

277. "Social Norms: Internalization, Persuasion, and History." *Law & Society Review*, Vol 34, No. 1 (2000), 157-178.

I. The Rediscovery of Norms

Legal scholars have rediscovered social norms. For decades, the insights and findings of law and society⁽¹⁾ were largely ignored, and law and economics--which mostly ignores social norms--was all the rage. In the past few years, however, new powerful essays about social norms have begun appearing in law reviews.⁽²⁾ As Richard Epstein wrote recently, "the subject of social norms is once again hot."⁽³⁾

Some of the scholars at the forefront of this revival attempt to integrate social norms into the law and economics paradigm⁽⁴⁾ while others may fit better under the emerging "law and socio-economics" model, which combines the law and economics and law and society perspectives into a single discipline.⁽⁵⁾ Much more is at stake than the division of labor among academic disciplines; at issue are different conceptions of human nature and the social order, of the ways people behave, and of the ways laws can both modify and be modified by social conduct.

To highlight the alternative approaches to the study of social norms, I examine three pairs of opposing concepts central to a full exploration of the subject: (a) whether social norms affect individual behavior merely as environmental/external factors or whether they also shape people's intrinsic predispositions; (b) the specific processes by which norms influence people (i.e., whether preferences are considered predetermined or assumed to be modifiable as a result of internalization and persuasion); and (c) the ways social norms themselves are formed (whether merely via rational choice or also through historical transmissions). Law and economics scholars tend to use the first elements of each of these pairs (environmental factors, predetermination, and intentional choice) to integrate social norms into their models, to depict the actor as a free agent, and to portray the social order as based on aggregations of voluntary agreements. The law and society approach is based upon the opposite elements of the pairs: intrinsic predisposition, internalization and persuasion, and history. Law and socio-economics combines these two sets of elements in ways to be discussed.

All the legal scholars who study social norms stand out compared to the much larger number of colleagues who have yet to include this important concept in their scholarly paradigm. These same pioneering legal scholars differ, though, in terms of the concepts they draw on to conceptualize social norms. Only some deal with internalization, still fewer with persuasion, and next to none with the role of history. This essay argues that a full analysis of social norms requires the inclusion of all three conceptions. One can view the three concepts as the building blocks of a pyramid whose foundation is secure, while the other tiers are best shored up--or, in some cases, constructed.

After briefly highlighting the importance of social norms for legal scholarship, this essay examines the core concepts of law and socio-economics and the importance of these for the understanding of social norms in legal studies in general.

II. Social Norms: a Major Foundation of Social Order

Social norms and laws both serve as foundations of social order, helping to ensure that people will act in ways considered pro-social by their society, from taking care of their children to paying their taxes. The relationship between social norms and laws is complex, and not the subject of this essay. It suffices to note for present purposes that it is widely held that strong social norms reduce the burden on law enforcement; that laws supported by social norms are likely to be significantly more enforceable; and that laws that are formulated in ways that are congruent with social norms are much more likely to be enacted than laws that offend such norms.

Robert Ellickson points out that social norms theory fills a significant lacuna in traditional law and economics models through its assertion that decentralized mechanisms also have an important role to play in maintaining social order:

Oliver Williamson has used the phrase *legal centralism* to describe the belief that governments are the chief sources of rules and enforcement efforts. The quintessential legal centralist was Thomas Hobbes, who thought that in a society without a sovereign, all would be chaos...Hobbes apparently saw no possibility that some nonlegal system of social control--such as the decentralized enforcement of norms--might bring at least a modicum of order even under conditions of anarchy...The seminal works in law and economics hew to the Hobbesian tradition of legal centralism.⁽⁶⁾

Epstein captures the importance of social norms, in a few well chosen phrases:

Even persons whose own world views are widely divergent often share one common belief about their preferred norms: they all believe the norms should be legally enforced. The set of purely social norms is often regarded as falling in an awkward no-man's land between the world of purely subjective preferences (vanilla against chocolate ice cream) and the law of fully enforceable legal norms. The older term, "imperfect obligation," refers to obligations enforced by conscience and social pressures but not law, and was thought in classical natural law theory to represent the *correct* way for society to implement norms of benevolence.⁽⁷⁾

Tracey Meares puts it succinctly: "It is time for us to take seriously the notion that social norms are better and more effective constraints on behavior than law could ever be. It is time to give norms a chance."⁽⁸⁾

In short, the study of social norms is of considerable importance for full study of the law.

III. A Methodological Aside

Recognizing the very existence and importance of social norms is an important step in constructing a more encompassing and sounder analysis of the law than law and economics has traditionally provided. Seeking such a construction is clearly one goal that compels at least some members of this new scholarship.⁽⁹⁾

There is no need to list again the various limitations of the law and economics model,⁽¹⁰⁾ save for two because they are directly relevant to the steps next undertaken. Law and economics proponents argue that while their paradigm may be unrealistic, it is highly parsimonious (or "simple") and thus generates valid predictions even if based on false models.⁽¹¹⁾ Actually, while it is true that neoclassical economics⁽¹²⁾ (the foundation of law and economics) starts from a few basic axioms,

numerous ad hoc assumptions are added before most empirical observations can be made. For instance, in his attempt to explain addiction, Gary Becker uses 18 pages of ad hoc assumptions and mathematical equations.⁽¹³⁾ The same holds true for many other economic theorists.⁽¹⁴⁾ And neoclassical economics, unlike practically all other sciences, very often "fits" mathematical formulas or conceptual exercises to previously collected data, rather than first formulating hypotheses and then collecting new data to test them.⁽¹⁵⁾ But the record of predictions made based on these models is far from compelling.⁽¹⁶⁾ It hence seems reasonable to seek to establish whether a paradigm whose basic assumptions are somewhat less parsimonious, but use fewer ad hoc assumptions, might provide better understanding and predictions of economic and especially social behavior, including of course those generated by laws. Three elements of a such paradigm, that of law and socio-economics, are explored next.

