A NORMS APPROACH TO JURY "NULLIFICATION":

Interests, Values, and Scripts

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A. Introduction

1. Lay Tribunals and Norms

Juries and other lay tribunals are curious institutions. Undoubtedly, decision-making with juries and other types of lay participation is less efficient than decision-making by professional judges alone. Nevertheless, many societies include some form of lay participation, at least in criminal cases.[1] Other benefits of lay participation are thought to more than compensate for this cost. On the criminal side, the most important justification is that lay participants offer a check on state power and their inclusion underlines the fact that every citizen is on both sides of every criminal prosecution.

This justification, however, does not explain the use of civil juries. The benefits of civil juries must be sought elsewhere. One frequently cited justification focuses on the benefits of a law/society exchange. On the one hand, jury service offers those who participate a type of citizenship training. Jury service teaches individuals about the law and the legal system and in

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[1] Joseph J. Kodner, *Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231 (2003); Stephen Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 319 in NEIL VIDMAR (ED.), WORLD JURY SYSTEMS (2000); NEIL VIDMAR (ED.), WORLD JURY SYSTEMS (2000).

some rather diffuse way makes them better citizens.[2] On the other hand, and perhaps even more importantly, juries and other tribunals bring their own values to law. Lay participation is a good thing because it leavens the law with community norms.[3] It is this leavening justification that is the focus of this essay.[4]

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[2] Although this rationale is often advanced, actual data on the long term effects of jury service is surprisingly sparse. In the short run, most people report that the found jury service to be a worthwhile activity and are glad they served. However, because of selection effects (in the United States the vast majority of people called to jury service never appear) it is difficult to be certain whether jury service would have the same short term salutatory effect on all individuals. John Gastil, Pierre E. Deess and Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. OF POLITICS 585 (2002) found that citizens who served on criminal juries that actually deliberated to a verdict were more likely to vote than jurors who failed to reach a decision or begin deliberations.

[3] For example, the United States Supreme Court provided this justification in Witherspoon v. Illinois, 391 U.S. 510, 519 & n.15 (1968). A number of commentators have provided this explanation. See Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1198 (1997). ("In their interpretation of instructions, juries tilt application of general rules toward particularized justice. They know less of the law than judges but arguably more of the social norms and practices that may inform law's application. "); Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law*, 91

In this regard, it is helpful to array legal tribunals on a continuum. At one end are courts comprised only of professional judges, in the middle are various forms of mixed tribunals, and at the other end lay juries. As one moves from a professional judge model to a jury model, presumably one increases the possibility that community norms will infuse a decision.[5]

The decision whether or not to adopt a jury system highlights an interesting question of balance. Although we may wish to have juror inputs because they bring societal norms to bear on cases, we generally condemn juries that appear to disregard the law and instead decide a case based solely on their own norms and values. Jury nullification is generally thought to be a bad

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GEORGETOWN L. J. 633 (2003). Recently, a United States federal district court judge in an "open letter" to fellow judges decrying the decline in the frequency of jury trials in federal courts argued, "without juries, the pursuit of justice becomes increasingly archaic, with elite professionals talking to others, equally elite... Juries are the great leveling and democratizing element in the law." William Young, An Open Letter to United States District Court Judges, http://webspace.utexas.edu/rosem3/CRN/JuryArticle.pdf. (Last visited August 23, 2005).

[4] There are other justifications for juries. There is some evidence that a group such as a jury is more likely to get the facts of the case right than is a single judge. Phoebe Ellsworth, *Are Twelve Heads Better Than One?* 52, No. 4 LAW & CONTEMP. PROB. 205 (1989).

[5] Very few countries follow the American practice and use lay decision makers in civil cases. Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in NEIL VIDMAR (ED.), WORLD JURY SYSTEMS 1 (2000).

thing. Indeed, were juries routinely to disregard the law and do rough justice according to their own lights, this would create enormous pressures to change dispute resolution processes. By and large, however, we do not observe blatant examples of nullification. Insofar as juries do substitute their normative judgements for that of the law, they generally do so in more subtle ways.

Unfortunately, we do not have a particularly good theory of when and how juries substitute their normative judgements for the law.[6] A first step in developing such a theory is to examine the nature of norms and the way jurors bring normative judgements to their task. In this article I have two primary objectives. The first objective is to compare and contrast different understandings of norms that currently are in vogue in the social sciences. The second objective is to use these approaches to help us develop a more systematic understanding of when juries do and when they do not substitute their normative judgment for that of the law.

2. The Study of Norms

This is a particularly interesting time to examine the role of norms in jury decision making because norms are once again at center stage in socio-legal studies. Norms have never

[6] *See* Kaimipono David Wenger, *Nullifacatory Juries*, 2003 WIS. L. REV. 1115.

been too far from the limelight.[7] They long have been a staple of the sociology of law[8] and play an important role in law and psychology[9] and legal anthropology.[10] It is fair to say, however,

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[7] For example, a concern with the role of norms and customs is at the heart of Eugen Erlich's interest in the "living law." EUGEN ERLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (1936).

[8] See ELLEN S. COHN., & SUSAN O. WHITE, LEGAL SOCIALIZATION: A STUDY OF NORMS AND RULES (1990); JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY (1990); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community,* 18 LAW & SOC. REV. 55 (1984); Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study,* 25 AMER. SOC. REV. 55 (1963); Richard D. Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L. J. 471 (1954); PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE (1969).

[9] Both distributive justice and procedural justice theories frequently invoke norms of "fairness." See Karen A. Hegtvelt and Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications* in JOSEPH SANDERS AND V. LEE HAMILTON (EDS.) HANDBOOK OF JUSTICE RESEARCH IN LAW 93 (2001); Tom R. Tyler and E. Allan Lind, *Procedural Justice*, in JOSEPH SANDERS AND V. LEE HAMILTON (EDS.), HANDBOOK OF JUSTICE RESEARCH IN LAW 65 (2001).

[10] Nearly from its inception, legal anthropology has been concerned with the relationship between law and norms and the often vague line that separates them. See MAX GLUCKMAN, THE

that in recent years research on norms has not been at the forefront of any of these disciplines. The revived interest in norms comes from law and economics, a field that traditionally has been nearly devoid of norms discussions. As have other disciplines before them, law and economics scholars examine the relationship between norms and legal rules and how norms influence an individual's fundamental decision whether to comply with or avoid a legal prescription.

Those who are not part of the law and economics movement may find themselves somewhat bemused by the new law and economics norms literature for sometimes it seems that articles in this area are rediscovering insights achieved long ago by other disciplines.[11] However, law and economics does bring its own perspective to the study of norms and should inspire all socio-legal scholars to revisit the relationship between norms and law and how the two interact to create the socio-legal environment within which people live their lives.

In Section B, I focus on the nature of norms. I begin by contrasting norms and legal rules. Next, I discuss the law and economics approach to norms: an approach that conceives of

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JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1967 [c 1955]); CAROL J. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN (1986); KARL N. LLEWELLYN AND E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941); BRONISLAW MALINOSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY. (1970 [c 1926]); LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE (1990).

[11] Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC. REV. 157 (2000).

norms as interests held by rational actors. I then compare this approach to sociological perspectives on norms. These perspectives conceive of norms as values and as scripts embodied in everyday practices. In Section C, I use these different perspectives to inform a discussion of the use of norms by juries and other lay tribunals. I demonstrate how the three different understandings of norms: as interests, value, and scripts each helps us to understand jury behavior. And I argue that many of the well known examples of juries substituting social norms for legal rules arise not from juror self interest but rather from contrary social values, especially those values embedded in scripted, societal ways of reaching decisions that are contrary to the dictates of the legal system.

B. Norms

1. Norms and law

Most norms scholars draw a line between norms and law. Norms are not law if by law we mean, as Max Weber would have it, an order that is "externally guaranteed by the probability that coercion, to bring about conformity or avenge violation, will be applied by a staff of people holding themselves specifically ready for that purpose."[12] From this perspective, social norms are

[12] MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 5 (1954). Similar definitions include Donald Black's terse statement: "Law is governmental social control." DONALD BLACK, THE BEHAVIOR OF LAW 2 (1976).

nonlegal rules or obligations that influence individual decisions despite the lack of formal legal sanctions.[13]

It is easy to overstate the difference between legal rules and norms. Like law, norms exist when a socially defined right to control behavior is held, not by the actor, but by others.[14]

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[13] Ann E. Carlson, *Recycling Norms,* 89 CAL. L. REV. 1231, 1238 (2001). Paul G. Mahoney and Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient,* 149 U. Pa. L. Rev. 2027, 2030 (2001) offer a similar definintion: "Norms, as the term has come to be used in legal scholarship, are rules of conduct that constrain self-interested behavior and that are adopted and enforced in an informal, decentralized setting."

Like laws, norms run the gamut of potential sanctions. The violation of some norms may result in no more than a raised eyebrow, while others may lead to permanent ostracism. It is interesting to speculate about the overall severity of sanctions for norm violations. My sense is that at the very time when legal sanctions, especially criminal legal sanctions have become harsher and harsher in the United States, sanctions for many norm violations have become less and less severe. Etiquette norms, norms of civility, and aesthetic norms whose violation once constituted a social felony, now barely rise to the level of misdemeanor.

[14] JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 243(1990) . Ellickson offers a similar definition when he says that "a norm is a rule supported by a pattern of informal

Thus, like law, norms are a social, not an individual phenomena. Although norms must originally arise from individual actions, "a norm itself is a system-level property which affects the further actions of individuals, both the sanctions applied by individuals who hold the norm and the actions in conformity with the norm."[15] Moreover, the nature of the group holding this right to control can be more or less similar to the state, and thus norms can more or less approximate law. This idea is captured in part by Moore's concept of semi-autonomous social fields.[16]

For example, in most neighborhoods the aesthetic norm against painting one's house an inappropriate color is enforceable only through gossip, shunning, and verbal disapproval. However, some neighborhoods are organized into community associations with a board of directors. A house color objection by this formally constituted group is a more substantial sanction and presumably is more likely to cause the homeowner to acquiesce to group pressure.

Moreover, in some communities each home contains deed restrictions explicitly giving a community association board or a committee of the board a right to approve house colors and

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sanctions" Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 549, n. 58 (1998).

[15] JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 244(1990).

[16] Sally Falk Moore, *Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC. REV. 719 (1973). For Moore, a semi-autonomous social field is a group that can generate rules and coerce compliance to them.

other such matters. In these neighborhoods, proceeding in the face of disapproval on the part of the community association board of directors potentially may result in civil litigation to enforce the board's position. This example captures Bohannan's idea that law often may be understood as the "double institutionalization" of rules and norms originally embedded in other institutions.[17] Here, the norm of the community, as expressed by its community association board of directors, is reinstitutionalized into an enforceable legal rule. In such a circumstance, the line between norms and rules is quite blurred.

