as follows:

> The Master said, 'If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.'

See Zheng, *supra* note 9 (suggesting that laws, while effective in coercing certain behaviors, would be unlikely to develop internal states, such as shame, which may influence the development of internal moral virtue).

11. KUPPERMAN, *supra* note 1, at 39.

12. Sophia Gao & Aaron Walayat, *The Compatibility of Confucianism and Law*, 41 PACE L. REV. 234, 237 (2020) (citing examples of legal systems which incorporate elements of Confucian-influenced cultural norms into the law); *see also* Norman P. Ho, *Literature as Law? The Confucian Classics as Ultimate Sources of Law in Traditional China*, 31 L. & LITERATURE 173, 173 (2019) (describing the use of Confucian classical literature as a source of law in Han dynasty China).

13. *See* FUNG YU-LAN, A HISTORY OF CHINESE PHILOSOPHY, VOL. 1: THE PERIOD OF THE PHILOSOPHERS 41-42 (D. Bode trans., Princeton Univ. Press) (1952) (interpreting Confucius' notion of the "rectification of names" as the notion that "things in actual fact should be made to accord with the implication attached to them by names.").

outsiders can be brought into the community.[14] Also, this article briefly describes this aesthetic and communicative function of law and how law forms a "constitutive rhetoric," by which a community conceives of itself.

II. WHAT LAW CAN DO

In what sense did Aristotle invoke law in his vision of moral education? For Aristotle, virtue comes from habituation – "one becomes virtuous by performing virtuous acts."[15] Through repeated performance, agents are able to "perceive the morally salient features of a situation, to feel the appropriate emotions in particular circumstances, and to feel pleasure and pain in the right circumstances and in regard to the right things."[16] Certainly, Aristotle acknowledged that simply following the law without proper motivation would not be enough to develop virtue through habituation.[17] The agent must have knowledge, make the choice to take a certain action for its own sake, and act while in a "secure and unchangeable condition."[18] But, given that an agent must be in a certain condition when they make a moral choice in order for them to be considered virtuous, it would not be virtuous to make a moral choice simply because such a choice is required by law.

These circumstances appear to be "internal," describing the internal state that agents must be in when making a moral choice. But, if this is the case, then how can law, as an external factor, influence internal states?[19] Philosopher Darren Weirnick interprets

14. *See* discussion *infra* Part III (explaining the meaning of the "traditional" and "communicative" functions of law).

15. Darren Weirnick, Law in Aristotle's Ethical-Political Thought 11 (1998) (Ph.D. dissertation, Rice Univ.) (on file with author); *see also* ARISTOTLE, *supra* note 4, at 23 ("…but the virtues we get by first exercising them…").

16. Weirnick, *supra* note 15, at 11.

17. As Aristotle wrote:

> As we say that some people who do just acts are not necessarily just, i.e. those who do the acts ordained by the laws either unwillingly or owing to ignorance or for some other reason and not for the sake of the acts themselves (though, to be sure, they do what they should and all the things that the good man ought), so is it, it seems, that in order to be good one must be in a certain state when one does the several acts, i.e. one must do them as a result of choice and for the sake of the acts themselves.

ARISTOTLE, *supra* note 4 at 115.

18. Zena Hitz, *Aristotle on Law and Moral Education*, OXFORD STUDIES IN ANCIENT PHILOSOPHY 277 (Brad Inwood ed. 2012) (citing ARISTOTLE, THE NICOMACHEAN ETHICS II.4.1105a26-33).

19. *See* ARISTOTLE, *supra* note 4, at 115 ("…but the virtues we get by first exercising them…").

Aristotle's advocacy of law as aiding in habituation.[20] Weirnick argues that written laws can indirectly assist in bringing about virtuous states of character by "actually specify[ing] the sorts of acts which one must perform or from which one must abstain."[21] But, laws can also go beyond commanding virtuous acts and may serve as "forms of approval and disapproval which may influence citizens' views of right action as surely as social customs and traditions."[22] Laws may also "create or support social frameworks in which habituation is likely to occur through other means, marshaling social customs or channeling human activities in ways more likely to encourage virtuous activity."[23] Laws, in this sense, are part of a person's full moral education, both in commanding certain actions to habituate persons, and in providing the social framework to influence a person's conception of the good within the community.

Aristotle's discussion of moral education tends to focus on the moral education of children, by preparing them to become virtuous adults.[24] Nevertheless, law does not only affect children, but adults as well. Can adults be educated through habituation in the same way as children? Thomas Hurka suggests that education through habituation would not be as effective for adults, as adults tend to have "fixed values and interests" and tend to "resent directives about their private lives," obeying them only "begrudgingly."[25]

Is it then the case that law is only incidentally useful in educating the young while coercing adults? If adults are not easily habituated, how can law play a role in their moral education? Perhaps Aristotle was not concerned with the moral education of adults, or simply presumed adults could be habituated in the same way as children. For example, some philosophers have noted that Plato and Aristotle "perhaps treated their contemporaries too much as if they were 'always children.'"[26] Certainly, cultivating virtue is an internal enterprise, with the goal being the internal moral development of the subject. What this analysis ignores, however, is the society that the subject is being educated *for*. An education develops subjects in two respects. First, it directs the subject to find proper pleasure towards the "good." Second, education is also a form of socialization, incorporating the subject into the wider moral community.[27]

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20. Weirnick, *supra* note 15, at 12-13.

21. *Id.* at 15.

22. *Id.*

23. *Id.* at 16.

24. *See e.g.*, KUPPERMAN, *supra* note 1, at 37, 39 (prefacing the chapter and highlighting Aristotle's thoughts on "early childhood training techniques.").

25. Weirnick, *supra* note 15, at 19 (*citing* THOMAS HURKA, PERFECTIONISM 154 (1993).

26. Weirnick, *supra* note 15, at 21 (*citing* ERNEST BAKER, THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE lii (1959)).

27. Hitz, *supra* note 18, at 267.

What does Aristotle mean by the "good?" Philosopher Alasdair MacIntyre notes that Aristotle's term for the "good of man" is *eudaimonia*, which is sometimes translated to "blessedness, happiness, [and] prosperity."[28] Nevertheless, the possession of the virtues "enable an individual to achieve *eudaimonia*." Though MacIntyre acknowledges that while it would be "incorrect to describe the exercise of virtues as a means to the end of achieving the good for man, that description is ambiguous."[29] Rather, *eudaimonia* is "a complete human life lived at its best," with the "exercise of the virtues [being] a necessary and central part of such a life, not a mere preparatory exercise to secure such a life."[30]

In political communities, there are a number of different types of associations that people join in order to attain some good. The "most sovereign and inclusive association" is the political association, the association that communicates the virtues and vices to persons, which is important for persons to attain *eudaimonia* within the community.[31] Philosopher Zena Hitz interprets Aristotle as believing that reason and argument had a limited effect in convincing people toward virtue.[32] However, even for those who are able to be convinced by reason and argument:

