

MYTH SYSTEM AND OPERATIONAL CODE*

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"This theory is designed only for the
special case of a nearly just society."

John Rawls

From the standpoint of the disengaged observer, the most overwhelming feature of social systems is the integrality and the seamless symbiosis of controller and controlled. But for certain problems, inquiry about legal control must distinguish the flow of behavior which comprises group life from those specialized institutions which purport to control, in diverse ways, what that flow of behavior ought to be. The specialized institutions--and they are not limited to the apparatus of the state--convey, both for themselves and for their targets, a very complete picture of how the group in question ought to be acting: a picture of the group as its members would like to imagine it and to some extent do imagine it. Membership in the group involves for most¹ acculturation, a

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1. Most, but not all. Even the most general and fundamental postulates of a culture may be held by different members with varying degrees of intensity. A psychopathic or sociopathic personality seems to learn the external forms but there is no accompanying sense of rightness and hence no possibility for autopunitive mechanisms, a most effective method for

profound shaping of the personality, in processes which impart that preferred picture and make it an integral part of the identity and cognitive structure of the individual. That picture includes the official code of the group and much of its distinctive ritual.²

The picture produced by control institutions does not correspond, point for point, with the actual flow of behavior of those institutions in the performance of their public function: indeed, there may be very great discrepancies between it and the actual way of doing things. The persistent discrepancies do not necessarily mean that there is no "law," that in those sectors "anything goes," for some of those discrepancies may conform to a different code. They may indicate an additional set of expectations and demands which are effectively though often informally sanctioned and which guide actions when they deal with "the real world." Hence we encounter two "relevant" normative systems:³ one which is supposed to apply and which continues to enjoy lip service among elites and one which is actually applied. Neither should be confused with actual behavior, which may be discrepant from both.

policing group uniformity. Marginal group members and "minorities" are distinguished by their multiple acculturations and, hence, a certain capacity for a more "objective" view of the official picture of the group.

2. Where an operational code deviates from a myth system, part of the support which will be necessary and demanded will be collaboration in suppressing information about the existence of the code. As great a challenge to the integrity of the code as the muckraking journalist is the "squealer" or "stool": someone who tells the truth to myth system advocates. A part of the sanctioning system of the operational code is directed against precisely these actors; the expectation of sanction serves to police loyalty.

3. And perhaps more, for each segment of the control process may have its own operational code. Lawyers entering a particular judge's court for the first time are struck by the extraordinarily different ways the rules may be applied there; to all intents and purposes there is a different code. A protest to the judge that what he is doing is a violation of the rules of procedure is not likely to be successful: "This is the way it's done in my court." Similarly, someone beginning to work in a government office will be told that "of course they're the rules, but this is the way we do things here."

A disengaged observer might call the norm system of the official picture the "myth system" of the group. Parts of it provide the appropriate code of conduct for most group members, and for some most of it is their normative guide. But there are enough discrepancies between this myth system and the way things are actually done by key official or effective actors to force the observer to apply another name for the unofficial but nonetheless effective guidelines for behavior in those discrepant sectors: the "operational code." Bear in mind that the terms "myth system" and "operational code" are functional creations of the observer and are not synonyms for the actual flow of official behavior or the official picture. The cynic who delights in nihilistic exercises would say there is no law. But from the perspective of an observer, as we shall see, parts of the myth system and the operational code comprise the law of the community. From the perspective of many actors within a given social process, however, only myth system is law; hence operational code activities are perceived as "illegal" and profoundly wrong.⁴

The locus classicus of myth systems and operational codes is probably the Code of Hammurabi, a massive casuistic

4. A brief and necessarily superficial note on ethnolinguistics. Different strata and lay and specialist groups use the same terms differently. Where the terms are normatively charged, the different uses indicate different codes and possibly different authoritative decision processes. Unless one believes that words have inherent meanings, one must accept that divergent uses are equally meaningful in their social contexts; one is not more correct than another.

In this regard, note that the popular use of the term "illegal" may be different from the specialist use of the term. Specialists will often pull rank and insist that a situation is "legal," hence appropriate for their expertise and insist on using their definitions. In myth system and operational code tensions, operators may answer popular charges of "illegality" by explaining patiently that what is being done is technically "legal." The social observer however should be careful not to be overawed, for the popular meaning or "misunderstandings" can be an important indicator of the social perspectives of a key group in the process. Which meaning and hence which value allocation becomes dominant depends, of course, on the disposition of authority and control in the context. But rejected meanings continue to be important social and political factors, indicating degree of group integration and of resistance to implementation as well as the type and likelihood of future conflicts.

code ostensibly designed to guide decision makers of the ancient Babylonian empire in a wide range of their official activities. There is substantial reason to believe that Hammurabi's Code was never applied; those charged with and those seeking decisions from officials operated on the basis of an entirely different code of norms.⁵ However, the Code of Hammurabi should not be dismissed as irrelevant, for insofar as it expressed key values of the elite and the society of the time, it may have influenced behavior and even the formulation and application of the operational code.

