Introduction

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Norms guide human conduct and social interaction as much as formal legal rules. The new institutional economics, premised on institutions as the "rules of the game" that structure social and economic systems, defines institutions to include informal rules, like norms, religious precepts and codes of conduct, and formal rules, like statutes and the common law.[1] In this sense, norms and law work in parallel to influence society.

Norms and law also have an impact on each other. Sometimes the law can be a strong influence on a change in norms, by forcing a change in conduct that gradually becomes accepted throughout society or by inducing a change in the perceptions about the propriety of certain conduct. Changes in social norms regarding the use of seat belts and smoking in public places are examples of this. Of course, the law can rarely change norms, even over decades, without the concomitant influence of education, propaganda, peer pressure, and other similar forms of social persuasion. The influence in the other direction, however, is much stronger because much of the law reflects society's values and norms.

A country's formal law grows out of its culture and society, as emphasized by scholars as different as F. A. Hayek and Lawrence Friedman.[2] The prevailing views of a society act as a constraint on both judge-made and statutory law because social norms influence judges and legislators alike. To the extent that law reflects society, enforcement costs are lower as citizens are more willing to follow the law. Similarly, if social norms promote adherence to contractual obligations and fairness in business dealings, there will be less need to resort

[1] *See* Douglass C. North, Institutions, Institutional Change and Economic Performance (1990).

[2] *See* 1 Friedrich A. Hayek, Law, Legislation and Liberty 72–93 (1973); Lawrence M. Friedman, *Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act*, this volume, *infra* p. 139.

to judicial enforcement of contractual and business obligations. Not only will the legal system operate more efficiently, the economy will be more likely to grow. As Douglass C. North has written, "Strong moral and ethical codes of a society are the cement of social stability which makes an economic system viable."[3]

Norms influence people to comply with the law even when doing so would work against their own self interests. It is understandable that people will accept a loss in a business transaction in order to establish a reputation that will bring them more business in the future. But people comply with legal rules that cause losses even if there is no possibility of a long-term gain. The question of a society's support for and acceptance of the rule of law is part of the broader question of how do groups overcome collective action problems or, to quote Robert Putnam, how does a society create "social capital . . . that can improve the efficiency of society by facilitating coordinated actions."[4] In economic terms, it is the same as asking how to minimize free-riding; in game-theoretic terms, it is asking how to induce people to cooperate rather than to defect. Examining why people follow the rule of law is the same as trying to understand why people cooperate. The answer lies in the norms that induce this type of behavior.

Over the past few years, legal scholars have begun to devote more attention to the importance of norms in analyzing legal issues.[5] The essays in this book examine the relationship between norms and the law in four different contexts. Part One consists of three essays, by Lynn Stout, Cass Sunstein, and Douglass North, that use the perspectives of cognitive science and behavioral economics to analyze norms that influence the law. The three essays in Part Two, by Robert Ellickson, Lawrence Lessig, and Elinor Ostrom and Juan-Camilo Cárdenas, use three different types of common property to examine cooperative norms. Part Three contains four essays, by Lawrence Friedman, John Ferejohn and Larry Kramer, Kathryn Abrams, and Harry T. Edwards, that deal with the constraints imposed by norms on the judiciary. Finally, in Part Four, Amartya Sen examines the influence formal law has on norms.

Part One begins with the essay "Social Norms and Other-Regarding Preferences" in which Lynn Stout examines the assumption of self-interest in the rational choice model. While many contemporary critiques of rational choice theory have focused on the assumption of rationality, few have examined

[3] Douglass C. North, Structure and Change in Economic History 47 (1981).
[4] Robert D. Putnam, Making Democracy Work: Civic Traditions in Modern Italy 167 (1993).
[5] *See* Lynn A. Stout, *Social Norms and Other-Regarding Preferences*, this volume, *infra* p. 13.

self-interest. Professor Stout argues that the tendency to act in an other-regarding fashion (to sacrifice in order to help or harm others) is far more pervasive, powerful, and important than generally recognized. In support of this claim, she reviews the extensive empirical evidence that has been accumulated over the past four decades on human behavior in social dilemma games, ultimatum games, and dictator games. This evidence establishes that in the right circumstances, experimental subjects routinely behave as if they care about costs and benefits to others. Moreover, the subjects' decisions to reveal other-regarding preferences appear driven primarily not by their own payoffs but by social context – that is, their perceptions of what others believe, what others expect, and how others are likely to behave.

