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**COMMENT:
ACCOUNTING FOR NORMS**

RICHARD H. McADAMS*

Twenty years ago, in a celebrated article, *De Gustibus Non Est Disputandum*, future Nobel laureates George Stigler and Gary Becker argued for “the proposition that one may usefully treat tastes as stable over time and similar among people.”¹ Rejecting the contrary notion that preferences are endogenous, they stated: “[N]o significant behavior has been illuminated by assumptions of differences in tastes. Instead, they, along with assumptions of unstable tastes, have been a convenient crutch to lean on when the analysis has bogged down.”²

In recent work culminating in his 1996 book, *Accounting for Tastes*, Becker changes course. He characterizes the conventional approach—which assumes preferences are “independent of both past and future consumption” and of “social interactions”—as a “valuable simplification.”³ But, noting how Adam Smith and Karl Marx focused on the effect work has on the tastes of the worker, Becker observes that “modern economics has lost a lot by completely abandoning the classical concern with the effects of the economy on preferences and attitudes.”⁴ He proposes a remedy: “The endogeneity of preferences highlighted in this book implies that the economy also affects tastes regarding goods, leisure, and other activities. In other words, preferences both influence

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1. George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, AM. ECON. REV., Mar. 1977, at 77.

2. *Id.* at 89.

3. GARY S. BECKER, *ACCOUNTING FOR TASTES* 4 (1996).

4. *Id.* at 19. Indeed, Becker thinks economics lost more by ignoring preference endogeneity than by assuming away cognitive errors. He believes systemic deviations from perfect rationality, as for example the framing effects demonstrated by Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986), have “received excessive attention at the expense” of weaknesses derived from models that “assume that preferences do not directly depend on either past experiences or social interactions.” BECKER, *supra* note 3, at 22. For a discussion of economic modeling in light of cognitive errors, see Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433.

economic outcomes and are in turn influenced by the economy.”⁵ Thus, though Becker thinks he can retain “most of [the] simplicity” of existing economic models, he thinks some sacrifice of simplicity is desirable.⁶

Make no mistake, Gary Becker still ardently believes that the economic method will consistently provide more explanatory power for behavior than its rivals.⁷ In *Accounting for Tastes*, he says of the *De Gustibus* article: “We were impressed by how little has been achieved by the many discussions in economics, sociology, history, and other fields that postulate almost arbitrary variations in preferences and values when confronted by puzzling behavior. We hoped that making these puzzles explicit would hasten the development of more rewarding approaches.”⁸ Becker’s book offers, in his view, the more rewarding approach,⁹ using the concepts of personal and social “capital” to explain habit, addiction, culture, norms, and other influences thought to be beyond the rational choice method.¹⁰ He states: “I do not believe that any alternative approach—be it founded on ‘cultural,’ ‘biological,’ or ‘psychological’ forces—comes close to providing comparable insights and explanatory power.”¹¹

The narrow point of this brief essay is *not* that “the more things change, the more they stay the same.” Rather, I describe the evolution in Becker’s thinking on endogenous preferences to illustrate two points about economics, each of which is pertinent to law and economics and its relation to law and society. First, economics is neither static nor monolithic. Even within neoclassical microeconomics, there are

5. BECKER, *supra* note 3, at 18; *see also id.* at 22 (“Preferences no longer have independent influences on behavior since personal and social capital are constraints that operate through preferences.”).

6. *See id.* at vii (stating that the “behavioral dynamics” of the *De Gustibus* article “were unsatisfactory”).

7. *See id.* at 3 (“sociologists and anthropologists do not imbed their analyses of social forces and culture in a powerful analytic framework.”). *See also* GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976).

8. BECKER, *supra* note 3, at 6.

9. Thus, the shift in Becker’s views is that in *De Gustibus*, he and Stigler prefer economics because it explains behavior without relying on circular arguments of preference change, while in *Accounting for Tastes*, Becker prefers economics because he views his economic theory as providing the best way to explain preference change.