In other studies, my colleagues and I have urged scholars to reserve the word "law" for those processes of decision which are both authoritative and controlling.⁶ The fact that people operating within social systems do not speak with such precision is one of the reasons why we have discrepancies between myth system and operational code. The point here is that much formal law, which community members continue to view as law and which they are not willing to dismiss as "survival" in River's sense of the term,⁷ will not only not be effectively enforced, but its violation will be accepted by those charged with operating it as the way things are done. Problems can erupt when those not privy to the operational code become aware of its practices and begin to test them against the standards of the myth system. New strata may be gaining political power or a counter-elite may be in the process of accomplishing a take-over. One might say that these new groups simply do not "know the rules" (or that cynical politicians assume that their constituents don't know the rules). One would predict that in the course of time they too will learn an operational code discrepant in varying ways from their own myth system.

5. See generally I G. Driver & J. Miles. The Babylonian Laws (1952). For a more extreme position, see Finkelstein, "Ammisaduqa's Edict and the Babylonian 'Law Codes,'" J. Cuneiform Stud. 91 (1961).

6. McDougal, Lasswell & Reisman, "The World Constitutive Process of Authoritative Decision," 19 J. Legal Ed. 253, 403 (1967), reprinted in I C. Black & R. Falk, The Future of the International Legal Order 73 (1969). See also idem. "Theories about International Law: Prologue to a Configurative Jurisprudence," 8 Va. J. Int'l L. 180 (1966).

7. Rivers, "Survival in Sociology," 6 Soc. Rev. 295 (1913).

1. Public Systems of Private Law

Certainly there is nothing startling in the hypothesis of multiple legal systems, in the proposition that within larger, conglomerate groups all small groups have and, indeed, are characterized by their own normative codes. Insofar as they are organized as groups--kin, racial, religious, language and dialect, specialist and so on--they must have their own legal systems.⁸ What is distinctive about the operational code is that it is a "private public law" in systems in which public law is supposed to be public. It is a system in which those authorized to play control functions and those who deal directly with them come to accept procedures, which deviate from the myth system, as licit or lawful. George Washington Plunkitt, the doyen of machine politicians, once submitted a flagrantly unconstitutional bill in the New York Legislature. When an opponent stigmatized its unconstitutionality, Plunkitt is reputed to have replied: "What's a constitution between friends."

Elites in a power process are those who have more power and influence than others. Their assumption--a varying mixture of self-service and community service--that they bear special responsibilities generates the feeling that they may and sometimes must take certain liberties. Because their function, as they perceive it, is to maintain group integrity, they will "have the courage" to do what is necessary to achieve that objective, but to suppress it in the interests of the community and the very integrity of the myth system which has been violated by their operations. Surely the most venerable formulation of this view is in that handbook for the erstwhile elite, Plato's Republic. In Book V, Socrates remarks coolly:

. . . our rulers will find a considerable
dose of falsehood and deceit necessary for
the good of their subjects . . .⁹

The exclusiveness of this elite prerogative is made patent in Book III:

. . . if anyone at all is to have the
privilege of lying, the rulers of the
State should be the persons; and they,
in their dealings either with enemies
or with their own citizens, may be al-
lowed to lie for the public good. But
nobody else should meddle with anything
of the kind; and although the rulers

8. Pospisil, "Legal Levels and Multiplicity of Legal Systems in Human Societies," 11 J. Conflict Res. 2 (1967).

9. V Republic 459.

have this privilege, for a private man to lie to them in return is to be deemed a more heinous fault than for the patient or the pupil of a gymnasium not to speak the truth about his own bodily illnesses to the physician or to the trainer, or for a sailor not to tell the captain what is happening about the ship and the rest of the crew . . .¹⁰

Of course, the elite rationalization of its operational code presents extraordinary opportunities for abuse. In constitutional democracies it short-circuits the very controls on office-holders which are at the heart of popular constitutional government. Elites who are regularly involved in these sorts of defections develop new though often secret justifications derived from historicism, mythical communions with the volksgeist, charismatic authority or validating vibrations from the Silent Majority.¹¹ The convenient rule of interpretation for the Silent Majority is, of course, that silence is assent: hence Homer's dead host never fail to confirm the politician who invokes them. The style of justification may vary; the persistent generation of the operational code does not. I would hypothesize that it is a by-product of social complexity, generated by the increase of social divisions and specializations. All foci of loyalty have, by definition, at least the rudiments of a normative code. Those specialized to the manipulation of power have their "operational code." In the power context, it is a private system of public law.

