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# Planting Seeds of Order: How the State Can Create, Shape, and Use Customary Law

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# Planting Seeds of Order: How the State Can Create, Shape, and Use Customary Law

*Bryan H. Druzin*

## ABSTRACT

*This paper argues that government can strategically trigger the emergence of customary law in order to achieve specific policy ends. While much has been written on customary law, the idea that the State can stimulate its emergence is a radical notion with clear policy implications. Harnessed correctly, such an approach could be a powerful legislative weapon to create, sustain, and even redirect social order. Building upon basic insights from game theory, the paper posits a way to do this: policymakers can deliberately recreate the social conditions that foster the emergence of customary order. The paper, however, draws a sharp divide between the technical and the normative. After laying out how this may technically be achieved, the paper considers the normative legitimacy of this kind of socio-legal engineering, concluding that, while it may be theoretically possible to trigger the emergence of customary law, the normative implications of doing so are quite another matter, and as such it is difficult to see how such policies could ever be casually pursued.*

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## INTRODUCTION

If we take law to mean the rules that structure society, then law is not a purely legislative creation. At best, codified law is but the formal tip of a colossal iceberg, the sublimation of an organic, social occurrence—a natural phenomenon comparable to the crystalline structure of a snowflake or the rippling patterns of water in a still lake.<sup>1</sup> Indeed, most social order is not created by the State. There exists a vast ocean of social rules completely untouched by formal law. The machinery of government stays well clear of most existing social order, electing to concern itself with only a small sliver of it. This natural social ordering, comprising of norms and customary rules, has been referred to as “bottom-up law.”<sup>2</sup> Bottom-up law stands in contrast to “top-down law.” That is, legal order created and imposed by the State.<sup>3</sup> Probably more familiar to the reader is the term “customary law,” which captures this concept of bottom-up social order, particularly when it has crystallized

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1. In fact, the need to artificially create legal order through some central law-making authority employing coercion can be understood as a sign of the natural processes of social order failing. As Lon Fuller points out, in its ideal form, legal order “works so smoothly that there is never any occasion to resort to force or the threat of force to effectuate its norms.” LON L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 221 (Kenneth I. Winston ed., 1981).

2. See Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997). As Cooter explains elsewhere, “Rather than proceeding from the top to bottom, lawmaking can proceed from bottom to top.” Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralised Law*, 14 INT’L REV. L. & ECON. 215, 215 (1994). The term has also been used by some to mean law-making by sub-state organizations. See, e.g., BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENTS, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003); *LAW AND GLOBALIZATION FROM BELOW* (Boaventura De Sousa Santos & César A. Rodríguez-Garavito eds., 2005); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 21 n.10 (2003). It is used here, however, in a far more fundamental sense: the level of individual actors working together in decentralized coordination. Here I am in agreement with Posner. See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1700 (1996) (discounting as bottom-up norms “the rules self-consciously formulated and issued by private institutions, such as trade associations”).

3. As the reader will see, I use the term “legal order” here much more broadly than simply in the sense of that created by the State. In this paper, “legal order” is used to describe any system where parties follow a collectively-recognized set of rules. Thus, this includes the “rules” of customs and norms. When the term “law” is used here, it is meant as also encompassing this species of informal regulation—it is law not merely in the formal judicial sense, but also the broad regulatory sense, even without any authoritative pronouncement or formal enforcement of these rules. Indeed, a very expansive view of “law” is embraced here. Some may take issue with such a loose definition, but the skeptical reader is urged to read on.

into an easily-identifiable body of rules (I will use this term henceforth).<sup>4</sup> Throughout most of human history, custom, more than any other force, has preserved social order.<sup>5</sup> This brings up a very interesting possibility: what if the energy of customary law could be tapped into? What if we could strategically harness the force of customary law to serve the specific ends of policy makers?

H.L.A. Hart observed that customs arise whereas laws are made.<sup>6</sup> From this, he concluded it is thus impossible for the emergence of custom to ever come under anyone's rational control and, as a consequence, custom could never serve the ends of policymakers.<sup>7</sup> Hart, this paper argues, is dead wrong. It may in fact be quite possible for custom to serve the interests of policymakers. Embracing this notion, this paper considers a somewhat radical proposition. The idea posited here is that government may deliberately stimulate the emergence of customary order by, in effect, planting seeds of order that will "grow" such order.<sup>8</sup> The idea is that if the conditions that give rise to bottom-up customary order can be sufficiently identified, policymakers can strategically recreate these conditions, triggering its emergence in a controlled manner. Within the law and norms literature, the idea that customary norms<sup>9</sup> can be used to alter mass social behavior, such as

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4. Throughout the paper, I use the term "customary law" in a very loose sense. In a more formal sense, two elements are required for the emergence of binding customary law: "(1) the practice should emerge out of the spontaneous and uncoerced behaviour of various members of a group, and (2) the parties involved must subjectively believe in the obligatory or necessary nature of the emerging practice (*opinio iuris*)." Francesco Parisi, *Spontaneous Emergence of Law: Customary Law*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS* 603, 606 (2000). Here these criteria are relaxed slightly. For example, in the definition of customary law proffered here informal coercion may be operative. Additionally, it is not necessary that every social rule be perfectly internalized (*opinio juris*). Also, I have in mind here a grass-roots customary ordering on the micro-level of individual actors as opposed to grand customary systems on, for example, a national or even international level.

5. AMANDA PERREAU-SAUSSINE & JAMES B. MURPHY, *THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES* 158 (2007).

6. H.L.A. HART, *THE CONCEPT OF LAW* 89-96 (1961).

7. *See id.*

8. This is quite an ironic proposal considering that bottom-up law is typically invoked by theorists of a libertarian persuasion to advocate for less centralized engineering, not more.

9. Note that I use the terms customary norms and social norms interchangeably. I likewise use the terms customary law and customary order more or less synonymously.

recycling, tax evasion, or smoking, has engendered a fair degree of optimism. This scholarship, the New Chicago School as it is called,<sup>10</sup> synthesizes economic insights with basic sociological inquiry,<sup>11</sup> examining law's powerful role in the formation of social norms.<sup>12</sup> Scholars who have advocated this approach include prominent theorists such as Lawrence Lessig, Cass Sunstein, and Dan Kahan.<sup>13</sup> The New Chicago School essentially offers four methods of influencing customary norms: (1) information campaigns to trigger widespread belief in the norm's legitimacy; (2) increasing the esteem (or the guilt) felt in following a norm by altering social perceptions; (3) mandating or banning a particular behavior; and (4) taxing or subsidizing behaviors.<sup>14</sup> The present thesis offers a fifth method. Yet the idea posited here is a far more expansive concept: it not only offers a technique to shape specific norms, it envisions the wholesale triggering of fairly complex systems of customary order.<sup>15</sup>

How? While the details are somewhat technical, in a nutshell it is this: it is well understood in game theory, as well as in sociology more generally, that repeated interaction tends to stimulate bottom-up order.<sup>16</sup> It is for this reason that customary order tends to arise so robustly in small groups. Given that repeated interaction tends to give

10. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998).

11. *Id.* at 661.

12. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 643 (2001).

13. See, e.g., Lessig, *supra* note 10; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997). See also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 346–47 (1997). But see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (cautioning against such approaches). “Norm management” is discussed again below. See *infra* Part III.D.

14. For a good overview of norm management techniques, see Ann E. Carlson, *Recycling Norms*, 89 CALIF. L. REV. 1231, 1250–52 (2001).

15. Even if the present thesis is incorrectly lumped in with the “norm management literature,” it represents an entirely fresh approach to the issue and is, even in this limited sense, a useful contribution to the literature.

16. Much of the game theory literature addresses the principle of repeated interaction in the context of iterated games which solves the prisoner's dilemma. The economics literature alone is very large but I refer the reader to the foundational work regarding this idea: see Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation* 211 SCI. 1390 (1981); Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306 (1981). See also ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991) (citing the emergence and enforcement

rise to customary order, the trick is simply to recreate the conditions that produce repeated interaction. Understanding this, the State can induce the emergence of customary law by yoking actors together into relationships of repeated interaction through establishing legal obligations between them that will ensure this repetition. Lawmakers can use ongoing positive legal duties (duties that require overt positive actions between actors) to create clusters of people who repeatedly interact, mimicking the conditions of a small group and in turn stimulating the emergence of customary order.<sup>17</sup> In this way, a little well-crafted top-down law can potentially stimulate a cascade of highly structured, complex bottom-up law. This offers several, very compelling advantages. Because it arises from an active discourse between parties, customary law is often more efficient.<sup>18</sup> Customary law is also often more robust, pragmatic, internalized,<sup>19</sup> and even self-enforcing.<sup>20</sup> Where the rules prove self-enforcing, the enforcement burden on the State may be dramatically lightened. In many areas, the cost of monitoring and enforcing top-down legal order may be prohibitively high or may raise privacy concerns. Of particular use, however, is that because this social order may be deliberately engineered, policymakers can grow customary order in directions that reinforce public policy objectives. Indeed,

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of norms among cattle ranchers in Shasta county); *see also, e.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Janet T. Landa, *A Theory of the Ethnically Homogenous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349 (1981); Sally Falk Moore, *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973).

17. It has been argued that the traditional norm management literature has been overly-optimistic in its claims that social norms can actually change behavior. While social norms may work well for small groups, these methods stumble in relation to large-number, small-payoff collective action problems. *See* Carlson, *supra* note 14, at 1233–34. The strategy of fostering customary order through recreating a small group dynamic thus offers itself as an attractive alternative to the norm management strategies proposed by this literature.

18. Parisi, *supra* note 4, at 611–12.

19. That is, participants feel emotionally obliged to observe these norms. As Eric Posner says, “people bound by [norms] feel an emotional or psychological compulsion to obey the norms; norms have moral force.” Posner, *supra* note 2, at 1709. Internationalization is arguably the most socially powerful component of custom, yet for the purposes of this paper, it is simply noted then mostly set aside. However, I deal with normative internalization in great depth elsewhere. *See* Bryan Druzin, *Law, Selfishness, and Signals: An Expansion of Posner’s Signaling Theory of Social Norms*, 24 CAN. J.L. & JURIS. 5 (2011) (explaining norm internalization as an evolutionary trait).