> "prepar[ation] for reason and teaching by habits" is also needed, as the "condition of proper affect is cultivated and shaped by habits" which are, in turn, "cultivated by good laws, ... rare constitutions which design education and practices with an eye to virtue."[33]

In Hitz's interpretation of Aristotle, the goal of habituation is "training in proper pleasure and pain" – feeling pleasure at virtuous things, and pain at un-virtuous things.[34]

First, when directing a subject to find the proper pleasure towards the "good", Weirnick writes that "[a] child's fear of punishment helps her to learn what sort of actions and motives are appropriate and what [are] inappropriate."[35] Weirnick touches upon an important point.[36] The use of the word "appropriate" implies a social aspect of what conduct is acceptable to a society. Thus,

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28. ALASDAIR MACINTYRE, AFTER VIRTUE 148 (3d. ed. 2007) (1981); *see also* ARISTOTLE, *supra* note 4, at 12 (contending that "happiness" or "*eudaimonia*" is held to be a final end of man, as "we choose [it] always for itself and never for the sake of something else" … while honour, pleasure, reason, and every virtue" may also be chosen for their own sake, they are also chosen "for the sake of happiness.").

29. MACINTYRE, *supra* note 28, at 148.

30. *Id.* at 149.

31. ARISTOTLE, POLITICS 7 (Ernest Barker trans., Oxford World's Classics 2d ed. 2009) (1995).

32. Hitz, *supra* note 18, at 264.

33. *Id*.

34. *Id.* at 267.

35. Weirnick, *supra* note 15, at 19.

36. *Id.*

education is as much about socializing individuals into a moral community as it is about developing virtue within the subject. Understanding education as socialization, therefore, provides a helpful way of understanding how law can be used to habituate adults as much as children.

Second, socialization of children also involves educating them on community morals. Therefore, education becomes a way in which children (outsiders to the moral community) are brought into the community.[37] Some adults, like immigrants into a new moral community, then, can be compared to children in the sense that they, as previous residents of a separate moral community, are also outside of the new moral community and need to be socialized into it. Therefore, the letter of the law operates as a societal framework and provides its moral language, thus communicating values to these outsiders. Treating adults like children in this context is understandable, as both adults and children are outsiders to the moral community who need to be educated or socialized to be brought into the community.

Law is inherently tied to the community and is often rendered meaningless if it does not acknowledge social norms and practices. This does not mean that law simply ratifies social norms and practices; laws may be passed in direct contradiction to social norms or customs.[38] Aristotle believed that law is tied to the community.[39]

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37. JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 6 (1985) (describing "constitutive rhetoric").

38. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 659 (2015). Justice Kennedy, writing for the majority, noted that while "[t]he ancient origins of marriage confirm its centrality … it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution even as confined to opposite-sex relations has evolved over time." *Id*. at 659. The Court's opinion analyzed the history of marriage as a central institution, and acknowledged that marriage has, in terms of law, also changed, moving from an arrangement to a "contract" by the 18th-century. *Id.* Marriage transformed away from a "single, male-dominated legal entity" known as "coverture, into more of a partnership model." *Id*. at 659-60. Justice Kennedy implied a need for laws to evolve to recognize social changes. These changes may naturally contradict the social norms or the traditional customs of marriage, and are certainly against the social norms and customs of those who still follow the traditional conceptions of. *Id.* at 659.

39. *See* ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 4, at 3 (suggesting that every art or inquiry that humans pursue is aimed at some good). "Every art and every inquiry, and similarly every action and choice, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim." *Id.*; *see also* ARISTOTLE, POLITICS, *supra* note 31, at 7 (furthering this idea by finding that associations between human beings are formed for the achievement of some good). As such, the "most sovereign and inclusive association is the city [or *polis*], as it is called, or the political association." *Id.* Aristotle writes that the political association:

> ordains which of the sciences should be studied in a state, and which each class of citizens should learn and up to what point they should learn

Because law is tied to the community, the moral content of the law is also tied to the community's moral framework. Essentially, law is a form of moral socialization and moral communication. This type of socialization and communication is not simply, by itself, a moral education, nor will it naturally lead to moral cultivation. Nevertheless, it is necessary to provide the foundation of a moral community, that is, a moral language by which a community can conceive of itself. Therefore, law plays an important role in the habituation of both children and adults.

Even if an adult cannot be educated through habituation in the same way that a child can, it is important for the education of children that adults behave within the language of the moral community. It may be ineffective to coerce adults through the threat of punishment, while also attempting to cultivate virtue within them.[40] Nevertheless, laws enforced by the threat of punishment may be effective in the education of children, as it treats the moral language of the community as axiomatic. In the legal process, even adults take for granted certain moral assumptions embedded in the law.[41] While this may not necessarily lead to the internal cultivation of virtue, it does internalize the moral language of the community.

In recognizing the function of law in education, Aristotle touches upon a function of law that goes beyond mere sanction of punishment.[42] Aristotle believed law performed two functions. First, law appears to be directed towards "coercing conduct."[43] Coercing conduct aims to spur internal reflection of the conduct to bring about moral cultivation. The goal is to create motivation for the act, itself, rather than merely following the law. Second, law attempts to embed a certain language, by which acts are understood

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> them; and we see even the most highly esteemed of capacities to fall under this …, since politics uses the rest of the sciences, and since, again, it legislates as to what we are to do and what we are to abstain from …, so that this end must be the human good.

ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 4, at 3-4.

As the political association is a way in which human beings pursue the good as a group, laws aimed at moral habituation emanate at the political association's function as providing a means for people to pursue the good. Laws become tied to the political community's role in pursuing the common good. *Id. But see* Weirnick, *supra* note 15, at 10 (arguing that the modern state is not comparable with Aristotle's notion of the *polis* or political community).

40. *See* Weirnick, *supra* note 15, at 20-21.

41. *See e.g.*, Aaron Walayat, *Legal Worlds and Legal Narratives*, 13 BALKAN J. OF PHIL. 45, 46 (2021) (describing how a legal definition of "murder in the first degree," defined under Pennsylvania law as "[a] criminal homicide constitutes murder of the first degree when it is committed by an intentional killing" implicitly requires observers to accept that an act of homicide when done intentionally is worthy of characterization as a "murder" rather than as a lesser form of homicide).

42. Weirnick, *supra* note 15, at 15-16.

43. *Id.* at 16-17.

in the community context.[44] Such a language is necessary to properly cultivate virtue in the context of the larger moral community.