II. Popular Responses

In systems in which government is generally unpopular in certain sectors or is viewed as a benefice which can be purchased and then used as a business, the privacy of the operational code is not at all startling. Nor, for that matter, would the privacy of the elite's operating procedures in a privately held corporation be deemed startling. It is only when the decision process holds itself as being public and popularly based that accounting for decisions by public procedures becomes a characteristic feature. With this development, tensions increase between the myth system of the group and the operational code of those charged with or directly concerned with decisions. Effectiveness of the operational

10. III Republic 389.

11. See generally K. Popper, The Open Society and its Enemies Chap. 8 (1944).

code as well as group cohesion will then depend on the comparative secrecy with which the code is practiced and, in particular, the insulation of those strata or individuals insufficiently "sophisticated" to appreciate its necessity or inevitability.

"Legality" may be taken to refer to conclusions by members of the community of the propriety of practices determined by some system of logical derivation of the myth system. Virtually all of the operational code discrepant from the myth system is thus "illegal." "Lawfulness" in contrast may be taken to refer to conclusions by members of the community of the propriety of practices in terms of their contribution (or lack thereof) to group integrity and continuity, of which the myth system is part.¹² Conclusions of lawfulness are teleological rather than logical and will vary according to time, context and group need. Many parts of an operational code may be deemed lawful at certain times, though the conclusion of lawfulness does not thereby integrate them into the myth system. In a society committed to meritocracy, an operational code of old boyism might be unlawful, while an operational norm of affirmative action to aid a disadvantaged minority might be deemed lawful. Both would be illegal. Whether an appropriate social goal is to secure conformity of myth system and operational code, i.e. to police or to abrogate that for which there is no intention to police is a question with its own complexities.

Precisely because of the discrepancies between myth system and operational code, maintenance of the myth system is a dynamic process requiring ongoing contributions from many. Some obscuring of the operational code is consciously designed. "Not surprisingly, the ideological approach to politics and government is encouraged by the politicians themselves, who would much rather portray themselves as motivated by principle than by power or personal profit."¹³ For some who may be gaining few benefits from the operational code, commitment to social order is held at levels of consciousness so deep they are unaware of them. The social philosopher who elaborates a theory, as John Rawls puts it, "designed only for the special case

12. I propose to use the word "licit" to characterize bribery which is prohibited by the formal code but which is accepted as "ok" by operators. Licit may be deemed to be synonymous with "lawful" and may also be distinguished from "legal," the latter being a conclusion based on logical derivation rather than teleological or consequential reasoning.

13. M. Tolchin & S. Tolchin, To the Victor: Political Patronage from the Clubhouse to the White House 9 (1971).

of a nearly just society" substitutes a rosy dream world for the violence and often savagery of political struggles. Intellectual efforts of this sort basically reinforce the myth system and obscure the operational code.¹⁴ Similarly, the economist, equipped with the inimitable proviso of ceteris paribus, neatly insulates himself from the operational code, and many other aspects of reality. The contribution of law professors, with the brief interlude of the legal realists, needs no comment.¹⁵

Every belief system has a coercive component but the apparatus for imposing "evils" or deprivations for deviations from orthodox belief may not be obvious. For example, the potential characterization of eccentricity may be enough to deter the more timid but nonetheless reflective members of a group from verbalizing their perceptions or deductions of the mythic quality of the formal normative code. More serious violators may be solemnly declared insane by the custodians of group sanity.¹⁶ Such characterizations neutralize the deviants and at the same time reinforce the accepted version of reality for the rest of the group. Public and prominent supporters of the myth system, in contrast, may often expect material rewards as well as the warm sunshine of approbation from those who would believe the myth system and find public confirmations reassuring.

Where there are discrepancies between myth system and operational code, elites, as I have remarked, have a strong incentive to conceal those activities, acceptable under the code, and to maintain the integrity of the myth system. For a member of the larger public, not privy to the rules and practices of the operational code, the result is a picture of "reality" which at certain disturbing moments is seen not to be reality but rather a vast production. In Book VII of the Republic, Socrates' extraordinary myth of the prisoners in the cave is evocative of prisoners of the myth system.

And now, I said, let me show in a figure how far our nature is enlightened or unenlightened:--Behold! human beings living in an underground den, which has a mouth open towards the light and reach-

14. J. Rawls, A Theory of Justice 363 (1971) and see the very perceptive comment on this point by Simson in his review of Rawls' book, "Another View of Rawls' Theory of Justice" 23 Emory L.J. 473 (1974).

15. See, for example, T. Arnold, The Folklore of Capitalism (1937).

16. T. Szasz, Ideology and Insanity 218-245 (1970).

ing all along the den; here they have been from their childhood, and have their legs and necks chained so that they cannot move, and can only see before them, being prevented by the chains from turning round their heads. Above and behind them a fire is blazing at a distance, and between the fire and the prisoners there is a raised way; and you will see, if you look, a low wall built along the way, like the screen which marionette players have in front of them, over which they show the puppets.

