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# The Limits of Behavioral Theories of Law and Social Norms

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*The Limits of Behavioral Theories of Law  
and Social Norms*

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## THE LIMITS OF BEHAVIORAL THEORIES OF LAW AND SOCIAL NORMS

*Robert E. Scott\**

### INTRODUCTION

The law influences the behavior of its citizens in various ways. Well understood are the direct effects of legal rules. By imposing sanctions or granting subsidies, the law either expands or contracts the horizon of opportunities within which individuals can satisfy their preferences. In this way, society can give incentives for desirable behavior. The direct effects of legal rules on individual behavior have been a fruitful source of inquiry for analysts using the techniques of law and economics. Modeling the incentive effects of legal rules provides a useful predictive tool for positive theory and normative critique. Indeed, the tools of economics are well-suited to analyzing variables--such as legal rules-- that stimulate changes in the costs of certain behaviors.

In recent years, the social norms literature has shown that law can also have indirect effects on incentives.<sup>1</sup> Thus, for example, a legal ban on smoking in public places or a “pooper-scooper” law can motivate citizens not to smoke in certain areas or to clean up after their dogs even where the state has no resources invested in direct (or first order) enforcement. By empowering neighbors and other citizens to use public ridicule as an enforcement technique, these

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\* Dean and Lewis F. Powell, Jr. Professor, University of Virginia School of Law. I am grateful to Robert Ellickson, Clay Gillette, John Jeffries, Jody Kraus, John Harrison, Daryl Levinson, Paul Mahoney, Elizabeth Scott, Paul Stephan and Bill Stuntz for helpful comments on an earlier draft.

<sup>1</sup> Robert Ellickson is generally credited with anticipating, if not creating, the field of law and social norms. See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623 (1986); Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 166 J. Legal Stud. 67 (1987); Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991). Since then there has been a veritable cottage industry of legal scholars examining the interaction of law and norms. See the excellent discussion of the secondary literature in Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 339-50 and accompanying notes (1997).

laws can influence behavior by imposing informal (or second order) sanctions, such as shaming.<sup>2</sup> Similarly, these laws can have self-sanctioning (or third order) effects to the extent that citizens internalize the legal rule and are deterred by the prospect of guilt.<sup>3</sup> These latter effects require that legal rules be mediated through social phenomena--social norms and human emotions-- that are highly complex and only imperfectly understood. In the case of a shaming sanction, the law must rely on existing normative structures to influence in predictable ways the “expression” or social meaning of the disfavored (or favored) action. In the case of self-sanctions, the law must rely on the even more complex phenomenon of internalization of normative behavior.

One way to understand these indirect effects is through the same rational choice lens that has proven tractable in studying the direct effects of legal rules.<sup>4</sup> Thus, the analyst might continue to treat values, moral character and preferences as exogenous, not because these phenomena are unimportant, but because her analytical tools don’t allow her to say anything systematic about them. This “parsimonious” approach would begin with the assumption that law has no systematic influence on behavior except in how it affects the costs of that behavior, either directly through

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<sup>2</sup> Richard McAdams has developed the most comprehensive theory to explain the origin and regulation of norms using the concept of competition for esteem (and the avoidance of disapproval). There is considerable empirical evidence to support the notion that peer disapproval is an effective sanction against disfavored behavior. See, e.g., Herbert Jacob, Deterrent effects of Formal and Informal Sanctions in Policy Implementation 69 (1980); Donna Bishop, Legal and Extra-legal Barriers to Delinquency: A Panel Analysis, *Criminology* (1984).

<sup>3</sup> The three different potential sources of legal sanction have been recognized by sociologists and social psychologists. See, Dennis H. Wrong, *The Oversocialized Conception of Man in Modern Sociology*, 26 *Am. Soc. Rev.* 183 (1961); Tom R. Tyler, Why People Obey the Law 44-45 (1990). Paul Robinson and John Darley have made a similar point as well. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. Rev.* 453 (1997)

<sup>4</sup> Rational choice theory is the branch of economics which studies how an individual decisionmaker chooses between competing alternatives. Traditional rational choice theory usually assumes that an individual’s preferences are consistent over time, and even those traditional models that incorporate changing preferences do not account for strategic manipulation of one’s future alternatives. Economists and other scholars have recently developed a theoretical structure to analyze individual’s attempts to control or modify their choices through precommitment or self-command. This theory describes how individuals limit or manage their future behavior to ensure that they not compromise their commitment to a present decision. See, e.g., Thomas Schelling, *Ethics, Law and the Exercise of Self-Command*, in *Choice and Consequences* 83 (1984); Thomas Schelling, *Self-Command in Practice, Policy, and in a Theory of Rational Choice*, 74 *Am Econ. Rev.* 1 (1984); Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 *J. Econ. Behav. & Org.* 39 (1980); Richard H. Thaler and Hersch M. Shefrin, *An Economic Theory of Self-Control*, 89 *J. Pol. Econ.* 392 (1981).

legal sanctions or indirectly by stimulating social sanctions associated with that behavior.

Of course, no one believes that the only way that the state ever influences the behavior of its citizens is through the incentive effects of legal rules. Quite clearly, the state sometimes influences behavior by shaping preferences rather than by constraining opportunities.<sup>5</sup> An analyst who wishes to understand how law predictably can influence behavior by changing a person's taste for engaging in a desired (or disfavored) action must treat preferences and values as endogenous. For post-modern legal scholars this is a straightforward move. If the goal of the analyst is to illustrate the social construction of behavior and preferences in particular contexts and to eschew abstraction, prediction and generalization, then the familiar tools of social theory and sociological description offer a rich story of the human experience. But for the law-and-economics analyst the invitation to treat preferences and values as endogenous is heady stuff.<sup>6</sup>

Despite the perils, legal scholars and economists continue to explore the internal mechanisms of social norms and of human emotions and to suggest predictive tools that may be capable of accounting for the influences of legal rules on social norms and individual values.<sup>7</sup> In this essay, I ask the evaluative question: How far have we come? Clearly, as a descriptive matter, we have come a long way. From sociology we have learned about the existence of social norms, an alternative, complex regime of social control that interacts with law in many different

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<sup>5</sup> For an interesting discussion of the effect of law on endogenous preferences in the criminal law, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 Duke Law J. 1.

<sup>6</sup> As one economist has observed:

To enter the field of taste changes one ought to find danger exhilarating. The perils are extreme... The very ground threatens to fall away at one's feet. The economist, as policy advisor, is supposed to seek efficiency, but whether a given policy is efficient depends upon the preferences of those affected, and those preferences may depend in turn on efficiency.... Most alarming of all, one risks discovering that true progress in this field means entering long-forbidden territory; exploring the structures of human contentment from the inside and becoming full and active partners with 'behavioral scientists', unrigorous as they may be...." T. A. Marschak, *On the Study of Taste Changing Policies*, 68 Am. Econ. Rev. Papers & Proc. 386 (1978).

<sup>7</sup> See text accompanying notes -- to -- infra.

ways.<sup>8</sup> From psychology, we have learned something about the relationship between external law and internal values and emotions. We know that external, material incentives are not the only force that governs behavior. Indeed, much of our behavior is stimulated by complex psychological reward mechanisms.<sup>9</sup> Moreover, evolutionary psychology teaches us that there is long term advantage in moral behavior. Salient emotional reactions--such as guilt, anger or empathy-- mark one as a “cooperator” who is able to make credible commitments concerning her future actions.<sup>10</sup>

But when it comes to using this more textured understanding of human experience to improve our ability to predict the effects of legal rules, the verdict is far less clear. In the first place, the academic debate currently suffers from conceptual pluralism and terminological

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<sup>8</sup> Moreover, we have some insights into both the relationship and differences between law and norms. Legal rules and social norms are overlapping, independent influences on human behavior. At the broadest level of generality, legal rules and social norms are complements as well as substitutes. Thus, disfavored behavior constrained by norms may not require additional legal sanction. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225, 12-- (1998); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal. L. Rev. 2005 (1987); McAdams, *The Origin of Norms*, supra note -- at 347-348.

There are also important differences between law and norms. Law compels by direct coercion; norms compel by shame and shunning. The threat of isolation from one’s peers is the key to the potency of enforcement. The meaning of law is precise, the meaning of norms is fuzzy. See e.g., Paul H. Robinson & John M. Darley, *Justice, Liability and Blame*, 16, 65 (1995). Obviously, the same principle implies that sometimes law and norms function antagonistically. See, for example, the code of silence among certain professional groups that undermines legal requirements that illegal activity be reported. Richard N. Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 Ind. L. J. 528 (1976).

<sup>9</sup> Thus, for example, individuals do not eat in response to a rational calculus of caloric need. Instead, a complex set of forces cause one to “feel hungry.” Robert H. Frank, *Passions Within Reason: The Strategic Role of the Emotions* 51-56 (1988).

<sup>10</sup> Robert Frank argues that moral behavior has its source in the emotions rather than in “rationality” and reason. *Id.* at ----.

Beyond the strategic role of endogenous values and preferences, we have learned from cognitive and social psychology that there are systematic “errors” in human judgment and decisionmaking reflected in the deviation between empirically observed behavior and the predictions of rational choice models of behavior under conditions of uncertainty. Best known to legal scholars is the “prospect theory” developed by Daniel Kahneman and Amos Tversky. See *Judgment Under Uncertainty: Heuristics and Biases* (D. Kahneman, P. Slovic & A. Tversky eds. 1982). More recently, the normative underpinnings of this research have been challenged by new studies that show that framing bias by researchers may account for many of the observed “errors” in human judgment. Thus, behavior that once might have been crudely characterized as reflecting cognitive errors or biases is better understood as human tendencies to use adaptive rules of thumb or “smart heuristics” that order human decision making around frequencies rather than probabilities. See generally, Gerd Gigerenzer, *Simple Heuristics That Make Us Smart* (1999) and text and accompanying notes --to-- infra.

disarray. Indeed, we lack even a basic consensus on the proper definition of a social norm. This tower of Babel quality is, in part, a reflection of the complexity of the social phenomena that we are seeking to understand. In part, it reflects the absence of a unified methodological and conceptual apparatus. The danger in such an environment is that the analyst will be guided more by the strength of her a priori beliefs in the relative efficacy of government intervention than in the analytical tools that are deployed. In short, the dilemma remains no different from when it was first identified by Arthur Leff a generation ago. Law-and-economics, Leff said, “is a desert,” and law-and-society (read: sociology and psychology) “is a swamp.”<sup>11</sup> For twenty-five years legal scholars have searched for the holy grail, the fertile middle ground between economics and the other behavioral sciences. The search may be noble and important, but the end of the journey is not yet in sight.

The Essay proceeds as follows. In Part I, I set out a contextual case study as an archetypal environment for analyzing the interactions of law and norms. Part II evaluates both the direct and indirect effects of law within this contextual framework using the techniques of rational choice theory. In Part III, I relax the assumption that preferences are exogenous in order to examine, in the same context, the explanatory power of the emerging expressive and internalization theories of law. I conclude, in Part IV, that a preference-shaping analysis provides a richer explanation for commonly observed interactions among legal rules, norms and values, but at a considerable price. The introduction of non-falsifiable hypotheses produces an analysis that is rich in content but also speculative and context-dependent.

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<sup>11</sup> Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* 147 (1991) (quoting Arthur Leff).