Blurred, but not erased. Norms that are reinstitutionalized in the legal form are often changed by the process. In the legal systems of developed Western societies, they are likely to become less flexible and more narrowly defined. A civility norm about being a good neighbor, designed to expresses general guidelines about how to live together in harmony may, if brought into the legal system, be translated into specific rules about barking dogs, loud noises late at night, and the like. This seems to be especially likely when norms are brought into the criminal law where offenses must be precisely defined and where the result of a trial is a binary decision that someone either has or has not violated a specific legal rule.[18]

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[17] Paul Bohannan, *The Differing Realms of the Law*, 67(6 pt. 2) AMER. ANTHROPOLOGIST 133, 136 (1965).

[18] Lempert and Sanders capture these ideas in their discussion of ideal types of settlement processes. "Issue Decision" settlement processes are ones that focus on a narrow legal question and determine a winner or loser. At the other end of the spectrum, "Relationship Settlement"

Law is more formal than norms in a second way as well. State law in developed Western societies has a substantial adjective law component, i.e. rules about the proper application of substantive rules.[19] Typically these involve procedural law and the law of evidence. Importantly, the procedural rules often spill over into instructions to the jury concerning the proper way to decide a case.

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processes, as the name suggests, focus on the entire situation or relationship between the parties and attempt to find a solution that is mutually acceptable. RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 209 (1986).

[19] Robert Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 ORE. L. REV. 1, 5 (2000).

Within the domain of norms, one further point is worth emphasizing; norms, like laws, vary in terms of the probability of enforcement by others. To return to the house color example one more time, one's ability to avoid detection when this norm is violated is very low, limited to one's ability to skate near the line of the unacceptable. Other norms, however, may be very hard to detect, or at least hard to detect by potential enforcers. Norms against littering often fall into this category. Even when others observe violations, such as when they observe someone throwing litter out of a moving automobile, the opportunity to express disapproval or impose any other sanction is very limited. In the absence of detection and response, a norm may collapse unless it is internalized.[20] The issue of internalization plays an important role in all perspectives on norms.

2. The new law and economics interest in norms.

Over the last decade or so a substantial number of law and economics scholars have written argued for the inclusion of norms as an important tool in understanding behavior. The

[20] MICHAEL HECHTER, PRINCIPLES OF GROUP SOLIDARITY 59-60 (1987).

commonly accepted impetus for law and economics interest in norms is Robert Ellickson's book Order Without Law, in which he explored how ranchers and others resolve the issue of straying cattle by means of informal social norms.[21] Ellickson explaines that regardless of legal rules with respect to damage caused by trespassing livestock,[22] disputes are settled based on a consciously adopted norm of cooperation that makes the owner responsible for the acts of his animals.[23] Deviants – that is ranchers who either do not keep their animals enclosed or who fail to pay for damage caused by their animals – may be subjected to various sanctions, ranging from negative gossip to attorney-assisted claims for compensation.

In part because the second half of Ellickson's book advances a norms based critique of the legal centralism that then dominated most law and economics analyses, the book ushered in a now

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[21] ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991).

[22] The English and American common law rule is one of strict liability: the owner of domestic livestock is liable, even in the absence of negligence, for property damages caused by his trespassing animals. This "fencing in" rule, as it is sometimes called, was rejected in parts of the United States. In its place, some states adopted a "fencing out" rule. One cannot recover for damage caused by trespassing cattle unless one has erected a fence that the livestock breached in some way.

[23] ROBERT C. ELLICKSON, ORDER WITHOUT LAW 5 (1991).

voluminous law and economics norms literature.[24] A central reason why this interest in norms flourished is the belief that a better understanding of the role of norms will enrich traditional rational choice models in classical law and economics. Most commonly these versions posit that individuals will seek to maximize what is in their own self interest.[25] If we can figure out what course of action most profits an individual, this conception of rational action has the advantage of suggesting falsifiable predictions about specific behaviors.

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[24] *See* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VIR. L. REV. 1579 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence,* 83 VIR. L. REV. 349 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms* ,96 MICH. L. REV. 338 (1997); Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L. J. 625 (2000); ERIC POSNER, LAW AND SOCIAL NORMS (2000); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 VIR. L. REV. 1839 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144U. PA. L. REV. 2021 (1996); Symposium, *The Legal Construction of Norms,* 86 VIR. L. REV. 1577 (2000); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998); Symposium, *Law, Economics, and Norms,* 144 U. PA. L. REV. 1643 (1996).

[25] Korobkin and Ulen note that "thicker" versions of rational choice theory typically found in law and economics writing add predictions about the nature of individual goals and preferences. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1051 (2000)

Consider, for example, the simple prediction that if there is no punishment for littering then people will litter (the cost to an individual of disposing of his litter in a lawful manner exceeds the cost to him of observing his individual litter on the ground). This prediction implicitly relies on the assumption that individuals are concerned with punishments they might receive, the disutility that they will suffer from looking at their own litter and the time and energy it takes to dispose of litter, but not with the disutility others will suffer from looking at their litter. Or consider the prediction that if punitive damages were to be abolished or capped, more defective products would be produced. This prediction relies on the assumption that product manufacturers are focused on their own bottom line, and that their interest in protecting the health and safety of their customers is constrained by how this affects that bottom line.[26]

Norms are interesting to law and economics scholars because they may explain behavior that seems to violate traditional rational choice models by placing the behavior and the law within the larger context of social relationships. For example, with respect to littering, if the fear of legal sanction were the only deterrent to throwing trash out the car window, and if individuals were simply acting to maximize their self interest, we should observe much more litter than we already do. Assuming that people are acting to maximize self interest, obviously something beside law is operating and norms against littering are a plausible candidate.[27] In general, the influence of

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[26] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CAL. L. REV. 1051, 1065 (2000).

[27] I might add here that some may choose to reject the premise that people are acting to maximize self interest. For such individuals, the search for variables that might explain behavior

norms on behavior might help to explain the substantial level of cooperative behavior in situations in which the economically rational thing to do would be to free ride.[28]

It is the concern with rational choice that most clearly distinguishes the law and economics approach to norms. As Mahoney and Sanchirico put it, norms "are rules of conduct that constrain self-interested behavior and that are adopted and enforced in an informal, decentralized setting."[29] The study of norms enriches rational choice theory by incorporating the costs and benefits individuals experience from complying with or violating norms.[30]

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that apparently disconfirms the rational actor hypothesis is an uninteresting exercise. For such people, the law and economics approach to norms itself may be uninteresting and perhaps a waste of time.

[28] Although norms are a partial answer to the question of why more people do not free ride by violating legal rules when it is to their advantage, as a number of law and economics scholars note, this explanation confronts a second-order free-rider problem. If norms help explain why people obey the law when the probability of detection is low, why do people follow norms when it is not in their self interest to do so and when the probability of detection is equally low? Why don't they free ride norms? I discuss this point below.

[29] Paul Mahoney & Chris Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?* 149 U. PA. L. REV. 2027, 2030 (2001).

[30] Or, to adopt Sunstein's formulation, norms may be seen as a tax on or subsidy to choice, and hence as part of the array of considerations that people face in making decisions.

Economists recognize that these costs and benefits may differ from those associated with legal rules. For example, Richard McAdams' theory centers around the idea of esteem. Individuals may comply with norms when others in a group or community share an opinion about the worthiness of engaging in some type of behavior, can detect non-compliance with some frequency, and can communicate to the group or community their opinion about the esteem worthiness of individuals who comply or fail to comply with the norm.[31] For example, if there is a social norm encouraging recycling, then individuals deciding whether or not to recycle will weigh the esteem they will gain from recycling and the loss of esteem they will suffer if they do not. If the norm to recycle is strong enough, the increased esteem it provides may outweigh the costs of recycling and induce the desired behavior.[32]

What of those situations, however, where the probability of detection, and therefore the loss of esteem, is low? One answer, of course, is that compliance with the norm will in fact diminish. One may choose not to recycle. Perhaps one will simply lie about one's recycling behavior in order to gain esteem without the cost of actually recycling. However, many people

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Cass R. Sunstein, *Social Norms and Social Roles.* 96 COLUM. L. REV. 903, 946 (1996).

[31] Richard H. McAdams, *The Origin, Development, and Regulation of Norms,* 96 MICH. L. REV. 338, 350-358 (1997).

[32] Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1238 (2001).

apparently do recycle even when the probability of detection is low. Why? Cooter, like many social scientists before him, answers this question by resorting to the idea of internalization.[33]

Absent internal regulation, the costs incurred by sanctions imposed by others are too uncertain to affect behavior in many circumstances. When a norm is internalized, the motivation to comply is not solely a matter of whether others will observe and sanction non-compliance but guilt or shame for doing something the actor experiences as "wrong." Part of the cost of violating norms comes not from society but from self. Why else does one tip a waitress in a strange town one will never revisit? Why else do we recycle when in many cases we could receive all the social benefits from being known as a recycler simply by lying about our behavior to others?[34]

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[33] Some scholars would distinguish between "ought" norms that people internalize and behavioral regulations that they do not. See, Michael Hechter and Karl-Dieter Opp, 'Introduction, in MICHAEL HECHTER AND KARL-DIETER OPP (EDS.) SOCIAL NORMS (2001). I agree with Cooter that the better course is to think of internalization as an attribute of individuals, not of norms. However, as I note below, norms (and rules) may vary in the degree to which one expected to internalized the behavioral regulation. Few begrudge a football player for a lack of remorse when he gets away with a violation of the rules of the game. The same may not be said of a professional golfer.

[34] Thus when we say that a norm is internalized we are saying something more than the fact that an actor accepts the legitimacy of a norm in the sense that the actor accepts the right of others' to sanction violations. JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 293 (1990).

True to his law and economics roots, Cooter's theory of how norms become internalized has a rational choice flavor.

> A rational person internalizes a norm when commitment conveys an advantage relative to the original preferences and the changed preferences. I call such a commitment a "Pareto self-improvement."[35]

One of Cooter's examples of a Pareto self-improvement is the decision to adopt a good work ethic that may be rewarded in terms of higher income.[36] Cooter's examples and those of other law and economic's scholars tend to focus on norms that have a readily available rational actor explanation and to give rational action explanations for the normative behavior that they do observe.[37] Whether people follow norms because they have internalized them or because of a

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[35] Robert Cooter, *Expressive Law and Economics,* 27 J. LEGAL STUD. 585, 586 (1998).

[36] Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the 'Bad Man' of Holmes,* 78 B.U. L. REV. 903, 924 (1998) .

[37] For example, with respect to the cattle norms in Shasta County, Ellickson notes:

> In uncovering the various Shasta County norms, I was struck that they seemed consistently utilitarian. Each appeared likely to enhance the aggregate welfare of rural residents. This inductive observation, coupled with supportive data from elsewhere, inspired the hypothesis that members of a close-knit group develop and maintain norms

concern for social esteem, the result is a greater level of cooperative behavior than we might expect in the absence of normative constraints.