I see.

And do you see, I said, men passing along the wall carrying all sorts of vessels, and statues and figures of animals made of wood and stone and various materials, which appear over the wall? Some of them are talking, others silent.

You have shown me a strange image, and they are strange prisoners.

Like ourselves, I replied.¹⁷

Few things in life are authentically unilateral and deception is often a shared process. While elites have an obvious interest in maintaining the integrity of the myth system, key personalities and entire strata in the public may abet the deception, avoiding the truth like someone pulling blankets over his head to avoid the cold reality of dawn.

But support for the myth system is not exclusively benign, voluntary, verbal or symbolic. Coercive efforts, as we have seen, may be regularly mounted by those comprising the official apparatus to police belief in and behavior in accord with the myth system by sanctioning, according to some rationale, defections from it. Efforts directed to policing beliefs may be even more urgent when there are widely perceived discrepancies between myth and operation.¹⁸ Policing is not exclusively hierarchical, a specialist function, or elite-initiated. Many group

17. Republic, Book VIII, at 773-774.

18. See generally S. Ranulf, Moral Indignation and Middle Class Psychology (1938, 1964). See also A. Hochman, Marijuana and Social Evolution 169 ff. (1972).

members who believe the myth may contribute to policing it, gaining in addition a certain gratification in the simple skill of "knowing the rules."¹⁹ Thus, in addition to the more patently coercive elements of the elite, teachers, clergymen, parents, even a stranger on the street may patiently explain to a youngster why a certain act should not be done.²⁰

Despite such efforts, there may be a point where discrepancy between myth and operational code becomes so great that either part of the content of the myth system changes, belief in it wanes or crusades for reassertion of the myth burst forth. In group life as in personal life, erosion of the myth system is most serious and underlines the vital though intangible function the myth system performs. Belief in the myth system is a critical part of group organization, the basis for mobilizing many necessary collective activities. Because it has been transmitted, through acculturation, to the core organization of the individual personality, a waning of belief in it, without a replacement, may lead to anomie and personal disintegrations. It may also lead to struggles between groups--classes, castes, religions, language and dialect groups and so on--for one aspect of war, as McLuhan and Fiore observe, is the mobilization of the self to protect images of reality challenged by others.

. . . all social changes are the effect of new technologies (self-amputations of our own being) on the order of our sensory lives. It is the shift in this order, altering the images that we make of ourselves and our world, that guarantees that every major technical innovation will so disturb our inner lives that wars neces-

19. J. Piaget, The Moral Judgment of the Child (Babain trans. N.Y. 1965).

20. As virtually any post-mortem of a failed effort at social change reveals, informal modes of acculturation are extremely important. In an earlier note, I had occasion to observe that "Cultures as well as civilizations must find ways of instilling components of the social code which are not appropriate for direct discourse. Often a way must be found to provide dramatic illustrations of how people balance the 'do's' and 'don't's' of group life in those dynamic situations which seem so much more complicated than the normative code. Stories [folktales] can be a particularly useful social carrier . . . "Folktales and Civic Acculturation: Reflections on the Myths of Dinkaland" in F. Deng, Dinka Folktales: African Stories of the Sudan (1974).

sarily result as misbegotten efforts to recover the old images.²¹

Whether the common technique of "diabolization" of an opponent is a product of intergroup tensions or a cause of them, it underlines a struggle of contending myth systems in which opponents protect, inter alia, their own idols.

Anomie here does not mean that an individual no longer knows how to behave in specific settings, but that he has lost more general guidelines for orientation and valuation of his environment. It is this coordinate personal mooring function of the myth system which drives the very individuals who may behave in many settings according to an operational code discrepant from the myth system nonetheless to defend with extraordinary passion the myth system itself.

Perception of a routinized code discrepant from the myth system is not restricted to the elite. Groups, particularly large conglomerations, are composed of many smaller groups. The culture of some of these smaller groups may have unique perspectives on the more general myth system and operational code, for to an extent members of these sub-groups may find it easier to apprehend the myths of the larger group as "facts." Perhaps because of this, some members have become specialists in the performance of certain operations for the larger group. But operators are not necessarily outsiders. Phrases such as "you've got to be practical," "take a more realistic view," "in the real world" or "the nitty gritty" are usually signals of operators who identify with the myth but perform group functions according to a discrepant operational code. Obvious domestic examples in official behavior might include the activities of intelligence agencies and certain police functions e.g. dealing with informers by paying money or reducing sentences, the practice of patronage and so on. More arresting examples might include running undesirables out of town or police execution of miscreants in vigilante actions. To characterize activities such as these as "unlawful" would not be illogical yet somehow it would be imprecise and incongruous, for the activities are carried out by the minions of the law and may be routinely supported by judges charged with the supervision of criminal justice processes.²² They do in-

21. M. McLuhan & Q. Fiore, War and Peace in the Global Village 4 (1968).

22. The Justice Department's investigation of the Central Intelligence Agency's 20-year old program of opening mail in transit between the United States and Communist countries supplies us with a telling example. Despite the fact that under Federal law, tampering with first-class mail in this country is a criminal offense, the Justice Department lawyers have

deed deviate from the myth system, and those who perform them defer to this fact by performing them in a covert or "discreet" fashion.²³ Of significance here is the fact that those who perform them view them as lawful under the operational code.

