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Some Well - Aged Wines for the “New Norms” Bottles: Implications of Social Psychology for Law and Economics

Yuval Feldman and Robert J. MacCoun *

Abstract

In the last decade, the study of social norms has become a major focus of theory and research in law and economics. Surprisingly, this "new norms" literature has almost completely ignored decades of systematic theory, experimentation, and field research on normative processes by social psychologists. We demonstrate that there are multiple mechanisms by which normative influence operates, each with its own principles and consequences. We also identify a host of situational and dispositional (individual difference) moderators that either attenuate or amplify the effects of normative influence sources. Finally, we show that the internalization process is much less mysterious than some have suggested; it can occur through any of several well-studied processes. By taking these theoretical distinctions and moderators into account, the new norms literature will necessarily become more complex, but not necessarily chaotic or incoherent. Because these complexities are facts of social life, acknowledging them will allow the new norms theorist to improve their predictions and hence their norm management implications.

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I. Introduction

Following Elickson's book, *Order Without Law*,¹ law and economics scholars have taken the leading role in the legal scholarship of social norms. Dozens of papers have been written on a variety of topics, showing the importance of taking norms into account when studying the effect of legislation on people's behavior.² Given the amount of review papers and symposiums, which have analyzed the current and potential contribution of the new norm scholarship on legal scholarship, we will not attempt to conduct a full review of the various ideas developed by scholars working in this scholarship.

Scholars of the law and economics of norms (henceforth, "LEN scholars") have proposed various theoretical mechanisms. Elickson has relied on the concept of reciprocity and reputation,³ citing it as the main reason that people engage in norms, hence arguing that norms could govern efficiently in close-knit groups or when reputations could be monitored. Following the reputation rationale, Posner⁴ has argued that norms serve as a means of signaling to others one's low discount rate and that they could, therefore, serve as good business parties. Moving to a less instrumental and materialistic account of norms, McAdams argues that people's primary motivation for following norms stems from their need for others' approval to maintain their self-esteem.⁵ Cooter goes even further, arguing that, ultimately, self-enforcing mechanisms are only ensured when people internalize the norm.⁶

¹ See Robert C. Elickson, *Order Without Law: How Neighbors Settle Disputes* 9 (Harv. Univ. Press, 1991) ("Order without law")

² For recent volumes dedicated to this topic see, for example, *Symposium, Law, Economics, and Norms*, 144 U. Pa. L. Rev. 1643 (1996); *Symposium, The Legal Construction of Norms*, 86 Va. L. Rev. 1577 (2000); *Symposium, Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. Legal Stud. 537 (1998). See Cooter, Cornell L. Rev., cited at note 43 at 906: "The demonstrated importance of social norms to law and the availability of analytical techniques from economics have caused a renaissance in legal scholarship on social norms."

³ Elickson, *Order Without Law*, cited in note 1; See also Robert M. Axelrod, *The Evolution of Cooperation* (Basic Books, 1984); Bernstein, *Jof Legal Studies*, cited in note 24.

⁴ This is the general theme of Eric Posner, *Law and Social Norms* (Harv. Univ. Press, 2000).

⁵ Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96(2) Mich. L. Rev. 338 (1997). For a psychological review see, Roy F. Baumeister & Mark Leary, *The Need to Belong:*

The motivation for writing this paper thus sprang from the fact that, in many cases, this emerging literature is tackling questions very similar to those that have been discussed by social psychologists for the past seventy years.⁷ Most L&E scholars appear to recognize that social norms have been analyzed by other social scientists (especially by sociologists), but such analyses are rarely examined explicitly, and earlier non-economic efforts are often dismissed in passing as primitive or at least pre-scientific. As a result, this new literature has almost completely ignored decades⁸ of systematic theory, experimentation, and field research on normative processes by social psychologists.⁹ We find this omission to be especially puzzling when considering the great visibility of cognitive psychology in the economic analysis of law, an area known as behavioral law and economics.¹⁰

Desire for Interpersonal Attachments as a Fundamental Human Motivation, 117(3) *Psych. Bull.* 497-529 (1995)

⁶ Robert D. Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86(8) *VA.L.Rev.* 1577 (2000)

⁷ We are hardly the first to take L&E scholarship to task for casual scholarship. See Tracey L. Meares, *Commentaries on Eric Posner's Law and Social Norms: Signaling, Legitimacy, and Compliance: A Comment on Posner's Law and Social Norms and Criminal Law Policy*, 36 *U.Rich.L.Rev.* 407, 408 (2002). Mark Tushnet, *"Everything Old is New Again": Early Reflections on the "New Chicago School"*, 1998 *Wisc.L.Rev.* 579 at 584.

⁸ As a matter of fact, while arguing that psychologists have studied norms for longer periods compared to economists, it is appropriate to admit that the sociology's interest in social norms preceded the that of social psychologists (e.g. Durkheim, about the creation of norms and customs by groups). Psychosocial experimental research goes back to the experiments conducted by Sherif in 1936 (see Muzafer Sherif, *The Psychology of Social Norms* (Harper and Row, 1966, originally published in 1936)). As well as the field research conducted by Newcomb in Bennington College in 1943 (see Theodore M. Newcomb, *Personality and Social Change; Attitude Formation in a Student Community*, (Dryden, 1943)). These studies are the most well-known early works of social psychologists in the area of social norms. Naturally the focus of psychologists (unlike that of sociologists) was more focused on understanding the behavioral processes underlying the effects of norms rather than exploring the content of rare areas in which norms are created.

⁹ Even critical scholars of the new L&E approach to social norms do not tend to find the lack of psychology to be problematic. For example Mitchell, *Toronto L.Rev.* cited in note 18, at page 179, argues that: "formally the province of anthropologists, sociologists, economists and philosophers, lawyers have begun to attempt to understand the norms play in ordering society and social groups outside the sphere of the norms promulgated by the state."

¹⁰ Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39(4) *Am. Psych.* 341 (1984); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and The Psychology of Choice*, 211 *Science* 453 (1981).

Of course, historical precedence does not give one discipline sufficient justification to criticize or patronize models developed by other disciplines. We do not contend that economic psychological models should replace economic models – indeed, existing psychological accounts have important limitations -- but that recent law and economics accounts of social norms would benefit from taking into account relevant principles and findings from social psychology. We will show that psychologists have already developed elaborate and empirically based answers for many of the questions that law and economics scholars are dealing with today.

Our discussion of relevant findings will be organized around three questions. First, *how* do norms operate? Some LEN scholars have recognized that a few basic normative influence processes, but we will show that social psychology has detailed numerous normative mechanisms in detail. Second, *when* do norms operate? We will identify a number of robust generalizations about classes of situational and dispositional (individual-difference) factors that moderate¹¹ the norm-behavior relationship. Third, how does internalization occur? LEN scholars have treated this question as a complete enigma, but we will identify several well-understood processes by which actors internalize normative messages.

Of course, we acknowledge at the outset that LEN scholars are concerned with important questions that social psychologists have largely ignored. For example, can a rational choice model of human behavior explain why would people follow social norms?¹² Under what circumstances could norms govern efficiently, and when would state intervention be required? To what extent do norms mediate the effect of legislation

¹¹ A moderator is a variable that determines the magnitude or valence of a relationship between two other variables, amplifying, attenuating, reversing or placing boundary conditions on more simplistic theoretical principles. See Reuben M. Baron & David A. Kenny. *The Moderator-Mediator Variable Distinction In Social Psychological Research: Conceptual, Strategic, and Statistical Considerations* .51(6) *J. Personality & Soc. Psych.* 1173(1986)

¹² Robert Sugden, *Normative Expectations: The simultaneous evolution of institutions and norms* in Avner Ben-Ner & Louis Puterman Eds., *Economics Values and Organization* 73 (Cambridge Univ. Press, 1998) (“EVO”) 73 See also Jane Mansbridge, *Starting with Nothing: On The Impossibility of Grounding Norms Solely in Self Interest*, in *EVO* at 151, criticizing the work of Sugden and arguing that without justice and morality the normative behavior of people could not be regulated solely by the expectations of society.

on people's behavior? And what is the interaction between formal and informal enforcement of laws? ¹³

The general theme of the papers in this volume is the law and economics of irrational behavior. Many norms do appear irrational, but many do not, and of course the mere fact that people often follow social norms is not irrational. Norms can provide a powerful coordination mechanism, and adherence to norms is often dictated by simple cost-benefit calculations. Our interest is less in the irrationality of normative content than in the frequent *arationality* of the normative influence process – the ways in which norms can shape behavior absent any explicit deliberative calculation by the actor. ¹⁴ We see little value in further debates about whether norm compliance is instrumental or not, or whether people are egoist or altruistic; ¹⁵ such debates often boil down to semantics. Instead we will simply assert that it is often clarifying and parsimonious to label certain behavior as normatively influenced, and we will identify a number of robust generalizations about such influence. Our hope is to improve the predictive and explanatory power of current LEN models by drawing attention to well-understood phenomena they oversimplify or obscure.

Economists sometimes criticize psychology for treating all social phenomena as context-dependent, producing a chaotic, falsifiable, and non-applicable view of reality. Scott¹⁶ argues 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 nonfalsifiable hypotheses produces an analysis

¹³ Only the latter question has received much attention from social psychologists. See, generally, Tom R. Tyler, *Why People Obey the Law* (Yale, 1990); Paul H. Robinson & John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Westview, 1995); Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 *Psychological Bull.*, 497 (1993); Robert J. MacCoun, & Peter Reuter, *Drug War Heresies: Learning From Other Vices, Times, and Places* (Chapters 4, 5, and 15). (Cambridge Univ. Press 2001)

¹⁴ Cass Sunstein, *Social Norms and Social Roles*, 96 *Colum. L. Rev.* 903, 945 (1996) argues that one of the main explanations for irrational behavior is people's adherence to social norms.

¹⁵ See for example the line of research suggested by Philip Tetlock's work on the different roles people can adopt in decision-making, across different circumstances. Philip E. Tetlock, *Social Functionalist Frameworks for Judgment and Choice: Intuitive Politicians, Theologians, and Prosecutors* 109(3) *Psych. Rev.* 451 (2002)

¹⁶ Cited in note 21 at 1607-1608.

that is rich in content but also speculative and context -dependent.” While we acknowledge that the picture we portray is considerably more complex than the pithy and stylized models of the LEN literature, a wealth of evidence from both controlled experiments and field studies shows that the complexity is a property of reality rather than a shortcoming of psychological analysis. The moderators and theoretical distinctions we will focus on are well established, testable, and fairly easy to recognize ex-ante,¹⁷ even from a legal -policy perspective. We fail to see how these concepts are any less falsifiable than the key factors in LEN accounts, and it is clear that social psychologists have gone far further than the LEN community in actually devising and conducting rigorous tests.

