

“It’s the Law.”: Social Norms and the Rule of Law

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ABSTRACT

This Article posits that treating social norms as isolated regularities, as is commonly done in the legal literature, misses the big picture of social norms. Analyses of the relations between social norms and the law consequently run the risk of becoming “just so stories.” Economic analyses of other-regarding behavior may go beyond the narrow view of self-interestedness yet they remain confined to the individual level of analysis. To account for the societal-level mechanisms underlying social norms, this Article outlines a model in which norms form interdependent systems. Societal emphases on cultural values define the backbone of an evolving body of particular norms. This model sheds new light on the nature of the rule of law and on its role in promoting social order. Testable hypotheses are derived and empirical evidence is marshaled for the proposition that the rule of law is not a universal, culturally independent norm.

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I. INTRODUCTION

Consider a hypothetical: A rancher from Shasta County, California comes to Berkeley, California with his dog. The rancher's dog soils the sidewalk. Emboldened by Berkeley's "pooper-scooper" municipal ordinance, a local pedestrian chastises the rancher: "Clean up. It's the law." What result?

When I presented this hypothetical to seminar participants at Boalt Hall School of Law in Berkeley, I was first treated to some anecdotes about Shasta County ranchers. After the laughs subsided, participants seemed to agree that the rancher would clean up after his dog. When I pressed for a reason, the answer was "because that's what the law says." In America, what the law says is of major importance. Absent severe (and rare) moral dilemmas that might call for civil disobedience, the fact that a particular injunction "is the law" usually means that it should be followed. In this view, "law and order" go together, the former being a precondition for the latter.

"It's the law" is a statement whose purpose exceeds providing information about the prescribed behavior and potential liability for offenders. As the "Berkeley Hypo" above suggests, quite often this statement is asserted for moral suasion. The pedestrian does not threaten the rancher directly nor is she likely to report the rancher to the local authorities. The interaction on the Berkeley sidewalk may be hypothetical but it has an undeniable air of reality to it nonetheless. Anybody who saw the signs saying "Buckle up. It's the law." that pepper Massachusetts's highways will readily confirm that. Officials at the Massachusetts Highway Department apparently consider

this message to be persuasive.¹ The moral suasion element in the message “Buckle up. It’s the law.” is all the more evident when it is not directed to drivers or even to adults. This is the case, for instance, when the Washington Traffic Safety Commission directs this message to children.² In all these cases, “It’s the law” essentially means “It’s the right thing.”

Rudimentary as it may appear at first blush, the Berkeley Hypo captures the gist of contemporary debates on social norms and the law. A growing number of legal scholars, primarily in law and economics, have become interested in the relations between social norms and the law in recent years. Robert Ellickson’s path-breaking study of extra-legal norms among Shasta County ranchers marks the inception of this renewed interest in social norms.³ To be sure, the insight that people’s practice may, and often does, depart significantly from what the law says is not new.⁴ What is new is the effort to identify the mechanisms that may underlie these social phenomena. Norms against littering in public places are the standard example for beneficial social

¹ Massachusetts is not alone in this regard. Tennessee has also conducted a safety-belt use campaign based on the same slogan. See JOHN H. LACEY, RALPH K. JONES, & RANDALL G. SMITH, TECHNICAL REPORT: EVALUATION OF CHECKPOINT TENNESSEE: TENNESSEE’S STATEWIDE SOBRIETY CHECKPOINT PROGRAM (1999), available online at <http://www.nhtsa.dot.gov/people/injury/research/ChkTenn/ChkptTN.html> (last visited ____).

² The Commission’s website enables visitors to purchase posters saying “Buckle Up. It’s the Law.” in both English and Spanish as well as “Buckle Up. It’s the Law.” coloring sheets for children. See <http://www.wa.gov/wtsc/ordering.html> (last visited ____).

³ Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986), later expanded in ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

⁴ The seminal work is Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (observing that merchants often do not follow formal rules of contract law, do not litigate over contractual disputes, and settle without resorting to formal institutions); see also Ian R. Macneil, *Contracts: Adjustments of Long-term Economic Relations Under Classical, Neo-classical & Relational Contract Law*, 72 NW U. L. REV. 854 (1978) (comparing classical contracts (enforced to the letter by courts) and neoclassical contracts (interpreted and updated by arbitration)).

norms in this literature.⁵ Robert Cooter suggested Berkeley's pooper-scooper ordinance as a case in point for harnessing the law to engender such norms.⁶ Together with other scholars, Ellickson conjectures that "the ordinance might embolden a pedestrian to chastise an irresponsible dog owner because the pedestrian could now say, 'Clean up. It's the law.'"⁷

By confronting the proverbial Californian rancher and pedestrian, the Berkeley Hypo calls this common conjecture into question. After all, if the law played a secondary (if not negligible) role in regulating the rancher's behavior he may well miss the moral suasion element in the pedestrian's admonition. Stated more generally, while we seem to have a grasp of the nature and potency of social norms, we still lack understanding of their structure, the factors that cause them to emerge, and their relations with the legal system. A notable deficiency in this regard is the equal treatment given to norms that are profoundly different in importance and prevalence. Thus, day-to-day behavioral regularities like cleaning after one's dog are treated similarly to manifestations of racial discrimination.⁸

⁵ This example is inspired by a series of studies led by Robert Cialdini. See Robert B. Cialdini, Raymond R. Reno, & Carl A. Kallgren, *A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places*, 58 J. PERSONALITY & SOC'L PSYCHOL. 1015 (1990); Robert B. Cialdini, Raymond R. Reno, and Carl A. Kallgren, *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 201 (Mark P. Zanna ed., 1991); Raymond R. Reno, Robert B. Cialdini, & Carl A. Kallgren, *The Transsituational Influence of Social Norms*, 64 J. PERSONALITY & SOC'L PSYCHOL. 104 (1993).

⁶ See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating The New Law Merchant*, 144 U. PA. L. REV. 1643, 1675 (1996)

⁷ See Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 39 (2001) (referring to Cooter, *id.*, *id.*). For similar treatments of a pooper-scooper ordinance, see also Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2032 (1996) (hereinafter *Expressive Function*); Robert E. Scott, *The Limits of Behavioral Theories of Law And Social Norms*, 86 VA L. REV. 1603, 1603 (2000).

⁸ See below, text to note 105.

This Article seeks to advance a systematic framework for the analysis of social norms and the law. As we shall see, insightful theories abound. What we lack is a framework with which to derive testable hypotheses about fundamental social factors that could support law-related social norms. Toward this end, this Article outlines a model of social norms that relies on the theory of value dimensions in cross-cultural psychology—a discipline heretofore untapped by legal scholars. The psychology of values and theories of value dimensions hold a key for understanding social norms as they deal directly with conceptions of the desirable (i.e., the normative) and with the notion of societal preferences. These theories suggest means for empirical testing and verification of social norms theories. By drawing on these theories, this Article goes beyond extant law and economics accounts of social norms without merely offering “just so stories.”⁹

Social norms specify behaviors that are seen as desirable or legitimate in the shared view of societal members and whose violation elicits at least informal disapproval. As conceptions of the desirable, values are closely linked to social norms. The myriad concrete social norms in every society constitute an interlinked system that can be depicted as a pyramid. In this metaphorical pyramid of social norms, societal or cultural¹⁰ orientations define the foundations of the pyramid. They

⁹ See Jon Elster, *Rational Choice History: A Case of Excessive Ambition*, 94 AM. POL. SCI. REV. 685 (2000) (criticizing the Analytical Narrative Project, among other things, for relying on “just so stories” while failing to account for high level of aggregation and for intentions and beliefs). See ROBERT H. BATES ET AL., *ANALYTIC NARRATIVES* (1998). For a rejoinder to Elster’s critique, see Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal, & Barry Weingast, *The Analytic Narrative Project*, 94 AM. POL. SCI. REV. 696 (2000). A notable exception to the anecdotal character of many legal accounts is Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003) (using survey data to statistically analyze attitudes toward gun-control laws).

¹⁰ Social scientists consider society as a system of relationships that connects individuals who share the same culture. Society and culture thus constitute one another. See ANTHONY GIDDENS,

represent societal preferences for the best ways to respond to the basic challenges that every society faces. These responses translate into societal emphases on particular values. Basic social norms specify the behaviors that are needed in order to promote cherished societal values or prevent violation of those values. Concrete social norms apply basic norms to the many situations in life where specific behaviors may promote or violate values. Thus cultural orientations constitute the lower strata of the pyramid and concrete social norms are found at higher strata.

Interest in social norms among lawyers is especially keen because they shed light on the role of the legal system in establishing social order. As already hinted, several commentators have argued that in addition to the traditional regulative role, the law can have an expressive role in that it could trigger beneficial social norms that do not rely on state enforcement.¹¹ This Article argues that the interface between the informal social norm system and the formal legal norm system is a rule-of-law social norm—a norm that calls on people to prefer legal rules over tradition, elderly people’s advice, or superiors’ command when seeking guidance about the right behavior. As such, the rule-of-law norm is consistent with cultural values of individual autonomy and egalitarianism; it is less inconsistent with cultural views of the individual as an embedded entity and with societal preferences for hierarchical ordering.

People in societies that exhibit the former preferences are more likely also to consider as persuasive the statement ‘it’s the law.’ Such societal preferences support voluntary compliance with the law. People in other societies, however, may respond

MITCHELL DUNEIER, & RICHARD APPLEBAUM, INTRODUCTION TO SOCIOLOGY ch. 3 (2d ed. 1996). This Article therefore uses the adjectives “societal” and “cultural” interchangeably to denote elements that belong to the societal level of analysis as opposed to the individual level of analysis. See below, text to note 79 *et seq.*

to this statement with a shrug or even resent it. The pyramidal model presented here implies that social norms that share with the rule of law a compatibility with underlying cultural values—such as societal condemnation of corruption—will exhibit similar levels of prevalence in societies that uphold the rule of law because of that. It follows that policy makers who plan to rely on legal reform as a vehicle for social change—among other things, through triggering beneficial social norms—may turn to the present framework as a means for assessing the social environment to which such reform is targeted. Environments of this sort include both developing countries that receive foreign aid as well as domestic social sub-groups, such as immigrants or special communities.

Part II reviews different approaches to social norms. Part III briefly describes basic concepts of value dimension theory. Part IV outlines the notional model of the pyramid of social norms and demonstrates its contribution to current debates over emergence and evolution of social norms. Part V considers the relations between social norms and the law, defines the category of norms of governance, and discusses the rule of law as a prominent norm in this category. Part VI concludes.

II. APPROACHES TO SOCIAL NORMS

A. *Foreword*

Notwithstanding the growing interest in social norms, the scholarly debate on the subject is in a state of flux. Indeed, the definitions offered for social norms are so numerous that the situation had been likened to the Tower of Babel. Dean Scott thus noted that

¹¹ See below, text to note 151 *et seq.*

“the academic debate currently suffers from conceptual pluralism and terminological disarray. Indeed, we lack even a basic consensus on the proper definition of a social norm. This tower of Babel quality is, in part, a reflection of the complexity of the social phenomena that we are seeking to understand.”¹²

Several social sciences consider social norms and culture in general as their business. Sociology and anthropology in particular have developed approaches for social analysis that differ markedly from the approaches on which this Article draws. It should thus be stressed from the outset that this Article does not claim that the value dimension framework that stands at the heart of this Article is generally superior to other methods of social analysis. Nor does this Article purport to provide a comprehensive critique of all major approaches to culture and social norms – a feat well beyond the present scope.¹³

What this Article does claim, however, is that the framework presented here is especially appropriate for enriching the legal literature that has been mostly influenced by economic analyses. The following paragraphs provide a thumbnail review of central approaches to social norms in economics, social psychology, and law and economics as a necessary background for understanding this concept and the gaps in our knowledge about it.