Professor Stout then considers how understanding socially-contingent, other-regarding behavior may offer insights into the nature and workings of social norms. In particular, she uses the phenomenon of other-regarding preferences to examine questions that are crucial to understanding the role of norms in maintaining societies and countries. These include the questions of what sorts of behavior are most likely to solidify into norms, why people follow norms, and how policymakers can best use norms to change behavior. In her chapter, Professor Stout also surveys the broad scope of the legal scholarship on law and norms and lays a foundation for the consideration of norms in the rest of this book.

Cass Sunstein uses Chapter 2, "Damages, Norms, and Punishment," to analyze group decisionmaking in the context of jury deliberation. His survey of the evaluation of personal injury cases by thousands of people showed that all kinds of demographic groups displayed considerable agreement in how they ranked and rated the cases. This finding led Professor Sunstein to conclude that the social norms that govern moral outrage and intended punishment are widely shared. This cohesion breaks down, however, in the evaluation of the dollar amount of damage awards. A study of about 3,000 people put into 6-person juries showed that deliberation made the lower punishment ratings decrease when compared to the median of predeliberation judgments of individuals, while deliberation made the higher punishment ratings increase and drove up damage awards. The difference was so dramatic that in 27 percent of the cases the dollar value was as high as, or higher than, the highest individual predeliberation judgment.

To find an explanation for these consistent differences between individual and group decisionmaking, Professor Sunstein turned to notions of "group polarization" and "rhetorical asymmetry." He finds additional support for his conclusions in two studies of the effects of group deliberation on social norms, one involving the medical norm of protecting patients and the other the norm

in favor of altruism. Then, Professor Sunstein examines the issue of punitive damages and asks whether the social norms at work in jury deliberation are consistent with optimal deterrence. Professor Sunstein ends his chapter with some tentative suggestions about how to deal with the cognitive problems faced by jurors and how to bring coherence to jury decisionmaking.

In Chapter 3, "Cognitive Science and the Study of the 'Rules of the Game' in a World of Uncertainty," Douglass North explains how economics, law, and social science in general should deal with the problem of uncertainty. He begins by departing from the rationality assumption and looks to Frederick Hayek for an alternative theory, based on the idea that the mind develops systems of classifications, theories, and belief systems to help the understanding of the external world. Assessing the effect of new policies, whether economic, legal, or social, can be quite difficult as a result of the feedback created by the consequences of the new policies. Not only might the feedback be imperfect, it might be so antithetical to the belief systems of the policymakers that they will be unwilling to recognize the true information provided by the feedback. Professor North uses the collapse of the Soviet Union to illustrate this.

Professor North then examines this feedback process in a world of uncertainty. He asks whether our social world is ergodic, that is, whether there is an underlying unity that would permit us to develop theories to explain the social world, just as scientists believe there is an underlying unity in the physical world that justifies the quest for explanatory and predictive theories in the physical sciences. If our social world is ergodic, social scientists are engaged in productive enterprises in their quest for underlying theories and policymakers have a chance at being effective. If the world is nonergodic, however, the work of social scientists and policymakers becomes much more difficult. It is this kind of dynamic world, without fundamental underlying structures, that makes research in cognitive science so important. Professor North concludes by explaining his belief that the study of the brain and its connections to the mind hold the greatest promise for dealing with a world of uncertainty.

