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FRAGMENTED MORAL  
CONSENSUS. SINGLE-  
ISSUE GROUPS CONTEND  
AGAINST ONE ANOTHER, SKEP-  
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RAMPANT, AND THE SOCIAL

order feels unstable. Individuals increasingly claim the right to establish their own moral and legal autonomy. It is a time when "every [person] walketh in his own way, and after the image of his own God" (D&C 1:16). Yet we also live in the day of the regulatory state. Laws, government regulations, and lawyers are everywhere. How is it that with so much law we could be surrounded by a sense of pervasive and unprecedented lawlessness?

For example, James B. Stewart tells us in *Den of Thieves* that the insider trading and corporate takeover manipulations of the 1980s were "the greatest criminal conspiracy the financial world has ever known."<sup>2</sup> And the recent S&L crisis led to \$300 billion in losses and the collapse of 2,800 banks and thrifts in ten years, a record annual rate of failure.<sup>3</sup> Thirty percent of the failed thrifts were infected by unlawful conduct—the

industry's highest-ever rate of illegality. Since 1988, federal lawyers have obtained over 1,200 indictments and have a 95 percent conviction rate.<sup>4</sup>

The level of public trust in other spheres also suggests a time of moral lawlessness. NBC last year shook our confidence in the mass media by admitting that it staged its filming of alleged defects in General Motors trucks. And during the 1992 presidential campaign, a news story entitled "Lies, Lies, Lies" reported that 75 percent of Americans now believe there is less honesty in government than only a decade ago. Forty percent said they thought George Bush did not usually tell the truth, and 36 percent believed the same about Bill Clinton. This article then continued,

"Lies flourish in social uncertainty, when people no longer understand, or agree on, the rules governing their behavior toward one another."<sup>5</sup>

Even so, American institutions have been reemphasizing ethics. The American Bar Association published its first code of professional responsibility in 1969 and then reinforced those standards in 1983. The world of politics has witnessed post-Watergate reforms, changes in campaign finance laws, and tough new standards for using Washington's revolving doors.

Corporations now publish "codes of corporate conduct." ITT's code seeks "to take all action necessary to maintain ITT's reputation for conduct in accord with the highest levels of business ethics and law compliance." Black & Decker's code instructs managers to comply with employment, antitrust, safety, accounting, and insider trading laws. Its managers sign a pledge "to be ethical and honest in all business dealings."

However, I wonder if growing ethical codes and new laws on every subject from air pollution to sexual harassment reflect a culture in which citizens take law seriously, or a culture whose moral decay makes more law an act of last resort. After comparing future U.S. business prospects with those of Asia, *Wall Street Journal* editor Robert Bartley recently offered this commentary on American decline: "If America is to decline [compared with Asian competition], it will not be because of military overstretch. Not the trade balance, Japanese management secrets, or even the federal deficit. If a decline is under way, it's a moral one. Not [a] petty morality about nanny taxes, but the profound morality of whether

a community can insist that its members bear certain responsibilities, and enforce them when necessary."<sup>6</sup>

As these illustrations suggest, we now face the dilemma of having developed an increasingly regulated society while also experiencing a reduced sense of community and shared moral frameworks. This dilemma has a history, and it has many implications for the future. I want to suggest a simple analytical model that may serve as a departure point for further thought about that history and its implications.<sup>7</sup>

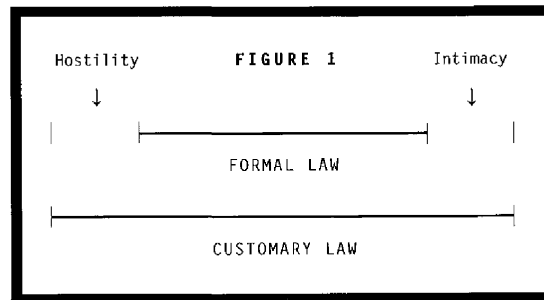
We must first define two key variables in this model—*customary law* and *formal law*. Legal philosopher Lon Fuller once described customary law as the unwritten expectations that govern all human interaction. Customary law is "not

the product of official enactment, but owes its force to the fact that it has found direct expression in the conduct of men toward one another" over extended periods of time.<sup>8</sup> Two different elements account for the strength of customary law—the sheer force of long-term habits and the tendency to see customary law as normative; that is, custom often reflects not only what is, but what people believe *ought* to be.<sup>9</sup>

Examples of customary law include such notions of fairness as "first come, first served" or "take your place in line." The custom that "a person's word is as good as his bond" is an essential basis of trust in many commercial fields.<sup>10</sup> Even the side of the road on which we drive is a reflection of long-standing custom. The deeply ingrained nature of customary law is captured in the question a little girl asked a friend of mine: "Mom, do we have to do this because that's just the way things are?"

