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## LAW AND CULTURE

TAMAR FRANKEL\* & TOMASZ BRAUN\*\*

### INTRODUCTION

We often speak of law and culture in one breath. That may be so because both systems impose on each person and organization required rules of behavior. Yet, law and culture are quite different, though they relate to and affect each other. Therefore, it is desirable to examine their similarities and differences and their relationship. While the structures of law and culture are more similar than we might expect, their differences greatly affect the enforcement of the rules issued under each.

To be sure, both systems consist of rules and their enforcement. Most of our thoughts and knowledge, and many aspects of our lives and livelihood, in whatever form they take, are subject to rules and their enforcement. Here we speak of rules that are directives of behavior by humans, backed by enforcement of other humans. Yet, law and culture differ in fundamental details, including: (a) the identity of those who initiate the rules; (b) the rules' underlying purposes and values; (c) how these rules are (i) initiated, (ii) developed, (iii) expressed, (iv) and enforced; and (d) the extent of their acceptance by those to whom they apply.

Many of the details relate to the reaction of the subjects of the rules. Since the subjects of the rules are not identical, they are likely to differ in their reactions and these differences may affect the degree of compliance with the rules. We might assume, however, that most people follow values that relate first and foremost to their own well-being, and secondarily, to the well-being of others. This assumption applies both to those who impose the rules and those who are subjects to the rules. Their relationships may affect the level of benefits that they bestow, and the level of obedience to the rules imposed on others.

Human genetics may play a role in the substance and enforcement of cultural and legal rules. Humans cannot live alone. They depend on each other from birth to death. Throughout their lives, however, they learn to cooperate and to offer their services to one another. These services can be partly genetic. . . . However, unlike many animals, whose reliability to serve others is genetic, humans' reliability to serve and support others is more volitional. In addition, humans may not have a genetic bar against hurting each other. Thus, dependence on others exposes the human dependents to the danger of abuse by those on whom

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they depend.<sup>1</sup> The power to provide or withhold support, and to coerce rather than convince and agree, can destroy human societies. The drive to survive has led humans to regulate supportive and destructive power of humans against each other. That is where human groups that imposed restrictions and duties on humans direct or indirect power over each other.

Constraining the exercise of humans' power over each other has taken many forms. Primarily among them are rules of law and rules of culture. Legal rules and their enforcement are generally imposed by governments. For example, rules of law address the protection of children. Many years ago, children were deemed to be the property of the parents.<sup>2</sup> These property rights were restricted in many countries by laws, backed by government enforcement, including the governments' authority to take the children away from their parents for abusive treatment of their children.

Like legal rules, the rules of culture may be coercive, but their creation and enforcement differ from those of laws. Culture may involve cooperation and inducing behavior by positive incentives such as medals, honorable reputation, and rewards or economic incentives, rather than painful punishments. Another incentive is cooperation, and its withdrawal. Cooperation may be crucial for certain human interactions. For example, a group of researchers cannot produce positive results when each of the group members' expertise is necessary to create the valuable objective, unless each expert can rely on the expertise of the other.

The fundamental questions relating to rules are: Who are the initiators and enforcers of the rules? How do they gain their power, is it by: (i) force and fear; (ii) majority of public consensus; (iii) minority of public consensus; (iv) the habit of obedience of the rules' dependents; or all the above? A general observation suggests that the more hidden the enforcer's power is, the more effective that power may become. After all, it is more difficult to rebel, or combine with others to rebel, against an unknown master, than against a known one.

A habit of obedience is a master's best weapon against human' disobedience. Habitual obedience creates not only an easy way to behave, as any habit does, but may also produce an uneasy feeling when disobedience is an option. This uneasy feeling may be overcome when obedience imposes harsh and painful results. However, even the fear of such results may be overcome when obedience produces related and similar pain, or if it has created a counter-habit of disobedience.

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<sup>1</sup> See Tamar Frankel, *The Rise of Fiduciary Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2018), <https://corpgov.law.harvard.edu/2018/09/10/the-rise-of-fiduciary-law/> [<https://perma.cc/JGS7-XDH6>]

<sup>2</sup> See Barbara Bennett Woodhouse, "*Who Owns the Child?*": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1037 (1992) (stating that in colonial times children were treated "as assets of estates in which fathers had a vested right . . . . Their services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance") (quoting MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 25 (1985)).

Usually, a single person follows the rebellion of many more persons, rather than deciding for himself or herself, whether to rebel when persons in a similar situation do not rebel. This behavior can be observed in children's as well as in adults' behavior. Classroom laughter may start with one student's giggle that cannot stop even by the teacher's frown or order, until a number of students cease laughing and the rest follow. Fashion demonstrates this tendency as well. For example, before the Second World War women had let their hair grow long. However, shortly after the war began, this changed, and short hair became the fashion. The reason may have been the enrollment of the women in military services and the rise and timing of their working hours.<sup>3</sup> After the war ended, the trend did not change immediately. It took time for one habit to overcome the other, for the hairdressers to open more shops, and for a younger generation to take over fashion leadership.<sup>4</sup>

As organizations, such as an army, a business, an educational institute, and others, acquire power, all of them raise the same issues. The power must be vested in humans, and that power may be used for good or for evil: for the benefit of the group or for the benefit of the power holders, or in any other way. The enforcement of the rules may be cruel or educational, the definition of good and evil may be changing and the roads leading to one or the other may be changing as well. Corporate wrongdoings, and in fact many other wrongdoings, can be the products of what we consider good. In this case, for example, competition.

About forty years ago, there arose in the United States the Law and Economics movement. Members believed that competition would resolve most frauds, if not every fraud.<sup>5</sup> Another contrasting view was that competition could contribute to and enhance fraud.<sup>6</sup> Perhaps both views were supported by

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<sup>3</sup> See, e.g., Kate Sullivan, *A Brief History of Short Hair in 20 Numbers*, ALLURE (Aug. 8, 2015), <https://www.allure.com/story/short-hair-history> [https://perma.cc/75N3-DAJ4] (noting that during World War I "American women began cutting their hair into bobs. Many historians attribute this trend to military nurses adopting shorter cuts for convenience and hygiene").