There are, to be sure, special dangers in following these informal and uncoded practices. It is always possible for reformers, some political opponents, or counter-elites to prosecute belatedly these defections from the myth system; the defense of operational code obviously will not then avail.²⁴ When, as we shall see, there are myth system purges of operational code practices, the practitioners will often stand together and try to thwart the effort. Even if sanctions are imposed and new prescriptions are made to prevent the practices, it is likely that the practices will nonetheless continue if those who control them conclude that they are necessary for group life.²⁵

recommended against criminal prosecution of CIA officials involved in the mail opening operations. See Crewdson, "Inquiry Is Said to Oppose Prosecuting CIA Aides," N.Y. Times, July 27, 1976, at 1; idem. July 30, 1976, at A20 (editorial).

23. While "secrecy" may be used to refer to serious efforts to conceal from all others practices deemed to be wrong and even sanctionable, "discretion" may be used to refer to the concealing of practices which though discrepant from the myth system are known to be widely done and most infrequently sanctionable. In Connecticut until recently, "law-abiding citizens" broke the law by buying and selling contraceptives in pharmacies; let us refer to this practice as discreet rather than secret. The use of discretion indicates a tension between myth system and operational code, but not necessarily unlawfulness.

24. There are circumstances in which unanticipated social or legal-institutional changes suddenly render effective or practicable norms which theretofore had been strictly mythic. For example, much of the "code" of consumer protection law was ineffective until changes in class actions and the development of public service type advocacies began to allow real effectuation. Defendants, relying in the past on the unlikelihood of application, could now hardly defend with the exceptio "This law was never made to be applied." Perhaps it is significant that effective decision makers responded in part by attenuating the opportunities for class actions and reducing official funding for public interest advocacy.

25. Attempts to regulate or control the transnational practices of U.S. based corporations will be confronted by this condition. Many commercial operators believe that conformity with foreign standards and practices, which may include bribery, is absolutely necessary for commercial success.

Operators, if pressed, will defend the operational code as self-evidently necessary for organizational efficiency, even survival. Enough of those concerned with appraising or policing lawfulness will accept such justifications to make behavior according to the operational code feasible. A legislature may pass a very open-textured statute to give increased discretion to those charged with applying it, after being told in executive session that some things just "have to be done" and it would be better for all if less were said about it. Legislators may avoid investigating certain sectors or during investigations carefully refrain from asking certain key questions. Prosecutors, using their broad discretion, will decide not to press forward with investigations and prosecutions against certain types of official behavior: mail openings, gift exchanges and so on. Judges will accept suggestions from secret agencies that the national interest would be served best if a certain case were quashed. Journalists will not report certain things.²⁶

What is characteristic of the operational code is that it is shared by key members of the control apparatus, that its deviations from the myth system are selectively tolerated and depend on the contingency, the identities of agents and objects, the purposes of the act and the probable effects on the larger organization. There is no attempt to revise the myth. On the contrary, efforts are made to maintain the integrity of the myth and to suppress the existence of the operational code. The justification of the discrepancies expressed in the operational code is that organizational efficiency and survival re-

Consider the following recent study.

An executive of a chemical firm sums up this point: "I believe that American companies must comply with the commercial modes of the countries in which they do business or forget trying to do business in certain countries. The competitive consequences of not complying would, in many cases, make it impossible for the American company to complete certain transactions. I have found that business people from most of the major exporting countries do not hesitate to meet the conditions required to do business."

The Conference Board, "Unusual Foreign Payments: A Survey of the Policies and Practices of U.S. Companies," by James R. Basche, Jr., Report No. 632, 1976, at 28.

26. See generally, J. Reston, The Artillery of the Press: Its Influence on American Foreign Policy 20-22, 30-31 (1966).

quire it. Hence in a type of casuistic reasoning, the operational code is not a violation of an oath to serve an organization, but rather the ultimate affirmation of that loyalty. But the violations of group myth also create intense complicities and loyalties among the operators, for they are a type of blutkit, generating an ancillary code of silence, like the Mafia's Omerta.²⁷ Hence one outcome of the discrepancy between myth system and operational code is the sharpening disidentification of elite and rank-and-file and the increasing identification of elites.