Formal or "enacted" law, on the other hand, includes not only constitutions, statutes, and regulations, but also legally enforceable contracts. Formal law typically arises from the experience of custom; hence, Justice Holmes said, the life of the law has not been logic, but experience. And we can best understand a formal law by knowing its origins in custom.

Yet some level of community disintegration usually precedes the emergence of formal law. Only when people begin to question or violate an accepted "customary" practice is it necessary to develop legally formulated rules. As legal philosopher Roberto Unger put it, the "further one moves away" from customary consensus, "the more acute the need for *made* standards" that a state can enforce.<sup>11</sup>



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Unger's insight gives rise to a logical extension: Can formal law stray too far from its origins in custom? Unger answers this question only indirectly by warning that a general system of formal law is seriously threatened when a state's rulers try to impose laws that reflect the leaders' needs but lack inherent or "customary" validity in the eyes of its citizens. We will return to this issue after considering the historical relationship between customary and formal law.

Consider how far each kind of law reaches across the total spectrum of human interaction. Customary law spans the entire spectrum, while formal law spans only its middle part (see Figure 1). Within the range between "hostility" and "intimacy" lies the broad middle ground where formal law governs relationships among "friendly strangers," drawing at times on the customs that underlie the formal rules. However, when relationships reach the extremes of hostility or intimacy, formal law breaks down and people rely solely on custom.

For example, international relations are often governed by formal treaties. But when a nation's sovereign interests conflict with a treaty's command of formal law, custom will prevail. No international tribunal has enforceable legal power to override any nation's sovereignty. Thus the ultimate customary remedy in the realm of hostility is war. Short of war, national economic and political interests as well as world opinion will influence behavior—but only at the level of custom.

At the other end of the spectrum, formal law is also

unable to govern intimate relationships, such as those within a family. Attempts by members of an intact family to legally enforce their "rights" or "duties" will undermine the "organization" and "consciousness" of the family.<sup>12</sup> When formal law intrudes excessively into family relationships, it can destroy the continuity without which there is no intimate relationship. However, because customary law "is at home [across the entire] spectrum of social contexts," it successfully regulates intimate associations in informal, customary ways, including expectations about "roles and functions" that contribute to "stable interactional expectancies."<sup>13</sup>

As with war between nations, the ultimate customary remedy for an impaired intimate relationship is to end the relationship. This remedy will obviously destroy the prior intimacy, which shows how the premature intervention of formal law can put at risk the intimate relationship it may seek to help. The legal system has long recognized this reality, as reflected by cases in which judges refuse to resolve disputes within families that do not rise to the level of true abuse or grounds for divorce.

Now consider the relationship between customary law and formal law in American history, because our recent experience simply extends certain long-developing trends. During the colonial period, custom exerted a stronger force than did law. The gradual trend since then has been for custom to decline and for formal law to increase. In a complete reversal of dominance, formal law is now a more significant force than is customary law.