<sup>4</sup> See, e.g., *1940s Hairstyles—History of Women's Hairstyles*, VINTAGE DANCER (June 8, 2017), <https://vintagedancer.com/1940s/1940s-hairstyles-history-womens-hairstyles/> [https://perma.cc/S9QW-R7K5] (noting that in 1940s "[women's] hair was usually worn shoulder-length or a little bit longer"); Short Hair for Women, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/fashion/encyclopedias-almanacs-transcripts-and-maps/short-hair-women> [https://perma.cc/Q9FB-3A8S] (last visited Nov. 18, 2021) (noting that during 1920s, the number of haircutting salons increased from 5,000 to 23,000).

<sup>5</sup> See, e.g., William K. Black, *The Department of Justice "Chases Mice While Lions Roam the Campsite": Why the Department Has Failed to Prosecute the Elite Frauds that Drove the Financial Crisis*, 80 UMKCL. REV. 987, 991 (2012) (arguing that "markets are so successful in detecting and preventing fraud that 'a rule against fraud is not an essential or even necessarily an important ingredient of securities markets'" (quoting FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 283 (1991))).

<sup>6</sup> See Black, *supra* note 5, at 991-92 (suggesting that "unfettered markets" may lead to fraud and corruption) (citing Robert Tillman, *Making the Rules and Breaking the Rules: The*

evidence of the good result and the bad one. In fact, almost everything good can be disastrous as well.

Humans have created forms of interactions that end by one party's winning and the other party's loss. For example, sport games, intellectual games, and competition in the markets, are considered either entertainment or beneficial not only to other humans but also to the acting parties. That is why, arguably, competition may produce for other human's better products and better medicines. Yet a drive for such benefits may not only reward others but may undermine the successful actions of the competitors. That may lead not to public benefits but to fraudulent and harmful ways of convincing the public to choose products, ideas, and services, over those that might produce better results in the long run. The issue of winning via cooperating, instead of competition, is at the heart of human society's well-being.

In sum, human society is continuously facing: (i) the creation and long-term use of power by some humans over others; (ii) the long-term interaction, and cooperation among humans; and (iii) the need of all human societies to induce others to contribute to benefits for all and avoid the destruction of any. These are the fundamental reasons for the rules of laws and cultures. . If these objectives are continuously kept in mind, detailed and redefined, while designing the legal and cultural rules, as well as the relationships between the two, their differences and contents might be more compatible, acceptable, and practiced.

#### I. UNDERLYING PURPOSES AND VALUES OF THE RULES

In comparing similarities and differences that characterize cultural and legal rules and norms it is particularly interesting to examine the social functions that each play in its different fields. We start by examining the sources from which these rules and norms originate and the needs to which they respond. The emergence of rules originate from the needs formulated by the community to which those rules regulate. The normative character of rules correspond, above all, to the need to remove the state of chaos, disorder, unpredictability. The ordering of the rules of societal coexistence, regardless of the epoch and geography, has been considered necessary and beneficial for the group. Such a need, to organize a desired model of order, could be met by both legal as well as cultural rules. The relationship between law and culture rooted in values is underlined by the definition - *ius est ars boni et aequi* - used by the ancient Romans, who considered law to be the art of good and justice.<sup>7</sup> If law was an art, it has certainly also been an element of the culture. This is just a starting point of analysis of the functions of these rules.

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*Political Origins of Corporate Corruption in the New Economy*, 51 CRIME L. & SOC. CHANGE 73, 73, 75, 76, 77-79 (2009).

<sup>7</sup> E.g., Peter Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1554 (1995).

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Before discussing the functions of law and culture rules, it is worthwhile to define culture, especially in the context of its relation to law. Among other ways, culture could be understood as a distinction from nature. Culture appears at the moment of any human intervention into anything that a human meets or creates that has not been transformed by human intervention earlier. Etymologically, it refers to cultivation. In fact, it is a primary meaning when humans began to order and at the same time subjugate nature, to interfere with it. The word “cult” included in this notion pertains to the morphological meaning of cultivation of the soil, and then the soul. In this sense culture includes a religion as well.

Beliefs are also a part of a form of culture and indeed probably the very first emanation of it. Equally, early agriculture was composed of beliefs, worship, religion, and spells. In this context emerges the crucial role of language as a part of an organized way of communicating, transmitting the coded messages, among people. Similarly, language as a means of this transmission plays an important role in law and in culture. It is an integral part of culture and sometimes equally culture is a part of what language describes. To the same extent language gives a substance to words and forms a way of articulating legal rules while at the same time law must be expressed in a language. Indeed, no sophisticated law can exist without being verbalized. Without a verbal and written language, the “language” of signs and actions cannot go very far.

One of the fundamental questions is whether culture—understood as a set of rules and desired postures, and behaviors forming the heritage of contemporary societies—can be helpful in eliminating, or at least diminishing, the harms that rules are designed to prevent. Does culture have a cure to prevent violations of rules? According to Edward B. Tylor, culture is composed of elements such as knowledge, arts, ethics, laws, customs, and other societal skills and habits created throughout history.<sup>8</sup> Describing it more generally and analytically, Bierstedt assesses that culture is composed of everything that humans do, think, and own.<sup>9</sup> Consequently, three types of cultures can be differentiated: (i) normative culture, (ii) ideal (symbolic) culture and (iii) material culture. This division, which is useful in anthropological and sociological analysis, may be relatively less useful while studying the interrelation of cultural and legal rules. For the purpose of this article, we assume that the culture *sensu largo* embraces also law, science, art, religion, namely all products of mindful and directional activities of humans, built across the times, across geographies and civilizations. In these contexts, to paraphrase Arthur Schopenhauer, “Es gibt nur eine Kultur und alle verschiedene Kulturen sind nur die Teile derselben.” There is only one culture—continuous, flowing, growing, uniting humanity and all its varieties are only parts of this culture and belong to it.<sup>10</sup>

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<sup>8</sup> 1 EDWARD B. TYLOR, *PRIMITIVE CULTURE* (4th ed. rev. 1903).