A. Recent criticism of social norms

Our argument for the failure of law and economics to recognize the important contribution that social psychology could make, becomes even clearer and more appealing when one considers the criticism this new literature has received. We will show that, at least to some extent, the proposed modifications in the models we advocate for could reduce some of the criticism of this new literature.

Mitchell argues that the new norms model offer an oversimplified account of the functioning of norms.¹⁸ Elster¹⁹ stipulates that it is simply impossible to explain norms only on grounds of rationality. Other scholars, who discuss these trends in law and economics, argue that current models of law and economics are either not backed by empirical research,²⁰ or cannot be backed by future research because they are just not

¹⁷ The main exception to this can be found in our discussion of individual differences, which are naturally hard to predict ex-ante. Nonetheless we will argue that a awareness of the existence of individual differences is required in order to predict the likely effect of norms, even if the identity of the specific individual could not be known in advance.

¹⁸ Lawrence E. Mitchell, *Understanding Norms*, 49 U. Toronto L.J. 177, 247 (1999): “...the new norms jurisprudence suffers from the same failing that led to the diminishing influence of the strict Chicago-style neoclassical law and economics – the oversimplification of a complex world”.

¹⁹ Jon Elster, *The Cement of Society: Studies in Rationality and Social Change* (1991) at 15: “...social norms provide an important kind of motivation for action that is irreducible to rationality or indeed to any other form of optimizing mechanism”

²⁰ Jeff Rachlinski, *The Limits of Social Norms*, (Symposium on Law, Psychology, and the Emotions) 74 Chicago - Kent L. Rev. 1537 (2000).

falsifiable.²¹ Similarly, Griffith and Goldfarb²² discuss the methodological complexities required of incorporating norms into positive economic models. More recently, Rostain²³ has criticized both the “law and behavioral economics” and the “law and economics of social norms” for lacking the required empirical foundations²⁴. More specifically, she recognizes that there is almost no field research backing the generalization made by game theorists regarding fairness and social norms.

The criticism of the current interests of law and economics in social norms is not limited only to social scientists, however. Legal scholars who are themselves identified with the new approaches to law and economics argue that some of the models used in this literature suffers from significant limitations.

Kahan,²⁵ discussing rational choice models of social norms, says:

“A theory can be said to be over determined when it furnishes a menu of opposing behavioral mechanisms that are sufficiently abundant to account for essentially any phenomena as well as its negation. In that circumstance, the theory does not generate ‘explanations’ at all; it merely supplies a convenient set of story-telling templates that allow the theorist to rationalize ex post whatever existing facts she encounters and to

²¹ Robert Scott, *The Limits Of Behavioral Theories Of Social Norms*, 86(8) V.A.L.Rev 1603 (2000)

²² William B. Griffith & Robert S. Goldfarb, *Amending the Economist’s “Rational Egoist” Model to Include Moral Values and Norms*, 39, in Kenneth J. Koford & Jeffrey B. Miller Eds, *Social Norms and Economic Institutions* (Univ. of Michigan Press, 1991)

²³ Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement* 34 L. & Soc’y Rev. 973 (2000)

²⁴ Interestingly enough, the work of law and economics scholars who do field research is for the most part based on interviews and is more qualitative in nature, which makes it hard to generalize from their case studies to other contexts. See Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea* 25(4) L. & Soc’y Rev. 759 (1991) discussing property regimes in Papua, New Guinea; Robert Elickson, *Order without law*, cited in note 1, discussing disputes among neighbors in Chastacoma county; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21(1) J. Legal Stud. 115 (1992) describing commercial practices in diamond industry and in the context of the Cotton Industry see Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions* 99(7) Mich. L. Rev. 1724 (2001)

²⁵ Dan M. Kahan, *Commentaries on Eric Posner’s Law and Social Norms: Signaling or Reciprocating? A Response to Eric Posner’s Law and Social Norms* 36 U. Rich. L. Rev. 367, 371. While he aims most of his disapproval at the work of Posner, his criticism seems to refer to the broader project of the social norms literature.

justify whatever policy prescriptions she chooses ex ante. Rational choice theories are notoriously vulnerable to this defect.”

McAdams, himself a leading scholar in this tradition, focusing on models developed by Posner²⁶ argues that the signaling model is non-falsifiable and gives no prediction as to when given norms will succeed and when they are likely to fail.

A very similar critique is suggested by Rachlinski:²⁷ “...the law and social norms scholarship is merely a post hoc effort to accommodate some anomalous phenomena... [that] might not generalize to new situations, making them useless to policy-makers.”

And even Elickson, the founding father of the LEN approach, admits in his evaluation of the area that he co-created: “But in the end, this canon accounts for only a handful of the snapshots in the thick photo album of the legal cathedral.”

B. Evaluation of the criticism

It is evident from the short review that we have conducted that the LEN approach has drawn a lot of fire from critics from different and sometime even opposing directions. In our view the criticisms aren't unwarranted, but we think the integration of informal social controls into law and economics scholarship is an important advance that should not be dismissed prematurely. Moreover, recent changes in law and economics have enabled the use of psychological literature in legal areas that were traditionally off-limits for psychology. Traditionally, psychology was employed both in legal practice and in legal theory to areas such as insanity defense, child custody and jury research. Prior to the interest of law and economics scholars in psychology, there were limited interactions between psychological theories and substantive legal questions in such areas as contracts, property, and corporate law. In the last ten years however, coinciding with the increasing interest in social norms and in behavioral decision-making, reference to psychological theories is a common practice in more and more areas of legal research. Hence, the new law and economics scholarship has created a “portal” for psychology to access legal

²⁶ Richard H. McAdams: *Signaling Discount Rates: Law, Norms, and Economic Methodology* *Law and Social Norms*. 110 Yale L.J. 625 at 633.

²⁷ Jeffrey J. Rachlinski, *Symposium On Law, Psychology, And The Emotions: The Limits Of Social Norms* 74 Chi. -Kent. L. Rev. 1537, 1539-1540 (2000)

doctrines to which it was never before considered relevant. Thus, in our view psychology should be seen as *complementary* to economics rather than as a substitute for it.

We think that it is important for scholars from other disciplines to recognize the benefits of an economic treatment of social norms. Relative to psychology, we see three important advantages:

First, economics has a meta-theory about the conditions under which the norm will be efficient.²⁸ A legal policymaker that focuses on norms must take into account not only how norms operate, but what the likely content of the norms will be, as well as how the content of the norms might be affected by the legal regulation.

Second, the economic analysis has an explicit account of social equilibrium and stability²⁹ in the development of norms. The focus on equilibrium is especially important for legal policymaking, which is naturally interested in understanding not only how norms affect behavior in a given situation but also in the dynamics of change and stability as expressed in social forces over time.

Third, there is a clear connection between positive and normative economics. While less important from the perspective of pure social science, when the interest is in using social science to enhance social welfare, the normative orientation of economics as well as the existence of a meta-theory of efficiency enables it to advocate more forcefully for a legal policymaking that will be sensitive to the functioning of social norms. Psychology, in contrast, largely lacks an explicit normative framework that is clearly linked to its descriptive theory and research.

We should also acknowledge two impediments to the incorporation of psychological theories into law and economic models: the fact that most theories in psychology are not formalized, and the proliferation of jargon.

²⁸ Most known example is the work of Robert Elickson, *Order Without Law* Cited in note 1

²⁹ See Robert Sugden, *Normative Expectations: The Simultaneous Evolution of Institutions and Norms*, in *EVO*, cited in note 12, 73, at 86-94 for a formal modeling of stability in norms.

Because theories in psychology aren't always formalized³⁰ it can be hard for economists to take advantage of those theories. Some argue,³¹ for example, that the relative success of the theories of Kahneman and Tversky³² in the context of decision-making among economists is due to the fact that their theories are formalized in a way, which makes the incorporation of their theories into economics relatively painless.

Social psychology is also plagued by a proliferation of jargon, which makes it difficult to understand what the "bottom line" is within psychological theories regarding policy questions. This fact is especially problematic given the general lack of mathematical formalization that could otherwise be used to avoid redundancy. Hence, sometimes-identical phenomena received different names by different scholars, creating needless complexities and uncertainties about the existence of bottom lines. Also frustrating for the LEN scholar is the fact that the term "norm" is rarely used. Instead, there is a bewildering array of related concepts – conformity pressure, group identification, public self, etc. We will attempt to clear much of this conceptual underbrush in the sections that follow.

II. How Do Norms Operate?

Social psychology offers several overlapping taxonomies of social influence. While a single comprehensive taxonomy might be preferred, attempts to integrate them into a grand scheme have been more cumbersome than useful, losing much of their heuristic focus for explanation and prediction.³³ Table I presents a rough depiction of the overlapping categories of these taxonomies.

³⁰ It is easy to overstate this point. There are many formal mathematical theories in social psychology, including the social impact, social decision scheme, and constraints satisfaction models discussed below. Curiously, social psychology was actually more mathematical, and more closely linked to decision theory and game theory, in the 1950s and 1960s. However, those early models were used for the formal deduction of new hypotheses. We believe such formalizations became less common in part because they became too cumbersome to accommodate empirical advances in the field.

³¹ See Robert J. MacCoun, *Why a Psychologist Won the Nobel Prize in Economics*, 15 *Am. Psych. Soc'y. Observer* 1 (December 2002).

³² Cited in note 10.

³³ One scheme offers sixteen different forms of influence, including such curiosities as "anticonversion," "disinhibitory contagion," "anticontagion," and "paradoxical anticompliance." Paul R.

Table 1. Approximate overlap among five different social influence taxonomies.

<i>Kelman</i>	Compliance		Identifica- tion	Internalization*		
<i>French & Raven</i>	Coercive power	Reward power	Reference power	Legitimate power	Expert power	(Argument strength)**
<i>Cialdini</i>	Descriptivenorms		Injunctivenorms			
<i>SDS literature; ELM model***</i>	Strength in numbers; strength of other peripheral persuasioncues				Strength in arguments	

Note: This table reflects our interpretation and not necessarily that of the authors of these taxonomies. The integration of Kelman with French and Raven was suggested by Kelly G. Shaver (1987). Principles of Social Psychology, 3/E. Lawrence Erlbaum Associates, Hillsdale, NJ. *This is Shaver’s placement, and corresponds to Kelman’s own treatment, but as noted later in the text, we believe that internalization can result from any social influence process via dissonance, self-perception, or constraint satisfaction mechanisms. ** French and Raven treated argument strength as a property of expert power, but research by Petty and Cacioppo, discussed below, suggests that these should be disentangled. *** SDS = Social decisionscheme; ELM = Elaboration likelihood model.

A. Compliance, identification, and internalization

The most well known model is that developed by Kelman, ³⁴ which distinguishes compliance, identification and internalization. Kelman discusses “ *compliance*,” which

Nail, Geoff MacDonald, & David A. Levy, *Proposal Of A Four -Dimensional Model of Social Response*, 126 Psych. Bull. 454 (2000).