¹² Scott, *supra* note 7, at 1607.

¹³ See, e.g., CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ARTICLES 26-28 (1973) (advocating the study of cultures through “thick description”). Geertz’s symbolic anthropology in turn does not represent all current approaches in anthropology since anthropologists have never agreed on the definition for culture. Similarly, iconic sociologists such as Emile Durkheim, Talcot Parsons, Robert Merton, and James Coleman, to name just a few, have addressed social norms and deviant behavior. See, generally, EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD, (1964 [1895] George E.G. Catlin Ed., Sarah A. Solovay & John H. Mueller Trans.); TALCOTT PARSONS, THE SOCIAL SYSTEM (1951); ROBERT K. MERTON, CONTEMPORARY SOCIAL PROBLEMS: AN INTRODUCTION TO THE SOCIOLOGY OF DEVIANT BEHAVIOR AND SOCIAL DISORGANIZATION (1961); JAMES COLEMAN, FOUNDATION OF SOCIAL THEORY (1990).

B. *Economic Accounts*

Several economists and other social scientists have tried their hand in proposing a definition for social norms. Prominent commentators include Robert Axelrod,¹⁴ Robert Sugden,¹⁵ and Jon Elster,¹⁶ among others. But as Kaushik Basu critically notes, “[m]ost existing definitions are suggestive rather than exact.”¹⁷ Basu goes on to offer a classification of social norms into ‘rationality-limiting norms,’ ‘preference-changing norms,’ and ‘equilibrium-selection norms.’¹⁸ Yet it is unclear whether these categories are mutually-exclusive or exhaustive of the social norm concept.

Economists in general find difficulty in analyzing precisely the type of norms that interest lawyers most—namely, norms that call for compliance with costly behavioral injunctions when legal enforcement is not forthcoming. In such cases, the cost side of the individual’s calculus is simply missing. There is no reliable source of deterrence that might induce costly compliance out of fear of yet more costly punishment. In particular, a naked view of self-interested behavior makes it difficult to formalize individuals’ other-regarding preferences—that is, preference that in some way consider the interests of other people (beyond close kin) as part of one’s own preferences.

¹⁴ Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986).

¹⁵ Robert Sugden, *Spontaneous Order*, 3 J. ECON. PERSPECTIVES 85 (1989).

¹⁶ JON ELSTER, *THE CEMENT OF SOCIETY* (1989); Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSPECTIVES 99 (1989).

¹⁷ Kaushik Basu, *Social Norms and the Law*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 476, 476 (Peter Newman ed. 1998).

¹⁸ *Id.*, *id.*

Jean Tirole thus reasons that the main challenge to economic modeling of norms is that unlike conventions, norm behavior need not be in one's self-interest.¹⁹ Within the conventional framework, Douglas Bernheim advances a model of conformity in which individuals conform to a single standard of behavior despite heterogeneous underlying preferences.²⁰ In this model, people are willing to conform because they recognize that even small departures from the social norm will seriously impair their status.²¹ Jonathan Bendor and Dilip Mookherjee, however, point to the role third-party sanctions may play in promoting compliance with social norms.²²

Whether individuals do in fact behave in other-regarding manners is no longer in dispute. A constantly growing body of behavioral research looks at people's behavior in social dilemma games. In such games subjects have to weigh their self-interest, usually expressed in some monetary payoff, against the interest of other players. It is now well established that in seeming contradiction to predictions of neo-

¹⁹ See Jean Tirole, *A Theory of Collective Reputations (with Applications to the Persistence of Corruption and to Firm Quality)*, 63 REV. ECON. STUD. 1, 4 (1996). According to Basu, *id.*, at 477, "a person endowed with rationality-limiting norms may forego options which could have enhanced his utility and thus such a person would be considered irrational in terms of mainstream economics." "Utility" here probably stands for economic welfare. In contrast, "equilibrium-selection norms" are fully compatible with self-interested behavior. Sometimes described as behavior rules for "coordination" or "Battle of the Sexes" games. Basu notes that "[t]his is the norm the study of which is currently in vogue in economics and has generated a lot of literature, to the extent that economists tend to forget about the other kinds of norms--conveniently so, since the equilibrium-selection norm is the one which is most compatible with conventional economics." *Id.* See also Robert Sugden, *Normative Expectations: The Simultaneous Evolution of Institutions and Norms*, in ECONOMICS, VALUES, AND ORGANIZATIONS 73, 73-74 (Avner Ben-Ner & Louis Putterman eds. 1998) (making similar distinctions).

²⁰ B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841 (1994). For models in a similar spirit see also Sugden, *supra* note 19; Martin Dufwenberg & Michael Lundholm, *Social Norms and Moral Hazard*, 111 ECON. J. 506 (2001); Assar Lindbeck et al., *Social Norms and Economic Incentives in the Welfare State*, 114 Q.J. ECON. 1 (1997).

²¹ Sushil Bikhchadani, David Hirschleifer, & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992) also advance a model of conformity. Their model, and others like it, rely on rational self interest driven by informational cascades.

classical economic theory, subjects quite often behave in ways that appear altruistic: They would reciprocate or sacrifice self-reward to achieve an outcome that benefits others, or in ways that appear compatible with an abstract ethical principle (e.g., fairness or equity).²³ Formal modeling of other-regarding preferences at the individual level is nascent and remains partial at this stage. Several authors have modeled reciprocity.²⁴ More intriguing, however, are models that seek to incorporate elements reflecting ethical principles such as equity²⁵ or general benevolence (i.e., seeking to increase general social welfare).²⁶

In trying to understand why people adhere to norms, David Kreps distinguishes between intrinsic motivations and extrinsic incentives as potential factors giving rise to social norms.²⁷ Game theorist Ken Binmore considers other-regarding preferences (in particular, Rawlsian-type fairness preferences) “held by individuals in a particular society as an artefact of their upbringing.”²⁸ Binmore surmises that children acquire such preferences unconsciously and later use a distilled

²² See Jonathan Bendor & Dilip Mookherjee, *Norms, Third-Party Sanctions, and Cooperation*, 6 J. L. ECON. & ORG. 33 (1990).

²³ As noted in the text, this is the subject of a burgeoning literature. For a review see, e.g., Ernst Fehr & Urs Fischbacher, *Why Social Preferences Matter - The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives*, 112 ECON. J. C1 (2002); see also Robyn M. Dawes & Richard H. Thaler, *Cooperation*, 2 J. ECON. PERSP. 187 (1988); David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC'Y 58 (1995).

²⁴ See, e.g., Dufwenberg & Lundholm, *supra* note 20; Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993); Gary Charness & Matthew Rabin, *Understanding Social Preferences with Simple Tests*, 117 Q. J. Econ. 817 (2002).

²⁵ See Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition and Cooperation*, 114 Q. J. Econ. 817 (1999).

²⁶ See Charness & Rabin, *supra* note 24.

²⁷ David M. Kreps, *Intrinsic Motivation and Extrinsic Incentives*, 87 AM. ECON. REV. 359 (1997); see also Assar Lindbeck, *Incentives and Social Norms in Household Behavior*, 87 AM. ECON. REV. PAPERS AND PROCEEDINGS 370 (1997) (arguing that not only economic incentives but also social norms may be analyzed by means of utility theory).

version of this “preference-belief model” as yardsticks for assessing future situations.²⁹

Economic modeling of social norms—as opposed to individual-level other-regarding behavior—involves considerable difficulties. Social norms imply societal preferences.³⁰ But the notion of societal preferences³¹ is hard to grapple with in neo-classical economics ever since Nobel laureate Kenneth Arrow expounded his impossibility theorem.³² Arrow’s theorem puts a hurdle on the way to aggregating individual preferences into coherent societal ones.³³ Often cited in connection with voting system design, Arrow’s theorem says that any rule of aggregation has to violate some conditions that are fundamentally important from the normative point of view.³⁴ Some scholars, like Nobel laureate James Buchanan, consider this hurdle

²⁸ Ken Binmore, *A Utilitarian Theory of Political Legitimacy*, in *ECONOMICS, VALUES, AND ORGANIZATION* 101, 114 (Avner Ben-Ner & Louis Putterman, eds. 1998).

²⁹ *Id.*, *id.*

³⁰ That is, non-trivial social norms do so, unlike norms that only entail selection of one mode of action from a menu of equivalent ones—the category that Basu calls equilibrium-selection norms and are also known as “coordination games.”

³¹ Many economic discussions confusingly employ “social preferences” to denote “other-regarding preferences.” This usage intermixes preferences of individuals with regard to other members of society with preferences of social groups. At the following discussion clarifies, the latter type of preferences is highly problematic from an economic perspective if not utterly denied. Yet this is not the case from the perspective of psychology or other social sciences even if one prefers not to ascribe faculties of choice, tastes, and preferences to social groups.

³² KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951, revised ed. 1963).

³³ To illustrate the outcome of Arrow’s theorem, without elaboration of its conditions, consider the following setting, also known as Condorcet’s paradox: Three individuals, A, B, and C, need to choose one out of three alternatives, x , y and z . Suppose individual A prefers x to y to z , individual B prefers y to z to x , and individual C prefers z to x to y . Under the standard majority rule, there are majorities of two out of three for x against y , for y against z , and for z against x – in other words, a cycle. This cyclic outcome implies that the group cannot make a coherent collective (social) choice.

³⁴ Arrow’s theorem has spawned a large literature, that on the one hand generalized its result and on the other hand pointed out the extent to which this result hinges on these minimal conditions. For a short discussion, see Kenneth J. Arrow, *Arrow’s Theorem*, in 1 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS* 124 (John Eatwell, Murray Milgate & Peter Newman Eds. 1987).

insurmountable.³⁵ The work of yet another Nobel laureate, Amartya Sen, formally deals with the necessity to “bring in something outside individual choice behavior in order to determine whether a particular behavior pattern is or is not consistent.”³⁶ Sen notes in this regard that “we [economists] cannot easily invoke some immediate notion of society’s ‘preferences’, or some transparent properties of ‘social utility’ ...”³⁷

Shira Lewin traces this problem, which she dubs “Sen’s paradox,” to the historical roots of the relations between economics and psychology during the last century.³⁸ More generally, there is now a growing awareness among economists that modeling individual behavior must incorporate psychological insights (as attested by the awarding of the Nobel Prize in economics to psychologist Daniel Kahneman). Efforts toward this end have by and large concentrated in integrating cognitive biases into individual utility functions.³⁹ But as was just noted, an additional degree of complexity lies in the move from the individual to the societal level. In an excellent discussion of endogenous preferences and cultural values, Samuel Bowles argues, *inter alia*, that “preferences go considerably beyond tastes, as an adequate account of

³⁵ James Buchanan, *A Contractarian Paradigm for Applying Economic Theory*, 65 AM. ECON. REV. 225 (1975) (discussing Arrow’s Nobel Prize lecture, arguing that it is not possible to cross the bridge from individual preferences). For further general analyses, see DENNIS MUELER, PUBLIC CHOICE II (1989); ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA (1991).

³⁶ Amartya Sen, *Internal Consistency of Choice*, 61 ECONOMETRICA 495, 498 (1993). See also Amartya Sen, *Rationality and Choice*, 85 AM. ECON. REV. 1, 15-18 (1995) (discussing values and individual choices).

³⁷ *Id.*, *id.*

³⁸ Shira B. Lewin, *Economic and Psychology: Lessons from Our Own Day from the Early Twentieth Century*, 34 J. ECON. LIT. 1293 (1996).