## I. LAW AND NORMS IN CONTEXT

One way ( if not the best way) to analyze competing theories of the interactions of law, norms and values is to test them in a specific real-world context. What follows is one such example, one which I describe with enough context to support an analysis of the complex interrelationships among overlapping normative structures, individual preferences and values, and legal regulation.

### *The Case of the Devoted Dog Lovers*

Bill and Ann Smith are University professors who have a summer home in Maine where they vacation with their four dogs. Upon returning to Maine this past summer, the Smiths took their smallest and most obedient dog out for a walk on a three-mile nature trail that they had previously enjoyed. Upon arriving at the trail head, the Smiths discovered to their dismay that the local “greens” had succeeded in having the township enact an ordinance banning all dogs, leashed or not, from the trail. The ordinance was marked with a large sign with a red line through a figure of a dog, followed by the terms of the ordinance. No sanction was specified, and, as long time summer residents, they knew that the township had no effective constabulary.

The Smiths engaged in a moral debate. They concluded that their principled commitment to animal rights trumped their environmental sensibilities and also their strong inclination to obey the law and, thus, they proceeded on the trail. Shortly thereafter, the Smiths encountered a neighbor on the trail, one with whom they had enjoyed friendly relations in the past. In calm but insistent terms, the neighbor chastised them for violating the ordinance and challenged them to admit that they had seen and ignored it. Shamed by the incident they returned home and, in subsequent trips, left the dogs at home.

To this day, the Smiths remain convinced that the ordinance is wrong-headed and equally agreed that, owing to the encounter, they will obey the ordinance in the future. When asked recently if they would stop taking the dog on the trail if, instead of an ordinance, there had been a

public announcement from the township that nature lovers with dogs could avoid unpleasant interactions by choosing another trail, the Smiths claimed that such an announcement would not have deterred them.<sup>12</sup> Why not? “Because,” they stated, “then we would have a right to go on the trail.” But, if that is so, weren’t they wrong to venture down the path in the first place? “No,” they replied (firmly). “We believed that animal rights were a trumping value.” Then why did they stop using the trail? “Because we wished to avoid the ‘green police.’” But wouldn’t the “green police” create an unpleasant encounter in the case of the public announcement? “So what,” they concluded. The neighbors would then have had no right to shame them and, under these conditions, the Smiths would be perfectly willing to defend themselves (and their dogs) even if the interactions were uncomfortable.

### ***The Complexity of Normative Constraints***

Norms scholars commonly analyze situations such as this one by isolating one or two normative constraints that influence the relevant behavior, and then speculating about the ways in which those norms have been created, modified or enhanced by legal rules.<sup>13</sup> Such analyses fail to appreciate the deep complexity of the normative structure that influences behavior even in simple contexts such as the *Case of the Devoted Dog Lovers*. The messy reality of norms--though often ignored by legal scholars -- is well understood by sociologists, social psychologists and cultural anthropologists.<sup>14</sup> At the outset, definitional clarity requires that we distinguish between

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<sup>12</sup> The relevance of this question is to test the plausibility of claims that legal rules can have expressive effects that are conceptually *independent* of any legal sanction. See text accompanying notes-- to--infra.

<sup>13</sup> See e.g., Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1996); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. (1996); Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. Rev. 903 (1998).

<sup>14</sup> The relationship between normative standards and normative behavior remains uncertain. Generally, social psychologists assume that normative standards are triggered by paradigmatic situations. Once “activated”, these standards then mediate individual normative behavior. See Leonard Berkowitz, *Social Norms, Feelings and Other Factors Affecting Helping and Altruism*, 6 *Advances in Experimental Social Psychology* 63 (Leonard Berkowitz ed., 1972); Melvin J. Lerner, *The Justice Motive: Some Hypotheses as to Its Origins and Forms*, 45 *J. Personality* 1 (1977); Leventhal, *The Distribution of Rewards and Resources in Groups and Organizations*, 9 *Advances in Experimental Soc. Psychology* 91 (Leonard Berkowitz & Elaine Walster, eds., 1976); June Price Tangney, *Recent Advances in the Empirical Study of Shame and Guilt*, 38 *Am. Behav. Scientist* 1132 (1995);

conventions--behavioral regularities that are commonly observed, such as serving dessert after dinner and not before-- and norms, which are behavioral regularities that create an obligation to obey.<sup>15</sup> In our case, for example, the Smiths determination to observe the rule against dogs on the trail is normative, supported as it is by a threat of sanction that, in turn, creates a felt obligation to obey. That obligation may come either from an internalized sense of duty or from a fear of external sanctions such as shaming or shunning or from both.<sup>16</sup>

Beyond the distinction between norms and conventions, and the different ways in which norms are enforced, there is the further complication that an individual perceives any given norm in two quite different senses. The first is what the actor believes that she will do and the second is what the actor believes that others will do. The experimental literature on preference formation and the cognitive psychology literature both suggest that while these two senses influence one another, they are also distinct. This distinction is relevant when the analyst seeks to answer the key question: Why do people enforce norms against other people? In my example, what explains the behavior of the neighbors?

One answer is that such “second order” enforcement is a signal to others of the individual’s role as a member of that particular norm community.<sup>17</sup> On this view, the neighbors may be enforcing a norm to avoid the disapproval of other members of the norm community. Alternatively, the belief that the individual will obey while others will not may stimulate a secondary norm that makes enforcement a norm itself. On this view, the neighbors may have internalized a norm that obliges them to enforce through shaming those norms to which they

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<sup>15</sup> To be sure, the distinction between conventions and norms is fuzzy. Often conventions, such as table manners, become normative over time in the sense that deviation is subject to social sanctions and, in turn, creates a felt obligation to obey.

<sup>16</sup> See Jon Elster, *The Cement of Society* 101-02 (1989); McAdams, *The Origin of Norms*, *supra* note -- at 350-351; Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1656 (1996).

<sup>17</sup> See Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. Legal Stud. 765 (1998) (presenting a signaling theory of norms); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 Va. L. Rev. -- (2000) (same); Eric A. Posner, *Law and Social Norms* (2000)(same).

themselves adhere.<sup>18</sup> Clearly, the correct answer to this question turns on the complex relationship between internalization of a norm and the imposition of second order sanctions --such as shunning or shaming.

The analysis becomes even more complex when a simplifying assumption, one rarely acknowledged by legal norms scholars, is relaxed. Normative behavior is multifaceted and not binary. Behavior is not constrained by one or two norms, nor is an individual either a norm “cooperator” or not.<sup>19</sup> Thus, to try even a simple taxonomy of norms necessary to analyze the *Case of the Devoted Dog Lovers* risks distortion and oversimplification. In the case of the Smiths, for example, they describe themselves as having the following (relevant) preferences and values. First, they have a deeply imbedded respect for law and legal institutions that is the product of their roles as members of the “informed elite.” Second, they both have a strong “moral sensibility” and a commitment to act on their moral principles that are products of many factors, including their education, age, experiences and associations. Third, they share a strongly held preference for preserving the environment that is linked to their self-identification as “liberal Democrats” and lovers of nature. And fourth, both the Smiths claim an even stronger preference for promoting the welfare of animals as exemplified by their devotion to their dogs.

Even at this simplified level, it is obvious that normative constraints are not complementary but frequently are in tension. To be sure, the Smiths have an embedded hierarchy of values that permits them to resolve value conflict. But until the conflict is presented to them,

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<sup>18</sup> A theory of secondary norms relies, in one way or another on a theory of internalization. The two most prominent economic analyses of internalized norms are those by Robert Cooter and Gary Becker. See generally, Robert Cooter, *Structural Adjudication*, supra note -- at ---; Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. Rev. 903 (1998); Robert Cooter, *Expressive Law and Economics*, 27 J. Legal Stud. 585 (1998); Gary S. Becker, *Accounting for Tastes* (1996).

<sup>19</sup> This is not to say that models that simplify normative behavior into binary categories are not useful on their own terms. Thus, for example, Eric Posner’s attempt to develop a signaling model of norms that separates individuals into two categories: “good types” and “bad types” provides useful insights into a variety of puzzling behaviors such as tax compliance. But the simplifications of the model also reveal how little of the relevant behavior can be predicted in those terms. See generally, Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 Va. L. Rev. -- (2000).

they are not able to articulate that hierarchy with any confidence. Not until the incident on the trail did the Smiths fully realize that, in their moral calculus, “dogs trump trees.” In sum, for the Smiths, as for all of us, normative constraints are “soft.” We adhere to most but not all, most of the time. We experience norm confusion when constraints overlap. Some norms are tied or “bundled” to each other, even though they may appear to have (and do have) separate spheres of influence for others. Finally, individuals practice what Elizabeth Scott has called “preference disguise.”<sup>20</sup> We are often unwilling to express intrinsic preferences, especially when to do so risks the imposition of sanctions by other members of our norm community who don’t have precisely the same preference structure.<sup>21</sup>

The human tendency to mask those preferences that are inconsistent with the prevailing norms complicates any predictions about how and when a particular norm is internalized. In the case of the Smiths, therefore, an objective analyst must begin by accepting their stated preferences and values as given. Moreover, as one who is a longtime close personal friend and intimate, my observation that these preferences are deeply internalized (putting aside for the moment how and why that process occurs) has been tested against numerous experiences, including instances where value conflicts require a more candid revelation of “true” preferences. This leaves us, then, with the core question. Given four internalized norms: a respect for law, a strong moral sense, a commitment to the environment and an even deeper commitment to animal rights, how can we understand the effects of the legal ordinance banning dogs on the nature trail?

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<sup>20</sup> Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev.-- (2000).

<sup>21</sup> Timur Kuran, *Private Truths, Public Lies* (1995).

## II. A RATIONAL CHOICE ANALYSIS OF THE INTERACTION OF LAW AND NORMS

The *Case of the Devoted Dog Lovers* presents us with a law that carries no formal legal sanction or threat of sanction. But it influences behavior. Is that influence due to either the expressive or internalization effects of the law? A rational choice analyst would answer, “not necessarily.” By focusing on the incentive effects of law in shaping the opportunity set of the Smiths and their neighbors, we can develop a plausible story to explain the case using the classic tools of rational choice.<sup>22</sup>

### *Preferences and Norms as Part of the External Environment*

Assume first that all preferences and normative behavior of the Smiths and their neighbors are exogenous and that the only relevant variables that influence the behaviors of the actors in predictable ways are changes in the costs and benefits of satisfying those preferences. By hypothesis, therefore, the new dog ordinance influences behavior (if at all) by granting a subsidy to enforcers who, in turn, impose an expected sanction on violators.

On this account, the neighbors are motivated by the legal rule to enforce a local norm that prefers trees to dogs. The incentives for the neighbors to publicly affirm their preference for trees

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<sup>22</sup> Rational choice theory is premised on the assumption that individuals rationally choose among available opportunities to achieve maximum satisfaction according to their individual preferences. Individual choice is thus a product of two functions: the individual’s “opportunity set” which specifies the set of all feasible opportunities from which choices can be made, and a “utility function” which specifies the ranking of those opportunities according to the individual’s tastes or preferences. The traditional assumption is that an individual chooses among these preferences rationally, that is, preferences are complete, reflexive and transitive. Thus, according to the model, an individual chooses the opportunity that produces the most utility given her preferences. The traditional assumption is that choices can only be manipulated or influenced by acts that expand or contract the opportunity set, such as by granting subsidies or imposing sanctions. Thus, under the traditional assumptions of rational choice analysis, only changes in the opportunity set are modeled. For purposes of the analysis, it is assumed that individual preferences are exogenous or immutable. See Hal R. Varian, *Microeconomic Analysis* 112-120 (3rd ed. 1992).

to dogs have been altered by the enactment of the ordinance.<sup>23</sup> This is true to the extent that the neighbors and other norm supporters are playing something like an assurance game in which the neighbors are more willing to sanction violators the more they believe others are willing to sanction. An increase in the number of potential norm enforcers reduces the expected costs of conflict for any single enforcer and, in turn, increases the reputational returns to being in the class of enforcers. The norm is enforced by a second order sanction--*shaming*. The effect of the sanction is to make the Smiths' preference for vindicating the rights of their dogs more costly to express than previously.