The first function can be described as the "traditional function of law."[45] This function refers to law as it is typically understood,[46] namely the social rules and norms enforced by the state.[47] Whether as a "command" or a "rule," law is most closely linked with social "sanctions."[48] The second function of law is the "aesthetic" or "communicative" function.[49] This function provides the most usefulness for moral development. Law is more than rules and sanctions applied to achieve material ends. Rather, law possesses an aesthetic nature, in which law "*translates* ordinary life into legal argument" by providing a "rhetorical way of communication and community building."[50] This is also known as "constitutive rhetoric," whereby the law forms how we "constitute ourselves as individuals, communities, and cultures."[51] Law is a way by which communities conceive themselves. Further, this communication is aesthetic, being communicated through "world projection" and through aesthetic contemplation.[52] This conception is influenced by Wolterstorff's aesthetics, which will be discussed further in Part

44. *See* Walayat, *supra* note 41, at 47 (examining the observations of White, Noonan, and Berman on the interconnection of law and language).

45. *See generally* Gao & Walayat, *supra* note 12, at 239-40 (discussing different definitions of law, including definitions comparable to the "traditional function" of law).

46. *See generally id*.

47. S*ee e.g.*, Walayat, *supra* note 41, at 46 (discussing assumptions in the definition of murder in the first degree).

48. The term "sanction" is preferable over coercion because it is beautifully ambiguous. To "sanction" has both a positive and negative meaning, as it can mean both that something is permitted or that something is disallowed, and punishments are levied for its participation. The opposite meanings of the words are key as law can be used to both permit an action while also being used to disallow and levy punishments for an action. *See Sanction*, DICTIONARY, www.dictionary.com/browse/sanction [perma.cc/7U7Z-95HL] (last visited Dec. 7, 2022).

49. Law's "communicative" function refers to the way laws communicate certain presumptions in the actual world by treating them as assumptions within the legal world. By doing so, the body of law intends to persuade participants of the legal system that the legal assumptions correctly reflect the actual world. This communicative function is also described as "aesthetic" in the sense that this form of persuasion is analogizable with the aesthetic theory of Nicholas Wolterstorff, as will be discussed below. *See* discussion, *infra* Part III; *see also* Walayat, *supra* note 41, at 48.

50. Walayat, *supra* note 41, at 48.

51. James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52. U. CHI. L. REV. 684, 684, 688, 690 (1985).

52. Gao & Walayat, *supra* note 12, at 242-46; *see also* Walayat, *supra* note 41, at 48 (describing Wolterstorff's notion of "world projection" in aesthetics, in which "[a]rtists attempt to project a world that is 'true' to what the artist's community believes to be real and important.").

III.[53]

III. WHAT DOES LAW DO?

What is meant by "constitutive rhetoric?" Philosopher and law professor James Boyd White describes "constitutive rhetoric" as "how to bring into a community an isolated individual who is now outside it."[54] For a person to become part of a community, they need "a way of talking about what has happened, and what will happen … and which could thus serve as the grounds of a newly constituted community between them."[55] This is comparable with the discussion above,[56] in which both adults and children must be educated through habituation, not only to become virtuous, but also to become part of the virtuous community.[57]

Understanding law as a form of community building can be compared to philosopher Nicholas Wolterstorff's aesthetics, in which he conceived works of art as a form of "world projection."[58] In the projection of a parallel world within the work, aesthetic contemplation becomes a matter of seeing in what ways the projected world is like or unlike our own. Art moves observers through the ways the projection is either like or unlike actuality. Observers note the ways they "hope the work shows actuality" or the way "we fear that it does."[59] This logic suggests that the representation of the world within a work of art comments on the actual world, which could be laudatory or critical.[60] Observers are moved by the representation as it contrasts with their experience with the things or circumstances represented in the work.

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53. *See* discussion, *infra* Part III (examining Wolterstorff's aesthetic theory of works of art as artefacts which project "worlds of art" and comparing this theory to a concept of law as an "artefact" which also projects a "world of law.").

54. WHITE, *supra* note 39, at 6.

55. *Id.*

56. *See* discussion, *supra* Part II.

57. WHITE, *supra* note 37, at 6.

58. NICHOLAS WOLTERSTORFF, WORKS AND WORLDS OF ART 358 (Oxford: Clarendon Press, 1980).

59. *Id.* at 365 (emphasis added).

60. An example of a "laudatory" piece of art may include the landscape art of Frederic Edwin Church. *Niagara* (1857), for example, provides a broad landscape of the Horseshoe Falls, attempting to depict the strength and abundance of the falls, almost as an example of the strength, majesty, and abundance of the American continent. On the other hand, Picasso's *Guernica* (1937) may be seen as a strong critical piece. A cubist portrayal of the bombing of Guernica during the Spanish Civil War, the painting attempts to reflect the chaos and suffering of war. A bull, possibly an allusion to Spain, is broken and warped while the human shapes of suffering people are grotesquely depicted so that their human form becomes obscured. In some ways, observers are affected by the way a laudatory work, like *Niagara,* is like reality while, in some ways, observers fear that *Guernica* is also true to reality.

In a similar fashion, a world of law is like a projected world within a work of art. A "world of law" or a "legal world" is a reflection of the actual world as represented through laws.[61] This legal world is a projected world – a subject of aesthetic contemplation.[62] It is inherently persuasive in character, seeking to persuade observers that the legal world is a real and important way in which the actual world functions.[63] The legal world's persuasive and communicative nature is also efficacious because it is not only observed, but practiced.[64] In acting within the legal world, individuals participate in it.[65] Even when objecting to certain projections within the world of law, they accept other assumptions of the legal world.[66]

But what does law project? The projections within the law are the fundamental connections between the law's subjects. Legal scholar John Chipman Gray defined "[t]he [l]aw of a community" as consisting of "the general rules which are followed by its judicial department in establishing legal rights and duties."[67] So, if law includes the "general rules … establishing rights and duties," then the law must be primarily concerned with relationships, as "rights" and "duties" (relational terms). The chief subjects of law, are "legal persons," the "subject[s] of legal rights and duties."[68]

Therefore, persons are the primary subject of the law. As the legal philosopher and judge John T. Noonan, Jr. wrote:

> Rules of law are formed by human beings to shape the attitude and conduct of human beings and applied by human beings to human beings. The human beings are persons. The rules are communications uttered, comprehended, and responded to by persons. They affect attitude and conduct as communications from persons to persons. They exist as rules – not as words on paper – in the minds of persons.[69]

If persons are the primary subjects of law, then the bulk of the

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61. Walayat, *supra* note 41, at 48-49.

62. *Id*.

63. *Id.*

64. *Id*.

65. *See id*. at 49 ([b]y attributing a property interest, law not only provides legal protection and an enforcement mechanism for an individual's property, it also attempts to say there is something real and important about an individual's relationship to an object, understood as one of 'property.' By providing legal protection for property, law implicitly claims that property exists. This is not to say that concepts like 'property' or 'contract' do not exist without legal enforcement, but that legal enforcement implicitly persuades people that these concepts exist.").

66. *See* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (2d ed. 1931) (describing a legal person as the "subject of legal rights and duties."); *See* discussion, *infra* note 74 (considering the notion of legal persons).

67. *Id.* at 1.

68. *Id.* at 27.

69. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 4 (1976).

subject matter of law regulates the relationships between persons. According to Gray, law is primarily focused on the rights and duties of persons in relation to one another.[70] However, the concept of legal persons is not predicated by the existence of rights and duties.[71] Legal subjects need not bear both rights and duties, as it is logically possible to conceive of a legal subject that only possesses rights or only possesses duties.[72] As Gray elaborates:

Right is a correlative to duty; where there is no duty there can be no right. But the converse is not necessarily true. There may be duties without rights. In order for a duty to create a right, it must be a duty *to act or forbear*. Thus, among those duties which have rights corresponding to them do not come the duties, if such there be, which call for an inward state of mind, as distinguished from external acts or forbearances. It is only to acts and forbearances that others have a right.[73]

So, even in a legal system which does not recognize a person's rights, the law is still concerned with that person's duties and whether that person has fulfilled their duties to others. Whether the law incorporates rights or not, the law is still concerned with relationships through duties, as duties represent a relationship between a duty-bearer and a duty-holder.

In response to whether certain duties are owed, organized societies seek to regulate and compel individuals to do or forbear from doing certain things.[74] To achieve this, "[s]ometimes the society puts this compulsion in force of its own motion; and sometimes it puts it in force only on the motion of the individuals who are interested in having it exercised.[75]

Gray shows that law is primarily concerned with the relations among people, in addition to showing how modern legal systems are primarily concerned with "legal rights and duties" of "legal persons," and the regulation of the exercise of those rights and duties.[76] He uses "rights" and "duties" as descriptions of such

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70. GRAY, *supra* note 66, at 7.

71. *Id.* at 27.

72. *Id.* at 27. As Gray writes:

> One who has rights but not duties, or who has duties but no rights, is, I suppose, a person. An instance which would commonly be given of the former is the King of England; of the latter, a slave. Whether in truth the King of England has no legal duties, or a slave no legal rights, may not be entirely clear. I will not stop to discuss the question. But if there is any one who has rights though no duties, or duties though no rights, he is, I take it, a person in the eye for the Law.

Id.

73. *Id.* at 8-9 (emphasis added).

74. *Id.* at 12.

75. *Id.*

76. *See id*. (defining a "legal person" as a "subject of legal rights and duties," which encompasses both regular human beings as well as "abnormal" human

relationships in the language of modern legal systems.[77] Therefore, a legal world does not rely on the notion of rights; rather a legal world convinces people of their rights. This is because it would be impossible to operate in the legal world without recognizing legal rights.

Through the traditional function, law implements sanctions to regulate the conduct of persons in relation to one another.[78] Law does two things. First, it reflects relationships from the actual world into the world of law.[79] However, it goes a step further. Relationships in the actual world may not be the ideal way for relationships to operate for a society to operate well. In response to this law provides certain "corrections," adjusting the operation of certain legal relationships through legal enforcement of these "corrections."[80] This type of law is a "reflex" to certain undesirable actions that occur in reality.[81] What law is projecting, then, are the relationships between persons.[82] What is observed and contemplated within the world of law are the relations between persons.[83] Through contemplation, we see what is true or untrue about reality.[84] Law attempts to "persuade" individuals that the conduct within such a relationship is true to reality. This communicates that the projection, while "untrue" to reality, is reflective of the community's values.[85] By participating in the law, actors accept these values, or at least operate within them when conducting their legal relations with other legal persons.[86]

Central to this communication is the language necessary to operate within the law. "Language" is "a shared set of terms for telling the story of what has happened and what will happen, for the expression of motive and value, and for the enactment of those

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beings); *see id*. at 29, 37-51 (considering examples of entities other than regular human beings as legal persons, including, but not limited to, corporations, unborn human beings, and supernatural beings).

77. *See id.* at 12. Legal worlds do not rely on the notion of rights. *Id*. A legal world that does project "rights" is instead attempting to convince participants that such a concept is a real and important way to describe the relations between persons. *Id.*

78. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 6 (Wilfrid E. Rumble ed. 1954) (arguing that laws are a "species" of "command" in what is called the command theory of law).

79. Walayat, *supra* note 41, at 50, 51.

80. *Id.* at 50, 53.

81. *Id*.

82. *Id.* at 55.

83. *Id*.

84. *Id*.

85. Walayat, *supra* note 41, at 51.

86. *See generally* Gao & Walayat, *supra* note 12 at 245 (stating that "[b]y contemplating the law, we can see how the law values certain behaviors generally. It is through this contemplation that we develop our language of understanding what we are observing.").

movements of the mind leading to a common end that we call reason."[87] This language is communicated in the societal assumptions embedded in the law. Observers internalize this legal language through contemplation of and participation within the law. This communication takes place through examining law outside of compelled conduct, contemplating the meaning communicated within the law itself.[88]

Edward Bullough describes this kind of contemplation as observing art from a "psychical distance."[89] Observing a work of art from a "psychical distance" requires separating the work of art from the observer's practical needs and ends, allowing observers to contemplate the work as a thing-in-itself.[90] Is it possible to observe law from a "psychical distance?" To some extent, yes, though it is certainly difficult to remove law from its practical ends. Nevertheless, observing law from a "psychical distance" would allow observers to contemplate law's communicative function and the "narratives within the law."[91] The narratives within the law describe the relationships within legal relationships.[92] Proper aesthetic contemplation encourages observers to see how these legal relationships are true or untrue to reality.[93] Further, through observing law from this distance, we also develop a way of speaking about the interactions and relationships projected within the world of law. By developing a way of speaking, observers can develop a "language in the context of looking."[94]

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87. WHITE, *supra* note 37, at 6.

88. *See* Walayat, *supra* note 41, at 51 (arguing that the legal system requires participants in litigation to make certain assumptions when participating in the legal process). As such, legal argument is not devoted to philosophical questions, such as whether human beings possess rights at all, but on factual questions, such as whether the legal participant in this scenario can claim the legal right and whether that person is also entitled to legal remedies. *See, e.g.*, *id.* at 46. What is assumed here, then, is that certain legal remedies accompany certain legal rights. *Id.* at 49. Nevertheless, the basic assumption, that human beings can possess certain rights and that certain legal remedies accompany those rights, are assumed and practiced, such that certain legal assumptions (e.g., that there is a difference between "relevant" and "admissible" evidence, or the existence of *mens rea* when committing a crime) are habituated into participants of the legal process). S*ee also* Gao & Walayat, *supra* note 12, at 244-45.

89. EDWARD BULLOUGH, AESTHETICS: LECTURES AND ESSAYS 96 (Stanford: Stanford University Press, 1957).

90. *Id.*

91. Gao & Walayat, *supra* note 12, at 243; *see also* Walayat, *supra* note 41, at 45-46 (discussing Burke's notion of observing from a "psychical distance.").

92. *See* Walayat, *supra* note 41, at 46-47 (discussing the intersection of law and language).

