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Law and Economics Discovers Social Norms

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ABSTRACT

Although Ronald Coase, Guido Calabresi, Richard Posner, and the other founders of classical law and economics accomplished much, they exaggerated the role of law in the overall system of social control and, conversely, underestimated the importance of socialization and the informal enforcement of social norms. They also implicitly placed too much stress on individuals' hunger for material, as opposed to status, rewards. The upsurge in the 1990s of scholarly interest in socialization, norms, and status does not threaten the demise of classical law and economics but rather promises to enrich it.

LET us start with a sociological analysis of this symposium itself. My article is shorter than most of the other contributions. Should I be criticized for this apparent act of deviancy? I assert an adequate justification. From the outset, the organizers of this symposium assigned participants to either of two roles. On the one hand, they assigned most to the role of full contributor, which implicitly required an article of the length and depth attained elsewhere in this issue. On the other hand, the organizers excused Richard Posner and me from the task of presenting a paper at the conference sessions and instead asked each of us to provide wrap-up remarks at the close of the proceedings. Posner and I were accorded these pooh-bah roles, I assume, because we are the most senior of the participants. Because I endorse the hypothesis that a norm tends to enhance the welfare of the members of a group that adopts it, to clinch the justification for my brevity, I should defend the adaptiveness of an academic norm of honoring one's elders. An attractive, but implausible, argument for this norm is that advancing age enhances one's ability to make Olympian comments.[1] A more credible ex-

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[1] While experience increases with age, imagination declines. See Richard A. Posner, Aging and Old Age 67–70 (1995). Because Olympian comments are synthetic, they tend to be products more of imagination than of experience.

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planation is that academicians have developed an informal system of life-cycle compensation that tends to underreward the young and overreward the old—a system common elsewhere in the economy.[2] To be sure, various "norm entrepreneurs"—Cass Sunstein's helpful phrase[3]—have been pressuring our activist governments to undermine the traditional norm of deference to elders. A federal statute, for example, attempts to foster age-neutral work assignments.[4] Perhaps the members of the "New Chicago School," who organized this symposium and invented their moniker on its occasion, will take heed of the lawmaker's inability to influence how the organizers themselves assigned roles for the symposium.

Hewing to my assigned role, I offer a few overarching comments on the current state of legal scholarship on social norms. I argue that the newly found appreciation of norms is likely to cause the significant redirection of law and economics, although hardly its abandonment.

I. The Destabilization of Classical Law and Economics

A. *The Kuhnian Perspective*

Thomas Kuhn's *The Structure of Scientific Revolutions,* first published in 1962, provides an enduring framework for analyzing the evolution of scholarly paradigms.[5] Kuhn argued that in ordinary times most members of a discipline pursue "normal science"—interstitial refinements within the prevailing mode of thought. Because any paradigm oversimplifies, however, researchers increasingly find inexplicable "anomalies"—phenomena irreconcilable with the paradigm. The accumulation of serious anomalies slowly destabilizes the theory and eventually builds to a crisis. The crisis prompts scholars (according to Kuhn, mostly younger scholars, who are less locked into old ways of thinking)[6] to offer fresh paradigms capable of accounting for the anomalies. The newly offered paradigms compete for center stage, and eventually members of the discipline embrace one of them and throw over the old approach. Normal science then commences under the new paradigm. This slowly generates another set of anomalies, and the cycle repeats itself.

[2] See Edward P. Lazear, Agency, Earnings Profiles, Productivity, and Hours Restrictions, 71 Am. Econ. Rev. 606 (1981) (arguing that this system deters the young from shirking).

[3] Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 909 (1996).

[4] Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (1994).

[5] Thomas S. Kuhn, The Structure of Scientific Revolutions (2d. ed. 1970).

[6] *Id.* at 90.

Kuhn's framework can be applied to the situation of classical law and economics—the paradigm developed by Ronald Coase, Guido Calabresi, Posner, and others in the 1960s and 1970s. The core of this paradigm was borrowed from economics. It consists of methodological individualism (the assumption that individuals are the only agents of human action) and the assumption that individuals are self-regarding and rational. The next section identifies some important phenomena that the classicists overlooked. Under the Kuhnian framework, the thesis that classical law and economics is in for significant change could be stated in either strong or weak form. The strong version is that the newly discovered phenomena are anomalies that ultimately cannot be reconciled with the classical paradigm and will lead to its demise. The weak version of the thesis asserts that normal science within law and economics can accommodate these phenomena, which are lacunae, not anomalies. I argue in support of this weaker version.[7] Because the oversights of classical law and economics were major, however, that paradigm is now in for a turbulent and productive period of normal science.