In this view, the effect of the law is to teach the community about the general local sentiment regarding the conflict between dogs and trees.<sup>24</sup> This, in turn, emboldens the neighbors to speak out. To be sure, one might characterize this "broadcasting" effect of the local ordinance as "an expressive" function of the law. On one level, then, the question becomes largely one of semantics.<sup>25</sup> But on a deeper level, there is a fundamental difference between a rational choice analysis of these second order sanctions and an "expressive" analysis.<sup>26</sup> The important point is this: As the *Case of the Devoted Dog Lovers* illustrates, we observe, as an empirical regularity,

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<sup>23</sup> In rational choice terms, the neighbors are motivated to express their preference for trees to dogs by shaming violators when (and only when) the returns to shaming exceed their costs. There is a plausible story to explain when that might be so. See note 28 *infra*.

<sup>24</sup> Without the ordinance, dog lovers might mistake the amount of community support for dogs over trees and thus persuade themselves that their neighbors disapproval reflects idiosyncratic preferences, a conclusion that the neighbors might share as well. Thus, the primary significance of the ordinance is that it carries information about the preferences of others in the community. This argument assumes implicitly that the local political process reflects majoritarian values. This may not always hold true. If legislation sometimes reflects successful rent seeking by interest groups, and this special interest bias is well-known, then people won't infer anything necessarily from the enactment of the ordinance. It also implies that, to the extent that preferences change faster than legislation, a recently-enacted ordinance may have more information value than an old one.

<sup>25</sup> I recognize that Richard McAdams calls these second-order sanctions an "expressive" effect. See McAdams, *What is Expressive Law?*, 86 Va. L. Rev. -- (2000). To the extent that he is focusing on the informational effects of the law and not on any changes in normative behavior that are caused by the law our debate is primarily semantic. But if McAdams is assuming that the law causes normative change through its expressive effect, then our differences are more fundamental.

<sup>26</sup> I am grateful to Paul Mahoney for recognizing the importance of making this point explicitly.

that people obey the law most of the time even when the threat of state-imposed punishment is remote. It is common ground that part of the explanation is that individuals may experience informal sanctions imposed by other members of the community. The key question is what is the relationship between the law itself and the informal sanctioning behavior?

As I describe in more detail in Part III, an “expressive” theorist would argue that the law changes things; that by expressing the sentiment of the community, the ordinance modifies or stimulates the creation of an underlying norm in some way. But a rational choice theorist offers an alternative explanation in which the law “expresses” something only in a Bayesian sense. Prior to the anti-dog ordinance, the Smiths might have estimated the probability that someone would chastise them for bringing dogs on the trail as, say, 1 in 10. Once they see the sign informing them about the ordinance, they will revise their estimate to, perhaps, 1 in 6. Thereafter, once they encounter their neighbors on the trail, they revise their estimate again, this time to, say, 1 in 2.

Why might the Smiths revise their estimate of the probabilities of sanction without experiencing a change in their preferences or in the underlying norms? The Smiths, as all of us, recognize that statutes are enacted only if (1) a substantial majority of the community has at least a weak preference for the new rule, or (2) a minority of the community has an intense preference for the new rule. If a majority doesn’t want dogs on the trail, then by definition if the Smiths encounter someone else on the trail, the other hikers are more likely than not to disapprove of the Smiths’ behavior. Minorities with intense preferences tend to relish playing “norm entrepreneur” (or “busybody” as norm entrepreneurs used to be known), so they are more likely than the average person to be out on the trail looking for people to shame. Knowing that one of these two things is the case would cause the Smiths to revise their prior estimate of the likelihood of an unpleasant encounter on the trail.<sup>27</sup>

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<sup>27</sup> The ordinance embodies a further piece of information for the Smiths. It tells them that the character of any conflict interaction on the trail has now been altered. Those inclined to enforce the norm will now have an argument that they lacked previously: as a matter of positive law, the Smiths no longer have the right to bring their dogs. While the Smiths can resort to claims of civil disobedience, the range of justifications for their actions has been narrowed.

A similar analysis applies to the neighbors. The existence of the ordinance implies either (1) that if the Smiths react aggressively to an attempt to shame them, other hikers on the trail are likely to take the neighbors side, or (2) the Smiths' (or any other dog walkers) preference is likely to be less intense than the neighbors, so they are unlikely to react aggressively. The important point in this story is that the law does not communicate a moral message, alter preferences, or anything else. So far as the world of norms is concerned, the ordinance serves *only* an informational function--it tells an affected citizen something about the likelihood of experiencing informal sanctions. The effects of the law are simply explained in terms of changes in the opportunities available to the Smiths and the neighbors respectively to satisfy a given set of preferences.<sup>28</sup>

A similar story can be told about pooper-scooper laws or smoking bans in airports, the favorite examples used by norms scholars to describe the expressive and internalization effects of law.<sup>29</sup> Pooper-scooper laws, even without effective enforcement by the state, change the incentives of individuals facing a preference conflict between a taste for clean yards and a taste for allowing "dogs to be dogs." No smoking ordinances in airports not only solve coordination

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<sup>28</sup> An objection to my story might run along the following lines: absent internalization of the new norm, won't collective action problems undermine enforcement of the norm through shaming? One answer to this question, advanced by Richard McAdams, is that shaming is costless or nearly so because individuals seek esteem from others and shaming builds esteem. See text accompanying notes -- to --infra, and McAdams, *The Origin of Norms*, supra note -- at --. The problem with McAdams' account is that if shaming is costless then the information the law transmits about the preferences of others (or in his terms the law's "expressive" effect) no longer has any role to play in the analysis. After all, nothing can lower the cost of something that is already costless. A richer analysis, therefore, might acknowledge that shaming carries both benefits and costs. Individuals engage in shaming when the expected benefits exceed the expected costs. The costs of shaming include the conflict costs associated with enforcement. But shaming behavior is complicated because it has benefits for the enforcer as well. These would include the reputational benefits from being a good norm enforcer, thus solidifying one's reputation as a "cooperator" within the norm community. There are also intrinsic benefits to shaming to the extent that it reinforces self-perceptions about the congruence between one's beliefs and one's actions--a broadly accepted indicator of "good character". On this account, the law not only provides information about others' expected behavior, but it also provides a *justification* for norm enforcers to speak out by affirming the appropriateness of their pre-existing preferences. In this sense, the ordinance subsidizes the neighbors' preference for disapproving of dogs on the trail by linking it to another preference: to be a "good person."

<sup>29</sup> For a sampling of the analyses of bans on smoking and pooper-scooper ordinances, see Lessig, *Social Meaning*, supra note --- at ---; Sunstein, *The Expressive Function*, supra note -- at ---; McAdams, *The Origin of Norms*, supra note -- at 385-86; Cooter, *Internalizing Legal Values*, supra note -- at ---.

problems but resolve a cooperation problem as well: the preferences of those who prefer clean air to those who prefer to smoke. The law in either case informs those with the preference that favors clean air or clean yards that general local sentiment supports their preference. This raises the benefits and lowers the costs of shaming violators. Similarly, the violator is informed of the prospect of second order sanction and the costs of the forbidden activity are increased.

The *Case of the Devoted Dog Lovers* thus shows why law qua law can be understood to have predictable and independent effects beyond the threat of sanctions imposed directly by the state. These effects can be analyzed in terms of changes in the costs and benefits of particular behaviors. On this account, the role of norms is to provide information to the actor about the external environment. Information is both valuable and costly, so rational choice theory would predict that people would engage in investments to acquire norm-related information up to the point where marginal return equals marginal cost. Traditional theory would also observe that norms have the characteristics of a public good, so public provision of norm-related information through legal change has some advantages.<sup>30</sup>

This focus on the different ways law can shape the opportunity set of the relevant actors provides a parsimonious and coherent account without recourse to the possibility that the law might have expressive effects or might influence the social meaning of the behavior or might, through internalization, induce changes in individual preferences. Moreover, the rational choice analyst using these tools can pursue insights into the interaction of law and norms and still be fully aware that life is more complicated than the models she uses to explain it.

### ***The Implications of Norms as Information***

Now let's assume that legal change not only influences behavior directly, but also, by providing norm-related information, affects the individual's perceptions of normative constraints which, in turn, stimulates second order effects. Several implications follow from an explicit assumption that norms are part of the external environment. Norms are ways of predicting how

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<sup>30</sup> I am grateful to Paul Stephan for pointing this connection out to me.

people will behave in response to certain social cues. That knowledge allows those familiar with the relevant norms to optimize their choices for any given set of normative and legal constraints. It follows, therefore, that the legal analyst will do better at predicting the effects of legal rules where legal and normative incentives tend to run in the same direction. Moreover, the overlapping effects of law and norms argue for a more careful analysis of which influence --law or norms--has the comparative advantage. As Ellickson has reminded us, the legal analyst must guard against the myth of legal centrism.<sup>31</sup> The fact that law operates in conjunction with a robust, complex and overlapping normative structure argues for a complementary role for state sanctions, permitting cooperation problems to be resolved within existing normative frameworks where those frameworks work best.<sup>32</sup> The more we learn about norms, therefore, the more we should demand evidence of the comparative inadequacy of these extralegal constraints on behavior before we impose additional, legal constraints.

Finally, the interaction of law and norms tells the analyst something about the relationship between prices and sanctions.<sup>33</sup> Sometimes, the effects of legal rules are amplified by an existing normative constraint, making the law a sanction that deters the action. Thus, for example, an ordinance that limits parking in spaces reserved for the disabled is buttressed by the existing social norm of respect for the disabled and makes a violation subject to condemnation. On the other hand, in the case of a mere parking meter violation, the existing norm describes the behavior in neutral terms and thus the legal rule merely sets the price for parking in that space.

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<sup>31</sup> Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. Legal Stud. 67, 81-90 (1987).

<sup>32</sup> See Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1288-1294 (1998) (arguing that the presence of strong social norms during marriage explains and justifies the absence of legal enforcement of marital “bargains”).

<sup>33</sup> As Richard McAdams observes, “demanding a price means that the behavior is deemed acceptable so long as the price is paid; imposing a sanction expresses that a behavior is unacceptable even for one willing to incur the sanction.” McAdams, *The Origin of Norms*, supra note -- at 398; See also Saul Levmore’s contribution to this symposium, Saul Levmore,-----, 86 Va. L. Rev. -- (2000), and Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1984).

