

The Globe and Mail (Canada)
May 11, 1993 Tuesday

FIFTH COLUMN
LAW AND SOCIETY

Bryan Schwartz peers into the gap between what the rules tell us to do and how we really act

MANY current controversies turn on a conflict between the official rules and the practical code.

In almost any society, from a small office to a big country, you find both kinds of law. The official rules are made by official lawmakers, like politicians or company executives. They are formalized in official texts, like legislation or office manuals. They are given formal written interpretations by official interpreters, like judges and personnel officers.

The practical code is established by the actual behaviour of public officials and members of society. Violators are ridiculed or shunned. Adherents are praised and emulated. The rules might say you work in the office until 4:30 every day. But the code might say that on Fridays in summer you leave an hour early, or face censure as a workaholic or toady.

Each kind of law has its advantages and drawbacks. If official rules are clear and respected, anyone can read them and rely on them. No one need fear official whim. But rules can misfire. They may be out of step with social realities from the start, or become outdated as society changes.

A practical code can have the advantage of flexibility; we can live and learn. It can be democratic; many people can help to shape it. Over the decades, baseball umpires gradually lowered the "strike zone," perhaps to protect batters from being struck in the head.

On the other hand, a practical code may not adequately protect vulnerable people from bullies. Naive or inexperienced people may not fully understand the code; tyrants may manipulate or ignore it. In a Monty Python skit, a man recalls that a notorious mobster nailed his head to the floor. "He had to; I violated the unwritten law." What law? "I don't know. It was unwritten."

When the rules and the code differ, people can get hurt. For instance:

Nannygate. Zoe Baird and her husband followed a code long observed by public authorities: You hired an illegal immigrant as a domestic, then openly applied for a work permit for the person. No one in Connecticut was ever prosecuted in these circumstances - until Ms. Baird was nominated as attorney-general and Nannygate erupted. Suddenly, Ms. Baird was officially fined and her nomination sank.

Charles and Diana. Diana expected marriage to conform to the official rules. Charles apparently understood it in terms of the time-honoured practical code for royals: marriage can be about politics and procreation, rather than an exclusive emotional and sexual commitment. Somebody should have explained things to Diana before she signed up.

The NHL playoffs. The code allows more grabbing, hooking and shoving than the official rules. How much more depends on the officials and the game or even the period. Teams rightly complain that their prospects can be spoiled by arbitrary and unexpected shifts in the refereeing.

Ban on pot smoking. Illegal under the rules, usually tolerated under the code. You might argue that this is a good compromise. Society sends a chastening symbolic message, and no one gets hurt. I would disagree. A few people actually are prosecuted and end up with criminal records. Others learn disrespect for the Rules in general.

Doctor-assisted suicide. You might again argue for a rules "code split: " Let the Criminal Code continue to officially ban the practice. That way, we send a strong message about the sanctity of life. If we relaxed the official rules, doctors and patients might give up on life too easily. But the practical code should be more permissive. In some rare cases, where death is imminent and suffering great, let the doctor help the patient end his or her life. The doctor, patient and family should keep the matter quiet. If the authorities happen to find out, they should quietly refrain from prosecuting." Again, I would disagree. Some patients or doctors would remain unaware of the unstated code, or be afraid to follow it. Worse still, encouraging doctors to violate the rules in one type of case could lead to wider abuses.

Conclusion: We should avoid conflicts between our rules and codes. In enacting new laws, we should try to make them worldly and flexible. If we discover that these rules are not being observed in practice, we must make a further choice. We can enforce the rules with renewed vigour or we can soften them as a concession to all-too-human realities.

Bryan Schwartz is a professor of law at the University of Manitoba.