<sup>9</sup> S. SAMUEL RAVI, *PHILOSOPHICAL AND SOCIOLOGICAL BASES OF EDUCATION* 309 (2015) (quoting Robert Bierstedt).

<sup>10</sup> “There is solely one and only culture and all particular cultures are only the parts of this culture.” This refers to the breaking through constations of Arthur Schopenhauer’s

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Particularly interesting from the point of view of comparison of the role of culture with that of the law is the aspect of arranging, sorting, classifying, and ordering. This is where the normative role of culture emerges clearly. The meaning of the norm in law is well defined: it defines an indication that prescribes a certain conduct, which is enforced by a defined formal authorized entity. The cultural norm, as compared to the legal norm, is far less tangible. The cultural norm is open to breach interpretation, much more interpretable, capacious, imposed by, and induced or derived from social changes, which may be unpredictable, the indeterminacy which is rather intuitively observed in the dynamics of social relations.

Therefore, there are several functions of culture that are understood as a process of creation of spiritual, intellectual, custom, and artistic achievements of people. On the other hand, the material achievements of humanity, which are manifestations of culture, are in fact the effects or results of some of these four functions. However, not all the products of human thought and activity become ipso facto a social culture. Often, they are not even a representation of it.

A closer look at the particular functions of culture could be useful at this point. Some of them demonstrate the similarity of culture and approximate culture to law.

*The function of an inherited message, a continuation function.* The most important element of this function is continuity, and consequent building and rebuilding and upbuilding upon predecessors' legacies. Every interruption of continuity can be harmful and retrograding for culture. Culture creates its value by adding new elements to the existing ones. One of the key elements around which culture is created is its own integrity, coherence, inseparability. Culture needs to be continued. It is neither created immediately nor finished in any specific moment of its existence. Culture is being built, overlaid, but also corrected; it is meandering, and it continues.

*The normative, ordering function.* The normative, regulating character of culture stems from the need to establish, consolidate and order the current desired patterns of behavior, but also the needs, aspirations, anxieties, feelings in a specific moment on the timeline. The liquid and constantly changing reality of societal relationships needs to be structured and often this happens with the help of the culture. A good example are the cultural norms of coexistence based on trust that are so indispensable in business. Studies on culture seem particularly actual in the context of cultural norms and their junction with the legal norms—the two types of rules and principles that (should) regulate the societal behaviors.

*The a-normative, altering function.* This function consists of postulating new paradigms and breaking down existing patterns. This function is inborn and refers to existing norms. It is particularly visible in activities of artists who

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regarding time, space, and matter that by their nature are undividable as in fact all their parts are integrated, and inseparable. See 2 ARTHUR SCHOPENHAUER, DIE WELT ALS WILLE UND VORSTELLUNG 70 (Könemann 1997).

perform their objections to the existing reality. They do so through their own creative manifestations. In fact, this is the expectation towards the role of artists in the society. As a result, new streams of sensitivity are created, which in time become acceptable, then patterning and consequently normative. From the initially elitist they transform into popular and, ultimately, become universal.

*The valuing, judging function.* Culture is backed by a unique form of sanctioning drawing on a catalogue of values to which individual and collective attitudes, affirmations, behaviors, and creations are related.

*The function of focused social opposition.* This role often manifests in activities of engaged activists representing various subcultures, off-cultures, or alternative cultures. The result of this function of culture is not a change of norms but a manifestation of disagreement with the surrounding phenomena in the lives of societies. This disagreement with the norms does not necessarily have to mean any change of these norms. Instead, the result of them may be a change of the surrounding environment. Due to the topic of this paper, the normative function of culture is essential in describing the relationship between law and culture.

## II. DEVELOPMENT OF THE RULES

In some cases, such as the legislature of a state, there is an established history of the process to develop and enforce legal rules. This process in the United States may involve a recognized and authorized proposed person or group, a process of presentations and arguments, and a final vote by the authorized group as well as a final publication and sometimes a test, subject to arguments before a court, going from a low-level court to the country's highest court. In other cases, such as religious rules, the process is longer. In a family, the cases may be subject to continuous arguments, especially if they apply to the children, who are growing and become educated, subject to different values and knowledge, as they get involved within other groups of children and teachers. Rules may be fully expressed, and developed in group session, or offered and imposed by one person.

Thus, to follow the establishment of a rule one should inquire: (i) who are the rule makers? (ii) what is the source of their rulemaking authority? and (iii) what, and who, triggered the exercise of their rulemaking authority?

To assess their efficiency, it is also crucial to establish how the rules are published to reach their (i) subjects, (ii) enforcers, and (iii) those that are affected by them. The publication of rules depends, first and foremost, on the proposed recipients and subjects of the rules. After all, if they do not know the ways they are expected to behave, one cannot blame them for behaving differently. That is why we do not spank a baby that does not know the language. However, watching how a baby sends a clear message to a parent, a nanny or anyone may provide a starting point. The baby uses the one tool he or she has - crying! Grown-ups have not abandoned this message either, depending on their evaluation of this message. We cry, smile compassionately or derisively, or



snicker; we lift the baby and walk with him or her around, or we try to feed him or her or change his or her diapers.

A tone may send the full message without any words. Many years ago, a wife of an ambassador in a northern European country told one of the authors of this article that she was speaking to one of the citizens and he kept on saying: Yasso? Tasso! She thought he was saying “Is that so?” and sending a positive message of interest. In fact, she was told later, he was disagreeing with her message and that is the way people expressed disagreement in his country. Signals in one culture may be signs of approval, but in other cultures highly offensive messages. For example, in the United States the curling of the first and second finger to denote a circle “O” is a sign of OK. But in some South American countries, like Venezuela, it is a highly offensive signal.<sup>11</sup>

### III. THE POWER OF THE RULES

One of the central problems while comparing law and culture rules refers to their power, the discussion about to what extent the rules are accepted and complied with by those to whom these rules apply. Absent enforcement, such “toothless” rules may be viewed as signals of the norm-setter expectations rather than true effective rules.