³⁴ The original model was formulated by Herbert C. Kelman, *Compliance, Identification and Internalization Three Processes Of Attitude Change*, 2J. Conflict Resol. 51 (1958), for a more developed discussion of the theoretical justification to see those models as separated and its relationship with other models see Herbert C. Kelman, *process of attitude change*, 25(1) Pub. Opinion Q. 57 (1961); Herbert C. Kelman & Lee Hamilton, *Crimes of Obedience*, 103 (Yale University Press, 1989). See Yuval Feldman, *The Psychological Foundations of the Expressive Function of the Law*, Working paper, 2002 for a comparison of these distinctions and the LEN approaches (e.g. Cooter) to deterrence, expression and internalization functions of the law.

focuses on the fear of societal reaction, also known as the “*rule*” perspective; “*identification*” which focuses on the maintenance of relationship with the social source, also known as the “*role*” perspective; and “*internalization*” which focuses on the change in “*values*”. In compliance the individual changes his or her opinion only externally simply to get rewarded or to avoid being punished. The change will hold only as long as his behavior is being scrutinized by the source of authority.

B. Sources of social power

French and Raven³⁵ suggest a different classification than Kelman that consists of five bases of social power. In other words their focus was not on different processes of social influence but instead on the factors that give the influencing source its social power. The first two bases - reward and coercive power - seem to be central to the deterrence/compliance model. The next base of social power - reference power - seems to be essential to the identification model. The last two bases - expert power and legitimate power¹ - seem to be most important in the internalization model.

The potential value that could emerge from a comparison of the psychological and the economic models is clear when we consider the functions of the identification versus the expressive model. According to McAdams’ expressive model of attitudinal change,³⁶ local government-enacted law might be better equipped from an expressive perspective due to the fact that local governments can better reveal the preferences of people in the relevant community. The identification model³⁷, focusing on the importance of the relationship between the source and its reference power, might suggest that the local government could do better from the expressive perspective because people’s group identity may be stronger and more salient on the local level than on the state or federal levels.

³⁵John R P French & Bertram Raven, *The Bases of Social Power*, in Dorwin Cartwright ed., *Studies in Social Power* 150 (Oxford, 1959)

³⁶Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, (New and Critical Approaches To Law and Economics) 79(2) Or. L. Rev. 339 (2000)

³⁷Nonetheless, our discussion of the “central route to persuasion” and of internalization, below, suggest that internalization is better.

C. Normscanbedescriptiveorinjunctive

Another very important distinction is Cialdini's distinction between descriptive norms and injunctive norms.³⁸ An injunctive norm is my perception of what other people think I should be doing,³⁹ while a descriptive norm is my perception of what other people are themselves doing. According to Cialdini's focus theory, the saliency of the normative source (descriptive/injunctive) will determine the influence of norms on behavior, a prediction he has supported in numerous field experiments involving littering of public spaces. Cialdini argues that injunctive norms tend to have a more robust and enduring effect, and tend to be more easily generalized to different situations.⁴⁰

LENS scholars are naturally aware of this distinction, and yet it does not really get any treatment by them. As Robert Cooter puts it, "I use 'social norm' ... to mean an effective consensus of obligation. By this definition, norm exists when almost everyone in a community agrees that they *ought to* behave in a particular way in specific circumstances, and this agreement affects what people actually *do*." In other words, while Cooter recognizes the difference between "ought" (injunctive) and "do" (descriptive), he assumes that these two concepts are going to follow the same path and that, therefore, a distinction between them is not required.⁴¹

This distinction is not maintained with regard to the expressive function of the law either. According to Cooter,⁴² enacting law increases the perceived number of people

³⁸ Robert B. Cialdini, Raymond R. Reno & Carl A. Kallgren, *A Focus Theory of Normative Conduct: Recycling The Concept Of Norms To Reduce Littering In Public Places*, 58(6) *J. Personality & Soc. Psych.* 1015 (1990); Carl A. Kallgren, Raymond R. Reno & Robert B. Cialdini, *A Focus Theory of Normative Conduct: When Norms Do and Do Not Affect Behavior*, 26(8) *Personality & Soc. Psych. Bull.* 1002 (2000)

³⁹ Compare with the sociological taxonomy of first order and second order expectations, see Lisa C. Troyer & Wesley Younts, *Whose Expectations Matter? The Relative Power of First -And Second -Order Expectations in Determining Social Influence*, 103(3) *Am. J. Sociol.*, 692 (1997).

⁴⁰ See Robert B. Cialdini, Bator J. Renee & Rosanna E. Guadagno, *Normative Influences in Organizations* In Leigh L. Thompson & John M. Levine, eds, *Shared Cognition in Organizations: The Management of Knowledge*, 195 (Earlbaum, 1999)

⁴¹ Robert D. Cooter, *Expressive Law and Economics*, 27 *J. Legal Stud.* 585, 587 (1998)

⁴² Id., at 595 —enacting a law might increase the number of right —doers to a point in which more and more people will obey the law even when no sanctions are represented.

who obey the law (in Cialdini's terms: "descriptive") leading to a shift in equilibrium⁴³. According to Scott,⁴⁴ law signals to people that the majority of people in the community believe in the content of the law and will disapprove of any violation (in Cialdini's terms: "injunctive"). Others treat the law as a focal point in a coordination game,⁴⁵ which implies a focus on descriptive norms: "what would people do in a specific circumstance rather than what they would approve."⁴⁶

We would argue that greater notice should be given to this distinction, as norm management could backfire if it is neglected. For example, Cialdini argues⁴⁷ that anti-littering ads have an injunctive message ("don't litter") that is undermined by a covert descriptive message ("look at all this littering here").

Another example comes from Dishion, McCord, and Poulin, who argue that interventions for juvenile delinquency inadvertently reinforce problem behavior.⁴⁸ Several long-term studies show negative effects when high-risk kids are brought to meet with counselors about their problems. The leading hypothesis is that peer influence is stronger than any other message that they receive from those counselors. Thus, while the kids who were invited to the intervention group were exposed to injunctive norms disapproving criminal activity, they engaged in a process of "deviancy training".

Another final example of this sort of backfiring is described in the work of Kahan⁴⁹. While Kahan's analysis of the decrease in the amount of trust in the tax-system

⁴³ What Cooter refers to as the "tipping point model." See Robert Cooter, *Symposium: Normative Failure*, *Theory of Law* 82 Cornell L. Rev. 947, 963 (1997)

⁴⁴ Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, Va. L. Rev. 1603, 1614 (2000) "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"

⁴⁵ Richard McAdams, *A Focal Point Theory of Expressive Law*, 86 Va. L. Rev. 1649 (2000).

⁴⁶ For an empirical demonstration of the differences in the relationship between injunctive norms, descriptive norms and announcement of the illegality of an act (know-how sharing), see Yuval Feldman, *Psychological Foundations of the Expressive Function of the Law*, Working paper UC Berkeley 2002.

⁴⁷ Cialdini et al

⁴⁸ Thomas J. Dishion, Joan McCord & Francois Poulin, *When Interventions Harm: Peer Groups and Problem Behavior*, 54(9), Am. Psych. 755 (1999)

⁴⁹ Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U.L. Rev. 333, (2001)

doesn't overtly discuss the differences between descriptive and injunctive norms, his policy conclusion does seem to target the tension between injunctive norm and descriptive norms⁵⁰:

...if the state says that it will enforce it, it basically signaling to other people that many other people evade the law... When the IRS engages in dramatic gestures to make individuals aware that it is redoubling its efforts to catch and punish tax evaders, it also causes individuals to infer that more taxpayers than they thought are choosing to cheat. ... This inference in turn triggers a reciprocal motive to evade, which dominates the greater material incentive to comply associated with the higher than expected penalty.

D. Norms have diminishing marginal social impact

Latane's social impact theory⁵¹ posits that the social influence of a set of sources is a power function of faction size, $i = s/N^t$. The exponent t is hypothesized to be smaller than 1, which means that there is marginally decreasing impact of the additional sources. Across a wide variety of field studies involving different settings, samples, and behaviors, the exponent is usually in the .35 to .55 range. In the reverse direction, when the individual stands with others in the target there is an inverse function of the strength, immediacy and number of the others who share the positions ($I = S/N^t$). Given that many LE scholars assume that an increase in the number of people who follow the law effects others' willingness to do the same,⁵² the social impact theory could be an important

⁵⁰Id, at 342.

⁵¹The theory has many other features not discussed here. See Bibb Latane, *The Psychology of Social Impact*, 36 Am. Psych. 343 (1981). Andrez Nowak, Jacek Szamrej, & Bibb Latane, *From Private Attitude to Public Opinion: A Dynamic Theory of Social Impact*, 97 Psych. Rev. 362 (1990). There are competing formal models of faction size effects, using slightly different functional forms, but most data sets fail to clearly favor one model over the other. See Brian Mullen, *Operationalizing The Effect of The Group on The Individual: A Self-Attention Perspective*, 19(4) J. Experimental Soc. Psych., 295 (1983). Sarah Tanford & Steven Penrod, *Social Influence Model: A Formal Integration of Research on Majority and Minority Influence Processes*, 95 Psych. Bull. 189 (1984). Jennifer D. Campbell & Patrick J. Fahey, *Informational and Normative Routes to Conformity*, 57 J Personality & Soc. Psych. 457 (1989). Scott R. Tindale, et al, *Asymmetrical Social Influence in Freely Interacting Groups: A Test of Three Models*, 58(3) J. Personality & Soc. Psych. 438 (1990)

⁵² See Cooter, Cornell L. Rev. cited in note 43, and Scott, Va. L. Rev. cited in note 21

addition to the understanding of how much change could be really expected from an announcement of the law.⁵³

The social impact of others is also influenced by their configuration in social, and sometimes physical, space. For example, dynamic cellular automata models⁵⁴ of social influence processes show that under a variety of plausible assumptions, social influence processes will result in a "clustering" of opinion members across social space, a pattern long established empirically.⁵⁵ If so, "interior" members will have less opportunity to "group" with members of outgroups than predicted by random sampling; only "border" members may end up in overlapping groups. Latane argues that social impact falls off as the inverse square of physical distance,⁵⁶ but his results may be artificial,⁵⁷ and a recent simulation shows that under certain conditions geographic proximity is not important for the emergence of cooperation among agents.⁵⁸

The models share a simplifying assumption that sources can be cleanly assigned to one of a small number of discrete opinion groups—usually two. In real life, of course, opinions vary in multidimensional space, though social categorization research suggests that perceivers do strive to “lump” sources together for cognitive simplicity. Wilder found that a faction’s influence exceeded what might be predicted from its size and

⁵³ The models which are discussed by Cooter, Cornell L. Rev, cited in note 43, don't seem to assume linearity, however there is no attempt to realistically predict what is the ratio, other than suggesting that they move in the same direction.