93. Gao & Walayat, *supra* note 12, at 244-45.

94. IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 22 (Abington-on-Thames: Routledge, 2d ed. 2001); *see also* Gao & Walayat, *supra* note 14, at 244-45 ("[o]bserving the law from a distance allows observers to contemplate the

The legal relationship of marriage is an example of this.[95] Political debates surrounding marriage are typically distracted by its constitutive definition – that is, what type of relationship is a marriage.[96] The constitutive debate assumes marriage is a social institution and adopts a legal definition through specific laws.[97] The concept of "marriage" touches upon many laws, including laws around marital property,[98] taxation,[99] and even the Federal Rules of Evidence.[100] The Rules contain two special marital privileges.[101] "Spousal privilege" gives a spouse a privilege to avoid being compelled to testify against their spouse.[102] There is something about the marital relationship that deserves protection, at least for the purposes of testifying as evidence, and the law allows for this. The second marital privilege is for "confidential marital communications," which protects communications made between spouses "within the sanctity of marriage."[103] This goes a step further than spousal privilege, as it protects communications made within the sphere of marital trust.[104] Again, the law recognizes something special about marital relationships. It not only considers it good policy to protect such statements, but also represents that couples should be encouraged, or at least not punished for communicating with their own spouse under the trust of the marital relationship.

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narratives within the law. … By contemplating the law, we can see how the law values certain behaviors generally. It is through this contemplation that we develop our language of understanding what we are observing.").

95. *See* Walayat, *supra* note 41, at 51-53 (discussing marriage and the "reflective" function of law).

96. *Id.* at 51.

97. *See* Walayat, *supra* note 41, at 51-53 (examining the different legal understandings of marriage in relation to other laws).

98. *See, e.g.*, *In r*e Brace, 470 P.3d 15, 26 (Cal. 2020) (determining "property acquired during marriage on or after January 1, 1975" is presumed to be community property, and that earlier title presumptions no longer apply).

99. *See* Ibrahim v. Commissioner of Internal Revenue, 788 F.3d 834, 835 (2015) (where a taxpayer filed a petition with the tax court "seeking to change his status [from 'head of household'] to 'married filing jointly' to receive a credit and refund.").

100. *See* sources cited *infra* notes 103-05 and accompanying text (describing the two marital privileges in evidence law).

101. *See* FED. R. EVID. 501 (providing that "[t]he common law – as interpreted by United States courts … – governs a claim of privilege. . . ."); *see also* FED. R. EVID. 501 advisory committee's notes on Senate Report No. 93-1277 ("[W]e would understand that the prohibition against spouses testifying against each other is considered a rule of privilege and covered by this rule. . . .").

102. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 43-44 (1980) (discussing the historical roots of spousal privilege).

103. *Id.* at 44, 51 (recognizing confidential marital communications as a rule independent of spousal privilege); *see also* Blau v. United States, 340 U.S. 332, 333 (1951) (describing confidential marital communications).

104. Walayat, *supra* note 41, at 51.

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Certainly, the definition of marriage is an important determination, but it is important because of the legal implications the marital relationship bears in the world of law. The projection of marriage into the world of law goes beyond mere constitution, but also touches upon the effects of the marital relationship within the context of taxation, evidence, divorce, or the other plethora of laws that factor in marital considerations.

IV. LI AND LAW'S COMMUNICATIVE FUNCTION

While Confucius did not seem to share Aristotle's optimism in the use of law in moral education, his pessimism appears to stem from a limited view of the traditional function of law as mere social sanction.[106] This is most clear in *Analects* 2:3, where Confucius was concerned with people being led by law, noting that their behavior would only be designed to avoid punishments rather than to form real internal change.[107] Unlike Aristotle, Confucius appeared less open to the idea that social sanctions through punishments would be able to cultivate morality.[108]

Kupperman is then right to point out a divergence between Aristotle and Confucius.[109] Aristotle saw law's traditional function playing a role in moral cultivation.[110] Nevertheless, systems of law are beneficial in both Aristotelian and Confucian projects through the communicative function. This function transmits community values so outsiders can internalize them. While this article already examined the ways in which law plays a communicative role in Aristotle,[111] it will now examine how the communicative function features in Confucianism.

As previously discussed, law's communicative function is a constitutive rhetoric, serving as a form of persuasion to bring individuals outside of a community into the community. One way to

105. *See Trammel*, 445 U.S. at 45 (describing the modern justification of spousal privilege as "its perceived role in fostering the harmony and sanctity of the marriage relationship. . ."); *but see id*. at 52 (finding the "contemporary justification of affording an accused such a privilege" as "unpersuasive."). As the Supreme Court determined if one spouse "is willing to testify against the other in a criminal proceeding … there is probably little in the way of marital harmony for the privilege to preserve." *Id.* Thus, the Court determined that spousal privilege belonged to the testifying spouse, rather than the accused. *Id* at 53.

106. *See generally* Zheng, *supra* note 9 (discussing Confucius' pessimism with law as social sanction).

107. *Id*.; *see also* KUPPERMAN, *supra* note 1, at 39.

108. *See* KUPPERMAN, *supra* note 1, at 40.

109. *Id.* at 39.

110. *Id.* at 40.

111. *See e.g.*, discussion, *supra* Part III.

understand law's communicative function is by comparing it with the Confucian concept of "*li*."[112] *Li* is difficult to define and may be described as "propriety, ethics, or moral rules of correct conduct and good manners."[113] *Li* is also linked to social roles, as it guides the proper conduct of individuals between each other based on their respective roles. [114]

Legal commentators have discussed how *li* can be understood as a type of law.[115] Generally, these commentators have found that comparing *li* and systems of law is ill-served because it would portray *li* as a subject matter to be enforced by systems of law.[116] For example, Herbert Ma warns against the inefficaciousness of simply enforcing Confucianism.[117] Also, John Wu expresses equal disdain for the mere enforcement of Confucian *li* through laws.[118]

Just as Aristotle emphasized the role of habituation in moral cultivation, *li* also plays a role in habituation. *Li* highlights proper conduct within relationships between people, providing ritual conduct that must be followed to effectuate those relationships virtuously.[119] One of Confucian *li*'s "primary functions" is to "provide parameters of appropriate behavior that indicate and reinforce the respective positions of people engaged in interaction."[120] Then how does this aid in the internal development

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112. *See* LAI, *supra* note 9, at 28 (noting *li* is a term that possesses "considerable elasticity" and that *li* in the *Analects* may refer to "religious ritual," "comportment of the cultivated person," and "behavioural [*sic*] propriety in the ordinary interactions of the common people."). Regarding behavioral propriety, Lai notes that, in the *Analects*, *li* "served as guides for correct behavior in a range of relational context: between children and parents, subject and ruler and prince and minister." *Id.* at 29 (internal citations omitted). As such *li* "mapped out different requirements for appropriate behavior according to one's place in a particular relationship." *Id*.

113. Luke T. Lee & Whalen W. Lai, *The Chinese Conceptions of Law: Confucian, Legalist, and Buddhist*, 29 HASTINGS L.J. 1307, 1308 (1978).