It could even be said that the rules without enforcement become just a sort of an indicative directional presentation of the norm-setter expectations rather than rules per se. It is not meant to say that such “soft” laws are not laws, and the “soft” rules are not rules. It is to suggest that to achieve the reality—shaping outcomes—obedience to the rules should be assured by the enforcement mechanisms. To be sure, having said this, one can add that these enforcement mechanisms can have various roots and structures. Thus, legal rules are enforced by legal rules (*e.g.*, the power of the authorities), while cultural rules are usually enforced by societal pressure. Culture rules and religious rules are backed by the subjects’ internalized beliefs.

While personal motivations to comply with rules differ, they are culture dependent as much as they are also educationally, family, and socially dependent. Gut feelings and religious motivations have a stronger correlation with obeying cultural (customary) rules than with the legal ones. But this presumption, adopted automatically from the Western societies’ perspective, turns out to be less relevant in systems where political power is joined with the religious one, namely in theocratic countries. In fact, this discussion enters a fascinating border zone between law, science, and anthropology.

To best compare power of legal and cultural rules it could be useful to examine their (i) sources, (ii) purposes, (iii) values, (iv) content, (v) regulating methods, (vi) societal links, (vii) obedience, and (viii) enforcement.

*Sources.* The original source of both legal and cultural rules is the need to organize the coexistence of individuals in a community within a model that is considered desirable by the community and its leaders. The aim of these norms

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<sup>11</sup> TAMAR FRANKEL, *LIVING IN DIFFERENT CULTURES* xxiv (2019).

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is to consolidate such a model. In the case of culture rules, their consolidation creates a custom. In the case of legal rules, after they consolidate through the formalized process of adoption, promulgation and use, finally they create a legal system. The consolidation of the customized culture and of the durable legal system is based on the formal (external) principles which are indispensable for their stability. In democracies, the universal acceptance (social deal) is necessary for their existence. Stability, cohesion, and clarity are essential for their quality. These formal principles are separate from material (internal) principles and values to which these rules refer.

*Goals.* A look at the similarities and differences in cultural and legal rules can be taken from different perspectives and can relate to various areas. It is particularly interesting to examine the social role that both legal and cultural rules play. The fundamental needs that law and culture rules must meet are to agree upon a form of coexistence that enables societies to achieve common goals.

The purpose of the norms on which both law and culture are based is similar. Both regulatory systems share two main objectives: regulating relationships of individuals with other individuals and regulating relationships of individuals with their leaders and masters. However, even though law and culture share the same objectives, they may differ in the methods by which each addresses these objectives and their enforcement. The reasons for the differences may vary and may include different history, different natural environments—such as climate, or vicinity to waters or ocean—and different neighbors.

*Values.* The most important axis of reflections is the consideration of the internal values incorporated within the rules. Ethical values are core to both the legal system and the culture in a given population.

The reach of the legal and cultural rules extends outside the country where they were issued. Both within and outside of a jurisdiction, the enforcement of these rules is based on the need for trust. The need for trust refers both to international and intranational relations, and the rules refer in different ways to the concept of doing the right thing. On this point, legal rules may differ from some cultural ones, depending on which values they are based. The axiological references are always at the center of law. They incorporate such values as justice, righteousness, fairness, balance, and transparency. In addition, they are referred to in the culture rules, designed to assure equality, care, openness, and the alike. On the other hand, many of these values refer to law and culture to the same extent. The human activities driven by any value—whether material or not—refer to the creation and protection of a value, and to sharing this value with the others.

*Content.* Although legal and cultural rules have eventually coincide in purposes, their substance may differ significantly. Legal rules formulate the rights and obligations useful from the viewpoint of the societal order while cultural rules refer to those patterns of behaviors that a society considers to be appropriate. If culture, however, refers not only to the cluster of desired behavioral patterns but also to the entirety of intellectual and artistic heritage of

humanity, then culture rules organize societal lives around ideas and values. In that sense, all norms, including those embedded in the rules, are not only prescriptions, but are patterns of behavior as well. That means they are understood in an extra-legal, and even in a more general, extra-ethnic language. Even though an ethnic language is less formalized than a legal one, the minimal necessary condition of its usefulness is its acceptance by the group that uses it. Legal rules are always noted with language built of words and signs, whereas with culture rules it is different because culture language can take different forms such as artistic expressions, visual arts, music, literature, and more.

*Regulating Methods.* The way in which the rules regulate is built on multiple factors, the strongest of which are individual motivations of their addressees. And these motivations differ. They depend not only on the relevant culture, but on education, family, and social rules. The rules are therefore culture dependent as much as educationally, familiarly and socially dependent. Religious motivations, for example, have stronger correlation with obeying cultural (custom) rules than with the legal ones. Among the very fundamental motivations that make both cultural and legal rules efficient are the ethics. Also, there are other important (founding) values of the law itself. One of the values is the stability and predictability of these rules. This is the dogmatic foundation of the law. Even though it is discredited or denied by some deconstructionist streams of contemporary doctrine that refer to the fast changes, the certainty of the rules and the entire rule system is the ultimate guarantee of the system's efficiency. Another is the coherence of the system. It is being challenged by numerous threats that jeopardize it, such as ubiquitousness, incompleteness, and inconsistency between the rules.

Legal rules also should be rational, comprehensible, and knowable. Additionally, a clear hierarchy of sources as a key tool for the systematic interpretation that eliminates gaps and collisions makes the system of rules logical and structurally correct, and the continuity of the creation of the law system allows for understanding it. Finally, anthropocentrism, which means that no other interests than the interests of humans and those other values that are important for humans (be it individual or collective), are in the center of the system created by the legal rules.