⁵⁴ Robert Axelrod, *The Complexity of Cooperation* (Princeton Univ. Press, 1997). Joshua M. Epstein & Robert Axtell, *Growing Artificial Societies* (Brookings Institution Press, 1996). Bibb Latané, *Strength from weakness: The fate of opinion minorities in spatially distributed groups*. In E. Witte & J. H. Davis eds., *Understanding Group Behavior: Consensual Action by Small Groups*, Vol. 1, 193 (Erlbaum 1996).

⁵⁵ A classic early demonstration was Leon Festinger, Stanley Schachter, & Kurt Back, *Social Pressures in Informal Groups: A Study of Human Factors in Housing* (Harper Row, 1950). For experimental evidence, see Bibb Latané & Todd L'Herrou, *Spatial Clustering in The Conformity Game: Dynamic Social Impact in Electronic Groups*. 70(6) *J. Personality & Soc. Psych.* 1218 (1996)

⁵⁶ Bibb Latané, et al., *Distance Matters: Physical Space and Social Impact*. 21(8) *Personality & Soc. Psych. Bull.* 795 (1995)

⁵⁷ Eric S Knowles, *Distance Matters More Than You Think! An Artifact Clouds Interpretation of Latane, Liu, Nowak, Bonevento, and Zheng's Results*. 25(8) *Personality & Soc. Psych. Bull.* 1045, 1999

⁵⁸ Robert Axelrod, Rick L. Riolo, & Michael D. Cohen, *Beyond Geography: Cooperation With Persistent Links in The Absence of Clustered Neighborhoods*. 6 *Personality & Soc. Psych. Rev.* 341 (2002).

position when efforts were made to individuate or distinguish faction members.⁵⁹ But this finding may be the exception that proves the rule, in the sense that redundancy – in an information-theoretic sense – may help to explain diminishing marginal sensitivity to sources.

E. Strength in arguments vs. strength in numbers

Latane's work on social impact theory, like that of Cialdini on norms, has drawn heavily on data from information perceivers gleaned from casual interaction with others, mere observation of others, or observation of the traces of others' behaviors. The social decision scheme literature⁶⁰ has systematically examined faction size effects in the context of deliberating experimental groups, where faction size, discussion content, and task factors can be disentangled using experimental manipulation. This literature has tested the relative fit of a wide variety of "social decision schemes" – roughly, transition probability matrices mapping the relationship between the distribution of initial individual opinions and either post-discussion individual opinions or post-discussion group decisions. Across dozens of experiments, two classes of decision schemes appear to describe the bulk of group processes.

One class involves "strength in numbers" schemes in which majority factions have drawing power disproportionately larger than would be expected from their relative size alone. When such schemes are operative, groups appear to be operating under a "majority rule" scheme even when they are assigned a unanimity rule (at one extreme) or given no explicit instruction to reach consensus (at the other).

A second class of schemes are asymmetrical, such that certain opinions or positions hold disproportionate drawing power even when initially endorsed by only a

⁵⁹David A. Wilder, *Some Determinants of the Persuasive Power of In-Groups and Out-Groups: Organization of Information and Attribution of Independence*, 59(6) *J. Personality & Soc. Psych.* 1202 (1990)

⁶⁰For reviews, see Gerald Stasser, Norbert L. Kerr, & James H. Davis, *Influence Processes and Consensus Models in Decision-Making Groups*. In Paul B. Paulus, ed., *Psychology of Group Influence* 279 (Erlbaum, 2nd ed. 1989); Patrick R. Laughlin, *Group Decision-Making and Collective Induction*. In Eric H. Witte & James H. Davis, eds., *Understanding group behavior* (Vol. 1) *Consensual Action by Small Groups* 61 (Erlbaum, 1996).

minority of those present. The most extreme case is the “truth wins” scheme, in such a position will prevail if at least one person present endorses it.

A simple majority scheme or slight variants have been shown to do a good job of summarizing group judgments under a very broad array of decision tasks, settings, and populations, particularly in judgmental situations where there is no normative algorithm for defining a correct answer (e.g., poetry, art, faculty hires). But when there is a shared scheme for identifying correct option (e.g., math, fastest runner), small factions with strong arguments are much more likely to prevail.⁶¹ But even here, the extreme “truth wins” model does a poor job of describing actual group behavior. At best, “truth-supported wins” --i.e., the member finding the solution needs at least some initial social support or the group will often fail to adopt the correct solution.⁶² MacCoun and Kerr have demonstrated that the reasonable doubt standard promotes such an asymmetric influence function in criminal juries; when mock criminal juries are assigned a preponderance of evidence instruction, influence becomes symmetrical.⁶³ Kerr, MacCoun, and their colleagues have shown that because of such influence processes, group deliberation can either attenuate or amplify biases in individual judgment, depending on whether there is a shared conceptual scheme by which a minority can call attention to the bias.⁶⁴

⁶¹ For a review of the various cognitive and social factors which could enable a minority to prevail, see Wendy Wood, et al., *Minority Influence: A Meta-Analytic Review of Social Influence Processes*, 115 *Psych. Rev.* 323 (1994)

⁶² This generalization largely stems from the research program of Patrick Laughlin, *Group Decision Making*, cited in note 60. Note that the notion of tasks with a “shared conceptual scheme” is neither circular nor ad hoc; it is fairly easy to identify such tasks a priori, and quite straightforward to validate using individual-level pretesting in the population of interest.

⁶³ Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 *J. Personality & Soc. Psych.*, 21 (1988)

⁶⁴ Norbert Kerr, Robert MacCoun, & Geoff Kramer, *Bias in Judgment: Comparing Individuals and Groups*, 103 *Psych. Rev.* 687 (1996). Robert MacCoun, *Comparing Micro and Macro Rationality*. In M. V. Rajeev Gowda & Jeffrey Fox Eds., *Judgments, Decisions, and Public Policy* 116 (Cambridge Univ. Press 2002).

1.1 Norms are biased samples

A challenge for the application of a norms analysis is that norms are formed from samples of social information, and those samples arise through processes that are statistically biased. Except perhaps in the (increasingly common) influence of publicized polling results, actors usually encounter normative information in a piecemeal fashion. The geographic features of social space, noted above, make it likely that physically and temporally proximate information will have an disproportionate weight in normative judgment.⁶⁵

Ceteris paribus, the analyst might cope with this fact through a simple scheme of distance weighting, as in Latane's hypothesis that impact falls off via an inverse square rule.⁶⁶ But this adjustment will often be inadequate because normative information sampling is an active, selective perceptual process. Sociologists have long recognized that actors are disproportionately influenced by "reference groups" – loosely, groups of special salience or interest to the perceiver. Social psychologists have identified various forms of selection.

One dimension is *horizontal* – we can make comparisons across individuals (me vs. her) or across groups (us vs. them). For example, actors tend to experience greater anger, and are more likely to engage in political action, when they perceive that their group is treated unjustly than when they perceive personal injustice.⁶⁷ And as discussed below, people apply different evaluative standards to the outcomes and actions of "ingroup" vs. "outgroup" members.⁶⁸

A second dimension is *vertical*; psychologists distinguish upward, lateral, and downward comparisons, referring, respectively, to those superior, comparable, or inferior

⁶⁵See Latane, *Am. Psych.*, cited in note 51.

⁶⁶Id.

⁶⁷For a review of evidence on this point, see Tom R. Tyler et al., *Social Justice in a Diverse Society* chapters 2 and 7 (Westview, 1997).

⁶⁸Tyler et al., *Social Justice*, Id; Susan Opatow, *Moral Exclusion and Injustice* (Introduction to *Special Issue*), 49 *J. of Soc. Issues* 1 (1990). For a nearly experimental demonstration, see Lawrence A. Messé, Robert W. Hymes, & Robert J. MacCoun, *Group Categorization and Distributive Justice Decisions*. In Hans W. Bierhoff, Ronald L. Cohen, & Jerald Greenberg Eds., *Justice in Social Relations* 227 (Plenum Press, 1986).

tous on the dimension of interest. ⁶⁹ A vast number of experiments and field studies have shown that vertical comparisons influence important judgments and behaviors, but the literature is still inconclusive about the underlying principles determining the direction of vertical choice. People tend to look upward when their goal is to improve their own abilities or to verify the correctness of their beliefs. People tend to compare themselves with similar individuals when their goal is to appraise their own abilities, preferences and outcomes. Evidence is mixed for the proposition that people look downward – to those less able or less fortunate – when their goal is to promote their own self-esteem.⁷⁰

Most law and economic scholars that discuss norms focus on the concept of consensus. In fact, in many business contexts, different groups might hold different views about the nature of the norm. ⁷¹ When those views are in conflict it is very important to be able to predict which the chosen reference group will be in every situation. By knowing which the likely reference group is, one could both predict better the behavior of the individual and target any policy effort on this specific target group. Along those lines Feldman has demonstrated, using experimental techniques, that employees were giving the approval of their previous employer different weight in different contexts, when deciding whether or not to share information. In most cases employees gave less weight to the likelihood of approval by their previous employer while giving much greater weight to their current employer's approval. However, in some cases (when they were told that the confidential information was downloaded while working for their previous employer), the approval of their previous employer was significant, while the approval of their current employer was not. Given the differing interests of the previous and the current employer with regard to the use of confidential know-how sharing, the importance of the choice of reference group carries policy implications for the

⁶⁹ Leon Festinger, *A Theory of Social Comparison Processes*, 7 *Human Relations* 117 (1954).
George R. Goethals & William M. Klein, *Interpreting and Inventing Social Reality: Attributional and Constructive Elements in Social Comparison*, in Jerry Suls & Ladd Wheeler Eds., *Handbook of Social Comparison* 23 (Kluwer, 2000).

⁷⁰ Donelson R. Forsyth, *Social Comparison and Influence in Groups*, in the *Handbook of Social Comparison*, cited in note 69 at 81. Jerry Suls, Rene Martin, & Ladd Wheeler, *Social Comparison: Why, With Whom, and with What Effect?* 11 *Current Directions in Psychological Science* 159 (2002).

⁷¹ Russell Hardin, *Institutional Commitment: Values or Incentives?* In *EVO*, cited in note 12, 419 at 428, recognizes the idea that different sub-groups within an organization could have conflicting interests and will compete to increase their influence over members of that organization.

⁷² In a multiple regression equation.

optimization of non-formal enforcement. This finding demonstrates our argument, that the norm-management literature might be better off taking a more detailed view of the most likely reference group, instead of defining norms only when they are shared by the consensus among the general community.