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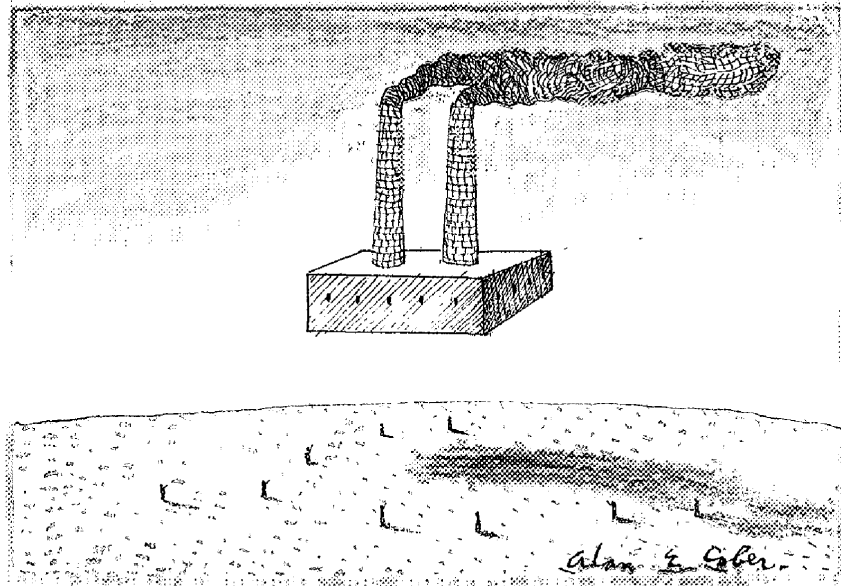
## THE U.S. CONSTITUTION, ADOPTED IN 1789, WAS A SIGNIFICANT EXPRESSION OF FORMAL LAW — A WRITTEN DOCUMENT THAT SUPERSEDED MANY

customary colonial patterns. But throughout the 18th and 19th centuries, custom was a stronger force than law among white Americans, who shared a Protestant, European heritage and a pattern of rural, agrarian life. We resolved this era's most divisive problems—states' rights and slavery—only after our weak system of formal law failed, and we resorted to the ultimate customary remedy: war. Immediately following the Civil War, we amended the Constitution in ways that laid the foundation for powerful 20th-century expansions of the formal law dealing with federal supremacy and personal equality. But these laws could not be fully accepted until after the customary norms of American society could accommodate greater racial diversity.

Consider a few headlines since 1865 that chronicle a decrease in the power of custom and an increase in the

power of formal law. By 1890 growing weaknesses in our unregulated "customary" market economy prompted the first antitrust laws. The labor union movement revealed that unregulated, customary assumptions about freedom of contract left individual laborers with inadequate bargaining power. And the gradual urbanization and immigration patterns of this era sowed early seeds of a growing religious, ethnic, and cultural diversity at the level of custom.

During the first half of this century, the combined effects of a great economic depression and two world wars led to vast increases in federal power and formal business regulation. The U.S. Supreme Court accommodated its philosophical stance to these expanded state powers because the events of history had profoundly shaken the nation's (and the Court's) confidence in our customary social and



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economic remedies. By 1950 the downward trend line of customary law and the upward trend line of formal law were clearly crossing (see Figure 2).

Since 1960 we have witnessed a widening gap between custom and formal law. Despite a few modest declines during the 1980s, governmental regulation has now become an accepted reality at every political level and in every public and private sector. Formal law has also become the primary medium for dispute resolution, as "the lawyering of America" and complex economic factors have brought us the litigation explosion and the liability insurance crisis. The successes of the Civil Rights movement spawned an entire generation of rights-oriented groups that alleged a variety of social injustices at the levels of both formal and customary law. Formal law moved further into the sphere of customary intimacy; individuals and groups won greater access to federal laws and federal courts, where procedural formalities and symbolic victories also reinforced the importance of formal law in public policy disputes.

Many of these developments were enormously positive, bringing some people into the social and economic mainstream who had been systematically and wrongly excluded from it by our customary law's inability to protect minority

interests. When entrenched customs protect patterns of prejudice and oppression, formal law can be a great liberator. In an age of growing pluralism and diversity, formal law has eloquently expressed our traditional ideas of liberty and justice for all.

Yet formal law can be a destructive bull in the china shop of customary intimacy, shaking our delicate sense of trust and cooperation with such force that we jeopardize our deepest and most personal sources of moral order. This destabilizing tendency is increased in times of cultural change. And during the recent era of formal legal empowerment, our cultural consensus has simply been falling apart, not merely because of formal law, but as part of a massive cultural shift. This process of disintegration within the last generation represents a sharp focusing of trends that had been under way for years.