B. Lacunae in Classical Law and Economics

In their early works, Coase, Calabresi, and Posner all addressed some situations where informal social controls might be more influential than legal rules. Norms, however, were simply beyond their field of reckoning. This is understandable, because those paladins had many other battlements to charge. Nonetheless, in retrospect, the classicists' analysis of social dynamics seems thin. Three deficiencies stand out.[8] By exaggerating the reach of law, they underrated two other major sources of order: internally enforced norms (socialization) and externally enforced norms. In addition, they paid too little heed to the human pursuit of status. The overlooked phenomena are lacunae, not anomalies, however, because they are potentially reconcilable with both methodological individualism and the assumptions that individuals are rational and self-interested.

A Neglect of Socialization. Much human effort is devoted to child rearing, schooling, and other systems of socialization. According to the standard sociological account, socialization brings about the internalization of

[7] See also Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics, 65 Chi.-Kent L. Rev. 23, 24–26 (1989) (advancing a similar argument).

[8] This list hardly is exhaustive. In another context, a reformer of the economic paradigm might stress the limits of human cognitive capacities or psychological phenomena such as loss aversion that are difficult to reconcile with rationality.

norms, which an individual then enforces on himself by means of self-administered feelings of guilt and pride. Economists, not to mention practitioners of classical law and economics, traditionally have paid little or no attention to the socialization process. Instead, they standardly have treated individual tastes as exogenous.[9] Because they also assume self-interested behavior, economists traditionally have had difficulty explaining why individuals give to public radio, control their littering, leave tips at roadside restaurants, return items to a lost-and-found, and otherwise cooperate when a rational, unsocialized person would not. Like virtually all legal scholars, the founders of classical law and economics featured unsocialized individuals in their analyses of hypothetical legal problems.[10] While this approach had the distinct virtue of making an analysis universally relevant, it surreptitiously suppressed the role of socialization and, as a result, exaggerated the role of law.

A Neglect of Socially Enforced Norms. Much of the glue of a society comes not from law enforcement, as the classicists would have it, but rather from the informal enforcement of social mores by acquaintances, bystanders, trading partners, and others. These unofficial enforcers use punishments such as negative gossip and ostracism to discipline malefactors and bounties such as esteem and enhanced trading opportunities to reward the worthy.

Informal systems of external social control are far more important than law in many contexts, especially ones where interacting parties have a continuing relationship and little at stake. The pioneers of classical law and economics were not attuned to this. For instance, Coase's central example in *The Problem of Social Cost* dealt with the allocation of the risk of cattle trespass between a farmer and a rancher who owned adjoining lands.[11] Although Coase invoked this scenario solely to illustrate a hypothetical world of zero transaction costs, his discussion misleadingly implied that rural neighbors in fact would look to formal law to determine who bears the risk of trespass by livestock. In fact, they rarely do.[12] These neighbors have continuing relationships, and cattle trespass seldom involves large stakes. As a result, in this context neighbors apply social norms rather than turning to the legal system. In a similar manner, in their brilliant article on the struc-

[9] This is changing. See, for example, Gary S. Becker, Accounting for Tastes (1996).

[10] See, for example, Guido Calabresi, The Costs of Accidents 73–75 (student ed. 1970) (asocial discussion of a person's decision to install better brakes on car); Ronald H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1–8 (1960) (asocial discussion of resolution of risk of cattle trespass); Richard A. Posner, Economic Analysis of Law 10–11 (1st ed. 1972) (asocial discussion of property rights in land).

[11] See Coase, *supra* note 10.

[12] Robert C. Ellickson, Order without Law 52–64 (1991).

ture of legal entitlements, Calabresi and Douglas Melamed penned sociologically myopic sentences such as, "If Taney owns a cabbage patch and Marshall, who is bigger, wants a cabbage, he will get it unless the state intervenes."[13] What? Can only the state prevent an onlooker from taking candy from a baby? Since the collapse of the Soviet Union in 1991, Russia has lacked an effective law-enforcement system. Legal centralists might ponder how Russian society has continued to function—fitfully to be sure—with its legal system in ruins.

A Neglect of the Human Quest for Status. Besides slighting these two basic forms of social control, the classicists implicitly fostered an excessively materialistic conception of human tastes. Although conventional economic theory supposes that an individual can obtain utility from any sort of experience, economists (and practitioners of classical law and economics) traditionally have paid little heed to the eagerness with which people pursue social status. The classicists' depictions of how people would behave in particular settings therefore tend to be misleading. To provide only one of many possible examples, Coase's vignette of the farmer and the rancher presents a calculus in which only the monetary costs of fencing and the monetary value of crops are relevant. In fact, ranchers are keenly concerned about where ranchers as a group stand within the larger social hierarchy, and each rancher is sensitive to his intragroup status as well. These concerns affect their handling of cattle-trespass risks.[14] Law-and-economics scholars are only beginning to explore to what extent the legal system can itself either confer status or regulate informal systems of status production.[15] Denizens of universities, where differentiation of titles is as baroque as under High Feudalism, should appreciate the possible seriousness of this omission.