F. True and pseudo "false consensus"

In many areas of law and economic scholarship it has become almost mainstream to draw on the psychological literature on heuristics and biases in discussions of risk assessment and the evaluation of economic goods. Curiously, the new norms literature has largely ignored such work; people are expected to accurately estimate public views and to be as sensitive to changes in consensus as they would to changes in the price of an economic good.⁷³ But it is likely that a variety of cognitive and motivational factors produces systematic distortions in consensus judgments.

For example, Ross, Greene, and House proposed that perceivers are susceptible to a "false consensus bias"⁷⁴ such that people who favor position A estimate more support for that position than people who don't favor A.

That such a bias might produce a normative failure follows from economic models of the expressive function of the law (e.g., Cooter, McAdams). According to these models, one of the basic mechanisms that leads people to follow the law is a perceived-consensus in one's relevant community. Nonetheless, according to the false consensus effect, sometimes the causal relationship will go the other way around. Thus, people who are unable to really know what most people in their community think about a certain law might infer what most people do from what they themselves would do in a similar situation. According to this bias, the ability of the law to use consensus as a tool

⁷³Following upon this puzzling omission, Feldman has demonstrated empirically some of the normative failures that could emerge from people's systematic errors in estimating what the consensus in their relevant community is, focusing on engineers' estimates of the proportion of their co-workers that engage in disclosure of trade secrets when they move from one company to another (Yuval Feldman, *An Experimental Approach to The Study Of Normative Failures: Divulging Of Trade Secrets By Silicon Valley Employees*, Forthcoming, *J. of L., Tech. & Pol'y* ("Normative Failures"))

⁷⁴Lee Ross, David Greene, & Pamela House, *The False Consensus Effect: An Egocentric Bias In Social Perception and Attributional Processes*, 13 *J. of Experimental Soc. Psych.*, 279 (1977). For a review of research and competing interpretations, see Joachim Krueger, *The projective perception of the social world*, 323, 328-331, in *The Handbook of social comparison*, cited in note 69

for social change might be slowed by people's inability to realize that their behavior is inconsistent with the changing consensus.

Along those lines, Feldman⁷⁵ has shown that employees who were very likely to share confidential information estimated that 95% of employees in Silicon Valley would have done that the same.⁷⁶ However those who were unlikely to share information gave a much lower estimate of approximately 40%.⁷⁷ Thus, while recent L&E expressive law theorists⁷⁸ claim that people will correct their views about what they should and should not do based on a perceived consensus, in reality they might correct their views of the consensus based on their own beliefs. Thus, it might take people a much longer time to realize that their behavior is inconsistent with the consensus. The existence of multiple equilibria, (when one's own dominant strategy is contingent upon the behavior of others), might suggest that such biases could be hard to fix relying solely on market evolution.

It is important to recognize that the false consensus effect has received considerable criticism. The most vocal opponent of this view is Dawes,⁷⁹ who argues that the effect may be a rational Bayesian calculation based on one's own knowledge (i.e., a sample of $n=1$).

On the normative level, it may not matter whether the false consensus effect is a rational heuristic or a bias. From a policy perspective, there can be a normative failure if people's ability to update their beliefs about the consensus is not independent of the views of the individual. Even if we accept Dawes' arguments, people with undesirable

⁷⁵Feldman, *Normative failures* cited in note 73

⁷⁶Overall, the average estimate was that just under 70% of Silicon Valley employees share confidential know-how information. (The sample was not fully random)

⁷⁷Since both measures were self-reported, the direction of causality could not be inferred. However, one can say with confidence that the deviation of the participants from the actual consensus was strongly correlated with their own reported behavior.

⁷⁸Cooter, J. Legal Stud. cited in note 41

⁷⁹Robyn M. Dawes & Matthew Mulford, *The False Consensus Effect And Overconfidence: Flaws In Judgment Or Flaws In How We Study Judgment* 765(3) *Org. Behav. & Hum. Decision Processes*. 201(1996)

views⁸⁰ will think that more people in society hold undesirable views than hold desirable views. This fact for itself is a normative failure⁸¹.

The second objection to Dawes' critique is more positive, focusing on the work of Kruger and his colleagues regarding the "truly false consensus effect."⁸² They show that the consensus bias is actually much larger than assumed in a Bayesian calculation in which information is received about the first chip. Moreover, Dunning and Cohen⁸³ found no difference in the consensus judgments of people who did or did not receive true consensus information.⁸⁴ (This, even though they were specifically told that the target student was in the 50th percentile). This shows strong egocentric bias even when information about the consensus was available.

G. Pluralistic ignorance

A related – and seemingly contradictory – perceptual principle is pluralistic ignorance,⁸⁵ a concept at least one L&E scholar has recently deployed.⁸⁶ According to

⁸⁰Exactly the people whose views the policymaker is most interested in changing.

⁸¹Along those lines, there is now a new focus in prevention research: Challenging exaggerated views of the popularity of drug use. See James W. Brown, et al., *Turning Off: Cessation of Marijuana Use After College*, 21(4): *Social Problems*, 527 (1974). And alcohol use, see Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors about the Collective*, 20 *Personality & Soc. Psych. Bull.* 541 (1994) arguing that college students overestimated the amount of drinking in college. In the context of trade secrets, Feldman, *Normative failures*, cited in note 73, has found using the same sample in which the false consensus effect was salient, that while in the self-reported, only about 40% of subjects said that they would divulge trade secrets, the estimate grew to 55% when questions were focused on one's co-workers, and almost 70% when the target group was the general population of Silicon Valley employees. Even when taking into account that the sample was not completely random and that people are more likely to lie about their own intentions (e.g. social desirability), this emphasizes the possibility of exaggeration of undesirable norms.

⁸²Joachim Krueger, *Handbook of Social Comparison*, cited in note 74

⁸³David Dunning & Geoffrey Cohen, *Egocentric Definitions of Traits and Abilities in Social Judgment*, 63 *J. Personality & Social Psych.*, 341 (1992).

⁸⁴25 with no behavior for those with knowledge about the consensus, and 27 with no behavior for those with no knowledge about the consensus.

⁸⁵A classic early source is Bibb Latane & John Darley, *The unresponsive bystander: Why doesn't he help?* (Appelton-Century-Crofts 1968). A more recent review is Dale T. Miller & Deborah A. Prentice, (1994). *Collective Errors and Errors about the Collective. Special issue: The Self and the Collective*. *Personality & Social Psychology Bull.*, 20, 541-550. A related source in the political science literature is Elisabeth Noelle-Neumann. *The Spiral of Silence* (U. Chicago, 2nd ed., 1993)

Prentice and Miller,⁸⁷ the state is “characterized by the belief that one's private attitudes and judgments are different from those of others, even though one's public behavior is identical.” It tends to occur in situations that preclude the expression of private views (e.g., strangers on sidewalks) or that encourage the active concealment or even misrepresentation of public views (e.g., discussions of politically sensitive or emotionally charged topics). In such settings, “people's tendency to rely on the public behavior of others to identify the norm leads them astray... Their own behavior may be driven by social pressure, but they assume that other people's identical behavior is an accurate reflection of their true feelings.” The discovery that one has misread social consensus can lead to sudden and dramatic “non-linear” shifts in public support.⁸⁸

On the surface, the pluralistic ignorance phenomenon seems to directly contradict the false consensus phenomenon, but they can be reconciled. Prentice and Miller note that “[Pluralistic ignorance] is most appropriately operationalized as a mean difference between the actual group norm and the perceived group norm... false consensus, on the other hand, is most appropriately operationalized as a positive correlation between ratings of the self and ratings of others.” They cite at least two studies where both patterns occurred.

H. Relationship-specific norms

A further complication is that both the content of norms and the implicit rules of social influence (whose inputs matter, and when) varies as a function of the interaction of setting and relationship.

⁸⁶ Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification*. (Harvard U. Press, 1995)

⁸⁷ Debora A. Prentice, & Dale Miller (1996). *Pluralistic Ignorance and The Perpetuation Of Social Norms By Unwitting Actors*. In Mark P. Zanna ed, 28 *Advances in Experimental Social Psych.* 161 (Academic Press, 1996)

⁸⁸ For examples, see Kuran, *Private Truths*, cited in note 86; Miller and Prentice cited in note 81; MacCoun & Reuter, *Drug War Hearsays* cited in note 13 at 401-404. Sudden non-linear shifts in opinion can arise even in the absence of any self-censorship, due to the lability of views on unfamiliar or complex topics; for a book-length analysis and many examples, see Bryan D. Jones, *Reconceiving Decision-Making in Democratic Politics*. (Univ. Chicago Press, 1994).

The importance of relationship is not unanticipated for LEN scholars studying social norms. One of the basic distinctions in the functioning of norms in game theory literature about norms is related to the difference between repeated players and one-shot players⁸⁹ and its implications for reputation, reciprocity etc.⁹⁰ Leading LEN scholars as Ellickson⁹¹ and Berenstein⁹² cite reciprocity and tit-for-tat as key factors in the maintenance of social norms among repeated players in a specific community.

However, psychologists have offered a richer and more nuanced account of the influence of relationships. In the early 1970s, Foa⁹³ showed that the implicit rules of social exchange varied depending on the nature of the social resource being exchanged – e.g., money vs. love vs. esteem or prestige. Later, Clark and Mills⁹⁴ distinguished exchange relationships from communal relationships. In essence, exchange relationships are those in which participants “keep score,” a tendency that is corrosive to the long-term stability of more communal, nurturance-based relationships. Clark, Powell and Mills⁹⁵ have shown that the tendency to reciprocate significantly varied with the nature of the relationship.⁹⁶ When the participants were manipulated to think that the other partner

⁸⁹Axelrod, *The Evolution of Cooperation*, cited in note 3. Game theory has been an active area of research in social psychology for many decades. Mathematical psychologist Anatol Rapoport submitted the “tit-for-tat” strategy used in Axelrod’s famous computer tournaments.

⁹⁰Berenstein, Mich.L. Rev., cited in note 24 states on page 1764: “In general, in order for cooperation to emerge in a particular market, transactors must each adopt strategies of cooperating at the beginning of each contracting relationship and thereafter responding to cooperative behavior with cooperation and responding to uncooperative behavior (defection) with punishment (such strategies are called “tit-for-tat” strategies). Each transactor must also be able to obtain information about the reputations of other market participants, and reputation must be at least partially dependent on how a transactor behaved in previous transactions. In addition, each transactor must be able to observe whether the person he is dealing with has cooperated or defected”.

⁹¹See Ellickson, *Order Without Law*, cited in note 1

⁹²Cited in note 24

⁹³Uriel G. Foa, *Interpersonal And Economic Resources*. 177 *Science*, 344 (1971).