³⁹ For an influential review, see Mathew Rabin, *Psychology and Economics*, 36 J. ECON. LIT. 11, 13-17 (1998). See, relatedly, Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LIT. 402 (2002).

individual actions would have to include values” and that “the more important effects of economic organization on preferences operate through cultural transmission.”⁴⁰

Economic analyses of culture tend to focus on mechanical aspects of this concept—mainly possible mechanisms for dissemination of behavioral regularities.⁴¹ When it comes to substantive analysis, certain economists use some of the terms mentioned below to describe cultures such as individualism, collectivism, or egalitarianism.⁴² Yet because of Sen’s paradox, what these researchers usually consider (formally) as cultural beliefs or values are actually individual-level other-regarding ones. With few exceptions the societal level of analysis is simply ignored.⁴³

C. *Social Psychology*

Defining social norms in social psychology does not raise difficulties reminiscent of those we encounter in economics. Quite naturally, social psychologists have been studying social norms for a long time. Social psychologists consider social

⁴⁰ Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and other Economic Institutions*, 36 J. ECON. LIT. 75, 78-79 (1998). For an effort to incorporate personal tastes into personal utility functions, see GARY S. BECKER, *ACCOUNTING FOR TASTES* (1996).

⁴¹ See, e.g., Guido Cozzi, *Culture as a Bubble*, 106 J. POL. ECON. 376 (1998); Sushil Bikhchandani, David Hirschleifer, & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992); Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623 (1998). “Corporate culture” is yet a different issue not dealt with in the present study.

⁴² See, respectively, Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994); Bhaskar Dutta & Debraj Ray, *A Concept of Egalitarianism Under Participation Constraints*, 57 *ECONOMETRICA* 615-35 (1989). See, in relation to Grief’s article, Robert Cooter & Janet Landa, *Personal versus Impersonal Trade: The Size of Trading Groups and the Law of Contracts*, 4 INT’L REV. L. & ECON. 15 (1984).

⁴³ See Elster, *supra* note 9. The first, and so far sole, effort to formally modeling Hofstede’s dimensions appear to be Pieter H.M. Ruys, Rene van den Brink, and Radislav Semenov, *Values and Governance Systems* (working paper 2000) (on file with author) and Rene van den Brink, Pieter H.M. Ruys, & Radislav Semenov, *Governance of Clubs and Firms with Cultural Dimensions* (working paper 2001) (on file with author).

norms as understood rules for accepted and expected behavior.⁴⁴ Muzafir Sherif's work on conformity is often cited as an early demonstration of the potency of social pressure to engender conformity.⁴⁵ Subsequent seminal works, e.g., by Solomon Asch⁴⁶ and Stanley Milgram,⁴⁷ further established that individual behavior varies considerably in response to social norms.

Contemporary analyses distinguish between two major categories of norms: *descriptive norms*, which describe what most others do in a situation, and *injunctive norms* which describe what most others approve or disapprove the re.⁴⁸ A series of studies on littering in public places conducted by Cialdini, Reno, and Kallgren has demonstrated the power of injunctive norms to affect individual behavior.⁴⁹

Psychologists have suggested different sources for social norms, varying from general societal expectations for one's behavior to one's own expectations for one's behavior.⁵⁰ Little emphasis has been put until recently on structural linkages among particular social norms.

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⁴⁴ DAVID G. MYERS, SOCIAL PSYCHOLOGY (1999).

⁴⁵ Muzafir Sherif, *An Experimental Approach to the Study of Attitudes*, 1 SCIOIMETRY 90 (1937).

⁴⁶ Solomon E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in GROUPS, LEADERSHIP, AND MEN 177 (Harold Guetzkow Ed. 1951).

⁴⁷ STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

⁴⁸ Robert B. Cialdini & Melanie R. Trost, *Social influence: Social norms, conformity and compliance*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 151, 151 (Daniel T. Gilbert et al. Eds. 4th ed. 1998); see also Dale T. Miller, *The Norm of Self-Interest*, 54 AM PSYCHOLOGIST 1053, 1056 (1996) ("Social norms can be defined as shared perceptions of appropriate behavior that possess the power to induce people to act publicly in ways that deviate from their private inclinations.")

⁴⁹ See cites, *supra* note 5.

⁵⁰ See, respectively, Albert Pepitone, *Toward a Normative and Comparative Biocultural Social Psychology*, 34 J. PERSONALITY & SOC'L PSYCHOL. 641 (1976); Shalom H. Schwartz, *Normative Influence on Altruism*, in 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 221-79 (L. Berkowitz ed. 1977). For a review see Cialdini and Trost, *supra* note 48.

Turning to the legal academia, law and economics scholars of different persuasions appear to dominate the contemporary study of social norms here. The inception of this branch of scholarship is often attributed to Ellickson's study of Shasta County ranchers.⁵¹ The years since the publication of Ellickson's book have witnessed an outpouring of writing on this subject, which yielded many important insights but also engendered several principled debates.⁵² Students of social norms in law and economics mainly focus on injunctive norms. Instead of defining social norms or their content in the abstract, these scholars tend to specify the mechanism that engenders norms and sustains them.

One can distinguish two major lines of thought in social norm analyses—namely, the internal versus the external approaches to social norms.⁵³ The key difference between these approaches is the identity, or location, of the factor that induces compliance with a norm. According to the internal approach, this factor lies within the individual person. Depending on the situation, one feels compelled to obey

⁵¹ ELLICKSON, *supra* note 3.

⁵² It is not the purpose of this Article fully to survey the law and economics literature on social norms and any partial list of references would do injustice to numerous contributions. With this caveat in mind, *see*, for instance, Robert D. Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); ERIC POSNER, *LAW AND SOCIAL NORMS* (2000); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (hereinafter *Social Roles*); Sunstein, *Expressive Function*, *supra* note 7. *See also* Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 L. & SOC'Y REV. 157 (2000); Lawrence E. Mitchell, *Understanding Norms*, 49 U. TORONTO L.J. 177 (1999). Additional sources are cited *infra* at note 56 *et seq.*

⁵³ Several writers make distinctions in this spirit, using a similar though not identical terminology. *See*, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1129-30 (2000); Etzioni, *id.*, at 161-65.

a norm due to guilt or pride,⁵⁴ namely, a “warm glow” for doing the right thing. According to the external approach, people comply with social norms due to non-governmental enforcement and in light of a cost/benefit calculation of sorts.⁵⁵ Roughly speaking, the internal approach is more receptive to motivations that are not strictly wealth maximizing and to psychological insights in general. In contrast, the external approach tends to distance itself from such motivations as a necessary element for understanding social norms.

Robert Cooter is the main exponent of the internal viewpoint. In a long line of research he developed an internalization theory of social norms.⁵⁶ In Cooter’s view, people obey and enforce a norm because they internalize its normative element – the “ought statement” it implies – such that this element becomes part of their preferences. Thus, “a person will pay a net price to uphold an *internal* obligation.”⁵⁷ Kaplow and Shavell examine how moral sanctions and rewards, notably moral sentiments involving feelings of guilt and virtue, may govern individuals’ behavior.⁵⁸ Although their model focuses on moral injunctions rather than social norms in

⁵⁴ See, e.g., Korobkin & Ulen, *id.*, at 1130.

⁵⁵ *Id.*, at 1129-30.

⁵⁶ See Cooter, *supra* note 52 at 586 -89. See also Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT’L REV. L. & ECON. 215 (1994); Robert D. Cooter, *Law and Unified Social Theory*, 22 L. & SOC’Y REV. 50 (1995); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating The New Law Merchant*, 144 U. PA. L. REV. 1643 (1996) (hereinafter *Decentralized Law*); Robert D. Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997) (hereinafter *Normative Failure*); Robert D. 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 (1998); Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000).

⁵⁷ Cooter, *supra* note 52, at 588 (italics in the original).

⁵⁸ Louis Kaplow & Steven Shavell, *Moral Rules and the Moral Sentiments: Toward a Theory of an Optimal Moral System*, working paper (2001), available at http://papers.ssrn.com/paper.taf?abstract_id=293906.

general,⁵⁹ it sheds light on the mechanism that may be involved in creating internal obligations as it distinguishes between economic utility and moral utility. Beyond law and economics *stricto sensu*, Amitai Etzioni holds that “social norms are not merely part of the actors’ environment but also affect their intrinsic predispositions... These predispositions reflect a combination of people’s biological urges and their cultural imprinting.”⁶⁰

Among the scholars that adopt an internal approach to social norms, Cooter is the most explicit in drawing on psychological theories to explain how people may internalize normative obligations. Cooter cites theories on internalization of morality during early childhood development advanced by such iconic psychologists as Jean Piaget, Lawrence Kohlberg, and Sigmund Freud.⁶¹ Some of the ideas expressed by Kohlberg have been criticized in light of feminist theories.⁶² Many modern psychologists likewise may object to taking Freud at face value. Nevertheless, the common assumption is that children acquire value preferences at a young age.⁶³ Finally, Lior Strahilevitz recently argued that social norms of reciprocity in loose-knit groups, which he identifies among Internet users (e.g., of music file sharing), can be

⁵⁹ The difference between “moral injunctions” and “social norms” implied in the text may be subtle. As used by Kaplow and Shavell, and perhaps other writers, the notion of moral injunctions has a clear deontological dimension – having to do with the good or the bad per se. Social norms prescribe behavior rules that oftentimes may difficult to pigeonhole into such restrictive categories notwithstanding the fact that social norms too reflect what the surrounding society considers as desirable.

⁶⁰ Etzioni, *supra* note 52, at 161.

⁶¹ Cooter makes these references repeatedly. *See*, e.g., Cooter, *Decentralized Law*, *supra* note 56, at 1661-62; Cooter, *Normative Failure*, *supra* note 56, at 965 (citing JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 13-108 (Marjorie Gabain trans., 1965); Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice*, in 1 *ARTICLES ON MORAL DEVELOPMENT* 1, 409-12 (1981); SIGMUND FREUD, *THE EGO AND THE ID* 18-29 (James Strachey ed. & Joan Riviere trans. 1962)).

⁶² *See* Cooter, *id.*, at 1661n54. Etzioni is even more critical of Kohlberg’s work. *See* Etzioni, *supra* note 52, at 168-69.

explained by psychological theories on internalized motivations for general, open-ended reciprocity.⁶⁴

Many social norms theorists in the legal academia, however, subscribe to different versions of the external approach, relying upon rational choice theory and game theory.⁶⁵ Members of this camp generally argue that social norms can be explained without reliance on psychological theories on non-selfish motivations. To various degrees, these commentators aver that self-interestedness, when properly considered, can provide sufficient basis for the emergence and maintenance of social norms. Thus, Eric Posner's prolific writing expounds a signaling model in which people comply with and enforce norms with a view toward future exchanges,⁶⁶ and Cass Sunstein perceives norms as "part of the background against which costs and benefits are assessed".⁶⁷ Ellickson defines social norms as rules "governing an individual's behavior that third parties other than state agents diffusely enforce by means of social sanctions",⁶⁸ and Lawrence Lessig espouses a similar view.⁶⁹ In a

⁶³ See below note 140.

⁶⁴ See Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File Swapping Networks*, 89 VA. L. REV. 505 (2003) (citing Sally Ann Shumaker & James S. Jackson, *The Aversive Effects of Nonreciprocated Benefits*, 42 SOC. PSYCHOL. Q. 148 (1979)). Strahilevitz also provides a survey of related research that has investigated whether the motivation for such generalized reciprocity is conditioned on having first being helped and what may be mechanisms that trigger such reciprocity norms. Strahilevitz, *id.*, at 563-564. See also

⁶⁵ Jeffrey J. Rachlinski, *The Limits of Social Norms*, 75 CHIC.-KENT L. REV. 1537, 1540 (2000). Scholars in this camp thus follow the more traditional line in economics surveyed above.

⁶⁶ See E. POSNER, *supra* note 52; See also Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998) (hereinafter *Symbols, Signals*); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000).

⁶⁷ See Sunstein, *Expressive Function*, *supra* note 52 at 935.