20. Parisi, *supra* note 4, at 611.

if policymakers can figure out a way to trigger the emergence of customary law, this strategy would provide the State with a valuable weapon in its legislative arsenal to create, sustain, and even redirect social order. Proving Hart wrong, custom could obediently serve the ends of policymakers.

While much has been written on how the State should incorporate customary law, the idea that the State can actually trigger its emergence is a somewhat radical notion. Many may find the idea of intentionally channeling the emergence of customary order to serve the policy interests of the State slightly chilling—a grossly paternalistic, if not frighteningly authoritarian form of social engineering.<sup>21</sup> This being the case, and lest I be accused of harboring closeted, fascist impulses, the paper draws a sharp divide between the technical and the normative. After descriptively mapping out how the State may trigger customary law on a technical level, the paper offers a critique of the normative legitimacy of this kind of socio-legal engineering. Ultimately, the purpose of the paper is simply to show that it is theoretically possible to trigger customary law. The normative implications of doing so are quite another matter.

The discussion that follows is highly theoretical, drawing on basic concepts from game theory. For the reader unfamiliar with game theory, I have attempted to avoid an overly technical analysis. While to make my case, a little technical nitty-gritty is unavoidable, every attempt is made to keep the argument as straightforward as possible. Technical points are relegated to footnotes wherever possible. The main problem is that the paper lands us in uncharted theoretical territory. Short of actual experimentation, the validity of the idea will remain an open question. As such, the argument would benefit enormously from research of an empirical nature. Such research is invited.

I develop my argument in three parts in the following manner. Part I discusses how repeated interaction tends to induce customary order.

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21. Social engineering is understood as the shaping of popular attitudes, social behaviors, and resource management on a large scale. For early treatments of the concept, see EDWIN L. EARP, *THE SOCIAL ENGINEER* (1911), as well as KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 147–157 (2012 [1945]).



Part II then proposes a model of how to trigger customary order, arguing that the State can craft positive legal duties to create relationships of repeated interaction and thereby trigger the emergence of customary law. The emergence of customary commercial law is then offered as an example of the ability of positive duties to trigger customary order. Part III then adopts an entirely different analytical tack and examines the normative implications of cultivating customary law, arguing that while such a strategy may indeed be technically viable, it runs counter to the fundamental principles undergirding a liberal democratic society, and as such it is difficult to see how such policies could ever be casually pursued.

### I. WHY CUSTOMARY LAW TENDS TO EMERGE IN SMALL GROUPS: GAME THEORY GIVES US AN ANSWER

In this section I discuss the tendency of customary law to emerge in small groups, examining first the critical role that repeated interaction plays in this process. I then look at the informal mechanisms that help sustain customary order once arisen. I then discuss how large groups, on a structural level, tend to inhibit the emergence of cooperative order.

#### *A. Repeated Interaction Tends to Produce Order*

Customary order can emerge quite robustly in small groups.<sup>22</sup> Research shows that the reason for this is bound up with the fact that members are repeatedly interacting: any situation where there is sufficient repetition between the same actors can generate degrees of stable

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22. See Robert Cooter, *The Law and Economics of Anthropology*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 719, 723 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (referencing much of the literature that supports this). See also PETER OREBECH, *THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT* 371 (2005); Carlson, *supra* note 14, at 1245. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

social order.<sup>23</sup> Game theorists have long noted the importance of repeated interaction in inducing social cooperation.<sup>24</sup> Crucially, where there is sustained cooperation, a coherent body of rules is sure to emerge. Repeated interactions between people can generate all sorts of relatively stable self-ordering arrangements.<sup>25</sup> This is true in many social dynamics captured in game theory.<sup>26</sup> Games with inefficient solutions, such as the Prisoner's Dilemma, often suddenly produce efficient solutions when repeated with the same players.<sup>27</sup> Repetition, for the most part, solves the social dilemmas that stand in the way of self-sustaining cooperative order.<sup>28</sup> This insight has become virtually axiomatic among game theorists: "One-shot encounters encourage defection; frequent repetition encourages cooperation."<sup>29</sup> Analyses of iterated games suggest "the general idea that social norms emerge endogenously in recurrent dilemma situations if the population is a close-knit community."<sup>30</sup> As Robert Ellickson contends, small groups of "[p]eople who repeatedly interact can generate [legal] institutions through communication, monitoring, and sanctioning."<sup>31</sup> This is be-

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23. This idea has been extensively studied. The foundational work here is Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCI. 1390 (1981). *But see* MATT RIDLEY, *THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION* 65 (1997); *LEADING EDGES IN SOCIAL AND BEHAVIORAL SCIENCE* 222 (R. Duncan Luce, Neil J. Smelser & Dean R. Gerstein eds. 1989); *COORDINATION OF INTERNET AGENTS: MODELS, TECHNOLOGIES, AND APPLICATIONS* 429 (Andrea Omicini et al. eds., 2001).

24. *See supra* note 23.

25. STEVEN ANTHONY HETCHER, *NORMS IN A WIRED WORLD* 254 (2004).

26. Indeed, the Folk Theorem, *see infra*, note 27, informs us that many social dilemmas may be resolved by the mere presence of repeated interaction. *See* DAVID C. ROSE, *THE MORAL FOUNDATION OF ECONOMIC BEHAVIOR* 44 (2011).

27. Cooter, *supra* note 22. For the foundational work on this, *see* Drew Fudenberg & Eric Maskin, *The Folk Theorem in Repeated Games with Discounting or with Incomplete Information*, 54 *ECONOMETRICA*, 533–54 (1986).

28. "A social dilemma exists when there is an incentive structure that leads individual actors to take a course of action that produces a collectively undesirable outcome." Toshio Yamagishi, *Seriousness of Social Dilemmas and the Provision of a Sanctioning System*, 51 *SOC. PSYCHOL. Q.* 32.

29. RIDLEY, *supra* note 23, at 65.

30. JULIAN NIDA-RÜMELIN- & WOLFGANG SPOHN, *RATIONALITY, RULES, AND STRUCTURE* 56 (2000).

31. R.C. Ellickson, *Property in Land*, 102 *YALE L.J.* 1366 (1993).

cause a small group is essentially an iterated game—it allows for repeated interactions with the same players.<sup>32</sup> Consequently, game theory predicts that small groups can give rise to informal legal ordering without having to rely upon State law.<sup>33</sup>

*B. The Mechanisms That Help Sustain Order*

Various mechanisms help guide and sustain this emergence. Individuals can rely on the threat of retaliation and reputational costs as enforcement mechanisms to encourage rule compliance. On the carrot side of the ledger, the element of reciprocal benefit that may accrue with repeated interaction reinforces such arrangements, cementing the social rules that emerge. Indeed, mutual self-interest alone may often be enough to sustain cooperation. Moreover, over time, these norms will tend to become internalized, infusing this customary order with an even greater stability. Yet it is not essential that these social rules be perfectly internalized by each participant. Indeed, many may privately reject their normative authority while outwardly conforming to them. However, the more widely internalized the customary order becomes, the more stable it is as a result of an increase in not only voluntary compliance, but also voluntary enforcement.<sup>34</sup> These mechanisms, which are built into small groups, help cement and stabilize bottom-up systems of social order.

The upshot of all of this is order. Informal or even exceedingly formal rules often arise endogenously in small groups that repeatedly

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32. Cooter, *supra* note 22, at 723. There is also the element of reputational costs in small groups even where there is no repeated interaction between the same actors. The effectiveness of any repeated game, however, is in fact based upon reputation even if this is only in the limited sense of one's reputation from preceding rounds of play. Indeed, "[r]eputations can make promises to perform credibly [*sic*] in small economies, and parties form trade associations partly to shrink the size of the relevant reputational group. . . . But reputations can be ineffective in large, heterogeneous economies . . . ." Alan Schwartz, *The Enforcement of Contract and the Role of the State*, in LEGAL ORDERINGS AND ECONOMIC INSTITUTIONS 104, 107 (Fabrizio Cafaggi et al. eds., 2007).

33. Cooter, *supra* note 22, at 723.

34. That individuals sanction norm offenders, often at even a considerable cost to themselves, has been well documented. See Ernst Fehr, et al., *Strong Reciprocity, Human Cooperation, and the Enforcement of Social Norms*, 13 HUM. NAT. 1, 1–25 (2002).

interact.<sup>35</sup> Witness the spontaneous seating arrangements among students in a class, or the unspoken rules of an office workplace. From members of an athletic team to the inmates of a prison, customary law arises naturally within groups that repeatedly interact. The key element here is repeated interaction. We need not go into this here to any great technical depth, as game theorists and sociologists alike have extensively studied this. It is sufficient to merely note that it is well established that in small groups, stable social order can emerge because there is repeated interaction between the actors, and indeed, it often emerges rather robustly.

### *C. The Large Group Problem*

Very little of this, however, holds true in the case of large groups. As group size increases, and there is less or no repeated interaction, the possibility of cooperation rapidly fades.<sup>36</sup> In very large multi-person games, actors turn into one-shot players.<sup>37</sup> That is, it ceases to be an iterated (a repeated) game. Because of this, things fall apart rather

35. ROBERT BOYD & PETER J. RICHESON, *THE ORIGIN AND EVOLUTION OF CULTURES* 148 (2005).

36. For a succinct overview of the early literature on this, see ROBERT BOYD, *CULTURE AND THE EVOLUTIONARY PROCESS* 230 (1988). See also Klaus Manhart, *Cooperation in 2- and N-Person Prisoner's Dilemma Games: A Simulation Study*, 11 *ANALYSE & KRITIK* 134, 134 (1989). Indeed, group size has been an important feature of game theory research and one that has been extensively studied. Research has shown that cooperation decreases in large groups. See David De Cremer & Geoffrey J. Leonardelli, *Cooperation in Social Dilemmas and the Need to Belong: The Moderating Effect of Group Size*, 7 *GROUP DYNAMICS: THEORY, RES., AND PRAC.* 168 (2003); N. L. Kerr, *Illusions of Efficacy: The Effect of Group Size on Perceived Efficacy in Social Dilemmas*, 25 *J. OF EXPERIMENTAL SOC. PSYCH.* 287 (1989); W.B.G. Liebrand, *The Effect of Social Motives, Communication and Group Size on Behaviour in a N-person Multi-Stage Mixed-Motive Game*, 14 *EUR. J. OF SOC. PSYCH.* 239 (1984). Indeed, it is well-recognized that the "conditions necessary for the evolution of reciprocity become extremely restrictive as group size increases." BOYD, *supra* note 35, at 146. As powerful as the folk theorem is, it becomes less relevant as the size of the group increases. See also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971) (examining the problem of free-riding in large groups).