IV. Social Norms: Environmental and Intrinsic

A socio-economic paradigm draws on the observation that social norms are not merely a part of the actors' environment but also affect their intrinsic predispositions. "Intrinsic predispositions" refers to the directions in which an actor would channel her efforts if left to her own devices. They reflect a combination of biological urges and cultural imprinting. Such predispositions can be rather open-ended (for instance, the quest for food), somewhat specified (the quest for healthy food), or even highly so (the quest for a particular kind of healthy food). Specified predispositions often are referred to as preferences. That is, intrinsic predispositions include preferences but encompass other concepts as well.

Not all of the new studies of social norms have incorporated into their paradigm the observation that social norms help shape intrinsic predispositions. Some legal scholars treat social norms basically as one more factor in the environment that the actor faces, an assumption that enables these scholars to incorporate social norms into law and economics without modifying the paradigm's neoclassical tenets. In such treatments, social norms are treated as one more source of costs the actor considers (e.g., would it annoy my neighbors if I were to operate my chain saw late at night, and would the gains from doing so exceed the costs of my neighbors' censure?), as one more constraint under which actors labor, or as one more resource the actor can draw on. Thus, Eric A. Posner writes: "...a norm constrains attempts by people to satisfy their preferences."⁽¹⁷⁾

In the same vein, Lawrence Lessig notes that social norms do not merely impose a cost but also serve like economic resources--for instance, when norms motivate people to work--but he still treats norms basically as external, environmental factors. Lessig uses the term "social meanings" to describe the shared cultural understandings of concepts like right and wrong that norms rely upon. He then observes that "these social meanings impose costs, and supply benefits to, individuals and groups...."⁽¹⁸⁾ In such a treatment norms are akin to droughts or rain, supply interruptions or new roads--that is, changes that take place outside the actor, which the actor includes in her calculations and choices.

Along the same line, Cass Sunstein writes "...we can understand a norm--with respect to choice--as a subsidy or a tax."⁽¹⁹⁾ Sunstein elaborates:

Hence the emphasis on social norms should not be seen as an attack on rational choice approaches to social and political problems. From the standpoint of an individual agent, norms provide a part of the background against which

costs and benefits are assessed; more specifically, they help identify some of the costs and benefits of action. From the standpoint of the individual agent, this is hardly irrational, and it is hardly inconsistent with self-interest. (Whether certain norms are rational for society as a whole is a different question. Undoubtedly some of them are not.)⁽²⁰⁾

I have no quarrel with these statements about the environmental roles of social norms, and the recognition of the importance of social norms in this external capacity clearly advances the study of law. However, these statements do not encompass a major way in which social norms affect behavior in general, and the law specifically. An example might help introduce the point. I start by examining the environmental factors and move to the intrinsic ones: if a Jewish butcher in an Orthodox Jewish community is unwise enough to try to sell pork, he will soon learn the full constraining power of social norms. He will lose his customers overnight and be ostracized by members of his community. Moreover, the community is likely to draw on public authorities to prevent him from acting in a way that violates the community's very strongly held norm against consuming pork. Norms clearly do constrain behavior, externally.

However, social norms have yet another important effect on human behavior: they are a major factor among those that shape predispositions, the wants of people, and the bases of individual choices.⁽²¹⁾ Beyond affecting the content and intensity of numerous particular predispositions, social norms help form (and re-form) the self, by profoundly influencing people's identities, their world views, their views of themselves, the projects they undertake, and thus the people they seek to become.⁽²²⁾

To return for a moment to our butcher, the notion that he might sell pork would seem such a gross violation of his values and preferences that he would likely dismiss the notion without any serious consideration, were it to ever cross his mind in the first place. To sell pork would be profoundly incompatible with who he is, the way he perceives himself, and who he seeks to become. This aversion to pork reflects no constraint on his choices in the way this term is typically used, because the actor in this case never was inclined to act in this way in the first place. One cannot constrain or suppress (and hardly needs) a non-existent urge, want, or preference. In short, this example serves to illustrate that social norms, aside from their environmental role, also play a key role in ensuring that certain preferences will never be formed in the first place, while others will be strongly held.

The significance of the distinction between treating social norms as part of the actor's environment, affecting costs and constraints, and treating them as factors that shape the actor's predispositions, stands out in several important respects. First of all, the contrast is apparent in the levels of compliance with social norms achieved, the level of social order sustained, and the relative costs of enforcing norms. If people follow their community's social do's and don'ts because they see the social norms as costs or constraints, they will tend to violate the norms when the benefits of abiding by them are lower than the gains of violating them and the risks of detection are low (e.g., dumping garbage at the side of the road if the town dump has been moved to a far away place). If norms shape their preferences, people will tend to abide by these norms because such adherence is a source of intrinsic affirmation.⁽²³⁾ They will pray not out of fear that they will otherwise be beaten (as people are in some fundamentalist countries) or end up in hell, but rather because they find the activity itself to be an expression of their inner self.