⁶⁸ Ellickson, *supra* note 7, at 3. See also Richard A. Posner & Eric Bennett Rasmusen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. (1999).

middle ground between the internal and external views, Richard McAdams advances an exchange-based model of social norms in which the currency is psychic: People comply with social norms because they seek other people's esteem (as a positive payoff) and try to avoid their opprobrium (as a negative payoff).⁷⁰

E. Interim Summary

As should be clear from the foregoing brief review, there are lively debates in several social sciences on the nature of social norms, the factors that engender them, and on the very definition of social norms. In a recent volume on this subject Michael Hechter and Karl-Dieter Opp indeed note:

“As there is no common definition of social norms, there can be little agreement about how to measure them... Much less clear, however, are the conditions responsible for their emergence.”⁷¹

That said, readers may also have noticed certain common threads running across these debates even in the present limited scope. In virtually every discussion there are interesting and uninteresting norms. Plain behavioral regularities—particularly those that resolve coordination problems by pointing out a focal point and are therefore in everybody's interest—belong to the uninteresting kind. Compliance with this type of social norms does not convey meaning. These norms will not occupy us beyond this point. In contrast, the interesting kind of social norms are those that

⁶⁹ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1044 (1995) (arguing that social norms rely upon “social meanings [that] impose costs, and supply benefits, to individuals and groups”); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662 (1998) (arguing that social norms “constrain [people] because of the enforcement of a community”).

⁷⁰ See, e.g., McAdams, *supra* note 52, at 355-57. For similar approaches see below, text to note 102 *et seq.*

call for explanation—the norms that are not ostensibly in people’s direct material interest. Here the challenge is to provide an analytical framework that would link social norms with other social phenomena without resorting to tautologies or idiosyncratic “thick descriptions.” Accounts of this sort, while intriguing, are susceptible to the critique that they are at bottom only “just so stories.”⁷²

In order to pin down the notion of social norms, at least partially, this Article adopts the definition used in social psychology for injunctive norms, namely, behavioral rules that describe what most people approve or disapprove in a situation. Thus, a behavioral pattern *X* would be a social norm if most people approve of it. We would say that the social norm *X* prevails in a society if most people approve of the behavioral pattern *X* and actually comply with this pattern *X* most of the time. The crucial element is the injunctive feature of the norm – the command, or the belief that doing *X* is right, appropriate, or desirable. This belief is injunctive, or normative, because it is shared by most people. The injunctive element captures the fact that compliance with the norm is not trivial as it does not reflect direct self-interestedness.

III. THEORIES OF VALUE DIMENSIONS

A. *Foreword*

The study of values in cross-cultural psychology has made significant progress in tackling the very issue that lies at the heart of social norm analysis—namely, the

⁷¹ Michael Hechter & Karl-Dieter Opp, *Introduction*, in *SOCIAL NORMS* *xiii* (Michael Hechter & Karl-Dieter Opp eds. 2001).

⁷² See Elster, *supra* note 9; see also Hechter and Opp, *supra* note 71, at *xix* (“Jon Elster... argues that the regulatory power of norms is fundamentally emotional. Consequently, the best evidence about emotions, he claims, is to be found in works of history, anthropology, fiction, and philosophy. It is doubtful, however, that these sources of evidence can contribute much to an analysis of social norms. More likely, the kinds of evidence that can be garnered from anthropologists’ and novelists’ thick

nature and structure of societal preferences. In cross-cultural psychology, societal preferences are assumed but not assumed away. They are given content, context, and structure. Equally importantly, by drawing on the concept of values, current theories in this discipline are able to connect individual-level motivations with societal level orientations and suggest means with which to measure them. This part provides a brief introduction to the basic concepts used in cross-cultural psychology while eschewing any attempt to cover the entire field in the present scope.⁷³

This part outlines theories of value dimensions advanced by two leading cross-cultural psychologists, Geert Hofstede and Shalom Schwartz, as a basis for discussion in subsequent sections.⁷⁴ Regrettably, the legal literature is virtually unaware of this body of knowledge.⁷⁵ Economists too are largely oblivious to this discipline although interest in modeling culture is emerging.⁷⁶ Other disciplines, however, make extensive

description lead to the “just-so stories” that Elster so frequently disparages in many of his other writings.”)

⁷³ This Part draws on Shalom H. Schwartz, *Cultural Value Differences: Some Implications for Work*, 48 APPL'D PSYCHOL. INT'L REV. 23 (1999) and on AMIR N. LICHT, CHANAN GOLDSCHMIDT, & SHALOM H. SCHWARTZ, CULTURE RULES: THE FOUNDATIONS OF THE RULE OF LAW AND OTHER NORMS OF GOVERNANCE (working paper 2003). For a more detailed review of these issues and other aspects of cross-cultural psychology see Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 DELAWARE J. CORP. L. 147, 166-80 (2001); see also Peter B. Smith & Shalom H. Schwartz, *Values*, in 3 HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY 70, 77-79 (2nd ed., J.W. Berry et al., eds 1997); PETER B. SMITH & MICHAEL H. BOND, SOCIAL PSYCHOLOGY ACROSS CULTURES: ANALYSIS AND PERSPECTIVES 38-69 (2nd ed. 1998); Michael Harris Bond & Peter B. Smith, *Cross-Cultural Social and Organizational Psychology*, 47 ANNU. REV. PSYCHOL. 205 (1996).

⁷⁴ For other analyses, see, e.g., RONALD INGLEHART, MODERNIZATION AND POSTMODERNIZATION: CULTURAL, ECONOMIC AND POLITICAL CHANGE IN 43 COUNTRIES; Peter B. Smith, Shaun Dugan, & Fons Trompenaars, *National Culture and the Values of Organizational Employees: A Dimensional Analysis Across 43 Nations*, 27 J. CROSS-CULTURAL PSYCHOL. 231 (1996); Chinese Cultural Connection, *Chinese Values and the Search for Culture-Free Dimensions of Culture*, 18 J. CROSS-CULTURAL PSYCHOL. 143 (1987).

⁷⁵ See Licht, *supra* note 73, at 180 (reporting that Lexis and WestLaw searches on legal literature retrieved only a handful of references to Hofstede's work and no reference to Shalom Schwartz's studies).

⁷⁶ See *supra* text to note 41 et seq.

use of these theories. Hofstede's theory in particular dominates analyses in management studies⁷⁷ and international accounting.⁷⁸

B. Values

The core concept in the present discussion is values. Values are defined as conceptions of the desirable.⁷⁹ Values thus feature at the two distinct levels of analysis: the individual and the societal (or cultural). For purposes of social norm analysis the latter level is the relevant one. We are interested in preferences, emphases, and orientations that are shared by the societal group as a whole, at least on average, and how they interact with the social institution which is the law. Unfortunately, the recent advents in the economic analysis of other-regarding preferences at the individual level, awkwardly dubbed "social preferences," tend to confuse these two levels of analysis. Many analyses of social norms share this confusion. This calls for briefly mentioning the role of values at the individual level in order to clarify the differences in the issues addressed at the two levels.

⁷⁷ See, e.g., STEPHEN P. ROBBINS & MARY COULTER, *MANAGEMENT* 125-29 (6th ed 1999) (arguing that "[t]he most valuable framework to help managers better understand differences between national cultures was developed by Geert Hofstede.") See, generally, Richard Mead, *International Management: Cross-Cultural Dimensions* (2nd ed. 1998) (drawing on Hofstede's theory); Greame Harrison & Jill L. McKinnon, *Cross-Cultural Research in Management Control System Design: A Review of the Current State*, 24 ACTG ORG. & SOC. 483 (1998) (same).

⁷⁸ The now classic work, implementing Hofstede's framework, is Sidney J. Gray, *Towards a Theory of Cultural Influence on the Development of Accounting Systems Internationally*, 24 ABACUS 1 (1988). For a review, see Helen Gernon & R.S. Olusegun Wallace, *International Accounting Research: A Review of its Ecology, Contending Theories, and Methodologies*, 14 J. ACCT. LIT. 54, 86-91 (1995). See also GERHARD G. MUELLER, HELEN GERNON, AND GARY K. MEEK, *ACCOUNTING: AN INTERNATIONAL PERSPECTIVE* 10-11 (4th ed. 1997); Harry H.E. Fechner & Alan Kilgore, *The Influence of Cultural Factors on Accounting Practice*, 29 INT'L J. ACTG 265 (1994). For an empirical analysis of Gray's theory see Stephen B. Salter & Frederick Niswander, *Cultural Influence on the Development of Accounting Systems Internationally: A Test of Gray's (1988) Theory*, 26 J. INT'L BUS. STUD. 379 (1995).

⁷⁹ See, generally, Clyde Kluckhohn, *Value and Value Orientations in the Theory of Action*, in *TOWARD A GENERAL THEORY OF ACTION* 383 (Talcott Parsons & Edward A. Shils, eds. 1951); MILTON ROKEACH, *THE NATURE OF HUMAN VALUES* (1973); Shalom H. Schwartz, *Universals in the Content and*

For individual persons, values represent motivational goals. This is the view of values as guiding principles in one's life. As beliefs, values are not objective, cold ideas. Rather, when values are activated (at the individual level), they become infused with feeling. Behavior in compliance the values endorsed by an individual person would elicit a sense of virtue; deviant behavior would elicit a sense of guilt. Examination of internal relationships between numerous specific values reveals that they in fact represent ten basic value-types. (Specifically: power, achievement, hedonism, stimulation, self-direction, universalism, benevolence, conformity, tradition, and security.) These value types can further be organized along two bipolar dimensions: self-enhancement versus self-transcendence and.⁸⁰

Future research should consider the relations between the two individual-level dimensions and what economists call other-regarding preferences. In brief, it appears that the latter dimension (conservation versus openness to change) has thus far gone largely unnoticed. As this Article concentrates on the societal level of analysis a comprehensive discussion of values at the individual level exceeds the present scope.⁸¹

Moving now to the cultural level of analysis, let us first note that definitions of culture abound. Social scientists often define culture in subjective terms as the values,

Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (M. Zanna ed. 1992).

⁸⁰ Shalom H. Schwartz, *Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries*, in 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (M. Zanna Ed. 1992) (presenting model). See also Shalom H. Schwartz & Anat Bardi, *Value Hierarchies across Nations: Taking a Similarities Perspective*, 31 J. CROSS-CULTURAL PSYCHOL. 1 (2000).

⁸¹ For an application of individual-level value dimensions to corporate governance analysis see Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style* (ECGI Law Working Paper No. 16/2003 2003), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=469801.

orientations and underlying assumptions that are prevalent among the members of a society.⁸² Values are the essence of culture seen this way. The values that constitute a culture are the implicitly or explicitly shared, abstract ideas about what is good, right, and desirable in a society.⁸³ These cultural values (e.g., freedom, prosperity, security) are the bases for the specific norms that tell people what is appropriate in various situations.

The ways that societal institutions (e.g., the family, education, economic, political, religious systems) function, their goals and their modes of operation, express cultural value priorities. Because cultural value priorities are shared, role incumbents in social institutions (e.g., leaders in governments, teachers in schools, executive officers of corporations) can draw upon them to select socially appropriate behavior and to justify their behavioral choices to others (e.g., to go to war, to punish a child, to fire employees). The explicit and implicit value emphases that characterize a culture are imparted to societal members through everyday exposure to customs, laws, norms, scripts, and organizational practices that are shaped by and express the prevailing cultural values.⁸⁴ Thus, adaptation to social reality and informal socialization are just as central to the transmission of cultural values as is formal socialization.

C. Dimensions of Culture

⁸² This definition is similar to that adopted in studies of the effects of societal development, e.g., *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (Lawrence E. Harrison & Samuel P. Huntington, eds., 2000) and widespread in cross-cultural psychology, e.g., *HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY* (J.W. Berry, M.H. Segall & C. Kagitcibasi, eds., 2nd Ed, 1997).

