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Norms As Supplements

Saul Levmore

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INTRODUCTION

MOST readers of law reviews can distinguish a norm from a law. A norm is a practice and a law creates an obligation, at least for the purposes of this Essay. These practices often have mysterious origins and puzzling staying power, while laws come from fairly familiar institutions and are generally enforced in transparent fashion. The papers and comments that appear here, and that were presented at a conference entitled "The Legal Construction of Norms" at the University of Virginia School of Law, are representative of the emerging law-and-social-norms literature (but at the high end, of course). This work is largely about the coexistence of laws and norms, and often about the influence of either law on norms or of norms on law. My own contribution in this Essay, concentrated in Part I below, emphasizes the supplemental quality of norms rather than the "overlap," or duplication, between laws and norms. All the work in this symposium shows that these two tools are better than (either) one. And all the pieces here demonstrate that the coexistence of social practices and legal obligations raises a set of interesting questions, both about the division of labor between laws and norms and about the ability of these tools, jointly and severally, to promote common ends.

Norms can supplement formal private arrangements as well as public rules. I consider the practice of paying gratuities following the receipt of certain personal services to help make this point about social norms as supplements to private contracts. It is, almost necessarily, an imperfect example of the supplemental quality of social norms with respect to private law. I then turn to the norms that accompany various public pronouncements, or laws, including

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rules about parking and smoking. The idea offered here is that, much as norms refine private arrangements where perfect contracting is difficult, norms can also supplement public law. In particular, norms help us to know whether to regard legal rules and sanctions as mere prices or as something to be followed even where we are willing to pay the stated, legal price associated with a violation. The parking example may seem unimportant, but, of course, extremely serious wrongdoing is likely to be discouraged unambiguously (at any price). Norms and laws may reinforce one another to discourage murder,[1] but there is no question of encouraging the right violations of that law.[2]

In Part II, I turn to my assigned task of commenting more directly on the work presented at the Virginia conference and recorded here. I try to offer something of a thematic guide by connecting these works with the question of whether the laws and norms under discussion are basic and supplemental, respectively, or instead overlapping and duplicative. Taken together, the papers demonstrate not only the richness of norm-thinking but also the complexity of the interaction between laws and norms.

I. THE NORM SUPPLEMENT TO PRIVATE ARRANGEMENTS AND PUBLIC LAW

A. Norms and Contracts: Tipping Practices

A classic law-norm distinction is that we pay bills or published charges in taxicabs, restaurants, and other venues, under threat of legal sanctions arising out of contract and criminal (theft) law, but then most of us often add a quasi-discretionary gratuity for the immediate provider of service. This practice presents many of the interesting issues associated with norms, though many of these are not subjects for the present Essay. Tipping is a norm in the sense that it is required neither by law nor contract but is nevertheless

[1] Though even here laws may bend toward norms, as we will see. See infra Part II.A (discussing Paul Robinson's work).

[2] Even in the case of murder, there is some play in definitions and excuses, so that there might be refinement through norms pertaining to euthanasia, civil conflict, and so forth. But I look elsewhere for examples of norms as supplements to fairly serious law. Thus, at the conclusion of Part I.B.3, there is the idea that norms may supplement laws requiring drivers of motor vehicles to be licensed and insured.

widely practiced in some industries; there is local variation; and it is transmitted fairly smoothly to succeeding generations and even to itinerant participants. Tipping, like many other norms, may solve a kind of collective action problem.[3] Rational choice adherents are somewhat puzzled by the tipping custom, as they are by many other norms, especially when practiced by non-repeat players. A one-time customer would seem to gain very little by making a gratuitous payment. The mystery is either why the practice persists or why it has not moved up chronologically to precede the provision of service.[4]

Through the lens of agency-cost theory, gratuities can be understood as useful supplements to contracts. Employers could compensate their employees more efficiently if they had more information about how these employees interacted with customers. Customers have better access to this information, and the most efficient compensation system might well incorporate payments from both employers and customers. Wages and (post-performance) tips can combine to create a superior compensation package. Pre-performance payments by customers, or payments by repeat customers, might also signal the level of service the customer seeks.

For example, the owner of a taxicab, who employs another to drive the vehicle, observes the driver's daily mileage and fare receipts as well as accident experiences, traffic violations, insurance claims, and wear and tear on the vehicle. But passengers are able to observe the driver's manner, attention to individual passenger's needs, and some aspects of driving behavior and vehicle condition.

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[3] As discussed presently, a service provider's customers and employer might efficiently combine to monitor and compensate the provider. Each customer will be better off if most or all customers assess performance and reward the provider. There is something of a collective action problem because each customer might benefit by contributing nothing to the compensation fund.

[4] One idea here is that service providers might as a group develop a reputation for responding to signals about the level of service that is desired. If one tips a taxi driver handsomely at the outset of a trip to the airport, then the driver knows that speed and risk have been bought. Even this example is imperfect because the rational driver might ignore the signal and the consequences of his own low effort on the fortunes of other taxi drivers in the city. Moreover, the customer might treat the tip as a down payment, so that the rational customer might underpay the legal fare at the conclusion of the trip. Finally, many customers do not know the appropriate baseline (such as the estimated fare to their destination) so they will not know how to formulate a generous up-front tip.

There is very little in this bifurcation that explains the development of the social norm of tipping. Each passenger has a private incentive to refrain from tipping or to tip minimally (once the norm is in place) in the interest of avoiding a confrontation. Social norm and rational choice theorists may puzzle over the question of how it happens that in some countries so many passengers do indeed contribute substantially to taxi driver compensation. But my interest here is not with the (good) question of how certain practices arise, but rather with the question of where we find them. I offer the taxicab example as a simple illustration of the contribution that agency theory might make to this question, namely that we might find discretionary payments from customers precisely where performance quality varies and where the customer is best able to observe the effort or outcome. The practice improves on the available contract.

The taxi example raises as many questions as it answers. There is the rationality problem, as already noted, because no customer has much of an incentive to tip at all or to tip according to observed performance. And if there is something of a sorting process going on, such that customers tip, or tip at different levels, in order to secure different levels of service, it might make more sense for the customer to tip in advance of the service rather than at its conclusion.[5] Moreover, many customers are not only one-time players but also are unfamiliar with local traffic conditions so that they are poor assessors of the performances they observe. Still, these flaws must be compared to those which accompany a compensation scheme controlled by the employer alone, and it is certainly plausible that tipping improves upon the contract that the employer and driver (or the regulatory authorities and these private parties) can arrange on their own.

Tipping is an equally common practice in haircutting establishments, and here the agency-cost explanation offers a nearly flawless version of the norm-as-supplement idea. The customer is well situated to assess the provider's performance, if only because the customer has normally given instructions prior to the service,

[5] Thus, up-front payments to secure desirable or quick seating in a restaurant are not puzzling. Payments made at the end of the transaction, by irregular or one-time customers, are more curious.

and at the time of the tip has experienced the service itself. Meanwhile, the employer evaluates the provider's teamwork skills, speed, and other performance characteristics that are more obvious and of greater interest to the employer than to individual customers. Finally, although the customer's payments are again discretionary, rather than fixed by contract, the customer is often a repeat player, who risks something with respect to future transactions and options by defecting from the tipping practice. There is less mystery as to the development and maintenance of this tipping practice than there is in the taxicab case.[6] Anecdotal evidence from several countries suggests that tipping is more universal in the case of haircutting than in taxicabs, which is unsurprising, given the preceding analysis.