C. *Evidence That These Lacunae Are Major*

Two quite different forms of evidence suggest the seriousness of these oversights of classical law and economics. First, scholars in many disciplines increasingly are emphasizing the significance of the informal glue that holds a society together. Second, analysis of two selected problems—the implied warranty of habitability and the increase in out-of-wedlock

[13] Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1091 (1972).

[14] Ellickson, *supra* note 12, at 25, 114–20.

[15] Two pioneering works are Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003 (1995); and Richard H. McAdams, The Origins, Development, and Regulation of Norms, 96 Mich. L. Rev. 338 (1997) (developing an esteem theory of norms).

births—demonstrates how recognition of the presence of norms can usefully enrich legal analysis.

1. The Explosion of Scholarly Interest in Norms

Sociologists have long studied the creation, transmission, and enforcement of norms as well as the pairing of norms with social roles. The field of sociology, however, has not had much influence on the scholars in other disciplines who have recently become interested in norms. Partly because sociologists themselves have been unable to coalesce around a dominant paradigm,[16] the alien newcomers have had difficulty finding much worth borrowing. In addition, because sociology stresses how social forces limit an individual's choices, sociologists traditionally have seen informal groups and cultures as operative engines. This methodological wholism bewilders economists and other devotees of methodological individualism.[17]

Beginning in the late 1980s, however, James Coleman and others organized a self-conscious subdiscipline of rational-choice sociology.[18] Its members are ideally situated to fertilize the research on norms being conducted by the many rational-choice scholars situated in disciplines outside sociology. Philosophers, for example, have been inquiring into conventions and norms.[19] Game theorists and evolutionary biologists have been probing the social conditions that foster cooperative behavior.[20] Economists, ever imperial, have begun to explore norms and status seeking.[21]

[16] See Kenneth G. Dau-Schmidt, Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law, 1997 Wis. L. Rev. 389, 399.

[17] See *id.* at 400–402; but compare Douglas D. Heckathorn, The Emergence of Norms, Strategic Moves, and the Limits of Methodological Individualism (unpublished manuscript, Univ. Conn., February 26, 1997) (urging the blending of methodological individualism with methodological wholism into an interactive model that reveals how social actors create and are created by systems of social norms).

[18] See, especially, James S. Coleman, Foundations of Social Theory (1990) (his magnum opus), and Rationality and Society, a journal Coleman founded in 1989. Compare Amitai Etzioni, The Moral Dimension: Toward a New Economics (1988) (exemplifying a kindred strand of sociological analysis).

[19] See, for example, David Gauthier, Morals by Agreement (1985); Edna Ullmann-Margalit, The Emergence of Norms (1977).

[20] See, for example, Robert Boyd & Peter J. Richerson, Culture and the Evolutionary Process (1985); Russell Hardin, Collective Action (1982); John Maynard Smith, Evolution and the Theory of Games (1982); Elliott Sober & David Sloan Wilson, Unto Others: The Evolution and Psychology of Unselfish Behavior (1998).

[21] See, for example, George A. Akerlof, A Theory of Social Custom, of Which Unemployment May Be One Consequence, 94 Q. J. Econ. 749 (1980); B. Douglas Bernheim, A Theory of Conformity, 102 J. Pol. Econ. 841 (1994) (developing model in which individuals value status); and Robert H. Frank, Choosing the Right Pond: Human Behavior and the Quest for Status (1985); see, generally, Robert Sugden, The Economics of Rights, Cooperation, and Welfare (1986).

Like law professors, political scientists traditionally have specialized in the workings of governments—the public institutions that promulgate and enforce legal rules. It is notable, then, that prominent political scientists with diverse interests and approaches have begun to stress the role of informal social controls. Examples include the work of Robert Putnam on social capital, of Robert Axelrod on cooperation, of Jon Elster on norms, and, in a somewhat more remote vein, of the political theorists who are reviving the republican political theory that stresses a citizen's moral obligations to contribute to his or her community.[22]

Most pertinently, in the mid-1990s norms became one of the hottest topics in the legal academy.[23] With the inclusion of this one, there have been at least four major symposium issues on the subject.[24]

2. How the Consideration of Norms Can Enrich Policy Analysis

This interest in norms may turn out to be fleeting. To bolster the case that it will not be, I offer two examples of how the appreciation of informal social controls can fundamentally alter analysis of a social problem.