But rational choice theory has its deficits as well. Common experience supports Larry Lessig's insight that social meaning is both internally constructed and subject to change.<sup>34</sup> Indeed, without understanding the social meaning of a particular act, the analyst risks not prescribing the right legal intervention to stimulate desired behavior. Thus, for example, the social meaning of graffiti on the New York subways was not fully understood as an invitation to antisocial and criminal behavior until "broken windows policing" revealed the benefits of paying attention to the social context of crime.<sup>35</sup> In this case, the legal change--strictly enforcing the rules against defacing public property-- appears to have had a powerful "expressive" effect in changing the social meaning of the experience of riding the subway. The evidence supports the hypothesis that random crime and violence declined as a result of changes in the meaning of the social context. Unsurprisingly, the legal analyst yearns for a theory to explain when and how these "expressive" effects might operate.

Similarly, self-reflection (as well as inability to explain in rational choice terms behaviors such as voting and tipping servers in roadside diners ) confirms the reality of internalization. We all experience guilt when we violate certain normative commands. Moreover, guilt is only one among a range of emotional responses that function as a pre-commitment to cooperative action.<sup>36</sup> If I feel guilt when I violate a promise, and there is some way of signaling that fact to others, then my commitments to act in a cooperative way are credible. These internal constraints on behavior can be understood from the perspective of evolutionary psychology. There is long-term advantage in moral behavior. But in order for emotions, such as guilt, to work as self-enforcing

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<sup>34</sup> Lessig, *Social Meaning*, supra note-- at---

<sup>35</sup> See Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (2000).

<sup>36</sup> Having the capacity to pre-commit to cooperate provides a solution to Schelling's classic "commitment problem." Thomas Schelling, *The Strategy of Conflict* (1960). Schelling describes the problem in terms of a kidnapper who, after getting cold feet, wants to release his victim, if he can be assured the victim will not go to the police. The victim willingly promises not to tell in return for his freedom. But since both parties realize that the victim has no incentive to keep his promise once released, the kidnapper reluctantly concludes that he must kill him. Among the solutions to the dilemma, is for the victim to make the commitment credible by offering an equivalent "hostage". For example, the victim might confess to a crime he has committed in the past as a bond against breaking his promise. Other solutions to the commitment problem include self-enforcing sanctions such as guilt. See Robert H. Frank, *Passions Within Reason: The Strategic Role of the Emotions* 4-7 (1988).

commitments, satisfaction must be intrinsic in the act of compliance and not premised on the possibility that material gains may later follow. Thus, as Robert Frank has argued, moral sentiments do not lead to material advantage unless they are internalized.<sup>37</sup> If the analyst could unlock the keys to internalization, a far richer and more robust theory of human behavior under constraints would be available to us.

In short, it is easy to understand why legal analysts seek to incorporate preference-shaping factors, such as those that may result from the “expression” or “internalization” of a legal command. But what, exactly, do we know about legal expression and internalization? In the next Part, I analyze the *Case of the Devoted Dog Lovers* using the preference-shaping tools that norm scholars have proposed we add to the legal analyst’s kit bag.

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<sup>37</sup> Frank, *Passions Within Reason*, supra note --- at ---.

### III. THE EXPRESSIVE AND INTERNALIZATION FUNCTIONS OF LAW

If we assume that people make choices among their opportunities (according to some criterion of rationality) so as to achieve the most satisfaction given their preferences and values, then it follows that individual behavior can be affected in two different ways. Rather than focusing on how changes in external constraints affect the actor's range of opportunities, given stable preferences and values, one can ask directly how external changes affect individuals preferences and values.<sup>38</sup> Treating preferences and normative behavior as endogenous permits the analyst to deal with the effects of experiences and social forces. The merit of this approach is obvious. A large number of social choices depend not only on opportunities but on past experiences and social influences as well. The challenge in any preference-shaping analysis is to retain the predictive power of the traditional model of rational utility maximizing behavior while enriching the analysis by offering a more complete account of the effects of changes in preferences and values on individual choice.<sup>39</sup>

Expressive and internalization theories of law and social norms seek to do just that. While

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<sup>38</sup> For a thoughtful attempt to apply a preference-shaping analysis to provide a better positive account of the criminal law, see Kenneth Dau-Schmidt, 1990 *Duke L. J. I.*

<sup>39</sup> Traditional rational choice theory deals with the problem of subjective preferences and values by employing a key assumption. Under the assumption of "typical value," individuals are universally motivated to attain certain instrumental goods, such as wealth, prestige or power. Those instrumental (and measurable) goods are then exchangeable with other subjective and idiosyncratic preferences that each individual holds. Thus, individual choice can be modeled with an objective utility function which is both known and constant. It follows, that if the preference function is constant, any changes in behavior are attributable to changes in the individual's opportunity set.

The problem, of course, is that there is significant evidence of individual behavior that is inconsistent with the assumption of typical value. Other-regarding behaviors, civic acts, voluntary decisions to forego employment in labor markets, and the like, all point to the existence of non-instrumental motivations for human behavior. One formal solution to the problem is to assume that individuals maximize "utility" as they conceive it. While "utility" is a formally objective function, to the extent that it incorporates incommensurable values, it is also an empty concept. Thus, incorporating endogenous values through a generic utility function does not address the central question: if these values change and if those changes influence behavior, then the rational choice analyst must treat those values and preferences as endogenous or else abandon any pretense of having a fully predictive model. There have been a few attempts to do this within the rational choice paradigm, but, as of yet, none has become broadly accepted. See generally, Michael Hechter, *The Role of Values in Rational Choice Theory*, 6 *Rationality and Society* 318, 319-320 (1994).

these two concepts are interrelated and overlapping, it is useful for analytical clarity to describe them as occupying two separate domains. The expressive effects of law are those consequences of legal rules that stimulate changes in social norms and conventions and /or change the social (or normative) meaning of particular behaviors. Ideally, by expressing a legal principle or standard, the state can overcome the collective action constraint that is precluding private parties from solving either a cooperation problem or a coordination problem or both.<sup>40</sup> In turn, the emergence of a new normative framework influences an actor's preferences either directly, through internalization, or indirectly through the imposition of second order social sanctions such as shaming or ostracism. In sum, expressive theory focuses on the first question: what are the mechanisms by which the social meaning of any action is shaped or modified?<sup>41</sup> Internalization theory, on the other hand, focuses on the further question: what are the mechanisms by which preferences can be modified?

### *Law as Expression.*

Expressive theories of law have been popularized in the work of Larry Lessig and Cass Sunstein.<sup>42</sup> While important in focusing scholarly attention on the issue, their work is illustrative

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<sup>40</sup> In a cooperation game, the parties can do better *collectively* if they cooperate, but without some collective action, their dominant strategy is to defect. The desired collective action may be an enforceable commitment to share the benefits from cooperative behavior (such as in the classic prisoners dilemma game) or a rule that assigns property rights in ways that promote the cooperative solution (such as in the problem of the commons). In any case, the law seeks to solve cooperation problems by changing the incentives of the parties. In the case of a coordination game, the parties have common interests, but, even so, may not reach the cooperative solution on their own. Thomas Schelling's famous example of where to meet a friend in New York City without prior agreement is illustrative. Focal points (such as "let's meet at Grand Central Station") provide coordination solutions. See Thomas Schelling, *The Strategy of Conflict* 54-55 (1960). In the case of coordination games, the law ideally will help solve the problem by changing parties expectations (rather than their incentives), such as by announcing focal points. For a discussion of the ways in which legal rules might optimally solve such games, see Richard H. McAdams, *What is Expressive Law?* 86 Va. L. Rev. -- (2000).

<sup>41</sup> To be sure, there are nonconsequentialist expressive theories that consider solely the symbolic content of legal rules. These are not relevant for my purposes. For a critique of such theories, see Matthew D. Adler, *Expressive Theories of Law; A Skeptical Overview*, 148 U. Pa. L. Rev. 1363 (2000).

<sup>42</sup> See generally, Lawrence Lessig, *The New Chicago School*, 27 J. Legal Stud. -- (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181 (1996); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903 (1996). Richard

rather than systematic. Lessig shows through anecdotal, cross-cultural comparisons that the social meaning of particular behaviors varies across time and cultures.<sup>43</sup> A collective action problem may prevent private parties from changing a disfavored social meaning by their individual actions. The state, however, if sensitive to social meaning, can stimulate desirable changes through legal expression. Thus, for example, anti-dueling statutes in the South were less effective than prohibitions against a dueler's holding public office because the bar on office holding made ambiguous the social meaning of defending one's honor in a duel.<sup>44</sup>

Sunstein extends Lessig's analysis by asking how legal statements (which carry social meaning as well as imposing sanctions) might be designed to create or modify social norms. If law can manipulate social meaning, then it follows that law can manipulate normative structures as well. Sunstein suggests that anti-littering statutes and pooper-scooper laws have such an expressive effect. Even without direct sanctions, such regulation inculcates appropriate behavior among some citizens (internalization) and also inculcates the expectation of social opprobrium in others (expression). These changes in preferences and values occur because the social meaning of littering or not cleaning up after one's dog has been changed from the exercise of free choice to a demonstration of disrespect for others. A "norm cascade" is stimulated by the mere consequence of changing preferences and behavior in some citizens, and, at some point, the behavior reaches a

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McAdams and Bob Cooter have made important contributions to this literature as well. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997); Richard H. McAdams, *What is Expressive Law?*, 86 Va. L. Rev. -- (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. Legal Stud. 585 (1998).

<sup>43</sup> Lessig relies on three primary examples of the interaction between social meaning and legal regulation: the effects of state propaganda on the social meaning of helmets for motorcyclists in Russia, the meaning of the duel for the educated elite in the American South and its relevance to the choice of effective regulation, and the effects of the Civil Rights Act of 1964 on the social meaning of racial discrimination in the South. See Lessig, *Social Meaning* at 964-73.

<sup>44</sup> The claim is that a mere anti-dueling ordinance did not undermine the practice because a gentleman's honor was still at stake if he refused a challenge. But once a dueler was barred from public office his honor and duty was at risk with either decision. If he chose to fight the duel, he risked violating his duty to be a public servant. If he declined to fight the duel, he risked the loss of honor in rejecting a proper challenge. This ambiguity ultimately undermined the practice (or so it is assumed).

tipping point and a new norm is entrenched.<sup>45</sup>

Richard McAdams' esteem-based theory of norm creation and modification is the most systematic effort to explain the mechanisms by which legal expression can affect social norms.<sup>46</sup> McAdams' argument assumes that individuals seek the esteem and respect of others. Moreover, their desire for esteem is relative. Because individuals want to enjoy more of a person's good opinion in comparison to others competing for the same levels of esteem, the withholding of esteem is a sanction. Moreover, the expression of such disapproval is relatively costless to the enforcer and thus individuals readily assume the role of norm enforcer.<sup>47</sup> McAdams explains the conditions for norm creation or modification as arising from a consensus within a community of the esteem-worthiness of a target behavior. If, in addition, there is a risk of detection for deviation from the consensus and there is a capacity to publicize the deviation--through gossip or other informal or formal means--then a norm can arise (and/or be modified).

The key element of publicity provides the link for McAdams to an expressive theory of law. Law can affect behavior through second order sanctioning by signaling the existence of a consensus that is only dimly perceived by the members of the community or group before the legal enactment. If the conditions are right, legal publicity can stimulate the creation and/or modification of normative behavior that, in turn, will influence primary behavior through group expression of disapproval.<sup>48</sup>

Lessig, Sunstein and McAdams freely concede that the expressive effects of law are dependent on circumstance. Thus, legal pronouncements may or may not lead to normative change

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<sup>45</sup> Sunstein, *Expressive Function*, supra note ---; Sunstein, *Social Norms and Social Roles*, supra note ---

<sup>46</sup> Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 Mich. L. Rev. 338 (1997).

