

Rules aren't always 'moral' or 'legal'

EDITOR'S NOTE: This is the eighth of 16 articles in the series "Moral Choices in Contemporary Society" and is the text for an Oakland University Courses by Newspaper program. The program was developed by University Extension of the University of California, San Diego, and funded by the National Endowment for the Humanities. Copyright 1977 by the Regents of the University of California.

By LON L. FULLER

Law and morality, to varying degrees, regulate human interaction in society, sometimes reinforcing one another, at other times imposing contradictory obligations.

But there are also many laws that have little to do with the larger issues of moral conduct—with securing justice, equality or such other forms of "good" as may be deemed desirable. These laws are, rather, pragmatic regulations for facilitating or making possible orderly relations between people.

Still other decisions affecting the conduct of society are not guided even by these pragmatic regulations. Such decisions cannot be reached through the application of impersonal, objective rules, indeed, the basis for them cannot be found in either law or morality, and yet they are binding on the individuals concerned.

To understand these issues, I suggest we examine some of the actual operations of a legal order and the ways in which legal rules and processes are employed to shape and control human behavior.

I SHOULD LIKE to begin with a body of law regulating vehicular traffic and known as "the rule of the road."

Over most of the world, the rule is that you pass the oncoming vehicle on the right and overtake on the left the vehicle moving ahead of you. A minority of countries, including Great Britain, have an opposite rule—you pass on the left and overtake on the right.

Though the rule is now practically everywhere embodied in written statutes, it took its origin in unwritten customary practice, which helps to explain how there came to be two rules, each serving the same function within its own territory.

"The rule of the road" would seem to present little in the way of tensions between law and morality. The man with consideration for others and an ardent desire not to do harm to them will, as a driver, follow the rule of the road.

If he is morally indifferent to the fate of others, he will nevertheless be likely to observe the rule of the road, not only to avoid being brought into court but to save his own skin.

THERE ARE PROBLEMS, however.

Even in ordinary traffic, rules of the road depend upon a sense of responsibility toward the other fellow and some perception of the problems he faces.

The law of traffic is thus not merely punitive; it is essentially facilitative. It lets the driver know, with some assurance, what he can expect, not only from the traffic officer but from other drivers as well.

This matter of knowing what to expect is basic in any functioning legal order. In his book, "The Law of Primitive Man," Adamson Hoebel writes that a visitor to the Musk Ox Eskimos in Canada learned that all 15 adult males in the community in the early 1920s had been either a principal or an accessory in a murder. Hoebel reports:

"For each of them, the motive was

Lon L. Fuller is Carter professor of general jurisprudence, emeritus, at Harvard University, where he has taught since 1939. Previously he taught at Oregon, Illinois and Duke. His published works include "The Law in Quest of Itself," "The Morality of Law," a casebook in the law of contracts (editor) and numerous articles on jurisprudence.



invariably some quarrel about a woman." In part, the Eskimo difficulties are enhanced by the lack of marriage and divorce rituals which might demarcate the beginning and the end of a marital relationship. Marriage is entered into merely by bedding down with the intention of living together; divorce is affected simply by not living together any more.

There may be a certain irony in comparing a marriage ceremony with a highway stop sign, but the analogy is not lacking a certain validity.

LET US CONSIDER briefly the law of divorce.

In former times, that law was to a large extent "objective" and "impersonal." To obtain a divorce, a party to the marriage had to prove some specified act or omission on the part of his or her partner. Among the acts that would justify the granting of a divorce were adultery, desertion, habitual drunkenness and other similar forms of misbehavior.

This meant the law of divorce was, like the rule of the road, impersonal and "act-oriented."

Recently, there has been a development in many jurisdictions that is called "the theory of the breakdown of the marriage."

Instead of having to prove some specifically defined misconduct by the party against whom the divorce suit is brought, what has to be established is that the parties have lost the capacity for a functioning marital relationship.

Perhaps the best test of a loss of this capacity is to have a skilled mediator attempt a reconciliation of the parties. But the judge who has the ultimate power to decide the case may or may not have any special aptitude for guiding a mediative procedure toward an ultimate reconciliation.

If, after discussing with the husband and wife their conceptions of the problems that have caused their marriage to fail, the judge grants a divorce, this does not mean that the standards which have guided him to such a conclusion can properly be categorized as either "moral" or "legal."

Neither party may have acted immorally or illegally, but their divergent dispositions may have made a successful marriage impossible.

IN OUR COMPLEX and densely populated societies, there are many decisions that cut deeply into men's lives, but that cannot be shaped or justified by standards derived directly from morality or law.

An example would be zoning regulations. These regulations may limit the size of a house, determine how closely the house may be located to the street it faces, stipulate how high a radio antenna on the roof may be, etc.

Regulations of this sort can often be realized on a showing of a special need to make an exception in the case at hand. The request for a relaxation of a particular restriction will be brought before an administrative agency, which in deciding whether to grant the relaxation will proceed in a manner much like that of a court of law.

But what may be lacking is the guidance of formal rules stating, with some precision under what conditions the normal restraints may be lifted. On what basis, then, is an exception to the regulatory law to be granted?

The householder may have an expensive radio and may ask to be given the privilege of extending his antenna to a height above what is normally allowed.

He may rest his request on any number of claims tending to establish that his situation is a special one. He is working on an invention affecting radio transmission that requires a higher antenna; he is a physician who wants to give advice to patients who have radio sets but no telephones, since they live in a somewhat distant mountain range.