The Implied Warranty of Habitability. According to the leading property casebooks, the development of an implied warranty of habitability was the capstone of the significant changes in landlord-tenant law that occurred during the 1965–75 period.[25] Prior to this legal innovation, the doctrine of caveat lessee applied to ordinary residential tenancies. If water suddenly were to begin dripping from a tenant's ceiling, caveat lessee would deny the tenant the right either to withhold a portion of the rent or to compel the landlord to repair the leak. The conventional account implies that, by supplanting caveat lessee with an implied warranty of habitability, courts and legislatures transformed relations between landlords and residential tenants.

[22] See Robert D. Putnam, Making Democracy Work: Civic Traditions in Modern Italy (1993); Robert Axelrod, The Evolution of Cooperation (1984); Jon Elster, The Cement of Society (1989); and, for example, Michael J. Sandel, Democracy's Discontent (1996) (urging revival of civic republicanism).

[23] For a more thorough review of the emerging legal literature, see Richard H. McAdams, Comment: Accounting for Norms, 1997 Wis. L. Rev. 625.

[24] Symposium, Law, Economics, and Norms, 144 U. Pa. L. Rev. 1643 (1996); Symposium, Law and Society & Law and Economics, 1997 Wis. L. Rev. 375; Symposium, The Nature and Sources, Formal and Informal, of Law, 82 Cornell L. Rev. 947 (1997). See also Special Issue on Mediating Institutions, 61 U. Chi. L. Rev. 1213 (1994); Symposium: The Informal Economy, 103 Yale L. J. 2119 (1994).

[25] See, for example, Jesse Dukeminier & James E. Krier, Property 514 (3d ed. 1993) ("sweeping reform"); Joseph William Singer, Property Law 841 (2d ed. 1997) ("virtual revolution"); see also Edward H. Rabin, The Revolution in Residential Landlord-Tenant Law, 69 Cornell L. Rev. 517 (1984).

An observer who appreciates social norms should be skeptical of the supposition that this legal change had revolutionary effects. Landlord-tenant disputes involve small stakes and, in midlease, parties in a continuing relationship. In this sort of context, disputants tend to rely on informal social controls, not the legal system.[26] Caveat lessee is an inefficient rule in most instances because (1) a landlord is apt to know more than a tenant about how to cure a defect, (2) a short-term tenant has inadequate incentives to make long-lasting repairs, and (3) when a defect affects several tenants, they would have to coordinate their efforts to deal with it, while a landlord could act single-handedly. If norms tend to be welfare enhancing for the parties involved,[27] during midlease the informal norm ordinarily prevailing between a landlord and residential tenant would be something like "the tenant is entitled to receive housing services whose value equals the rent the tenant is paying." In the usual case, this norm would require a landlord to repair a ceiling that had begun to leak during midlease.

If so, the legal centralists' vision of landlord-tenant relations would be flawed for the periods both before and after the 1965–75 "revolution." First, the informal norm just articulated would have significantly protected tenants when caveat lessee was the nominal rule. Second, after the revolution, the same norm would deter most tenants from fully exploiting the overly draconian protenant remedies available in many states under the warranty-of-habitability doctrine.[28]

Out-of-Wedlock Births to Teenagers. Of the nonwhite women ages 15–19 who gave birth in 1960, 42 percent were unmarried. By 1980, the proportion had risen to 82 percent.[29] Why this sharp increase in the proportion of births out of wedlock?

One possibility is that the material incentives of young women changed. Observers who believe that poor women are highly responsive to levels of welfare benefits might stress the significant expansion during the 1960–80 period of the federal benefits available to unmarried mothers.[30] A related

[26] This is not to say that implied warranty of habitability law is never important. Landlord-tenant law becomes more relevant as a lease nears its end and prospects of continuing relations wane. In addition, a tenant receiving free legal services is likely to be relatively legalistic. For fuller discussion of the dynamics of landlord-tenant relations, see Ellickson, *supra* note 12, at 275–79.

[27] As hypothesized in *id.* at 167–83.

[28] See, for example, Hilder v. St. Peter, 144 Vt. 150, 161, 478 A.2d 202, 209 (1984) (articulating an overly protenant measure of damages).