The law and economics concern with norms in general and internalization in particular is a promising sign for those who seek a rapprochement between law and economics and the larger field of socio-legal studies for it engages each of the fields in the quest for a better understanding of normative motivations. It moves the law and economics away from a deterrence based social control model and closer to psychological models that center on internal constraints.[38]

3. Sociological Approaches to Norms

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whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.

ROBERT C. ELLICKSON, ORDER WITHOUT LAW 167 (1991).

In this respect, the law and economics approach is mirrored by recent research in political science. *See* DENNIS CHONG, RATIONAL LIVES: NORMS AND VALUES IN POLITICS AND SOCIETY (2000).

[38] Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000).

Nevertheless, the law and economics commitment to rational choice explanations for why people follow norms often meets with criticism.[39] The critiques often focus on the minimalist nature of law and economics theories of social norms and argue that the discipline's restricted set of rational choice explanatory concepts are not sufficient to explain compliance with norms.[40]

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[39] JON ELSTER, THE CEMENT OF SOCIETY (1989); Jefferey J. Rachlinski, *Symposium on Law, Psychology, and the Emotions: The Limits of Social Norms*, 74 CHICAGO-KENT L. REV. 1537 (2000). One should keep in mind, however, that economic and sociological understanding of norms share a good deal. Law and economics explanations of why people comply with norms parallel social psychology models of norm compliance. Yuval Feldman and Robert J. MacCoun, *Some Well-Aged Wines for the "New Norms" Bottles: Implications of Social Psychology for Law and Economics* Center for the Study of Law and Society Working Papers (2003). To take but one example, Kelman's taxonomy of social influence distinguishes compliance, identification and internalization. Herbert C. Kelman, *Compliance, Identification and Internalization: Three Processes of Attitude Change,* 2 J. CONFLICT RESOL. 51 (1958). Compliance is motivated by fear of social reaction, a traditional deterrence explanation for following rules or norms. Identification focuses on maintenance of a relationship with the source of influence and thus parallels McAdams' esteem model. Internalization focuses on an individual's change in values and thus parallels Cooter, albeit without the rational choice gloss.

[40] W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L. J. 1, 12 (2002).

For these critics, sociological insights provide a better understanding of norm internalization. Although socialization and norm internalization continues throughout the life-cycle,[41] much of this happens during childhood socialization.[42] Socializing agents do not simply try to instill specific norms, but rather attempt to get the individual to identify with the socializing agent.[43] As Coleman notes, this occurs not only with parents but with other agents as well, and the process does not cease with childhood. Other organizations, including businesses, professional schools, religious orders, the military, and the state take steps to create individuals for whom the internalization of norms is not a matter of rote memory but rather a matter of identifying with the values of people and institutions with which they interact. In sum, if the

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[41] June Louin Tapp and Lawrence Kohlberg, *Developing Senses of Law and Legal Justice*, in JUNE LOUIN TAPP AND FELICE J. LEVINE (EDS.), LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 89 (1977).

[42] Tom R. Tyler and John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law,* 28 HOFSTRA L. REV. 707, 718 (2000); Tom R. Tyler and Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights,* 43 DUKE L. J. 703, 743 (1994).

[43] *See* ROBERT D. HESS & JUDITH V. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 95-96 (1967); ELLEN S. COHN., & SUSAN O. WHITE, LEGAL SOCIALIZATION: A STUDY OF NORMS AND RULES (1990).

economic study of norms focuses on individual interests, the classical sociological study of norms generally focuses on values.[44] Our own introspection about our internalized norms lends support to this perspective. We often explain our own internalized normative commitments not as a matter of an instrumental choice designed to serve our own self interest but as "the right thing to do" regardless of our own self interest, however it might be defined.

Sociology's emphasis on socialization processes and norms as values brings to the fore three variables that I believe are necessary for a more complete understanding of norms, norm internalization, and the relationship of norms and law.

The first variable is power.[45] Childhood socialization and its accompanying norm internalization is possible in part because of the power differences between parents and children. The same may be said about much adult socialization. Employers, professors, officers, and abbots socialize employees, students, soldiers and novitiates. Only to a limited degree does the process run in the opposite direction. Moreover, compliance with norms is related to social power. Powerful persons are less likely to obey norms, in part because they are less likely to be

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[44] Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict,* 144 U. PA. L. REV. 2079 (1996).

[45] Dau-Schmidt notes that economists have shied away from the concept of power, in part because of the modeling difficulties it poses. Kenneth Dau-Schmidt, *Pittsburgh, City of Bridges: Developing a Rational Approach to Interdisciplinary Discourse on Law*, 38 L. & SOC. REV. 199, 204 (2004).

sanctioned by those with less power. And at the other end of the social order, those who are lowest on the social ladder are less compliant with norms enforced only by a process of gossip or informal reputational sanctions because they have little to lose in this regard.[46]

The second variable is social role.[47] Most norms are role related and across roles the internalization of norms may vary a good deal.[48] Moreover, we often occupy multiple roles and these roles may lead to conflicting norms. In this situation, one is less likely to obey or internalize a norm.

A focus on roles underlines the fact that our sense of self is not simply as an individual but as a member of a group. Whether or not we comply with or violate normative demands turns on

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[46] JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 286-87 (1990).

[47] *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

[48] For example, within the realm of athletics, the internalization of norms appears to vary from sport to sport. In some sports, violations of rules appear to be acceptable as long as one is not caught. In other sports, for example golf, self reporting of norm or rule violation occurs with some frequency. Of course, one could say about this situation that there is no norm of self enforcement in some sports, but it does seem clear that athletes in those sports do not experience a sense of guilt because of their successful breach of norms or rules.

the nature of the role and our position in the group to which the role is relevant.[49] Some norms are quite role specific and we are expected to follow them only when we are in that role.

The third variable is the degree to which norms are imbedded in the rule systems of formal organizations.[50] Most of the law and economics interest in norms has focused on those norms that are not enforceable by a formal organization but rather on norms whose violation does not potentially lead to formal sanctions similar to those associated with legal rules, e.g. loss of liberty or economic sanctions.[51] However, law and economics scholars agree that norms embedded in

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[49] V. LEE HAMILTON AND JOSEPH SANDERS, EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES (1992).

[50] For a discussion of norms inside an organization from a law and economics perspective, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

[51] For example, McAdams makes the following observation about his study of norms.

> [N]onlegal obligations may be created and enforced in a centralized or decentralized manner. Centralized private organizations, such as a diamond bourse, enforce relatively formal, usually written, rules, while groups and entire societies often enforce highly informal rules, such as the property norms ranchers follow in Shasta County. The distinction is important because some theorists prefer to use the term norms to refer only to decentralized rules and regard organizational rules as a set of obligations falling

organizations are a critical component of social control, whether the organization is a family, a church, a place of employment, or a number of organizations to which people belong.

It is difficult to overestimate the role played by organizations in creating and enforcing norms. It is within organizations that power relationships are most clearly differentiated, it is here where social roles are most clearly defined, and it is here that norm internalization and norm enforcement is most likely to occur. The study of norms in institutions has lead to two complementary perspectives.

Traditional sociological analyses of institutions focus on the informal structure inside organizations and naturally lend themselves to an examination of the relationship between laws and organizational norms.[52] In this tradition, organizational forms become institutionalized when

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between centralized law and decentralized norms. However the terminological matter is resolved, this article focuses on informal, decentralized obligations.

Richard H. McAdams, *The Origin, Development, and Regulation of Norms,* 96 MICH. L. REV. 338, 351 (1997).

It is understandable why this is the case, for if one starts from a rational actor premise it is with respect to norms without formal sanctions that compliance is most puzzling. Again, there are exceptions. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms,* 144 U. PA. L. REV. 1765 (1996).

[52] PHILIP SELZNICK, TVA AND THE GRASS ROOTS (1949).

bureaucratic practices and structures become "infused with value beyond the technical requirements of the task at hand"[53] and when their members internalize organizational values.

In recent years, the value based approach to norms reflected in the old institutionalism has been challenged by the so-called "new institutionalism." The new insitutionalism attends less to the informal structure inside organizations and more to the symbolic role of formal structure as a legitimating force for the organization.[54] At the individual level, new institutionalism offers a more cognitive and less normative view of actors within organizations. It focuses on taken-for-granted scripts, rules, and classifications members bring to their tasks. These scripts simultaneously help actors to organize information and constrain the options available to them.[55] The new institutionalism emphasizes the idea that shared cognitive systems come to be perceived as objective, external structures defining social reality.[56]

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[53] PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION 17 (1957).

[54] P.J. DiMaggio & W. W. Powell, *Introduction*, in WALTER W. POWELL AND PAUL J. DIMAGGIO (EDS.) THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1 (1991).

[55] Mark Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475; PETER BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1967).

[56] W. Richard Scott, *Unpacking Institutional Arguments* in WALTER W. POWELL AND PAUL J. DIMAGGIO (EDS.), THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 164, 165

(1991). DiMaggio and Powell summarize the differences between old and new institutionalism as follows:

> When institutions were seen as based on values and commitment, and formal organization identified with the relatively rational pursuit of goals, it made sense to ask how the "shadow land" of informal social relations provided a counterpoint to the formal structure. By contrast, if legitimacy is derived from *post hoc* accounts or symbolic signals, it is more sensible to focus on the institutionalized quality of formal structures themselves. Indeed, it is an emphasis on such standardized cultural forms as accounts, typifications, and cognitive models that leads neoinstitutionalists to find the environment at the level of industries, professions, and nation-states rather than the local communities that the old institutionalists studied, and to view institutionalization as the diffusion of standard rules and structures rather than the adaptive custom-fitting of particular organizations to specific settings.

Paul DiMaggio & Walter Powell, *Introduction*, in WALTER W. POWELL AND PAUL J. DIMAGGIO (EDS.) THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 27 (1991).

This view of the relationship between organizations, norms, and law is quite compatible with that part of law and economics norms scholarship that focuses on the expressive function of law. *See* Robert Cooter, *Expressive Law and Economics,* 27 J. LEGAL STUD. 585 (1998b); Lawrence Lessig, *The Regulation of Social Meaning,* 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law* 144 U. PA. L. REV. 2021 (1996b). It shares the idea that law and other rule systems are a central part of the belief systems that shape the meaning of

The "old" and "new" insitutionalism reflect two slightly different perspectives on social values. The older perspective emphasizes values as longer term, consciously held substantive commitments and group identifications. The newer perspective more clearly equates values as mental procedures, that is as conventions and scripts we routinely apply to situations and roles.[57] Both views may be distinguished from the law and economics perspective insofar as they do not attempt to explain norms primarily by a focus on individual interests.

The distinction between values and scripts on one hand and interests on the other is easily overstated. The values embedded in a norm may often correspond to individual interests. Coleman notes, for example, that with respect to many norms the set of beneficiaries of the norm coincide with the set of targets and the interests favoring observance of the norm and those opposing its observance exist within the same individual.[58] Nevertheless, the focus on values and scripts suggests that norms may involve more than efforts to control self interest and that the process of internalization often results in routinized ways of acting and judging situations.