⁸³ See ROBIN M. WILLIAMS, *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* (3rd ed. 1970).

⁸⁴ See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1972); Hazel R. Markus & Shinobu Kitayama, *A Collective Fear of the Collective: Implications for Selves and Theories of Selves*, 20 *Personality & Social Psychology Bulletin* 568 (1994).

A common postulate in cross-cultural psychology is that all societies confront similar basic issues or problems when they come to regulate human activity with a view to establishing social order.⁸⁵ Societal members, especially decision-makers, recognize and communicate about these problems, plan responses to them, and motivate one another to cooperate in coping with them. They do so by drawing on values. Values are the vocabulary of socially approved goals used to motivate action and to express and justify the solutions chosen. Because values vary in importance, it is possible to characterize each society by the relative importance attributed to these values in the society. This cultural-level analysis yields unique cultural profiles.

Schwartz derives three bipolar, cultural value dimensions from three basic issues he identifies as confronting all societies. In coping with these issues, societies exhibit greater or lesser emphasis on the values at one or the other pole of each dimension. Seven types of values (societal orientations) on which cultures can be compared derive from the analysis of the bipolar dimensions. The theory also specifies the structure of relations among these types of values. The following paragraphs briefly describe these three value dimensions, the seven types of values, and the basic issues to which they relate. Figure 1 presents graphically the relations among the value dimensions and value types.

[Figure 1 about here]

Embeddedness/Autonomy: This dimension concerns the desirable relationship between the individual and the group. Embeddedness represents a cultural emphasis

⁸⁵ See, for instance, ROKEACH, *supra* note 79; FLORENCE R. KLUCKHOHN & FRED L. STRODTBECK, VARIATIONS IN VALUE ORIENTATIONS (1961).

on the person as embedded in the group and committed to maintaining the status quo, propriety, and restraint of actions or inclinations that might disrupt group solidarity or the traditional order. The opposite pole of Autonomy describes cultures in which the person is viewed as an autonomous, bounded entity who finds meaning in his or her own uniqueness. It is possible to distinguish conceptually between two types of Autonomy. *Intellectual Autonomy*: A cultural emphasis on the desirability of individuals independently pursuing their own ideas and intellectual directions (curiosity, broadmindedness, creativity). *Affective Autonomy*: A cultural emphasis on the desirability of individuals independently pursuing affectively positive experience (pleasure, exciting life, varied life).

Hierarchy/Egalitarianism: This dimension concerns the desirable ways to guarantee responsible behavior that preserves the social fabric. Hierarchy represents a cultural emphasis on obeying role obligations within a legitimately unequal distribution of power, roles, and resources. Egalitarianism represents an emphasis on transcendence of selfish interests in favor of voluntary commitment to promoting the welfare of others whom one sees as moral equals.

Mastery/Harmony: This dimension concerns the relation of humankind to the natural and social world. Mastery refers to a cultural emphasis on getting ahead through active self-assertion in order to master, change, and exploit the natural and social environment. Harmony represents an emphasis on accepting the social and physical world as it is, trying to comprehend and fit in rather than to change or exploit.

A pioneering and influential dimensional framework for characterizing culture was advanced by Hofstede.⁸⁶ The following sets forth Hofstede's value dimensions and the basic societal problems they address. Here too, each dimension describes a range of possible stances between two polar extremes.

Individualism/Collectivism: This dimension refers to the relationship between individual and group. A collectivist orientation values loosely knit social relations in which individuals are expected to care only for themselves and their immediate families. An individualist orientation values tightly knit relations in which people expect their broad in-group (e.g., extended family, clan) to look after them in exchange for unquestioning loyalty.

Power Distance: This dimension concerns social inequality, including relations with authority. High power distance indicates that an unequal distribution of power in institutions is viewed as legitimate.

Uncertainty Avoidance: This dimension concerns cultural preferences for dealing with uncertainty. Are uncertainty and ambiguity viewed as disturbing and threatening or as acceptable challenges? The more threatening uncertainty is perceived to be, the more highly valued are beliefs and institutions that provide certainty.

⁸⁶ See GEERT H. HOFSTEDÉ, CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES (1980, abridged ed. 1984) (hereinafter "CULTURE'S CONSEQUENCES 1980"); GEERT HOFSTEDÉ, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS (2d ed. 2001) (hereinafter "CULTURE'S CONSEQUENCES"); GEERT H. HOFSTEDÉ, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (1991) (hereinafter "SOFTWARE OF THE MIND").

Masculinity/Femininity: This dimension concerns the social implications of gender-linked behavior as they are presented in many societies (irrespective of their desirability). More “masculine” cultures value achievement, heroism, assertiveness, and material success. More “feminine” cultures emphasize relationships, modesty, caring for the weak, and interpersonal harmony.⁸⁷

Long-Term Orientation: This dimension concerns cultural emphases on time horizons. High Long-Term Orientation emphasizes Confucian work ethics such as thrift and persistence; low Long-Term Orientation reflects greater acceptance of rapid changes.⁸⁸

IV. A PYRAMID OF SOCIAL NORMS

At this point, readers may be able to see how values and cultural value dimensions relate to social norms and to the law. These are all social phenomena that deal with the “ought”. The cultural profile of each society affects its members’ personal values as well as its social institutions. It therefore defines the setting in which more concrete norms evolve. This part develops this insight by advancing a pyramidal model of social norms that rests on cultural value foundations.

A. *Values and Social Norms*

⁸⁷ Although this label has elicited negative responses, Hofstede argues that it reflects an empirical reality of gender differences that is independent of its normative undesirability. In the 2001 edition of his study, Hofstede follows the modern distinction between *sex* and *gender* and uses the latter term when referring to social function. HOFSTEDE, *CULTURE’S CONSEQUENCES*, *supra* note 86, at 280. For further discussion, *see* MASCULINITY AND FEMININITY: THE TABOO DIMENSION OF NATIONAL CULTURES (Geert H. Hofstede & Willem A. Arrindell eds. 1998).

⁸⁸ This value dimension was not included in Hofstede’s original study. It was added later, in HOFSTEDE, *SOFTWARE OF THE MIND*, *supra* note 86, in light of a study led by Michael Bond. There, it was named “Confucian work dynamism.” *See* Chinese Cultural Connection, *Chinese Values and the Search for Culture-Free Dimensions of Culture*, 18 J. CROSS-CULTURAL PSYCHOL. 143 (1987). Notwithstanding its apparent link to Asian cultures it is arguably a universal dimension. Data for this dimension cover a smaller set of countries and it is not commonly used in the literature.

Patterns of behavior become (injunctive) social norms when people around the actor expect her to follow such patterns and signal their expectations to her, and when the actor recognizes these expectations and adjusts her behavior to them. The framework that societies use to determine what is expected, desirable, or legitimate consists of values. Values, as defined by social psychologists, are therefore conceptually close to social norms, as the latter are understood by students of social norms in the legal academia. This is not merely a linguistic statement but rather a conceptual claim.⁸⁹ Social norms are “ought statements” and values compactly represent what ought to be pursued in a particular social group.⁹⁰

The conceptualization of values in the value dimension framework integrates elements from both the internal and the external approaches to social norms. The internal approach assumes that the process of socialization molds societal members’ utility functions, as suggested by Bowles, Binmore, and Cooter.⁹¹ During this process, societal members internalize the choices and preferences that had already been made by previous generations as they are reflected in the surrounding culture. Recall that when values are activated they become infused with feeling. When people behave in

⁸⁹ Support for the linguistic claim may be found, for instance, in Hofstede’s writings, as he repeatedly refers to value dimensions as “societal norms”. Hofstede, *CULTURE’S CONSEQUENCES*, *supra* note 86, at 97, 159 (referring to Power Distance and to Uncertainty Avoidance, respectively). The review in Part 2 indicates that term usage is far from settled, however, such that this reasoning cannot be decisive. *See*, e.g., Michael Hechter, *The Role of Values in Rational Choice Theory*, 6 *RATIONALITY & SOC’Y* 318, 321-22 (1994) (distinguishing between “values”, “preferences”, and “norms”).

⁹⁰ Cultural values may thus be likened metaphorically to building blocks of a socio-genetic code that every modern society carries. In this metaphor, societies share many of these building blocks but differ in the relative weight they give to each one, somewhat like species that share many genes but differ in the makeup of their genetic codes. *Cf.* J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (1998) (asserting a theory of cultural evolution).

⁹¹ *See* Bowles, *supra* note 40; Binmore *supra* note 28; Cooter *supra* note 56.

compliance with cultural values it is because they feel they ought to do so. Cultural values thus shape and inform people's internal utility functions.

The internalization approach suggests that values may be analyzed as arguments in people's utility function. In this view, people constantly assess alternative modes of conduct not only in light of corresponding material payoffs but also against their internalized set of value preferences. In some cases the material incentive, or narrow self-interest, would dominate. In other cases some people may consider compliance with other values as more rewarding. Experimental economics—particularly the research programs led by Frey, Fehr and Rabin—confirms this conjecture at least with regard to reciprocity and general fairness.⁹² One may further assume that people's revealed preferences would reflect their cultural profile. This conjecture too receives supported from a large body of empirical evidence.⁹³

The value dimension framework may help in addressing the challenge that Sen had pointed out, namely, economists' current inability to invoke a notion of societal preferences or transparent properties of social utility.⁹⁴ The pivotal element here is the distinction between individual and cultural levels of analysis. At the individual level, the idea that internalization of social values affects personal utility functions entails that societal preferences may be regarded as part of societal members' self-interest. At the cultural level, the same building blocks—namely, the particular value items—may serve to identify societal stances toward basic social problems. By postulating cultural value dimensions as responses to social problems the value dimension framework

⁹² See *supra* text to note 23.

⁹³ See Smith & Schwartz, *supra* note 73; HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 86.

identifies the parameters of a social utility function. To the extent that individual behavior is guided by cultural values such behavior can be assumed to simultaneously maximize both personal utility and, consequentially, social utility. To be sure, theories of value dimensions cannot resolve the theoretical problem posed by Arrow's impossibility theorem; but they do suggest means for sidestepping the hurdle this theorem places on the way to explicating societal preferences.

Recall now Kaplow and Shavell's model of moral rules and moral sentiments.⁹⁵ Kaplow and Shavell base their model on the assumption that

“[i]ndividuals are subject to a process of inculcation such that they will experience guilt or virtue as a function of the choices they make, and, accordingly they will be led to behave other than in their narrow self-interest if the weight of guilt and virtue exceeds their personal benefit from an act.”⁹⁶

One can readily recognize that this assumption in fact reflects a restatement of the concept of values and in particular, the notion that values are infused with feelings, such that choices and actions are also affected by the level of good or bad feeling that they entail. In concentrating on moral rules, Kaplow and Shavell unnecessarily limit the scope of their model. The set of actions and situations involving moral judgments is narrower than the set involving value judgments. On the one hand, this limitation makes the model universal in that it refers to acts that are “good” or “bad” in the abstract. On the other hand, this feature of the model limits its universality with respect to the actual nature of acts that societies perceive as good or

⁹⁴ Sen, *supra* note 36, at 498.

⁹⁵ Kaplow & Shavell, *supra* note 58.

⁹⁶ *Id.*, at 3.

bad. The value dimension framework explicates the notion that relative superiority of actions with respect to one another may differ across social groups. Kaplow and Shavell indeed acknowledge that “[t]he possibility of inculcation, moreover, is important in attempting to explain cross-cultural variation in moral rules.”⁹⁷

As noted briefly above, the need to account for psychological factors in order to sophisticate models of individual rational behavior is no longer contested. This enterprise has been largely limited to cognitive bounds that directly affect individual decision-making.⁹⁸ However, as one develops the ability to decide for oneself, one’s decision-making mechanism is affected by cultural values just as it is affected by cognitive bounds on human memory and computational capability. Integrating the value dimension framework into law and economics analysis is therefore a direct extension of integrating behavioral economics insights into it – what is now known as Behavioral Law and Economics.⁹⁹ Value dimension theories can advance social norms analysis by providing an empirically validated framework with which to account for social phenomena that are otherwise difficult to reconcile with standard micro-economic predictions.