A related systematic difference between the compliance of those adhering to norms because of environmental considerations versus intrinsic ones is noted by several of the social norms scholars, such as Richard McAdams and Robert Cooter, when discussing the difference between shame, which is externally generated, and guilt, which is internally generated.⁽²⁴⁾ Individuals motivated by the former will tend to resent the socially imposed costs of the norms, the "tax" they contain, and endeavor to evade or to change them. In contrast, if people accept the expected behavior as largely in line with their predispositions, they will be likely to blame themselves if they fail to live up to expectations and seek to change their behavior rather than the norms. As a result, compliance based on intrinsic forces such as guilt is less costly and more stable than that based on extrinsic forces such as shame.⁽²⁵⁾

Neoclassical economists, law and economics scholars, and even some students of social norms try to obviate the need to modify their basic paradigms by arguing that when people abide by norms for what seems like intrinsic predispositions they actually have extrinsic motivations, such as aiming to please their friends or acquiring prestige. To the extent that this can actually be proven, rather than merely presumed, environmental explanations prevail. However, a socio-economic view suggests that there are numerous forms of behavior (such as work done out of enjoyment of one's scholarly, professional or artistic role, or voting) that cannot be empirically shown to be motivated by external considerations and do correlate with independent measurements of internal commitments.

Moreover, the different sources of compliance produce expected consequences: studies of taxpayers, for instance, show that they are much more compliant with the law and much less resentful when they feel that tax laws square with prevailing social norms of fairness (e.g., a fair sharing of the burden) and that the funds are being used for what they consider to be legitimate goals, than if taxpayers comply merely because they fear being caught if they cheat.⁽²⁶⁾

The implications for the law of such findings are enormous. Given the billions of transactions people engage in each day, a social order based on laws can be maintained without massive coercion only if most people most of the time abide, as a result of supportive social norms, by the social tenets embedded in the law, and only if the majority of transactions are sufficiently undergirded by social norms, and thus do not require constant intervention by public authorities. Above all, laws work best and are needed least when social norms are intrinsically followed. For example, the failure of prohibition is often attributed to the populace's unwillingness to accept temperance as a norm. Finally, those social norms that shape actors' intrinsic predispositions are less likely to be subjected to attempts by members of the community to change them (e.g., not only was prohibition not abided by, but lacking political support, it was repealed) or weaken their force (e.g., calling for decriminalizing rather than repealing laws prohibiting the use of marijuana).⁽²⁷⁾

A reviewer of a previous draft of this paper argued at this point that the distinction here made may be of interest to those concerned about the "truth," but that "a pragmatic law and norms scholar might not much care" because whether or not norms are driven by the environment or internalized, they will still serve to curb criminal behavior. As I see it, not only would there be significant differences in the costs and stability of law enforcement backed by the two different sources of social norms, but understanding the different sources (or causes) leads to rather different pragmatic public policies. For instance, the more one is blind to the importance of

internalization, the more one would be inclined to increase fines and jail sentences to curtail crime, but if one understands internalization and the ways it can be enhanced, one would rely more on character education, shaming, and peer groups. Moreover, to rely on enhanced internalization, one must have an understanding of the ways it works. To put it in more general terms, the quest for truth and pragmatic measures, while far from identical, tend to enrich one another.

V. Adherence to Social Norms: Fixed vs. Shaped by Internalization and Persuasion

Given the importance of intrinsic adherence to social norms, the question arises whether one can convert compliance that relies largely on environmental factors into compliance that relies mainly on intrinsic forces. Such a change would be reflected in a change of preferences to modify either what the actor actually prefers (e.g., increasing desire to attend church rather than play golf) or the intensity with which the actor prefers one activity or object over others (e.g., engendering support for the purchase of recycled paper).

Most neoclassicists tend to assume that preferences are given and fixed.⁽²⁸⁾ Ellickson notes, "[o]ne of the [rational actor] model's most serious limitations is its failure to explain how people come to hold particular preferences."⁽²⁹⁾ As Cooter observes, "[i]nternalization of norms changes preferences and decisively affects behavior. However, economic theory cannot explain internalization or predict its occurrence. Filling this gap requires a theory of endogenous preferences linking economics and developmental psychology."⁽³⁰⁾

Assuming that people's inner predispositions and selves are immutable allowed law and economics scholars to focus on environmental factors. Indeed, the assumption of predetermined preferences is crucial for the neoclassical paradigm. It is profoundly related to the core assumption that people are free and rational agents. These assumptions can be sustained only if the actor's preferences are given and he or she selects the most suitable means for realization of these goals. If the preferences themselves are changeable by social and historical factors and processes the actor is neither aware of nor controls, the actor's behavior may be non-rational and is not free.⁽³¹⁾ To some extent this is true by definition: without drawing on information and deliberation, the actor is not acting rationally. (The possibility that the norms themselves will lead to rational behavior, even without deliberations by the actor, is discussed below.) And to the extent that the actor's choices are set by others, he or she is not a free agent.

Socio-economics, in contrast, assumes that people's predispositions (including preferences) are formed in part by social norms, and thus can change over time as social norms are changed, as well as that these changes can take place through non-rational processes. (The differences between non-rational and irrational are discussed below.) The new field of socio-economics and the older one of law and society have paid much attention to the processes involved in numerous studies of value socialization, character education, and, above all, internalization.⁽³²⁾

Internalization is an element of socialization whereby the actor learns to follow rules of behavior in situations that arouse impulses to transgress and there is no external surveillance or sanctions.⁽³³⁾ This is accomplished through such non-rational processes as identification with authority figures and affective attachments.⁽³⁴⁾

Several of the legal scholars who study social norms have recognized the importance of socialization. Cooter, for instance, observes that "[i]nternalization of obligations is

pivotal in a theory of decentralized law: after internalizing an obligation, the net benefit from cheating becomes a new cost to the actor. This sign reversal dramatically lowers the costs of enforcing norms."⁽³⁵⁾ One should disregard Cooter's economist-like wording and focus on the pivotal observation: internalization is a remarkable process through which imposed obligations (compliance with which must be forced or paid for) become desires. Sign reversal is not a phenomenon that is often observed in the social sciences; the mathematical metaphor effectively captures the magnitude and importance of the difference between externally enforced norms and norms that have been internalized.