These quick examples suggest the outlines and limits of a positive theory of norms as supplements (to legally enforceable, but private, contracts). The most optimistic version begins with the haircutting example and then works its way through taxicabs, restaurants, pizza deliveries, and valet parking until it gets to the margin where the gains from tipping are barely worth the candle. Such things as hotel housekeeping services are found at the margin; the employer can observe performance fairly well, for there is little personal contact, but the customer may know that he or she has presented the housekeeper with an unusually challenging room. Beyond this margin, say at the counter where fast food is ordered, tipping is nonexistent because there is no gain from using the customer (and the social practice) to enhance the employment contract. The employer has standardized the employee's task down to the details of how customers are greeted, and supervisory employees can directly monitor virtually everything that customers observe.

Although this is obviously not the place to offer a comprehensive theory of tipping, it is useful to take note of a collective action problem that plagues contractual and legal supplements alike. A resident or tenant in a high-rise building might tip a doorman or other employee "because" the tenant observes the level of service

[6] A cold-blooded rational choice observer may be puzzled that more customers do not renege on the implicit agreement of payment from two principals, departing without leaving a gratuity and moving on to another provider.

better than the manager who pays the doorman's base salary. Tipping might generate greater effort on the doorman's part. But there is a danger that in order to maximize gratuities, the doorman will withhold service from some tenants and shift effort to others. Tipping might simply cause the provider to allocate efforts and good cheer across residents, rather than to increase total effort. If tipping generates competition among residents more than it does greater effort from the employee, then tenants might be better off with a no-tipping norm.[7] This conclusion requires that we downplay the possibility that competitive tipping, as I will call it, is efficient simply if it works to allocate service to those who value it most highly. The rough idea is that such a market would be highly imperfect because the doorman, or comparable provider, is able to manipulate relatively ill-informed buyers.

This sort of reasoning about competitive tipping helps explain why professors do not expect or accept gratuities from their students and why we disapprove of (and to try to outlaw) tips to police officers and judges. Residents of some apartment buildings do in fact sometimes discourage tipping, but the problem is that it is difficult to enforce this norm because tipping is nontransparent and in the interest (or at least the short-term interest) of many residents. Tipping seems like a generous thing to do, and it may be difficult to nudge a norm toward a new equilibrium that seems both contrary to the actor's self-interest and ungenerous.

In other settings, the collective action problem among potential tippers is present but so is the more positive effect of tipping on work effort. If a restaurant forbids gratuities, or strongly discourages discretionary payments by adding a substantial service charge

[7] Employers might also be better off with no tipping either because they lose from the competition among customers or, more interestingly, because tipping facilitates collusion against the employer. Thus, a waiter might bring free drinks with the hope of receiving a "tip" that is greater than the tip the waiter would have expected to receive from bringing the drinks but billing the customer as instructed. A fast-food franchise avoids the problem of "free" food passing from employees to customers by announcing a no-tipping policy; any observed payment to the employee raises serious questions. In the taxicab case, the driver and customer can collude by agreeing on trips "off the meter" but tipping is unlikely to have much of an effect on this problem. Indeed, where no-tipping is the norm, unmetered trips may be somewhat more likely than where tipping is practiced; in the latter case the driver loses the normal tip on the metered fare and must hope that the side payment will more than compensate for this loss.

to all checks, then we can explain the practice (of no individualized tipping) with an eye on the collective action problem among patrons. In a busy establishment, I would prefer not to be served by a waiter who also serves a nearby table where a known or likely big tipper is sitting. Once again, haircutting is a convenient example because there the customer is a superior monitor, receives personalized service, and (we now see) rarely competes directly with other potential tippers. While tipping surely has something to do with individualized service, it may be more useful to emphasize the presence of tipping where there is no danger of destructive competition among those who are served. Accordingly, most of us tip taxi drivers but not bus drivers. We give individual gratuities to tour guides only when they serve a single family or very few clients at one time. It is not surprising that a group tour will tip the driver or guide; repeat play by the intermediary (the tour organizer) is more likely than for the individuals and in both cases the customers have information not available to the employer. But it is noteworthy that the group will collectively rather than individually do the tipping. In short, the collective action problem among those who are served by a single provider reduces the efficiency of the tipping supplement and makes a positive theory more difficult.[8]

Finally, I should note that customers do not normally make discretionary payments to salespeople in a retail store, even though these customers are both excellent observers of service and rarely in direct competition with other customers. But in this setting the salesperson often receives a commission, in the form of a percentage of sales facilitated by the salesperson, which is a good deal like the fixed service charge at some (no-tipping) restaurants. In the case of restaurants, we normally choose the establishment but not the waiter. The worst waiter in the restaurant may deliver the same amount of food and drink as the best waiter; discretionary tipping, or commissions, rewards the attentive and knowledgeable waiter, and it does so in a way that serves the employer's interest because

[8] This is a cousin of the argument that multiple principals served by a single agent (as in the case of most homeowners who employ a single real estate agent to sell their houses) will prefer fixed commissions that reduce the agent's incentive to prefer one seller over another. See Saul Levmore, Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards, 36 J.L. & Econ. 503, 507 (1993).

it encourages return visits. In contrast, we often spend time in retail establishments without buying anything, so that fixed commissions are more likely to offer differential rewards to skilled and attentive salespeople than they would to waiters.

Tipping is rare where the customer already pays the provider by the hour, but this variable may simply camouflage the question of whether the customer is especially well situated to help determine the provider's compensation. Gardeners, psychiatrists, electricians, lawyers, auto mechanics, and plumbers are not tipped even when they are employees, even though there would rarely be a problem of competitive tipping, and even though there is an element of personal service that most customers think they can evaluate. Ski instructors are counterexamples because they charge by the hour but are, nevertheless, often tipped. It is possible that the ski school student has more private information than the other clients implied in the preceding list of hourly professionals, but it is more likely that the ski school student is the one least likely to offer repeat business. More likely, these cases and exceptions remind us that norms are imperfect contractual supplements in the sense that they require some cultural convergence and are difficult to modify. There is, for example, something awkward about—which is to say that there is a mysterious norm against—tipping across or up the socioeconomic ladder, and perhaps a positive theory should limit itself to the presence or absence of discretionary transfers to relatively low-earning providers.[9]

[9] Something of this sort may be at stake in the (old-fashioned) norm of refraining from tipping when the service provider owns the establishment. The cultural interpretation of this practice is that the entrepreneur is more of an equal and that it might be insulting to suggest that an immediate ex-post evaluation is necessary to encourage effort. At the same time, the dual agency approach suggests that the entrepreneur fully internalizes the various interests in repeat business and the like. The boss is already on a 100% commission, so to speak, and the threat of a dissatisfied customer is a substantial threat indeed. Note that this suggests that the practice of withholding tips from provider-owners should be absent, or at least weaker, where the customer is normally a one-time client. Indeed, the sometime norm against tipping entrepreneur-hairdressers has not discouraged the tipping of taxi-drivers who own their vehicles and medallions.

The awkwardness of tipping in one direction is offset, or sometimes exacerbated, by gift-giving norms. Clients do not tip lawyers, but they do send occasional gifts, and various professionals receive very substantial gifts or bonuses (or even de facto commissions) in the event that the client experiences a particularly good outcome. Such gifts and commissions can travel down the economic ladder as well. Gamblers

If it is easy to rationalize the conventional disinclination to tip some service providers, it is more difficult to understand the presence of a tipping practice with respect to others. One such puzzle is the practice of tipping when receiving delivery of prepared food. The customer who tips the pizza delivery person is, after all, in a poor position to observe service because it is hard to know whether the provider hustled or whether it was simply a slow night in the ovens or on the roads. These gratuities may however offer a kind of risk pooling; if the pizza parlor is experiencing a slow evening, the few customers who are served will perceive the delivery person as skilled or attentive, and the increased tips they provide may compensate for the slow business. But if this is the case, it is of little interest here because the employer could directly provide this sort of compensation, evening out busy and slow nights. The practice, or norm, is not needed to supplement the obvious contract.