*Societal Links.* Compliance within reference to the legal rules is a state of accordance with the entirety of a normative environment despite the nature of these norms and independent of whether they are strictly binding or not. For example, in corporate law, regardless of how good the rules are, the problem is how to convince people to follow them. This can be achieved by a threat of punishment, reward, or education. This leads to a couple of psychological questions: how people's behavior can be shaped in order to assure compliance with the rules and which personal drivers work the most efficiently. If the purpose is shaping people's behavior, we ought to understand the ways in which behavior is induced or enticed.

*Obedience.* Power and authority are the formalized pressures of the society. The difficulty is to recognize where an individual versus the collectivities (the

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nation, local and regional communities, other groups) is placed and to where the power authorized by this individual and these communities is directed. For legal rules, obedience refers to the formal authority; for culture rules, it is the informal authority of the society. It is worth noting that the informal authority of the society has often been powerful enough to assure obedience, even despite lack of acceptance of some rules by some individuals in some cases.

*Enforcement.* Enforcement refers to the ways in which people can be induced to act in a certain way. Rules are not sufficient unless they are followed or enforced. The right execution involves not only the motivation underlying the rules but also their enforcement. Even religious leadership can be very strong with relatively little enforcement. But perception changes in this case if we think of a kind of a “deferred enforcement” where believers follow the rules proposed by their religious leaders by accepting the concept of an ultimate justice that will enforce the judgement on their behavior in the future.

#### IV. HOW TRUST AND ABUSE OF TRUST ARE INCULCATED IN PEOPLE

The importance of law and culture also emerges when analyzing the problem of abuse of power resulting in a traumatic experience. Psychiatrists would suggest that many of the human characteristics may be the reflection of human childhood’s traumatic experiences. For example, a child transferred at an early age to an orphanage may have very different trusting tendencies as compared to a child raised by supportive parents at home.

A person, who, as a child, had one or a few bad experiences at school, may carry the trauma of the experience to adulthood. Bad experiences of trusting at a very early age are likely to produce a trauma which is carried for life or at least until the person undergoes psychiatric treatment, which helps resurface these childhood experiences to be remembered, understood, and often analyzed. It is at this point that relief may occur. Memory and realization of the source offer the key for relief and a more controlled and rational reaction to present events and experiences.

Thus, a childhood event that resulted in a painful exposure to a breach of trust may be carried to an approach of mistrust and sometimes to a behavior of breach of trust. The realization of the source of this feeling may relieve the child-now-adult of mistrust.

In addition, and just as importantly, mistrust spawns weak trustworthiness. The vague memory of the painful breach of trust may provide the model of the same behavior as a protection against being the subject of this painful treatment. Similarly, an unfair treatment at a very early age is likely to be forgotten, but the painful and angry reaction may be carried to become part of a person’s behavior.

However, sociopaths may not only carry their own mistrust and lack of trust as a protection. They may find soul brothers and sisters, as well as organizations, that share either the actual reaction, backed by their background, or follow friends and leaders that have a similar reaction.

These circumstances and interactions can spawn a culture of sociopaths. The United States, as well as part of Europe, has had a history of the Mafia, which demonstrates this type of group culture.

Sociopaths are driven to suspect, mistrust, and react by breach of trust in them. They are suspicious, see breach of trust all around them, and justify their tendency to reciprocate in kind. Their model spawns a reflection by their followers and gives rise of a culture of mistrust and a large number of sociopaths who habitually practice a breach other people's trust in them. This result is not automatic. It is a product of a slow process and sometimes years of leadership and practices that then take root in a culture and are hard to change.

Even if the breach of trust and the gain spawn benefits, it seems that the feelings of winning and achievement do not last. One reason may be the realization that the violation is not only prohibited but also punished by some of society's rules of law or culture. Regardless of whether the violator disagrees with society's rules, the punishment that is looming large in the background usually does not leave.

Even if the rewards of the breach are rich, there is usually a looming shadow of disapproval. This shadow can accompany the violator of trust even when it is supported by a myriad of arguments, justifications, and even pride.

The life of a trust abuser is not necessarily a happy one. Fear of reprisals may be nodding in the background. The desire for more could be already percolating. With these feelings may come the search for a culprit or someone to blame. Any helper in the violation of other people's trust may be a good target for blame, especially if that helper has performed the directions of the abuser. A search for a culprit may be accompanied by the preparation for another abuse of trust. Besides, the pattern may become a habit. It is something to plan, to prepare, to find whom to blame later, if necessary, and it involves the self-satisfaction of being smart and exposing the stupidity of others, especially those whom the person feels are competitors.

Abuse of trust is not necessarily ever satisfied. Its short-term satisfaction, as well as its longer concerns, are not lasting enough to erase the childhood anger and anguish and fill the void of a pattern of similar behavior. Thus, abuse of trust may become a habit that locks the actor in the jail of habitual similar behavior.

## V. ENFORCEMENT

Rules of culture are enforced in a number of ways. The following are the usually most effective and powerful ones, although their order of presentation does not necessarily demonstrate their history or relative effectiveness. That effect might depend on the nature and history of the particular culture group. But a general observation may suggest that the enforcement of a rule of culture is based on fear, such as the police enforcement or punishment of prison or fines. In that case, the identity and type of the enforcers is most effective. However, in many situations the more hidden the identity of the enforcer, the more effective the rules' enforcement might be.

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The reason for this observation is the humans' internal conflict. Most humans, if not all, seek freedom to think and act as they wish and to receive all the protection and needs that they require and cannot provide for themselves. However, unlike many animals and living units in which support for members of their species is genetic, the humans' support of other humans is not genetic.<sup>12</sup> It is not inbred. Even the parents' love of their children does not reach the genetic level and depends on the nature of the relationship, the individuals, and the way they were raised.

Therefore, if the possible supporter must be relied upon and if this supporter is not forced to provide the necessary support, the supporter may gain power over the dependent person's behavior by threatening to withdraw, or actually withdrawing, support, or conditioning support on required behavior by the dependent. In sum, human support of other humans is not free; it can be accompanied by the supporter's power to control and influence the dependents' behavior.