Part Two uses three different types of "commons" – households, cyberspace, and natural resources – to examine cooperative norms and their relationship to laws that regulate common property. In Chapter 4, "Norms of the Household," Robert Ellickson defines a household to mean a private space where two or more people regularly share shelter and meals, including such social arrangements as a family sharing a home, students sharing an apartment, and unrelated adults living together in a house. Professor Ellickson limits his analysis to living arrangements in which the participants have the power to exit, as well as the power to control entry by newcomers. In the tradition of the

"liberal commons" in which privilege of exit is a central feature, he refers to these arrangements as liberal households. Professor Ellickson uses economics to elucidate some of the central aspects of a household: distinguishing between those who supply capital to the household from those who supply labor; noting that a household living arrangement generates "household surplus" from the increased utility of living together; and analyzing who has the better claim to the surplus in different situations. He also analogizes to ownership and control rights of corporations, as well as using game theory to analyze the interaction among the members of the household. Professor Ellickson emphasizes that trust among the members of a household is the most important source of cooperation, but he also cites other interrelated sources of social control in a household. Norms sometimes are very important to the household, both in the form of internalized ethical norms and diffused enforced social norms. Contracts can be important, especially oral informal ones, as can be organizational rules for the household. Finally, Professor Ellickson notes the role of formal legal rules that govern household relations.

In his examination of the household, Professor Ellickson raises the question of whether the contribution of capital to a household bestows certain control powers or increases the risk of opportunistic behavior, as in a business firm. He also explores whether the threat of exit from the household can be used to gain a greater share of the household surplus or greater power to control the household. Finally, Professor Ellickson's analysis also raises the question of the importance of various procedural and decisionmaking rules within the household, such as acting by consensus or through a majority rule.

Lawrence Lessig views cyberspace as a commons in Chapter 5 because it is a resource that may be used simultaneously by millions of people without the need to obtain the permission of anyone else. In fact, Professor Lessig believes that the essence of the Internet was the decision to not allow anyone the power to control access. This took place through an unusual combination of property rights regimes. The bottom layer of the Internet is a physical layer made up of wires and computers, and wires linking computers, that are all owned. The middle layer is a logical layer made up of the protocols that make the Internet run. This layer is the commons, owned by no one and purposely open to all. The top, content, layer is both free and controlled. Much of the material accessible over the Internet is free to the user but controlled by someone who creates the webpage. It is the middle, logical layer that makes the Internet a commons. The creators of the Internet designed the protocols of that layer to permit anyone to have access to the Internet. The norm underlying the creation of the Internet was to make it free and open to all, unlike any other

communications network. It was, as Professor Lessig puts it, the norm of "open code."

The commons feature of the Internet has led to extraordinary creativity as great as humankind has ever seen, not just innovation in technological matters but also innovation in human interaction and in cultural growth. This prompts Professor Lessig to ask how "an environment where property is only imperfectly protected" led to such an explosion in creativity and innovation. With tremendous profits available for businesses involved with the Internet, there is great pressure to diminish the commons and place more and more of all layers of the Internet under private control. This harm to the commons would, in turn, harm creativity and innovation. Professor Lessig identifies some of the principal threats to the Internet commons and questions how we can preserve the commons against those threats.

In Chapter 6, Elinor Ostrom and Juan-Camilo Cárdenas explain cooperative behavior through a framework that focuses on information gathering and learning for the building of norms that help reduce the tragedy of the commons. The authors note that experimental research still provides evidence of substantial variation in the levels of cooperation within the exact same treatment, a variation that cannot be totally explained by the laboratory setting or the rules induced by the experimenter. They point out that the differences may emerge from elements that the subjects bring into the lab from their own experience, values, group composition, or background. To reach those elements, Professors Ostrom and Cárdenas develop a framework of four layers of different kinds of information that individuals use when facing a collective-action dilemma. Two of the layers involve "systemic" variables that are difficult to control for in a laboratory setting. Consequently, the authors designed an experiment to study cooperation among the inhabitants of three different villages in Colombia, with the participants bringing to the game backgrounds and relationships that enabled the authors to analyze the two systemic layers. This enabled them to test their framework by comparing the experimental results from a laboratory setting with the results from their field experiments.