The pizza practice may have a simpler explanation—but again it is one that has nothing to do with norms as supplements to contracts. The delivery must be paid for at the recipient's door, and the absence of exact change may have generated tips as a kind of rounding routine, as reflected in the expression "keep the change."

B. Norms and Laws

1. Prices and Sanctions

Norms can supplement legal rules by coloring around the rules in a way that informs actors as to whether a rule is a serious signal, or "sanction," or is instead a mere price.[10] I begin with the price-sanction distinction and then use a straightforward example to communicate this idea of norms as supplements to laws. There are

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tip their bookies, and even the clerks at the racetrack windows, after a big win. But difficult as it is to limit the discussion here, I need only to make the case that norms can often supplement private contracts. The norms governing gratuities certainly seem to do this, although they do much more as well. In the early twentieth century some state legislatures considered legislative sanctions against tipping, and there were apparently antitipping leagues. One explanation for these movements is that the practice was considered demeaning to the recipients. See Viviana A. Zelizer, The Social Meaning of Money 94–99 (1994). A modern view might insist that the rhetoric of that era might have been about class differences but the reality might have been about competition among tippers.

[10] There is much more to be said about prices versus sanctions. A good starting point is Robert Cooter, Prices and Sanctions, 84 Colum. L. Rev. 1523 (1984).

surely other kinds of supplements that law can use and that norms can offer. And norms plainly do some things that cannot be described as supplementing law. I do not aim to offer an exhaustive theory or categorization of norms. Norms may sometimes, though rarely, be substitutes for laws, and norms may be unrelated to laws. My aim here is to describe a subset of norms. This subset contains norms that supplement legal rules, and thereby produce packages that are superior to those that laws (or norms) alone can generate.

When is a legal rule a mere price? There is a surprising dearth of literature and agreement on the subject. Imagine that *A* pollutes in a way that harms *B*, and that *B* sues and collects $1000 from *A*. If *A* wishes to continue as before, despite the liability imposed by law, *A* might bargain with *B*, hoping that *B* would sell the right to collect from *A* (as a result of *A*'s repeat tort) for less than $1000. *A* might instead seek legislative approval, amounting to a kind of reversal of the law made in court. And there are other steps *A* might take, including doing nothing more than polluting as before. If *B* then sues *A* again, and then a third time and so forth, it is possible that *A* will simply pay or settle for $1000 each time, setting aside the possibility that *A*'s damages have changed slightly with time. The law and economics literature sometimes assumes that this tort suit is a mere price, in which case *A* can continue to operate as before and pay the $1000.[11]

It is possible that tort liability is less than a price, by which I mean that *A*'s continuing behavior might influence a judge to reverse prior law, if only prospectively, and to find no liability on *A*'s part if only because *A*'s willingness to pay shows (very loosely speaking) that *A*'s behavior was not in fact negligent. *A* did not find a cheaper precaution, and *A*'s gain was apparently greater than *B*'s loss because *A* is now willing to pollute and to pay. Of course, this creates something of a moral hazard. If *A* knows that a court might accept stubbornness as a sign of rightness or efficiency, then *A* might inefficiently continue as before, but the point is that

[11] There have been some objections to this theory on grounds that *A* is being permitted to "steal" or condemn *B*'s entitlement. See Daniel A. Farber, Reassessing *Boomer*: Justice, Efficiency, and Nuisance law, *in* Property Law and Legal Education: *Essays in Honor of* John E. Cribbet 7 (Peter Hay & Michael H. Hoeflich eds., 1988); Saul Levmore, Unifying Remedies: Property Rules, Liability Rules, and Startling Rules, 106 Yale L.J. 2149, 2165 n.48 (1997).

liability can sometimes be treated as less than a price in the sense that *A* might have reason to expect past liability judgments to sketch an upper bound of future liability.

But it is also possible, and perhaps much more likely, that repeated and unabated emissions by *A* might lead a court to deplore *A*. A court that regarded *A* as wrongfully failing to bend to the signal offered by the earlier imposition of liability might lose patience as it were, and raise the liability judgment or find another more severe penalty to impose on *A*. *B* might, for example, be permitted to recover punitive damages, or *B* might gain an injunction against *A*, and *B* might be able to trade these legal assets to *A* in return for more than $1000. Good lawyers will hesitate before telling *A* (or *B*) that one tort judgment in favor of *B* is merely a price for *A* to consider in the future, for it may be something considerably riskier than that (or even something less).

In short, and at least in private law settings, it is by no means obvious when liability rules are prices, which is to say costs or starting points for bargains, or something more or less than that. Laws are more than prices when courts[12] had expected behavioral changes and are annoyed to find no such changes. Laws are less than prices when courts observe through repeat litigation that there have been no behavioral adjustments, and then reassess their original findings in a way that now yields to *A*. My concern here is not with these occasional instances where law turns out to be less than a price. My focus, instead, is on a party's ability to discern when a legal rule is a price (or less, I suppose) and when it is more than a price, or what I have been calling a sanction.

The same uncertainty that is found in tort law and other private law is found in public law and in extralegal private practices. In the latter arena, nonadjusting behavior is sometimes taken as a sign of disrespect, although there is always the possibility that brazen determination leads to a reassessment of the rules. On the one hand, if a child throws food during dinner and is required to pick it up and to express regret, we generally expect the disciplinarian to try some bigger weapons if, after paying the price, the child coolly

[12] Of course, the reacting party might sometimes be an administrative agency or legislature, but the discussion in the text sticks with the image of courts reacting to post-judgment behavior.

hurls some more food across the room. On the other hand, a friend or business associate who is often late to a meeting is likely to be greeted with decreasing (social) penalties as acquaintances adjust to the habitual tardiness and implicitly recognize that this person finds it costly to arrive in timely fashion.

In public law, as in these other settings, there are often clues as to whether formal rules are more than they appear. Even where formal rules do not announce that a repeat offender will be treated more harshly than a first-time offender, such things as the non-transferability and uninsurability of prison sentences, not to mention the difficulty of apprehending all offenders, suggest to all players that repetition is likely to generate severe treatment. But this sort of case is made less interesting than it might be by the fact that we rarely take seriously the problem of overdeterring or chilling serious criminal behavior. It is where overdeterrence is more palpable that the price-sanction distinction is most interesting.

2. Laws and Norms in Ordering Parking Violations

Consider, for example, the rules set out and implied by parking meters on a commercial street. Imagine that *P* has an important meeting in the area, and that *P* expects the meeting to last three hours. There are no available spaces in nearby commercial lots, and the meters will only accept coins for a one-hour maximum stay. *P* knows that it will be very costly to leave the meeting in order to feed the meter; *P* is unable to contract with someone to feed the meter on her behalf; and *P* is sufficiently surprised by the congestion that we can ignore the question of incentives that will cause *P* to arrive earlier or to use mass transit in order to solve the parking problem. One available option is for *P* to park at a meter, expecting with a probability approaching one that her car will be ticketed during the second or third hour of her stay and that she will then be required to pay $25.[13] Another option is to avoid the metered spaces but to park in some other illegal spot. If *P* thinks there is an oversupply of spaces set aside for handicap use (notoriously weak as such private assessments may be), *P* might park in

[13] It might be nice if I could reduce enforcement costs, by voluntarily paying the fine before receiving the ticket. Those who did not pay the fine in advance might be required to pay a more substantial fine, as discussed presently.

one of these spaces. The city will gain revenue from the additional vehicles that can now park in the metered space that *P* does not occupy, and other users (and merchants) will gain from the availability of this metered spot. Alternatively, *P* could park in yet another illegal spot, by blocking a crosswalk, for example, where the expected cost of the ticket might or might not be higher than that associated with overstaying at a meter.