[29] Charles Murray, Losing Ground: American Social Policy, 1950–1980, at 262 (1984). The equivalent figures for young white women were 2 percent and 11 percent. *Id.*

[30] See, for example, *id.;* Robert Rector, U.S. Welfare System Imposes Penalty on Marriage, Cleveland Plain Dealer, May 24, 1994, at 7B.

materialist theory posits that many poor women gave up on the marriage market during this period because the job prospects of poor men were deteriorating.[31]

A norm-focused analyst, by contrast, would stress changes in the status rewards associated with unwed motherhood. In the 1950s, giving birth out of wedlock was widely regarded as deeply shameful. A generation later, in many inner-city neighborhoods by becoming pregnant and giving birth, an unmarried teenager would attain *higher* status among her peers.[32] In a similar vein, by the 1980s a teenage male could win peer status by fathering a child out of wedlock even if he intended to do little or nothing to help support the mother and baby.[33] Because teenagers crave the esteem of other teenagers, these shifts in norms likely had major behavioral consequences.

A norm-centered policy analyst would seek to understand why poor teenagers had changed their norms. George Akerlof, Janet Yellen, and Michael Katz hypothesize that advances in birth-control technologies (contraception, cheaper abortion) undermined the traditional norms supporting shotgun weddings.[34] A second possibility is that the women's movement, which was ascendant during 1960–80, provided ideological grounding for norms that would free women from depending on men for economic support. A third is that the expansion of the welfare state helped induce residents of poor neighborhoods to develop norms that would reduce the cognitive dissonance created by dependence on welfare benefits. These interrelated hypotheses, whatever their relative merits, all envisage teenagers as primarily responding not to monetary incentives but to the status incentives that their peers create. In *Losing Ground,* Charles Murray's much contested discussion of financial incentives in his "Harold and Phyllis" vignette exemplifies the traditional law-and-economics emphasis on material incentives.[35] By the lights of the emerging law-and-norms scholarship, *Losing Ground*'s

[31] See, for example, William Julius Wilson, The Truly Disadvantaged (1987); Greg J. Duncan & Saul D. Hoffman, Welfare Benefits, Economic Opportunities, and Out-of-Wedlock Births among Black Teenage Girls, 27 Demography 519 (1990).

[32] See, for example, Elijah Anderson, Neighborhood Effects on Teenage Pregnancy, in The Urban Underclass 375, 388–91 (Christopher Jencks & Paul E. Peterson eds. 1991) (discussing effects of peer pressure on inner-city teenage childbearing); see also Mary Jo Bane & David T. Ellwood, Welfare Realities 114–15 (1994) (citing studies showing increased acceptance of out-of-wedlock childbearing between 1974 and 1985); Kristin Luker, Dubious Conceptions 95 (1996) (noting that in 1970 only about one in 10 Americans thought that childbearing outside of marriage should be legal; by 1985, the figure had risen to 40 percent).

[33] See Anderson, *supra* note 32, at 383.

[34] George A. Akerlof, Janet L. Yellen, & Michael L. Katz, An Analysis of Out-of-Wedlock Childbearing in the United States, 111 Q. J. Econ. 277 (1996).

[35] Murray, *supra* note 29, at 156–77.

less noted discussion of the status incentives of the residents of poor neighborhoods has greater policy relevance.[36]

II. The Ongoing Competition to Enrich Classical Law and Economics

This section briefly identifies ongoing efforts on the part of eight different individuals or scholarly clusters to bring about a better understanding of how the legal system meshes with more informal systems of social control. Because none of these contenders to enrich classical law and economics has yet to command the field, the conclusion will speculate about what might come next.

Law-and-Society Scholars. Compared with most others in the legal academy, members of this school have well appreciated the significance of informal social controls. These scholars are admired, however, more for grubbing for facts than for building overarching theory.[37] Several detached observers of the American legal academy have asserted that the work of the law-and-society school has not "caught on."[38] This may speak to the limitations of the school or, more ominously, to the inherent difficulty of developing a covering theory in this context.

Donald Black. Black, a sociologist, stands out for his ambitious and relatively clear-headed efforts to develop a general theory of social control.[39] He generally treats law as a dependent variable that fluctuates with other social conditions. None of the other papers prepared for this conference cite Black's work—an indication of how seldom sociologists influence legal scholars.

Social-Capital Theorists. In the 1990s, Coleman and Putnam inspired widespread interest in the notion of social capital, that is, networks of civic engagement and webs of trusting relationships.[40] So defined, social capital is analogous to a set of adaptive norms. Scholars interested in social capital are aware of the desirability of developing a theory of creation and destruction of this intangible asset. The academicians mining this vein are potential

[36] *Id.* at 178–91.

[37] See, for example, Stewart MacAulay, Non-contractual Relations in Business, 28 Am. Soc. Rev. 55 (1963); H. Laurence Ross, Settled Out of Court (rev. ed. 1980).