C. Lay Tribunals, Norms and Laws

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organizational life. *See* Lauren Edelman and Mark Suchman, *The Legal Environments of Organizations,* 23 ANN. REV. SOC. 479, 493 (1997).

[57] For a useful discussion of these different perspectives on values and their relationship to interests see Denis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2092, 2113 (1996).

[58] JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 247 (1990).

1. The Threat Posed by Lay Decision Makers

In this section, my goal is to demonstrate how integrating sociological and economic conceptions of norms helps us understand jury behavior, especially the jury's propensity to follow the law. As I noted in the introduction, a primary justification for lay participation is that non-professional decision makers bring social norms to bear in deciding cases.[59] From one point of view this is a playing with fire.

Max Weber made this point with respect to English jury. Recall that Weber argued that western legal systems were moving toward the ideal of formal rationality. A legal system is formal to the degree that the rules it applies are intrinsic to the legal system. The system is substantive to the degree that the norms it applies are extrinsic to the legal system because, for example, they come from religious values. A system is rational if it yields outcomes that are predictable from the facts of the case because case outcomes are determined by the reasoned analysis of action in light of a given normative structure. A legal system is irrational when outcomes are not so predictable.[60] Depending on their degree of independence, lay decision makers threaten the legal system along both the formal-substantive dimension and the rational-irrational dimension. This is most obvious with respect to Common Law juries. Juries may bring substantive considerations to bear when they decide a case. That is, they may use normative

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[59] *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law,* 68 FORDHAM L. REV. 407 (1999).

[60] David Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 729.

standards that are not intrinsic to law. Indeed, in some ways they are encouraged to do just that. Moreover, because juries typically decide a single case, the outcomes over a series of cases may be irrational in the Weberian sense.

It is not surprising, therefore, that the legal system would attempt to control juries and other lay decision makers in some way. Whatever their virtues, lay decision makers threaten any legal system that purports to aspire to a rational-legal order. Here, the law and economics approach to norms offers a valuable insight into the law's response. From this perspective, norms to control lay decision making are important precisely because if lay decision makers act solely in their own self interest they threaten larger, collective goods. Just as the litterer threatens a clean community, lay decision makers who decide cases simply according to their own sense of justice threaten the advantages of a predictable legal system based on reasonably well defined rules. Rules and norms of appropriate jury behavior, like rules and norms against littering, attempt to preserve a larger social good that is threatened by the externalities of individual decisions based on personal self interest.

What is surprising is how successful these efforts are. Of course lay decision makers may occasionally arrive at manifestly incorrect results when judged by legal rules, but only rarely do they appear to choose to simply act according to their own lights.[61] From the norms perspective, there are several reasons why this is so.

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[61] As Harry Kalven described the situation, juries engage in a "polite war with the law." Harry Kalven, Jr. *The Jury, the Law and the Personal Injury Damage Award*, 19 OHIO ST. L. J. 158, 168 (1958).

It could be that legal rules and social norms overlap such that the law simply reinstitutionalizes the norms lay decision makers would otherwise apply. Lay and professional decision makers will arrive at the same result whether they follow the law or follow norms. Undoubtedly, this phenomenon does explain a good deal of conformity with law.[62]

Not only do norms often parallel law, both legal actors and other citizens understand that some legal rules are to be interpreted within the context of ordinary practice. For these legal rules, practice establishes the boundary of acceptable behavior around which both norms and legal enforcement congeal. Many traffic laws provide a good example. Citizens, police officers, judges, and juries commonly understand that speed limits are in fact means around which there is a range of acceptable (legal?) speed. The same may be said for other traffic rules such as how completely one must stop at stop signs. The norms surrounding traffic laws place a gloss on the meaning of compliance and, interestingly, here the norms trump a literal interpretation of the law. That is, a police officer would herself be subjected to rebuke by judge and juror alike if the officer

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Of course, most deliberations are hidden from scrutiny and some judgments may be arrived at through an illegitimate process, e.g. by drawing straws. However, the substantial body of jury research in the United States, both in the laboratory and through observation of actual jurors suggests that it is very rare for jurors to act in this way. The one universal from jury research is that jurors take their task seriously.

[62] *See* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995); PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997).

routinely gave speeding tickets to individuals going three miles per hour over the speed limit on highways. Margaret Raymond captures this idea with the concept of "penumbral crimes." As long as one stays within the penumbra of acceptable violation, there is a low level of law enforcement or public sanction, but when one steps outside the penumbral range, sanctioning and stigma resume.[63] From crime to crime, the size of the penumbra varies. Traffic laws are examples of crimes where the penumbra is relatively large. Another example of a penumbral crime may be tax evasion.

On the civil law side, the overlap between law and norm often is built into the rules themselves. This is especially true in the area of tort law. The fundamental negligence rule within which most accidents are tried is that the jury must determine whether the defendant behaved as a reasonable person under the circumstances. As the courts note, this way of describing the issue presents to the jury a "mixed question of law and fact."[64] Arguably, this rule is a rule asking jurors to use ordinary social rules of reasonable conduct to judge the defendant (and the plaintiff) as well as a rule telling the judge to accept the jury judgment in all but extraordinary cases. Indeed, one way to approach the modern substantive law of tort is to examine the degree to which courts establish a general law of negligence versus adopting special rules to be used to judge a case.

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[63] Margaret Raymond, *Penumbral Crimes*, 39 AMER. CRIM. L. REV. 1395 (2002).

[64] *See* GEORGE CHRISTIE, ET AL., CASES AND MATERIALS ON THE LAW OF TORTS (4TH ED) 150-158 (2004).

For example, in common law jurisdictions the law surrounding the duties of owners and occupiers of land with respect to people who are injured on their property may involve special rules that depend upon the injured party's status on the land (trespasser, licensee, invitee). These specific legal rules are less likely to correspond to social norms than is a general rule that the owner owes all who come on the land reasonable care under the circumstances.[65] Much of American substantive tort law is clearly designed to be "jury friendly" in this way. Legal duty rules often are defined in such a way that they are isomorphic with ordinary social norms governing proper care.

Remaining are situations where social norms and law clearly establish different standards. This situation may not be widespread, but it does occur. On the criminal side, as Robinson and Darley note when summarizing a group of studies comparing community views with the criminal law in the United States, "In our investigations we discover that often the legal codes and the

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[65] For a discussion of the current trend toward abolishing the common-law categories see Nelson v. Freeland, 507 S.E.2d 882 (N.C. 1998). Other scholars have argued that at least in some jurisdictions the judiciary is reintroducing more detailed rules into tort law as a way of taking power back for judges and away from juries. *See* Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 470 (1999); Williams Powers, Jr. *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1719 (1997).

community standards reflect similar rules in assigning liability to a case of wrongdoing...."[66] However, there are areas of disagreement in the Robinson and Darley study. They include the seriousness of "statutory rape" laws, (laws making it a crime to have consensual sex with an underage individual), felony murder laws (declaring accidental killings committed during the commission of a felony to be murder), and the mitigating effect of justifications even when, legally, they are unavailable. The last difference includes situations such as women claiming self defense when they kill their abusive husbands while the husband is sleeping, and the near acquittal Bernhard Goetz, who shot several persons he believed were preparing to mug him during a trip on the New York City subway.[67] Kahan offers other areas where he believes there is a discrepancy between norms and legal rules occurs, including date rape, drug use, and drunk driving.[68]

On the civil side, conflicts occasionally occur between legal and social norms. For example, some have argued that the jury verdict against Texaco in the famous Pennzoil v. Texaco case is best understood as a clash between legal and social norms. While the financial experts on

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[66] PAUL H. ROBINSON AND JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 2 (1995).

[67] PAUL H. ROBINSON AND JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 204-210 (1995).

[68] Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem,* 67 U. CHI. L. REV. 607 (2000).

mergers and the corresponding legal experts submitted by Texaco were in basic agreement on the legality of the transaction, there seems to have been little serious question in the minds of the jury that Texaco's behavior was morally blameworthy, a point of view reflected in their verdict.[69]

2. Controlling Lay Decision Makers on Mixed Tribunals

In those situations where there is norm/law disagreement, what factors influence whether lay decision makers will follow the legal rule? A critical factor, of course is the nature of any sanction for failing to do so. One of the important lessons from the law and economics perspective is that while norms may solve some free rider problems with respect to legal rules, they create second order problems when people evade norms as well as legal rules. The ability of others to detect violations is as important to norm enforcement as it is to legal rule enforcement. This suggests the obvious hypothesis that when a judge or other legal professional is in a position to observe lay decision maker behavior, compliance with the legal rule is more likely. In a circumstance where professional and lay judges collectively determine the outcome of a dispute,

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[69] Walter O. Weyrauch, *Unwritten Constitutions, Unwritten Law*, 56 WASH. & LEE L. REV. 1211, 1233-35 (1999); Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733 (1990). Interestingly, Pennzoil originally filed a claim in Delaware, the corporate home of the parties but as LoPucki and Weyrauch note, they cleverly moved the case to Texas where social norms were likely to be much more favorable. Lynn M. LoPucki and Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L. J. 1405 (2000).

presumably the professional judge often will announce and attempt to enforce the legal rule whenever lay decision makers indicate a desire to apply a norm contrary to the legal rule.[70]

Recently the Japanese chose to reintroduce lay decision making into criminal cases. After contemplating a return to a jury system they opted instead for mixed tribunals. This seems to have been motivated in part by a desire to limit the extent to which the decision maker is likely to substitute its norms for a legal rule.[71]

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[70] Sometimes professional judges also may prefer to follow a social norm rather than the law. It may be the case that the existence of lay judges increases the likelihood that this will happen, at least on the margins. Moreover, there may be a number of areas where the legal rule is intentionally indeterminate, providing a good deal of leeway to incorporate normative judgements through means such as a reduced criminal sentence.

[71] Lester W. Kiss, *Reviving the Criminal Jury in Japan,* 62-SPG L. & CONTEMP. PROB. 261 (1999); Reinstating a Jury System, Japan Times 5/29/04, 2004 WL 56378342. A lay assessor system also exists in China. Di Jiang, *Judicial Reform in China: New Regulations for a Lay Assessor System*, 9 PACIFIC RIM L. & POL'Y J. 569 (2000). The new Japanese system will go into effect in 2009 after a five year "get-acquainted" period. At that time, most major felony cases will be decided by a panel of three professional judges and six lay people that will decide both guilt and punishment. Each member of the panel will have one vote. Joseph J. Kodner, *Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step,* 2 WASH. U. GLOBAL STUDIES L. REV. 231, 246 (2003).