With sophisticated meters, the price of metered parking could rise as fewer spaces remained, so that there would virtually always be open, metered spaces capable of accommodating willing buyers for short or long periods at market-clearing prices. The municipality would find it worthwhile to hold an inventory of spaces for rent. But with fixed prices and political obstacles to innovation, it is possible to imagine that it might be efficient and even fair (or morally acceptable) to park illegally if one is willing to pay the price.

My claim here is that social practices help law along by supplementing the information provided by formal rules. In this particular case, I suspect that most observers would agree that the norm against parking in a space designated for the handicapped encourages *P* to park in the metered space, even after the allowable hour, or in the crosswalk. And as between those two choices, there is probably a modest norm against blocking a pedestrian intersection and virtually no extralegal sanction that discourages overstaying at a parking meter. At some level this is an empirical claim, but (as usual with these sorts of things) it is supported by surveys of law students. My guess is that a politician would lose votes if it became known that he or she regularly blocked crosswalks, and simply paid tickets when they were issued. Fewer (or no) votes would be lost if the news was that the politician received but then paid numerous tickets for meter violations.[14]

It is likely that these norms about parking improve upon law alone. The legal regime creates something of a market mechanism for the purpose of allocating parking spaces in a congested, commercial area but, owing to logistical problems rather than conscious design, it is a primitive system. Roughly speaking, we might say that the law here has no reason to overdeter *P*'s parking, and that accordingly the law offers high-value, desperate parkers the

[14] The conjecture assumes that the politician is not particularly wealthy.

opportunity to park beyond the meter's expiration time so long as they pay a substantial overcharge in the form of the fine. There are many informal and formal signals in favor of this interpretation. Tow trucks are more likely to clear crosswalks and handicap spots than they are to clear long-term parkers from short-term meters. And the fine at the meter is likely to be less than that in the crosswalk and much less than that associated with invading the handicap-designated space. On the other hand, there may be more enforcement at meters simply because it is more cost-effective to patrol streets with numerous meters than to monitor side streets where there are only crosswalks that might be blocked. But the point of social norms is that expected extralegal sanctions or reactions are better known or better constructed than these direct signs from lawmakers and law enforcers.

3. Laws and Norms: Parking and Smoking

The situation is subtler than depicted thus far, and to see this it is useful to contrast the parking case with one where the social reaction to a violation of a formal rule is more disapproving. Consider another price-sanction puzzle for the potential violator. A smoker, *S*, wishes to light up in an area designated as nonsmoking. The easy case is where a smoking area is offered nearby, because it is hard to imagine that the cost to *S* from lighting up in the forbidden area exceeds the costs absorbed by all those who seek a smoke-free area.[15] I am hardly suggesting that the legal mix of smoking and nonsmoking areas is optimal; indeed, this imperfect mix is a topic to which I return below. But it is quite likely that some sort of separation of air spaces is a fine idea, in which case *S* is likely to impose substantial costs when he invades the area designated to be free of smoke.

Our smoker's best hope for tolerance, or for a norm in favor of treating the legal rule as a mere price (or less), is surely where there is no smoking haven nearby so that the cost of compliance is high. Similarly, overstaying at a meter or parking in a crosswalk is much less interesting where the meter accepts coins for longer periods or where there are available spaces in a nearby commercial

[15] This calls for some annoying interpersonal utility comparisons, but at least we can say that the nonsmokers could bribe the smoker to move to the smoking area.

parking facility. In these cases, we might still tolerate self-centered parking violations, because other citizens are now less inconvenienced (inasmuch as they too can use the garage, for instance), but it is increasingly likely that our parker is simply gambling on the municipality's enforcement strategy. Put differently, there is something of a collective action problem in law enforcement. Whether a legal rule is intended as a price or as a more serious sanction, everyone would be better off with more conformity and less costly enforcement. It follows therefore that a problem with deploying the law-as-price approach as a means of discriminating among persons with different reservation prices is that more aggressive enforcement is needed in order to sort these persons. If no one expects a ticket at an expired meter, then it is possible that a norm will develop to limit parking to the metered period, but it then will be impossible for persons who are desperate to park longer to do so by paying more. By hypothesis, the meters or their programmers are unsophisticated and incapable of providing perfect peak pricing and an inventory of spaces; moreover, high enforcement costs (or at least the expectation of weak enforcement) destroy (even) the simple pricing system offered by conventional meters. And the norm alone will fail because members of the community will simply notice individual parking violations and have no way of knowing whether a given violator was really willing to pay a high price. Law that is enforced can on its own offer something of a market in a way that is superior to norms alone. But law and norms together, as we have seen, might do much better by not only enabling desperate, high-valuing parkers, but also by directing these violators, or price-bearers, to some violations rather than others. Norms direct *P* to overstay at a space served by a meter rather than to occupy a crosswalk or a space reserved for handicapped users.

Still, we sense that if a desperate smoker, like *S*, lights up on a nonsmoking airplane flight, he is in serious trouble both legally and socially. If *S* seeks to gain our consent by announcing that smoking is important to him at the moment, then his announcement simply emphasizes the intentional character of the violation, and the social reaction will be all the more hostile. But what is the difference between the smoking and parking? Enforcement on the aircraft is remarkably complete, so we cannot explain the norm against all smoking by reference to enforcement problems. A town that failed

to enforce its sensible parking rules might generate a healthy norm against all parking violations, but a town that enforced its numerous rules to the letter would, I think, encourage *more* violations by desperate parkers who were willing to treat the fine as a mere price. The norm supplement is clearer and more valuable where law enforcement is excellent. And yet there is no relief for the smoker on the airplane; if anything, the norm has more bite than the law.

An important difference between the cases is that clean air is something of a public good while a single parking space is not. Sophisticated meters and combinations of laws and norms cannot guarantee beneficial trades in air quality. The smoker may be willing to pay the price established by law, but there are likely to be passengers on the plane who would pay considerably to maintain their smoke-free environment. If the fine is $50 or $1000, there will be times that a smoker is willing to pay that for the opportunity to light up, but there may be many nonsmokers willing to pay much more than that to maintain the clean air. It is difficult for law to set the right price, and it is almost impossible to use a bidding system in order to find market clearing prices, which would enable trades between the two groups.[16]

Even if we can limit the bargaining problem on the airplane to two groups, each group faces a considerable collective action problem in assessing the preferences of, and in collecting payments from, its members.[17] In the presence of these problems, the law

[16] Of course the law does need to set some price, and if high-end smokers were thought to be more desperate or willing to pay than high-end antismokers, a very high price (and no more) might be justified. One problem is that ignorant passengers might mistakenly light up; a modest fine rather than something on the order of $10,000 seems appropriate for these violators.

[17] If we permitted bargains, and implicitly accepted the idea of legal rules (and bargaining results) as mere prices, additional groups might form. Thus, some passengers might be willing to pay or be paid to establish a smoking section on the aircraft. One way to think of the complexity is to imagine that the legal rule simply provided for a majority vote by passengers on each flight to determine the smoking rules for that flight. But this move would turn an opportunity to think about norms into one that explored public choice problems. My comparison of smoking and parking is not intended to do that. But I am suggesting that group coordination problems (of the kind necessarily at stake in thinking about public choice methods) can explain a good deal about our use of norms.

simply sets a fine and then the norm informs passengers that there are no exceptions. This legal rule is more than a mere price.[18]

In the parking case, it is much less likely that when we satisfy intense demand it is at the expense of an equally intense loss. If *S* would pay $100 to smoke on an airplane, it is perfectly plausible that *N* would pay that amount to maintain clear air. It is even more likely that a few passengers, *N* through *R*, would combine to outbid *S*. But if *P* is desperate to park for the duration of a three-hour meeting, and would pay $50 to do so, it is much less likely that any other driver who actually comes along would pay that amount to keep that metered space available. The idea is that *S*'s smoke carries throughout the plane but *P*'s car uses only one parking space. *P*'s parking violation removes just one space of many from the available pool, and it is therefore much less likely that *P*'s marginal action imposes a loss that is the size of *P*'s atypical gain.