Similarly, McAdams notes that internalization of norms refers to the process by which "an individual acquires a preference for conformity to a behavioral standard and suffers some psychological cost--guilt is an appropriate term--when she fails to conform, whether or not others are aware of her violation."⁽³⁶⁾

McAdams points out that although norms initially elicit compliance through external reinforcement, they often are subsequently internalized by individuals:

Without internalization, one obeys the norm to avoid external sanctions made possible by the desire for esteem, though the sanctions may in fact include material punishments. After internalization, there is yet another cost to violating a norm: guilt. The individual feels psychological discomfort whether or not others detect her violation.⁽³⁷⁾

Lawrence Lessig also agrees that internalization plays a key role in generating compliance with norms.⁽³⁸⁾

Cooter suggests that preferences can be changed not only through non-rational internalization but also through another process, which he also calls internalization, and which is compatible with the rational assumptions of law and economics. He describes this process as "acceptance of a new reason."⁽³⁹⁾ According to this view, which Cooter associates with Jean Piaget and Lawrence Kohlberg, "a child perfects the ability to internalize norms as he or she acquires a capacity for general reasoning."⁽⁴⁰⁾ Writes Cooter:

Piaget's and Kohlberg's research, like my characterization of internalization as acceptance of a new reason for acting, makes the process sound cool and rational. In contrast, "depth psychology" often traces the internalization of morality to processes that are hot and inchoate. According to these theories, internalization of morality ingrains new impulses in a child through emotional experiences. An example is Freud's theory that morality is the "ghost in the nursery," meaning the repressed memory of parental punishments. Repression transmutes fear into guilt, which changes behavior.⁽⁴¹⁾

Upon closer examination, however, one notes that Piaget's and Kohlberg's research actually deals with cognitive development and not with changes of preferences. Kohlberg posits that all human beings pass through several stages of development of their moral judgment as they mature intellectually. There are six stages, grouped into three major levels. In the preconventional level (Stages 1 and 2), individuals obey rules out of fear of punishment or some similar self-interest. In the conventional level (Stages 3 and 4), individuals are able to grasp basic ethical concepts like the Golden

Rule. In the postconventional level (Stages 5 and 6), individuals reason in terms of abstract notions like individual rights, utilitarianism, and the social contract.⁽⁴²⁾

Thus, while individuals who have progressed through Kohlberg's stages may well be capable of complex ethical reasoning, this does not necessarily mean that they will have stronger moral commitments or act more virtuously.⁽⁴³⁾ Kohlberg himself is quite explicit in his belief that it is possible to "reason in terms of such [high level] principles and not live up to them."⁽⁴⁴⁾ Unfortunately, to know the good cannot be equated with doing the good; one can be rather conversant with Kant and Rawls and still act immorally. To put it in the terminology followed here, knowledge affects behavior by affecting considerations of costs and benefits but, as a rule, does not shape preferences. Internalization clearly does.

A major goal of education (as distinct from teaching) is to foster internalization of social norms by children and thus to affect their preferences. Children are born with broad, vague predispositions. For instance, they are predisposed to food over hunger, but these general predispositions are translated into specific preferences in line with the particular social norms they internalize. Thus, while children have an inborn need for food and perhaps even for variation in food and combinations (e.g., proteins and carbohydrates), the specific foods they consider desirable--Kosher, soul, those their parental or peer sub-cultures cherish--are a function of acquired tastes. Moreover, the acquisition is often not the result of any conscious reasoning. Teenagers do not prefer Cokes and french fries because they have calculated that such consumption will enhance their peer standing; they feel that these are the right foods to consume and typically are unaware how they gained such tastes.

Once children become adults, their preferences do not suddenly become immutable (like the "Rocky Mountains," as Stigler and Becker put it⁽⁴⁵⁾), independent, or hermetically sealed. Non-rational processes continue to affect them. Persuasion is the term often used to refer to the non-rational processes through which adult preferences are changed.⁽⁴⁶⁾ Persuasion works by non-rational means, such as identification with authority figures (like Minister Louis Farrakhan) group enthusiasm generated through rituals and appeals (e.g., KKK leaders' calls for a cross burning); and relating new forms of behavior to values that the person already holds in high regard (e.g., convincing a non-activist to join a political demonstration on the grounds that the person already believes in the ideals of political activism and in the cause the demonstration seeks to advance). Persuasion is also part of processes such as acculturation (especially of immigrants from other countries or of people moving within the same society from one area to another where the sub-culture is different), religious conversions, joining social movements, or joining a cult. Leadership, mass hysteria, mob rule, and propaganda are all forms of persuasion.

The issue at hand is highlighted by the debate over the role of advertising. Neoclassical economists tend to insist that advertising is strictly informational rather than a means of subconsciously affecting people's preferences, and thus a form of persuasion.⁽⁴⁷⁾ Becker writes of his disagreement with thinkers like John Kenneth Galbraith, who claim that

the advertising "persuades" the consumer to prefer his product, and often a distinction is drawn between "persuasive" and "informative" advertising...We shall argue in direct opposition to this view, that it is neither necessary nor useful to attribute to add the function of changing tastes.⁽⁴⁸⁾

The underlying reason that neoclassicists must deny the existence of manipulative ads is that if people purchase an item which does not serve their preferences, but rather those that some Madison Avenue firm has implanted in them without their knowledge, people could no longer be considered logical-empirical (rational) actors. Furthermore, they could not be the free agents the neoclassical paradigm assumes them to be. ⁽⁴⁹⁾

In contrast, a socio-economic paradigm has no reason to deny that many ads contain information about changes in costs and constraints (e.g., flight schedules and fares) but also pays attention to the persuasive element of much advertising; for example, ads that appeal to people's subconscious motives ranging from guilt to sexual desire.