37. For a more detailed discussion, see RUSSELL HARDIN, *COLLECTIVE ACTION* 169 (1982). See also OLSON, *supra* note 36. This dynamic can create the well-known "tragedy of the commons" described by Garrett Hardin in which the players are worse off following the rational dictates of their self-interest than if they coordinated their actions. Actors are driven to do so even when it is clear that it is not in anyone's long-term interest for this to happen. See G. Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1248 (1968).

quickly. All of the various mechanisms outlined above that help sustain bottom-up order suddenly vanish. As a result, an increase in group size worsens the problem of opportunism and free-riding, undermining the possibility of bottom-up decentralized social order.<sup>38</sup> To simplify things we can call this the *large-group problem*. In large groups, customary social order cannot emerge as robustly (if at all) because there is no repeated interaction. Because of this, in large societies, State-enforced law is necessary to realign the incentive structure and prevent cheating. The State with its arsenal of sanctions acts as a guarantor that players will be motivated to cooperate. The take-away point is this: social order can arise naturally in small groups; however, in large groups, because the key element needed to trigger customary law (repeated interaction) is missing, social order must be imposed top-down.

Having laid out how repeated interaction can stimulate customary order, the task before us now is to figure out a way to use this. The question is: How can the State exploit this insight to strategically trigger the emergence of customary law? The following section maps out a way to achieve this.

## II. FINDING A TRIGGER: HOW TO CULTIVATE CUSTOMARY LAW

In this section, I explain how the State may be able to trigger the emergence of customary law—to rig the game, if you will, in favor of customary order. As we have seen, repeated interaction tends to generate bottom-up order. The trick, therefore, is simply to lock people into relationships of repeated interaction. As long as this can be accomplished, the chances that customary law will arise increase significantly. Put another way: if large groups discourage spontaneous social order and small groups tend to engender it, then the solution is to recreate the dynamic of a small group. In this section I will suggest a simple strategy as to how this may be achieved. The centerpiece to the approach is the bifurcated nature of legal duties, so let us begin there.

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38. ROSE, *supra* note 26, at 44.

*A. Differentiating Between Positive and Negative Duties*

Broadly defined, legal duties come in one of two forms.<sup>39</sup> By far, the vast majority of legal duties are framed in the negative: one shall not infringe upon the property rights of the man who lives next to you; one shall not wantonly assault other people, and so on.<sup>40</sup> These acts are what we must refrain from doing—they oblige inaction. Most do not relate to specific individuals but rather apply to all members of the public generally and are simultaneously owed to everyone.<sup>41</sup> However, legal duties also come in the second, albeit less common form<sup>42</sup> of positive duties owed to *specific* individuals.<sup>43</sup> These are positive duties that require one to perform some overt act or another—that is, what we are obliged to do. I call the first kind of legal duty *negative duties* and the second *positive duties*. Positive duties are a lot less common. If one were to thumb through the pages of the criminal code of any random jurisdiction one would find scant few, if any, actual positive legal duties towards other individuals.<sup>44</sup> Negative duties form the core of any criminal code.<sup>45</sup> Within this kind of “negative law,” positive duties to other parties do of course arise: fiduciary duties, a duty to warn, a duty of care, a duty to rescue, etc., but these are more exceptions than the norm.

Why is this important? The distinction between positive and negative duties is important for our purposes because positive duties—specifically ongoing positive duties—create interaction between parties.

39. FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW* 56–57 (1896).

40. JOHN FORGE, *THE RESPONSIBLE SCIENTIST: A PHILOSOPHICAL INQUIRY* 236 (2008).

41. PATRICIA G. SMITH, *LIBERALISM AND AFFIRMATIVE OBLIGATION* 8 (1998).

42. J.J. DU PLESSIS & JAMES MCCONVILL, MIRKO BAGARIC, *PRINCIPLES OF CONTEMPORARY CORPORATE GOVERNANCE* 355 (2005) (“[T]here are very few positive moral duties imposed on us. This is also the case as far as the law is concerned. Thus it is rare that individuals are required to positively do an act . . . as opposed to refraining from engaging in conduct . . .”).

43. Some positive duties are not owed to specific individuals such as the legal duty to pay one’s taxes or the duty to scoop up after one’s dog in the park. For the purposes of this paper, we are interested in positive duties that are owed to specific parties.

44. Cases where such positive duties do arise are treated in more detail below. *See infra* Part III.D.

45. SMITH, *supra* note 41, at 7.

This opens the door to the possibility of using ongoing positive duties to trigger the emergence of customary order. The State can capitalize on the unique character of positive duties to indirectly stimulate customary law through the top-down law it designs.

*B. How Ongoing Positive Duties Can Be Used to Trigger Customary Law*

To understand how this is possible, the question we need to ask here is: what exactly does an ongoing positive duty entail on a structural level? The answer: positive duties bring about the all-important ingredient of repeated interaction. Ongoing positive duties thrust people into repeated interactions simply because they are actively doing something. To the extent that they require repeated interaction, positive duties recreate the dynamic of a small group. Ongoing positive duties help solve the previously discussed large-group problem because they carve out a specific set of participants from the amorphous mass of a faceless society and lock them into interaction with each other, effectively recreating the key conditions of a small group.

By nature, an ongoing positive duty implies certain key properties: it defines the players and creates a discrete cycle of interaction. A positive duty by definition must be performed, and at a specific point in time by a specific party. Positive duties are, as Friedrich Hayek so perceptively noted, “discrete in that they demand a particular quantity and quality of action at particular points in space and time.”<sup>46</sup> Thus, if these obligations are ongoing, players are repeatedly thrust into interaction with one another and as a result, a stable legal order tends to emerge as the actors naturally coordinate their behavior. Moreover, these patterns of legal order may increase in terms of sophistication and complexity as parties formulate new rules (often entailing new positive duties) to govern changes or elaboration in their interactions. Indeed, this

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46. JOHN C. W. TOUCHIE, HAYEK AND HUMAN RIGHTS: FOUNDATIONS FOR A MINIMALIST APPROACH TO LAW 155 (2005). Fuller also touches on the idea that particular forms of law can be distinguished in that they involve a certain call to action (though he is speaking of customary law in general): “[W]hat is involved is not simply a negation, a prohibition of certain disapproved actions, but also the obverse side of this negation, the meaning it confers . . . approved actions, which then furnish a point of orientation for ongoing interactive responses.” FULLER, *supra* note 1, at 213–14.

process is eminently clear in the case of commercial contracts and commercial relationships in general (this is discussed again in further detail below). The repeated cycles of interaction allow order to build on itself just as it tends to do in small groups.

Law that only assigns negative duties implicitly lacks this potential. Negative duties do not create interaction. One is not engaging in repeated interaction with a specific party. In fact, a lack of interaction is the very goal of a negative duty. As such, negative duties do not recreate the conditions of a small group. There is nothing to be repeated, nothing to be actively done.<sup>47</sup> While positive duties naturally bring parties together, negative duties by their nature keep parties apart.<sup>48</sup> All of this boils down to a very simple but theoretically useful insight: ongoing positive duties facilitate the emergence of customary order because they bring parties together into relationships of repeated interaction, recreating the conditions of a small group.<sup>49</sup> For our purposes, the nature of a positive duty and what it entails on a structural level is important because by strategically creating positive duties it may be possible for the State to stimulate the emergence of customary law.<sup>50</sup>

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47. Hayek also points this out. See TOUCHIE, *supra* note 46 (“Negative duties, then, being continuously in effect, are not ‘carried out’ or satisfied by the performance of conduct and can be addressed to the entire world.”).

48. Or at least they do not bring parties together.

49. Indeed, the impact of repeated interaction in rule-formation is quite evident in the case of long-term commercial contracts.

50. Some key conceptual points regarding what precisely is meant here by a positive duty should be made clear, as its superficial similarity with other concepts may be a source of potential confusion. First, the notion of a positive duty should not be confused with the idea of a positive duty of care. While a positive duty always requires an overt action of some kind, a duty of care may or may not require an overt act. A duty of care is not always a positive duty as it is understood here. For example, if we say that an employer owes a positive duty of care to her employees to provide safe working conditions, this may or may not require the performance of an overt act. This would depend upon the particular situation: if in order to satisfy this duty of care to her employee, the employer must actively perform something (e.g. have ice removed daily from a loading dock) then it is a positive duty as understood here because it demands some overt action to be taken. If, however, to meet her positive duty of care to her worker, the employer need only, for example, *refrain* from dousing the loading dock with water on a cold day, then this is not a positive duty as it is understood here. It is in fact a negative duty because it requires one to refrain from action—that is, it requires inaction as opposed to action. The focus here is simply upon the nature of what is demanded: action or inaction. Negative duties demand inaction; positive duties require action. A duty of care may or may not demand overt action.