⁹⁴For an overview, see Margaret S. Clark & Judson Mills, *The Difference Between Communal and Exchange Relationships: What It Is and Is Not*. 19 *Personality Soc. Psych. Bull.* 684 (1993)

⁹⁵Margaret S. Clark, Judson Mills & Martha C. Powell. *Keeping Track of Needs in Communal and Exchange Relationships*. 51(2) *J. of Personality & Soc. Psych.* 333 (1986)

⁹⁶Some argue that the distinction between exchange and communal relationships were exaggerated and in fact some reciprocity exists also in communal relationship. See for example Daniel C. Batson, *Communal and Exchange Relationships: What Is The Difference?* 19(6) *Personality & Soc. Psych. Bull.* 677 (1993).

desired an exchange relationship, they were willing to help only when there was an opportunity for reciprocity.⁹⁷ However, when the participants were manipulated to think that the other partner desired communal relationship⁹⁸ they were equally willing to help, whether there was opportunity for the other party to reciprocate or not.

Fiske⁹⁹ has recently merged these two perspectives, together with foundational ideas from sociology, into a fourfold taxonomy of fundamental social relational schemas: Communal sharing, authority ranking, equality matching, and market pricing. Fiske's theory contends that social relations in all societies are governed by various combinations of four fundamental psychological templates: We sometimes categorize individuals and treat category members identically (communal sharing), we sometimes treat individuals by their rank within a group (authority ranking), we sometimes keep score of outcomes and strive to equalize them (equality matching), and we sometimes value outcomes on an absolute metric and make tradeoffs among them (market pricing). Each template has its own rules of appropriate conduct, its own norms of distributive fairness, and most crucially, its own consensually agreed upon domains of operation in a community's life.¹⁰⁰ Fiske's model fits a considerable body of sociological and anthropological evidence, and it has fared well in more exacting psychometric analyses and social cognitive laboratory experiments.¹⁰¹

⁹⁷ Thus for participants in this group, reciprocity significantly predicted the help that participants were offering. It should be noted that there were also strong individual differences with regard to the role of reciprocity in human behavior. See for example, Marco Perugini & Marcello Gallucci, *Individual Differences and Social Norms: The Distinction Between Reciprocators and Pro-Socials*, 15(1) *Euro. J. Personality* 19 (2001)

⁹⁸ The distinction between communal and exchange relationship was shown to moderate related activities as well. Clark has found that people keep track of inputs in exchange relationships but not in communal relationships. See Margaret S. Clark, *Record Keeping in Two Types of Relationships*, 47(3), *J. Personality & Soc. Psych.* 549 (1984)

⁹⁹ Alan Page Fiske, *The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations*, 99 *Psych. Rev.* 689 (1992). For a legal application, see Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 *Stan. L. Rev.* 1821 (2000).

¹⁰⁰ Fiske, *Psych. Rev.* Id., at 693 - 708.

¹⁰¹ Id.

The activation of different schemas is posited to have numerous effects with regard to decision-making, moral judgment, and the exchange of goods and services.¹⁰² But of special relevance to the present discussion is the argument that the four schemas are associated with distinct social influence processes.¹⁰³ Communal sharing involves a desire to promote similarity and maintain unanimity; thus the individual will change attitudes to maintain a certain harmony in the group. In a authority ranking, there is obedience to authority or prestigious leaders, irrespective of the content of the norm. In equality matching, the focus is on reciprocity and turntaking. Finally, in market pricing, influence flows from incentives and a weighing of the costs and benefits of compliance with a request or demand.

The fact that different processes of social influence are more dominant in one schema than another indicates that a single account of the interaction between laws and norms might fail to capture important differences across domains of law, such as family law, employment law, or administrative law. So for example, a model of social norms that is likely to predict the function of social norms in a family context could not be applied, as is, to the social norms of corporate directors. Because people are likely to comply with the social norms through different behavioral mechanisms across these different schemas, factors such as reciprocity, monetary incentives, ability for monitoring and the like, will carry differing weights with regards to the efficiency of legal decentralization and the policymaker's ability to rely on social norms in each legal doctrine.

III. *When Do Norms Operate?*

A. Norms vs. attitudes

Psychologists tend to measure attitude fairly rigorously, but to define them fairly loosely. Most definitions involve a relatively stable evaluative judgment reflecting the desirability of various outcomes associated with an object or behavior, weighted by the

¹⁰²For an application to jury awards in personal injury tort litigation, see Jennifer Robbennolt, John Darley, & Robert MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, Brooklyn L. Rev., in press.

¹⁰³See page 9 for further discussion of the multiple processes that take place in social influence.

likelihood that those outcomes will occur. In this sense, attitudes roughly correspond to the expected utilities of rational choice theories, but without the (unsupported) expectation that these evaluations and expectations are formed and combined in a mathematically coherent and rationally defensible way.

In the 1960s and 1970s, there was growing skepticism about the predictive power of public opinion polls and other attitudinal measures. In recent decades, there have been considerable advances in understanding the conditions under which attitudes do or do not predict and influence behavior.¹⁰⁴ Much of this work has been organized under the rubric of Ajzen and Fishbein's "theory of reasoned action" and its successor, Ajzen's "theory of planned behavior."¹⁰⁵ Three principles from these theories are relevant to the present discussion.

First, to be predictive, attitudes and behaviors need to be matched at the same level of specificity. Because most behaviors are specific (e.g., voting for a particular ballot proposition), abstract attitudes ("I abhor guns") are far less predictive than highly specific attitudes ("this gun control proposition is a hopeless and meaningless compromise"). These more specific attitudes are less intriguing than the lofty abstractions at issue in many sociolegal analyses, but they are often more relevant in particular settings.

Second, attitudes are only one determinant of the intention to engage in a behavior. A second determinant is the actor's perceived capability of performing the act – what Bandura¹⁰⁶ calls "self-efficacy beliefs" and Ajzen calls "control beliefs." Two

¹⁰⁴Alice H. Eagly and Shelly Chaiken. *The Psychology of Attitudes*. (Harcourt Brace Jovanovich, 1993)

¹⁰⁵Isac Ajzen & Martin Fishbein, *Understanding Attitudes and Predicting Social Behavior*, (Prentice-Hall 1980). Isac Ajzen, *The Theory of Planned Behavior*, 50 *Org. Behav. & Hum. Decision Processes* 179 (1991). Charles Manski, correctly points out that much of the research motivated by these theories suffers from serious statistical identification problems, but his critique greatly overstates the problem. First, such identification problems are in fact endemic in correlational research, including most econometric tests of economic theory. Second, he ignores the many experimental and quasi-experimental studies that use random assignment, temporal sequence, or other features to strengthen causal inferences. Without discounting the contribution of these theories, it should be noted that they used most widely as organizing frameworks for empirical work in applied settings, being too general and too open-ended to play an important directive role in most theory-testing efforts in social psychology. See Charles F. Manski, *Identification Problems in the Social Sciences*, chapter 5, (Harv. Univ. Press, 1995).

¹⁰⁶Albert Bandura, *Self-Efficacy: The Exercise of Control*, (Stanford 1997)

actors can share identical attitudes toward an action, yet only the actor with high perceived control will follow through with the action, reducing the attitude-behavior correlation.

More relevant for the present essay, Ajzen and Fishbein identify subjective norms as a third major determinant of behavioral intentions.¹⁰⁷ Across dozens of field studies involving many different classes of behavior (diet, drug use, exercise, voting, energy conservation, military enlistment), investigators have assessed both attitudes and perceived injunctive norms, allowing a comparison of their relative associations with behavior. In an examination of 30 different types of behavior, Trafimow and Finlay¹⁰⁸ found that overall, behavioral intentions were better predicted by attitudes than by subjective norms (median correlations = .68 vs. .40). As might be expected from our earlier discussions of consensus and social clustering, attitudes and norms were reliably correlated (median correlation = .37). But for most behaviors, perceived norms significantly increased the predictability of intentions above and beyond attitudes.¹⁰⁹ Behaviors varied in the degree to which they were under attitudinal vs. normative control. For example, “eat vegetable regularly” was almost entirely under attitudinal control, but “go into debt on my credit card” was primarily influenced by perceived norms, and “use condoms if I have sex” was influenced about equally by both factors.

Trafimow and Finlay also found strong individual differences in the relative weight given to attitudes vs. norms across behaviors.¹¹⁰ The behavior of a fifth of the people in their study was mainly under normative control, while the remaining four-fifths were mainly under attitudinal control. Later, we identify some empirical correlates of these individual differences.

¹⁰⁷They focus primarily on injunctive norms, beliefs about what other people think I should do. They acknowledge that one might subsume these beliefs under “attitude” as anticipated consequences of the action, but not that doing so leads the analyst to underemphasize the importance of these beliefs, and begs the interesting questions regarding the relative influence of external and internal influences on behavior.

¹⁰⁸David Trafimow & Krystina Finlay, *The Importance of Subjective Norms for a Minority of The People*, 22 *Personality & Soc. Psych. Bull.* 820 (1996)

¹⁰⁹Also see Krystina A. Finlay, David Trafimow & Aimee Villareal, *Predicting Exercise and Health Behavioral Intentions: Attitudes, Subjective Norms, and Other Behavioral Determinants*, 32(2) *J. Applied Soc. Psych.* 342 (2002)

¹¹⁰Cited in note 108 at 823-825. Also see Lynn E. Miller & Joseph E. Grush, *Individual Differences in Attitudinal vs. Normative Determination of Behavior*, 22 *J. Experimental Soc. Psych.* 190 (1986).

B. Habit and automaticity

An acknowledged boundary condition on the “planned behavior” framework described above is that behavior itself is only partly intentional, at least in the sense of consciously formed plans. The notion of intentional choice is becoming increasingly problematic as psychologists discover the considerable extent to which behavior is mediated by factors outside conscious awareness.¹¹¹ But that question is probably orthogonal to debates about rationality; it is quite possible for the brain to make coherent, incentive-based choices without conscious deliberation.