It should be noted in passing that to argue that preferences are initially set by internalization and thereafter subject to persuasion is not to deny that the actors have several degrees of freedom. They can become more aware of the forces that shape them, including social norms, and they can work with others to change these forces. There are, though, considerable limits to their ability to liberate themselves from the constitutive influence of social norms. And the extent of freedom they possess is significantly less than the neoclassical paradigm posits, although smaller than some law and society paradigms assume, the Marxist's for instance. A wit expressed the difference by suggesting that in economics everything has a price; in sociology--nothing. Socio-economics builds on the notion that some transactions are highly affected by prices, while other relations are not transactions at all, and not affected by prices except under unrealistic, limit conditions. (One might note in addition that the desire to gain insight into self and enhance one's independence, for instance through psychoanalysis, is itself, in part, a reflection of social norms. A comparison of the relevant social norms of Westerners to those of Asians, of this generation's to those of earlier ones, and of people on liberal campuses to those in traditional small towns, further highlights this point.)

Recognizing that social norms can affect compliance with mores and laws by forming preferences and by changing those that have been formed, through internalization and persuasion, is an important element of the law and socio-economics paradigm. Several legal scholars have adopted these elements. Others have kept one foot in the law and economics camp and planted the other in law and society, while still others have yet to add these core conceptions to their evolving paradigm.

VI. Sources of Social Norms: Rational Choice vs. History

The more one recognizes the importance of social norms, the more one is drawn to the question of where these norms come from, and what forces influence their development. The new social norms scholarship has yet to reach definitive conclusions on this subject. Some of the discussion reflects law and economics responses; some, law and society; and some, a synthesis of the two much like the socio-economic approach.

The law and economics position is that norms themselves are "rational" and thus can make actors act rationally, without having to deliberate before each action--or even at all. Norms are said to either reflect previous deliberations or, while not traceable to any actual deliberations, seem "as if" they were the outcome of rational choice. That is, the specific norms adopted "fit" the assumption of rationality as if rationality was some kind of a mathematical formula that best fits the patterns of the evidence at hand.

A simple example of a rational rule is that of an actor who follows a rule of carrying an umbrella everyday, rain or shine. His rule is considered to be rational because he is portrayed as having assumed to have calculated that the costs of checking weather forecasts everyday (and their reliability) are higher than those of carrying the umbrella on rain-free days. No evidence is provided that anyone ever made such calculations; however, such assumptions allow law and economics to reconcile certain seemingly irrational behaviors with the presumption of rationality.⁽⁵⁰⁾

McAdams provides one of the many highly theoretical models of how norms may arise rationally:

Under the right conditions, the desire for esteem produces a norm. For some behavior X in some population of individuals, a norm may arise if (1) there is a consensus about the positive or negative esteem worthiness of engaging in X (that is, either most individuals in the relevant population grant, or most withhold, esteem from those who engage in X; (2) there is some risk that others will detect whether one engages in X; and (3) the existence of this consensus and risk of detection is well-known within the relevant population. When these conditions exist, the desire for esteem necessarily creates costs of or benefits from engaging in X. If the consensus is that X deserves esteem, a norm will arise if the esteem benefits exceed, for most people, the costs of engaging in X. Conversely, if the consensus condemns X, a norm will arise if, for most people, the esteem costs exceed the benefits of engaging in X.⁽⁵¹⁾

Ellickson's pioneering study of the matter stands out precisely because he examined the matter empirically. He concludes:

In uncovering the various Shasta County norms, I was struck that they seemed consistently utilitarian. Each appeared likely to enhance the aggregate welfare of rural residents. This inductive observation, coupled with supportive data from elsewhere, inspired the hypothesis that *members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another...* Stated more simply, the hypothesis predicts that members of tight social groups will informally encourage each other to engage in cooperative behavior. It should be stressed that this proposition was *induced*, rather than deduced from an explicit model of social interactions.⁽⁵²⁾

Others, following Axelrod's work,⁽⁵³⁾ have argued that rational norms arise out of experience. Cooter writes:

The economic analysis of social norms draws upon a fundamental result in game theory: One shot games with inefficient solutions...often have efficient solutions when repeated between the same players. This generalization grounds the "utilitarianism of small groups," by which I mean the tendency of small groups to develop efficient rules for cooperation among members.

The utilitarianism of small groups has been demonstrated for cattle ranchers, Chinese traders, medieval merchants, and modern merchant associations. Research on property rights has revealed variety and detail in the political arrangements by which small groups manage their assets. Utilitarianism

applies to social groups whose members repeatedly interact with each other, such as the Berkeley Chess Club, but not to social categories of people who seldom interact, such as chess players in California.⁽⁵⁴⁾

Other mechanisms that lead to rational norms are said to include rational elites who cause rational selection of rules even if most people do not deliberate.⁽⁵⁵⁾ Still others assume that history is rational, as if God were a utility maximizer who guided history through all its gruesome developments, an assumption initially embraced (though later abandoned) by Nobel laureate Douglas North.⁽⁵⁶⁾

The new scholars of social norms have increasingly recognized that while some social norms are certainly rational, others are clearly affected by the kind of forces law and society focuses on: history, broadly understood, including tradition, institutions,⁽⁵⁷⁾ customs, and habits. ("History" refers here not merely to past events but also to the narratives about such events, which are interpreted in ways that help transmit social norms.) According to this approach, the sources of norms are remote in time (e.g., Moses brought the Ten Commandments down Mt. Sinai); they are passed from one generation to the next; and they derive authority by virtue of there being a part of tradition rather than reflecting deliberations.