*C. A Hypothetical Example*

A hypothetical example may help clarify this process. Let us ground this in an example involving two scenarios: scenarios “Meal” and “No Meal.” Scenario Meal represents a positive duty situation, while scenario No Meal corresponds to situations that invoke negative duties. In scenario Meal, our protagonist, we will call him Bartley, has twenty friends who are required to help him prepare one meal a day. In scenario No Meal, Bartley simply announces to the entire world (somehow) that no one should ever help him make a meal of any kind. In scenario Meal there will emerge definite cycles of interaction between Bartley and his twenty friends. From this repeated interaction, even absent a centralized authority to formulate commands, a system of set “rules” will proliferate around this core meal-making duty. This will likely cover a wide array of details: *e.g.*, which meal of the day,

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Another point: we should take care to not be confused by mere semantics. One can always frame a negative duty to appear positive in nature. For example, we can rephrase “do not open the window” as “keep the window closed (the present state being that the window is closed).” Yet regardless of how this is dressed up, there remains a fundamental difference between the ways the two types of duties are satisfied that cuts through this conceptual fog. A negative duty requires that the actor refrain from a specific act—that is, that a specific event should *not* occur. The actor can do an endless array of other acts; however, the act stipulated by the negative duty is not to be performed. Thus, in regards to the proscribed act, the actor *can comply simply by inaction*, “by ‘sitting on one’s hands’” as one scholar puts it (*i.e.* not opening the window). TOUCHIE, *supra* note 46, at 154. A positive duty, by contrast, requires a specific kind of overt *action* in order for there to be compliance (*i.e.* opening the house)—a specific thing *should* occur. Regardless of how you frame it, not opening a closed window requires only inaction.

Yet this is a bit more conceptually tricky than it may initially appear. In some situations it may not simply be a matter of “sitting on one’s hands” in that a negative duty may in fact require the performance of some supporting positive act. For example: “Do not go through a red light” requires inaction. It is a negative duty “Do not do X.” However, if you are driving a car speeding towards a red light, in order to not go through the red light, you will have to press on the brakes, gear down, etc., all of which are positive actions. However—and this is a key point—while not doing X may in some special situations require performing a positive action to achieve this goal of non-occurrence (*i.e.* not running the red), the end result is still that X is not performed—X does not occur. This point is important because the doing of X is what forms the basis of the interactional relationship between the parties. So long as X is not performed, no relationship of interaction arises even if circumstances require one or even many positive actions to achieve this. Thus, even in situations where positive actions are required in order to comply with a negative duty, the end result is the same: X does not occur and so the parties are not brought together into any kind of interactional relationship. It does not matter that positive actions were needed behind the scenes to achieve the inaction of not doing X. To sum up, if a specific overt act of some kind is demanded, then it is a positive duty; if no overt act is demanded, then it is a negative duty.

where, what kind of food on which day, who purchases what ingredients, who cooks what, who cleans, who selects the food, who bears what costs, and so on and so forth. Through the brute force of sheer repetition this ordering will tend to harden into established rules.<sup>51</sup> An intricate patterning will emerge in the form of a collectively recognized set of rules—a spontaneous system of cooperative order reflexively formulated by the participants themselves: customary law.

Scenario No Meal will not give rise to discrete systems of customary law. The key difference between scenarios Meal and No Meal is one of positive and negative duties. The actors are actually doing something. The existence of a positive duty (to help Bartley make a meal once a day) necessitates repeated interaction between specific parties. This repeated interaction then triggers the emergence of a complex system of rules. Consider for a moment how different the two scenarios are. In scenario No Meal, as long as the duty is being complied with, by definition, nothing will ever occur and consequently there is nothing to build on. The essential basis for customary law—repeated interaction—is simply not present. In fact, the players are not even known to each other: it is never clear *who* is not helping Bartley make a meal. It is quite the opposite of a small-group dynamic where people repeatedly interact. The negative duty in scenario No Meal actually discourages interaction between parties and so discourages such a dynamic. The large-group problem remains unsolved. With scenario Meal, however, the players are actively engaging with one another and so a degree of bottom-up ordering is very likely to materialize. The large-group problem is solved. While this hypothetical may help clarify the point on a conceptual level, a living example of how positive duties help trigger customary law would go a long way in making a more persuasive case. Fortunately, we have such an example.

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51. Also of great significance, though not delved into deeply here, is that over time the rule may even be internalized, taking on a genuine normative quality. For instance, the norm may emerge that Bartley should be the lead cook because it is his home. Indeed, a commonly cited defense (although not a very compelling one) when a normative rule is challenged is “that is just the way we have always done it.”

*D. A Living Example: Commercial Customary Law and the Law Merchant*

If positive duties are such powerful generators of bottom-up ordering where, the unpersuaded reader may ask, is there a concrete example of this? Should not its effects be readily observable? The answer is that they are. We can discern the tendency of positive duties to give rise to stable customary order when we examine people engaging in repeated commercial activity.<sup>52</sup> Customary order in commercial communities vividly illustrates the ability of positive duties to induce customary law. As Jeremy Waldron observes, “the example of commerce . . . is a prototype of how the mundane growth of repeated contact between different humans and human groups can lay the foundation for the emergence of . . . norms, in a way that does not necessarily presuppose a formal juridical apparatus.”<sup>53</sup>

It is positive duties that structurally enable this “repeated contact.” Commercial relationships may generate robust forms of customary order can be traced to the fact that people engaging in commerce assume clear positive duties towards each other: participants are actively doing something with specific partners as opposed to merely refraining from doing something. Such is the nature of trade.

It is quite apparent how positive duties create the structural framework of repeated interaction if we take the case of a typical commercial contract: A orders goods from B; B delivers the goods on a certain date; A pays for them on delivery. The round is complete, and then the players can repeat it.<sup>54</sup> From this milieu, therefore, a stabilized body of customary norms can materialize. There are of course other reasons for

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52. I have explored this idea from different angles elsewhere. See Bryan H. Druzin, *Law Without The State: The Theory Of High Engagement and the Emergence of Spontaneous Legal Order within Commercial Systems*, 41 GEO. J. OF INT'L L. 559, 561 (2010) (positing a theory I term “high engagement theory,” that may account for the ability of commerce to generate and sustain decentralized legal order). See also Bryan Druzin, *Opening the Machinery of Private Order: Public International Law as a Form of Private Ordering*, 58 ST. LOUIS U. L. J. (2013) (forthcoming) (positing that positive duties help sustain commercial contracts by establishing trust through repeated rounds of signaling).

53. Jeremy Waldron, *Cosmopolitan Norms*, ANOTHER COSMOPOLITANISM 83, 94 (Seyla Benhabib et al. eds., 2006).

54. Even if this interaction is short-lived, reputational costs within the broader merchant community help create and sustain order.

the success of commercial customary law that more quickly leap to mind: namely, the mutual benefit provided by commercial trade. However, this only explains the motivation for why these actors come together into relationships of repeated interaction. On a structural level, it is the fact that these relationships are repeated that explains why they are able to create and sustain bottom-up order. The specific manner of interaction involved in commercial activity—i.e. that individuals are actively dealing with each other—is key to truly understanding the phenomenon of customary law in the realm of commercial trade.<sup>55</sup> Indeed, the ability of long-term commercial relationships to reduce opportunism and sustain stable partnerships has been widely noted by many theorists and linked to the fact that they are in essence repeated games.<sup>56</sup> While customary order that arises within commercial communities may give rise to negative duties just as much as positive duties, positive duties form the backbone of such customary order. Without such duties, there would be no repeated interaction and thus no opportunity for customary order in the first place.

Because it can depend upon customary law to take the helm, the State's role in commercial contracts may be relatively minimal compared with other areas of law.<sup>57</sup> Recognizing this, the State has traditionally assumed a very minimalist tack in relation to contract. Under

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55. Of course, as already discussed, the lure of benefit and the potential loss of it plays a crucial role in sustaining order. However, my point here is that for this to have the impact it does there must be repeated interaction. I take up the idea of the structural nature of trade's ability to develop and sustain legal order elsewhere, albeit from a slightly different tack. See Druzin, *supra* note 52, at 116 (positing that the unique manner of interaction implied by commerce plays a crucial role in this capacity to evolve spontaneously in the absence of a clear state authority).

56. See, e.g., ROBERT COOTER & THOMAS ULEN, L. & ECON. 244–45 (1988); GARY J. MILLER, MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY ch. 10 (1995); JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 260–314 (1994); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Douglas Bernheim & Debraj Ray, *Collective Dynamic Consistency in Repeated Games*, 1 GAMES & ECON. BEH. 295 (1989); Joseph Farrell & Eric Maskin, *Renegotiation in Repeated Games*, 1 GAMES & ECON. BEHAV. 327 (1989); L. G. Telser, *A Theory of Self-Enforcing Agreements*, 53 J. BUS. 27 (1981); See also ANTHONY DE JASAY, AGAINST POLITICS: ON GOVERNMENT, ANARCHY, AND ORDER 186 (1997) (“Many historical episodes show that the private enforcement of customary contract law thrived whenever the state for one reason or another was unable forcibly or amicably to displace conventional cooperation.”).

57. This brand of legal minimalism forms the core of the nineteenth century *laissez-faire* view of contract law. Roscoe Pound described this approach stating that “the law was conceived negatively as a system of hands off while [people] do things rather than as a system of ordering

the banner of freedom of contract, the State allows the parties themselves to formulate the particular legal order under which they wish to operate.<sup>58</sup> Indeed, for all intents and purposes, parties to a contract are “a kind of miniature legislature, and their law a miniature statute.”<sup>59</sup> This capacity for autonomy extends even to the case of enforcement. While the received wisdom from Hobbes is that contracts “without the sword are but words of no strength,”<sup>60</sup> the vast majority of commercial agreements are in fact fulfilled without having to go to court.<sup>61</sup> In fact, empirical research has shown that most business transactions are executed without entering into formal contracts of any kind.<sup>62</sup> This is of course not to deny that formal enforcement remains a more effective way to ensure compliance—promises are clearly more secure with a vigorous enforcement regime in place;<sup>63</sup> however, degrees of self-enforcement are nevertheless highly possible even without the iron hand of state.<sup>64</sup>

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to prevent friction and waste.” LINDA MULCAHY & JOHN TILLOTSON, *CONTRACT LAW IN PERSPECTIVE* 34 (2004).

58. RICHARD STONE, *THE MODERN LAW OF CONTRACT* 8 (2009); MINDY CHEN-WISHART, *CONTRACT LAW* 13 (2012). Guided by the principle of self-regulation and freedom of contract, the courts are generally very reluctant to interfere with the parties’ agreement. See RYAN MURRAY, *CONTRACT LAW: THE FUNDAMENTALS* 90 (2008).