This point explains, in a sense, why the norm against overstaying in a metered spot is much weaker (or nonexistent) than that governing the illegal occupation of a handicap-designated space or a crosswalk. If *P* parks in one of these spaces, she may well inconvenience one or more persons who value the available space or crosswalk at least as much as *P* values occupying that spot. It is more likely that another high-end user needs the handicap-designated space or the crosswalk than it is that the last regular metered space is so required. This is especially so where there are many other metered spaces and very few others designated for handicap use. Our norms encourage *P* to choose the metered space rather than the others.

In short, the law-plus-norm package can be seen as remarkably efficient. In the parking case, it directs the desperate user because norms can discriminate among legal violations. *S*'s smoking on a commercial flight would be like *P*'s parking in some homeowner's driveway for a few hours in order to attend her meeting. *P* may have no other options, but the law and the social norm combine to offer the assessment that it is unfair and inefficient for *P* to assume

[18] I am not claiming that in the face of these collective action problems it would necessarily be inefficient for law to offer a single price that could be treated as a simple cost by desperate or intense users. Complexity does not force us to a corner solution in which laws are necessarily severe sanctions. My argument here is thus not a normative one.

that her special need trumps the homeowner's needs, which may after all be equally serious. In this (parking) setting, norms supplement law in the sense of providing signals or information that law alone does not communicate. More technically, law normally goes about its business by setting liability or fines at a level equal to the average cost imposed by the offender. Norms can supplement law by doing something about the variability of the occasional and high costs that offenders impose. The average cost imposed by *P* when she parks at an expired meter may well be the same as that which she imposes when she blocks a residential driveway. But when we focus on the tail of the distribution, which is to say on less likely events, it is more likely that *P* will (once in a while) impose very high costs on a homeowner who needs to exit than it is that *P* will impose very high costs on the next parker who comes along in search of a (sole remaining) meter. It makes sense for law to focus on the average imposed cost and for norms to supplement law by encouraging violators (whose benefit exceeds the average costs they impose) to avoid imposing very high costs (once in a while).[19]

It may be useful to repeat the point that enforcement problems can cloud the analysis. We might like *P* to purchase a ticket in advance of her illegal overstay at the meter or to mail in a check to the municipality before actually receiving a summons on her car's windshield. Indeed, we might have a separate, yet larger fine for illegal parking without such advance payment. On the airliner, the enforcement problem is solved by the presence of flight attendants, but in other smoking cases, it may again be the case that the

[19] An economist is immediately interested in the case where the average or expected cost of one kind of violation is higher, but the tail of the distribution of the other sort of violation is more pronounced. In this sort of case the legal sanctions might improperly signal the best violations. Consider, for example, illegal parking outside a hospital emergency room. Ambulances might get through if there are as many as five illegally parked cars, but a sixth car blocks the roadway and creates the prospect of a very high cost. Not only do the first few cars impose low costs, but they also provide benefits in the form of enabling drivers to drop off or pick up patients. It is difficult for law to draft the perfect rule, if only because it is hard for an authority to discern the order in which parked cars arrived (and because these parkers are accompanying needy patients, it is costly to have these parkers run in to acquire passes). The stated fine for parking in the emergency area is likely to be much higher than that associated with blocking a nearby crosswalk, but norms suggest that it is sometimes acceptable and certainly preferable to be one of a few cars parked illegally in front of the emergency room for a very few minutes.

smoker is less desperate and more convinced that there will be a collective action problem among potential enforcers who prefer to avoid confrontations about norms or to get involved in calling for public enforcement agents.

One of the features that drives the airplane example is thus the variability among passengers' tolerance for smoke. If we could confidently assess the value of smoke-free air to the hundred nonsmokers on the flight, we might be willing to offer a mere price to the one or two eager smokers. But it is difficult to assess these values, and whenever a desperate smoker appears who is willing to pay the high price the nonsmokers would demand, we are concerned that an equally idiosyncratic or allergic nonsmoker is present as well. In contrast, the frantic parker who overstays at a meter does not impose comparable losses on another desperate parker, because there are many meters and it is unlikely (or even perhaps impossible) that *P* imposes very high costs.

A second feature that is important in making norms a useful supplement to law in the smoking case—but also in the parking case—is that law alone may do well to limit penalties in order to take account of mistakes and chilling effects. It might be unwise to set the perfect price for smoking on a plane or parking in a handicap space, and to allow purchases, because occasional mistakes occur and it is difficult for law to gather all the information necessary for perfect rules.[20] It is easier for law to take norms as given (though these norms bend according to the signals law itself sends out), and then to do as best it can with two tools rather than one.

There are many other examples of the norms-as-supplements idea. Law requires that all motor vehicles be registered (and possibly insured) and that all drivers be licensed. In some communities, there is a strong social norm overlapping with the law against the unlicensed operation of a vehicle. But in some less affluent communities, unlicensed drivers and vehicles are commonplace—and apparently not in violation of local social norms. This is not a case of civil disobedience, or an example of a norm that reflects a sentiment that a law is horribly unjust. It is simply a case where the

[20] Mistakes might generate very high fines (prices), and, in turn, these fines might chill desirable activity. To the extent that itinerants are more likely to make these mistakes, it is interesting that they are also less likely to be influenced by extralegal sanctions.

norm suggests that people regard a violation of the law as extralegally inconsequential. It is possible that this sentiment is efficient, and another example of norms as supplements, or correctives. The cost of licensing and insurance may be too great for this population and yet, for many members of this population, the social benefit of driving without a license or without insurance may exceed the benefit of keeping the given driver and vehicle off the road. It is interesting to note that a pay-at-the-pump tax, which would cover insurance and other costs, may be an improvement over current law if only because it discourages marginal driving.[21] This is not the place to exhaust this example, but it is useful to think of it as a plausible (and novel) application of the norms-as-supplements idea to nontrivial laws.

Some of the papers presented at this symposium provide additional examples of the norms-as-supplements idea. I turn to these in Part II. Meanwhile, it may be fair to observe that we should not expect often to see norms operating alone without accompanying law. After all, some people may be immune to peer review, and little is lost by piling a bit of law on to existing norms. And of course law cannot hope to operate all alone, because norms are given; norms may change with law, but law finds them already out on the playing field it enters. Norms and laws can reinforce one another, and indeed extralegal sanctions normally reduce the level and cost of optimal law enforcement. One point of the discussion here has been that when we find law alone in a discouraging role—which is to say there is a law against *w* but a norm that encourages people to think that *w*, and violating the law against *w*, is of no great moral or social consequence—we should recognize that the absence of a reinforcing norm may serve the purpose of encouraging some participants to do *w* if they are willing to pay the legal price. Norms tell us when legal rules are (and are not) more than mere prices. Norms can supplement law in this way when law has a difficult task. Some norms supplement law and other norms supplement private contracts. The similarity is nothing more than that two tools can sometimes accomplish more than one alone.

[21] Unlicensed and uninsured drivers will find driving more expensive, but they might be expected to discriminate between important and unimportant trips. Current law and norms do this only by imposing a mileage cost in the form of some incremental probability of apprehension for unlicensed driving.

II. COMMENTARY: OVERLAPS AND SUPPLEMENTS

Why a symposium on law and social norms? Interested readers are often drawn to collections of work that deal either with a single substantive topic or a single methodology. But this conference is about a single set of connections: the relationship (if any) between law and social norms. Repeated applications of this kind, however loosely related, often generate new insights.