The entire history of Western civilization since the medieval era reflects a gradual separation of the individual from communal forces—a movement that carries elements of both progress and decline. For a relatively recent example, 20th-century art, music, literature, and philosophy signify a questioning and sometimes a fracturing of traditional or "customary" forms that had been stable for centuries. These

abstract expressions have mirrored and anticipated, as art generally does, the movement of fundamental cultural assumptions. While that process was long since in motion beneath the surface, it has now erupted for all to see. Robert Bellah and his colleagues plaintively describe these social changes as an "ontological individualism" that has produced a "culture of separation"<sup>14</sup> in which—using John Donne's words—"tis all in peeces, all cohaerence gone." Or as Hugh Nibley once put it, "our culture has been privatized, then polarized, then pulverized."

At the level of customary consensus, our entire culture now feels the sense of fragmented incoherence reflected in the arts. In the last 30 years, our primary social institutions have all felt its impact: corporations, governments, schools, families, and churches. As described by future forecaster Morton Darrow, "Every major institution found itself dealing with people unwilling to blindly accept customary responses." Responding to this eroding confidence, our political, economic, and educational institutions heightened the rhetoric of their promises in attempts to satisfy public criticism. But these responses often only created an irreconcilable gap between expectations and fulfillment. The resulting disillusionment has led to an even greater "lessening of institutional authority which, in turn, caused increased institutional fragmentation."<sup>15</sup>

One vivid example of this disintegration has occurred in the public schools, where formal law has invaded the intimate sphere of a once very custom-based world. As educational researcher Gerald Grant put it, "the new adversarial and legalistic character of urban public schools" over the past few years is "a shift of profound dimensions."<sup>16</sup> With the presence now of hall guards and police officers in the schools, "all behavior is regarded as tolerable unless it is specifically declared illegal." Students did not cause this loss of control by themselves; it has arisen because "many adults—in school and out—are no longer sure that they know what is right, or if they do, that they have any right to impose it."

Grant's empirical studies led him to conclude that "the crisis of authority in the American school is that in many places we no longer have any agreement on what morality ought to be, or we feel that any attempt to provide it is a form of indoctrination. [We now believe] that children are adults capable of choosing their own morality as long as they do not commit crimes."<sup>17</sup> This is what I mean by the loss of customary consensus.

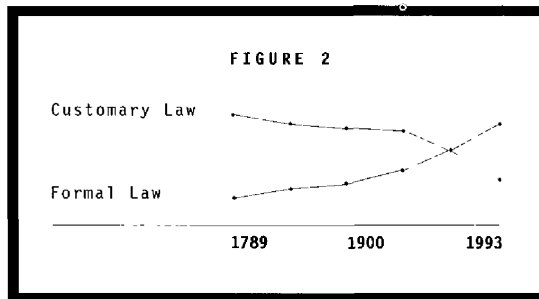
One perverse way of dealing with this loss of consensus is to change society's definitions of what conduct is considered "deviant." In a disturbing recent essay entitled "Defining Deviancy Down," Senator Daniel Moynihan argues that

American society has simply chosen "not to notice behavior" that a generation ago would have been "controlled, or disapproved, or even punished."<sup>18</sup> He cites several examples of this "moral deregulation": our redefining of mental illness, which has played a major role in creating current levels of homelessness; our acceptance of single-parent families as a perfectly "normal" alternative, despite the evidence of social, educational, and personal harm that flows from single-parent homes; and our yawning at exploding crime rates that in 1960 "would have been thought epidemic."<sup>19</sup> Assessing society's response to all this, Moynihan finds that "there is a good deal of demand for symbolic change," but "none of the marshaling of resources that is associated

with significant social action."<sup>20</sup> Our preoccupation with rhetoric and formal law at only symbolic levels strikes him as a collective denial akin to drug abuse: "Societies under stress, much like individuals, will turn to painkillers of various kinds that end up concealing [the] real damage."<sup>21</sup> Is formal law a painkiller? At some level, perhaps it is.

During the late 19th and early 20th centuries, formal and customary law moved into a relatively productive—perhaps even optimal—balance between the need for personal liberty and the need for social order. There was then an appropriately dynamic tension between the "is" of formal law and the "ought" of custom. But as the two sources that guide our conduct have grown further apart, we may already be in a "post-formal" time when the gap between the commands of formal law and the disarray of customary norms is unbridgeable. Emile Durkheim wrote of such times, "When mores are sufficient, laws are unnecessary. When mores are insufficient, laws are unenforceable." Yet, as Edmund Burke put it, "Society cannot exist unless a controlling power upon the will and appetite be placed somewhere, and the less of it there is within, the more there is without." What happens when customary law, the source of mores, has become too weak and formal law has become too strong?