59. ROBERT S. SUMMERS & LON L. FULLER, *JURISTS: PROFILES IN LEGAL THEORY* 81 (1984).

60. THOMAS HOBBS, *LEVIATHAN* 155 (A.P. Martinich & Brian Battiste eds., Broadview Press 2010).

61. See SUMMERS, *supra* note 59. Indeed, “Private mechanisms generate some degree of contract compliance . . . .” JEFFREY A. MIRON, *LIBERTARIANISM FROM A TO Z* 74 (2010). For some early examinations of self-enforcing agreements, see Telser, *supra* note 56, at 27; B. Klein & K.B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981). See B.L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 646 (1989).

62. See S. Macauley, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). See also Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 2 (1981); AVINASH K. DIXIT, *LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE* 25 (2007) (“Most business transactions . . . are conducted using various informal arrangements, such as handshakes and oral agreements, ongoing relationships, and custom and practice.”).

63. ROSE, *supra* note 26, at 45.

64. See DIXIT, *supra* note 62, at 27 (“One may think that . . . methods of private ordering must suffer a crippling disadvantage relative to the government’s courts, namely their lack of coercive power to ensure that their decisions are obeyed. However, the difficulty is often nonexistent or easily overcome.”).

History is littered with examples of fairly robust systems of customary law of a commercial nature.<sup>65</sup> An oft-referenced example is the case of the medieval law merchant—the international system of merchant law that arose across vast swaths of Europe during the tenth, eleventh, and twelfth centuries. During this period, merchants dealing with each other in fairs across Europe developed their own intricate body of rules.<sup>66</sup> This system of law was “voluntarily produced, voluntarily adjudicated and voluntarily enforced.”<sup>67</sup> The medieval law merchant is a good example of a coherent system of customary law arising from the maelstrom of repeated and sustained interaction.<sup>68</sup> Absent the State, familiar enforcement mechanisms such as reputational costs, reciprocal benefit, and internalization helped sustain the law merchant among communities of traders over centuries.<sup>69</sup> In fact, despite its many deficiencies, commercial law has frequently evolved in the vacuum of a single coercive power and continues to do so today; “customary commercial law flourishes and promotes order in most of our modern merchant society, much as it did in the medieval period.”<sup>70</sup> Indeed, customary law still “plays an especially important role in basic markets

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65. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF WESTERN LEGAL TRADITION* 333 (1983) (discussing the medieval law merchant). *See also*, Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Norms, Rules, and Institutions*, 99 MICH. L. REV. 1724 (2001); Karen Clay, *Trade without Law: Private-Order Institutions in Mexican California*, 13 J. L., ECON., & ORG. 202 (1997); Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989); Richard Zerbe & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114 (2001). *See also* Claire Cutler et al., *The Contours and Significance of Private Authority in International Affairs*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* 333, 351 (A. Claire Cutler et al. eds., 1999) (contending that private ordering has existed in many historical periods).

66. Cooter, *supra* note 2, at 217.

67. Benson, *supra* note 61, at 647.

68. Cooter, *supra* note 22, at 723.

69. Benson, *supra* note 61, at 660.

70. *Id.* *See also* Gillian Hadfield, *Privatizing Commercial Law*, 24 REG. MAG. 40, 41 (2001) (observing that from “the Middle Ages to the infant digital age, there are examples of law developed and administered by private entities with varying degrees of state involvement.”).

where state enforcement of contracts fails, as in capital markets in developing countries.<sup>71</sup> Moreover, trade organizations and similar commercial communities can provide the framework for repeated interaction in that they mimic the dynamic of a small group.<sup>72</sup>

The example of customary commercial law strongly supports the present thesis. Because commercial parties are actively dealing with each other on a repeated basis (or indirectly through the larger community) in that they perform positive acts (i.e. trade), customary law can arise between commercial parties without the need for the State to explicitly formulate rules. Communities of traders, therefore, tend to naturally create a coherent system of customary order. Without the brute force of repeated interaction structurally ensured by the performance of positive duties, it would be difficult for private order of this kind to emerge.<sup>73</sup> Indeed, customary commercial order illustrates quite clearly the generative potential of positive duties. By establishing positive duties, commercial parties recreate the conditions of the small group that facilitate the emergence of customary law (active, repeated interaction). With this in mind, the burning question for our project is: to what extent can we use this insight? What are its broader implications and how far can we take it?

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71. Cooter, *supra* note 22, at 723 (footnotes omitted).

72. Robert D. Cooter & Janet T. Landa, *Personal versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 INT'L REV. L. & ECON., 15–22 (1984). See also studies of modern diamond exchanges and commodity trading associations by Lisa Bernstein. Bernstein, *supra* note 64. See also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 114 U. PA. L. REV., 1643–96 (1996). The idea of a new law merchant is a point of intense theoretical interest that has garnered a cascade of literature starting around the 1980s and continuing today. For an early yet comprehensive examination of the law merchant, see generally LEON TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983).

73. In the economics and legal literature, the term private ordering—the coming together of non-governmental parties in voluntary, self-enforcing arrangements—is often used to describe this form of self-ordering. See, e.g., Bernstein, *supra* note 65 (using the term “private ordering” to refer to private enforcement); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (2002) (using the term to refer to private enforcement or regulation); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 163–68 (1985) (making the case that repeated play and reputation are “private ordering” tools for enforcement).

### III. CULTIVATING CUSTOMARY LAW: ITS POTENTIAL AND ITS LIMITATIONS

Having discussed how positive duties can stimulate customary law, we may now turn our attention to an exploration of the policy potential that flows from this. What has been discussed up to this point has been exceedingly theoretical. This section, the final section of the paper, applies this theory, outlining how the State can create, shape, and use customary order.

#### *A. The Possibility of Triggering Customary Law as a Matter of Policy*

If we accept as true the premise that ongoing positive duties between parties stimulate customary law, the question that presents itself is this: could not the State exploit this and deliberately legislate specific ongoing positive duties between individuals in order to strategically trigger the emergence of customary order? The State in theory could craft positive duties between citizens that pull actors into stable relationships of repeated interaction thereby ensuring a degree of recurring interaction sufficient to stimulate customary law.<sup>74</sup> In this way, the State could channel the energy of customary law to allow customary order to blossom in a relatively targeted manner. The State could “grow” social order much like a gardener who plants seeds in particular configurations, columns, rows, circles, etc., but then allows nature to take its course.

In addition to being ongoing, these positive duties would preferably be broad and open-ended. This would allow the participants to actively coordinate around them and self-organize. The ongoing positive duty would merely ensure that the parties are sufficiently yoked together in a relationship of repeated interaction; the rest would then simply be a matter of bottom-up ordering. Customary law would arise just as Lon Fuller describes it: “practices are often open-ended and oblique at the outset, and become refined and fixed only by a gradual process of adjustment and accommodation. They commonly “glide

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74. There is a certain undeniable irony to such a proposal in that the proponents of bottom-up law typically advocate quite vociferously for State minimalism. For such scholars, this kind of legal engineering would, no doubt, be anathema to their views.



into being imperceptibly' . . . The stabilized practices that ultimately emerge are typically tacit, yet recurrent."<sup>75</sup> From these practices, a fairly coherent body of customary law may evolve. Yet the initial direction of this system of order would be set by policymakers.

To different degrees of success, customary law is perfectly capable of accomplishing many of the primary functions performed by State law: i.e. prevent social conflict; provide authoritative rules for conduct; provide public goods; solve collective action problems, and so forth. Yet, it may do so with some important comparative advantages. Indeed, we can expect several benefits to such a system of cooperative order over that of top-down law. These advantages were enumerated in the introduction but are worth repeating here in a little more detail. Just keeping the overall role of the State to a bare minimum provides many advantages.<sup>76</sup> For instance, resources are used in light of local knowledge, so a more efficient allocation of responsibilities in terms of maximizing the individual skills and expertise of the participants can be expected.<sup>77</sup> With customary ordering, the task of making accurate social welfare assessments through complex political processes is completely bypassed.<sup>78</sup> The rules that emerge will be ground-tested and pragmatic.<sup>79</sup> Customary law may be far more suited to issues of a relatively trivial matter when "individual violations (though perhaps not aggregate violations) are too trivial . . . to justify the expense of trials, police, and prisons."<sup>80</sup>

Moreover, having arisen bottom-up, customary rules already have the community's authority and are likely to be widely internalized. As a result, the entire system may be more robust, reinforced by a sturdy

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75. SUMMERS, *supra* note 59, at 78.

76. Indeed, legislators are not always the wisest creators of law. As Ellickson notes, "law-makers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order." R. C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 286 (1991).

77. See Tullock, arguing that "voluntarily entered-on social arrangements should be taken as optimal from society's point of view." G. TULLOCK, *PRIVATE WANTS, PUBLIC NEEDS: AN ECONOMIC ANALYSIS OF THE DESIRABLE SCOPE OF GOVERNMENT* (1987).

78. Francesco Parisi, *Towards a Theory of Spontaneous Law*, 6 CONST. POL. ECON. 211, 212 (1995).

79. *Id.*

80. See Richard Posner & Eric Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT. REV. L. & ECON. 369, 380 (1999).

normative underpinning,<sup>81</sup> and importantly, the State need not formulate nor enforce any of this—the entire system may be sufficiently self-sustaining, reducing burdensome governance costs.<sup>82</sup> All of this makes the prospect of cultivating customary law particularly attractive.

*B. State-Imposed Lawn Care and Other Forms of “Engineered” Customary Order*

*1. Lawn care*

To illustrate in concise terms how the State could trigger the emergence of customary law, let us take lawn care as an example. If the State considered it in the public interest that everyone take better care of their front yards, rather than concocting intricate laws requiring people to do so (something that would require unrealistic levels of monitoring and enforcement), the State could adopt the more deft approach of customary law cultivation. The State could harness the self-ordering potential of repeated interaction by requiring, for example, that the residents of a street collectively tend to one of the yards on the street each Sunday (the yard to be tended would change each week to ensure reciprocity). Non-compliance would be subject to a small fine. Instead of fabricating and enforcing a complex system of regulation, the State could simply impose a single legal obligation yet one that deliberately comprises an ongoing positive duty so as to bring private parties together into relationships of repeated interaction. This stripped-down, base, ongoing positive duty (“tending to a specific yard every Sunday”) would instantly demand a litany of positive acts between the residents of the street. For example, residents would have to decide when to water the grass, how much, where, who would weed, etc. The State would, in this manner, simply allow the parties to fill in the details, inducing them to essentially fashion a system of customary legal order rather than imposing one upon them. We could reasonably expect this customary order to be the most optimal for those participants and even internalized over time. The many benefits of customary

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81. Parisi, *supra* note 78.