<sup>47</sup> Id at ---.

<sup>48</sup> Id. at ---.

in any particular case. Norm change turns on many highly context-specific factors, including whether the existing norms are tied or bundled with other, desirable norms,<sup>49</sup> whether a “silent majority” exists for changing existing norms, and whether there are in place *successful* norm entrepreneurs, individuals of extraordinary skill who perform the roles of “mavens” and “connectors.”<sup>50</sup> Despite these limitations, it is fair to require, at a minimum, that, an expressive analysis of legal change have descriptive, if not predictive, power.

### ***The Limits of Expressive Explanations of Legal Change***

Does law as expression enrich the analysis in the *Case of the Devoted Dog Lovers*? Under our facts, the Smiths do report that they were shamed by the intervention of their neighbors on the trail. An expressive analysis might proceed along the following lines. The expressive effect of the ordinance is the signal to the community that a clear norm consensus exists which prefers trees to dogs. Absent the ordinance, the existence of a consensus might have been uncertain. Now the Smiths, as law-abiders, are confronted with the prospect of being deviators, and the neighbors, as norm enforcers, are reinforced in their predisposition to impose sanctions. The expressive effects of the law stimulates a change in the expectations of both the Smiths and their neighbors. The Smiths now understand their behavior as constituting a normative violation. This altered expectation reshapes their prior preferences for dogs to trees. Through a process as yet imperfectly understood, the expectation of social sanctions stimulates a preference change and

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<sup>49</sup> See E. Scott, *Social Norms and Marriage*, supra note --at---

<sup>50</sup> Malcolm Gladwell, *The Tipping Point* (2000). In Gladwell’s terminology, a “maven” is a norm entrepreneur who delights in learning a great deal about emerging norms and then delights equally in sharing that knowledge freely with others, thus serving to spread the information widely and at low cost. The key is to find someone who both accumulates information and experiences intrinsic rewards from giving it away freely to others. Id. at ---. A “connector,” on the other hand, is a norm entrepreneur merely by virtue of circumstance, that is, owing to the large number of people with whom she has personal contact and relationships. Connectors spread emerging norms widely simply because they “connect” to many different social groups and at many different levels. Gladwell’s argument is that fads, fashions and (by implication) norms are spread through the offices of mavens and connectors until they tip. Id. at ---. The absence of these individuals in particular cases is presumably a barrier to a norm cascade. See also Sunstein, *Expressive Function*, supra note -- at 2035-36; Randall C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. Chi. L. Rev. 1225 (1997).

the new norm is internalized.<sup>51</sup>

An expressive analysis thus understands the Smiths behavior after the exchange on the trail in terms of a change in endogenous preferences that was stimulated, in the first instance, by the ordinance. But a traditional rational choice analysis reached the identical point by focusing on changes in incentives rather than expectations. That analysis concluded that the incentive effects of the ordinance were to increase the costs of walking the dog on the trail for the Smiths while increasing the subsidy to those who were predisposed to exclude dogs. What neither rational choice theory nor expressive “theory” can answer, however, is whether the local ordinance stimulated a change in social meaning and thus modified the existing norms or whether it simply emboldened the neighbors because it revealed information about an existing norm. In other words, we simply do not know whether the willingness of the neighbors to impose social sanctions on the Smiths was stimulated by normative change or not.<sup>52</sup>

In short, expressive “theory” standing alone cannot improve upon rational choice theory in describing the effects of legal rules. Moreover, unlike rational choice theory, the ideas about expressive effects are not a theory or a model in the conventional sense of those concepts. They do not provide a method of analysis that generates testable predictions about the world. To be sure, especially with McAdams’ refinements, the mechanisms for norm influence are described at a level of abstraction that purports to permit generalization. But the relationship among the key variables is not adequately specified.

There is a good reason for this critical omission. In point of fact, whether norms are created or modified as a result of a legal rule is context-dependent, and, under the current state of

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<sup>51</sup> Although neither the analysts who focus on endogenous preferences nor those who focus on internalization acknowledge the fact, it seems clear as an analytic matter that the concepts of changing preferences and norm internalization are synonymous. It is perhaps the case that the former has a somewhat broader domain, but, in any event, when a norm is internalized a preference has changed.

<sup>52</sup> In sum, the “expressive” theories that have been formulated to date are non-falsifiable. If *either* norms influence law or law influences norms, we would observe changes in behavior around the time of a change in law. Unfortunately, we would have no idea in which direction the causation runs.

our understanding, unknown. In order to claim that a normative change is a causal consequence of a legal rule, the analyst must begin with a baseline. What is the state of the world before the legal change? In other words, when does a norm become a norm? We do not know the answer to this question because of the intractable problem of assessing social meaning in a world where private preferences are often disguised. The expressive analysis thus cannot answer the question whether the law *precedes* or *merely follows* the creation of the norm. On one view, a norm already exists and the law is simply reflecting the emerging norm. On the other view, the conditions for normative change are ripe and the law stimulates the creation of the new norm. Which came first, the chicken or the egg? Without further, more rigorous, analyses, the verdict on the expressive effects of law must remain: not proven. The ideas are interesting, the question is important, but, thus far, the observations are largely speculative.<sup>53</sup>

There have been several, additional attempts to systematize the idea that law can have expressive consequences. Richard McAdams, in this symposium, focuses on the state's comparative advantage in publicity and prominence that allows it to solve vexing coordination problems (such as those facing smokers and non smokers in airports) through legal pronouncements.<sup>54</sup> In the version of his paper presented at this symposium, Robert Cooter described the expressive effects of law as analogous to the economics of cheap talk.<sup>55</sup> Cheap talk is a statement that changes individuals expectations but not their incentives. Cooter gives the example of a public official making a believable public pronouncement that stimulates enough

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<sup>53</sup> To be sure, there is a great deal about human behavior that we cannot know scientifically. And there are other ways of "knowing" than science, other methods than empirical testing. These ways of knowing can be and are very useful, if only because the alternative--where testing and falsifiability are impossible--is total ignorance. This makes a strong case for intuition and speculation, for telling stories that either do or do not "ring true". Such stories may not be falsifiable, but sometimes they can tell us things that are useful for lawyers to understand because they make us better predictors of how different sorts of legal moves will play out. The problem, therefore, is not with speculation per se, but with speculation that purports to a certainty that it does not have. In this sense, the norms scholars who work in the tradition of law and economics bear a heavier burden of proof than those whose methodologies are post-modern.

<sup>54</sup> Richard H. McAdams, *What is Expressive Law?*, 86 Va. L. Rev. --- (2000).

<sup>55</sup> Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalizing Legal Values* (paper presented at the Olin Conference on The Legal Construction of Norms, February 25-26, 2000, on file with the Virginia Law Review).

citizens to change their behavior such that a new and superior equilibrium emerges in which a majority of the citizens adopt a new civic norm.

Neither the new McAdams paper nor the initial Cooter draft adds much to the preceding analysis of expressive law. In the case of coordination problems--such as driving on the right or the left, or smoking only in designated areas-- it is not clear what the state can do, *other than as any property owner*, to stimulate coordination solutions. To be sure, as several scholars have argued, the law would seem to be a very effective source of focal points to the extent that it reliably publicizes a latent consensus.<sup>56</sup> The problem, however, is with the claim of *reliability*. At the level of the local community, a public announcement may well reliably reflect a local consensus. But at more removed levels of legislative or judicial action, the fact that law is mediated through representative democracy precludes many judgments about whether the consensus is latent or as yet undeveloped.

Similarly, it is unclear what advantage the state enjoys in creating a better civic environment through speeches and other forms of public discourse. In the main, through its legal pronouncements the state solves (or purports to solve) cooperation problems that private parties cannot easily solve themselves. To do so, the state must order competing value choices. Thus, for example, in the *Case of the Devoted Dog Lovers*, the local ordinance decrees, in effect, that on the nature trail “trees trump dogs.” Viewing the ordinance as the solution to a coordination problem or as an appeal to a higher civic purpose ignores the reality that the ordinance creates a value conflict in those who order moral choices differently from the duty as embodied in the new law. Their obedience does not derive either from adherence to convention or from cheap talk. It derives from law as sanction.

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<sup>56</sup> See Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. Pa. L. Rev. 1697, 1719 (1996) (discussing the way legislatures and courts “solve coordination games just by publicizing the strategies that are most common. But legislatures, more so than courts, and courts, more so than norm-producers, are less dependent on the preexistence of focal points”); Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. Pa. L. Rev. 1987 (1996).

This is not to deny that an incidental effect of some laws is to solve a coordination problem through the announcement or expression of a new convention or understanding that serves as a focal point. But, in this regard, there is nothing unique about *law* (independent of sanction). Conflict over smoking in airports can be (and in some places is) avoided by the airport announcing separate smoking and nonsmoking areas. Put simply, as distinct from civic discourse or public pronouncements, law as cheap talk is a null set. Law, by its very nature, is expensive talk.

***Law as Internalization.***

The more interesting and provocative efforts to analyze endogenous preferences are those that focus on the mechanism of internalization. In *Accounting for Tastes*, Gary Becker seeks to solve one of the key difficulties confronting the theorist who wishes to meld an analysis of endogenous preferences with rational choice theory.<sup>57</sup> The problem is that welfare economics assesses the morality of any action (including a legal rule) in terms of its consequences as determined by the preferences of those affected. Thus, for example, a social state is deemed pareto optimal if it would be impossible to make anyone better off without making at least one other person worse off. But as Sunstein has pointed out, “when preferences are functions of legal rules, the rules cannot be justified by reference to the preferences. Social rules and practices cannot be justified by the practices that they have produced.”<sup>58</sup>

To solve the problem of endogenous preferences undermining the welfare criterion of utility maximization, Becker creates the concepts of personal capital and social capital (as extensions of his concept of consumption capital in which individuals have stable second order preferences about preferences).<sup>59</sup> Personal capital consists of the sum of the individual’s personal experiences over time. Social capital is the sum of the individual’s social networks and past experiences. Together, these capital stocks constrain an individual’s choices. Thus, the past casts

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<sup>57</sup> Gary S. Becker, *Accounting for Tastes* (1996).

<sup>58</sup> Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. Legal Stud. 217, 222 (1993).

<sup>59</sup> See George Stigler & Gary Becker, *De Gustibus Non Est Disputandum*, 67 Am. Econ. Rev. 76 (1977).

a shadow over the present and, as individuals are forward looking, over the future as well. Preferences and values change as the capital stock changes over time, but individual choice is consistent over time. Forward looking rational actors maximize their utility from meta or second order preferences and not from current preferences alone because they recognize that the choices they make today will become part of their capital stock and thus will affect their future utilities and preferences as well.<sup>60</sup>

Becker's theory purports to provide a foundation for analyzing the preference-shaping effects of law. If a legal change stimulates a change in preferences, that change becomes part of the individual's personal capital stock. Alternatively, the legal change may influence how the individual is treated by others. This, in turn, would become part of her social capital. In either case, these two capital accumulations will affect both present and future choices consistently over time.