A culture, which is enforced by entrenched habits, is shielded more effectively against horrific surprises for which people are unprepared. Habits of good fundamental behavior are necessary for the survival of any society. Just as crucial, however, is the requirement of any culture to include a habit of flexibility in order to reflect and adjust to environmental changes and to be linked to necessary fundamental values. For example, trust is a foundation of obedience. Distrust is likely to destroy it. Trust must be linked to trustworthiness, without which trust will be destroyed.

A habitual obedience creates not only an easy way to behave, as does any habit, but also may produce an uneasy feeling when disobedience is an option. This uneasy feeling may be overcome when obedience imposes harsh and painful results. However, even the danger of such results may be overcome when obedience to orders produces related and similar pain, or if it has created a counter-habit of disobedience. Furthermore, habits of both obedience and disobedience may depend on the habit of reliance on others to support either of these behaviors. For some people, habits are a relief against the painful internal decision-making choices of unknown results.

In sum, habits may be induced by other humans, or by a changed environment, and not necessarily by third parties. In addition, habits are strong internal self-enforcers. Thus, a fairly consistent feature of habits is the difficulty of changing them.

A threat of forcing compliance with a rule is an effective enforcer of obedience. It is based on fear of the weaker person of being hurt for disobedience. In addition, the use or possible use of force may establish in humans (and perhaps in animals as well) a habit of fear. However, the threat of force works well only if the subject of the fear is weaker emotionally or physically than the carrier of the force and if the subject of the coercive force has little or no hope of getting help soon after a threat of coercive force was

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<sup>12</sup> See Frankel, *supra* note 1.

made and the subject of the force cares whether he or she lives or dies. In sum, the fear of abuse by force rarely closes the door to hope. The winner may ultimately be the weaker fearing party, especially if that party continues to seek various forms of protection.

Forms of protection may involve: seeking and discovering the stronger party's weak points and vulnerable desires, and then using those weakness points to achieve protection; seeking others to provide protection and reducing the strength of the opponent; or ascertaining the strong party's desires and trying to use it as a counter powerful protection by offering and withdrawing the satisfaction of these desires.

When the weaker person lacks the advantage of controlling something that the stronger person desires (i.e., the stronger person needs the weaker person's contributions or cooperation as well), the weaker person may depend for protection on this strong person's need for protection. To be sure, if the dependent party has such an advantage, it might have a protective bargaining chip to manage the relationship with the powerful party. Otherwise, dependence on the other party becomes deeper.

So long as a dependent person has a counter-control over a source of power, such as the army or finance or anything that the controlling person needs, the dependent party has a measure of protection against coercion.

However, when the coercive member controls these means, such as large sources of a country's wealth, this control supports the coercive power of the strong person and induces further obedience. In contrast, if the weak person or persons control these sources, this control may become the strong person's "Achilles Heel." If the weak person is able to recruit others' help both within the area of the powerful party, as well as outside it, the cooperating parties may overcome the strong person or group of people that rules.

Comparing the effects of long-term changes in the enforcement as compared to short-term changes in the environment on the enforcement of rules invites the question: "How is the enforcement of a rule affected by long-term possible events as compared to short-term surprises?" In both cases, we deal with the same puzzling element—the range of the rule's enforcement, when the rule itself is not explicit about enforcement. However, in a long-term rule, the substance variations of the rule are known fairly well in advance. In addition, most importantly, the rule's interpretation and its range of application have been tested and examined in various contexts, subjects, and enforcement forms. Furthermore, the long-term rule has been adjusted by interpretation not only to the reality of the date of its passage but also to changes that may have occurred since its passage.

In the case of a short-term notice command, if the substance of the command is known and is embodied in the general rule, then the command is part of that rule's general interpretation. The meaning and extent of its application is limited to that command. However, if the command does not contain a closely comparable application to the general rule's application or other similar situations, the legitimacy of the command is not established. It may well be that

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the particular situation presented was not tested or applied in the past and cannot draw on a precedent to determine its justification and range of applicability.

In the first case, there are long-term applications of a rule, its interpretation and precedents, and a system of interpretation that would apply to new situations. In the second, short-term surprise command, this application of the rule has not been tested and no precedent has been established as to its range and rationale. Therefore, the surprise command's legitimacy and its range must be examined and established. However, the "surprise" of the surprise command should not be a surprise to the subject of the command but to the range of interpretation and applicability of the rule. It is not whether the subject of the command knew of its legitimacy but whether a command under such circumstances is valid. But if the law requires that person to be aware of the command and understand it, then these conditions, like all conditions concerning the force of the command as law, must be observed in order to enforce the command.

In addition, a long-term rule and its application to new situations are likely to produce a system of interpreting the rule's applicability to new "surprise" situations. This is a system of precedents. It requires the innovator of the new interpretation to justify it, usually by demonstrating that the innovation's roots, purposes, and underlying values are tightly linked to the foundational rationale of the rule. Yet, the interpretation must be performed by an independent party rather than the commander or the subject to the command. To be sure, both parties may present their case, but neither should decide its outcome.

The more difficult, yet perhaps also most effective, form of conditioning humans is cooperation with those who agree only partially with one's view and values. Seeking the common ground and looking for ways to compromise and reach a "yes" may be the hardest. It requires weighing the value of one's own values with a concern not only between what is best for the actor versus the best for society now and long-term, but also one's own interests, benefits, and losses. In these cases, the satisfaction might come from the impact on social values and following behavior. Anger may convert into satisfaction, and winning may convert into a satisfying compromise by many more people than one could imagine thus creating a surprisingly large following. It is winning not against the other party but *with* the other party.

To what extent does a time span affect the parties' power? Possibility, rather than assured happening, would weaken the party whose power depends on a possible event. In contract, if an event is likely to tighten and increase the power of a party, then even though the event is only a possibility, it might cast its shadow on the controlling party. For example, elections in a democratic regime demonstrate the effect of the unknown results. Similarly, a monarch's power is weakened with the event of his or her sickness.