82. R.D. Cooter, *Against Legal Centrism*, 81 CAL. L. REV. 425, 425 (1992).

law would follow: these rules would have a greater chance of being more efficient, robust, pragmatic, and self-enforcing.

As with the example of Bartley and his friends, this ordering would harden into established customary order through the sheer force of repetition. To sharpen my point: imagine if this process was repeated over a period of one hundred years, or five hundred. Indeed, a very powerful and well-articulated system of customary law would undoubtedly emerge. In this example, the State is in essence sub-contracting law-making and enforcement to the actors themselves, ensuring only that they are bound together into patterns of repeated interaction. The State simply creates the crucial dynamic of repeated interaction founded on a core ongoing positive duty and then allows the parties to produce more sophisticated rules related to this newly created point of interaction—"planting seeds of order" centered around the principle of lawn care. The rest is a natural process. Again, the standard mechanisms that help sustain customary law would likely arise, i.e. reputational costs, reciprocal benefit, and internalization.

## *2. Social goals more clearly in the public interest: various possibilities*

Of course, the social good in promoting proper lawn care is, to be charitable, questionable. However, there are social goals that are more clearly in the public interest. Customary law cultivation could be used to achieve many of these. Examples include bottom-up: community security; local poverty relief; sanitation standards; road safety maintenance; conservation and environmental efforts; public health initiatives; community construction projects; agricultural projects; educational services; various forms of community service; and so on and so forth. The desirability and appropriateness of these programs would vary from place to place. For example, customary systems that promote water conservation may only suit drought-prone regions while road safety maintenance may only be appropriate for extremely remote, rural areas of the country. Similarly, customary systems aimed at security may only be useful in either crime-ridden urban areas or very remote areas where police security may not be as readily available. Systems of customary order related to forest fire prevention may be more useful to cultivate within communities in the forests of Washington State

than in downtown Manhattan. Triggering customary order may be especially useful within certain commercial communities where the policymakers may wish to promote specific standards—e.g. hygiene or safety practices. Such communities represent a defined subset of society already possessing a certain commonality and a natural degree of repeated interaction, and so it may prove even easier to trigger customary order with respect to them.

An historical example that structurally parallels the above model of collective lawn care is that of collective barn building, a custom once extremely common in 18th and 19th-century rural North American communities known as a “barn raising” or a “raising bee.”<sup>83</sup> The practice involved the building or repair of a barn collectively by all the members of the community for a particular member, an act that was reciprocated at a later date.<sup>84</sup> The custom of barn-building was able to develop because the nature of these rural communities ensured sufficient repeated interaction. However, while social dynamics that are pre-disposed to relationships of repeated interaction (such as residential communities) are natural fits, it is important here to note that the small group dynamic may be artificially constructed. As commercial customary law demonstrates, it need not depend on actual physical proximity; it merely depends upon a sufficient degree of repeated interaction. Moreover, while the essential ingredient is that the actors are linked together in relationships of repeated interaction, the particular form that this takes is less important: it may be many actors performing a task in relation to one member (as in the lawn care example); it may be a group of actors interacting with a larger group; it may be a single actor performing an action for many actors; it may be actors working in dyadic relationships (in pairs); or it may be an entire group of actors working in concert to achieve some collective end. Indeed other variations could be imagined. Different structural arrangements may be more or less suited to particular situations. The key element, however, is creating relationships of repeated interaction.

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83. See generally TINA LONSKI, *BARN RAISING: STORIES OF A VANISHING AMERICAN LEGACY* (2008).

84. *Id.*

### 3. *Recycling*

For the most part, top-down law is a cumbersome method of legal creation. The more nuanced approach of cultivating customary law can, in the right circumstances, prove to be a more agile technique for shaping social order. Such a light-footprint approach may be more suited to certain areas than the brute force of top-down law. This is particularly true for areas where direct top-down monitoring and enforcement may be taxing, logistically challenging, or raise privacy concerns. Recycling is a good example. Indeed, in the case of recycling, “[m]onitoring and enforcement . . . can often be extremely difficult, expensive, or impossible. Simply mandating a reduction in garbage disposal, for example, can turn government officials into garbage snoops.”<sup>85</sup> Rather than forcing people to recycle through the brute force of top-down coercion, the State can instead attempt to achieve this indirectly by cultivating customary law related to recycling. This time, let us use the example of a floor in a residential high-rise to flesh out in greater detail the various ways customary order could, in theory, be triggered. One variation could require one resident to sort the recycling for the entire floor. This would be performed on a rotating basis so that the duty would eventually pass to every resident on the floor, ensuring reciprocity and an equitable distribution of responsibility.

If a more complex system of order is desired, all the residents of the floor could be mandated to perform the task as a single group thereby allowing specific roles and duties to be naturally assigned as the residents interacted. A more complex customary order such as this has the potential to more easily build on itself as it responds to new ideas, requirements, tweaks and changes regarding the activity—new community rules may emerge endogenously as the group coordinates cooperation. Another variation could yoke the residents together into dyadic relationships: Neighbor A could sort the recycling for herself and neighbor B once a week, and then neighbor B can do likewise the following week.<sup>86</sup> Still another, even more creative variation would be

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85. Carlson, *supra* note 14, at 1245.

86. This variation, however, suffers from the limitation of being vulnerable to mutually

to link the residents into dyadic relationships that form an overlapping chain: i.e. neighbor A bears the recycling duty for neighbor B, neighbor B for neighbor C, neighbor C for neighbor D, and neighbor D for neighbor A (closing the chain). Alternatively, the chain could connect the entire building (or an entire city). Again, the duty would be established on an alternating basis in order to ensure reciprocity.

Regardless of the particular form, the idea is simply to bind actors together into relationships of repeated interaction. Again, the large-group problem is the lack of repeated interaction. The solution, therefore, is simply to create the conditions so that there is repeated interaction. The dyadic variations above mimic the structural dynamic of a commercial community, where traders interact with each other directly and in an indirect yet interconnected fashion. Different variations may be more or less appropriate depending upon the particular form of customary order the State seeks to foster (i.e. simple or complex). In each variation, non-compliance would be subject to a small fine. While fee-riding may be “reported” (to use a chilling phrase), in practice this is unlikely to occur very often: if customary ordering successfully sets in, the system should be largely self-sustaining without the need to rely upon State enforcement. Social pressures, reputational costs, reciprocal benefit, and internalization will likely be more than adequate to ensure compliance. Anti-smoking laws are a good example of this dynamic. In many western countries, customary norms prohibiting smoking in certain public areas have been so successfully cultivated that they are now widely observed while in actual practice rarely formally enforced. Enforcement was only needed in the initial stages. A similar dynamic can be observed in the case of laws regarding littering, dog waste, and spitting in public.<sup>87</sup> Customary rules have a very healthy chance of becoming self-enforcing. Indeed, the twin elements of repetition and time can forge an extremely robust, self-sustaining system of customary law.

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agreed upon defection. *See infra* note 109.

87. CHESTER N. MITCHELL, *THE DRUG SOLUTION* 200 (1990).

*C. WWII Scrap Drives and Chinese Work Units: Historical Examples of the State Fostering Customary Order*

The unpersuaded reader should consider that schemes aimed at fostering specific systems of customary order have been implemented in the past with great success. Such schemes capitalized on the order-inducing effects of repeated interaction. A good example is that of wartime recycling schemes. During WWII, local “scrap drives” (and a complimentary food rationing program) were initiated by communities across the United States to collect materials vital to the war effort (as in many other countries).<sup>88</sup> Government undertook a massive effort to promote customary norms that promoted recycling.<sup>89</sup> Local salvage committees recruited thousands of women and children to regularly go door-to-door and collect scrap material.<sup>90</sup> Crucially, these scrap drives were community-based and carried out on a local level. Different rules emerged depending on location and community. While the collection methods varied, these efforts were all “cleverly designed to maximize face-to-face contact among potential participants. . . .”<sup>91</sup> As a direct result of these citizen-led programs, recycling and rationing quickly set in as pervasive customary norms—the overriding cultural ethos became one of conservation for the public good.<sup>92</sup> A robust system of customary order related to recycling materialized. Scrap drives became a common community activity, popping up across the country. Schools, classes, service clubs, towns, counties, and even states competed with each other to collect scrap for the war effort.<sup>93</sup> Initially, such rationing was completely voluntary; only later as the war progressed were these norms finally codified into formal law (when they were already widely established).<sup>94</sup> Citizens would admonish those who did

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88. ANNE E. MACZULAK, *RENEWABLE ENERGY: SOURCES AND METHODS* 46 (2010).

89. Carlson, *supra* note 14, at 1257.

90. KEN GEISER, *MATERIALS MATTER: TOWARD A SUSTAINABLE MATERIALS POLICY* 217 (2001).

91. Carlson, *supra* note 14, at 1258.

92. CARL A. ZIMRING, *CASH FOR YOUR TRASH: SCRAP RECYCLING IN AMERICA* 94 (2009).

93. R. DOUGLAS HURT, *THE GREAT PLAINS DURING WORLD WAR II* 95 (2008).

94. DAVID WHITE & DANIEL P. MURPHY, *THE EVERYTHING WORLD WAR II BOOK: PEOPLE, PLACES, BATTLES, AND ALL THE KEY EVENTS* 284 (2007).

not comply. No doubt, social pressures, reputational concerns, and internalization played a significant role in bolstering customary order related to war-time recycling.