Becker's analysis, though suggestive, does not answer the one central question necessary to a complete theory of internalization: can an individual affect his own preferences in the future by self-motivated changes in his current preferences? Robert Cooter has proposed just such a mechanism in his concept of "pareto self improvement."<sup>61</sup> Cooter's claim rests on the assumption that an individual's character is "translucent" at least to his intimates and close colleagues. While the state may not know whether an individual is a "cooperator" or a "defector," basic moral values are observable, albeit imperfectly, by friends, neighbors and co-workers. Knowing that, an individual with a defective moral character observes that she lacks the ability to solve ordinary commitment problems in the absence of formal mechanisms like enforceable contracts. Social interactions depend on credible commitments that are self-enforcing. Thus, our putative moral

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<sup>60</sup> Id. at ---.

<sup>61</sup> Cooter's notion of pareto self-improvement was first proposed in Robert Cooter, *Expressive Law and Economics*, 27 J. Legal Stud. 585, 597-601 (1998), and reprised in Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the "Bad Man" of Holmes*, 78 B. U. L. Rev. 903 (1998), and again in Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. -- (2000).

defective observes that she loses opportunities because she cannot make credible commitments. The motivation to increase her opportunity set stimulates the necessary characterological changes in values. Out of this process emerges a “new person.” New and better preferences and values--honesty, loyalty, trustworthiness--are now part of the individual’s stock of traits.

Cooter posits that the state, aware of the possibility that individuals are motivated to make pareto self-improvements, is able to stimulate desirable changes in group behavior.<sup>62</sup> Since the state is not in the same position as friends and colleagues to infer character from behavior, the state must, in Cooter’s world, rely on intimate groups to instill civic virtue in each other. What the state can do, however, is to announce modifications or changes in civic responsibility. Suppose, for example, the state announces a legal rule that good citizens pick up litter in public places. Rather than attaching a direct sanction, or even relying on a second-order sanction such as shaming, this law can have an internalization effect to the extent that behaving consistently with civic responsibility is seen as a proxy for good moral character as a “cooperator.” Some number of citizens will, therefore, internalize the new norm as a pareto self-improvement. Others will obey the norm automatically because their respect for law causes them to obey the laws as an intrinsic value. Together these two effects can motivate a tipping point that will shift behavior to a new equilibrium.

### *A Critique of the Theory of Internalization*

Cooter suggests three steps in the process by which law can change the preferences of citizens through internalization: (1) align law with morality, (2) rely upon citizens’ respect for law itself, and (3) depend upon self-motivated improvements to stimulate individual acts of civic virtue. Can any of these factors predictably explain changes in behavior that are induced by legal rules? First, consider alignment of law with morality. Cooter correctly states that when a

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<sup>62</sup> This part of Cooter’s argument is only briefly sketched in the version of his paper that is available to me as I write this essay. The argument is difficult to follow in its current form, so I apologize for any errors in summary.

particular law is aligned with morality, obedience to and effectiveness of the law will increase.<sup>63</sup> But here all (or certainly most) of the work is being done by the presumed existence of an uncontroversial moral sentiment that the state is wise enough to elevate to a civic duty through law. None of the work is done by the law itself. Take, for example, the more common case, such as our “no dogs” ordinance, where the legal rule reflects conflicting moral claims. Under these conditions, a person who values dogs over trees will not change her belief in the morality of the new law since, as to her, the law orders morality improperly. If behavior changes, it is owing to factors other than alignment.

What about the claim that respect for the law standing alone will stimulate increased willingness to perform a civic duty once it is announced as a legal command? This is, as Cooter recognizes, a contestable empirical claim.<sup>64</sup> But even granting Cooter his assumption, he fails to account for the force of a moral claim to civil disobedience. In any well-ordered society, there is an N of citizens who respect particular laws when the basic structure of law appears to be just. Once they respect law in general, they are predisposed to respect particular laws. Thus, by embodying an emerging norm in a particular law, the state may induce a superior equilibrium by virtue of the general claim to obedience alone. Sometimes this is so, but not always or even predictably. As in the *Case of the Devoted Dog Lovers*, whenever a legal change conflicts with a particular moral claim, even those who habitually obey the law are confronted with a moral choice. Indeed, I would suggest that the greater the habitual respect for law, the greater the commitment to civil disobedience as a moral principle.<sup>65</sup> Mohandas Gandhi was a Cambridge-

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<sup>63</sup> This point is central to the work of Paul Robinson and John Darley in the criminal law. They contend that when a legal rule meshes with existing norms and moral notions of responsibility, it is perceived as just and enhances those norms. Moreover, when criminal law has moral credibility, it influences the values that society internalizes. This in turn enhances the effectiveness of the law. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453 (1997).

<sup>64</sup> Cooter, *Do Good Laws Make Good Citizens?*, supra note --- at ---; See also e.g., Tom R. Tyler, *Why People Obey the Law* (1990).

<sup>65</sup> In an important sense, Cooter’s first two mechanisms cut against each other. If the normative legitimacy of law is made to depend on its correspondence with morality, then citizens may be all the more willing to disregard “aberrant” laws that do not accord with (their version of) morality. That is, the strength of the first mechanism--aligning law with morality--tends to undermine the second--relying on citizens’ respect for law itself.

educated lawyer with a profound commitment to the principles of justice embodied in the English legal system. Those principles drove him to disobey particular laws. Less profoundly, the Smiths' belief in the justice of their commitment to animal rights prompted them to disobey the ordinance notwithstanding their internalized sense of respect for the law. Only when they realized the potency of the sanction did they reconsider their actions.

This leaves Cooter's most creative (and controversial) idea-- "pareto self-improvement." This is a provocative concept, but it suffers from three basic difficulties. First, I quarrel with Cooter's assumptions, in particular the assumption that preferences are translucent, by which he means that others, especially colleagues and associates, can observe, albeit imperfectly, the content of one's character. The assumption that character can be reliably inferred from behavior is inconsistent with common observation. I would assert, to the contrary, that behavior is translucent but preferences (or character) are opaque. Preferences and character stem from motivation which, as psychologists tell us, is peculiarly elusive.

There is a second problem with self-motivated preference change. The claim that observable behavior reflects preference change is, itself, non-falsifiable. No plausible empirical observation can distinguish between the two competing assumptions. Thus, how can one distinguish between adaptive mimicry behavior--a colleague who behaves as a cooperator in order to expand his opportunity set, but who remains a self-absorbed defector at the core-- and a true preference conversion where a formerly selfish individual is motivated by the prospect of enhanced opportunity to internalize cooperative preferences?

A psychiatrist friend captured this insight with a comment that is apt for all those times that acquaintances comment on the puzzling marriage of an apparent cooperator to an apparent defector. He says, "You get the spouse you deserve." The key to the observation is that it works reciprocally: appearances could be wrong in both directions. It is another way of saying that preferences are opaque except in marriage or other similarly intimate settings.

In short, I know the revealed character of my colleagues, but I don't know their character. (And as long as their revealed character is consistent with institutional virtue, the distinction is irrelevant to me and, in consequence, to their opportunity set.) The Smiths in my example are perhaps our dearest friends. I have known them for almost twenty-five years. But if they had told me that they had decided at the outset to obey the dog ordinance because they had reordered their preferences between trees and dogs, I would have no way of knowing whether that was true or whether they wanted me to believe that it was true. Behavior is observable. Character is not. And until we have a means of looking inside the human soul, we can only make predictions based on what we can observe.<sup>66</sup>

Finally, the concept of self-motivated preference change within a framework of rational choice theory is internally incoherent. A pareto self-improvement, by definition, is a self-motivated change in the individual's discount rate. It assumes that an individual can rationally choose to expand her opportunity set by reducing her rate of time discounting and thus increasing the present value of future interactions. But under rational choice theory, an actor who wants to be motivated by a concern for future considerations *is, in fact*, motivated by a concern for future considerations. In other words, someone who wants to be a cooperator is a cooperator. But if one lacks the motivation in the first instance, she cannot, by definition, be motivated to acquire it. In short, under the very theory that Cooter advances, the pareto self-improvement is a null set. Only cooperators can be motivated to undertake a pareto self-improvement and, as to them, the transformation is unnecessary.<sup>67</sup>

Even taken on its own terms, the mechanism for internalization that is implicit in the work of Becker and explicit in Cooter does not add significantly to the traditional account of the

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<sup>66</sup> It is not true, of course, that the internalization of new preferences is per se non-falsifiable. Thus, for example, if the Smiths declined to walk their dog even at night when there was no risk of social sanction, one might surmise that the norm had been internalized. But my point is a more subtle one. If the Smiths are intent on having others *believe* that they are "cooperators" they can mimic internalization through the expedient of not walking the dog at night, even though the risk is small, so as to avoid any prospect of being exposed as norm violators.

<sup>67</sup> Jon Elster, *More Than Enough*, 64 U. Chi. L. Rev. 749, 75- (1997). Jon Elster makes a similar point in his critique of Gary Becker. *Id.*

interaction in the *Case of the Devoted Dog Lovers*. The Smiths did not internalize the new legal proscription of the underlying norm because it conflicted with their deeply held values and preferences. Their obedience was commanded by the threat of external sanctions--the disapproval of friends and neighbors. To be sure, it is possible to surmise that the neighbors' willingness to enforce the social sanction was itself stimulated by an internalized preference for trees to dogs where none previously had existed. Or, in the alternative, the Smiths might over time internalize the new norm. Such a norm change could indeed have been produced by the legal rule, the neighbors' respect for law and/or their desire to appear as cooperative persons through their allegiance to civic virtue as proclaimed by the state. But of course it is equally plausible that none of those things occurred. Indeed, it is more likely that the neighbors preferred trees to dogs prior to the enactment of the ordinance. While the ordinance gave them information about what their fellow citizens preferred, and may thus have emboldened them to act, it would not, under this story, have led to a preference change.

In sum, the efforts of norms scholars and economic theorists to incorporate changing values and preferences into the framework of rational choice theory remain problematic. This is not to say that there are no puzzles in life and in law that are better explained *ex post* by assuming changes in endogenous preferences. But the problem remains that theories of internalization and expression turn on a much richer understanding of individual behavior *in context* than economic analysis currently comprehends. Thus, the analyst who is searching for a preference-shaping explanation of legal change is faced with a dilemma: Either enrich rational choice theory with context-specific variables that impair the theory's capacity to generate testable hypotheses, or create substantively empty concepts, such as the notion of pareto self-improvement. The fact is that behavioral science does not yet understand the mechanism of internalization. Thus, attempts to generalize and abstract from particular observations of internalized values or of changing preferences are, at least under the current state of knowledge, unilluminating.

#### IV. TOWARD A NEW LAW AND SOCIAL SCIENCE CONSENSUS

##### *Placing the Norms Debate in Perspective*

Over the past decade, a number of law and economics scholars have sought to incorporate endogenous social norms within the framework of rational choice analysis. Their approaches have varied. Ellickson and other have treated norms as patterns of behavior that emerge from iterated prisoner dilemma games among closely knit groups.<sup>68</sup> Posner and others have treated norms as signals of underlying character predispositions.<sup>69</sup> Evolutionary game theorists have sought to explain norms and conventions as equilibrium solutions to various coordination games.<sup>70</sup> Finally, McAdams, Becker and Cooter have sought to incorporate conceptions of status, other-regarding behavior and self-motivated changes in character as part of an expressive<sup>71</sup> and internalization<sup>72</sup> theory of human behavior.