10. I will not attempt to state fully his theory. In general, he wishes to incorporate into the utility function two “new types of (human) capital stocks.” BECKER, *supra* note 3, at 5. “*Personal capital, P*, includes the relevant past consumption and other personal experiences that affect current and future utilities. *Social capital, S*, incorporates the influence of past actions by peers and others in an individual’s social network and control system.” *Id.* at 4. He then explains: “[T]he economy . . . changes tastes and preferences by changing personal and social capital.” *Id.* at 19.

11. *Id.*

substantial disagreements on the basic issues of rationality and behavioral motives. Though these internal disputes are not always evident to other social science scholars, they are an engine for important and interesting changes in economic theory. Second, one particular construct Becker addresses with his new theory—norms—promises to further complicate law and economics, forcing to the foreground issues that divide economic theorists, and offering the greatest opportunity for comparative (cooperative or competitive) research by various law and social science scholars.

I. DIVERSITY AND CHANGE IN LAW AND ECONOMICS

Academic trends are notoriously difficult to predict, but I believe the growing complexity in law and economics modeling represents a genuine and lasting change. External criticism is having some effect. Others have made this observation before,¹² but my impression is that it bears repeating because skeptics still think “economics” is necessarily the simplest and least realistic of rational choice models.

Consider Robert Ellickson’s 1989 recommendation that law and economics scholars complicate their models with insights from psychology and sociology, concerning, for example, cognitive limitations and cultural influences.¹³ Ellickson’s short article cited a wealth of examples where economists were already sacrificing some parsimony to achieve greater realism in their behavioral models.¹⁴ As one example, he recommended that law and economics seek to explain the social process of preference

12. See, e.g., AMITAI ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1988); *LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES* (Robin P. Malloy & Christopher K. Rarun eds., 1995).

13. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989). The article was part of a symposium on “Post-Chicago Law and Economics.”

14. See, e.g., ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985) (modeling individual concern for relative position and relative wealth); George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, AM. ECON. REV., June 1982, at 307 (modeling how cognitive resistance to dissonant information might cause workers to systematically underestimate job risks); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, AM. ECON. REV., Sept. 1986, at 728 (finding evidence that firms sometimes sacrifice profit to act “fairly”); Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, AM. ECON. REV., June 1984, at 279 (finding evidence that legislators’ ideology influences their votes); Thomas C. Schelling, *Self-Command in Practice, in Policy, and in the Theory of Rational Choice*, 74 AM. ECON. REV. PAPERS & PROC. 1 (1984) (modeling the problems of impulsiveness and self-control); Richard H. Thaler & H. M. Shefrin, *An Economic Theory of Self-Control*, 89 J. POL. ECON. 392 (1981) (modeling the same).

formation, what sociologists sometimes call the “internalization of norms.”¹⁵ At the time, Richard Posner responded to Ellickson by reasserting his position that the reductionism of economics was and should remain its strength. Posner worried that “too many bells and whistles will stop the analytic engine in its tracks.”¹⁶ But while no one wants “too many” complications, economic theorists obviously differ on the issue of what number of complications is optimal.

As it turned out, Ellickson correctly predicted that “both economics and law and economics . . . will . . . witness more work on taste formation.”¹⁷ Soon thereafter, Ken Dau-Schmidt published his article on criminal law as a preference-shaping device.¹⁸ Becker’s book now offers a general theory of endogenous preferences, even including the observation that law can shape preferences.¹⁹ And despite his defense of reductionism, Richard Posner went on to complicate matters considerably, as when he proffered an economic theory of “ideology,” in which groups control the beliefs of their members to further the interest of the group.²⁰

15. Ellickson, *supra* note 13, at 45 (“Besides deepening the normative power of economics, a successful theory of taste formation would enable economists better to make positive predictions of shifts in supply and demand curves.”).