The results of scrapping efforts were impressive. Prior to the war, large-scale recycling was comparatively rare.<sup>95</sup> During the war, the United States, a country of roughly 138 million at that time, recycled approximately twenty-five percent of its total refuse.<sup>96</sup> Official strategies relied mostly on marketing campaigns and patriotic appeals.<sup>97</sup> The success, however, can be largely attributed to the fact that these programs were created and implemented on the local community level where repeated interaction was already vibrantly present. While the recycling initiatives were no doubt guided by a vague appreciation for the power of creating order on the localized level where repeated interaction is rife, it is interesting to consider how much more powerful this kind of social engineering might have been if it had more efficiently utilized the machinery of customary ordering by strategically constructing such relationships. Indeed, absent the powerful patriotic sentiment aroused by war, to achieve comparable levels of success, policymakers would need to go about planting seeds of order in a more targeted fashion than the haphazard strategy of mass marketing campaigns.

There are other, more uncomfortable examples (at least for the average American) of the effectiveness of partitioning large numbers of people into smaller groups in order to engineer customary order. Indeed, throughout the pre-reform era (prior to the 1980s), this approach was a fundamental organizational principle of Chinese communist urban administration.<sup>98</sup> While the structural mechanics of fostering customary order through repeated interaction was not understood in the context of game theory, its effects were clearly not lost on Chinese policymakers. Chinese citizens were partitioned into small

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95. H. LANIER HICKMAN, *AMERICAN ALCHEMY: THE HISTORY OF SOLID WASTE MANAGEMENT IN THE UNITED STATES* 9 (2003).

96. MACZULAK, *supra* note 88, at 47.

97. ZIMRING, *supra* note 92.

98. Janet Weitzner Salaff, *Urban Residential Communities in the Wake of the Cultural Revolution*, *THE CITY IN COMMUNIST CHINA* 289, 289 (John Wilson Lewis ed., 1971).



networks that largely defined their social world<sup>99</sup> (similar social cells were common in the Soviet Union and other communist countries<sup>100</sup>). In China, these networks were patterned around an individual's daily repeated interactions and so were based upon the person's place of employment.<sup>101</sup> These work units, the *dan wei* (單位), maintained basic services such as housing, child care, dining, medical care, shops, etc.<sup>102</sup> They were in essence "small societies," artificial villages of a sort.<sup>103</sup> All government departments, state-owned companies, factories, shops, hospitals, and universities and schools each represented a single *dan wei*. The size of a *dan wei* varied considerably depending on the institution that it represented; however, the average size was approximately 100 members<sup>104</sup>—a good number to ensure a healthy degree of repeated interaction and maximize the small-group dynamic to cultivate customary order.

While in the countryside the close-knit ties of the village remained, carving out small clusters of actors who repeatedly interacted was crucial in larger urban areas where repeated interaction could vanish inside the anonymity of a large city. The solution: Chinese society was "sliced into millions of isolated *danwei*." Chinese society was a giant honey comb: "each *danwei* formulated an independent and closed cell." The *dan wei* system was the main vehicle through which the State executed its political and social policies. Through it, the State "grew" rules, values, assumptions, and norms that promoted collectivist values.<sup>105</sup> For the individual, the rules and norms of their *dan wei* reigned supreme.<sup>106</sup>

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99. *Id.*

100. XIABOLO LÜ & ELIZABETH J. PERRY, DANWEI: THE CHANGING CHINESE WORKPLACE IN HISTORICAL AND COMPARATIVE PERSPECTIVE 21 (1997).

101. Salaff, *supra* note 98.

102. LÜ, *supra* note 100.

103. *Id.*

104. KERRY BROWN, FRIENDS AND ENEMIES: THE PAST, PRESENT, AND FUTURE OF THE COMMUNIST PARTY OF CHINA 63 (2009).

105. DAVID BRAY, SOCIAL SPACE AND GOVERNANCE IN URBAN CHINA: THE DANWEI SYSTEM FROM ORIGINS TO REFORM 145 (2005).

106. *Id.* at 144.

No doubt, social pressures, reputational concerns, reciprocal benefit, and internalization aided by repeated interaction drove this process of norm formation forward, displacing the need for top-down enforcement. The *dan wei* was “the cornerstone of. . . social control in the cities.”<sup>107</sup> As such, the strategy was highly effective.<sup>108</sup> The *dan wei* provided a degree of repetition more than sufficient to generate and solidify a discrete system of customary order the State could channel in a direction of its choosing.

Second World War scrap drives and Chinese communist work units may strike the reader as very different social projects. Yet in both these cases the same basic strategy was invoked to cultivate a certain customary order: the crucial characteristic of the small group—repeated interaction—was indirectly exploited in order to foster customary norms. Both scrap drives and the *dan wei* system were constructed around pre-existing patterns of interaction represented by a social network of some kind. Scrap drives were centered on schools, companies, churches, or entire towns. A *dan wei* represented a company, school, or government department. In both cases, the small-group dynamic was harnessed to cultivate customary order—not with a precise understanding of game theory, but with a general appreciation of the customary order-inducing effects of small-group interaction. The present thesis, however, contends that there need not even be a pre-existing pattern of interaction: positive legal duties may be used to artificially create such patterns. The State only need bind actors together into relationships of repeated interaction centered around a simple base obligation, and then let the natural processes of bottom-up ordering take effect. Such duties would be oblique and rudimentary so that specific rules and norms emerge in due course as the targeted parties interact and established norms set in.<sup>109</sup> Many socially desirable ends could be achieved in this way, all without the need for top-down intervention

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107. JIANFENG WANG, *THE POLITICS OF NEIGHBORHOOD GOVERNANCE IN CHINA* 6 (2008).

108. *Id.* at 7.

109. While binding together large groups of actors into such relationships is preferable, there is no reason why this could not just as easily be applied between just two participants (as touched upon above). However, given the possibility of mutually agreed upon defection, a more robust system of bottom-up order is more likely in the case of large groups of actors.

and micro-legal creation. As the relationships between these actors strengthen, crystallizing into norms, the State would likely find it less necessary to enforce the initial base requirement; the entire system of order should stand a good chance of becoming self-enforcing and even self-generating. The State only need to give the dynamic an initial push by laying the structural framework for repeated interaction; in its wake, customary order may then set in and flower in complexity.

*D. The Normative Argument Against Cultivating Customary Law*

That said, there are, however, painfully obvious obstacles to this kind of legal-social engineering. Indeed, there are three main problems with this idea: (1) the logistical challenge in creating relationships of repeated interaction; (2) the general discomfort most people have with the idea of social engineering; and (3) the large-scale imposition of positive duties is an unacceptable encroachment upon individual liberty. These problems need to be addressed even if they cannot be entirely resolved. As to the first, the pre-existing relationship of the individuals between whom we wish to trigger customary ordering would have to be one that could be transformed into one of an ongoing, repeated nature. If it is logistically impossible to lock participants into relationships of repeated interaction, a customary law cultivation policy, no matter how ingenious, is simply not possible. This, however, is highly solvable. This could be done in most cases if the law is well-targeted and thoughtfully crafted. As pointed out above, a lack of physical proximity is not necessarily an obstacle to creating such relationships.<sup>110</sup>

However, the second and third problems pose a far greater challenge. This is largely because the obstacles here are not structural; they are normative. Here we move from a descriptive account of cultivating customary law to a normative critique of the strategy. Indeed, we would be grossly remiss if we were to simply ignore the normative implications of the present proposal. Social engineering of this kind just seems anathema to a liberal and democratic society. Indeed, the above

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110. See *supra* Part III.C.2.

example of forced lawn care conjures up chilling images of some dystopic Orwellian State. At best, such policies come across as offensively paternalistic.<sup>111</sup> Yet this does not have to be the case. Indeed, Lessig, Sunstein, Kahan, and other legal scholars warm to the idea of using policy to shape social norms; contending that in a pluralistic society the risk of totalitarianism may be safely contained.<sup>112</sup> In fact, in the last two decades there has been an explosion of interest in social norms within the legal academy,<sup>113</sup> particularly in the possibility of “social norm management” as a regulatory tool. Moreover, we should appreciate that it may not actually even be a matter of choice whether or not the State should shape informal social order. As some of these scholars point out, norm-shaping may be an inescapable consequence of law, something that occurs regardless of whether or not it is planned.<sup>114</sup> This being the case, it behooves us to approach the cultivation of customary order in a reflective manner that allows for the positive maximization of the effect. In the end, the choice may be only whether or not to do it smartly.

The third problem, however, may prove insurmountable. Even if we assume that ongoing positive duties can successfully trigger customary law and can accept the goal of social engineering as legitimate, the large-scale imposition of positive duties upon individual members of the public runs directly counter to the fundamental notions of individual freedom that undergird a liberal democratic society. It is difficult to get around this. The problem is that, compared with negative duties, positive legal impositions are far more restrictive of individual liberty in that they demand action to satisfy the duty.<sup>115</sup> This is a dilemma, likely an insurmountable one if we are to maintain the current

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111. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2035 (1996) (discussing the view of norm-shaping as paternalistic).

112. See Lessig, *supra* note 10; Sunstein, *supra* note 13; Kahan, *supra* note 10. See also Robert Ellickson, *The Evolution of Social Norms: A Perspective from the Legal Academy*, SOCIAL NORMS 35, 60 (Michael Hechter & Karl-Dieter Opp eds., 2001). But see POSNER, *supra* note 13 (cautioning against such approaches).

113. Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 542 (1998).

114. See POSNER, *supra* note 13; Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996).

115. TOUCHIE, *supra* note 46.

social and civic standards of our society. Indeed, this objection may prove fatal to the present project. Let us explore this final point in the context of existing law.