The Japanese system is modeled in part on the German system, which consists of a panel one professional judge and two lay judges in misdemeanor and non-serious felony cases and two lay judges and two or three professional judges in serious felony cases. In the German case, as in Japan, because convictions require a two-thirds majority, the lay judges can always force an acquittal. Volker F. Krey, *Characteristic Features of German Criminal Proceedings–An Alternative to the Criminal Procedure Law of the United States?* 21 LOYOLA LOS ANGELES INTERNAT. & COMP. L. REV. 591 (1999). Unlike the proposed Japanese lay jurors, who will be randomly selected from a pool of eligible voters, German lay jurors are selected by local committees to serve four-year terms. Therefore, they have the experience of being repeat players, who may hear multiple cases during their term of office.

Other countries also have recently introduced lay decision makers into its judicial process. In the 1990s, both Spain and Russia reintroduced trial by jury in some cases. Stephen Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in NEIL VIDMAR (ED.), WORLD JURY SYSTEMS 319 (2000), p. 319. In Russia the jury is comprised of 12 individuals; in Spain nine individuals. In both cases, jurors are chosen from voter registration lists. *Id.* 326. As in the case of the United States and England, the jury decides the case out of the presence of the judge. However, both systems restrict the power of the jury more than is the case in the United States. For example, in Russia the new system moves the criminal trial in a more adversarial direction but judges continue to play an inquisitorial role. *Id.* 336. Moreover, in both systems jurors are not permitted to return a general verdicts of guilty or not guilty. Rather, they are asked to respond to specific questions. See Stefan Machura, *'Fairness, Justice and Legitimacy: Experiences of People's Judges in South Russia,* 25 L. & POL'Y. 123 (2003).

To my knowledge, we have little systematic research on how often lay jurors in mixed tribunals attempt to apply contrary social norms for legal rules. What research we do have, indicates that lay judges rarely disagree with a professional judge, even when the legal rule being applied is contrary to societal norms.[72] But we have no systematic data on the frequency with which professional and lay judges have normative disagreements or the outcome of those disagreements.

Law and economics approaches help us understand the importance of detection in norm enforcement. However, the sociological concepts of power and role help us to understand why professional judges meet with substantial success in limiting the penetration of inappropriate social norms mixed tribunals. The power of the professional judge derives from several sources. In part it is built on information only in possession of the professional judge. Obviously, the

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These societies join a long list of countries that have some fom of jury or mixed tribunal, at least in criminal cases. Very few countries, however, follow the American practice and use lay decision makers in civil cases. Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury,* in NEIL VIDMAR (ED.), WORLD JURY SYSTEMS 1 (2000).

[72] *See* Sanja Kutnik Ivkovi , *An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals*, 25 L. & POL'Y. 93 (2003) (lay judges in Croatia); Stefan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 INTERNAT. REV. PENAL L. 451 (2001) (lay assessors in Germany); Stefan Machura, *Fairness, Justice and Legitimacy: Experiences of People's Judges in South Russia,* 25 L. & POL'Y. 123 (2003) (lay judges in Russia).

professional judge often has superior knowledge of the law. In addition, the professional judge may have superior knowledge about the case at hand[73] and about how other, similar cases were treated.[74]

The professional judge's influence also arises from his or her role status and the deference ordinarily given to the judicial role. Hofstede's concept of "power distance" is useful in this context.[75] Power distance reflects the degree to which people prefer an autocratic or consultative style of authority. Those low in power distance prefer consultation and discussion and view subordinate disagreement with and criticism of authorities as appropriate and desirable. Those high in power distance prefer hierarchical leadership and dislike disagreement or criticism on the

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[73] For example, German lay assessors at criminal courts have little access to case files, resulting in diminished influence. Stefan Machura, *Interaction Between Lay Assessors and Professional Judges in German Mixed Courts*, 72 INTERNAT. REV. PENAL L. 451 (2001).

[74] In this regard, German assessors have an advantage because they are selected to serve four-year terms in which they hear a number of cases, sitting for several days per year. John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?* 1981 A. B. F. RESEARCH J. 195, 206; Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform,* 48 ALA. L. REV. 441 (1997).

[75] GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS (2D ED.) (2001).

part of subordinates.[76] Societies, as well as individuals vary along this dimension and we should expect that in societies that are relatively high in power distance variation from the professional judge's wishes will be rarer.[77]

The willingness of lay jurors to follow the professional judge in a mixed tribunal may also depend on the lay judges' relative status. In this regard, one would anticipate that German lay assessors would be more likely to vote according to social norms because they are selected to serve four-year terms in which they hear a number of cases, sitting for several days per year and because they themselves tend to be of higher social standing. Both of these factors reduce power differences between the professional and lay judges.[78]

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[76] Joseph Sanders, V. Lee Hamilton, & Toshiyuki Yuasa, *The Institutionalization of Sanctions for Wrongdoing Inside Organizations: Public Judgments in Japan, Russia, and the United States,* 32 L. & SOC. REV. 871 (1998); Tom R. Tyler, E. Allan Lind & Yuen J. Huo, *Cultural Values and Authority Relations: The Psychology of Conflict Resolution Across Cultures,* 6 PSYCH. PUB. POL'Y & L. 1138 (2000).

[77] A concern expressed by those who preferred a jury for Japan is that because Japanese culture is relatively high in power distance, the professional judge will have overwhelming influence on lay judges.

[78] Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform,* 48 ALA. L. REV. 441 (1997).

3. Controlling Juries

Successful sanctions are far less likely in systems where the jury performs its task outside the observation of other court personnel, as is the case in societies that have traditional juries. Control of these juries, that is insuring that they obey the norms of jury service, is much more difficult. Absent a clear signal from the jury that it has failed to perform its task in an acceptable manner, intervention by the court is nearly impossible, especially in criminal cases.[79] The law and economics emphasis on detection in the enforcement of norms suggests that such juries are more likely to succeed when they attempt to substitute their norms for the law.

The ability of judges and other legal actors to influence jury behavior occurs primarily at the beginning of the trial proceedings and through oral arguments and judicial instructions. From the perspective of this paper, much of what is going on during these proceedings is an effort to socialize individuals into the juror role and to exclude individuals who appear unwilling to follow the norms appropriate to the role. In American courts, lawyers often inquire about jury willingness to follow the law during the voir dire, i.e. the preliminary examination of potential

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[79] Double-jeopardy provisions make *ex post* interventions impossible in situations where the jury finds for the defendant. In civil cases, of course, there are many opportunities for the judiciary to intervene after the fact of a jury verdict. In some situations, such intervention seems to be the norm. This appears to be the case with respect to the size of punitive damage awards. *See* Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform* 50 BUFF. L. REV. 103 (2002); State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 407 (2003).

jurors. Jurors are asked if they can follow the law as given by the judges and the few that say no are very likely to be challenged for cause. And at the end of the trial they are instructed to apply the law as provided by the judge. That is, they are asked to follow a **legal rule supremacy norm**.[80]

Voir dire only occasionally uncovers outright refusal to be guided by the judge with respect to the law.[81] Perhaps this is because many jurors believe that if they do express an

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[80] Occasionally, jurors are sent mixed messages about obeying the law. Lawyers occasionally will make a plea to a jury to disregard some legal rule. When this occurs in a blatant way, it is likely to result in a new trial. For example, in Liggett Group, Inc. v. Engle, 853 So.2d 434 (2003), a class action against tobacco companies, plaintiff's counsel urged the jury to disregard the law with respect to punitive damages and they returned a punitive award of $145 billion. The plaintiff verdict was reversed by the appellate court and is now on appeal to the Florida Supreme Court. Both state and federal courts routinely condemn nullification arguments.

[81] The jury's willingness to be guided is a separate question from whether in fact they can sufficiently understand the instructions so as to follow them. There is some experimental work that suggests jurors are not very good at this task and that judicial instructions often are very difficult to understand. Phoebe Ellsworth, *Are Twelve Heads Better Than One?* 52, No. 4 L. & CONTEMP. PROB. 205 (1989); Phoebe Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy,* 6 PSYCH. PUB. POL'Y & L. 788 (2000). Professor Saks advances the argument that because judicial instructions are so difficult to understand and follow; judges themselves

unwillingness to follow a law this in itself will open them to some type of sanction. Judges do not routinely go out of their way to disabuse prospective jurors of this belief.

Juror apparent acquiescence to this requirement also may be explained in part by esteem considerations such as those advanced in Richard McAdam's theory of norms.[82] Jurors want judges and other legal actors to think well of them. However, it is important to keep in mind that jurors are one-shot players who most likely will never again see the judge or the lawyers in the case. They do not enjoy any long term benefits from a rise in esteem. And, of course answers during voir dire do not necessarily reflect actual behavior during subsequent deliberations.

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encourage, and perhaps even insure nullification by civil juries. *See,* Michael J. Saks, *Judicial Nullification* 68 IND. L. J. 1281 (1993).

Even when instructions are clear, statutes themselves may be unclear or may be of questionable application on a given set of facts. In these cases, judges as well as juries might conclude that the statute should not apply and therefore a jury refusal to apply the legal rule is not an occasion where a norm trumped a rule. See Darryl K Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199 (1998); Lawrence M. Solan, *Jurors as Statutory Interpreters,* 78 CHICAGO-KENT L. REV. 1281 (2003).

[82] Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350-58 (1997).

Insofar as jurors follow the law during deliberations, they are doing so for reasons other than a fear of judicial sanctions or seeking esteem from the judge or lawyers.[83]

If the influence of judges and lawyers is limited, compliance with legal rules during deliberations might be explained by two additional factors: jurors are sanctioned by fellow jurors if they fail to follow the norms of proper jury behavior and individual jurors have in fact internalized this legal supremacy norm.

Some data suggests that internalization is an unlikely source of compliance with law. In surveys conducted for the National Law Journal in 1998 and 1999, many prospective jurors expressed a willingness to disobey instructions when they conflict with other norms pointing toward a different outcome. In the 1999 survey, 49% of 1,000 potential jurors answered yes to the question, "In reaching a verdict, should juries ignore a judge's instructions if they believe justice will best be served by doing so?" And the year before 76% said that as jurors they would, do what they believed was right regardless of what a judge says that the law requires.[84] However, recent studies in the United States that involve recording actual jury deliberations indicates that

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[83] If there are any esteem gains from these sources, they are collective in nature, directed at the entire jury.

[84] *See,* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1608 (2001).

contrary to this survey data jurors do admonish each other to do as the judge has instructed and that these admonishments have their intended effect.[85]

This result raises two questions. Why do jurors admonish each other and why do these admonishments have the desired effect? As to the first question, one answer may simply be, "the judge told us so." That is, jurors rather mindlessly enforce this norm. The law and economics approach to norms offers a second, and perhaps more interesting hypothesis. Within the jury itself, the legal rule supremacy norm is a useful way to control deviant perspectives which threaten the ability of the jury to do its job at all. If each juror attempted to apply his or her own set of social norms to a case, a verdict might prove to be impossible.[86] Thus, the legal rule

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[85] Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis, and Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 44 ARIZ. L. REV. 1 (2003). As Diamond notes, "There is a great deal in the data on comments by jurors on their duty to follow the law.... The jurors seem to accept it as their obligation to follow the law -- they don't tend to express any reason for doing it. On occasion, one or two will balk at what they see as the strictures they must operate under, but the overall acceptance of the law as their legitimate guide is striking." Private correspondence from Shari Diamond to Joe Sanders. June 8, 2005.