16. Richard A. Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.-KENT. L. REV. 57, 62 (1989). He said an “‘enriched’ economic theory of human behavior . . . would be consistent with all possible observations” and therefore not falsifiable. *Id.* at 60. “A commitment to a relatively simple economic model, one that does not supply a facile explanation for every regularity (or peculiarity) in human behavior, forces the analyst to think hard before discarding the possibility that the behavior under scrutiny may indeed be rational in a straightforward sense.” *Id.* at 62; *see also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 16 (3d ed. 1986) (stating that reductionism is inherent in scientific inquiry).

17. Ellickson, *supra* note 13, at 45.

18. Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1; *see also* Kenneth G. Dau-Schmidt, *Legal Prohibitions as More than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, in *LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES*, *supra* note 12, at 153.

19. Becker even makes a point many thought cut against the normative implications of his earlier work on discrimination, stating that civil rights laws changed racial preferences in a way that made interaction more tolerable to racist whites. BECKER, *supra* note 3, at 19-20.

20. RICHARD A. POSNER, *The Material Basis of Jurisprudence*, in *OVERCOMING LAW* 33-80 (1995) (describing “guilds” as groups that share an ideology—a common morality and “mystique”; claiming that guilds use ideology to cartelize an industry and serve the self-interest of guild members); *see also* RICHARD A. POSNER, *AGING AND OLD AGE* 84-95 (1995) (discussing use of “multiple selves” theory in economic modeling of choice over time).

Several Symposium participants demonstrate the increasing diversity and complexity of economic theories. Tom Ulen, for example, identifies how psychological research on risky decisions falsifies simple rational choice models.²¹ He predicts the future of law and economics will be a continuous effort to complicate its models as necessary to account for this and other data, some of which is generated within the discipline. Eric Posner addresses why contract law does not enforce gratuitous promises.²² His approach does not require that every gift have an ulterior selfish motive, as a caricature of economics might suggest. Indeed, his paper contrasts with earlier economic models of such promises not by considering altruism, but by positing a variety of gift motives—altruism, status seeking, and trust building—and analyzing the effect of promise enforcement in each case. And, besides his own work on taste formation, Ken Dau-Schmidt reviews recent law and economic scholarship on social groups and cooperative norms.²³

Of course, economics still values simple assumptions. One can comfortably predict that some economic theorists will criticize as unnecessary all of the above efforts to complicate the behavioral model. I would agree with such critics that parsimony has sufficient value to justify *some* mistrust of new and messier assumptions. But despite the economist's fondness for simplicity (which strikes some non-economists as the essential failing of the discipline), almost any plausible cognitive or motivational complexity has its advocates *within* economics—risk misperception,²⁴ commitment to habit,²⁵ impulsiveness,²⁶ altruism,²⁷

21. Ulen, *supra* note 4; see also RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991); Richard H. Thaler, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE (1992); Thomas S. Ulen, *Rational Choice and the Economic Analysis of Law*, 19 LAW & SOC. INQUIRY 487 (1994) (reviewing prior two books).

22. Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567.

23. Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WIS. L. REV. 389.

24. See, e.g., Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391 (1990); Ulen, *supra* note 4, at 460.

25. See, e.g., BECKER, *supra* note 3, at 118-35 (chapter entitled "Habits, Addictions, and Traditions"); Robert A. Pollak, *Habit Formation and Long-Run Utility Functions*, 13 J. ECON. THEORY 272 (1976).

26. See, e.g., Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of Will*, 11 INT'L REV. L. & ECON. 149 (1991); Schelling, *supra* note 14; Thaler & Shefrin, *supra* note 14.

27. See, e.g., B. Douglas Bernheim & Oded Stark, *Altruism Within the Family Reconsidered: Do Nice Guys Finish Last?*, AM. ECON. REV., Dec. 1988, at 1034; David D. Friedman, *Does Altruism Produce Efficient Outcomes? Marshall Versus Kaldor*, 17 J.

status,²⁸ and even emotion.²⁹ Becker's modeling of preference change is merely one striking example of the increasing complexity of economic theory.³⁰ While some economic thinkers praise the virtue of a model that can be applied to all behavior—the so-called triumph of economic imperialism³¹—the natural result of these extensions is that the models grow increasingly less simple. The outcome is unknown, but the “complicators” are winning.