Rules can spawn and become habitual by repetitiousness, long-term events, and short-term memorable surprises. Long-term events are common events that we rarely recognize become rules. For example, a family may develop a rule about attendance at eating time. During the week, when both or one of the



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parents must go to work and the children must go to school, they might not eat breakfast together and thus their unique breakfast times becomes the family rule. In the evening, and during holidays, and during birthdays, however, the habitual rule is that family members eat together, and the participants may include the birthday person's friends.

Similarly, there are rules in any workplace regarding dress and form of addressing each other. These rules are understood and followed almost automatically. Yet, they are subject to exceptions. If any participant wishes to break the rule, for example, by missing a meeting, the participant is expected ask for permission from a person who is authorized to grant the permission. This person is recognized in the rule as well. At home, parents might ask permission from each other; children might have to ask the mother or father or both.

In this family context, the rules can be long-term, and the exceptions require an authorized permission. Such rules flow from repeated occurrence. The exceptions to the rules usually arise with short-term and spotty surprises, such as a job requirement for the parents, a unique event for the children, or illness or for any member of the family.

There are other contexts in which rules can acquire the force of a habit subject to exceptions for justifiable reasons. These cases cover specific groups, repeated events and circumstances, and exceptions for unique unanticipated situations. In addition, these cases need not be applicable only to people who know each other. They could be institutional rules, such as for schools, religious institutions, theaters, and more.

Different societies use different methods and ways to enforce their values. Many of the underlying values driving these rules are similar, although elements of enforcement may be combined in different ways. The combination may be the product of different priorities which can result in different enforcement of the rules.<sup>13</sup>

Societies may enforce their values in different ways. Methods for enforcement may include force and coercion; rewards for compliance and punishment for non-compliance; conditioning the population from a very early age to comply with the directives of parents, teachers, and government officials; demonstrating, following, and enforcement from a very early age by watching appropriate movies and theater; competition of various abilities from spelling to sports and support of the needy.

Even though it does not seem serious, humor also may play a serious cultural enforcement mechanism. Making fun of a concept or a form of behavior, on the one hand, and considering such a behavior as holy and unique, on the other hand, may leave a lifelong reaction on a child and a community. Good and bad, holy and sacrilegious, a trusted person's and a traitor's behavior, may never leave an adult after childhood inculcation.

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<sup>13</sup> See TAMAR FRANKEL, *FIDUCIARY LAW* 101 (2011) (noting role of a society's culture, institutions, and values in determining balance between ethics- or morality-imposed self-policing, legal policing, and parties' self-policing).

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Various societies have different methods of enforcing their values. In some cases, the values direct, if not dictate, the method of enforcement. If a value is to avoid using force to induce others to follow a rule, but rather try to convince or induce others to follow it, a society may enforce such a rule in a variety of ways, including: enticing attention by leadership to following the rules, which is a reward in and by itself; by granting awards, giving a public or private “thank-you,” creating appropriate publicity, notices, or granting medals or titles; or paying money or other tradable assets.

Some reward forms may acquire the power of rules, which induce people to “earn” them. Alternatives to inducements are enforcements, threats of punishments for violating social values. They may include withdrawal of permission to practice certain professions, such as law and medicine, or require engaging in certain trades or producing certain items or driving cars and so on. A licenser is not only the regulator of the particular activity but also could be an enforcer of that activity and or a related activity.

Usually, values have their roots in history. In fact, these roots may fade and rise again when similar situations arise years later. In fact, it seems as if values have a longer memory period than do rules. Values can appear in various rules, in different measures of emphasis and different factual situations. In addition, values can be turned on their heads. The famous joke is of the young members of the Boy Scouts who were told to help older people cross the street and then forced an old woman to cross the street against her will. These well-wishing young people focused on crossing the street and missed the main point. Thus, values include not only certain actions or inactions but also their purpose.

Very few people are subject to only one form of rules. Some rules, such as those in the military, are rigid. They require uniformity of behavior and subject members to a uniform way of life including dress and food. Yet, family rules may be similar. Some family rules require all members to act or avoid acting in a certain way, and the rules may cover a significant part of the members’ lives. If members are faced with two rigid rules which conflict, how are they going to resolve the conflicts? They have to adjust and sometimes find the system which would allow some negotiations. In this case, the military may be more rigid than the family, even though the feelings of the family member may be far stronger than his or her feeling for the military.<sup>14</sup> However, in some countries, such as Israel, military service is legally mandatory. In such cases, the military provides some flexibility when its rules conflict with family rules.

Another important question is, does examining behavior help us examine our own behavior and drive us to finding more effective cultural rules? Arguably, the answer should be yes.

Generally, every comparison with what we do could produce awareness of what we did not take into consideration. This awareness may lead to following what we learned or avoiding it at all costs, depending on our own values. Enforcement of a rule is linked to the culture of the subjects to the rule. In this

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<sup>14</sup> See FRANKEL, *supra* note 13, at 41.

discussion we deal with each of these issues separately and then link them together. Therefore, the first and third parts of this question are linked together.

The following question might help our answer as well. To what degree are the current cultural rules acceptable to the particular subjects of the rules and the relevant population at large? This question can be answered by looking at the degree of the popular acceptance and following of the rule, and the time span in which the rule was imposed by the population. Was a sufficient time given for adjustment of the population to the rule? The imposition of lockup when the dangerous COVID-19 virus struck millions is an example of this. One can also look at the degree to which the environment has changed since the rule was imposed. Again, the current pandemic may serve as an example, and so were the changes resulting from the World Wars. In both cases we could count dozens of changes, including the evolution of alternatives, the rise of fraud, anger, and defiance in populations, while there are also support, friendship, and commitment to others by others.

When an environment changes drastically, and with it the rules that follow, that is when our culture, laws, behavior, and reaction both to change and to each other are tested. This is the moment for understanding ourselves, as well as our governance system, values, and the rules we live by. To some extent, this is the moment of truth—good or bad—from which it is harder to escape. And perhaps this is a blessing that we should not try to escape but choose to self-examine, judge, and change.