[86] This explanation assumes that the legal rule is the norm most easily agreed upon by all the jurors. If, in fact, jurors only wanted to reach a decision and had no separate predisposition to do so by following the law, then any easily mutually agreed upon norm that settles the case would be at least as acceptable as the legal rule.

supremacy norm is in fact a norm that controls individual juror self interest, the self interest of deciding a case according to one's own lights.[87]

If self interest helps explain why jurors invoke the legal rule supremacy norm, why do these appeals produce compliance? In part this may be because of an individual's desire to earn the esteem and respect of fellow jurors. But, as is the case with the judge and the lawyers, jurors know that once the trial is over they will not have any future dealings with their fellow jurors.

In my opinion, to the degree any of these relatively weak esteem and respect considerations are effective it is because most jurors take the role seriously. Even if the survey data reported above accurately describes prospective jurors' state of mind concerning their obligation to follow legal rules, once individuals are actually embedded in the role of juror in the courtroom setting, part of playing the role well is following an obedience norm that tells jurors

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[87] James Coleman distinguishes disjoint norms, that is where the targets simultaneously the norm and the beneficiaries are not the same person from cojoint norms, that is norms where the set of beneficiaries of the norm coincides with the set of targets. JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 247 (1990). In the latter case, each actor is potentially both a beneficiary and target. Interestingly, when set forth in judicial instructions the legal rule supremacy norm is a disjoint norm. However, when used in the jury room to influence fellow jurors it become a cojoint norm. The apparent effectiveness of appeals to this norm in deliberations is evidence that it is internalized for many jurors.

what to do in the face of a conflict between specific legal rules and lay values.[88] As the "old institutionalism" literature suggests, insofar as jurors accept the legitimacy of the court as an institution, the admonishing jurors and perhaps also the jurors who are admonished have internalized the norms of what it is to be a good juror. The institution of a court and the practices and structures of the organization are "infused with value beyond the technical requirements of the task at hand."[89] The key component of these values is the norm of legal rule supremacy.[90]

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[88] This norm is akin to choice of law rules about what to do when laws conflict and more than one body of law could apply. These conflict rules are paralleled by a sub-species of norms about what to do in the face of conflicting norms. For example, there are parental norms about what children should do when confronted with a situation in which parental norms and the norms of a child's cohort conflict, as they may with respect to such behavior as smoking, sex, and drug use. Conflict of norms issues arise in other places as well, e.g. teacher versus student norms, employer versus employee norms, etc.

[89] PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION 17 (1957).

[90] It is an interesting question whether the obligation of jurors to follow the law is itself a law or a norm. In the American context, at least, I believe it is best understood as a norm. Jurors are not legally accountable for their verdicts, even when the verdict is manifestly contrary to the law. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 249 (2003). As noted by the United States Supreme Court, a jury has the power to bring a verdict "in the teeth of both law and facts," Horning v. District of Columbia, 254 U.S. 135, 138, 41 S.Ct. 53, 54, 65 L.Ed. 185 (1920).

From this older institutional perspective, we should expect that jurors are more likely to follow the law because they have internalized a legal supremacy norm when they have greater trust in and respect for legal institutions, especially the courts. In fact, there is some jury interview data that suggests that when trust is higher, so is apparent compliance with instructions.[91] This finding is consistent with research that indicates the legitimacy of courts does

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[91] Paula Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries,* 78 CHICAGO-KENT L. REV. 1249., 1270 (2003).

Additional support for this position comes from Janice Nadler, *Flouting The Law,* 83 TEX. L. REV. 1399 (2005). Nadler presented mock jurors with a vignette after exposing them to another, unrelated situation that resulted in a just or an unjust outcome. Among a sample of citizens (but not among a sample of students) exposure to the unjust outcome lead to a higher level of acquittals in a fact pattern where, if the jurors followed instructions, they would have to convict. Nadler interprets these results as supporting the hypothesis that specific instances of perceived injustice in the legal system can lead to diminished deference to the law generally. *Id*. at 1440.

Specific efforts to find jurisdictions that have a large number of potentially disaffected jurors have not been generally successful, however. *See* Mary R. Rose & Neil Vidmar, *The Bronx "Bronx Jury": A Profile of Civil Jury Awards in New York Counties,* 80 TEX. L. REV. 1889 (2002).

not turn on particular rulings but upon diffuse support for courts as institutions.[92] The result is also consistent with the general sociological finding that the internalization of norms often is accomplished by getting individuals to identify with the socializing agent.[93] When this support is not present, it is more likely that a juror will fail to apply a legal rule that conflicts with a relevant social norm. Outright jury nullification in criminal cases is an example of such a direct value clash.[94]

On the civil side, however, the idea of nullification is not particularly useful if by the term we mean that the jury consciously decides to substitute its own normative judgement and reach an outcome clearly contrary to that which would be dictated by the application of the law. Nevertheless, sometimes civil juries do engage in practices that most would agree are contrary to

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[92] Gregory A. Caldeira, and James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AMER. J. POL. SCI. 635 (1992); James L. Gibson, et al., *On the Legitimacy of National High Courts*, 92 AMER. POL. SCI. REV. 343 (1998).

[93] JAMES COLEMAN, FOUNDATIONS OF SOCIAL THEORY 295 (1990).

[94] In the United States, both the appropriateness and the extent of nullification are contested. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677 (1995) (arguing for racially based jury nullification in some criminal cases); RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM (2003) (assessing the frequency of nullification, especially nullification tied to the ethnicity of jurors).

legal rules as set forth in judicial instructions. I believe the concept of norms as scripts offers the most useful insight as to when this is most likely to occur.

4. When Juries Are Most Likely to Violate Legal Rules

Norms conceived as interests probably play a minimal role in jury decisions. Rarely do jurors have a strong personal self interest in case outcomes in the sense that they would personally benefit from a specific outcome contrary to the one indicated by legal rules. The modern view of juries, as a group of disinterested if not right out uninformed citizens minimized the probability that this will occur. The rare prospective juror who indicates that this might be the case is routinely stricken for cause.

Likewise, norms conceived solely as values seem to offer limited insight into when juries will substitute their values for the law's. The evidence from the Arizona Jury Project and other studies[95] suggests that when there is a value conflict jurors accept the legal rule supremacy norm. When the conflict between norms and rules is purely substantive, as would occur for example when the law requires the plaintiff to prove that the defendant was negligent before the plaintiff can recover but some jurors believe a rule of strict liability should apply,[96] jurors, mindful of judicial instructions, are likely to apply a negligence rule to decide the case.

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[95] *See* VALERIE HANS, BUSINESS ON TRIAL(2000).

[96] *See* Steven Hetcher, *The Jury's Out: Social Norms' Misunderstood Role in Negligence Law,* 91 GEORGETOWN L. J. 585, 643 (2003).

However, many norms are not simply substantive positions. Rather, they reflect values that are embedded in scripted way of reaching decisions. I believe that when this is the case, social norms jurors bring to their decisions are far more likely to influence their judgment.[97]

These scripts may operate in a number of different ways. Sometimes, jurors may bring scripts that are contrary to instructions to their decision making. That is, everyday scripted ways in which a decision is reached may be different from the script prescribed by law. Sometimes the script suggested by the law is itself found to be objectionable, often because it implies a set of substantive norms that individuals find inappropriate.[98] Finally, legal scripts may be acceptable to jurors but they simply provide different calibration of outcomes using the script. In the next few paragraphs I will indicate how this focus on scripts helps us understand circumstances in which jury decision making may not follow legal dictates.

a. Competing scripts

One example of competing scripts is the well known phenomenon of jurors refusing to arrive at tort judgments by independently determining whether the plaintiff has proven by a

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[97] This is not a new insight. See Irwin A. Horowitiz, Norbert L. Kerr & Keith E. Niedermeier, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207 (2001). Horowitz, et al. note that juror decision making may vary from a legal ideal because the jury is unwilling or unable to disregard certain evidence, to limit the use of certain evidence, or to consider certain evidence. *Id.* at 1212.

[98] This is one way to view what happened in the Texaco v. Pennzoil case.

preponderance of the evidence each separate element of a tort. For example, in negligence cases, the jury is instructed that it should find for the plaintiff only if it has concluded that it is more likely than not that the defendant has breached a legal duty to the plaintiff, that the plaintiff suffered damages, and that the defendant's behavior is the legal and factual cause of the plaintiff's injury. If the plaintiff fails to prove any of these elements – breach, causation, damages – by a preponderance of the evidence then the defendant should prevail.[99] Problems surrounding this procedure, this proposed script if you will, have been the source of considerable debate within the legal community.[100] Most students of the jury would agree, however, that jurors routinely fail to follow the legal script. Instead, often they commingle elements, thereby bolstering weak

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[99] *See* DAN B. DOBBS, THE LAW OF TORTS 359 (2000). This type of decision making is captured in Anderson's information integration theory. NORMAN H. ANDERSON, FOUNDATIONS OF INFORMATION INTEGRATION THEORY (1981). This theory assumes that pieces of information are evaluated independently of one another and their evaluation is separated from their subsequent integration into a final decision. Similar assumptions underlie similar to Bayesian theories. *See* JONATHAN BARON, THINKING AND DECIDING 3D ED. (2000).

[100] *See* Ronald J. Allen, *The Nature of Juridical Proof*, 13 CARDOZO L. REV. 373 (1991); D.H. Kaye,,*Two Theories of the Civil Burden of Persuasion,* 2 L. PROBABILITY & RISK 9 (2003); Saul Levmore, *Conjunction and Aggregation* 99 MICH. L. REV. 723 (2001); Dale A. Nance, *A Comment on the Supposed Paradoxes of a Mathematical Interpretation of the Logic of Trials*, 66 B. U. L. REV. 947 (1986); Ronald J. Allen and Sarah A. Jehl, *Burdens of persuasion in Civil Cases: Algorithms v. Explanations*, 2003 MICH. STATE L. REV. 893.

evidence on one element with stronger evidence on another. Evidence that this occurs comes from research on the story model and cognitive consistency models of jury decision making,[101] from experimental jury research,[102] from reports of jurors in actual cases,[103] and from numerous

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[101] Nancy Pennington & Reid Hastie, Evidence Evaluation in Complex Decision Making. 51 J. PERS. & SOC. PSYCH. 242 (1986); Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61 (1995); NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS. WASHINGTON, D.C.: AMERICAN PSYCHOLOGICAL ASSOCIATION (2000); Dan Simon, Chadwick J Snow & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERS. & SOC. PSYCH. 814 (2004).