To return to the umbrella example for a moment, law and society students would argue that taking an umbrella on sunny days in the dry season is irrational (say, obsessive) or non-rational, or that if a person does so, somebody must have persuaded him that carrying it is the right thing to do, say because it is a status symbol. (British citizens used Bowler hats and rolled up umbrellas in this way.) Cooter makes this point as follows:

Someone subsequently convinces me, contrary to my previous beliefs, that smoking is morally wrong ("God forbids us to harm ourselves for pleasure's sake," "You risk orphaning your child," etc.). After my conversation, I have an additional reason for not smoking; smoking violates a moral rule I now hold.⁽⁵⁸⁾

Some of these norms are irrational; many others, non-rational. For example, most people who pay their brokers for stock selection act irrationally, and so do most of those millions who put money into their IRA accounts toward the end rather than beginning of the year.

Much more often, social norms are non-rational as they govern behavior dealing with matters that Talcott Parsons called "other worldly" and hence do not implicate empirical-logical matters.⁽⁵⁹⁾ These include whether or not one believes in God, spirituality, the idea of progress, and many other such beliefs. Each of these are not merely abstract values but also the source of numerous norms.

Many of these values, and the norms that govern the behavior associated with them, are transmitted from generation to generation, through communal processes such as rituals, holidays, and identification with older authority figures. These norms are commonly legitimated on such grounds as tradition, superstition, nationalism, or some other such cultural factors. While people often also offer valid consequentialist-utilitarian instrumental arguments to explain why they heed the norms under discussion, these explanations are secondary to ritualistic invocations of the past.⁽⁶⁰⁾ Thus, many New Age gurus recommend meditation as a way to reduce stress. However, should social science tests show that meditation has no such effects, most followers of these gurus would probably not stop meditating. Religious people speak

of the benefits to mental hygiene of being devout, but this obviously is not the leading reason they are religious.

Socio-economics can accommodate both cultural and cost considerations. Social norms are often heeded because they are viewed as "how things are done here." Norms, however, are more likely to be modified when costs they inflict are high than when they are low.

Dennis Chong recognizes this dual position of norms, although at times he slips into a law and economics line of thinking:

Although some group norms appear calculated to further the interests of group members, many group norms seem to be adopted without reflection and appear instead to be driven mainly by imitation and group identification...

Although much cultural transmission has this inertial quality, it does not always violate the process of rational decision making. No individual has the resources to evaluate thoroughly all of the choices he must make, so by conforming to the status quo he takes advantage of the cumulative wisdom of the community. In effect, he operates on the assumption that existing practices have survived the trial and error test.⁽⁶¹⁾

Chong adds: "even if people act primarily in response to the advantages and disadvantages of the options presented to them, they still economize in their decisions by developing and relying on rules and information embodied in their attitudes, beliefs, and values."⁽⁶²⁾ At another point he concludes:

The economic model...underestimates the extent to which motivation from enduring group loyalties and values can override changes in the opportunity costs of available choices. People sometimes resist cultural changes even when environmental changes undermine the original rationale for their values and actions. Also, much value formation and transmission occurs through limitation and conformity without involving explicit instrumental calculation.⁽⁶³⁾

This point is also recognized by Lessig, who writes:

For even if an institution arises in response to demands of efficiency, it does not follow that the institution survives if and only if it continues to advance efficiency. "[A]t a particular time in a particular economy, there may exist lots of institutions which serve no social purpose and which though once valuable to society, may now actually be harmful."⁽⁶⁴⁾

VII. The Socio-Economics of Social Norms: the Art of Combinations

Once one fully accepts that human behavior is deeply affected both by social norms imbedded in the actor's environment and by their embodiment in the self, that the actor's predispositions are formed and modified in part by processes of internalization and persuasion, and that social norms themselves are in part the fruits of rational choice and in part reflect historical processes, one can explore the ways in which the factors modeled by law and economics and law and society may be effectively combined into a socio-economic perspective. This is a huge, complex, and new subject that is only briefly illustrated here.

Social factors often play a larger role in setting "priors" than in determining the considerations that follow. Thus, social factors (especially psychological and cultural ones) may largely determine the extent to which a given actor (or actors in a given culture) is risk-averse. Economic factors may play a larger role in determining which specific low-risk investment an actor will choose, given his or her particular predispositions.

Another form of combination of the two kinds of considerations can be observed in well-functioning economies, where social factors play a significant role in setting the limits on the reign of market forces, but leave it largely to economic forces to form the processes that take place within the market.⁽⁶⁵⁾ For instance, the government sets the limits of acceptable pollution but leaves it to the industry to choose the most efficient way to reduce pollution rather than requiring that smoke stacks to be equipped with government-approved scrubbers.

Another way to think about socio-economic combinations is to view them as defining a two dimensional space. Behavior that is both endorsed by social norms and also rewarding in narrow economic terms, is likely to be the most stable. Conversely, behavior that is censured by social norms and economically unrewarding is most likely to be abandoned. The differences between the stability of behavior that is highly normative but not rewarding, and behavior that is considered a violation of norms but still rewarding remains to be studied. The particular response is, of course, affected by the respective magnitude of the two key factors. For instance, acts that are considered minor violations of norms but are highly rewarding are much more likely to occur than acts that are considered serious violations of norms and are not highly rewarding.

To reiterate, these very preliminary illustrations are intended solely to call attention to work that largely remains to be done.

In Conclusion

The implication of the preceding discussion, that human nature allows elders and peers to constitute and reconstitute our preferences, is a much less sanguine view of the individual and society than the image of a group of free and rational citizens, of people who convene to deliberately, voluntarily, and reasonably form (or reform) the social norms they seek to live by. However, socio-economics does not assume that people are fully determined. It builds on the observation that we are both persuadable and deliberative creatures, that social norms both affect our predispositions and reflect our choices.