As an illustration, consider the issue of school prayer. In 1985, the Supreme Court held that a school violated the First Amendment when it provided for a "moment of silence" in its classrooms each day. Chief Justice Rehnquist's dissent showed that the founding fathers intended to prohibit only the establishment of a state religion and the preference of one religion over another. They never intended to require "neutrality on the part of government between religion and irreligion."<sup>22</sup> Justice Stevens' majority opinion made no serious attempt to refute Rehnquist's historical argument. Stevens simply wrote that "when the [establishment clause's] underlying principle has been examined in the crucible of litigation," the Court has moved from a con-



cern over "intolerance among Christian sects" to "intolerance among 'religions,'" and finally to a concern with "intolerance of the disbeliever and the uncertain."<sup>23</sup>

Justice Stevens' summary reflects the ongoing fragmentation of the American consensus on the meaning of religion—not only as a legal term of art, but as a meaningful concept in our national life. Now that traditional religion has lost much of its customary meaning, prayer in the schools has become a great battleground at the level of formal law. The very shrillness of the recent debate reflects the frustration of those who sense that religion has lost much of its influence as both a personal and a cultural force at the level of custom.

This disintegration of the normative consensus makes us yearn to recapture the place of religious meaning in society. We naturally reach for some tangible signal having the authority of formal law—the one force that seems to verify religion's public approval and protection. Even people who believe in the value of religion can feel ambivalent about the hopes for such action, because mere legal formalities will hardly create serious religious attitudes and may even imply that religion is mostly a matter of superficial ritual. On the other hand, a tangible statement of law, even if only symbolic, may be more necessary in times of fragmented consensus than at other times.

Formal law often reflects public posturing designed to send symbolic messages. Such laws may be unenforceable, partly because they do not arise from deep enough customary roots to be taken seriously, and partly because those who write them may be more concerned with "making a statement" than they are with crafting rules that will work in practice. We push formal law in this direction when we believe, as many now do, that the battle for the American soul must be waged at the level of appearances and media influence.

Consider now some implications of our modern plight in the business world. Many business managers, public accountants, and corporate lawyers worry every day that their industry practices involve technical violations of the law—yet these violations may be neither enforced nor enforceable. In part, this occurs because much modern legislation arises from well-intentioned but vague legislative desires to "make a statement" or "send a message" at the important symbolic level of formal law. But these laws are not always designed to address specific problems in practical ways. This problem is compounded by the sheer volume and complexity of new regulatory fields, from environmental and safety issues to employment practices, taxation, and disclosure requirements.<sup>24</sup>

For example, the *Wall Street Journal* has described the massive new Americans With Disabilities Law as "so complicated and unclear that the only way managers can know exactly what it requires of them is to be told by a judge."<sup>25</sup> In the equal employment area, where America has "the most far-reaching equal employment laws found anywhere in the world," managers must now avoid not only intentional discrimination, but the *appearance* of statistical dis-

parities that imply *unintentional* discriminatory effects. Yet, while economic complexities and political sensitivities make judgments difficult, our current laws are arguably hurting minority workers more than helping them. *Forbes* magazine estimates that employment law compliance costs range up to \$19 billion annually in the U.S.—despite evidence that current market forces coupled with older, less intrusive laws would benefit minority workers more than do today's quota-based requirements.<sup>26</sup>