[102] *See* Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 L. & HUM. BEHAV, 269, 282 (1990). In this laboratory experiment, using a toxic tort trial stimulus, the researchers found that juries hearing a unitary trial were significantly more likely to find for the plaintiff (85%) than were juries that heard trials in which causation, liability and damages were heard separately (68%). *Id.* at 277-78. If juries in the bifurcated condition did find for the plaintiff, however, their compensatory damages awards were significantly larger than those of unitary juries. *Id*.

Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963) conducted a field study where bifurcation was manipulated across trials. They observed that juries hearing only evidence related to compensatory damages returned

30% fewer judgments of defendant liability in a sample of personal injury trials from a federal district court in Illinois.

See also Edith Greene, Michael Johns & Jason Bowman, *The Effects of Injury Severity on Jury Negligence Decisions*, 23 LAW & HUM. BEHAV. 675, 689-91 (1999). In this study jurors and deliberating juries alter their judgement concerning the defendant's negligence depending upon the severity of injury to the plaintiff (in the "mild" condition the plaintiff suffered a concussion and mild back pain that subsided over time and in the "severe" condition he suffered a catastrophic head injury resulting in palsy, brain damage, language impairment and paraplegia). Overall, the defendant was assigned more responsibility in the severe condition than in the mild condition. But interestingly, in situations where the defendant's negligence is unclear, the effect of a more severe plaintiff injury is to reduce the likelihood deliberating jurors will find the defendant negligent. The authors suggest that in this situation the jurors were hesitant to saddle the defendant with a large damage award. *Id.* at 690.

Neal Feigenson, Jaihyun Park & Peter Salovey, *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in comparative Negligence Cases*, 21 L. & HUM. BEHAV. 597 (1997) also found that mock jurors engage in what they call noncombinatorial decision-making. For example, the plaintiff's gross damage award is significantly lower when the victim is more legally blameworthy. As the authors note, this produces a "double discount" of the plaintiff's award. The absolute size of the award is reduced and the plaintiff's award is further reduced by her percentage of responsibility. In general, the authors argue that rather than deciding each element of liability separately, mock jurors, "employ

anecdotal discussions of particular cases or group of cases.[104] Recent research by Simon, et al.[105] replicates earlier story model findings that jurors do not consciously trade elements in the sense that they know the causation evidence is too weak to sustain a verdict for the plaintiff but, nevertheless, find for the plaintiff because of the defendant's clear negligence. Rather, when jurors work through the decision making task there is a bidirectional effect between verdict and evidence and evidence is reevaluated so as to achieve coherence with the emerging decision.[106]

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a more holistic judgmental strategy in which they combine blameworthiness and outcome severity to reach the decision that they feel is correct." *Id.* At 609.

[103] SPECIAL COMMITTEE ON JURY COMPREHENSION OF THE AMERICAN BAR ASSOCIATION SECTION OF LITIGATION. 1989.

[104] JOSEPH SANDERS, BENDECTIN ON TRIAL 132-134 (1998); Rebecca S. Dresser, Wendy E. Wagner & Paul C. Giannelli, *Breast Implants Revisited: Beyond Science on Trial*, 1997 WIS. L. REV. 705, 740-43; Richard A. Nagareda, *Outrageous Fortune and the Criminalization of Mass Torts*, 96 MICH. L. REV. 1121, 1168-70 (1998).

[105] Dan Simon, Chadwick J Snow & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction*, 86 J. PERS. & SOC. PSYCH. 814 (2004).

[106] Dan Simon, Chadwick J Snow & Stephen J. Read, *The Redux of Cognitive Consistency Theories: Evidence Judgments by Constraint Satisfaction,* 86 J. PERS. & SOC. PSYCH. 814, 830 (2004); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004). *See also* Edith Greene, Michael Johns & Jason Bowman,

The normative power of everyday scripts that judge situations holistically is so strong that efforts to curtail the practice with anything other than bifurcated trials is unlikely to succeed.[107]

Another example of competing scripts arises from experimental work on punitive damages. Sunstein, et al.[108] conducted a set of experiments designed to examine whether mock jurors would follow a deterrence model when awarding punitives. A key component of this model is the idea that the size of damage awards should vary inversely with the probability of detection of wrongdoing. However, in their experiment juror awards did not significantly increase as the probability of detection fell from one in five to one in a hundred.[109] In a separate study, strong majorities of a sample of University of Chicago Law students rejected an optimal deterrence model. In neither study were the respondents specifically asked to follow a deterrence

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The Effects of Injury Severity on Jury Negligence Decisions, 23 LAW & HUM. BEHAV. 675, 690 (1999).

[107] A number of jurisdictions, recognizing this issue, routinely permit defendants to bifurcate the punitive damages phase of trials. *See* Texas Civil Practice and Remedy Code § 41.009. Arguments for and against bifurcation of other elements of a tort case are discussed in Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1653-57 (2001).

[108] Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?* 29 J. LEGAL STUD. 237 (2000).

[109] Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?* 29 J. LEGAL STUD. 237, 242 (2000).

based instruction. But given these findings and other research that suggests individuals often follow a retributivist script based on a sense of outrage and retribution,[110] one should anticipate that even when instructed to do so some juries would not follow this script.

Of course actual jury instructions on punitive damages do not ask jurors to apply a deterence model but rather are more in tune with a retributivist model of justice.[111] Insofar as social norms concerning punitive damages are centered on retributive ideas, legal and social scripts and values may be quite similar. The primary difficulty posed by punitive damages lies in the difficulty jurors have translating their judgement of outrage into a consistent dollar amount. I discuss this problem below in the section on calibration.

b. Illegitimate Scripts

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[110] *See* Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages* 107 YALE L. J. 2071 (1998); David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L. J. 359, 378-79 (1998); Jonathan Baron & Ilana Ritov, *Intuitions about Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993); Jonathan Baron, Rajeev Gowda, & Howard Kunreuther, *Attitudes toward Managing Hazardous Waste: What Should Be Cleaned Up and Who Should Pay for It?* 13 RISK ANALYSIS 183 (1993).

[111] *See* Neil Vidmar, *Retributive Justice*, in JOSEPH SANDERS AND V. LEE HAMILTON (EDS.), HANDBOOK OF JUSTICE RESEARCH IN LAW. (2001)

An example of illegitimate scripts arises from the law's definition of negligence. As defined in The Restatement (Third) of Torts, one is negligent when one does not exercise reasonable care under the circumstances.

> Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the forseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.[112]

This test echoes that advanced by Judge Learned Hand in the famous Carroll Towing Case.[113] It invites individuals and organizations to calculate (either implicitly or explicitly) the costs and benefits of a given course of action and alternative courses of action that might have a different risk-benefit profile, and to choose a course of action for which the benefits outweigh the costs. However, translated into everyday decisions, this script invites people to engage in a balancing exercise that may run counter to normative positions concerning the limits of proper comparisons. As it is often expressed, such calculations violate incommensurability norms.

In everyday life there are a number of incommensurability norms that deter us from making certain comparisons. As Tetlock puts it:

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[112] Restatement (Third) of the Law of Torts: Liability for Physical Harm (Proposed Final Draft No. 1 (April 6, 2005)) § 3.

[113] United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

> [O]ur commitments to other people require us to deny that we can compare certain things– in particular, things of finite value to things that our moral community insists on formally treating as possessing transcendental or infinite significance. To transgress this boundary, to attach a monetary value to one's friendships, children, or loyalty to ones country, is to disqualify oneself from the accompanying social roles. Constitutive incommensurability can thus be said to exist whenever comparing values subverts one of the values (the putatively infinitely significant value) in the trade-off calculus. Taboo trade-offs are, in this sense, morally corrosive. The longer one contemplates indecent proposals, the more irreparably one compromises one's moral identity. To compare is to destroy.[114]

As Tetlock's passage suggests, comparing things in this way is certainly possible and, as Cass Sunstein notes, we can and do make choices among incommensurable goods.[115] Nor are such choices essentially irrational in the sense that they cannot be justified by a set of reasonable

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[114] Philip E. Tetlock, *The Virtues of Cognitive Humility*, in RAJEEV GOWDA AND JEFFREY C. FOX, EDS. JUDGMENTS, DECISIONS AND PUBLIC POLICY 358 (2002). *See also* S.T. Fiske & P.E. Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress Spheres of Justice,* 18 POLITICAL PSYCH. 255-297 (1997); GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES (1978).

[115] Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994). The June 1998 issue of the University of Pennsylvania Law Review is devoted to a symposium on incommensurability and cost-benefit analysis.

principles. However, engaging in such practices – employing such scripts – may well be seen as inappropriate if not illegitimate. Not only may juries balk at this way of viewing negligence, they may look with disfavor upon others who do.

Kip Viscusi's study of corporate risk analysis lends support to this hypothesis.[116] In a judgment survey given to juror-eligible individuals, subjects were asked to whether or not to assess punitive damages and if so in what amount after hearing a hypothetical automobile accident case in which the car had an alleged design defect. Versions of this vignette were manipulated so that some subjects were told that the defendant engaged in a risk-benefit analysis while in other versions the defendant did not do such an analysis. In each version, a value is placed on human lives lost. When the defendant did conduct an explicit risk benefit analysis, trading off lives lost against the price of the automobile, subjects were more likely to award punitive damages and, when awarding them, gave higher awards.[117]

As Viscusi notes:

> Standard negligence principles call for risk balancing, and firms should be encouraged to make such judgments explicitly. Ideally, they should not be faulted additionally for

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[116] W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* 52 STAN. L. REV. 547 (2000). Viscusi's article is discussed and critiqued in Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52 STAN. L. REV. 1821 (2002).

[117] W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* 52 STAN. L. REV. 547, 593, Table 2 (2000).

> undertaking an erroneous analysis. Undertaking a risk analysis before marketing a risky product should not be viewed as reckless corporate behavior. Such legal ideals are, however, divorced from the reality of personal injury and environmental damage cases and the thinking of jurors with cognitive biases. The injuries in such cases are more than financial abstractions: They often generate powerful emotional responses, which may be affected by the character of the corporate decision making process...[118]

Anecdotal evidence pointing in the same direction comes from large awards against corporations that have engaged in such behavior. Discussing the famous Ford Pinto case,[119] Gary Schwartz notes that, "[I]t seems sensible to recognize in all of this an instance of the 'two cultures' problem. A culture has developed around public policy analysts that sees the risk-benefit criterion as obviously acceptable; but the culture of public opinion itself tends to regard that criterion as distressing."[120]

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[118] W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* 52 STAN. L. REV. 547, 560 (2000).

[119] Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757, 174 Cal.Rptr. 348 (1981).