It encompasses both facets of the self, recognizing our more vulnerable side. While not ignoring our deliberative capacity, it takes into account that we are susceptible to persuasion. Indeed, it suggests that such an understanding of the self will enhance the reach of our choice and reduce the scope of those forces we neither understand nor control.

The focus of this article's discussion was the concepts needed for a fuller understanding of the role of social norms. The complex relations between social norms and the law have not been explored, other than to briefly note that strong social norms allow for less reliance on the coercive power of the state, make for better law enforcement of enacted laws, and make it less likely that laws will be repealed, and hence are more compatible with liberty.

ENDNOTES

1. For examples of early law-and-society works, see Donald Black, *The Behavior of Law* (1976); Lawrence Friedman, *The Legal System* (1975); Robert L. Kidder, *Connecting Law and Society: An Introduction to Research Theory* (1983); and Richard Lempert and Joseph Sanders, *An Invitation to Law and Social Science: Desert, Disputes, and Distribution* (1986).

2. See Cass Sunstein, *Social Norms and Social Roles*, 96 *Colum. L. Rev.* 903 (1996); Sunstein, *Preferences and Politics*, 20 *Phil. & Pub. Aff.* 3 (1991); Robert C. Ellickson, *Law and Economics discovers Social Norms*, 27 *J. Legal Stud.* 537 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. Chi. L. Rev.* 943 (1995); Lessig, *The New Chicago School*, 27 *J. Legal Stud.* 661 (1998); Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *Va. L. Rev.* 349 (1997); Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591 (1996); Eric Posner, *Law, Economics, and Inefficient Norms*, 144 *U. Pa. L. Rev.* 1697 (1996); Richard Epstein, *Enforcing Norms: When the Law Gets in the Way, The Responsive Community*, Summer 1997, at 4; Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 *U. Pa. L. Rev.* 2079 (1996). For an informal discussion, see Jeffrey Rosen, *The Social Police*, *The New Yorker*, 20 & 27 October 1997, at 170.

3. Epstein, *supra* note 3, at 4.

4. A reviewer pointed out that there is "no single law and economics." It is of course true that there are significant differences within any school, but what makes them into a paradigm, is that these divergent views share certain core assumptions, concepts and perspectives. When I refer to law and economics, law and society, and law and socio-economics, I mean their shared paradigm.

5. Socio-economics was founded as a discipline in 1989. The International Association of Socio-economics has all the features of a scholarly association, including an elected group of officers, a journal, and a series of books.

6. Robert Ellickson, *Order Without Law* 138-39 (1991).

7. Epstein, *supra* note 3, at 7.

8. Tracey Meares, *Drugs: It's a Question of Connections*, 31 *Val. U. L. Rev.* 579, 594 (1997).

9. See Robert Cooter, *Law and Unified Social Theory*, 22 *Law and Society* 50 (1995).

10. Amartya Sen, *Rational Fools*, 6 *Phil. & Pub. Aff.* 317 (1977); Lester Thurow, *The Zero-Sum Society* (1980).

11. Lawrence Lessig, for example, argues that the neoclassical paradigm assumes stable preferences:

[This assumption is made] [n]ot because economists are so silly as to actually believe they are fixed, but because most of the techniques of economics, like any system of knowledge, function only when certain structures are taken for granted. Usually this discussion is in the context of the evolution of custom, but a custom is no less valuable for our purposes than a direct discussion of social meaning: Custom is just a

particular form of social meaning, less symbolic in general, but generated and transformed by the same mechanisms that affect social meaning. Economists aim to understand both custom's origin and its persistence, and it is in tracking this understanding of a custom's persistence that the most useful parallels to the regulation of social meaning can be drawn.

There is nothing about positing a change in preferences, however, that is inconsistent with even Gary Becker's conceptions of the stability of preferences. As he has explained, what his account presumes is the stability of 'metapreferences,' not particular preferences.

Lessig, *supra* note 3, at 1005 n.207. See also, Milton Friedman, *The Methodology of Positive Economics*, in *Essays in Positive Economics* (1953).

12. I refer to the neoclassical paradigm rather than economics because the former is now widely applied in social sciences that do not deal with economic behavior. See Amitai Etzioni, *The Moral Dimension* (1988).

13. See Gary S. Becker and Kevin M. Murphy, *A Theory of Rational Addiction*, in *Accounting for Tastes* 50 (Gary S. Becker, ed., 1996).

14. See Mark Blaug, *The Empirical Status of Human Capital Theory: A Slightly Jaundiced Survey*, 14 *Journal of Economic Literature*

837 (1976). See also Etzioni, *supra* note 13.

15. Wassily Leontief, *Interview: Why Economics Needs Input-Output Analysis*, *Challenge*, March/April 1985, at 27.

16. See Etzioni, *supra* note 13, at 141-42.

17. Posner, *supra* note 3, at 1699.

18. Lessig, *supra* note 3, at 1044.

19. Sunstein, *supra* note 3, at 939.

20. *Id.* at 935.

21. See Kingsley Davis, *The Human Society* (1948).

22. On the difference between treating people as a product of their social status versus the creation of their project, see Arthur Schlesinger, Jr., *The Disuniting of America: Reflections on a Multicultural Society* (1991).

23. Intrinsic affirmation refers to the sense one has when one acts in a manner consistent with one's moral commitments. This sense is often treated, particularly by reductionists, as if it were just another source of satisfaction (i.e. pleasure). However, these acts often entail pain or deferred gratification, and the feelings they generate are far more complex than mere satisfaction. For additional discussion see Etzioni, *supra* note 13.