114. LAI, *supra* note 9, at 29.

115. *See id.*; *see also* Herbert H. P. Ma, *The Legalization of Confucianism and its Impact on Family Relationships*, 65 WASH. U. L.Q. 667, 670, 673 (1987) (explaining that *li* is used to "[implement] the Confucianists' theory concerning human relationships" and that "Confucian doctrines easily became the content of law, and the criminal code became the instrument for executing such content."); Caleb Wan, *Confucianism and Higher Law Thinking in Ancient China*, 10 REGENT J. INT'L L. 77, 91-94 (2013) (comparing *li* with natural law theory).

116. *See e.g.*, Gao & Walayat, *supra* note 12 (arguing that "Legalization of Confucianism" had negative effects on family law).

117. *See* Ma, *supra* note 115, at 673 (stating that the "[l]egalization of Confucianism" "brought disrespect and even damage to both the law and Confucianism.").

118. John C. H. Wu, *The Struggle between Government of Laws and Government of Men in the History of China*, 5 CHINA L. REV. 53, 68 (1932).

119. LAI, *supra* note 9, at 29.

120. Karyn Lai, *Li in the Analects*: *Training in Moral Competence and the Questions of Flexibility*, 56 PHIL. E. & W. 69, 70 (2006).

of virtue? It is through habituation, by acting within such relationships, that *li* attempts to cultivate within the mind of practitioners the necessary requirements that must be considered in proper conduct with others.

Li can be compared to the communicative function of law. At first glance, *li* refers simply to strict rules that guide interpersonal conduct.[121] But, *li* also attempts to designate the proper conduct in these interpersonal relationships.[122] By doing this, *li* seeks to achieve two goals: (1) to educate the person of proper conduct within relationships to build proper emotional responses to actions occurring within those relationships, and (2) to socialize persons to enter the moral community, by providing the rules of conduct that will occur between persons of varying roles.[123] While punishment may play a role in this schema, typically in the form of communicating the severity of certain conduct that the community is willing to inflict to enforce such conduct, *li* is primarily concerned with cultivation through habituation and possibly through socialization of outsiders into the moral community.[124]

This type of socialization is a form of moral education by itself, as it provides the moral language by which the community understands itself. Within Confucianism, *li* provides this form of moral education through habituation. *Li* is comparable to systems of law.[125] Much like law, *li* can also be seen as a form of "art or drama" where the value of the *li* comes from contemplating the ritual practices from a psychical distance.[126] This analysis follows the similar lines of the aesthetic contemplation of law, internalizing the communicated meanings represented through the legal regulations within a legal relationship.

There is something valuable about the marital relationship in the actual world that is protected in the law. These protections are not standardized into one collective code, but acknowledged in various other laws within the general body of law. However, just as the major debate on marriage is the constitutive definition, the definition of things is central to speaking effectively within the world of law. Law translates the real world into legal code to convey how the community responds to the actual world. Law not only enforces this community response, but also communicates it to outsiders who will be incorporated into the wider community.

A community's values need a language to be conveyed to outsiders. This is true for both the communicative aspect of law and

121. LAI, *supra* note 9, at 28.

122. *Id.* at 29.

123. *See, e.g.*, LAI, *supra* note 9 (discussing ways that *li* is described in the *Analects*).

124. *Id.*

125. Gao & Walayat, *supra* note 12, at 238-46.

126. *Id.* at 244.

li, as they both regulate conduct within relationships. However, persons are often faced with countless relationships in their daily life. Two human beings can even have simultaneous but different relationships with one another. In these relationships, individuals have certain roles within the relationship.

Consider two persons, A and B. Suppose A is the employer of B, but that B is also the owner of a residence which is being rented by A. In this situation, A and B maintain two concurrent relationships with each other. A is the employer of B, and B is the landlord of A. The legal rights and duties differ between the two. A and B would bear different rights and duties to each other as employer-employee as they would as landlord-tenant. To properly understand their rights and duties, the two must clarify in what sense they are relating to each other. The two would be unable to deal effectively if they applied their landlord-tenant relationship to their capacities as employer-employee. This need for clarity exists in both legal and moral relationships. There is a need for each to understand their roles and capacities in dealing with each other. The first step to properly regulate the conduct between them is to identify the role they take in their relationship (depending on the specific circumstances). This identification of roles can be compared to the Confucian concept of the "rectification of names."[127]

V. THE RECTIFICATION OF NAMES

To Confucius, the rectification of names was central to the affairs of state, as it provides the basis of a community's understanding of itself.[128] This goes beyond mere standardized language, but into the content of the words themselves. Both Confucius and Socrates saw "correct language [as] … the prerequisite for correct living and even efficient government."[129]

The notion of the rectification of names, or *zhengming,* comes from a conversation between Confucius and Zi Lu in the *Analects*:

> Zi Lu said: "The monarch of the state of Wei wants you to govern the country, what is the first thing you plan on doing?"
>
> Confucius said: "First it is necessary to rectify the names."
>
> Zi Lu said: "Is that really what has to be done? You are being too pedantic, aren't you now? How will you rectify these names?"
>
> Confucius said: "Zhong You, you are too unrefined. A gentleman, faced with the matter that he does not understand, takes a skeptical

127. *See* Zi Lu, CHINESE TEXT PROJECT, ctext.org/analects/zi-lu [perma.cc/7FN5-E84H] (last visited Dec. 7, 2022) (providing that the term "rectification of names" originates from *Analects* 12:3).

128. *See id.*; *see also* YU-LAN, *supra* note 13, at 41.

129. W.K.C. GUTHRIE, THE SOPHISTS 276 (London: Cambridge Univ. Press, 1971).

> attitude. If names are not correct, one cannot speak smoothly and reasonably, and if one cannot speak smoothly and reasonably, affairs cannot be managed successfully. If affairs cannot be managed successfully, rites and music will not be conducted. If rites and music are not conducted, punishments will not be suitable. And if punishments are not suitable, the common people will not know what to do. So, when the gentleman uses names, it is necessary to be able to speak so that people understand. If one can say it, one can definitely do it. A gentleman should not be careless with words.[130]

The discussion between Confucius and Zi Lu concerns the first duty of a ruler.[131] After Zi Lu asked Confucius how to govern, Confucius responded that the first duty of a ruler is to "rectify names."[132] While the meaning is obscure, Confucius noted that correct names are necessary for the community to "speak smoothly and reasonably" to allow "affairs [to be] managed successfully."[133]

Chinese philosophers have interpreted this concept differently. The Chinese philosopher Zhu Xi, and those influenced by him, related the rectification of names to "social status," arguing that names "are an ethical and moral standard and a behavioral norm that everyone … must respect based on his status."[134] The passage most cited in defense of this view is *Analects* 12:11, which reads:

> . . .A monarch must be a monarch, a minister must be a minister, a father must be a father, and a son must be a son.
>
> Duke Jing said: Oh, well said! If a monarch is not a monarch, a minister is not a minister, a father is not a father, a son is not a son, even if there is grain, will I still be able to get some to eat.[135]

This passage suggests that the rectification of names is primarily focused on titles (*e.g.,* a monarch as a monarch, a father as a father, etc.).[136] By affixing proper names and associated roles with those names, people would be able to speak "smoothly and reasonably" in their social responsibilities to one another based on these roles.