Though behaviors cannot be neatly parsed into “conscious” and “unconscious” categories, it is both meaningful and useful to distinguish relatively habitual or “scripted” behaviors from more novel behaviors and choices. Thus, a meta-analytic path analysis of 64 separate studies by Ouellette and Wood found that past behavior was a stronger predictor of present behavior for actions that tend to occur routinely (e.g., once or more a week; weighted path coefficient = .45) than for actions occurring less frequently or in varying contexts (weighted path coefficient = .12). Conversely, self-reported intentions were a weaker predictor of behavior for routine actions (weighted path coefficient = .27) than for actions performed less frequently or in highly variable settings (weighted path coefficient = .62). Of special interest to the present discussion, perceived norms were stronger predictors of behavior for fairly novel actions than for routine actions.¹¹² We suspect the latter finding is more general; because highly routinized behaviors become increasingly automaticized and “mindless,” any external source of information seems more likely to influence novel choices than routine choices.¹¹³

111 John A. Bargh & Melissa J. Ferguson, *Beyond Behaviorism: On the Automaticity of Higher Mental Processes*, 126(6) *Psych. Bull.* 925 (2000); Daniel M. Wegner, *The Illusion of Conscious Will*, (MIT 2002); Timothy D. Wilson, *Strangers to Ourselves: Discovering the Adaptive Unconscious*, (Belknap Press 2002)

112 Judith A. Ouellette & Wendy Wood, *Habit and Intention in Everyday Life: The Multiple Processes by Which Past Behavior Predicts Future Behavior*, 124(1) *Psych. Bull.* 54 (1998)

113 See Bargh, cited in note 111.

C. Ambiguity of situational cues

Norms are particularly likely to influence behavior in highly ambiguous situations. In an early demonstration, Sherif¹¹⁴ showed that strangers quickly formed an arbitrary consensus about the “size” of an illusory movement of light produced by an optical illusion. Festinger later argued that people engage in social comparison in order to reduce uncertainty by learning about the behavior of others.¹¹⁵ Feldman has found suggestive evidence¹¹⁶ that the perceived clarity of trade-secret law¹¹⁷ moderates the relationship between Silicon Valley employees’ perceptions of local norms and their judgments of the morality and fairness of complying with the law.¹¹⁸

Ambiguity may be sufficient to promote reliance on norms, but it is not necessary. In the famous conformity paradigm created by Solomon Asch,¹¹⁹ a large fraction of participants were willing to endorse patently false beliefs if enough experimental confederates first endorsed them. This is a clear-cut case of Kelman’s compliance factor; no identification or internalization was involved. What is interesting is that no explicit social sanctions were involved other than the vague possibility of peer disapproval; the parties were strangers with nothing at stake and no expectation of future interaction.

¹¹⁴Muzafer Sherif, *The Psychology of Social Norms* (Harper and Row 1966) originally published in 1936.

¹¹⁵Leon Festinger, social comparison cited in note 70; but see Anne Maass & Chiara Volpato, *Social Influence and the Verifiability of the Issue Under Discussion: Attitudinal Versus Objective Items*, 35(1) Brit. J. of Soc. Psych. 15 (1996) for a demonstration that uncertainty moderated the effect of minority but not majority.

¹¹⁶Feldman, *Psychological Foundations of the Expressive Function of the Law*, cited in note **Error! Bookmark not defined.**

¹¹⁷Legal certainty in that context was operationalized by asking the participants in the study about the clarity and perceived certainty with which they felt they could specify the types of information that could be defined as trade secrets.

¹¹⁸For those who had a clear review about the meaning of trade secrets law the relationship between perceived norms and morality, fairness and care effect were much weaker than for those who were not clear about the actual meaning of trade secrets laws. The existence of interaction was conducted by creating a product term interaction factor of centering factors of descriptive norms and certainty.

¹¹⁹Solomon Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in Harold Guetzkow, *Groups, Leadership and Men*; (Carnegie Press, 1951)

D. Public and private selves

Contemporary psychology tends to view “the self” not as a unitary agent but rather as a complex of currently activated memories and goal states, emerging through processes of spreading activation and competition for limited cognitive resources. It is convenient to classify these various complexes in terms of multiple selves, though no implication of discrete cognitive or neurological modules is intended.

Carver and Scheier¹²⁰ distinguish behavior under private vs. public self-regulation. The fundamental distinction is that private self-awareness focuses on matching one’s conduct to personal goals and standards, while public self-awareness strives to match one’s conduct to the perceived goals and standards of other people. Extremely subtle situational factors can promote increased private vs. public self focus. For example, the presence of a mirror significantly increases private self focus (as measured in various ways), and relative to a control condition, this private focus in turn leads to greater self-comparison to personal standards, and behavior that is more consistent with prior attitude survey responses. On the other hand, the presence of a patently non-operational camera stimulates attention to broader social standards and greater conformity to the behavior of others.¹²¹

Private and public self focus vary dispositionally as well as situationally; i.e., there are stable individual differences in chronic attention to private standards vs. public standards, as assessed by Snyder’s self-monitoring inventory,¹²² which identifies the extent to which individuals strategically cultivate public appearances. High self-monitors engage in expressive control, based on sensitivity to social cues and the tendency to be influenced by the expectations of others. Low self-monitors put more weight on their own attitudes. Self-monitoring has been shown to moderate or qualify many bivariate relationships in the personality and social psychology literatures. Of particular relevance

¹²⁰Charles S. Carver & Michael F. Scheier, *Attention and Self-Regulation: A Control Theory Approach to Human Behavior*. (Springer-Verlag, 1981). Charles S. Carver & Michael F. Scheier, *On the Self-Regulation of Behavior*. (Cambridge Univ. Press, 1998).

¹²¹For a review of studies using this paradigm, see Fredric X. Gibbons, *Self-Attention and Behavior: A Review and Theoretical Update*. In Mark P. Zanna, ed, *23 Advances in Experimental Soc. Psych.* 249 (Academic Press, 1990)

¹²²Mark Snyder, *Self-Monitoring of Expressive Behavior*. *30J. Personality & Soc. Psych.* 526. (1974)

here, high self monitors show greater conformity to the behavior of others; low self monitors show significantly stronger attitude-behavior correlations.¹²³

Interestingly, scores on the self-monitoring scale are bimodal, rather than the bell-shaped distribution typical of many traits.¹²⁴ This is problematic for the “representative individual” assumption that is implicit if not explicit in most economic models,¹²⁵ and indeed in much of social psychology prior to the “interactionist” trend that began in the mid-1980s.

For example, the paradigm of self-monitoring is an important model to consider for Coote’s conception of Pareto self-improvement¹²⁶ and the signaling theory of Posner,¹²⁷ since it basically discusses the extent to which people engage in expressive control. Both accounts seem to better describe chronic high self-monitors than low self-monitors.

E. Individual differences in moral reasoning

Another individual-differences moderator of normative influence is moral reasoning style. Kohlberg’s well-known theory of moral development¹²⁸ proposes a developmental sequence of six stages, divided into three levels: pre-conventional,

¹²³For a meta-analysis of studies examining this issue, see Stephen J. Kraus, *Attitudes and The Prediction of Behavior: A Meta-Analysis of The Empirical Literature*, *Personality & Soc. Psych. Bull.*, 21, 58-75 (1995). Similar results are found using alternative measures of private and public self-consciousness. See Carver and Scheier, *On the Self-Regulation of Behavior* cited in note 120; Lynn E. Miller & Joseph E. Grush, *Individual Differences in Attitudinal Versus Normative Determination of Behavior*, *J. Experimental Soc. Psych.* 190 (1986).

¹²⁴Steven W. Gangestad & Mark Snyder, *Self-Monitoring Appraisal and Reappraisal*, *Psych. Bull.* 530 (2000)

¹²⁵Alan P. Kirman, *Whom or What Does The Representative Individual Represent?* *J. Econ. Perspectives* 117 (1992)

¹²⁶Robert Coote, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, *78 B.U.L. Rev.* 903, 905 (1998)

¹²⁷cited in note 4

¹²⁸See Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages*. (Harper and Row, 1984).

conventional, and post-conventional. ¹²⁹In the pre-conventional orientation characteristic of younger children, compliance is primarily motivated by the desire to avoid punishment. At the conventional level, individuals are more likely to be affected by perceived injunctive norms -- what they think is expected of them by their family or other reference groups. People in the post-conventional level are more likely to be influenced by more abstract and universal principles of justice and morality. The framework suggests a complex pattern of attitude-behavior relations, with pre- and post-conventional individuals more influenced by "attitudes" (perceived sanctions in the former case, perceived impact on others in the latter), and conventional individuals more influenced by norms.

Tappan and Kohlberg ¹³⁰ have applied this framework to legal compliance in a manner that closely parallels the three-tier approaches of Kelman and Cooter, although from an individual-difference perspective rather than a multi-processes approach. ¹³¹ They distinguish rule-obeying, rule-maintaining, and rule-making orientations. The first type is most sensitive to the magnitude of risk, and obeys the law mainly out of fear of punishment without any respect for the rules. This type seems to be best described by deterrence models. ¹³² The second type is most sensitive to the legality of the act, and tends to obey the law mainly out of a law and order perspective: "if the lawmaker says I should do it is probably good". This type seems to be the most aligned with the expressive model since they are most likely to care about the announcement of the law, disregarding its sanctions or its alignment with morality. ¹³³ The last type is exemplified

¹²⁹ Kohlberg's theory has been controversial, in part because of his Rawlsian normative stance and in part because of unsupported claims that his findings mostly describe males rather than females. See Sara Jaffe Hyde & Janet Shibley, *Gender Differences in Moral Orientation: A Meta-Analysis*, 126(5) Psych. Bull. 703 (2000)

¹³⁰ June Louin Tappan and Lawrence Kohlberg, *Developing Senses of Law and Legal Justice*, 27(2) J. Soc. Issues, (1971); For a more elaborated version of this paradigm see Tappan and Kohlberg, *Developing Sense of Law and Legal Justice*, in June Louin Tappan & Felice J. Levine eds., *Law, Justice and the Individual in Society*, 89 (Holt, Rinehart and Winston 1977)

¹³¹ For treating these processes as individual orientation (e.g. an individual difference) see Kelman & Hamilton, *Crimes of Disobedience*, cited in note 34

¹³² See MacCoun, Psych Bull. (1993) cited in note 13

¹³³ This also appears to be very similar to the identification process because conventional people tend to see the system of rules as responsible for the maintenance of society and social order. Thus while the relationship with the lawmaker is less emphasized according to this model, these people do care dearly about their relationship with society as a whole

by one who thinks about the law, using abstract principles of justice which are independent of society, and who is more concerned about the legitimacy of the law. This individual will naturally be most likely to obey the law in a similar way to those who engage in the processes of internalization.

IV. How and When Do We Internalize Norms?

A basic question in the new norms literature is whether the effect of a norm is external/exogenous or internal/endogenous. In previous sections of this paper, we have discussed the mix of attitudes and norms as if these factors are independent. Nonetheless, in many cases, this independence will cease to exist and the attitudes and norms of the individual will merge.¹³⁴ In neo-classic economic theory, preference change was long off-limits as an area of research. Despite the fact that the internalization of social norms captures much attention from law and economics scholars,¹³⁵ the behavioral mechanism underlying this “internalization” is still far from clear.¹³⁶ While a full analysis of the endogenous/exogenous nature of preferences is beyond the scope of this paper, we would like to clarify the concept of internalization, to the extent that this process is being treated by LEN scholars of social norms as being relevant to psychology.

Some LEN scholars have suggested that psychology cannot explain the mechanism of internalization. Scott, for example, maintains that “The fact is that behavioral science does not yet understand the mechanism of internalization.”¹³⁷ A

¹³⁴ Of course, attitudes and norms are dependent in a second sense, because my expressed attitudes may help to constitute your perceived norms.