One question that lurks in the background is whether social norms do much work in law. We have laws against murder, and lawyers are understandably impatient with the observation that there are social norms against murder. These norms and laws might usefully reinforce one another, but the presence of these norms tells us little about the need for (and design of) laws regarding murder. Norms catch lawyers' attention when there is a claim either that some important behavior is puzzling or that some legal rules are themselves mysterious until one throws norm-thoughts into the mix. There is nothing puzzling about the coexistence, or "overlap," of the laws and norms discouraging and decrying murder.

A. Bending Toward Norms

Many of the papers in this conference identify and explore real puzzles about the coexistence (and overlapping quality) of laws and norms, and these puzzles demonstrate the utility of norm-thoughts. Paul Robinson's Article shows that, contrary to the preceding paragraph, there is actually something puzzling about the overlap of (criminal) laws and norms, because criminal law often diverges from what we might have expected this law to do if left to its own devices.[22] The criminal law is in many places best described as matching, or converging on, the content of widely held lay intuitions—sensibilities that may be synonymous with, or at least quite similar to, norms.[23] Robinson offers many examples to show that

[22] See Paul H. Robinson, Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control, 86 Va. L. Rev. 1839, 1858–59 (2000).

[23] I will not dwell on the relationship between intuitions and norms, but one important and perhaps troubling difference is that norm-thinking asks when and where there would be extralegal sanctions, whereas Robinson asks what people think

our criminal law defers to lay intuitions about justice even when this deference seems inconsistent with the aims of the criminal law. The puzzle is why criminal law bends toward norms in this way and Robinson's suggestion is that deference to lay intuitions improves upon the law's crime-control power.[24]

At one level this may seem obvious because the idea that norms and laws reinforce one another is fairly straightforward. But the deep point here is that law might purposefully choose rules—that law would on its own have avoided—in order to gain this reinforcement. In taking aim at goal *Z* (optimal social deterrence or whatever), law *Y* might seem superior to law *X*, but because the behavior of potential violators, jurors, and enforcers are all influenced by norms, *X* can come to dominate *Y* with respect to this same goal *Z*. There is, in other words, a cost to law's straying from norms, and law best does whatever it is that it is trying to do by cutting down on these costs. The idea is closely related to Robert Cooter's conclusion that a state that wishes to promote civic virtue is wise to align its laws with the prevailing social norms.[25]

At the risk of moving from the sublime to the ridiculous, note that Robinson's intriguing conception can be connected to the thesis advanced above, in Part I. Norms may efficiently or usefully encourage illegal parking of one kind rather than another, it will be recalled, but surely law can itself do this by announcing more severe penalties for increasingly disfavored parking options. In turn, Robinson would say, law might attach greater penalties to unauthorized parking in handicap-designated spaces than at expired meters, for instance, not because the social cost is greater for the former than the latter but rather because lay intuitions are that the former is more blameworthy than the latter. Given these lay intuitions, law sets its fines to conform to these intuitions in order to induce more compliance and to accomplish the main goal of ordering parkers in a socially useful way (even at the expense of failing

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of as criminal, or as more criminal than something else. Robinson is less interested in the question of whether and when most people would penalize or ostracize violators in extralegal fashion.

[24] See Robinson, supra note 22, at 1869.

[25] See Robert Cooter, Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 Va. L. Rev. 1579, 1599–600 (2000).

to direct desperate violators as law on its own might like to do).[26] My claim that norms refine law must therefore be modified to take account of the possibility that the modification is biased toward the prevailing norms and these may be somewhat at odds with what lawmakers or markets would generate on their own.

B. Signaling by Complying

Robinson's idea that lawmakers, or any set of formally designated authorities, exploit lay intuitions is nicely related to other suggestions in this symposium as to how we might exploit social practices. In some settings it is puzzling that we do not leverage these norms or practices. Consider, for example, Eric Posner's provocative and resolute Essay on tax compliance.[27] Robinson looks at the overlap between law and norms and shows us that there is so much overlap as to be puzzling; law bends toward norms (by seemingly using tools that match lay intuitions better than legal theory or the apparent aims of the law). Posner also emphasizes the overlap—rather than the supplemental quality of norms—but for him the puzzle is why people comply when law alone makes compliance irrational.[28] Law and norms may reinforce one another, but the question for the resolute rationalist is why norms hold sway over self-interested players. Posner's suggestion, as readers of this sym-

[26] Note that I use the example of handicap-designated spaces and meter violations rather than a paired combination of one of these and the blocking of crosswalks. This is because it is hard to think of any reason why law alone would rank crosswalks as less serious than meters. As such, the legal fines and lay intuitions simply run together for this pair, and there is no opportunity to observe Robinson's most interesting result, namely that to accomplish its own ends, law might bend toward norms. It is plausible, however, that law bends in its elevation of the fine for handicap-space occupation, because there is at least an argument to be made that there is sometimes an oversupply of these spaces.

[27] See Eric A. Posner, Law and Social Norms: The Case of Tax Compliance, 86 Va. L. Rev. 1781 (2000).

[28] See id. at 1782–83. Note that we would not expect norms to supplement law in tax compliance as they do for parking violations. In the parking case, we recognize that at different times different violators have very different needs, and we wish we could satisfy and perhaps charge according to these differentiated needs. But in the tax case, all violators are trying to save money, after a fashion, and there is less of a case to be made for encouraging some violations rather than others. In the parking case, lawmakers might well wish they could order the violations (and norms do this for them). In the tax case, lawmakers would prefer 100% compliance or something very close to that.

posium know, is that it makes sense to do what others admire because these other people will want to enter mutually advantageous relationships with cooperators rather than with (narrowly) self-interested defectors.[29] The compliant taxpayer *signals* his or her suitability as a partner. One who fails to comply with tax law faces not only a modest legal sanction (in expected-value terms) but also a loss of contracting opportunities. The legal and extralegal threats may combine to make compliance rational. Robert Cooter also emphasizes the value of conformity, or norm internalization, in terms of increased opportunities with others.[30] I refer presently to Posner's arguments, but space allotments prevent me from commenting on every paper offered in this symposium. I encourage the reader to work through Cooter's contribution; his demonstration of tipping points and multiple equilibria is one of those insights that every law student and professor should internalize.

Posner's argument about the signaling value of compliance with tax laws[31] is vulnerable but perhaps ultimately indestructible. We might insist that it is unpuzzling that most people comply with the tax law, because noncompliance raises the probability of future audits, and the expected cost of these audits is great (or at least costlier than Posner's opening gambit allows). At the same time, we can criticize the back (norm) end of the argument by wondering why lawmakers do not exploit more fully the signaling power of compliance. If taxpayers comply because they are afraid of sending negative signals—in the form of discoverable information about violations of the tax law—to potential partners, then why so few negative signals and why not many more positive signals? Taxpayer *T*'s potential partners do not know when *T* is audited or when *T* has been required to pay civil penalties.

Posner does suggest that the government might strengthen the nonlegal sanction by publicizing noncompliance more than it does at present.[32] But why not, we must wonder, publicize or certify when an audit shows perfect compliance by *T*? This sort of strategy might even generate more of an interest group in favor of govern-

[29] See id. at 1786.

[30] See Cooter, supra note 25, at 1595; Robert Cooter, Expressive Law and Economics, 27 J. Legal Stud. 585, 598–601 (1998).

[31] See Posner, supra note 27, at 1786–91.

[32] See id. at 1796.

ment expenditures for tax law enforcement and administration. As a normative matter it is noteworthy that lawmakers are likely to interfere with signaling opportunities. If taxes were not withheld from *T*'s wages, *T* would have more opportunity to demonstrate compliance and capacity for cooperative relationships. Might it therefore be in the social interest to repeal our laws about mandatory withholding, even though there is powerful evidence that this would raise noncompliance at great cost to the Treasury? Might the government's loss be more than offset by the social gain that can be captured if there are more opportunities for voluntary compliance and signaling?