The relevance of value dimensions is not limited to internalization-based views of human norms. The societal cultural profile also operates as an external

⁹⁷ *Id.*, at 27. The difference between individual- and cultural-level organization of values entails, however, that aggregation of individual preferences to create a social welfare function may involve more than simple mathematical integration.

⁹⁸ See Rabin, *supra* note 39; Bowles, *supra* note 40.

⁹⁹ See, generally, Korobkin & Ulen, *supra* note 53; Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998); Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115 (1999). For a thorough review, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

mechanism for creation and enforcement of norms, in concurrence with internal mechanisms. The crucial element in this context is the nature of value preferences as capturing shared meanings and beliefs. Even in the strong formulation of the external approach—e.g., as espoused by Eric Posner’s signaling model—societal members must have a minimal shared basis of “common knowledge.”¹⁰⁰ Such common knowledge is necessary for people to be able to generate the right signals and interpret signals sent by others. To the extent that individuals have acquired culture, they can predict how their actions would likely be perceived by others in their environment, such as professional peers, family, the media, and so forth. They can assess whether an action is generally considered right or wrong. As certain cultural values take root among individual members of society, they shape social institutions and the general social environment. This environment gives meaning to action, defines what is socially acceptable, and exercises social control through triggering sanctioning. Values therefore delineate the constraints for and give meaning to individual behavior, as in Lessig’s and Ellickson’s accounts.¹⁰¹

Recently, Fehr and Falk reviewed the psychological foundations of incentives, arguing that economists may fail to understand the levels and the changes in behavior if they neglect motives like the desire to reciprocate or the desire to avoid social disapproval.¹⁰² The point is well taken and is also consistent with McAdams’s account

¹⁰⁰ “Common knowledge” here connotes the game theoretic concept of common knowledge, namely, the information that is available to all the players, all the players know that it is available to all of them, all the players know that all the players know this, and so forth ad infinitum. *See* ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 44 (1989).

¹⁰¹ *Cf.* Bond & Smith (1996, p. 209) (adopting a definition of culture as a set of “shared constraints that limit the behavior repertoire available to members of a certain . . . group”).

¹⁰² *See* Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 *EUR. ECON. REV.* 687 (2002).

of social norms, under which social approval or disapproval motivates individuals' compliance with norms. These accounts, however, may not fully acknowledge that people's response to (actual and would-be) social approval or disapproval is not uniform. Such responses in fact vary systematically with people's values even within societies, as was shown by Philip Tetlock's work on accountability.¹⁰³ Similar to Kaplow and Shavell's theory, these insights can be generalized by accounting for cross-cultural differences in social stances towards reciprocation, and, more generally yet, toward the subject of social approval. Different societies approve of different behaviors and these differences are captured in their cultural profile of value orientations.

B. Strata of Social Norms

One of the striking features in the extant social norms literature is the equal treatment commentators give to norms that are profoundly different in importance and prevalence. Conducts like dueling, flag desecration, and racial discrimination are considered representative of social norms as are cleaning after one's dog, smoking in public places, or bringing cookies to faculty seminars.¹⁰⁴ To be sure, similar incentive mechanisms may be at work when such norms exert their influence. But a sound

¹⁰³ See Philip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Ideological Beholder?*, 45 ADMIN. SCI. Q. 293 (2001); see, generally, Philip E. Tetlock & Jennifer S. Lerner, *The Social Contingency Model: Identifying Empirical and Normative Boundary Conditions on the Error-and-Bias Portrait of Human Nature*, in DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY 571 (Shelly Chaiken & Yaacov Trope, Eds. 1999).

¹⁰⁴ See, e.g., Lessig, *supra* note 69, at 682 (dueling); E. Posner, *Symbols, Signals*, *supra* note 66, at 780-81 (flag desecration); Scott, *supra* note 12, at 1608-09 ("pooper scooper" norms); Ellickson, *supra* note 7 (racial discrimination, smoking, and "pooper-scooper" norms); Cooter, *Normative Failure*, *supra* note 56, at 977 (smoking in public and "pooper scooper" norms); Mitchell, *supra* note 52 (cookies).

theory of social norms should also be able to distinguish between lighting a cigar in a dinner party and burning a cross on an African-American's front lawn.¹⁰⁵

A notional model of a pyramid of social norms that relies on the value dimension framework provides means for sensibly making such distinctions. The basic idea is rather simple: in every society norms constitute a system – a set of interdependent and interacting elements that work together to accomplish specific purposes.¹⁰⁶ In fact, the system of social norms is a sub-system of social order institutions, together with legal norms and other sub-systems. In the system of social norms, some norms are central to the social structure and are deeply rooted; others may be less so. The perception of social norms as a system implies that norms are interrelated and therefore cannot be analyzed solely as isolated objects.

A useful way to describe the interrelation between social norms is to use a pyramidal model. Now the metaphor of a pyramid of norms should rightfully be attributed to Hans Kelsen. In his *Pure Theory of Law*,¹⁰⁷ Kelsen postulated a multi-level structure of legal norms in which each layer generates and legitimizes the next. The validity of the entire structure emanates from a preexistent basic norm (*Grundnorm*).¹⁰⁸ The pyramid of social norms resembles Kelsen's pyramid in two respects: first, it makes explicit the notion that norms constitute a system; second, it

¹⁰⁵ See Ellickson, *supra* note 7 (using cigar example); Lessig *supra* note 69, at 684 (using cross burning example).

¹⁰⁶ See MICHAEL L. GIBSON & CARY T. HUGHES, *SYSTEMS ANALYSIS AND DESIGN* 5 (1994). For an implementation of a general systems approach to the law, see Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479 (1997). From a positive point of view, the attribution of goals to systems is merely shorthand for the proposition that the goals of a system are the results that the system in fact produces. Lopucky, *id.*, at 485. For a brief background on general systems theory see Kathryn R. Heidt, *Taking a New Look at Secured Transactions Secured Credit*, 96 COLUM. L. REV. 759, 762-64 (1996).

¹⁰⁷ HANS KELSEN, *PURE THEORY OF LAW* (1942).

distinguishes between norms according to their importance to the entire system. Like Kelsen's pyramid, the pyramid of social norms actually stands on its head, as its basis consists of only a few basic norms.

The pyramid model exhibits structural features that may be described as vertical and horizontal. The vertical structure distinguishes different strata, or layers, of norms, ranging from fundamental to particular norms. In this respect, the model identifies limited sets of core normative inclinations from which societies derive more concrete norms.¹⁰⁹ Cultural emphases on value types (i.e., poles of value dimensions) constitute the fundamental layer of norms in the pyramid. These are the societal first principles – the most deep-seated elements of each society's social order system. Thus, a cultural emphasis Autonomy over Embeddedness is a basic social norm; so is a cultural preference for Individualism over Collectivism. These norms are manifested in societal emphases on particular values. Norms at the deeper strata in turn set the stage for the development of more concrete norms in higher strata.

The present pyramidal model of social norms is consistent with a model of stratified social institutions advanced by Oliver Williamson.¹¹⁰ Williamson's model

¹⁰⁸ For a critical review, see J. W. HARRIS, *LEGAL PHILOSOPHIES* 73-80 (2nd ed. 1997).

¹⁰⁹ The preeminent political scientist Aaron Wildavsky also pointed out the need to organize values along a limited set of dimensions. See Aaron Wildavsky, *Choosing Preferences by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 *AM. POL. SCI. REV.* 3, 8 (1987) ("All of us in social science are looking for bedrock, for the most basic value and factual premises that we can hypothesize as lying behind specific political and policy preferences.") Relying on a cultural model developed by anthropologist Mary Douglas, Wildavsky also subscribed to a theory of cultural dimensions of human relations postulating four models of cultures: Fatalism, Collectivism, Individualism, and Egalitarianism. Wildavsky, *id.*, at 6. For an application of Wildavsky's conceptualization to gun control see Kahan & Braman, *supra* note 9.

¹¹⁰ Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 *J. ECON. LIT.* 595 (2000).

distinguishes four levels of analysis. “Level 1” consists of informal institutions.¹¹¹ This is where norms, customs, mores, and traditions are located and where religion plays a role. According to Williamson, “Level 1 is taken as given by most institutional economists.”¹¹² Level 2, located below Level 1, consists of formal legal rules, comprising constitutions, law, property rights, etc.¹¹³ Governance structures (e.g., in firms) and marginal analysis (e.g., of economic outcomes and prices) belong to Levels 3 and 4, respectively. Although the system is fully interconnected, feedback among levels is neglected. Figure 2 describes graphically these four levels, causal links (represented by solid arrows), and feedback links (represented by dashed arrows).

[Figure 2 about here]

In Williamson’s model, higher levels impose constraints on the development of the levels immediately below. Williamson postulates that Level 1 informal institutions are pervasively linked with complementary institutions, both formal and informal. The resulting institutions “have a lasting grip on the way a society conducts itself.”¹¹⁴ One can readily acknowledge that the pyramidal model of social norms elaborates Williamson’s model as it allows one to look into the “black box” of Level 1 informal institutions. The cultural value dimension framework on which the pyramidal model

¹¹¹ Williamson identifies Level 1 with the notion of “embeddedness” proposed by Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91A M. J. SOCIOL. 481 (1985). Both concepts must not be confused with the cultural orientation of Embeddedness.

¹¹² Williamson, *supra* note 110, at 596.

¹¹³ Douglas North has shown that the definition and enforcement of legal rights are important features of this level. *See* DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); Douglas C. North, *Institutions*, 5 J. ECON. PERSPECTIVES 97 (1991).

¹¹⁴ Williamson, *supra* note 110, at 597.

draws provides concrete content to the structural elements that constitute Level 1 institutions.

Furthermore, viewing Level 1 informal institutions merely as constraints that define transaction costs for alternative institutions does not fully capture their role. The prevailing informal institutions in a society (beliefs, norms and values) also serve as sources of motivation for and justification of alternative formal institutions.¹¹⁵ Culture—as this Article conceptualizes it—encompasses both facets of Level 1 institutions, namely, as constraints and as motivational factors. Culture operates as a constraint due to its nature as societies’ “common knowledge.” It thus coordinates people’s epistemics and expectations. This lowers the social costs for developing and sustaining norms that are compatible with prevailing cultural values. Culture operates to motivate and justify action compatible with its values through its impact on organizational policies and on the values of individual decision-makers.¹¹⁶

The horizontal structure of the pyramid model relates to the internal relationship between norms at the same level. The model assumes that such norms are interrelated. In Schwartz’s model, value dimensions constitute structured systems in themselves, with opposing and adjacent value types, thereby exhibiting a horizontal

¹¹⁵ See Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 *J. Pol. Econ.* 912 (1994); Victor Nee, *A New Institutional Approach to Economic Sociology*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* (Neil Smelser & Richard Swedberg, Eds., 2nd ed. Forthcoming 2003).

¹¹⁶ Lilach Sagiv & Shalom H. Schwartz, *A New Look at National Culture: Illustrative Applications to Role Stress and Managerial Behavior*, in *Handbook of Organizational Culture and Climate*. 417 (Neal M. Ashkanasy, Celeste P.M. Wilderom, & Mark F. Peterson Eds. 2000); Peter B. Smith, M. F. Peterson, & Shalom H. Schwartz, with 49 co-authors, *Do Cultural Values Predict Managerial Behaviors? A 47 Nation Study*, 33 *J. Cross-Cultural Psychol.* 188 (2002); Shalom H. Schwartz, *Mapping and Interpreting Cultural Differences around the World*, in *Comparing Cultures* (Henk Vinken, Joseph Soeters & Peter Ester Eds. forthcoming 2003).

structure.¹¹⁷ Hence, deeply ingrained norms that are compatible with certain values in a society may also correlate with adjacent ones. For example, a norm of paying and receiving bribes—which is compatible with emphasizing Hierarchy—is also likely to be linked with the adjacent value type of Embeddedness. People may accept bribery as a benign fact of life if they believe that power differences in society are desirable (Hierarchy) and that social order must not be disrupted (Embeddedness).