In this sense, economics expands its domain and proclaims the power of its approach; and yet, it seems to me, its approach thereby becomes (desirably) less distinct from the alternatives. The new problems it confronts require more attention to the subtle and complex motives economics could previously ignore. I do not suggest that economics and sociology are or should be merging. They are not merging because there remain important methodological differences other participants detail.³² The disciplines should not merge because, as Dau-Schmidt observes, there is value in preserving distinct approaches to problems of human behavior.³³ Despite general differences, however, we have or are reaching the point where, for some discrete topics, there will be less substantive difference between some economic and sociological theories than between theories within the same discipline.

LEGAL STUD. 1 (1988).

28. See, e.g., FRANK, *supra* note 14; Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992).

29. See, e.g., ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988); Jack Hirshleifer, *The Affections and the Passions: Their Economic Logic*, 5 RATIONALITY & SOC. 185 (1993); Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT'L REV. L. & ECON. 31 (1992).

30. What is striking is that Becker is a major part of “Chicago School” economics and his *De Gustibus* article, *supra* note 1, was thought to be a classic statement of the parsimony of exogenous preferences. On the other hand, Becker says that he has, “[a]long with others,” consistently attempted “to pry economists away from narrow assumptions about self interest.” BECKER, *supra* note 3, at 139. “Behavior is driven by a much richer set of values and preferences . . . selfish, altruistic, loyal, spiteful, or masochistic.” *Id.*

31. See BECKER, *supra* note 7, at 14.

32. See, e.g., Ian Ayres, *Never Confuse Efficiency with a Liver Complaint*, 1997 WIS. L. REV. 503; Dau-Schmidt, *supra* note 23. I should state that, for most of these differences, I find myself more comfortable with the economic approach. Even as I participate in complicating the simpler rational choice models, I believe there is value in beginning with simple assumptions to determine what additional assumptions are strictly necessary. And even though culture constrains individuals, I believe the superior method for understanding group influences is to begin with the behavior of individuals—though I do not think I could *prove* this to be the case.

33. Dau-Schmidt, *supra* note 23, at 407.

These observations are rather abstract, so let me turn to a concrete case: norms.

II. THE NEW NORMS LITERATURE

Ellickson advocated enriching the rational choice model by incorporating the influence of “culture,” by which he meant to include the internalization of norms. As with the rest of his 1989 article, he was both reporting on an existing trend and urging that the trend continue and expand. In this respect, his article and his own norms work were greatly successful. After ceding the field to anthropology and sociology for many decades, economics has finally started to take norms seriously. Much of what economic analysts have to say about norms may strike law and society advocates as a variation on an old error. But I believe that the substantial differences dividing economic theories of norms present an opportunity for law and society scholars to influence the future course of this subfield of law and economics. I trace the recent history of this literature and then describe some of its unsettled issues.

Law and economics discovered norms only recently. The first few efforts—perhaps the very first was Stephen Cheung’s 1973 analysis of norms among orchard owners in rural Washington³⁴—remained isolated for a time. Then, in the early 1980s, a variety of rational choice scholars in political science, philosophy, and economics began to address norms.³⁵ The interest within law and economics accelerated at the same time. Janet Landa and Robert Cooter asked why, in parts of Asia, ethnic minorities tended to dominate the “middlemen” position in many industries.³⁶ They contended that these “ethnically homogeneous middlemen groups” succeed in nations without reliable legal enforcement of contracts because the group’s social connectedness gives its members

34. He found a norm required these orchard owners to keep a quantity of bees proportionate to their number of orchard trees. See Steven N.S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11 (1973).