¹³⁵ William M. Landes & Richard A. Posner, *Altruism in Law and Economics* 68 Am. Econ. Rev. 417 (1978), is one of the early accounts by leading law and economics scholars of the sociobiology of internal norms.

¹³⁶ Another overlooked aspect of the relationship between the expressive and internalization aspects of social norms is whether these aspects are supposed to come one after the other or to function in tandem. Such a discussion could be seen with regard to the development of trust in different types of relationship. Roy J. Lewicki & Barbara B. Bunker, *Developing and Maintaining Trust in Work Relationships* in Roderick M. Kramer & Tom R. Tyler, eds, *Trust in organizations: Frontiers of theory and research*, 114 (Sage publication, 1996).

¹³⁷ Scott, Va. L. Rev. cited in note 21 at 1637.

similar argument is that internalization is a mysterious and, to some extent, non-reversible process that requires depth psychology.¹³⁸

We find such arguments puzzling, it is true that psychologists lack a complete and comprehensive “final theory” of internalization, but the gap is far from cavernous. Psychologists actually know a great deal about internalization, but the topic is so large that it encompasses many rubrics. There are vast literatures on the principles of inductive learning,¹³⁹ vicarious social learning,¹⁴⁰ and moral socialization by parents,¹⁴¹ each of which involves robust empirical generalizations based on literally thousands of laboratory and field studies. Rather than attempting to do justice to such vast literatures, we will simply focus on two explanatory paradigms that seem readily applicable to internalization by adults following an exposure to new norms.

A. Central vs. peripheral route to persuasion

Applied work by psychologists for the military in World War II launched an enormous post-war effort to identify the systematic principles of persuasion. By the mid-1970s, there was an enormous and unwieldy catalog of findings involving specific source, audience, and message factors, alone or in combination. In the late 1970s and early 1980s, it was discovered that most of this literature could be integrated using a few straightforward organizing principles that yield clear, testable, and replicable predictions.¹⁴²

¹³⁸ See Robert Cooter, *Symposium: Law, Economics, & Norms: Decentralized Law For A Complex Economy: The Structural Approach to Adjudicating The New Law Merchant* 144 U.P.A.L.Rev. 1643, 1661-1662 (1996).

¹³⁹ Thomas Gilovich, Dale Griffin & Daniel Kahneman eds. *Heuristics and Biases: The Psychology of Intuitive Judgment*. (Cambridge Univ. Press, 2002). John H. Holland, et al., *Induction: Processes of Inference, Learning, and Discovery*. (MIT Press, 1986)

¹⁴⁰ Albert Bandura, *Social Foundations of Thought and Action: A Social Cognitive Theory*, (Prentice-Hall, 1986).

¹⁴¹ For a review, see Diane N. Ruble and Jacqueline J. Goodnow, *Social development in childhood and adulthood*, in Daniel T. Gilbert, Susan T. Fiske & Lindsey Gardner, eds. *Handbook of Social Psychology*, Vol. 1, chapter 16 (McGraw-Hill, 4th ed, 1998), For a new approach, see Grazyna Kochanska, *Mutually Responsive Orientation Between Mothers and Their Young Children: A Context For The Early Development Of Conscience*. 11 *Current Directions in Psychological Science*, 191 (2002).

¹⁴² These principles were independently proposed in 1979 doctoral theses by Shelly Chaiken and by Richard Petty. Shelly Chaiken's heuristic-systematic model is described in detail in Eagly & Chaiken, *The psychology of attitudes*, cited in note 104; we will focus instead on Petty's model (developed with

Petty and Cacioppo's elaboration likelihood model¹⁴³ distinguishes between two basic routes to persuasion, corresponding two distinct types of information processing. The central route involves active, conscious deliberation; an assessment of arguments and the attempt to generate plausible counterarguments. The central route is only activated when two conditions are met: the individual is motivated to think about a message, and the individual is able to cognitively process information. When those two conditions are met, the primary determinant of persuasion is the perceived strength of the presented arguments. Argument change generated by the central route tends to be durable and resistant to all but the strongest counterinfluence attempts.

When individuals are disinterested in the topic (low motivation), distracted (low ability), or unable to comprehend the message (low ability), at best they will be influenced by a quick and superficial reliance on currently salient "cues to persuasion" — e.g., "the majority favors this," "there are a lot of arguments here so it must be right," "she's the expert so I'll take her word for it," "he's the NBA's leading scorer, and he buys Nikes." Petty and Cacioppo call this the "peripheral" route to persuasion. Attitudes and beliefs formed via peripheral persuasion are fragile and transitory, easily "knocked out" when alternative peripheral cues become more salient.

This framework has obvious relevance for the influence taxonomies of Kelman, French and Raven, and Cooter (see Table 1 above). For example, in the Petty-Cacioppo framework, French and Raven's "expert power" may be correlated with strong arguments, but only if the audience is motivated and able to reflect on those arguments. If not, expertise serves as a mere, and transitory, peripheral cue. The central route — persuasion based on thoughtful deliberation — is a key path toward internalization, but it is only one such path. Peripheral persuasion, on the other hand, can produce either mere public compliance, identification, or (as we shall see) even internalization.

John Cacioppo), which is more transparent for present purposes. Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion* in 19 *Advances in Experimental Soc. Psych.* 123 (1986)

¹⁴³Id.

B. Self-reinforcing peripheral beliefs

The central route is not the only path to internalization. Peripherally formed beliefs are ephemeral when they fail to produce action, but under the right conditions, positions adopted expediently or superficially via the peripheral route to persuasion can become self-reinforcing and stable.

This can occur through the sort of path dependency that has long interested economists.¹⁴⁴ Actions based on transitory views (“whims”) can expose the actor to new settings and a new mix of social contacts, which can in turn place the individual under new compliance pressures, but also under new cognitive pressures.

Festinger’s work on cognitive dissonance,¹⁴⁵ and Bem’s¹⁴⁶ work on self-perception suggest two similar, but still distinctive, mechanisms by which a change in behavior can produce a change in attitudes, they differ in their view of which mechanism is being employed. According to Festinger, the gap between one’s attitudes and behavior create a mental dissonance associated with an unpleasant feeling that could potentially be reduced by a change in one’s attitudes. According to Bem, the processes are more straightforward. The individual simply infers from her behavior what her attitudes are. Empirically, Festinger’s theory is most applicable to attitudes that the actor cares about; Bem’s account mostly applies to more trivial or casually considered views.¹⁴⁷

A related process is parallel constraint satisfaction, as represented using connectionist models.¹⁴⁸ Constraint satisfaction algorithms are used to model the cognitive processes by which actors integrate numerous interrelated elements (e.g.,

¹⁴⁴E.g. W.B. Arthur, *Competing Technologies, Increasing Returns, and Lock-In By Historical Events*. 99 *Econ. J.* 116 (1988).

¹⁴⁵ Leon Festinger, *A Theory of Cognitive Dissonance*. (Stanford Press 1957).

¹⁴⁶ Daryl J Bem, *Self-Perception: an Alternative Interpretation of Cognitive Dissonance Phenomena*. 74(3): *Psych. Rev.* 183 (1967).

¹⁴⁷ See Eagly & Chaiken, *The Psychology of Attitudes*, cited in note 104, for a review of competitive tests of these theories.

¹⁴⁸ See generally, Stephen J. Read & Lynn C. Miller Eds. *Connectionist Models of Social Reasoning and Social Behavior* (Erlbaum, 1998). Paul Thagard, *Coherence in Thought and Action* 17 (MIT, 2000). See Robbenolt, Darley, & MacCoun, *Brooklyn L. Rev.*, cited in note 102 for a discussion of constraint satisfaction processes in juror decision making,

concepts, propositions, or goals), that may or may not be consistent, into a coherent whole.¹⁴⁹ There is some evidence that the processes described by dissonance theory and other cognitive consistency theories are simply special cases of the operation of more general constraint satisfaction mechanisms.¹⁵⁰

We recognize that that the se theories both clarify and complicate the LEN analysis. They clarify it in the sense that they make internalization less mysterious, but they also identify conditions for internalization – strong arguments, motivated and able perceivers, pressures toward self-consistency -- that are difficult to incorporate into stylized formal analyses. These accounts also make internalization somewhat less of a legal panacea. The law’s normative messages aren’t the only norms that can get internalized; processes of persuasion, dissonance reduction, and constraint satisfaction can solidify all sorts of views that the government would wish to discourage. Nor can economists cannot assume that all types of internalization are permanent and irreversible. The law’s messages will have to compete in a marketplace of ideas – both good and bad, serious and trivial.

V. Conclusion

In this paper we have reviewed and organized some of the main theories in the psychological literature of social norms in three main themes. The choice of theories was conducted not according to their importance within psychology, but according to their relevancy to the new norms literature in law and economics. The first theme that we have discussed is the multiplicity of normative processes. We have argued that taking these distinctions into account could refine and improve the current vague definition of norm used by LEN scholars. Our second theme is the multiplicity of normative moderators – factors that strengthen or attenuate the influence of norms relative to attitudes, prices, and other factors. We have argued that awareness of factors that mitigate the effect of norms on behavior is required of any policymaker who is interested in decentralizing legal enforcement, since the widespread existence of a norm is insufficient to guarantee its

¹⁴⁹Read&Miller,citedin note 148atvii.

¹⁵⁰SeeStephenJ.Read,etal., *Connectionism,ParallelConstraintSatisfactionProcesses,and GestaltPrinciples:(Re)IntroducingCognitiveDynamicstoSocialPsychology*,1Personality&Soc.Psych. Rev.26(1997).DanSimon&KeithJ.Holyoak, *StructuralDynamicsofCognition:FromConsistency TheoriestoConstraintSatisfaction*, 6Personality&Soc.Psych.Rev.283(2002).

influence on behavior. Our third theme is that internalization is neither as simple as suggested by some LEN accounts nor as mysterious as suggested by others.

In all, we realize that the theories that we have reviewed and their implications to the current L&E models of social norms create considerable complexity and heterogeneity. We don't contend that theorists need to construct a grand theory that accounts for the full depth and breadth of the social psychology literature – if psychologists haven't, why should economists? Rather, we think the challenge is for LEN theorists to draw upon social psychology selectively in a manner that increases the validity and realism of the models while striving to maintain their formal tractability and heuristic value. Taking this challenge into account in our review, we have focused mainly on the types of theories that, once incorporated into the current models, seem to worth the cost. We believe that by taking these moderators and theoretical distinctions into account, LEN scholars will be able to analyze when norms are likely to govern efficiently and what the nature of interaction between norms and law is in much greater clarity and predictability. At the same time, we are aware of the fact that not all theories reviewed here will have equally practical implications for the “norm management” project. Nonetheless, we think that even in these cases a theoretical value emerges from the comparison of newer economic models with older psychological models that aim to answer the exact same questions from different, and sometimes richer perspectives.