It is not surprising that a further step in this project has been the attempt to understand these models within an institutional context, particularly the effects of legal rules on norms and preferences. That law can, in particular contexts, influence norms and preferences through changes in social meaning is an insight from social theory that Lessig and Sunstein have introduced to legal analysts. Nevertheless, current attempts to generalize and systematize that observation within a general theory have been unsuccessful. General theories require parsimonious structures that can

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<sup>68</sup> Ellickson, *Order Without Law*, supra note --; Robert H. Frank, *What if Homo Economicus Could Choose His Own Utility Function, Would He Want One with a Conscience?*, 77 *Am. Econ. Rev.* 593 (1987); Frank, *Passions Within Reason*, supra note --; Jack Hirshleifer, *Evolutionary Models in Economics and the Law: Cooperation versus Conflict Strategies* (1987).

<sup>69</sup> Eric A. Posner, *The Case of Tax Compliance*, supra note --; Eric A. Posner, *Signals, Symbols and Social Norms*, supra note ---; Eric A Posner, *Law and Social Norms* (2000).; Barnheim, *A Theory of Conformity*, 102 *J. Pol. Econ.* 841 (1994)

<sup>70</sup> Robert Sugden, *The Economics of Rights, Co-operation and Welfare* (1986); H. Peyton Young, *The Economics of Convention*, 10 *J. Econ. Persp.* 105 (1996); Randall Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 *U. Chi. L. Rev.* -- (1997).

<sup>71</sup> See sources cited in notes -- and -- supra.

<sup>72</sup> See sources cites in notes -- and ---supra.

be applied across cultures and contexts. But norms are highly context-sensitive. Norms are both specific and soft; that is, they apply to particular environments and populations and, even within those constraints, normative meaning changes with particular circumstances. As Steve Nock points out, for example, the normative framework that defines what it means to be a man or a woman in a marriage is not the same as what it means to be a man or a woman in church or in the work place.<sup>73</sup> Sociologists understand this problem well. Society is a cluster of integrated and overlapping institutions. These institutions influence social roles and, in turn, social roles are constituted by social norms. Thus, from the perspective of a social science research design, the effort to explain the relationship between law and social norms is deeply problematic.

### ***The Limits of Behavioral Science***

This is not to say that we should abandon our exploration of the behavioral sciences just because thick observations are not amenable to ready generalization. Rather it means that we should take the behavioral sciences on their own terms, as interesting and important observations that may or may not apply in other contexts. The main criticism that one can level at the behavioral theories of law and social norms is that they purport to know more about the world than they do know. Thus, to describe theories of expression and internalization as interesting and plausible speculations is not to demean the ideas but rather to underscore their limits.

Nevertheless, despite these constraints, legal analysts persist in using the behavioral sciences in the service of legal argument. The truth is that legal analysts have an instinct to generalize the descriptive disciplines of sociology and psychology just as they have an instinct to particularize the abstract discipline of economics. Such is the occupational hazard of applied social science analysis. We consistently make the mistake of thinking of character, preferences and techniques of decision-making as something unified and all-encompassing, that is, as something provable as scientific fact. Legal scholars reach for a dispositional explanation for behaviors rather than a contextual explanation.

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<sup>73</sup> Nock, *Comment on Social Norms and the Legal Regulation of Marriage*, supra note ---.

An instructive example of this bias is the recent popularity of legal applications of the cognitive heuristic literature of a decade or so ago.<sup>74</sup> When Daniel Kahneman and Amos Tversky published their influential work on “prospect theory” in the early 1980’s,<sup>75</sup> there was a rush of legal analysts seeking real-world applications for the various biases in individual decision-making that had been experimentally established.<sup>76</sup> The emerging research in cognitive psychology was integrated with the related work in behavioral economics by Richard Thaler, Hersh Shefrin and others that sought to analyze individuals’ attempts through self-command to control or modify their future choices.<sup>77</sup> Within a short period of time, experimental concepts such as the endowment

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<sup>74</sup> The study of the psychophysics of human judgment has evolved from three parallel literatures: (1) the study of how individual’s subjective probability assessments vary from the Bayesian paradigm (in which individuals will predictably revise their probability assessments about propositions in light of subsequent evidence), see Ward Edwards, *Dynamic Decision Theory and Probabilistic Information Processing*, 4 Hum. Factors 59 (1962); (2) the comparison of statistical predictions with clinical performance, see P. Meehl, *Clinical versus Statistical Prediction: A Theoretical Analysis and a Review of the Evidence* (1954); and (3) the investigation of human strategies of reasoning and the use of heuristics to resolve complex judgment tasks, see H. Simon, *Models of Man: Social and Rational* (1957). These three stands led in the early 1980’s to an emerging literature in cognitive psychology concerned with theories of human judgment under uncertainty. Rather than simply comparing human performance in making inductive inferences against the ideal of statistical probability, this research generated descriptive theories that purported to explain judgmental errors and biases. See TAN and sources cited in notes -- to -- infra.

<sup>75</sup> *Judgment Under Uncertainty: Heuristics and Biases* (D. Kahneman, P. Slovic & A. Tversky eds. 1982). According to the axioms of consistency and invariance, the preference order among choices should not depend on the manner in which they are described. Using tests with experimental subjects, Kahneman and Tversky explained the consistent failure of these axioms in terms of the dominance of the anchoring point in how individuals assess the gains or losses from any particular choice. Under their “prospect theory” individuals evaluate choices in terms of incremental gains or losses from a posited starting point. Their theory of judgment has three key features: (1) individuals are risk averse in protecting gains, (2) individuals are risk seekers in avoiding losses, and (3) losses loom larger than gains in human judgment when the prospects of either are equally probable. See Amos Tversky and Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974); Daniel Kahneman & Amos Tversky, *The Framing of Decision and the Psychology of Choice*, 211 Science 453 (1981); Daniel Kahneman and Amos Tversky, *Choices, Values and Frames*, 39 Am. Psychologist 341 (1984).

<sup>76</sup> For a review of the literature and its application to legal policy, see Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1925-29 (1992), and Robert E. Scott, *Rethinking the Regulation of Coercive Creditor Remedies*, 89 Colum L. Rev. 730, 761-772 (1989).

<sup>77</sup> See Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. Econ. Behav. & Org. 39 (1980); Hersh M. Shefrin & Meir Statman, *Explaining Investor Preference for Cash Dividends*, 13 J. Fin. Econ. 253 (1984); Richard H. Thaler & Hersh M. Shefrin, *An Economic Theory of Self-Control*, 89 J. Pol. Econ. 392 (1981); Hersh M. Shefrin & Richard H. Thaler, *Rules and Discretion in a Two-Self Model of Intertemporal Choice* (1980) (Cornell Univ. Graduate School of Business and Pub. Admin., working paper no. 80-07); Richard H. Thaler, *Quasi-Rational Economics* (1991); Richard H. Thaler, *The Winner’s Curse* (1992). For an analysis of the

effect, “anchoring,” and the availability and representativeness biases became standard equipment in the lexicon of legal scholars.

But as the number of generalizable applications seemed to dwindle, the efforts to integrate cognitive psychology and theories of inconsistent preferences within legal theory began to diminish. In the past several years, however, the same research has been redeployed under the new name of “behavioral law and economics.” A veritable flood of law review commentary has once again elevated human error in making decisions under uncertainty as an appropriate topic for legal analysis.<sup>78</sup>

The new work in behavioral law and economics is interesting and suggestive. Moreover, many of the legal analysts who are focusing on these questions are appropriately cautious about the degree to which behavioral approaches can be used as the basis for legal regulation.<sup>79</sup> All of this is to the good. But a skeptic would also ask that the caution extend to generalizations about the state of the science as well.<sup>80</sup> As early as the 1980's, Ward Edwards, one of the pioneering researchers

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relationship between the research on cognitive biases and the self-command literature, and its implication for legal policy, see Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship between Cognitive Illusions and the Management of Choices*, 59 S. Cal. L. Rev. 329 (1986).

<sup>78</sup> See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420 (1999); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. Rev. 630 (1999); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law & Economics*, 50 Stan. L. Rev. 1471 (1998); Cass R. Sunstein, *Behavioral Law & Economics: A Progress Report*, 1 Am. Law & Econ. Rev. 115 (1999); Russell Korobkin, *Inertia and Preference in Contract Negotiation*, 51 Vand. L. Rev. 1583 (1998); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608 (1998); Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 Tex. L. Rev. 1783 (1996); Donald Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. Pa. L. Rev. 191 (1997); Christine Jolls, *Hands Tying and the Age Discrimination in Employment Act*, 74 Tex. L. Rev. 1813 (1996); Jeffrey J. Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. Cal L. Rev. 571 (1996).

<sup>79</sup> See, e.g., Cass R. Sunstein, *Progress Report*, supra note -- at 146-150---

<sup>80</sup> The all too common temptation among legal academics is to assert as a scientific fact the existence of those behavioral predispositions that have been found in laboratory experiments. But science doesn't work that way. The important work of Kahneman, Tversky and others is now undergoing the sort of critical scientific review

to study cognitive biases, began publicly to doubt the emerging applications of this work. In an important, and unfortunately overlooked, paper, Edwards reported research results that showed that individuals who had access to simple “tools”--such as pencil and paper-- performed dramatically better in the very experiments that had formed the foundation of the cognitive bias literature.<sup>81</sup> In the intervening decade, the work of Gerd Gigerenzer and others have shown that a significant part of the “error” in human judgment is attributable to the way the research design itself is framed.<sup>82</sup> For example, in Gigerenzer’s experiments, subjects are asked the same questions that were the basis for the claim that individuals make consistent and predictable errors based on the availability and representativeness heuristics.<sup>83</sup> When the questions are framed in terms of probabilities (as in the experiments of Kahneman and Tversky), the biases are consistent with previous research results. But, if instead of using probabilities, the same questions are asked as *frequencies*, the error is dramatically reduced.<sup>84</sup> These results suggest that humans do have inductive-reasoning capabilities

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and replication necessary to establish its predictive power. See TAN and sources cited in notes – to –infra.

<sup>81</sup> Ward Edwards & von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. Cal. L. Rev. 225 (1986) .

<sup>82</sup> Gerd Gigerenzer, *Why the Distinction between Single-event Probabilities and Frequencies is Important for Psychology (and Vice Versa)*, in Subjective Probability 130-159 (G. Wright & P. Ayton, eds. 1994); Gerd Gigerenzer, *The Psychology of Good Judgment: Frequency Formats and Simple Algorithms*, 16 Medical Decisionmaking 273 (1996); Gerd Gigerenzer & Ulrich Hoffrage, *How to Improve Bayesian Reasoning Without Instruction: Frequency Formats*, 102 Psych. Rev. 684 (1995); Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 Psych. Rev. 650 (1996); Gerd Gigerenzer, *The Bounded Rationality of Probabilistic Mental Models*, in Rationality: Psychological and Philosophical Perspectives (K. I. Manktelow & D.E. Over eds. 1993); Gerd Gigerenzer, *Simple Heuristics That Make Us Smart* (1999).

<sup>83</sup> In particular, Gigerenzer has shown that, by using questions framed in terms of frequencies rather than probabilities, the overconfidence bias (overestimation) completely disappears; the so-called “conjunction fallacy” is reduced from about 85% to 20%; and people reason “rationally” (i.e., according to Bayesian theory) in about 50% to 75 % of the cases.