Concrete norms at the higher levels of the pyramid may vary in their level of generality. Some norms may be of the most mundane kind yet associate with deeper-strata norms. For example, Hofstede documented a correlation between carrying an identification card and countries' rankings on Uncertainty Avoidance.¹¹⁸ Constantly carrying an ID card serves a generally felt need to reduce uncertainty, this time with regard to people's identity. The same need probably also stands behind the enactment of such a mundane issue into law. Hofstede further argues that “in countries where the societal norm is one of greater uncertainty avoidance, the citizen feels more at the mercy of the authorities and his or her dependency is accentuated by the continuous need to be able to justify his or her identity by carrying a document.”¹¹⁹

Finally, saying that values and value dimensions constitute social norms does not entail that all behavioral regularities are necessarily linked to cultural values. Concrete norms may be so particular and context-specific that any relation to

¹¹⁷ See Schwartz, *supra* note 73, at 30-31. Schwartz's model depicts value types as organized in a circle. Adjacent types are conceptually close to one another (e.g., Autonomy and Egalitarianism) and conceptually opposing values (e.g., Autonomy versus Embeddedness) are found in diametrical positions. Hofstede's model does not specify such theoretical structure but his value dimension do correlate with one another.

¹¹⁸ See HOFSTEDE, CULTURE'S CONSEQUENCES 1980, *supra* note 41, at 136.

¹¹⁹ *Id., id.*

fundamental value dimensions would be too tenuous to be effective. The norm that paper presenters bring cookies to the faculty seminar is an example for such a case, no matter how strongly people may feel about obeying it.¹²⁰ Social norms of this type—namely, norms that are not rooted in general societal inclinations—might therefore be more susceptible to change and reform—a topic to which we now turn.

1. Application: The Shareholder Wealth Maximization Norm

To get a grasp of the pyramidal model, consider the need felt among students of comparative corporate governance to operationalize social norms and integrate them into their analyses. In the words of Jack Coffe:

“Although the relevance of norms cannot be denied, the problem with this debate is that it has an ineffable and subjective character. Of course, individuals internalize norms, seek to maximize their reputational capital, and function in teams that operate based on informal systems of consensus and cooperation. They do so within both corporations and all other forms of social organization. But once this is said, can any testable propositions be framed?”¹²¹

Of special interest in this field is the norm of shareholder wealth maximization in business corporations.¹²² The gist of this norm is that the corporation is run for the benefit of its shareholders – the investors of equity capital. In Anglo-American legal

¹²⁰ See Mitchell, *supra* note (discussing the norm of bringing cookies).

¹²¹ John C. Coffe, Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. PA. L. REV. 2151, 2151 (2001). See also Licht, *supra* note 73, at 159-65 (documenting awareness among comparative corporate governance scholars of the need to account for culture).

¹²² See, e.g., Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm*, 50 WASH. & LEE L. REV. 1423 (1993); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROB. 9 (1999); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539 (2000) (hereinafter *Political Preconditions*); Mark Roe,

systems, where this norm prevails, shareholders are protected by a variety of legal measures.¹²³ Other interested constituencies, such as creditors and employees, often must negotiate their protections contractually. Non-contractual parties have limited standing vis-à-vis the corporation, if at all.

Value dimension theories allow one to formulate concrete testable propositions about the relations that are likely to exist between specific norms of corporate governance and underlying societal emphases that promote them. Thus, societies in which the shareholder wealth maximization norm prevails expect people to fend for themselves. Societal members are encouraged to seek their fortune independently, sometimes at the expense of other constituencies. In Hofstede's model, this norm is consistent with an emphasis on Individualism, which connoted selfishness. In Schwartz's model, this norm is consistent with emphases on Autonomy and Hierarchy. Conversely, a stakeholder-rights norm of corporate responsibility toward other constituencies would be consistent with societal emphases on Collectivism and Egalitarianism, respectively.¹²⁴

Now this is precisely the type of testable propositions called for by Coffee. In fact, these conjectures largely correspond with typical cultural profiles of English speaking counties versus Western European countries under Schwartz's model.¹²⁵ The former countries indeed adhere to shareholder wealth maximization whereas the latter

Shareholder Wealth Maximization Norms and Industrial Organization, 149 U. PA. L. REV. 2063 (2001).

¹²³ For a review of American case law, starting with the famous decision in *Dodge v. Ford*, 204 Mich 459, 170 NW 668 (1919), see D. Gordon Smith, *The Shareholder Primacy Norm*, 23 IOWA J. CORP. L. 277, 279 (1998).

¹²⁴ For further development of this argument see Licht, *supra* note 81.

countries find difficulties to abandon a stakeholder-interest norm.¹²⁶ Moreover, the value dimension-based hypothesis is also consistent with Mark Roe's politics-based theory about differences between corporate governance in Anglo-American countries versus social democratic (mostly West European) countries.¹²⁷

A societal preference for Hierarchy would be reflected in emphases on values like wealth and social power.¹²⁸ Societal endorsement of wealth and power as desirable values can manifest itself in all aspects of life, social norms being only one of them. However, even in the limited context of corporate governance norms, such endorsement may give rise to a number of more concrete norms, as wealth and power are the constitutive elements of corporate governance. In addition to shareholder wealth maximization, the combination of Hierarchy and Autonomy values may lead to greater tolerance toward hostile takeovers—a hallmark of Anglo-American corporate governance.¹²⁹ This may be the case even if ensuing layoffs could be more disruptive in comparison to layoffs in egalitarian societies that maintain better social safety nets. Other examples include high levels of executive compensation¹³⁰ and deference to managerial discretion, as reflected in the (legal) norm of business

¹²⁵ See Shalom H. Schwartz & Maria Ros, *Values in the West: A Theoretical and Empirical Challenge to the Individualism-Collectivism Cultural Dimension*, 1 *WORLD PSYCHOL.* 99 (1995).

¹²⁶ See Roe, *Political Preconditions*, *supra* note 122.

¹²⁷ *Id.*

¹²⁸ See Schwartz, *supra* note 73, at 30-31.

¹²⁹ See Eisenberg Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 *COLUM. L. REV.* 1253, 1287-90 (1999) (discussing the emergence of a hostile takeover norm in the United States). See also Robert Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 *U. PA. L. REV.* 1717 (2001).

¹³⁰ See, e.g., Randall S. Thomas & Kenneth J. Martin, *The Effect of Shareholder Proposals on Executive Compensation*, 67 *U. CIN. L. REV.* 1021, 1025-30 (2000); Lucian Arye Bebchuk, Jesse M. Fried, & David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 *U. CHIC. L. REV.* 751-846 (2002).

judgment rule.¹³¹ All these norms share an underlying attitude of legitimation – ranging from deference to respect to admiration – of individuals who take advantage of their wealth and power over others.

C. Emergence and Evolution of Social Norms

The notional model advanced thus far holds a potential contribution for understanding the emergence and evolution of social norms.¹³² Let us begin with analyses that adopt versions of the external approach to social norms. Ellickson advances an elaborate informal model of the evolution of social norms that depicts a market for social norms, complete with norm entrepreneurs, opinion leaders and other agents at the supply side, respective counterparts at the demand side, and currencies as suggested by Eric Posner and McAdams.¹³³ Separately, Richard Posner and Eric Rasmusen present a sanction-driven theory of social norms in which some sanctions, shame and guilt, have a psychic element.¹³⁴

¹³¹ See, e.g., Edward Rock & Michael Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1607 (2001).

¹³² In doing so, I restrict myself to the legal and law and economics literature on social norms. For economic perspectives on the evolution of culture and social norms see, e.g., Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPECTIVES 137 (2000) (reviewing literature and advocating evolutionary theories); Robert Axelrod, *The Dissemination of Culture: A Model with Local Convergence and Global Polarization*, 41 J. CONFLICT RESOLUTION 203 (1997) (reviewing literature and presenting model); Ken Binmore & Larry Samuelson, *An Economist's Perspective on the Evolution of Norms*, 150 J. INST. & THEORETICAL ECON. 45 (1994); Ken G. Binmore, *The Evolution of Fairness Norms*, 10 RATIONALITY AND SOCIETY 275 (1998); Randall C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHIC. L. REV. 1225 (1997). For an evolutionary psychology perspective, see Todd J. Zywicki, *Evolutionary Psychology and the Social Sciences: A Bibliographic Article*, 13 HUMANE STUD. REV. 1 (2000); Paul H. Rubin, *The State of Nature and the Evolution of Political Preferences*, 3 AM. L. & ECON. REV. 50 (2001). McAdams, *supra* note 52, at 340n2 lists many non-legal sources about this subject.

¹³³ Ellickson, *supra* note 7. See also Dorothea Kubler, *On the Regulation of Social Norms*, 17 J. L. ECON. & ORG. 449 (2001) (advancing an alternative model).

¹³⁴ Posner & Rasmusen, *supra* note 68.

External view theories of social norms have relatively less to gain from the present model than those that espouse the internal approach. In models like Ellickson's or Posner and Rasmusen's, cultural values may play a role in actors' cost/benefit analysis inasmuch as they affect the exchange rate of sanctions. Models in this category do not rely on cultural values to explain or predict the emergence of certain types of norms. In theory, virtually every behavioral regularity could take hold and become a social norm. Posner and Rasmusen acknowledge, however, that "[n]orms enforced by guilt and shame are particularly difficult to create or to change... Guilt and shame are heavily influenced by social conditioning, which is not quickly or easily altered either by individuals or by governments."¹³⁵

As was clarified above with regard to Kaplow and Shavell's and Fehr and Falk's positions, the value dimension framework generalizes this observation in its postulation that (1) values are imbued with feeling and carry a normative (injunctive, "ought") load; and (2) values define the bases for social approval and disapproval.¹³⁶ It follows that the more closely a social norm is linked to cultural values—namely, the more tightly it is associated with fundamental value dimensions—the less likely it is to change in response to exogenous shocks.¹³⁷

Value dimensions can play a pivotal role in theories of social norms that rely on norm internalization. Recall that Cooter and Etzioni separately turn to theories of preeminent psychologists about the internalization of morality during child

¹³⁵ *Id.*, at 27.

¹³⁶ This is also why prevailing values and deep-seated societal orientations operate as constraints on the development of norms in the institutional economic account.

¹³⁷ *Cf.* Licht, *supra* note 73 (in the context of corporate governance, presenting culture as "the mother of all path dependencies").

development to explain the emergence of social norms and the internal motivation to comply with them.¹³⁸ The issue of value acquisition is an open one at this stage. There has been little work on the topic because researchers assume that much of value acquisition occurs during childhood but cannot measure abstract values in childhood. The ability to engage in deontic reasoning about what one may, ought, or ought not to do in a given situation has been demonstrated in 3- and 4-year-old children.¹³⁹ The assumption is that value learning is much like other learning in childhood and adolescence.¹⁴⁰

In contrast with the external approach to social norms, the present model implies that not all behavioral regularities are equally likely to become social norms. Rather, behavioral regularities that are conceptually compatible with the surrounding normative environment—namely, the prevailing cultural orientations—are more likely to take root. As values feature at both the individual and societal levels of analysis, they simultaneously point to sources of motivation for compliance by individuals and to the direction of norm development by societies. People adhere to norms to the extent that such adherence triggers positive affective experience. Such triggering is more likely to occur the norm adhered to is compatible with widely-held values that express cultural orientations.