One of the norms that has now been widely discussed in the literature on collective action is reciprocity as a key engine for cooperation. Through the experimental data from the field, they show how reciprocal behavior in participants can, for the case of self-governed institutions such as face-to-face communication, help to reinforce group-oriented strategies in a game. On the other hand, negative reciprocity can act against the interests of the group within an institutional environment in which agents face imperfectly monitored regulations that are enforced by external authorities.

Professors Ostrom and Cárdenas conclude that their model provides "some initial guidance" in organizing the various factors relevant to cooperative behavior, but also raises questions about the importance of the information layers in different circumstances. The authors believe that some aspects of their model are poorly understood and understudied, such as the cross-effects between the layers and the characteristics of a game that prompt individuals to switch on and off different information layers. Their model also raises questions about the importance of contract law and enforcement since strong and well-enforced contractual rights make it unnecessary to use some of the information layers. From a broader perspective, the importance of the characteristics and experiences of individuals to the outcome of games raises doubt about the ability of transplanting legal systems from one country to another, where the culture, norms, and history of the two countries differ.

Part Three contains four essays that examine the influence of norms on the judiciary. Lawrence Friedman's essay in Chapter 7, "Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act," investigates the popular conception of judges as impartial, independent, and autonomous decisionmakers. He does this by recognizing that judges are products of their contemporary society, of its culture and norms. Thus, Professor Friedman believes that the "framework of norms and values and ideas floating about in society" has a powerful impact on judicial rulings. Noting that judges invariably view themselves as free from social influences, Professor Friedman considers why that is and suggests that the process of judicial decisionmaking may explain this difference between perceptions and reality.

Professor Friedman's essay raises the question of the degree of social influences on judges. How much does it vary from judge to judge and from era to era? He also inquires whether there are systematic differences in judicial decisionmaking that can be attributed to race, gender, or ethnicity. Without a doubt, judges behave differently than legislators in making the law, but Professor Friedman seeks a better understanding of those differences in the context of the similar social influences on both groups.

In Chapter 8, "Judicial Independence in a Democracy: Institutionalizing Judicial Restraint," John Ferejohn and Larry Kramer focus on judicial independence, one of the characteristics examined by Professor Friedman. They do so from the premise that unbridled independence undermines democratic values and so our system of government tries to balance both. This is done through substantial protection of individual judges from political influence and from pressure by the other branches of government, while the judiciary as an institution is dependent upon (and so threatened by) political forces and other governmental actors. Professor Ferejohn and Dean Kramer review the numerous

ways Congress and the President constrain the judiciary through such things as the appointment process, impeachment, budgets, executive enforcement of judicial decisions, and Congressional control over jurisdiction. They also examine the ways the judiciary minimizes conflict with the other branches through mechanisms for correcting individual judges when they ignore or erroneously apply prevailing law and through doctrines for removing cases from the purview of the judiciary, such as limits on jurisdiction and justiciability. These doctrines of self-restraint are equivalent to a judicial norm that has developed and become embedded since *Marbury v. Madison*, itself a case in which the ruling was designed to avoid conflict with the President.

Professor Ferejohn and Dean Kramer raise the issue of the proper balance between judicial independence and judicial accountability or, to put it another way, between the rule of law and democratic values. Their essay also asks the important question of why the branches of government avoid deep conflict with each other. Congress could do much more to limit the judiciary, through budgetary limitation, shrinking jurisdiction, or even impeachment, but Congress does not. The Supreme Court could expand its power by cutting back on its justiciability restraints, but it does not. This essay asks why this equilibrium between the branches of government continues to persist.

In Chapter 9, "Black Judges and Ascriptive Group Identification," Kathryn Abrams also considers an issue raised by Professor Friedman, that is, whether race affects judicial decisionmaking. Professor Abrams contrasts judicial impartiality from judicial "interdependence," which she defines as a judge's connection or affiliation with an identifiable group within the larger population. Using African-American judges as her study group, she examines empirical studies and judicial narratives to determine whether racial affinity has any effect on judicial conduct. The empirical studies found that the race of the judge made no significant difference in decisionmaking, except for sentencing in criminal cases. The narratives indicated the strongest effects took place outside the adjudicative process, with many African-American judges expressing an obligation to help other African-Americans in civic and social matters.