35. See JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* (1989); ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION, AND WELFARE* (1986); George A. Akerlof, *A Theory of Social Custom of Which Unemployment May Be One Consequence*, 94 Q.J. ECON. 749 (1980); Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986); see also EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977).

36. See Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349, 350 (1981); Robert Cooter & Janet T. Landa, *Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 INT’L REV. L. & ECON. 15 (1984); see also JANET TAI LANDA, *TRUST, ETHNICITY, AND IDENTITY* (1994); Jack L. Carr & Janet T. Landa, *The Economics of Symbols, Clan Names and Religion*, 12 J. LEGAL STUD. 135 (1983).

a unique means of (informally) sanctioning contract breaches by other group members. At the same time, Ellickson began investigating how Shasta County, California ranchers settled property disputes.³⁷ He concluded that these ranchers enforced informal norm-based rules for disputes involving cattle trespass and boundary fences, and thus resolved certain conflicts without the legal regime.³⁸ In the seminal *Order Without Law*, Ellickson criticized the extreme law and society claim that norms determine behavior to the exclusion of law—what he called “legal peripheralism”—and also the extreme law and economics claim that law determines behavior to the exclusion of norms—“legal centralism.”³⁹

Since that time, the rational choice work on norms has mushroomed. Political scientists, philosophers, economists, and even a rational choice sociologist developed general models of norms.⁴⁰ Within law and economics, norms are now a central concern to contracts scholars⁴¹ who

37. He completed his investigation a few years later. See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); see also Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORGANIZATION 83 (1989).

38. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 40-81 (1991). On the other hand, where the conditions are not appropriate for norms, legal rules still govern the relevant conduct. See *id.* at 82-103 (discussing disputes regarding highway collisions involving livestock).

39. He advocated focusing on which “controller” is more powerful in particular contexts. See *id.* at 137-55.

40. See BECKER, *supra* note 3, at 225-30; JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* (1990) (chs. 10, 11, 30); RUSSELL HARDIN, *ONE FOR ALL: THE LOGIC OF GROUP CONFLICT* (1995); THE DYNAMICS OF NORMS (Crisina Bicchieri et al. eds., 1997); B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841 (1994); Ken Binmore & Larry Samuelson, *An Economist's Perspective on the Evolution of Norms*, 150 J. INST. & THEORETICAL ECON. 45 (1994); Robert D. Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC'Y 50 (1995); see also Symposium, *Norms in Moral and Social Theory*, 100 ETHICS 725-885 (1990).

41. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996) [hereinafter Cooter, *Decentralized Law*]; Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215 (1994) [hereinafter Cooter, *Structural Adjudication*]; Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859 (1996); Geoffrey P. Miller, *Contracts of Genesis*, 22 J. LEGAL STUD. 15 (1993).

pursue Stewart Macaulay's early finding⁴² that norms often determine business behavior more than law. Ellickson and others continue to study neighborhood and "street" norms.⁴³ Various theorists use economic analysis of norms to explain the persistence of race discrimination,⁴⁴ the effectiveness of anti-dueling statutes from the previous century and safe-sex education efforts from this one,⁴⁵ and the effect of legislation on the groups that enforce norms.⁴⁶

In 1995, the American Law and Economics Association had its first panel devoted exclusively to the economic analysis of norms. In 1996, the *Pennsylvania Law Review* published a symposium on "Law, Economics, and Norms," in which the authors found norms useful to explain a multitude of legal issues: voting;⁴⁷ at-will employment;⁴⁸ blackmail;⁴⁹ difficulties in moving from a Marxist to a market economy;⁵⁰ and the general efficiency of the common law.⁵¹ As I was

42. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

43. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Or Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); see also Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2062-63 (1996). Informal land regulation is of considerable interest to many rational choice scholars. See, e.g., ELINOR OSTROM ET AL., RULES, GAMES, AND COMMON-POOL RESOURCES (1994); Laurence R. Iannaccone, *Sacrifice and Stigma: Reducing Free-riding in Cults, Communes, and Other Collectives*, 100 J. POL. ECON. 271 (1992).

44. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1064-71, 1083 (1995).

45. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968-72, 1019-25 (1995).

46. See Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 159-60 (1996) (discussing how employment legislation protecting individual workers undermines the power of unions and union norms); see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (expressing ambivalence about economic analysis but using norms to discuss societal trends in smoking, recycling and gender roles).

47. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996).

48. See Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996).

49. See Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237 (1996). Saul Levmore also compares legal and norm-based rules governing anonymous communication in society, concluding that law is unable to mirror the nuances of the norm-based rules. See Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191 (1996).

50. See Pildes, *supra* note 43, at 2062-63.

51. See Cooter, *Decentralized Law*, *supra* note 41, at 1690-94.

preparing this comment, the *Journal of Legal Studies* published an economic analysis of norms governing sumo wrestling in Japan.⁵²

If one scratches beneath the surface, it is clear that economic theorists have widely divergent views on what norms are and how they function. Despite terminological differences, it seems to me that the economic literature should engage law and society scholars because the sociological literature may dispute what some economic theorists claim and, possibly, because the disputes within economics may mirror disputes within sociology. Consider a few examples.

First, while much of this literature agrees that norms are informal obligations,⁵³ there are competing explanations for how such norms are enforced. Some theorists view norms as necessarily internalized: the individual has acquired a "taste" for conforming to the obligation and feels guilt otherwise. Becker, for example, says that "[n]orms are those common values of a group which influence an individual's behavior through being internalized as preferences."⁵⁴ Cooter agrees, stating that "a social norm is ineffective in a community, and does not exist, unless people internalize it."⁵⁵ Yet I, for one, think norms can arise without internalization. If one posits only that individuals value what others think of them, then norms will arise when most people in a group share a strong consensus as to what behavior merits approval or disapproval, there is a substantial risk that others will detect the behavior, and the consensus and risk are well-known.⁵⁶

When Becker says, for example, that "[a] teenager may begin to smoke, join a gang, and neglect his studies mainly because his friends smoke, are gang members, and do not pay attention to school,"⁵⁷ I do not think it necessary that the individual or any of her friends have *internalized* these behaviors, in the sense that they feel guilt when they do study or do not smoke. It is entirely sufficient to imagine that, among a group of teenagers, most enjoy smoking and not studying (or enjoy rejecting societal values) and therefore approve of others who do the

52. See Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997).

53. See Cooter, *Decentralized Law*, *supra* note 41, at 1656-57.

54. BECKER, *supra* note 3, at 225.

55. Cooter, *Decentralized Law*, *supra* note 41, at 1665.

56. See McAdams, *supra* note 44, at 1026-29; Richard H. McAdams, *Law, Economics, and the Origin of Norms*, 96 MICH. L. REV. (forthcoming 1997); see also Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 ETHICS 725, 751 (1990).

57. BECKER, *supra* note 3, at 13. Becker does not use this example when discussing norms. He intends it to show the effect of social factors like the concern for "respect, recognition, prestige, acceptance." *Id.* at 12. But when he states his thesis of norms he defines norms as arising solely by internalization. *Id.* at 225.

same. And when Cooter says that a new no-smoking ordinance makes it easier for non-smokers to complain to smokers,⁵⁸ that cannot be because the ordinance caused individuals to “dis-internalize” their preferences overnight, but because enactment of the law immediately changes beliefs about what others will approve or disapprove. At least, the question remains an open one.