[38] This is the conclusion advanced in both John Henry Schlegel, American Legal Realism and Empirical Social Science 251–52 (1995), and Neil Duxbury, Patterns of American Jurisprudence 445 (1995). I offer a somewhat more positive assessment in Ellickson, *supra* note 12, at 6–8, 147–55.

[39] See Donald Black, The Behavior of Law (1976); Toward a General Theory of Social Control (2 vols., Donald Black ed. 1984).

[40] See Coleman, Foundations of Social Theory, *supra* note 18, at 300–321; Putnam, *supra* note 22, at 163–85.

consorts of the legal scholars interested in norms. At present, however, social-capital theory remains embryonic.

Game Theorists. Game theory provides a rigorous, if inevitably simplified, framework for examining the dynamics of informal social control.[41] Game theorists can readily allow for socialization (for example, by allowing past outcomes to alter future payoff matrixes), imperfect information, and limitations in cognitive capacities. The number of talented scholars practicing (and heavily influenced by) the theory is huge and ever growing.[42] It is notable that interest in the approach transcends disciplinary boundaries. This suggests that the tortoise of game theory may win the race to provide a paradigm that captures the essentials of social life. There is a danger, however, that game theory will become increasingly inaccessible to those who have not devoted their lives to it.

Order without Law. In this book, I developed a road map of the overall system of social control.[43] This included taxonomies of norms and also of various "controllers" that discipline human conduct. While the book's field study of Shasta County cattlemen won some attention, the taxonomies have yet to win many adherents.

Robert Cooter. Among legal academicians interested in norms, Cooter stands out for his stress on socialization, a process commonly ignored by scholars who use the rational-choice framework.[44] Cooter's emphasis on this first-party system of social control (to revert to my taxonomy) may lead him to neglect self-help (second-party control) and externally enforced norms, organizational rules, and law (the various third-party controls).

Rising Independent Stars of the Next Generation. As Kuhn would have predicted,[45] younger scholars are leading the thrust to expose and fill in the major lacunae in classical law and economics. In her work on merchants' norms, Lisa Bernstein has demonstrated unusual skill in combining theory with primary empirical work.[46] Richard McAdams has engagingly explored

[41] A classic is Axelrod, *supra* note 22.

[42] A significant game theorist within the legal academy is Randal Picker. See Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms, 64 U. Chi. L. Rev. 1225 (1997) (modeling groups and their choices among competing norms); Douglas G. Baird, Robert H. Gertner, & Randal C. Picker, Game Theory and the Law (1994).

[43] Ellickson, *supra* note 12.

[44] See Robert D. Cooter, Normative Failure Theory of Law, 82 Cornell L. Rev. 947, 955–57 (1997); compare Robert Frank, If Homo Erectus Could Choose His Own Utility Function, Would He Want One with a Conscience? 77 Am. Econ. Rev. 593 (1987).

[45] See text around note 6 *supra.*

[46] Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992); Lisa Bernstein, Merchant Law in a Mer-

the implications for law of the human quest for status.[47] Eric Posner, the most wide ranging of the many legal scholars working on norms, is well on the way to establishing himself as a major theorist.[48]

The "New Chicago School." Lawrence Lessig's symposium article "playfully" introduces this appellation and outlines the essence of the approach.[49] I interpret the school to comprehend some of the recent work of Dan Kahan,[50] Cass Sunstein,[51] Lessig himself,[52] and perhaps that of a few others, such as Kenneth Dau-Schmidt[53] and Richard Pildes,[54] who are not based at the University of Chicago.[55] Members of the school seek to acquire the positive understandings necessary to carry out their normative program, which is the intentional manipulation of norms to achieve desired social goals. While they recognize that an individual "norm entrepreneur" may be able to achieve change in some contexts, the members of the New Chicago School tend to favor governmental activism in the molding of norms.[56]

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chant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765 (1996).

[47] See, for example, the two articles by McAdams, *supra* note 15.

[48] See, for example, Eric A. Posner, The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action, 63 U. Chi. L. Rev. 133 (1996); Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Pa. L. Rev. 1697 (1996); Eric A. Posner, The Regulation of Religious Groups, 2 Legal Theory 33 (1996).

[49] Lawrence Lessig, The New Chicago School, in this issue, at 661.

[50] See, for example, Dan M. Kahan, Social Meaning and the Economic Analysis of Crime, in this issue, at 609; Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349 (1997).

[51] See, for example, Sunstein, *supra* note 3; Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021 (1996).

[52] See, for example, Lessig, *supra* note 49; Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995).