One answer is that some people do not care about their reputations, so that there is the danger that additional cheating by these people will overwhelm the gains from additional compliance (and signaling benefits) by dutiful taxpayers. Another answer is that there are sufficient opportunities to send and read signals, so that there is no need for the government to create more. Even if all my income is subject to withholding or is electronically reported to the government, there are other opportunities for noncompliance and therefore for signaling. Similarly, *T* may avoid a life of crime in order to signal future partners about his trustworthiness, but this hardly means that the government should leave doors unlocked (but premises loosely policed) in order to maximize opportunities for *T* to signal that he resisted temptation.

But if there are sufficient opportunities for signaling, and if signaling is valued, then why do potential partners not ask useful questions? For example, state law normally requires *T* to pay a compensating use tax when *T* avoids direct sales taxes by purchasing items from out-of-state vendors. Some states cleverly encourage consumers to pay this tax by sending a form and informing taxpayers of their obligation. At least in these states, most taxpayers could not possibly explain their own noncompliance by claiming ignorance of the law. And yet I have never heard of an employer (or other potential partners) surprising applicants by asking to see evidence of the previous year's compensating use tax payment or form. The idea is that if signals are valuable, potential employers (and others) should participate in the enforcement process by conducting audits of their own, after a fashion. And if the problem is that potential employers fear that too many appli-

cants (or other potential partners) would regard such inquiries as wrongfully intrusive, then the signaling idea is again weakened if only because it is these very potential partners who are supposed to gain from the signaling opportunities.

A similar point could be made about the "nanny tax," which is to say the tax obligations generated by employing domestic help. It is not just that many people are in noncompliance with state and federal law. That fact could be explained by the low and infrequent legal sanction, along with the fact that the extralegal sanction (offered by potential partners) is weak because of the infrequency of the legal sanction. It is instead that potential partners could ask about these things and they do not. But, again, a signal does not need to be as strong or as well utilized as it might be for us to believe in its existence. A clever and well-read employer, or other potential partner, might be expected to react to Posner's provocative Essay by now asking questions about past nanny taxes and compensating use taxes.

Posner's signaling argument is displayed in the context of tax compliance because individual behavior there seems irrational at first glance. But the central role of signaling suggests that we might do better looking for evidence of its existence in the very relationships that are of the kind one wants to influence. *T*'s potential contractual partner, *U*, will probably gain more relevant information about *T* by checking into *T*'s past contractual relationships than by investigating *T*'s compliance with tax laws. Knowing this, it might be rational for *T* to work hard on matters related to existing contracts, and to reason that noncompliance is rational with respect to government laws because *U* will investigate and value *T*'s private relationships more than *T*'s relationships with the government.

In some settings this sort of reasoning raises a different set of puzzles about signals. *T* might choose to comply with the nanny tax, for example, not because noncompliance (if discovered) would ruin opportunities with any *U*, but because noncompliance will be obvious to the nanny. *T* might fear that the nanny will interpret the signal to mean that *T* is rather casual about complying with laws—many of which *T* desperately hopes the nanny will abide by in caring for *T*'s children. The fact that so many taxpayers ignore the nanny taxes suggests perhaps that they do not think that private

parties with whom they deal put much stock in information about compliance with tax laws.

A more general question is whether any compliance information can be useful as a means of screening people for their cooperative worth. Owen Fiss has suggested that there is a case to be made for not allowing settlements before claims are brought.[33] If we add signaling to the mix, the idea might be that every legal dispute is an opportunity to broadcast to the world the parties' proclivities. If *A* contracts with *B* and the latter breaches opportunistically, settlement deprives *C* of the opportunity to learn about *B*. *C* might ask *A* for a reference (or *A* might offer to provide one), and *C* might in this way learn from *A* about *B*. But if the claim is that law adds value to signaling (beyond what parties can broadcast about themselves or ask about others on their own) then there is something to be said for public records of private disputes.

C. Laws as Signals

The focus of the Article by Richard McAdams is also on the overlapping coexistence of norms and laws, and it provides a new idea to explain the duplication.[34] The idea is that cooperative practices sometimes require focal points or agreement—and law can facilitate beneficial cooperation by communicating such points or equilibria.[35] Thus, drivers need a signal as to whether to drive on the right or left, and whether and when northbound or southbound traffic should pass on a hilly two- or three-lane road.[36] Law provides these signals with rules, occasional signs, and appropriate dashes and solid lines on the asphalt.[37]

As usual, McAdams is optimistic and clever. Only a dull skeptic would complain that if his observation were important we would often find overlapping laws and norms with no legal sanction for failing to abide by the laws. Instead, we rarely find purely expressive (or equilibrium-pointing) laws. This observation may be a restatement of Robert Ellickson's point that law does not have

[33] See Owen Fiss, Against Settlement, 93 Yale L.J. 1073 (1984).

[34] See Richard H. McAdams, A Focal Point Theory of Expressive Law, 86 Va. L. Rev. 1649 (2000).

[35] See id. at 1663–64.

[36] See id. at 1709 n.130.

[37] See id. at 1704–06.

much of a competitive advantage when compared with norms.[38] I return to this point presently.

It is even duller to wonder publicly why focal points are so rare in real life. Thomas Schelling's famous example has students in New Haven meeting their mystery partners under the big clock in Grand Central Station.[39] But the train from New Haven goes to that station, few urban college students had cars in that era, and the need for an agreement as to a time suggests the clock, so the success of this focal point is less magical and representative than it first appears. Strangers in England might also manage to meet beneath Big Ben. But if the same question were asked in the environs of Los Angeles or Washington, I suspect that focal points would seem unattainable.

With respect to the overlap of laws and norms (or, alternatively, the supplemental character of some norms), the most interesting claim about the expressive character of law in guiding cooperative parties is that law and norms might well overlap completely—but law chooses the rules. My point here will be that we might sometimes desire norm entrepreneurs to choose these rules, and for law to bend toward these norms and to assist at the enforcement end. The point is relevant to the papers by McAdams and by Cooter, and it is hardly inconsistent with either.[40] An example is useful.

Consider again that favorite of the norms literature, smoking and nonsmoking areas. One approach, most easily attributed to McAdams, is to think of citizens as grasping the advantage of occasionally segregating themselves into smoking and nonsmoking areas, but as failing to do this smoothly without some coordination clues. Some smokers might prefer to socialize with other smokers, and many would be willing to bear modest costs in order to avoid offending, or being confronted by, nonsmokers. In the absence of designated areas, the smoker risks giving offense wherever the smoker lights up.

One way to sort smokers and nonsmokers is with an asymmetry.[41] If a few smokers light up early in the evening at restaurant

[38] See Robert Ellickson, Oral Comment at "The Legal Construction of Norms" conference at the University of Virginia School of Law (Feb. 26, 2000).

[39] See Thomas C. Schelling, The Strategy of Conflict 55–56 & n.1 (1980).

[40] See McAdams, supra note 34 at 1678; Cooter, supra note 25, at 1599–600.

[41] See McAdams, supra note 34. at 1713–14.

tables located in booths near the bar, subsequent patrons might read the smoke signals as suggesting that smokers be seated in that section, and nonsmokers elsewhere. The asymmetry of the restaurant's floor plan can certainly help to sort the clientele. In a hotel, sorting is more difficult because newcomers will not know which floors already house smokers. Law can help out here. Lawmakers might decree that the x% of hotel rooms that are most distant from the lobby be designated smoke-free. Guests who are assigned to the uppermost floors of a hotel would know to be pleased if they preferred smoke-free air, and smokers would know to ask to switch to a lower floor.