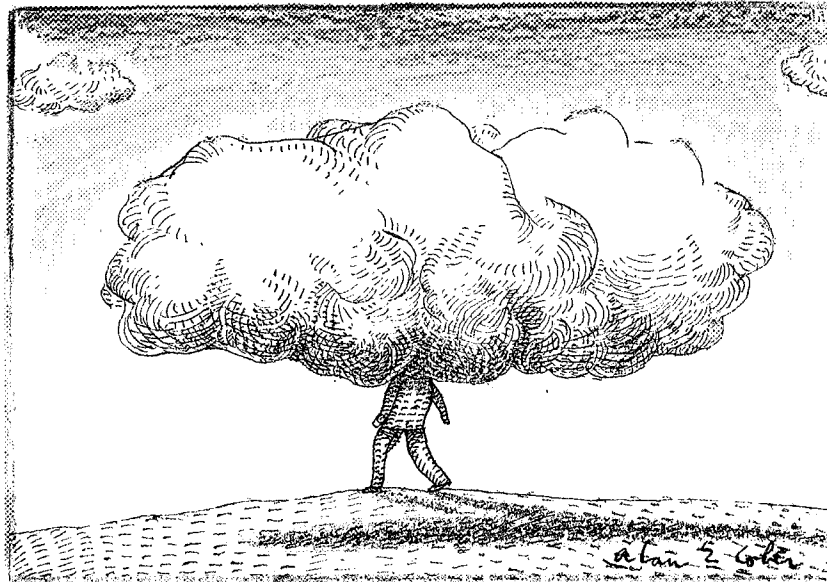
We noted earlier the recent and extraordinary failure rates among U.S. financial institutions. Was this primarily an ethical failure? Blatant fraud was clearly involved in some cases. But much of what happened resulted from natural market risks and competitive behavior related to major economic change. Some experts argue that the traditional banking industry was being rendered obsolete by an irreversible decline in traditional banking services. With the rise of cheaper and better alternatives for both depositors and borrowers, banks were forced to expand into riskier segments of the market.<sup>27</sup>

Similarly, the deregulation of the savings and loan industry in 1984 was probably a good idea, but the new ability this gave the S&Ls to make speculative investments attracted entrepreneurs who took risks that were intolerable for institutions that enjoyed the unique protection of federal deposit insurance. Some analysts argue that the industry was insolvent before deregulation occurred, because residential mortgage loans had been booked years earlier at fixed rates but were being funded with deposits that paid much higher current interest rates.<sup>28</sup>

As some S&Ls offered economically unrealistic rates of return, others followed their lead just to stay competitive, and the industry crawled collectively out on a limb of speculation. Then when the real estate market took a sharp cyclical fall after a 15-year boom, the limb broke and chaos followed. Although regulators found some evidence of hard-core fraud, most of the ensuing litigation was a search for deep pockets to help cover the losses; and our complex regulatory scheme offered endless theories of illegal and fraudulent activity sufficient to justify damage claims.<sup>29</sup>

This regulatory scheme may be designed less to protect against intentional fraud than to create a system of insurance and risk distribution. When the market is healthy, the laws are not consistently enforced; when the market falls, new enforcement pressures reveal that many transaction participants arguably violated some law. If the primary effect of this approach is to spread the risk of loss as far as possible, do these laws and regulations raise fundamental ethical issues—or is this mostly a formalistic legal regime that renders genuine ethical virtue not very relevant?

We saw the political version of this same phenomenon in 1993, when two candidates for U.S. Attorney General were disqualified by "nanny law" problems. Most people have ignored household help laws, because, as one observer wrote, the laws are "so complicated, so unrealistic and so morally ambiguous that in the normal course of business the government doesn't dare to enforce" them.<sup>30</sup> So why the right-



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eous indignation about Zoe Baird and Kimba Wood? One explanation was that the attorney general must enforce immigration laws. Another was that Ms. Baird's disclosures provoked more public criticism than had been anticipated.

But a less obvious explanation may be that Ms. Baird was too conservative to suit some critics,<sup>31</sup> so they found a justification for rejecting her that would not have mattered if she had had different philosophical views. And once her technical legal flaw had become a rallying point, even the appearance of a similar problem doomed Judge Wood. A *Washington Post* writer described this affair as Washington's "crime du jour," noting that by contrast, smoking marijuana and committing adultery just weren't the "in" crimes in 1993, although marijuana and adultery had ruined earlier candidates for high office.<sup>32</sup>

Other recent writers have echoed this theme, suggesting that "when too many rules exist, the law becomes capricious and unsettling," resembling "a lottery." They further affirm both elements of our thesis by noting that there is more law breaking today than in the past, partly because "there are so many laws," and partly because "in a nation that is increasingly multicultural, many laws don't represent shared values."<sup>33</sup>

To bring law and custom closer together, we must work at both levels to reduce the growth of formal law and to increase the influence of customary morality. As we do, I suggest four sample issues for consideration.