This interpretation differs from what fellow philosopher Xunzi found. [137] As he wrote:

> When the king sets about regulating names, if the names and the

130. Lu, *supra* note 127.

131. *Id.*

132. *Id*.

133. *Id*.

134. Cao Feng, *A New Examination of Confucius' Rectification of Names*, 2 J. OF CHINESE HUMAN. 147, 150 (2016).

135. Zheng, *supra* note 9.

136. *Id*.

137. *See* Feng, *supra* note 134, at 149-53 (discussing the various ways rectification of names was understood, which includes a systematized writing system, a rectification of political roles, and even serving as the foundation for early Chinese studies in logic).

> realities to which they apply are made fixed and clear, so that he can carry out the Way and communicate his intentions to others, then he may guide the people with circumspection and unify them.[138]

Xunzi, like Confucius, considers the rectification of names as a political enterprise, a necessary step for a ruler to properly govern the political community.

Warren Steinkraus interpreted Xunzi as believing that because "[g]oodness is acquired because the social order is proper," then the rectification of names was necessary to direct people toward cultivating virtue."[139] However, Steinkraus goes astray when he traces the doctrine through Xunzi to the Legalists, noting how the Legalists sought to keep "actualities" under "strict control through the application of names."[140] Writing on the different interpretations of the "rectification of names" between Confucians and Legalists, Fung Yu-Lan notes that "Confucius had advocated the rectification of names wishing thereby to make all classes of society accord to what they ought to be. The Legalists advocated it as a means by which the ruler might maintain control over his subjects."[141]

What Steinkraus misses, then, is how law is directed towards both social control and "mak[ing] all classes of society accord to what they ought to be."[142] Law is not simply a way to control subjects, but to direct right action within specific situations in the context of the community's values. This discrepancy is marked by the misunderstanding of what law does. It limits itself to the command theory of law proposed by John Austin.[143] While some laws can be seen as commands enforced by punishments, not all laws are commands.[144] Laws involve various rules, including both "duty-imposing" and "power-conferring" rules.[145] Power-conferring rules guide conduct in certain legal relationships, such as contracts.[146] A contract is not a command. Rather, the law of contracts determines what must be done to effectuate a proper contractual relationship.[147]

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138. HSUN TZU, BASIC WRITINGS 140 (Burton Watson trans., 1963).

139. Warren E. Steinkraus, *Socrates, Confucius, and the Rectification of Names*, 30 PHIL. E. & W. 261, 262 (1980).

140. *Id.* at 262-63; YU-LAN, *supra* note 13, at 324. For more information on the Legalists and an introduction to Legalist thought generally, *see* Lai, *supra* note 9, at 163-187.

141. YU-LAN, *supra* note 13, at 325.

142. *Id*.

143. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 9-25 (1954).

144. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 604-05 (1958).

145. *Id.*

146. *Id.*

147. *See e.g.*, *id.* at 604, (acknowledging that while some legal rules are

It is notable that Confucius responds that the first step a political ruler of a state must take is to "rectify names," in order to allow the population to speak "smoothly and reasonably."[148] Even in Feng Cao's straightforward interpretation, the importance of language in building the state is foundational.[149] However, what Cao misses is that by noting the importance of names in "proper accord" with reality, Confucius does not only seek a standardization of language generally, but a standardization of moral language.[150] A Confucian theory of law would likely seek to focus on ensuring that the legal definitions of things are "correctly in accord with reality in order for people to properly internalize the definitions communicated in the law."[151] A "proper use of names would therefore help to identify certain legal principles within reality and help citizens to internalize these legal norms and build a motivation to obey the law."[152] In this way, the rectification of names is part of the communicative aspect of law, as focusing on the proper definitions of names and concepts "accord with reality" in order to "encourage people to internalize the proper behaviors communicated within the law into behaviors in reality."[153]

Therefore, the rectification of names is comparable to the projection of a world of law. A legal world is meant to be a parallel world, translating the actual world into law to highlight the relationships between legal subjects. In the aesthetic contemplation of the world of law, observers can see in what ways the legal world is like or unlike reality. Indeed, it provides a way for observers to see how a world of law, unlike reality, may be *truer* to reality, for a projected legal world is not mere "naturalness."

When saying that names should be rectified or brought into accord with reality, it must be noted that the projected legal world is a rhetorical project, meaning that it aims to persuade observers of its truth. In persuading observers, the projected world is not simply a clear reflection of society, but often projects the world in distinction to reality, but in deeper accord to the society's values. In other words, a legal world is not meant to be "natural." Moral development is not designed to be in accord with nature. For example, Aristotle noted that moral virtues do not arise by nature, for "nothing that exists by nature can form a habit contrary to its

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"commands [to be] simply 'obeyed or 'disobeyed' and contrasting them with legal rules that "provide facilities more or less elaborate for individuals to create structures of rights and duties for the conduct of life within the coercive framework of the law.").

148. Lu, *supra* note 127.

149. *See* Feng, *supra* note 134, at 134.

150. *See* Gao & Walayat, *supra* note 12, at 256.

151. *Id.*

152. *Id.*

153. *Id.*

nature."[154] Further, Kupperman writes that the "naturalness" that Confucius favored "represents the thorough assimilation of a higher style of life that, however, is grounded in original nature: it is not 'far from the common indications of consciousness.'"[155]

The communicative function of law has a similar role as *li*, providing ritual propriety directing proper actions within the proper situations. In observing the relationship of persons within a legal relationship, law communicates to others a notion of how persons should behave within that relationship. In the act of world projection, law presents another two functions: the reflective and reflexive functions of law. The reflective function of law translates concepts within the actual world into the legal world. This function attempts to stay true to reality. The reflexive function of law, on the other hand, projects a concept that is intentionally not true to reality. This projection is done to correct aspects of the actual world that the community does not find real and important.

VI. RECTIFYING A TOMATO AS A VEGETABLE

In the famous 1893 case, *Nix v. Hedden*, the United States Supreme Court faced the amusing issue of whether a tomato was a fruit or a vegetable for the purposes of the Tariff Act of 1883.[156] Botanically, the Supreme Court admitted a tomato was a fruit.[157] However, for the purposes of the Tariff Act, the Court decided that a tomato would be treated as a vegetable.[158] Interestingly, the Court felt empowered to define something outside of its actual definition.[159] Perhaps this is not so surprising, given the Court had done it before, identifying beans as a vegetable rather than a seed.[160]

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154. ARISTOTLE, THE NICOMACHEAN ETHICS, *supra* note 4, at 23.