[53] See, for example, Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a Preference Shaping Policy, 1990 Duke L. J. 1; Kenneth G. Dau-Schmidt, Legal Prohibitions as More than Prices: Analysis of Preference Shaping Policies in the Law, in Law and Economics: New and Critical Perspectives 153 (Robin P. Malloy & Christopher K. Braun eds. 1995).

[54] See, for example, Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, in this issue, at 725; Richard H. Pildes, The Destruction of Social Capital through Law, 144 U. Pa. L. Rev. 2055 (1996).

[55] Because of differences in methodology, focus, and normative outlook, some University of Chicago law professors who are interested in norms—Richard Epstein and Randal Picker, for example—do not fit comfortably within the school. See, for example, Richard A. Epstein, The Path to *The T. J. Hooper:* The Theory and History of Custom in the Law of Torts, 21 J. Legal Stud. 3 (1992); Picker, *supra* note 42.

[56] See, for example, Lessig, *supra* note 49, at 661; Sunstein, *supra* note 3, at 907–10. Anticipating criticism, Sunstein is careful to qualify his position. See *id.* at 965–67.

It is already clear, however, that the school's relative confidence in state norm-shaping is not universally shared.[57]

III. Differences among the Approaches

Although these entrepreneurs share a common focus, their approaches diverge in a number of respects. Among them are the following.

Terminological Variations. It is worrisome that the new norms scholars do not agree on basic terms, not to mention analytic frameworks. The waters are so muddy that many writers on norms feel compelled to start by proffering their own definition of *norm*.[58] Sociology itself has long suffered from terminological disagreements, which helped prompt Arthur Leff to characterize it as a swamp.[59] Will an academic norm entrepreneur equivalent to Paul Samuelson appear to tidy up the mess or are the underlying phenomena simply too intractable?

The notion of "social meaning," a tool in the kit of the New Chicago School, illustrates the present terminological wrangling.[60] During this conference, a number of commentators stated that they found this term to be ambiguous because it could denote either (1) an actor's intended meaning or (2) the message received by those who sense another's act. If the latter concept is the central one, "social reception" would express it more clearly than "social meaning" does.[61]

[57] See, for example, Roderick M. Hills, You Say You Want a Revolution? The Case against the Transformation of Culture through Antidiscrimination Laws, 95 Mich. L. Rev. 1588 (1997) (expressing skepticism about government's comparative advantage in assigning stigma); Picker, *supra* note 42, at 62 (noting that groups other than governments can play the role of seeding new norm clusters); Pildes, Destruction of Social Capital, *supra* note 54 (detailing ways in which state activism may undermine social capital); Eric A. Posner, Symbols, Signals, and Social Norms in Politics and the Law, in this issue, at 795–96 (predicting that elected officials will be reluctant to challenge dysfunctional norms that most voters embrace).

[58] Cooter, for example, adopts the philosophers' definition that a norm is an obligation. Cooter, *supra* note 44, at 954–55. I prefer the positivist definition that a norm is a rule supported by a pattern of informal sanctions; this denies normative status to, for example, an aspirational statement that is routinely violated without consequence. See Ellickson, *supra* note 12, at 127–30. See also Posner, Law, Economics, and Inefficient Norms, *supra* note 48, at 1699 (defining a norm as a rule of behavior enforced by private third parties).

[59] See Ellickson, *supra* note 12, at 147 n.46.

[60] A concept developed in Lessig, *supra* note 52.

[61] A legal positivist interprets the "legality" of an action as a prediction of what law enforcers would do in response to the action. By the same token, the "social meaning" of an action could be construed as a prediction of how ordinary onlookers and others would sanction the actor with informal rewards and penalties.

Divergent Assessments of the Adaptiveness of Norms. A substantive debate is brewing over the central question of to what extent norms enhance welfare. As noted earlier, I am among the optimists on that issue.[62] Even I worry, however, that the members of a group may generate norms that impose negative externalities and that the norm-making process may go wrong when the members of a group are not closely knit. In addition, critics far more skeptical of the efficient-norm hypothesis have been surfacing.[63]

Varying Accounts of the Evolution of Norms. How norms change is a central and potentially contentious topic. We optimists tend to suppose that norms evolve in response to changes in science, technology, scarcity, demography, and other influences on supply and demand.[64] Although methodological individualism invites a theory of how human actors manage to reform norms, many of us have ducked that challenge, in effect relegating norm change to a black box. A strength of the New Chicago School is its interest in the ability (or inability) of purposive actors such as norm entrepreneurs and political leaders to alter existing norms. Randal Picker, who evokes examples such as the sudden demise of foot binding in China, has been particularly creative and rigorous in his explorations.[65]