First, could some federal office responsibly assess the "environmental impact" of any proposed new law or regulation? During his campaign, Bill Clinton promised the nation's mayors that as president he would stop the government from "regulating you to death." He also warned of the threat to small businesses of "crushing governmental regulations."<sup>34</sup> Previous presidents have taken similar positions, but the regulatory state keeps rising. Is it out of control?

Second, managers and professionals must learn to live in this bewildering ethical climate while avoiding the extremes of both cynicism and naiveté. Students of business and law learn soon enough that some modern laws are unrealistic and unenforceable. They also find that many professionals are groping without a strong compass of conscience in a time of moral uncertainty. When someone enters this environment naively, the sudden discovery of legal and moral ambiguity can be so shattering that it moves a person all the way from innocence to cynicism.



At the personal level, this state of affairs creates two different problems: (1) the temptation to do something a morally alert person would know is wrong, simply because many other people are yielding to the temptation; and (2) the very different dilemma of not knowing what to do when the circumstances make it totally unclear to a morally alert person what is right and what is wrong. Those who enter this confusing climate with the mentality that "things are either black or white" probably could handle the first of these problems, but will have trouble dealing with the second. Moral relativists, by contrast, will not understand the first dilemma, but will have few problems with the second. Both groups must see that moral principles still exist, yet not every difference of opinion over the meaning of a technical regulation is a major moral crisis. We must take the formal law seriously enough to obey it, even while being realistic about it—even while trying to change it. We must also beware of those who ignore the formal law by claiming that they live by a more fundamental ethical code. Cynicism can damage our view of both formal law and custom.

Third, let us not be confused about the basic purpose of ethical standards, which is to develop personal character. As that happens, we develop through natural aggregation the character of the body politic. For both individuals and society, these developments occur primarily at the level of customary law. If we look for our ethical constructs primarily in the formal law, we may never develop a genuine feel for the personal values that lie embedded only in the untidy and unenforceable realms of custom. And if we focus only on formal law, the embarrassing gap between what that law asks and what it enforces may cause us to become so cynical that we abandon any attempt to take rules of conduct seriously, at either the formal or the customary level.

A related problem is the recent rise of what Christina Hoff Sommers calls "ethics without virtue." This is the view that individual character is strictly a matter of personal choice, and that therefore ethics today should be concerned only with the *social* morality of institutional and other public policies. Sommers explains that in this view of ethics "a student soon loses sight of himself as a moral agent and begins to see himself as a spectator," because "the contemporary . . . moralist is concerned with what we are to advocate, vote for, protest against, and endorse," not with how we are to behave. This argument assumes that ethics belongs at the level of formal law, for formal law defines our public policy. This is one consequence of losing our customary vision. We no longer realize that the

Western philosophical tradition about ethics "assumed that the practical end of all moral theory was" not better public policies and formal laws, but "the virtuous individual."<sup>35</sup> When custom nourishes the virtuous individual, ethics at the formal law level will take care of itself.

Fourth and finally, we must rediscover and nourish the wellsprings of customary understanding, for the "mores" of which Durkheim wrote will originate at the customary level or not at all. Alexis de Tocqueville called these mores "the habits of the heart." For him these habits—we could call

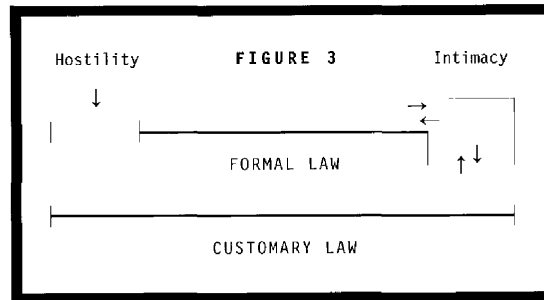
them customs—reflect "the whole intellectual and moral state of a people."<sup>36</sup> And Tocqueville found that the Americans cultivated this sense of civic and personal virtue through voluntary "mediating institutions" that he called "intellectual and moral associations." He was referring to churches, families, schools, and other small-scale mediating structures that have long been the

value-generating and value-maintaining agencies of a free society.