III. The Elite Response

La Rochefoucauld's famous apothegm that "hypocrisy is the homage vice pays to virtue" should not obscure the point that homage is owed, and that something should be paid. How much is to be paid is a question of key political importance. Elites are operators and are certainly acquainted with discrepancies from the myth system; more important, they are well aware of the utility (to themselves, and perhaps in rationalized form, to "the system") of the particular practices of the operational code. When popular disquiet grows, they will respond in ways which reinforce belief in the myth system, but often with a planned inefficiency. Some responses are uncomfortably obvious. For example, after a recent revelation of campaign fund abuses, Congress heroically cleaned house by, inter alia, shortening the statute of limitations on the offenses involved from five to three years.²⁸ Other responses are more beguiling in their complexity. The so-called lex imperfecta, "imperfect law" or "law without teeth" is often a conscious operator or elite design for dealing with aggravated myth system and operational code discrepancies. Where prescribed norms are clear but an otherwise effective administrative process has not established adequate enforcement mechanisms, has staffed them with exquisite incompetents, has permitted those enforcement mechanisms to atrophy or, as Key's examples show, has insulated certain activities from the reach of an enforcement mechanism,²⁹ we are probably encountering a discrepancy between myth system and operational code. The late Alex Rose remarked: "To put people in law enforcement

27. On Omerta see F. Ianni & E. Ianni, A Family Business, Kinship and Social Control in Organized Crime 34-35 (1972).

28. 2 USC §455.

29. V. Key, The Techniques of Political Graft in the United States 81-86, 361-369 (unpublished doctoral dissertation, University of Chicago, 1934).

for the purpose of non-enforcement is a very big attraction for politicians."³⁰

In some instances, the imperfect law may have been designed for cynical motives; for example, to permit operators to do what rank-and-file are still prohibited from doing or to discharge, via the legislative exercise, popular dissatisfactions with certain public behavior.³¹ In other cases, a subtly crafted imperfect law may be a way of restoring confidence in certain discredited institutions or practices. Consider, for example, the Securities and Exchange Commission, established after the great market crash of 1929. A market in which those with substantial liquid capital can lend to those who wish to use it in productive enterprises is indispensable to a capitalist system. But the market cannot work without reassurances to investors that the economic system is productive and that producers are being candid and accurate in revealing how they will use the money and what returns can be reasonably expected. Both of these expectations were dashed in 1929, but apparently restored after the legislation and subsequent administrative activity in 1934. There are reasons to doubt that the SEC, as time-structured, staffed and budgeted, can really police the market,³² but it performs its function if it creates the expectation that it can, in the minds of potential investors. To carry it off effectively, it is vital that the

30. Tolchin & Tolchin, supra note 13 at 12.

31. A recent example may be the 1976 draft of a code of guidelines for multinational corporations prepared by the OECD. See Organization For Economic Co-operation and Development. "International Investment and Multinational Enterprises," Declaration by the Governments of OECD Member Countries, Decisions of the OECD Council on Guidelines for Multinational Enterprises, National Treatment, International Investment Incentives and Disincentive Consultation Procedures Declarations of June 21, 1976. Bus. Week (June 14, 1976, at 43) asserted the code "has rubber teeth when it comes to enforcement." A similar journalistic characterization was given to the Ford Administration (S.R. 3741) and the Proxmire drafts (S.R. 3664) dealing with bribery abroad by U.S. corporations. See Time, June 28, 1976, at 58.

32. See R. Chatov, Corporate Financial Reporting (1975); Stizler, "Public Regulation of the Securities Market," 37 J. Bus. 117 (1964); Friend & Herman, "The S.E.C. Through a Glass Darkly," id. at 382; and Benston, "The Effectiveness and Effects of the SEC's Accounting Disclosure Requirements," in H. Manne (ed.), Economic Policy and the Regulation of Corporate Securities 23 (1969).

bulk of the policers in the SEC profoundly believe in their cause, constantly and honestly gripe about the inadequacy of their budget and staff, criticize superiors who are too "political" (i.e. see the larger picture) and cause periodic shake-ups.

In some cases, the Imperfection is genetic, built into the very structure of the law in question. Sometimes the imperfection is blatant. Consider a 1975 amendment to the Arms Control and Disarmament Act.³³ In order to assist the Director of ACDA in the performance of his duties, any government agency preparing legislative or budgetary proposals with regard to the general area of armaments and military facilities shall, on a continuing basis, provide the Director with full and timely access to detailed information, in accordance with procedures established . . . with respect to the nature, scope, and purpose of such proposal.³⁴

The information gained may be shared with appropriate Congressional committees to aid them in the performance of their function.³⁵ The final subsection of the amendment adds, almost as an afterthought,

No court shall have any jurisdiction under any law to compel the performance of any requirement of this section or to review the adequacy of the performance of any such requirement on the part of any Government agency (including the Agency and the Director).³⁶

When Solon gives with one hand and takes with the other, he uses lex imperfecta.