24. See Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 *Mich. L. Rev.* 338, 381 (1997). See also Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 *U. Pa. L. Rev.* 1643, 1662 (1996). Shame can be turned into guilt, a point not discussed here.

25. See Kahan, *supra* note 3.
26. Alan Lewis, *The Psychology of Taxation* (1982).
27. This statement raises an important question: when should social norms be challenged on normative grounds? Dealing with this issue would take the discussion too far off track. See Etzioni, *supra* note 13, at 217-57 (for discussion of the selection and critical assessment of core societal values).
28. George Stigler and Gary Becker claim that preferences are fixed. "[O]ne does not argue over tastes," they reason, "for the same reason that one does not argue over the Rocky Mountains--both are there, will be there next year, too, and are the same to all men" (Stigler and Becker, *De Gustibus Non Est Disputandum*, 67 *Am. Econ. Rev.* 76, 76 (1977)). More recently, Becker has retreated somewhat from this position. It is still very widely held by neoclassical economists.
29. Ellickson, *supra* note 3, at 156.
30. Robert Cooter, *Law and Unified Social Theory*, 22 *Journal of Law and Society* 50, 61 (1995).
31. See Charles Lindbloom, *The Intelligence of Democracy: Decision Making Through Mutual Adjustment* (1965); see also Herbert Simon, *Administrative Behavior: A Study of Decision Making Processes in Administrative Organization* (3rd ed. 1976); see also Sen, *supra* note 11.
32. See *Communitarian Bibliography* (last modified May 12, 1998) <<http://www.gwu.edu/~ccps/biblio.html>> (for a list of seminal socio-economic works).
33. Lawrence Kohlberg, *Moral Development*, in *International Encyclopedia of the Social Sciences* 483, 483 (David Sills, ed., 1968).
34. Mark C. Hoffman, *Childrearing Antecedents of Moral Internalization* (unpublished manuscript, on file with the author).
35. Robert D. Cooter, *Book Review: Against Legal Centrism*, 81 *Cal. L. Rev.* 417, 426-27 (1993).
36. McAdams, *supra* note 25, at 376.
37. *Id.* at 380-81.
38. Lessig, *supra* note 3, at 997.
39. Cooter calls this process internalization as well. Yet the phenomenon he describes is not necessarily compatible with common usage of the term. See Cooter, *supra* note 25, at 1643.
40. *Id.* at 1662.
41. *Id.* at 1662.
42. Lawrence Kohlberg, *Moral Stages and Moralization*, in *Moral Development and Behavior* 31, 32-35 (Thomas Lickona ed., 1976).

43. Though Kohlberg himself clearly does believe that "moral stage is a good predictor of action" (*id.* at 32).

44. *Id.* at 32.

45. See Stigler and Becker, *supra* note 29, at 76.

46. While it often flows from authority figures or elites to followers, this need not always be the case. Members of a community can work out a shared position in which peers persuade those who may initially have differed on normative issues, drawing on non-rational means. For additional discussion see examination of moral dialogues in Etzioni, *supra* note 13, at 85-118.

47. Stigler and Becker write: "A consumer may indirectly receive utility from a market good, yet the utility depends not only on the quantity of the good but also the consumer's knowledge of its true or alleged properties" (Stigler and Becker, *supra* note 29, at 84).

48. Stigler and Becker, *supra* note 29, at 83-84.

49. John Kenneth Galbraith, *The New Industrial State* (1967).

50. Becker acknowledges the significant effect of habits acquired during childhood, and concedes that these may make little sense as the individual grows up. Yet far from conceding the possibility of non-rational behavior, Becker argues that this is the case because "it may not pay to try greatly change habits as the environment changes" (Becker, *Habits, Addictions, and Traditions, in Accounting for Tastes, supra* 17, at 118, 127).

Again, not bit of evidence is provided concerning the costs of changing habits as compared to losses incurred by not chaining them. See also Lessig, *supra* note 3 (on habits).

51. McAdams, *supra* note 25, at 358.

52. Ellickson, *supra* note 3, at 167. Note that "cooperative" is synonymous with "rational" in the language of the Prisoner's dilemma.

53. Robert Axelrod, *The Evolution of Cooperation* (1984).

54. Robert Cooter, *Normative Failure Theory of Law*, 82 *Cornell L. Rev.* 947, 950-51 (1997).

55. See Robert Shiller, *Stock Prices and Social Dynamics, in Brookings Papers on Economic Activity* 457 (1984). See also Gary S. Becker, *Norms and the Formation of Preferences, in Accounting for Tastes, supra* note 14, at 226.

56. Douglas C. North, *Structure and Change in Economic History* (1981).

57. Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 *Am. Pol. Sci. Rev.* 3 (1987).

58. Cooter uses this example to illustrate rational reasoning. Actually it is a prime example of persuasion by appeal to values the actor already holds, rather than appeal to facts and logic. See Cooter, *supra* note 42, at 1661.

59. Talcott Parsons, *The Structure of Social Action* (1937).

60. This can be empirically demonstrated. In situations where respect for tradition prevails, changing instrumental factors will not modify behavior, or at least, only if this is carried to great extremes. Most people will not eat human flesh, however hungry they are, if they are not members of a culture whose social norms legitimates cannibalism. There are, of course, limited exceptions to this rule under extreme conditions. See Piers Paul Read, *Alive; the Story of the Andes Survivors* (1974)(for reports of cannibalism among survivors of a plane crash in the remote Andes mountains).

61. Chong, *supra* note 3, at 2101.

62. *Id.* at 2094-95.

63. *Id.* at 2132.

64. Lessig, *supra* note 3, at 1006 (citation omitted).

65. See Gordon Tullock, *Private Wants, Public Means; an Economic Analysis of the Desirable Scope of Government* (1970).