A primary loss from the rise of formal law and the decline of customary law is that the institutional strength of the mediating institutions has drastically declined. This is a major loss, because these associations are the key link between formal law and custom, between private morality and social stability. Consider this relationship as diagrammed in Figure 3.

The primary transmission of influence between formal law and customary law occurs within mediating structures at the intimacy end of the spectrum of interaction. The mediating institution mediates between the formal law and the world of private interaction, while functioning primarily within the realm of intimacy. Inside the "box" of the mediating entity, relationships are governed by customary law, but the exterior legal structure is created by formal law. Thus the mediating institution interacts with both the customary law and the formal law. It draws upon the custom-based wellsprings of commitment that characterize intimate relationships and then teaches, in largely unenforceable ways, what Robert Bartley called the profound morality of personal responsibility to the community.

For this process to occur, the formal law must resist the temptation to invade the intimate sphere. This is because formal law's coercive force tends to disrupt the fragile trust that is crucial in sustaining all bonds of intimacy, whether in a family, a teacher-student relationship, membership in a church, or in any other mediating institution. Yet formal law must uphold the institutional authority of the mediating institution, so that the "box" of its structure is strong enough to protect its individual members and resourceful



enough to nourish its members' personal development. That nourishment is the vital element by which individual citizens learn to accept membership in communities of trust and love enough to obey the unenforceable. Then the influence that flows from the mediating institution into the formal law will both nourish and moderate the formal law, so that it does not stray too far from its origins in custom.

When these processes and relationships are in place, the "intellectual and moral associations" of mediation will *teach*—not command—those ethical habits of the heart, without which neither personal character nor social survival is possible. When mores are sufficient, laws are unnecessary. When mores are insufficient, laws are unenforceable.

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#### Endnotes

- 1 Originally presented at a Conference on Ethics and the Management of Financial Institutions, Brigham Young University Marriott School of Management, March 25, 1993, and published in *Vital Speeches*, Sept 15, 1994, p. 719.
- 2 James B. Stewart, *Den of Thieves*, (New York: Simon & Schuster, 1991), p. 15. In only one of his typical heyday years, Michael Milkin earned \$550 million—and when he later confessed to six felonies, he agreed to pay the government \$600 million in fines and penalties. *Ibid*. Some writers judge Milkin's junk bond activity less harshly, given its positive value in financing needed telecommunication innovations. Roger E. Alcaly, "The Golden Age of Junk Bonds," *The New York Review of Books*, May 26, 1994, p. 28.
- 3 "GAO Faults Bush for Bank Woes," *Deseret News*, February 6, 1993.
- 4 Harris Weinstein, Chief Counsel, Office of Thrift Supervision, Washington, D.C., remarks in panel on "Financial Institutions and Consumer Financial Services," Annual Meeting of the Association of American Law Schools, San Francisco, Jan. 9, 1993. In many of these cases, however, the defendants escaped long prison terms by agreeing to make large penalty payments that now appear uncollectible, suggesting that the fines provide little more than "the appearance of government action." "Steep fines, prison time avoided by savings and loan defendants," Associated Press as reported in *Daily Universe*, February 25, 1993, p. 1.
- 5 *Time*, October 5, 1992, pp. 32, 37.
- 6 "A Traveler's View of Morality, American Decline," *Wall Street Journal*, February 10, 1993, editorial page.
- 7 I first attempted to describe some elements of this model as it applies to family law in "Law, Custom, and Mediating Structures: The Family as a Community of Memory," in *Law and the Ordering of Our Life Together*, ed. Richard John Neuhaus (Grand Rapids, Michigan: Eerdmans, 1989), p. 82.
- 8 Lon Fuller, "Human Interaction and the Law," *The American Journal of Jurisprudence*, 1969, pp. 1-2.
- 9 See Roberto M. Unger, *Law in Modern Society* (New York: Free Press, 1976), p. 49.
- 10 For example, I read a few years ago about a group of Jewish wholesale diamond dealers in New York City who have always conducted—and still conduct—their business by loosely carrying merchandise worth thousands of dollars in their pockets and making strictly verbal agreements with other traders. They enforce their agreements informally through internal discipline that includes expulsion from the group.
- 11 Unger, pp. 61-62.
- 12 Unger, p. 55.
- 13 Fuller, p. 33.
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