Would examining the behavior of others help us examine ours? Spreading behavior virus is embedded with rules. A habit is a psychological driver of behavior. Just as shock is of surprise. A habit is valuable because it does not require a continuous single full-scale examination to determine how we should direct behavior. Past results then shorten the road to an examination and create an automatic reaction event or a rule reaction. The experience of being hurt by fire may produce a habit of automatically withdrawing our hand from the fire. This rule is embedded in our system. Our body's need for food has created a habit of satiating hunger. The commander is our body and its needs. However, when it comes to habits of behavior, over which the person, rather than the body, controls the commander, the formation and power of habits are more complex.

In psychology, a "habit" is defined as "a more fixed way of thinking, willing, or feeling acquired through previous repetition of a mental habit."<sup>15</sup> A person may not have intended to acquire the habit and may not even be aware of the habit.<sup>16</sup> Habits can be difficult to develop or break; intervening in a habit may

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<sup>15</sup> B.R. Andrews, *Habit*, 14 AM. J. PSYCH. 121, 121 (1903). According to a 2002 study, between one third to one half of participants' behaviors were classified as habits, i.e., performed almost daily and usually in the same location. Wendy Wood, Jeffrey M. Quinn & Deborah A. Kashy, *Habits in Everyday Life: Thought, Emotion, and Action*, 83 J. PERSONALITY & SOC. PSYCH. 1281, 1286 (2002).

<sup>16</sup> *Habit Formation*, PSYCH. TODAY, <https://www.psychologytoday.com/us/basics/habit-formation> [<https://perma.cc/4RFL-KPEC>] (last visited Nov. 18, 2021). The

require awareness and effort. However, habits can be intentionally formed or broken.<sup>17</sup> Habits interface with goals, and goals can direct habits.<sup>18</sup> The *American Journal of Psychology* defines a “habit, from the standpoint of psychology [as] a more or less fixed way of thinking, willing, or feeling acquired through previous repetition of a mental experience.” Habitual behavior often goes unnoticed in persons exhibiting it, because a person does not need to engage in self-analysis when undertaking routine tasks. Habits are sometimes compulsory.

A 2002 daily experience study by “habit researcher” Wendy Wood and her colleagues found that approximately 43% of daily behaviors are performed out of habit.<sup>19</sup> New behavior can become automatic through the process of habit formation. Old habits are hard to change or break, and new habits are hard to form because the repeated behavioral patterns which humans repeat become imprinted in the neural pathways. It is possible to form new habits through repetition. A 2007 study by Wood and Neal found that when behaviors are repeated in a consistent context, there is an incremental increase in the link between the context and the action. This increases the automaticity of the behavior in that context.<sup>20</sup>

A culture, which is enforced by entrenched habits, is shielded more effectively against horrific surprises for which people are unprepared. Habits of good fundamental behavior are necessary for the survival of any society. However, just as crucial is the requirement of any culture to include a habit of flexibility to reflect and adjust to environmental changes and be linked to necessary fundamental values. Again, trust is a foundation of obedience and distrust is likely to destroy it.

Therefore, when the value of competition governs as a matter of habit, it may become toxic when a significant change in the environment occurs and there is no counter-habit or sufficient flexibility to support powerful people’s identification with needy others. A habit of satisfying flexibility for the benefit of a group, rather than oneself, can provide protection and support against unexpected changes that may undermine wealth, health, and a current power structure, as the COVID-19 pandemic has demonstrated.

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defining characteristics of an automatic mental process are the extent to which it (1) is unintentional, (2) occurs outside of awareness, (3) is uncontrollable, and (4) is efficient with attentional resources. John A. Bargh, The Four Horsemen of Automaticity: Awareness, Intention, Efficiency, and Control in Social Cognition, in 1 HANDBOOK OF SOCIAL COGNITION: BASIC PROCESSES 1 (Robert S. Wyer, Jr. & Thomas K. Srull, eds., 2d ed. 1994).

<sup>17</sup> *Habit Formation*, *supra* note 16.

<sup>18</sup> Wendy Wood & David T. Neal, *A New Look at Habits and the Habit-Goal Interface*, 114 PSYCH. REV. 843 (2007).

<sup>19</sup> Wood, Quinn, & Kashy, *supra* note 15, at 1286.

<sup>20</sup> Wood & Neal, *supra* note 18.

## CONCLUSIONS

In a stable environment, how do we prepare for an unstable environment? It seems that the current values in some countries focus more on individuals' self-interests and competition among family members, businesses, sports teams and within social networks. When an unexpected change occurs in such a society, and then personal fortune, the practice systems, the leaders' background and tendencies, and those of each society member could destroy the entire society rather than protect its existence, let alone its prosperity.

Current cultures will fail if there are no mechanisms (at least even a movement towards inquiries) aimed at seeking to find other ways to protect the groups. These deficient cultures may either conflict with society's current needs or fail to support the necessary needs of their people. If they do not or cannot distinguish between fraudulent and exploitive needs, on the one hand, and true needs, on the other, they will corrode and corrupt themselves internally—and are bound to die.

The current issues are many but related:

(i) How can we identify and introduce a culture in which its embedded values would prepare us for significant threats to individual freedom, health, and fortunes?

(ii) What values must we inculcate in ourselves, our children, and in others by education and information to achieve this objective?

(iii) Who will enforce these values? Can the power holder enforce self-limitations and identify with others?

(iv) How do most parents self-enforce their rules on their helpless children? What rules apply to parents that abuse their children? How are these rules enforced?

(v) Are our current enforcement methods, in law and in cultures, effective to achieve their purpose?

(vi) Did the experiences of past societies' reaction help inform us today? For example, what may we learn from American behavior during the First and Second World Wars?

(vii) Let us seek and find a method that helps to design a system that would facilitate social protection of the entire society against an unexpected threat.

(viii) Let us raise the level of satisfaction in helping others who deserve it without expecting any benefits except the positive results of our help and avoid wrapping our help with the expectation that the help benefits us. We should try it. We might like it.