<sup>84</sup> Research shows that humans perform well as intuitive statisticians when they are tested under ecologically appropriate conditions. It turns out that human performance in probabilistic reasoning tasks is remarkably sensitive to the format in which information is presented and answers asked for. Most of the experiments that have shown base rate error asked subjects to judge the probability of a single event ( i.e., “what is the chance that a person who tests positively for a disease actually has that condition?”). But many of the purported biases and fallacies disappear when individuals were asked to judge frequencies instead. ( i.e., “How many people who test positive for the disease will actually have the condition?”) See Gary L. Brase, Leda Cosmides and John Tooby, *Individuation, Counting, and Statistical Inference: The Role of Frequency and*

that track with traditional notions of rationality, but that the evolutionary design of those mechanisms requires the use of event frequencies to function properly.<sup>85</sup> Gigerenzer concludes that rules of thumb or heuristics do exist in human decision making, but rather than demonstrating the general predisposition of humans to err, they establish, to the contrary, how capable humans are in making efficient decisions under uncertainty.<sup>86</sup>

What lessons can we learn from the ongoing academic debate among cognitive psychologists over the existence and extent of cognitive “errors?”<sup>87</sup> This story is a further

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*Whole-Object Representations in Judgment Under Uncertainty*, 127 *J. Exp. Psych.* 3, 4 (1998). Cosmides and Tooby were able to boost performance on an otherwise identical problem from 36% correct to 64% correct with simply a minor change in the wording of the question. By presenting other elements of the problem in terms of frequencies, they report that performance rose to 76% correct for verbal responses and 92% correct when the subjects were asked to create a visual representation of the key frequencies. Leda Cosmides & John Tooby, *Are Humans Good Intuitive Statisticians After All? Rethinking Some Conclusions of the Literature on Judgment Under Uncertainty*, 58 *Cognition* 1 (1996).

<sup>85</sup> Brase, Cosmides, and Tooby, *The Role of Frequency*, supra note – at 4.

<sup>86</sup> Other cognitive psychologists have reached similar conclusions. Gary Brase, Leda Cosmides and John Tooby report data showing that untutored subjects reliably produce judgments that conform to many principles of probability theory when (1) they are asked to compute a frequency instead of a probability of a single event, and (2) the relevant information is expressed as frequencies. They show that human performance can be significantly improved where the subject is asked to make inferences over representations of “whole” objects, events and locations rather than arbitrary parsings of objects. (“For instance, apples should be easier to count than four inch square pieces of bark on the tree trunk”) See Gary L. Brase, Leda Cosmides, & John Tooby, *Individuation, Counting, and Statistical Inference: The Role of Frequency and Whole-Object Representations in Judgment Under Uncertainty*, 127 *J. Exper. Psych.* 3 (1998).

<sup>87</sup> The debate continues. In a recent paper, Kahneman and Tversky responded to Gigerenzer’s critique as being a caricature of their basic argument. See Daniel Kahneman & Amos Tversky, *On the Reality of Cognitive Illusion*, 103 *Psych. Rev.* 582 (1996). In reply, Gigerenzer repeated his claim that frequencies make cognitive “errors” largely disappear and reiterated his main point as follows:

The important issue that divides us is research strategy. Kahneman and Tversky’s (critique) ended with an appeal for “building on the notions of representativeness, availability, and anchoring.” In the same breath they denied the need for constructing process models and specifying the conditions under which different heuristics work. What sort of “building” can occur without first daring to be precise? As I see it, there are two ways in which a theory can fail: by being wrong or by being indeterminate. The latter may be worse for scientific progress, because indeterminate theories resist attempts to prove, disprove, or even improve them. Twenty-five years ago, extending on Ward Edward’s work, Kahneman and Tversky opened up a fertile field. Now it is time to plant theories.”

Gerd Gigerenzer, *On Narrow Norms and Vague Heuristics: A Reply to Kahneman and Tversky*, 103 *Psych. Rev.* 592, 596 (1996).

illustration of how important is for legal scholars to appreciate the limits of behavioral science. The instinct of legal academics to generalize from emerging social science data risks having the analyst herself commit a fundamental cognitive error --known to social scientists as the “fundamental attribution error” (FAE).<sup>88</sup> The FAE results from the experimentally observed tendency of humans to make the mistake of overestimating the importance of fundamental human character traits and underestimating the importance of situation and context.<sup>89</sup> Thus, analysts may have been too quick to assume that cognitive heuristics and biases are dispositional rather than contextual as the work of Gigerenzer and others seems to demonstrate.

A similar tendency to assume that traits of character--such as honesty, truthfulness and trustworthiness--are immutable or inherent pervades the work of the “norms scholars” of the past decade. As Malcolm Gladwell points out,

“character isn’t...a stable, easily identifiable set of closely related traits. It only seems that way because of a glitch in the way our brains are organized. Character is more like a bundle of habits and tendencies and interests, loosely bound together and dependent, at certain times, on circumstance and context. The reason that most of us seem to have a consistent character is that most of us are really good at controlling our environment.”<sup>90</sup>

There are a number of reasons why legal scholars, including those disposed to be suspicious of the abstractions of rational choice theory, have nonetheless ignored the limits of behavioral science in their effort to incorporate human fallibility as well as endogenous preferences within a rational choice framework. For starters, legal scholarship is also a

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<sup>88</sup> See Richard E. Nisbett & Lee Ross, *The Person and the Situation* (1991) (describing the frequency attribution error).

<sup>89</sup> Lee Ross, Teresa Amabile and Julia Steinmetz report the results of an experiment where subjects are asked to play a quiz game, with one as “contestant” and the other as “questioner”. The “questioner” is asked to prepare ten challenging questions in a particular area of her expertise. After the “game” is over the parties are asked to rate each other on general knowledge. The contestant invariably rates the questioner as more knowledgeable and intelligent. Lee D. Ross, Teresa M. Amabile, & Julia L. Steinmetz, *Social Roles, Social Control, and Biases in Social-Perception Process*, 35 *J. Person. & Soc. Psych.* 485 (1977).

<sup>90</sup> Gladwell, *The Tipping Point*, supra note -- at 163.

generalizing methodology. The legal analyst uses analogical reasoning to suggest that if A is sufficiently similar to B, then A should be regulated in the same way as B. This approach requires identifying salient characteristics and ignoring extraneous detail. Moreover, the core technique of legal analysis is to frame all legal consequences in binary terms. Thus, either A is like B or it isn't. These techniques inculcate an instinct in the analyst for separating the important from the extraneous. The behavioral sciences, on the other hand, are *enveloping*. Often it is the collection of detail that allows patterns and structures to appear. Thus, the observational sciences depend on the detail for nuance and insight.

Moreover, there is an inherent bias in legal scholarship toward methodologies that support legal interventions into private behavior. This bias does not depend upon the claim that most legal scholars have political views that lead them to prefer governmental to market-based solutions to collective action problems. Rather, it is an observation based upon the political economy of the academic marketplace. Law professors, as a group, enhance their importance relative to other academic disciplines in direct relation to the frequency with which legal solutions to social problems can be seen as superior to alternative solutions premised on insights from political science, economics or social theory.<sup>91</sup>

Whatever the reasons, it is important for legal academics to appreciate the biases inherent in their discipline and work to correct for them. As an applied discipline, law is dependent on the tools of primary disciplines for both the positive and normative claims that it makes about real world phenomena. It is perhaps understandable that legal analysts should try to mix economics and behavioral sciences to produce stronger legal arguments. But, in fact, a wrench grafted on a hammer is not a better wrench or a better hammer, but simply an unwieldy tool. Far better would be the instinct of the next generation of legal scholars to strive to become polymaths. Rational choice theory is useful for certain purposes and any legal scholar who purports to make claims about large scale effects of legal rules should have a basic competence in deploying these

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<sup>91</sup> For a formal model of the political economy of legal academics in the context of private law reform groups, see Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 144 U. Pa. L. Rev. 595 (1996).

techniques. Similarly, the research methodologies of psychology and sociology are useful in enriching our understanding of the underlying behaviors that are regulated by those same legal rules. While this context may not always be amenable to generalization, deep familiarity with particular context is the best medicine for any legal analyst who strives for general theory.<sup>92</sup>

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<sup>92</sup> Perhaps the best example of how such a collaboration of related disciplines and legal scholarship can work effectively is the current research surrounding marriage and the family. Economists, most famously Gary Becker, have proposed methods of analysis that yield testable hypotheses. Psychologists and sociologists continue to enhance the empirical foundation that allows us to describe the primary behaviors themselves. Finally, legal scholars such as Peg Brinig, Elizabeth Scott and Amy Wax have the competence to engage in collaborative research in both the abstract and contextual disciplines.

## V. CONCLUSION

Law incorporates both the general and the particular. One function of law is to generalize across contexts. Thus, notions of horizontal equity --of treating like cases alike--run through both public and private law inquiries. But law is also particular and context-specific. The metaphor of the exceptions to the rule ultimately consuming the rule is but one manifestation of the notion that legal commands are sensitive to their environment. Indeed, the common law method itself illustrates the parallel processes of generalization and particularization. Out of the particular facts and circumstances of a single dispute emerges a rule that is then generalized in its application to other, similar circumstances. In deciding whether the rule applies to another case, the common law method requires a further inquiry into the particular circumstances of the new dispute in order to determine whether the necessary salience exists to support generalization of the rule.

As a consequence, academic lawyers, more than any other academic discipline, need to be mindful of the paradox of context which lies at the heart of the binary choice between the desert and the swamp so pungently identified a generation ago by Arthur Leff. Without context no legal rule can be applied, but with nothing but context no legal rule can be found. Accommodating this paradox is the central challenge for legal scholars today. This essay has analyzed recent efforts to enrich rational choice theory through the incorporation of endogenous preferences derived from social norms. Those efforts have been frustrated thus far by the heroic but ultimately fatal step of trying to graft the complex and highly individualized process by which values and preferences are created and modified onto a formal analytical framework. A more profitable approach, I have suggested, is to deploy rational choice analysis on its own terms, but retain (as part of the analyst's frame of judgment) the situation sense of context-specific knowledge as an antidote to inapposite analogies and generalizations. As legal scholars, we are in the uncomfortable middle ground between the general and the particular. Law, as applied behavioral theory, strives to generalize from real-world observations in order to implement socially desirable changes in real-world behaviors. Inevitably, this requires the legal analyst to generalize uncomfortably from the particular observations of the behavioral sciences and to particularize with equal discomfort the

abstractions of economics.

In any case, the norms scholars whose work I have examined deserve credit for asking the key question: what are the mechanisms by which law influences behavior apart from the deterrent effect of state sanctions? That question remains a fertile area for further investigation. Legal analysts can and should continue to deploy all the social sciences in service of testable hypotheses that explain the linkages between legal and normative constraints and between external and internal explanations of human behavior. A traditional rational choice focus on the incentive effects of legal regulation offers a parsimonious explanation of the interactions among law, norms and values, though it fails to explain key phenomena that we can observe in the world. Treating preferences, values and norms as endogenous variables promises, at first blush, to offer a more robust explanation for the changes in behavior that are stimulated by legal rules. But we currently lack a persuasive explanation of the mechanics by which norms evolve and are modified by law, or of the process by which values are internalized. As a consequence, we lack as well the knowledge of which phenomena are as yet unknown and which are simply unknowable.