Whatever benefits might be gleaned from fostering customary law, in a normative sense the trade-off is arguably too high.<sup>116</sup> Traditional liberal individualist doctrine suggests that the gratuitous foisting of positive duties upon private citizens is an unacceptable assault upon individual freedom.<sup>117</sup> Such arguments arise, for example, in relation to non-liability for omissions in Anglo-American criminal law.<sup>118</sup> Explaining why we do not, for example, impose a duty to rescue someone in distress—why it is for instance perfectly legal for a man to watch a infant drown in a foot of bathwater and do nothing—one English jurist asserts, “In political terms it is less of an invasion of an individual’s freedom for the law to require him to consider the safety of others in his actions than to impose upon him a duty to rescue or protect.”<sup>119</sup> This principle of individual autonomy is also eminently clear in the case of, for example, specific performance in contract and mandatory injunctions in tort that require a party to perform an affirmative act or a specified course of conduct. Such injunctions are quite rare in practice and are granted not as a matter of right, but in the exercise of judicial discretion.<sup>120</sup> The extreme reluctance of courts to award specific performance in circumstances where damages are a viable alternative underscores the hesitation with which the law views the idea of forcing an individual to perform an act rather than merely refraining from an act.<sup>121</sup> Indeed, the law is far more comfortable telling people what they cannot do as opposed to what they must do. The individual’s right

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116. Not to mention the difficulty policy-wise in determining what is even to be considered as a worthy aim for which we should attempt to trigger customary law.

117. Smith, *supra* note 41.

118. JANE WRIGHT, TORT LAW AND HUMAN RIGHTS 129 (2001). Some common law jurisdictions make it a criminal offense not to give aid to those in peril when doing so could have been performed with no danger to oneself. These “good Samaritan” statutes have been enacted in some states in the United States. RICHARD G. SINGER & JOHN Q. LA FOND, CRIMINAL LAW 41 (2010). I return to positive duties in relation to omissions below.

119. *Stovin v. Wise*, [1996] A.C. 923, 943.

120. *Morrison v. Work*, 266 U.S. 481 (1925).

121. JENNY STEELE, TORT LAW: TEXT, CASES, AND MATERIALS 650 (2007); THOMAS KREBS, RESTITUTION AT THE CROSSROADS: A COMPARATIVE STUDY 22 (2001).

against overburdensome state legal encroachment, in fact, informs the situations where positive duties are imposed upon the individual. With very few exceptions, in situations where positive duties do crop up the party subject to the duty has in a sense acquiesced to the arrangement that has given rise to the duty.

The term *consensual law* is used in public international law to describe law voluntarily adopted by states, such as treaty obligations.<sup>122</sup> However, it can be used here in an analogous sense: to describe legal duties voluntarily assumed by private parties. Contract encapsulates consensual law. It is where it comes up most often and most clearly, yet consensual law arises in other areas of law as well. With regards to the instances where positive legal duties do arise in areas such as tort, property, family law, and criminal law, the law is unique in that the actors willingly open themselves up to the duty through their choice of actions, be this a duty of care, a fiduciary relationship, as a participant in a marriage, or even parenthood.<sup>123</sup> One chooses to assume the role of a trustee, a doctor, an accountant, a business partner, a driver, a negligent manufacturer of ginger beer, a spouse, or a parent;<sup>124</sup> it is not unilaterally foisted upon one by the State. People are not born into such social roles; they choose to adopt them. A duty of care, for instance, arises in tort where an actor chooses to undertake an activity that may reasonably harm another.<sup>125</sup> There are important political, social, policy, and even economic reasons why the State may conclude

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122. JAMES DAVID ARMSTRONG & JUTTA BRUNEE, *ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW* 101 (2009).

123. Though it should be noted here again that positive duties to others do not always imply that the actor must undertake a positive action of some kind; satisfying the duty may simply be a matter of refraining from an action. It may be, for instance, to refrain from giving uninformed financial advice. In this case it is not a positive duty to act; it is a negative duty to refrain from acting. *See supra* note 50.

124. Although one could of course argue that the role of parent is sometimes not a voluntary commitment. Yet in most cases it is, at least in terms of the conduct that precipitates it.

125. NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, *TORT LAW* 59 (2008). Indeed, this notion of the actor voluntarily entering into the situation where a duty of care arises may be a useful analytic tool with which to better understand the special relationships that give rise to a duty of care.

that it is necessary to impose a positive duty.<sup>126</sup> However, for our purposes, in situations where the State does issue duties requiring positive action, it is notable that individuals have implicitly or even explicitly assented to it. Thus, arguably, the integrity of their individual liberty remains uncompromised. Such individuals have, through their very actions, consented to the positive duty—it is in this sense, consensual law.

This is true even in the case of criminal law where positive duties to others are imposed in some instances—a voluntary strand can still be discerned. For example, the requirement that a parent must care for their child; contracts to provide personal care; the voluntary assumption of care that isolates an individual; the creation of peril (e.g., pushing someone who cannot swim into a lake); the duty to control the conduct of another (e.g., as with an employer and her employee); the duty of a landowner (e.g., the duty for a store owner to provide safe conditions for her patrons).<sup>127</sup> In all these cases, the party that assumes the positive duty does so as the result of their own voluntary actions, whether this be the parent, the nursing home, the reckless teenager pushing his friend into a lake, the businessman failing to stop his chauffeur from speeding, or the hotel owner failing to unlock the hotel's fire exits. The element of voluntariness underlies all of these situations. This voluntary model is unmistakable in the law related to omissions where the primary justification for a duty to act is based upon the conceptual framework of a contract.<sup>128</sup> The juridical basis for the existence of a duty to act was historically the notion of a contract that “based

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126. For example, scholars point out that “the Industrial Revolution and the railways operated as catalysts in the emergence of the tort of negligence.” PAUL WARD, *IEL TORT LAW IN IRELAND* 46 (2010). In the case of expanding the notion of a duty of care in tort the varied nature of these considerations is eminently clear. See CATHERINE ELLIOT, FRANCES QUINN, *TORT LAW* 18 (2007).

127. SINGER & LA FOND, *supra* note 118, at 40.

128. ALAN NORRIE, *CRIME, REASON, AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW* 125 (2009).

liability on the individual's prior consensual act."<sup>129</sup> Indeed, this consensual model remains today a key conceptual foundation of the law of omissions,<sup>130</sup> although its presence is sometimes obscured.<sup>131</sup>

All of this bodes quite badly for the prospect of using positive legal duties to trigger customary law. The imposition of positive duties where these duties are not voluntarily adopted stands in contrast to the fundamental tenets that undergird a free society. Yet, that said, the imposition of burdensome positive duties by government upon its citizens is certainly not without precedent. For example, governments often mandate community service as a part of citizenship requirements or in lieu of military service. In times of war, positive duties are routinely foisted upon the public writ large (though not owed specifically to other private parties). Military conscription is of course the classic example. However, such duties have taken many forms. War-time recycling discussed above is a good example. Another example of positive duties imposed upon the public on a truly massive scale is blackout regulations in Britain and along the U.S. eastern seaboard during WWII.<sup>132</sup> Indeed, in times of national emergency, the sanctity placed upon the right of the individual not to have positive duties foisted upon her diminishes significantly.

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129. *Id.* This is clear, for example, in the case *Instan* [1893] 1 Q.B. 450, where the court held that a niece had a duty to care for her aunt based on the idea that she had implicitly voluntarily undertaken a contractual-like duty to look after her ailing aunt in return for her keep, although in the strict sense no intention to create legal relations ever occurred. In *Gibbins and Procter* [1918] 13 Cr. App. R. 134 (Eng.), a duty was imposed upon a common law wife to care for her partner's child because she had voluntarily assumed the duty when she chose to live with the child's father. Similarly, in *Stone and Dobinson* [1977] Q.B. 354 (Eng.), an affirmative duty was imposed upon a couple to care for the boyfriend's sister because they had consented to take her in.

130. NORRIE, *supra* note 128.

131. A good example of this obscuring would be the case of *Miller* [1982] UKHL 6, where a squatter accidentally set fire to an abandoned house then chose to not douse the flames. The court "discovered" a new legal duty at common law related to not rectifying accidents that oneself has created where one can easily do so. I submit, the court groped its way to this convoluted duty because the consensual nature underlying the case was obscured by the fact that the fire was set accidentally; nevertheless, the squatter assumed a duty to act when he voluntarily chose to squat in the house. That the fire was set accidentally was incidental. That the squatter voluntarily entered into the situation (squatting in the house) gives rise to the intuitive feeling that the defendant should bear some positive duty to act.

132. DAVID E. NYE, *WHEN THE LIGHTS WENT OUT: A HISTORY OF BLACKOUTS IN AMERICA* 37–66 (2010).



Yet, in the final analysis, radical socio-legal engineering crafted to exploit the self-generating properties of ongoing positive duties by increasing the number of such duties between private parties would most likely be viewed by most as simply an unacceptable assault upon individual liberty and for this reason alone is probably not feasible. The extent to which the State can unilaterally impose positive duties is profoundly limited by the concept of individual liberty, which stands as a bedrock principle of modern western society. This is clearly reflected in our law. It is a well-entrenched principle in our law and social ethos that the State may reasonably impose such duties only within the confined boundaries of consent, and because of this, customary law cultivation as a child of policy would likely not sit well with our sense of social equity.

#### IV. CONCLUSION

This paper posited a somewhat radical idea: by creating positive duties between individuals government can trigger the emergence of customary law in a controlled manner. While the idea involves a certain degree of theoretical complexity, at its heart it is in fact a simple and intuitive point: the more parties repeatedly interact the greater is the potential that a stable cooperative order will emerge that will give rise to customary rules. Thus a way to trigger customary law is simply to create conditions that allow for repeated interaction. Such an approach, if viable, would be a particularly powerful legislative tool. Harnessing the energy of bottom-up order holds great promise in terms of creating, sustaining, and even redirecting social order. Whether or not this strategy can be successfully implemented ultimately remains an open question, one subject to the experiment of actual application. Short of this, its viability is difficult to assess. Yet beyond the issue of mere technical feasibility, there are serious normative implications that would need to be carefully weighed. While this kind of socio-legal engineering may prove technically possible, the idea cannot help but leave a morally unpalatable taste in the mouth, and as such it is difficult to see how such policies could ever be casually undertaken. Nevertheless, while it may suffer from some fundamental limitations (at least in the normative realm), given the many advantages of customary law over that of formal top-down law, it is an attractive concept. As for the

normative implications of such a policy, I leave that for others to consider for themselves with respect to their own moral intuitions.