But is there any reason to think that lawmakers will choose x wisely? In the case of marking lanes for passing on a highway, there is no reason to think that the state might be inefficiently biased in favor of northbound or southbound cars. The designation of smoking areas is, however, less neutral. The idea of designated areas is clever (and nearly neutral) but the optimal size of each area is a difficult question and one that is not immune to interest-group politics. When law tells restaurants how many seats to guarantee nonsmokers it is doing much more than solving a coordination problem among patrons. It is plausible that the restaurant's owner is better positioned not only to designate the smoke-free zone but also to indicate its size. But there is some reason not to allow the owner to change the size of the designated area, as she would like in response to short-term demand. The point of legal intervention in this area might be to protect nonsmoking patrons against the risk that they will travel to a restaurant only to find that on this occasion smokers are everywhere. Restaurants could react to this risk by guaranteeing smoke-free sections, but the transactions costs associated with this sort of contracting may be substantial.[42]

[42] Put differently, we might generally ask for evidence (or at least a theory) suggesting some market failure before law chooses a mix of regulatory regimes that a private party was equipped (and motivated) to choose. In the highway case, no private party has an incentive to draw dashes and lines carefully, and the government has no reason to prefer southbound or northbound drivers. But in the hotel case, for instance, the owner has a financial incentive to please customers, and we might look for evidence of market failure before we empowered or encouraged the government to choose the percentage of rooms that must be smoke-free.

In short, overlapping laws and norms may hide the fact that without the (expressive) laws, the norms would be slightly different. McAdams is surely right about this, but in practice there will always be the question of whether lawmakers are any good at efficiently or neutrally choosing among possible mixed rule systems. Indeed, this may be why in some contexts[43] norms erase—rather than supplement—law. Law provides sorting equilibria, for instance, but it may do so poorly enough that norms develop such that people abide by some laws and not others. Thus, law may usefully sort bicyclists and pedestrians along paved park paths by designating some paths to be bicycle-free. But if law does a poor job of predicting the mix of users, then it is likely that in some parts of some parks norms will contradict laws, and bicyclists will be found where they are technically forbidden, and so forth.

But if the details—whether drawn by law or by private entrepreneurs—are reasonably well decided, then it makes sense for law and norms to overlap. In the hotel case, private entrepreneurs designate the number and location of hotel floors (if any) that will be smoke-free, and law overlaps by enforcing these privately designated boundaries (along with the "norms police" who give disapproving looks in the event of violations). The same overlap can occur where law provides reasonably good details. Legal and extralegal sanctions will often work well together. I might even insist that this view suggests that in the restaurant case, norms *supplement* law. Law requires some smoke-free designation and may indicate its minimum scale; private parties supplement law with the details of the zones and they often create larger smoke-free zones than required by law; norms and law then work together to enforce these private add-ons.

D. Bending Norms

This last point draws us, finally, to Elizabeth Scott's convincing Essay on the difficulty of norm management in the context of mar-

[43] See Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 Va. L. Rev. 1603, 1608–09 (2000) (commenting on an example where hikers and dog walkers signal one another about the seriousness of posted signs barring dogs from trails).

riage.[44] I would like to stress here that (among other things) Scott can be seen as taking the Cooter and McAdams (expressive or sorting) ideas one step further by encouraging us to think of features of the legal regulation of marriage as little more than the state setting out several options from which parties can choose. McAdams advances the idea of one regulatory scheme, pointed to or expressed by law, solving a coordination problem, and enforced by self-interest, law, and social practice. Scott's example has the state offering a menu, with any choice supported (at least within some subsets of the community) by a social norm. Louisiana famously permits a choice between covenant marriage and conventional marriage, which is to say marriage with the option of no-fault divorce.[45] Scott reminds us that the new choice of covenant marriage changes the meaning associated with choosing (even) the conventional option.[46]

This sort of limited menu and its interesting impact on private choices is both more familiar and more startling than is first apparent.[47] On the familiar side, couples who contemplate marriage have long been able to choose a civil ceremony or a religious ceremony; indeed, some choose a member of the clergy who will accede to their (interfaith or other) wishes rather than one with whom they have associated in the past. The clergy can impose requirements. A couple that chooses a cleric from one religion must go through prenuptial counseling, while one drawn from another church might have required promises about child rearing. The state does not offer unlimited menu options, but it does deputize most members of the clergy to perform marriage ceremonies. Given these choices, many couples that choose a civil ceremony in City Hall or with a local judge have emphatically rejected the (obvious) religious alternatives in a way that they would not if the clergy were not available for this function. Moreover, the very process of choosing among religious ceremonies, or entering a counseling process as a precursor to some ceremonies, might cause a couple to discover

[44] See Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901 (2000).

[45] See La. Rev. Stat. Ann. §§ 9:224(c), 9:234, 9:272–75, 9:307–09 (West Supp. 2000).

[46] See Scott, supra note 44, at 1967–68 & n.189.

[47] Revealed conflicts may cause the discussants to fear that they are not ready for marriage.

that they are unwilling or unready to marry. Scott's point about the "bundling effect," or about the baggage that might go along with choosing covenant marriage, is thus a new example of a familiar problem in norm management.[48]

On the startling side, Scott's example reminds us that the ranking of preferences can change when new alternatives are not as irrelevant as they first appear. An example familiar to every student of social choice theory begins with the opportunity to choose between vanilla and chocolate ice cream; imagine, then, that I respond with a preference for vanilla. Now the choice set is expanded to include strawberry ice cream. I might select the new option, strawberry, but we would think it funny or irrational if I now preferred chocolate. But imagine now a couple, *C*, that selected conventional (no-fault divorce) marriage when the state offered only conventional marriage or, of course, no marriage. Now (prior to *C*'s actual marriage) the state offers covenant marriage as a third option. Is it not plausible that *C* might now choose the option of no marriage? The choice between conventional and covenant marriage may have exposed conflicts between these two people. A preference by one or both for conventional marriage over covenant marriage may be understood by the couple as a warning sign that any marriage is a poor choice for them. Strawberry ice cream may be an independent alternative that is irrelevant to the ranking of vanilla and chocolate, but where serious interpersonal relationships are involved, seemingly independent alternatives (like covenant marriage in Scott's discussion) may turn out not to be independent and irrelevant (with respect to the preference for marriage over no marriage).[49]

As I have learned from Elizabeth Scott, the same is true for much of the regulation of marriage. The possibility of prenuptial contracting might, for example, cause some couples not to marry.

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[48] Scott, supra note 44, at 1960.

[49] In this example the new option of covenant marriage plays much the same role as the option of a religious ceremony in the preceding example. In turn, the "bundling" of covenant marriage and gender concerns (in the social perception or norm associated with covenant marriage) is like the bundling of a religious ceremony with many things individuals associate with that religion or a specific clergy member or a prerequisite for the religious ceremony. The state may not have intended any of this bundling when it agreed to fold civil ceremonies into religious ones chosen by the couple, but the baggage is not easily jettisoned.

Some people will avoid prenuptial arrangements or bargains because they fear that raising the topic would signal distrust. Others might raise the subject and in the end choose not to marry after a period of unsuccessful and tense bargaining. One advantage of norms in this context is that they may remove the variable of choice. If the norm (or the law) requires everyone to have a prenuptial agreement regarding certain subjects, then there is no negative signal attached to initiating this agreement process. In some communities, norms regarding wedding rings or transferring a certain number of cattle from one family to the other incorporate this feature. There is no reason why our modern laws could not do the same with mandatory rules—if Scott can convince legislatures that prenuptial bargains are of sufficient value—but it may be impossible to do the same for alternative marriage forms.

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