Differing Conceptions of the Wellsprings of Human Order. As noted, some observers regard socialization (first-party control) as the key precondition of cooperative behavior.[66] Game theorists, by contrast, focus on the structure of incentives that a social setting creates, thereby emphasizing the role of self-help (second-party control).[67] At the conference, there was some discussion of the relative future importance of law and norms (two major

[62] See note 27 *supra* and text around note 27 *supra.* Other optimists include Coleman, Foundations of Social Theory, *supra* note 18, at 249–58; and Robert D. Cooter, Decentralized Law for a Complex Economy, 144 U. Pa. L. Rev. 1643 (1996). Compare Picker, *supra* note 42 (systematically exploring social conditions that help lead members of a group to embrace a more efficient norm).

[63] See, for example, Lewis A. Kornhauser, Are There Cracks in the Foundations of Spontaneous Order? 67 N.Y.U. L. Rev. 647 (1992); Jody S. Kraus, Legal Design and the Evolution of Commercial Norms, 26 J. Legal Stud. 377 (1997); Posner, Law, Economics, and Inefficient Norms, *supra* note 48. For another head count of both sides of this debate, see McAdams, *supra* note 23, at 635 nn.59–63.

[64] See, for example, Ellickson, *supra* note 12, at 187–88 (seeing change in economic conditions as cause of change in cattle-trespass norms); Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (Pap. & Proc. 1967) (asserting that rise in demand for fur prompted Labradorian Indians to create exclusive hunting territories).

[65] See Picker, *supra* note 42, at 62, citing Gerald Mackie, Ending Footbinding and Infibulation: A Convention Account, 61 Am. Soc. Rev. 999 (1996) (reporting total collapse of footbinding in Tinghsien between 1889 and 1919). Also notable is McAdams, The Origin, Development, and Regulation of Norms, *supra* note 15.

[66] See text around note 43 *supra.*

[67] See, for example, Bernheim, *supra* note 21 (developing model in which conformity occurs despite diverse underlying preferences).

forms of third-party control). What is the extant division of social-control labor, and how is it likely to change?

During the conference, Richard Posner predicted that law will become increasingly important and norms less so. I disagree. It is highly plausible that politicians—cheered on by members of the New Chicago School—will seek to expand their sphere of influence. I join Cooter, however, in thinking that the ever increasing intricacy of social life will make it harder for governmental agents to constructively manage human affairs.[68] The point is similar to Friedrich Hayek's insight that central economic planning becomes more, not less, difficult as an economy becomes more complex, in part because planners at the center become increasingly incapable of obtaining and processing needed information.[69] The fierce and (so far) largely successful resistance to government regulation of those involved with the Internet illustrates how members of a significant new social group have opted to make norms, not law, their social-control instrument of choice. Although I agree with Richard Posner that law has been expanding during the past century, the current popularity of deregulation suggests that voters increasingly recognize the limits of law. It is possible of course that the interest groups that benefit from inefficient regulation will continue to hold sway in many contexts. If they do, however, I predict that members of informal social groups increasingly will punish those who have hijacked the legal system for selfish ends.

IV. Conclusion

The founders of classical law and economics were oblivious to important phenomena, especially the centrality of informal systems of social control. The mounting appreciation of those systems has destabilized the classical paradigm. Because scholars do not have to throw over the rational-choice model to deal with these lacunae, however, law and economics is in for a time of turbulent normal science, not extinction.

Several scenarios of future intellectual developments suggest themselves. The first is optimistic. An intellectual entrepreneur or school (perhaps one of the many contenders mentioned in Section II) devises a superior unifying theory that comes to be widely accepted. The current unruliness diminishes, and law and economics, newly enriched, proceeds.

The second scenario is a pessimistic vision. Because human life proves to be too messy to be cabined within a unifying theory, norm theorists continue to thrash about. No theory comes close to sweeping the field. Socio-

[68] See Cooter, *supra* note 44, at 948; Cooter, *supra* note 62, at 1644–46.

[69] See Friedrich Hayek, The Road to Serfdom 35–37 (1944).

logically enriched law and economics continues to resemble what sociology is today: a field without a paradigm. This failure of theory leads to a lessening of scholarly interest. The burst of interest in norms in the mid-1990s turns out to have been a temporary spike.

The third, and most probable, scenario is modest and incremental intellectual change. Symposia such as this one generate additional interest in the role of norms. Although no unifying theory comes to command the field, numerous legal scholars cull value from the various offerings. A few works come to comprise a canon on law and norms. The authors of influential casebooks refer to some of these canonical works. But in the end, this canon accounts for only a handful of the snapshots in the thick photo album of the legal cathedral.