LET ME CONCLUDE with another hypothetical case that may not be readily decided either by rules of law or familiar principles of morality.

Two men, strangers to one another, are charged with committing identical crimes. Both admit their guilt.

It happens the only available prison is so packed with convicts that there is only a single cell with room for one more. The judge cannot send both men to prison, which one shall he sentence?

It would hardly be befitting for the judge to suggest that the convicted men throw dice to see who goes in and who stays out.

Suppose that one of the convicted parties has, over the years, been convicted of 10 different crimes and served a term of imprisonment for each. The result is that jail has become for him almost like a home, and he has no special dread of serving another term.

The other man has never before been convicted of a crime, and serving a term in jail might or might not put an end to his inchoate criminal tendencies.

The judge cannot send both men to jail. Which one shall he sentence?

NEXT WEEK: The effectiveness of punishment as a deterrent to crime.

See Our Complete Selection of **HALLMARK CARDS**

Father's Day is June 19

McDevitt

7 Mile Farmington Rd. 478-9707

GARAGE DOOR OPERATORS

Genie 450D

CRYPTAR II DIGITAL CONTROLS

\$175.00 installed

1 Year Warranty—Any Suburb

ALLIANCE AUTOMATIC DOOR CO.

358-3833

SOUTHFIELD

ENJOY SUMMERTIME WITH Michigan AWNINGS

TO REDUCE AIR-CONDITIONING COSTS.

SAVE 6¢ to 7¢ ON EVERY BTU UNIT

CALL TODAY **894-4400**

NEW PERMANIZED VINYL & SLICONE FABRICS and PATTERNS ARE BETTER and PRICED RIGHT

MICHIGAN AWNING CO. • 4892 GRAND RIVER

Summer Clearance

Sale

10⁹⁵

OR LESS

Village Shoe Inn

in the **Village Outlet**

FARMINGTON
33224 Grand River
Downtown Farmington
474-7105

ROCHESTER
401 Walnut
682-2695

Imagine a genuine **Culligan** automatic water softener at a price like this!

NOW ONLY \$389 DELIVERED

Our NEW **NORTHBROOK®** Model is a product you can trust, backed by a dealer you can trust.

Culligan softeners have developed into the new water conditioner to help lower the rising cost of inflation two ways: 1—Filtered with water to more economical to use in your home—2 The Northbrook Model gives you Culligan quality and reliability at a lower original investment.

MONTHLY RENTAL RATES LOW AS 17¢ PER MONTH

Culligan

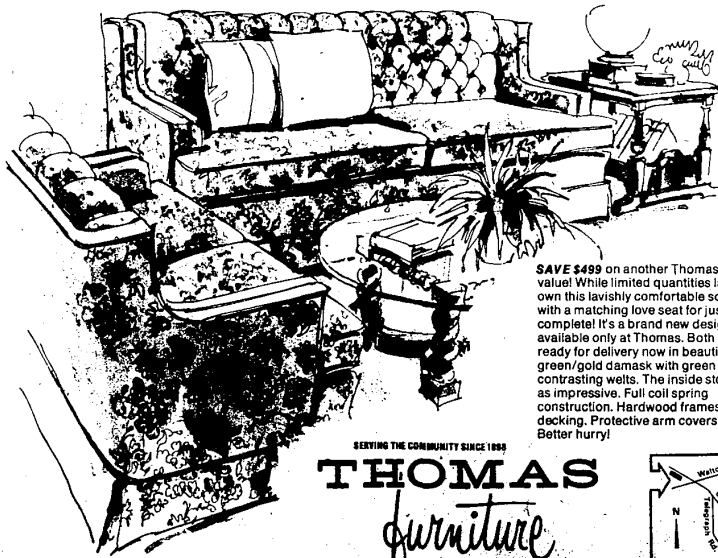
WE TREAT WATER SERIOUSLY.

925 ORCHARD LAKE ROAD

2 blocks E of Telegraph Rd. Pontiac
Pontiac 334-9944 • Detroit 964-2246
Office hours 9 to 5 p.m. • Sat. 8 to 1 p.m.
Serving Wayne, Oakland and Macomb Counties

IT'S THOMAS' BIG JUNE... **Brandmoe**

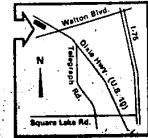
ONLY AT THOMAS - LUXURY SOFA PLUS LOVE SEAT AT ONE LOW, LOW PRICE... **\$599**



THOMAS furniture

674-0321 4848 BLUE HWY., DRAYTON PLAINS

SAVE \$499 on another Thomas exclusive value! While limited quantities last, you can own this lavishly comfortable sofa teamed with a matching love seat for just \$599 complete! It's a brand new design available only at Thomas. Both pieces are ready for delivery now in beautiful green/gold damask with green velvet contrasting welts. The inside story is just as impressive. Full coil spring construction. Hardwood frames. Self-decking. Protective arm covers included. Better hurry!



Serving the Area For 22 Years

ABLE HOME BUILDERS

Licensed Builders Completely Insured

ADDITIONS • PORCHES
DORMERS • GARAGES
ALUMINUM SIDING
ALUMINUM TRIM
ATTICS • BATHROOMS
KITCHENS • REMODELING

FREE ESTIMATES • 5 YEARS TO PAY NO MONEY DOWN

Quality Workmanship Only

WE SPECIALIZE IN RESIDENTIAL WORK

Call **LO 5-9070**

8446 WHITEFIELD DEARBORN