Second, economic theorists debate whether norms are likely to promote social welfare. Ellickson, Cooter and James Coleman are optimistic about norm efficiency, although they note several qualifications—including the danger that group norms may benefit the group by harming those outside the group.⁵⁹ Becker also thinks norms will tend to be beneficial to the entire society even though his theory contemplates that the norm primarily benefits the wealthy classes.⁶⁰ Other theorists are more critical. Russell Hardin, for example, claims that the most common and most powerful group norms are norms of “exclusion,” the very norms that benefit the group at the expense of those excluded.⁶¹ Eric Posner bases his skepticism for norm efficiency on the pervasive problems of information and strategic behavior that sometimes cause market failure.⁶² Given my beliefs about norm origin—that norms can arise arbitrarily simply because people approve of behavior they prefer for themselves—I also believe many norms constrain individuals without producing any societal benefit.⁶³

A final and related question is intensely legal: should the state regulate particular norms? If we decide that a norm is desirable—perhaps one obligating neighbors to recycle or prohibiting diamond merchants from committing deceptive trade practices—should law attempt to strengthen the norm by enforcing it? If we decide that a norm is

58. Cooter, *Decentralized Law*, *supra* note 41, at 1674-75.

59. See COLEMAN, *supra* note 40, at 249-58; ELLICKSON, *supra* note 38, at 167 (“[M]embers of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.”); Cooter, *Structural Adjudication*, *supra* note 41, at 224-26 (claiming that norms in business communities tend to be efficient absent structures that cause “spillovers” or “nonconvexities”).

60. See BECKER, *supra* note 3, at 230.

61. HARDIN, *supra* note 40.

62. Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); see also David Charny, *Illusions of Spontaneous Order: “Norms” in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1848 (1996) (arguing that when norms arise from centralized processes within formal organizations—such as industry-wide trade associations—they are likely to be the product of interest group competition and therefore be plagued by the inefficiencies that public choice theory attributes to legislative rule-making).

63. See McAdams, *supra* note 56.

undesirable—as one obligating race or sex discrimination or a teenager norm against studying—should law be used in some manner to weaken the norm? And if we decide that norms are, on average, efficient or inefficient, should the law take some action that makes norm enforcement, in general, more or less difficult?⁶⁴

More complex governance issues arise if one adopts Neil Komesar's comparative institutional framework.⁶⁵ Komesar reminds us that the important decision is always “who decides,” which means we must consider the strengths and weaknesses institutions possess for deciding certain kinds of questions. Komesar focuses on legislatures, markets and courts,⁶⁶ but one concerned with norms might follow Ed Rubin's alternative institutional division: government, markets, and community.⁶⁷ “Community” here includes social influences on behavior such as group and societal norms. Thus, the state may regulate a behavior directly, it may avoid direct regulation and allow market and community forces to manage the behavior together (perhaps after a struggle one institution “wins” and displaces the other), or it may explicitly favor one of the other institutions as the regulator of the behavior.⁶⁸ For example, government may set a curfew for juveniles, directly regulating when they can be in public. More often, government avoids prescribing the details of child rearing and defers the issue to the other institutions. But the form of deference clearly favors the family (a community group) over the market, both because the government limits market participation by minors (e.g., with legal obligations to attend school and limits on child labor) and because it grants parents power over minor children (e.g., the right to use corporal punishment) that it does not grant to other individuals.

In sum, norms present one of the most important ways economists are complicating their models. Explaining norms requires either greater attention to social forces like status or the psychological forces by which obligations are internalized. I have not described all the disputes within law and economics on norms, but the above three are sufficient to understand what is at stake. In individual cases, economic scholars

64. See McAdams, *supra* note 49, at 2264-66.

65. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* (1994); Neil K. Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465.

66. See KOMESAR, *supra* note 65, at 53-152.

67. Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463, 475.

68. I realize this framing puts government in charge of deciding “who decides,” but as Rubin observes, see *supra* note 67, one must address scholarship to an audience, and I address those who may influence government.

sometimes rely heavily on the empirical findings of other social sciences. But I raise the issue here in the hopes of sparking more direct exchange. I have no doubt that much of any exchange will be critical—that law and society scholars may wonder whether it was better when economists merely ignored norms. But I also suspect that some of the issues will cut across conventional disciplinary lines, so that scholars in each field will be as likely to find allies in the other as in their own. That would be interesting.