If it is true that African-American judges rule differently than other judges in criminal cases, Professor Abrams asks whether that means that African-American judges have been able to overcome barriers, including unconscious ones, to fair treatment of Blacks, rather than demonstrating greater partiality to members of their own race. She wonders whether interdependence may actually increase objectivity in some cases. Professor Abrams ends her essay by identifying a research agenda that would lead to a better understanding of the patterns and tentative conclusions she describes.

Harry T. Edwards adds another dimension to the analysis in Chapter 10, "Judicial Norms: A Judge's Perspective." He agrees with the assessment of Professor Ferejohn and Dean Kramer that the judiciary maintains its independence through self-restraint, but adds that the relationship between the branches of government is dynamic. Judge Edwards believes that the executive and legislative branches need to develop, over time, the habit of enforcing judicial judgments, which when reinforced, over time, by judicial self-restraint, will lead to the real independence of the judiciary. Judge Edwards also adds the importance of collegiality among the judges on a court to the development of judicial self-restraint. He believes that judges will better understand their limited role in governance if they view themselves as part of a collective enterprise. Citing examples from his experience as Chief Judge of the D.C. Circuit Court of Appeals, Judge Edwards agrees with the concern for administrative obstruction of the judiciary raised by Professor Ferejohn and Dean Kramer, but he believes that administrative obstruction does not impede the decisional independence of the judiciary.

Not surprisingly, Judge Edwards disagrees with Professor Friedman's assessment of the social and cultural constraints on judicial decisionmaking. Judge Edwards does believe that judges are "significantly constrained," but by discernible legal principles, not by social norms or contemporary views. The stark disagreement between these two authors may result from a focus on different kinds of court cases or from different temporal perspectives of society's influence, although it may reflect a genuine disagreement over the influences on judicial decisionmaking. Finally, as an African-American who has served as a judge for decades, Judge Edwards is an ideal commentator who supports the thesis of Professor Abrams. To those who would ask why we should care about racial diversity on the federal bench if race is largely irrelevant to judicial decisionmaking, Judge Edwards's thoughtful answer may surprise some readers.

The book ends in Chapter 11 with an essay by Amartya Sen, "Normative Evaluation and Legal Analogues," in which he reverses the focus of the other authors. Rather than examining the influence norms have on the law, he concentrates on formal law's effect on norms and rights. Professor Sen explains the importance of natural human rights in structuring a wide domain of human conduct, even though these rights are not part of the formal law. There is a long history of the distinction between human rights and legal rights, which Professor Sen illustrates by contrasting the views of Tom Paine and Mary Wollstonecraft with those of Jeremy Bentham. Professor Sen also emphasizes the harm that can result to basic human rights, such as freedom from poverty, by the view that rights not formalized into law are somehow subordinate or inferior

to legal rights. An even greater danger, according to Professor Sen, stems from the excessive influence of legal thinking on moral and political reasoning. The wide-spread acceptance of the legal contract as the proper analogy for contemporary philosophical investigation is harmful because a contractarian model rigidly confines analysis and forecloses alternative perspectives. This is especially the case, Professor Sen believes, for issues involving global justice. Consequently, he argues for an alternative mode of analysis based on Adam Smith's "impartial spectator."

In considering the relationship between law and rights, Professor Sen argues that many rights should not be enacted into formal law. His analysis raises two important questions that are relevant to many of the other essays in the book – which rights should be formalized into law and which should be left as custom or norms; and how should we determine that boundary between formal law and moral rights and duties? Many of the authors provide their own answers to Professor Sen's questions, albeit implicitly in some cases.

As you read this book, you will see the different styles and approaches of the authors as they examine the relationship between norms and the law in a variety of contexts. These differences reflect the wide range of academic disciplines used in the essays – including law, legal history, neoclassical economics, new institutional economics, experimental economics, game theory, political science, cognitive science, and philosophy. This blend of perspectives from so many disciplines is one of the special attributes of this book.