[120] Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1041 (1991). *See also* Peter D. Jacobson & Matthew L. Kanna, *Cost-Effectiveness Analysis in the Courts" Recent Trends and Future Prospects*, 26 J. HEALTH POL. POL'Y & L. 291 (2001)

Plaintiff's lawyers intuitively appreciate the incommensurability issue and may attempt to exploit it when arguing to the jury. For example, in a case involving a rear-end crash causing a fire in a Chevrolet Malibu, an internal cost-benefit analysis was introduced into evidence. The case resulted in a jury verdict of $107 million in compensatory damages and $4.8 billion in punitive damages. The plaintiff's lawyer observed after the trial, "The jurors wanted to send a message to General Motors that human life is more important than profits." Some jurors echoed this sentiment. One said, "We're just like numbers, I feel, to them. Statistics. That's something that is wrong." Another said, "There was no evidence that the car they put out there was as safe as what they could have put out there."[121]

c. Different Calibration

Finally, I want to mention a rather modest way in which jury judgments may stray from legal rules. In this situation, jurors may use the scripts provided by law but incorporate information that is arguably legally irrelevant and thereby reach subtly different outcomes than they otherwise would have reached. Clearly, this is the mildest form of jury failure to follow legal scripts and arguably it is the very sort of social norm input supporters of juries have in mind.

The most thoroughly researched example of this practice with respect to civil juries

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[121] W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* 52 STAN. L. REV. 547, 577 (2000).

involves attributions of responsibility to corporate actors.[122] A number of researchers have investigated the question of whether jurors are more likely to find against business corporations because of their "deep pockets." Few studies have found that this is the case.[123] However, experimental research does indicate that subjects, often placed in the role of jurors, do hold corporate actors to a higher standard of care than individuals charged with identical acts of

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[122] A similar, well documented example on the criminal side is the overall leniency of juries when compared to judges. In their path breaking book on the American jury, Kalven and Zeisel found that when judges and juries disagreed about a verdict, i.e. when judges reported that they would have reached an outcome different from the jury, it was usually the case that the judge would convict when the jury had actually acquitted. Harry Kalven Jr., and Hans Zeisel, The American Jury 106-111 (1966). They interpreted this result in part as due to different interpretations of the reasonable doubt standard. *See* Valerie P. Hans & Neil Vidmar, *The Twenty-Fifth Anniversary of* The American Jury, 16 L. & SOC. INQUIRY 323, 327 (1991). A recent study based on data from the National Center for State Courts replicates this finding. Theodore Eisenberg, Paula l. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, G. Thomas Munsterman, Steward J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's* The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171, 181 (2005).

[123] *See* Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and suffering in Medical Malpractice Cases*, 43 DUKE L. J. 217 (19930.

negligence.[124] Whatever the merits of this result, it is not one that is sanctioned by legal rules.[125] Jurors in Hans' study were instructed to judge individuals and corporate actors using the same standard.[126]

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[124] *See,* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000); Robert J. MacCoun, *Differential Treatment of Corporate Defendants By Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 L. & SOC. REV. 121 (1996); Joseph Sanders, V. Lee Hamilton & Toshiyuki Yuasa, *The Institutionalization of Sanctions for Wrongdoing Inside Organizations: Public Judgments in Japan, Russia, and the United States*, 32 L. & SOC. REV. 871 (1998).

[125] One might argue that under the tort standard for negligence the defendant's status as a corporate actor is a "circumstance" to be considered in assigning liability. But this argument proves too much for in a different case one could say in the same way that in an automobile accident case the fact the defendant is an African-American is also a "circumstance." Few would agree that this would be a legally permissible factor for the jury to consider.

[126] *See* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 83 (2000). Instructions such as this exist for federal courts as well as most, if not all state courts. For example, the California Civil Jury Instruction contains the following provision:

BAJI § 1.03 Entity Not To Be Prejudiced As Such

The Hans research offers a valuable insight into the effect of the legal rule supremacy norm in situations such as this where ordinary social norms call for a different script and at the same time offers a note of caution about extrapolating mock jury research to actual trials. Hans asked three groups of respondents to agree or disagree with the statement, "Corporations should be held to a higher standard of responsibility than individuals." The groups were; citizens in a general survey, mock jurors in a laboratory simulation, and actual jurors. Sixty-four percent of the poll respondents agreed with this statement. Among mock jurors, 57% agreed. However, among actual jurors only 41% agreed and 48% disagreed (the remainder said they did not know).[127] These results do underline the fact that social norms the standard to use in judging corporations is different from that to be used to judge individuals.

The responses of actual jurors to this statement suggest that the outcome results we observe when mock jurors are asked to decide cases may not be replicated if we could systematically study decisions in actual cases. On the other hand, it might be the case that even

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The fact that a (corporation, business association or public entity) is a party must not prejudice you in your deliberations or in your verdict.
Do not discriminate between a (corporation, business association or public entity) and natural individuals. Each is a person in the eyes of the law and entitled to the same fair and impartial consideration and to justice by the same legal standards.

[127] VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 119, Fig 5-1 (2000).

though real jurors verbally support the legal decision rule they would not in fact follow it in actual cases, i.e. they would hold corporate actors to a higher standard of care. What we can conclude from this survey is that the law's script and the scripts provided by social norms do compete within the context of a trial and we should predict that playing the role of juror will move many individuals in the direction of following the legal script when judging a case.

Another example of potential differences in calibration can be found in defamation cases. In the wake of the constitutionalization of libel law in New York Times v. Sullivan,[128] the court has been concerned that jurors will apply the relevant standard but in doing so will conclude that the defendant acted with constitutional malice – that is, with knowledge that the statement was false or with reckless disregard of whether it was false or not– in circumstances where judges would conclude to the contrary. Presumably because of this concern, a concern that a jury may calibrate the standard in too liberal a fashion, the Supreme Court has held that the issue of malice is one of "constitutional fact,"[129] that is a fact as to which a trial court deciding whether to accept a jury verdict or an appellate court reviewing a trail court decision must exercise an "independent judgment." As applied, the rule requires courts to grant a defendant a judgment n.o.v. unless, using a clear and convincing standard of proof there is sufficient evidence to support a jury verdict for the plaintiff.[130]

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[128] 376 U.S. 254 (1964).

[129] *See* Bose Corp v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984).

[130] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

A similar reluctance to accept jury calibrations may be found in the area of intentional infliction of emotional distress. As stated in the Third Restatement of Torts, "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distrubance to another is subject to liability for that emotional distrubance, and if it causes physical harm, also for the physical harm."[131] The proposed comment *e* to this section discusses the role of judge and jury.

> As with all questions of fact, the court first determines whether the evidence is sufficient to permit a jury to find that the actor's conduct was extreme and outrageous and, if so, the jiry then decides whether the actor's conduct was in fact extreme and outrageous.
>
> The court, however, plays a more substantial role in screening cases from the jury on the qauestion of extreme and outrageous conduct than on other questions of fact. This is so partly because a finding that conduct was extreme and outrageous is as much a normative judgment as it is a finding of fact (although that is also often true for a finding of negligence). It is also so because courts are propoerly reluctant to adopt a potentially wide ranging tort (especially one that might have a chilling effect on legally protected conduct) without safeguards that it will not be abused. Consequently, many courts adopting this cause of action have noted that judges will play a more active role screening cases before they are sent to a jury."[132]

As the comment notes, in everyday tort cases a much more generous standard of review is employed and it is usually said that a verdict should stand if, looking at the facts from the point of view of the non-moving party, a reasonable jury could decide the way it did then the jury verdict should stand.[133]

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131 Restatement (Third) of Torts: Liability for Physical Harm § 45 (Preliminary Draft No. 5, 2005).

132 Restatement (Third) of Torts: Liability for Physical Harm § 45, comment *e.* (Preliminary Draft No. 5, 2005).

[133] Restatement (Third) of the Law of Torts: Liability for Physical Harm (Proposed Final Draft No. 1 (April 6, 2005)) § 8.

Finally, I might mention the considerable trouble jurors have in assessing general damages. Jurors appear to do relatively well in assessing the severity of a plaintiff's injury but have a difficult time translating that assessment into a consistent dollar award.[134] In this case, however, it might fairly be said that the law offers almost no guidelines and the lack of calibration among jurors is matched by a similar lack among legal professionals.[135] As Professor Kalven once noted, it might be said that the law invites the jury to write the law of damages in personal injury cases.[136] This final example demonstrates the fine line that may often exist between the jury substituting a social norm for a legal rule on the one hand and the jury simply acting within the broad parameters of the rule itself on the other hand.

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[134] *See* Cass R. Sunstein, Daniel Kahneman, & David Schkade, *Assessing Punitive Damages*, 107 YALE L. J. 2071 (1998). For a review of this literature, see Joseph Sanders, *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad)*. (Forthcoming, DePaul Law Review).

[135] *See* Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883 (1993); Roselle L.Wissler, Allen J. Hart & Michael J Saks, *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999).

[136] Harry Kalven Jr., *The Jury, The Law, and The Personal Injury Damage Award*, 19 OHIO ST. L. J. 158, 164 (1958).

4. Summary

The examples of ways in which civil jury judgments may vary from legal rules discussed in this section are all well known.[137] What I hope my discussion adds is to demonstrate that all of these examples are instances where societal normative values, deeply embedded in scripts, cause some juries to act in ways contrary to the formal legal rules that apply in a given case.

One might ask, of course, why these differences? Why do jury norms vary in these particular ways? One way to address this question is to ask a slightly different one. Why do legal systems, at least those in advanced societies, find it necessary to create rules that ever vary from everyday ways of working through a problem? Why, as I discussed earlier, do legal systems develop less flexible and more narrowly defined rules and why do they have such a well defined adjective law component? I do not have a complete answer to this question, but one consideration surely is that of Max Weber. Western legal systems are comprised of a set of rules that theoretically are formally rational, that is a set of rules that if applied properly would allow one to predict case outcomes. To that end, they formulate a rational, rather than a holistic way of processing cases, e.g. the element by element approach to proof in negligence cases. They also adopt a restricted view of people, e.g. individuals are stripped down to the status of juridical actors and even corporate entities are to be squeezed into this juridical person mold. If this is correct, then the types of jury variance from ideal legal rule decision making that are discussed

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[137] *See* Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601 (2001). The Noah article discusses every one of the examples reviewed in this section and is essential reading for those interested in civil jury deviations from formal legal rules.

above are a byproduct of the very formally rational legal regime towards which most Western societies strive.

D. Conclusion

In this paper I review different approaches to the understanding of norms that exist in economics and sociology. I then discuss ways in which these approaches help us to understand when juries and other lay tribunals do and do not substitute their judgment for that of the law. My review of the existing literature suggests that at least with respect to American civil juries, this type of substitution is most likely to occur when substantive societal value norms embedded in scripts are contrary to legal rules. This result suggests the following two hypotheses: whenever we observe systematic jury deviation from legal rules presented in judicial instructions we will also observe a normative alternative that is embedded in a script that offers a routine method of dealing with such situations that is contrary to law. Second, almost all civil jury sins are procedural in the sense that they result from the use a normative script contrary to the ideal legal script. I hope this article inspires research that explores these hypotheses.