A cognate species of lex imperfecta, performing a function similar to the imperfect law, is a legislative exercise

33. Section 146, P.L. 94-141: 25 U.S.C. 2576.

34. Subsection (a).

35. Subsection (b) (3).

36. Subsection (c). This provision cannot be taken as merely shifting enforcement from the courts to the Executive Branch. The genesis of the amendment was the inability of ACDA, a comparatively small agency, to secure data from that Goliath of Government, the Department of Defense. The amendment could be meaningful only if its implementation were to be shifted from the Byzantine politics of the Executive Branch where the fact that ACDA had already been bested gave rise to demands for new law, to a more equalizing arena such as the courts. But see Berdes, Congress' New Leverage, 9 Center Magazine, No. 4, at 76 (1976).

which produces a statutory instrument apparently operable, but one which neither prescribers, those charged with its administration, nor the putative target audience ever intend to be applied. We might call this a lex simulata. The prototype is the Code of Hammurabi. One way of identifying such laws is by the absence of meaningful travaux preparatoires or legislative history. If the context is one in which legislative bills adverse to the interests of the target group are ordinarily contested, but the particular bill is unchallenged, the difficulties or costs of applying it to hard or to marginal cases are not raised and so on, it is not unreasonable to assume that no one ever intended it to be applied.

Where such laws are "legislated," they are akin, in function, to the flying buttresses of a gothic cathedral; they seem to support parts of the myth system, from which the operational code deviates unambiguously and routinely. That apparent support can be most reassuring to diminutive mortals looking up at those massive walls. The function of the legislative exercise is not to affect the pertinent behavior of the manifest target group, but rather to reaffirm on the ideological level that component of the myth, to reassure peripheral constituent groups of the continuing vigor of the myth and perhaps even to prohibit them from similar practices. As elsewhere, the mere act of legislation functions as catharsis and assures the rank and file that the government is doing what it should, viz. make laws. Legislation here becomes a vehicle for sustaining or reinforcing basic civic tenets, but not for influencing pertinent behavior.

An amendment in 1971 to the Internal Revenue Code³⁸ would appear to be a salient example. Under the Code, deductions are not allowed for a domestic illegal bribe "which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business," but, the Code continues, "only if such State law is generally enforced." The enforcement proviso permits a tax authority or federal court to temper application of the law prohibiting deductions for bribe payments by a consideration of the operational code actually prevailing in that commercial sector. But regarding bribery of foreign officials no such proviso exists. Sec. 162 (c)(1) provides:

No deduction shall be allowed under subsection (a) for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the pay-

38. IRC §162 (c)(1).

ment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment would be unlawful under the laws of the United States if such laws were applicable to such payment and to such official or employee. The burden of proof in respect of the issue, for the purposes of this paragraph, as to whether a payment constitutes an illegal bribe or kickback (or would be unlawful under the laws of the United States) shall be upon the Secretary or his delegate to the same extent as he bears the burden of proof under section 7454 (concerning the burden of proof when the issue relates to fraud).

Prohibition of deduction of bribe payments to foreign officials applies (1) even if the foreign law making it illegal is not generally enforced and (2) even if it is lawful according to the foreign law.³⁹ This is a standard so pure that one doubts that it was any more than pious aspiration, without intention to control. From the period of its enactment to the current antibribery crusade, I have been unable to find cases of prosecution.

Another example of *lex simulata* is offered in the amendments to the Export Control Act of 1965.⁴⁰ Amidst agitation for greater U.S. resistance to the Arab boycott, a bill was submitted prohibiting compliance by U.S. business.⁴¹ When opposition was mounted, the prohibition was diluted to require only a report to the Department of Commerce that a boycott request had been received.⁴² The report would go to the Secretary of Commerce "for such action as he may deem appropriate."⁴³ The form which was actually prepared by the Depart-

39. In many ways, the entire prohibition of deductions for illegal bribes may be viewed as a simulation. My colleague Boris Bittker believes that the sanction is ordinarily so minimal as to have power neither to deter nor to act as an incentive for self-correction. Indeed, where legislation is supported by ludicrously mild sanctions, the total effect may be to communicate that there is no real official intention to change behavior.

40. Export Control Act §2 (4)(B).

41. See Hearings to Amend Section 2 of the Export Control Act of 1949, 89th Cong. 1st Sess. (1965) before Subcomm. of the Sen. Comm. on Banking and Currency.

42. 15 C.F.R. §369.

43. Export Control Act, §3 (c).

ment of Commerce indicated that respondents need not answer whether they actually complied with the Arab boycott request;⁴⁴ hence few respondents answered this key question.⁴⁵ One student of the legislation remarks, "The official opposition to the Arab boycott was essentially ritualistic, and the supposed deterrent effect of the reporting requirement was negated by the decisions not to require an answer to the critical question and to keep the completed forms confidential."⁴⁶ What then was the function of the legislative exercise? To assuage those who felt that U.S. law was being violated by the Arabs, to affirm opposition to boycotts of other governments and to create a bureaucratic process which seemed to implement the policy but which allowed business to continue as usual: lex simulata.