155. KUPPERMAN, *supra* note 1, at 33.

156. Nix v. Hedden, 149 U.S. 304, 305 (1893) (citing Tariff Act of 1883) (levying a customs duty on "vegetables in their natural state, or in salt or brine" but providing that fruits are duty-free).

157. *Nix*, 149 U.S. at 307.

158. *Id.* (acknowledging that while tomatoes were, "[b]otanically speaking" a "fruit of a vine," it determined that "in the common language of the people, whether sellers or consumers of provisions, [tomatoes, as well as cucumbers, squashes, beans, and peas] which are grown in kitchen gardens, and which … are … usually served at dinner in, with , or after soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.").

159. Walayat, *supra* note 41, at 84-86.

160. *Id.* at 85 (citing Robertson v. Salomon, 130 U.S. 412, 414 (1889) (determining that beans "[a]s an article of food on our tables … are used as a vegetable.") The determinative factor for the *Robertson* court seems to be the "principal use to which [beans] are put" rather than botanical categorizations. *Id.*

The ruling in *Nix* is an example of law's reflexive function.[161] The Court justified its decision in *Nix* on the belief that, while a tomato was botanically a fruit, it was "used" as a vegetable in ordinary people's cooking.[162] The Court took issue with how people used tomatoes because it was concerned with how tomatoes should be taxed.[163] The relationship between the importer and the taxing authority is more properly defined by consumer use, rather than the botanical identification of a tomato.[164] When considering the purpose of taxation, the Court stated, "the use of the legal concept of a tomato was so much like a vegetable for the purposes of taxation, that the law decided that the tomato *is* a vegetable."[165]

In this way, the Court's decision was a rectification of names, rectifying the tomato as a vegetable rather than a fruit for the purposes of taxation. By rectifying the tomato, the Court sought to allow the community to speak clearly and reasonably about how a tomato was taxed.[166] This is not to assert that a particular definitional change is exactly what Confucius desired in his advice to rectify names. Certainly, a legal definition that is not in accord with the actual definition seems to cause more confusion than it corrects. In reality, a tomato is a fruit, given its botanical properties. Nevertheless, affording proper names within a legal world leads to clearer behavior within the law. A tomato is taxed as a vegetable because its use by ordinary people is more akin to that of a vegetable. In this instance, the rectification of names is important for the ease of the practice of the laws.[167]

By rectifying names, observers can properly acknowledge their place in relation to others. This is not unlike a world of law, which is based on the relationships between legal concepts. How would people be able to follow proper *li* in their relationship to others if they are unsure about what their relationship to others is?

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161. *Id.* at 85-86; *see also* Walayat, *supra* note 41, at 50. The "reflexive function" refers to the flip side of the "reflective function" of the law. *Id.* While the "reflective" function is meant to translate social norms and institutions into the law, the reflexive functions acknowledges that certain legal concepts "may not be beneficial to society as a whole," and the law therefore plays a "corrective role" by either "amend[ing] … legal relationship[s] by restoring it to its natural order or to change the natural relationship between concepts in order to provide greater benefit to society as a whole…." *Id.*

162. *Nix*, 149 U.S. at 307.

163. *Id.* at 306-07.

164. *Id.* at 307.

165. *Id.* (emphasis added).

166. *Id.*

167. *See e.g.*, Annex III (A)(1), Council Directive 2001/113/EC of 20 December 2001 (defining carrots under the European Union law as fruit for the purpose of jam classification); *see also* Toy Biz, Inc. v. United States, 248 F. Supp. 2d 1234, 1239 (Ct. Int'l Trade Jan. 3, 2003) (finding that Toy Biz, Inc.'s action figures were legally "toys" and not "dolls" which effectively reduced the tariff rate by half).

Therefore, the rectification of names becomes the first step in a position of political influence because it will allow citizens to acknowledge their relationships, both to the state and among each other.

VII. CONCLUSION

The project of law, itself, is a rectification of names, bringing names into proper accord for outsiders to identify themselves within the world of law. The hope that names could lead to the internalization of social norms and law, as argued by Solum and Wang, is aspirational, but more than internalizing norms into persons, rectifying names brings persons into the law.[168] It places them within the world of law, communicating this place to all those who participate in the law. By seeing themselves within the legal world, the observer must acknowledge the proper conduct of their relationships to operate within the law. Whether a person will actually internalize those norms is another story, as it is clear that while these persons would follow the law for its own sake, they do not do so because the laws are right and good, but out of recognition that they must follow these laws in order to operate within the legal world at all.

How laws can be in accord with virtue and what laws are actually virtuous exceeds the scope of this examination. Laws ought to be in accord with virtue, not simply for people to act virtuously as a consequence of following the law, but to build the language of virtue, or to understand the community's conception of virtue in order to participate in the moral community. The very project of law brings this language of understanding to those already within the community, as well as to those outsiders that are to be brought into the community. Therefore, law is communicative of the community's values, beginning with identifying that person's legal role in the legal relationships identified by the law. After that person acknowledges their legal role, they will identify their legal relationship with others in their capacity of the legal role.

By understanding law as a form of moral communication, the similarities that law shares with the Confucian concept of *li* becomes clearer. Both *li* and the communicative function of law play an important role in the moral education of persons. They identify the ways in which communities conceive themselves, the persons which constitute them, and how these persons relate to each other. Law projects a legal world, a reflection of the actual world, corrected to be truer to the community's values. Law communicates this to others by requiring these values be assumed to operate within the

168. Linghao Wang & Lawrence Solum, *Confucian Virtue Jurisprudence*, *in* LAW, VIRTUE AND JUSTICE 110-14 (Amalia Amaya & Hock Lai Ho eds. 2012).

law. However, to operate smoothly in the law, it must be clarified where persons factor into this world. How can individuals be properly socialized into their legal relationships if they cannot identify themselves within the world of law?

Consequently, the first step for the law is to rectify names. Just as Confucius acknowledged that the first task of a ruler is to rectify names for people to be able to speak smoothly, the first step of the law is to clarify the legal capacities that individuals take in their relations to others. Further, a rectification of names is not simply translating names from mere reality. It is not enough to be "natural," as the natural state of things is not always reflective of the community's actual values. Both Confucius and Aristotle acknowledged this in their shared insistence that education is a necessary part of moral cultivation. Thus, as seen in *Nix*, certain things must be translated from their actual definitions for them to be properly understood within the legal world.[169]

Words and language are central to the practice of law. Therefore, it is fitting that the very nature of law is to serve as a language, by which persons understand their legal relations to one another. Law goes beyond merely being a clever use of language, but to forming the language of the community itself, in which individuals understand their place in the greater community – identifying their role, and the associated relationships within the world of law. While Confucius was certainly right to be skeptical of the effectiveness of punishments in the cultivation of virtue, interpretations of Confucianism, which do not see law playing a major role, apply a narrow vision of law. In recognizing all of law's functions, this article shows that law's role is central to the fabric of the community. Law's role goes beyond mere coercion to touch upon the self-understanding of the community itself.

169. *Nix*, 149 U.S. at 306-07.