Lex imperfecta and lex simulata, in their very ineffectiveness, express and reinforce the essential distinction between myth system and operational code. There is, to be sure, a measure of cynicism. In many cases, however, the discrepancy between myth and code, captured by lex imperfecta and simulata, is cultivated and created in good faith, as a way of retaining fidelity to fundamental social values, and not, as would first appear, out of sheer hypocritical homage to virtue. Here, as elsewhere, the inquirer must accept the complexity of events, the multiplicity of inconsistent normative codes within a single functional legal system, the demands for behavioral accommodation and the continuity of contradictions. The fact that individuals, including realistic operators, in some or even all cases breach a certain norm does not mean that they wish to terminate it. On the personal level, the self-initiation of ritual penance for breach of a norm by an individual even while he knows that, in comparable circumstances in the future, he will breach the norm again, provides us with a telling example. While we cannot here enter into examination of the guilt dynamics which give rise to such rituals, it is clear that one of their major functions is to restore, on both social and personal levels, commitment to the norms.⁴⁷

This is an important dimension of the discussion and, at

⁴⁴. See "U.S. Exporter's Report of Request Received for Information Certification or other Action Indicating A Restrictive Trade Practice or Boycott Against a Foreign Country, Form 1a-1014, reprinted in 3 Lowenfeld, International Economic Law: Trade Controls for Political Ends 470 (1977).

⁴⁵. Lowenfeld, at 116.

⁴⁶. Id., at 126.

⁴⁷. Walzer, "Political Action: The Problem of Dirty Hands," 2 Philosophy and Public Affairs 160 (1973).

the risk of repetition, I would emphasize that my thesis is not one of nihilism or the hypocrisy which so delights the cynic. On the contrary, The concept of operational code does not mean that everything is lawful, or that, in Ivan Karamazov's anguished words, "everything is permitted." There will be much that remains unlawful and effectively sanctioned by the appropriate community processes. Operators know that some discrepancies from the myth system are licit and will be tolerated; others will not. In other words, determining the "law" or the socially proper behavior in a particular setting necessitates a much wider social inquiry than the simple consultation of the formal law; it may be myth system.

From the perspective of general members of the community who are not privy to the operational code of the specialist group, some operational code activities may well seem unlawful. But often, there will be a certain toleration or a desire for ignorance. A number of writers have studied "dirty work" in society and have noted the coordinate generation of ignorance when it must be performed.⁴⁸

There is, then, a symbiotic relation between myth system and operational code, the latter providing a degree of suppleness and practicality which the myth system could not achieve without changing much of its content.⁴⁹ Hence in extended periods of social stability, the discrepancy between myth and practice will tend to be stable and even institutionalized. Unless one puts a special premium on stability per se, this does not mean that every aspect of the operational code contributes to group weal, that some invisible hand directs a complex but nonetheless euphonious social symphony. From the perspective of community goals expressed in the myth system or deduced by a disengaged observer, much of the operational code may be profoundly dysfunctional during these and other periods. Indeed, parts of the operational code may be designed to accord special benefits to elite members while other parts may take on a blutkit character, making elite membership permanent and irrevocable by participation in a taboo act.⁵⁰ Many other

48. See generally E. Hughes, Good People and Dirty Work, Social Problems 10 (1962); Coser, "The Visibility of Evil," Journal of Social Issues 25 (1969). See also in this regard the intriguing remarks of Walter Mondale in "Nobody Asked: Is It Moral," Time, May 10, 1976, at 32, 34, col. 3.

49. Some reasons for the differential rates of change are examined with regard to territorial title in Chen & Reisman, "Who Owns Taiwan: A Search for International Title," 91 Yale L.J. 599, 601-03 (1972).

50. See Alexander, "War Crimes and their Motivations," 39 J. Amer. Inst. of Crim. L.J. 298 (1948).

practices which deviate from the myth system serve to protect the entrenched position of subgroups e.g. a system of rewards based on old-boyism or caste or ethnic ties instead of meritocracy, protective practices in professional groups and so on.

On the other hand, during periods of rapid social change, discrepancies between myth and practice will be more unstable. Accommodations and rationalizations ordinarily provided by culture and general past practice will be less available, obliging each individual to make choices for himself. The same sense of comparative rulelessness and anomie often experienced in periods of relative stability by individuals or groups who are suddenly changing social position now becomes a more general experience, imposed on many who never sought change and who were willing to forego its potential rewards in return for a routinized "peaceful" environment in which the ambit of choice was narrow. For very independent persons, these can be times of great opportunity; but for those who seek guidance and validation from their environment, these are times of heightened anxiety and often desperate searching for new leaders and meaningful rectitude systems.