¹³⁸ See *supra* text to note 61 et seq.

¹³⁹ See Denise D. Cummins, *Evidence of Deontic Reasoning in 3- and 4-Year-Old Children*, 24 MEMORY & COGNITION 823 (1996).

¹⁴⁰ On internalization of cultural values at young ages see, e.g., Meg J. Rohan & Mark P. Zanna, *Value Transmission in Families*, in 8 THE PSYCHOLOGY OF VALUES: THE ONTARIO SYMPOSIUM 253 (Clive Seligman et al. eds 1996); Joan E. Grusec, Jacqueline J. Goodnow, and Leon Kuczynski, *New Directions in Analyses of Parenting Contributions to Children's Acquisition of Values*, 71 CHILD DEVELOPMENT 205 (2000); Judith Rich Harris, *Where Is the Child's Environment? A Group Socialization Theory of Development*, 102 PSYCH. REV. 458 (1995). For an implementation of the value dimension framework at the individual level in this context, see Ariel Knafo & Shalom H. Schwartz,

Against this backdrop, consider Richard Posner’s assertion about possible ways to combat bad social norms:

“Efforts to intervene at the norm-formation stage include schooling children in tolerance, public-spiritedness, law-abidingness, respect for rights, and so forth. But education that emphasizes the acquisition of knowledge and intellectual skills may undermine norm inculcation. It may encourage the student to think for himself and equip him with the specific intellectual tools for circumventing moral norms...”¹⁴¹

Posner expresses a generally negative view of norm internalization because “norm internalization reduces human freedom.”¹⁴² Yet in the present context he seems to be missing a crucial point. Education that emphasizes acquisition of knowledge and intellectual skills *is* norm inculcation; it does not undermine it. It is simply inculcation of particular values and not others. The value repertoire that Posner draws on strongly expresses certain value types—primarily Intellectual Autonomy and also Egalitarianism. This is not surprising because an emphasis on Autonomy in particular characterizes Western cultures.¹⁴³

A close reading of Posner’s assertion reveals that it is, in fact, a fine example of the pyramidal model of norms. At the basis there lies a deeply ingrained (i.e., internalized) endorsement of Autonomy; so much so that it is actually unnoticed by its author. From this fundamental norm emanates a layer of more particular, yet still

Value Socialization in Families of Israeli-Born and Soviet-Born Adolescents in Israel, 32 J. CROSS-CULTURAL PSYCHOL. 213 (2001).

¹⁴¹ See Posner, *supra* note 52, at 367.

¹⁴² *Id.*, *id.*

¹⁴³ The desirability of conducting one’s life as a free and equal rational agent is a common thread in Western thinking. See generally JOHN STUART MILL, ON LIBERTY 55-56 (1859/1978); JOHN RAWLS, A THEORY OF JUSTICE 560-61 (1971). For a cultural value dimension analysis see Schwartz & Ros, *supra* note 125.

general, compatible norms: behavior rules that promote values like tolerance, respect for rights, and so forth. With this layer of norms in place, the stage is set for people to develop the myriad norms that govern their lives while paying little heed to moral preaches of older generations.

Here's the rub: in societies that are high on Autonomy, parents (let alone grandparents) may want their children to follow their ways. But parents also take part in their children's socialization process. Consequently, these parents instill in their children the very value preferences that would lead them to prefer breaking their own path to treading the path beaten by their parents. Stated more generally, society as a whole may internalize in children a set of cultural values that motivate them to seek autonomy and to respect others who do the same. Societies – or social subgroups, such as immigrants – whose cultural profile emphasizes different value dimensions may find it hard to implement such educational programs, however.¹⁴⁴ The tools offered by the value dimension framework should prove helpful in identifying cultural cleavages of this nature and in the design of effective educational programs.

This Article says little about how cultures emerge and take form or whether they develop along a certain path. The implicit assumption thus far has been that social norms emerge in light (or under the shadow) of an existing cultural endowment. This is a static perspective taken for clarity of presentation. It should be clear that dynamic processes are always at work.¹⁴⁵ Cultural value dimensions constitute the

¹⁴⁴ For a review of acculturation and adaptation in adulthood see J. W. Berry & D.L. Sam, *Acculturation and Adaptation*, in 3 HANDBOOK OF CROSS-CULTURAL PSYCHOLOGY 293 (2nd ed., J.W. Berry *et al.*, eds 1997).

¹⁴⁵ In what regards the origins of informal social institutions contemporary scholars mostly offer broad conjectures. For example, Williamson, *supra* note 110, at 597, surmises that “informal institutions have mainly spontaneous origins.” BALKIN, *supra* note 90, asserts a sweeping theory of

backbone of a constantly developing body of social norms. As such, cultural emphases too may change. There is evidence that nations adapt their cultural value orientations in response to severe external shocks.¹⁴⁶ It has been shown, for instance, that people in European countries that came under communist rule developed values that, first, were more compatible with life conditions under such a regime, and second, were distinctively different than the values prevailing in neighboring West European countries. In particular, East European societies exhibit significantly lower preferences for Autonomy and Egalitarianism compared with West European societies.¹⁴⁷ These findings have direct implications for business practices, corporate governance reform, and democratization—all of which rely on certain general attitudes about individuals' place in the economy and the polity.¹⁴⁸

V. SOCIAL NORMS AND THE RULE OF LAW

The pyramidal model of social norms enables one to generalize about social norms and the law and to specify conditions for effective use of the law as a norm-inducing means. Moreover, this model makes such arguments susceptible to empirical

cultural evolution, seeking to explain both shared understandings and disagreement and diversity within cultures based on the transmission of cultural information embodied in “memes.” For another broad theory on the development of culture, *see* DEEPAK LAL, UNINTENDED CONSEQUENCES: THE IMPACT OF FACTOR ENDOWMENTS, CULTURE, AND POLITICS ON LONG-RUN ECONOMIC PERFORMANCE (1998).

¹⁴⁶ In addition to responsiveness to shocks, cultures also exhibit correlation with economic and environmental conditions – a subject that exceeds the scope of this Article. *See*, generally, HOFSTEDE, CULTURE CONSEQUENCES, *supra* note 86; INGLEHART, *supra* note 74.

¹⁴⁷ *See* Schwarz & Bardi, *supra* note 80.

¹⁴⁸ *See* Schwarz & Bardi, *supra* note 80, argue that the values that were suitable for survival under communist rule are not conducive to personal entrepreneurship and competition. This could have been an invaluable insight for the Russian privatization project. *See*, with respect to corporate governance, Bernard Black, Reinier Kraakman, & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?* 52 STAN. L. REV. 1731 (2000) (specifying social and structural reasons for the failure to establish a functioning corporate sector in Russia in the wake of the collapse of communism); Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture, Law, and Corporate Governance*, INT’L REV. L. & ECON. (forthcoming 2004) (elaborating on culture and corporate governance reform).

testing. This Part discusses these issues while concentrating on the social norm of obeying the law – the rule-of-law norm. This Part then classifies the rule-of-law norm as part of a broader category of norms dubbed “norms of governance” and demonstrates how the value dimension framework relates to it.

A. *Social Norms and the Law*

Interest in social norms has grown considerably over the last decade, *inter alia*, as a result of accumulating empirical evidence that social norms may replace legal norms in certain communities. In addition to Ellickson’s study of Shasta County ranchers,¹⁴⁹ studies by Lisa Bernstein and Lior Strahilevitz have provided substantial support to this notion.¹⁵⁰ Much of the debate revolves around the interrelations between social norms and the law. Of particular interest are ways to integrate the potency of informal social norms with the malleability of formal legal norms – namely, how can the law be used to induce emergence of beneficial social norms. Ideally, people would abide by norms that were triggered by laws. Hence the depictions of law as having an expressive (rather than regulative), or focal point-providing, role.¹⁵¹ Generalizing this point, Cooter called for promoting the “rule-of-

¹⁴⁹ Ellickson, *supra* note 3.

¹⁵⁰ See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). Strahilevitz has extended the discussion of social norms from close-knit groups to loose -knit ones. See Strahilevitz, *supra* note 64; Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003).

¹⁵¹ See, e.g., Sunstein, *Social Roles*, *supra* note 52, at 2021-28 (arguing that the law can be used to change social attitudes); Sunstein, *Expressive Function*, *supra* note 52 at 914 (same); Cooter, *supra* note 52 at 587-88 (discussing use of social norms by lawmakers); Lessig, *supra* note 52 at 2182-83 (discussing expressive function of law); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); see also Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) (arguing that the law serves to signal attitudes). On the difficulties of harnessing law to change social norms see Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the*

law state,” in which state law is aligned with social norms such that citizens can economize on legal counsel by using morality as a guide to legality.¹⁵²

The pyramidal model of social norms and the value dimension framework provide structure to these interrelations such that one could make concrete statements about the relations between culture, social norms, and the law – the fundamental elements of social order.¹⁵³ Several arguments of this nature appear in the preceding sections and need not be repeated here. At bottom, the basic hypothesis is that the law would tend to be compatible with the cultural profile – stated in value dimension metrics – of the society that promulgated it.¹⁵⁴ From this primary hypothesis one may derive many secondary hypotheses as a research agenda.

Hofstede argues, for instance, that “[u]ncertainty avoiding countries will have a greater need for legislation than will less-uncertainty-avoiding countries”¹⁵⁵—a conjecture that clearly deserves careful testing. Anecdotally, Hofstede notes that “Germany has an extensive set of laws even for emergencies that *might* occur

Sticky Norms Problem, 67 U. CHIC. L. REV. 607 (2000). Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 422 (1999) also recognizes the potential for controversial expressive use (“[C]ulturally embattled groups can use [the content of criminal law] to demonstrate... that their norms are worthy and ascendant and their cultural adversaries’ bankrupt and deviant.”) For a detailed critique of expressive theories of law, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

¹⁵² Robert D. Cooter, *The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, in 1996 ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 191 (1996).

¹⁵³ Compare Steven Shavell, *Law versus Morality as Regulators of Conduct*, 4 AM. REV. L. AND ECON. 227, 227n1 (2002) (“Of course, law and morality work against the background of other important factors – market forces, reputational concerns, and the *cultural environment* – that influence our behavior”) (italics added).

¹⁵⁴ Cf. Williamson, *supra* note 110, at 597 (arguing that formal institutions (legal rules) “are pervasively linked with complementary institutions.”)

¹⁵⁵ See HOFSTEDE, *supra* note 86 at 174 (italics in the original). One should be careful, however, to distinguish between “more legislation”, which may address higher uncertainty avoidance by formally regulating many life situations, and “more rights”, which may have the opposite effect due

(“*Notstandgesetz*”); Great Britain does not even have a constitution.”¹⁵⁶ It should also be interesting to look for differences between various fields of law—e.g., property law versus constitutional law. It is possible further to compare societies that have developed their legal systems organically over generations versus societies that have experimented with legal transplantation – either voluntarily or as a result of imposition by foreign powers. In addition to such static comparisons, one expects culture to operate at the dynamic level as well, that is, to affect the development of legal systems by inducing path dependence dynamics.¹⁵⁷

These are intriguing questions that have not been taken up until recently. In the field of corporate governance, Williamson and Stulz have used countries’ predominant religion as proxies for culture and obtain ambiguous results on levels of investor protection.¹⁵⁸ In a joint study of this Author with Chanan Goldschmidt and Shalom Schwartz, however, we document robust correlation between measures of investors protection rights and value dimensions under both Schwartz’s and Hofstede’s models (Harmony and Uncertainty Avoidance, respectively).¹⁵⁹ We further document theoretically consistent and robust correlations between these dimensions and measures of formalism in civil litigation rules around the world.¹⁶⁰ Higher levels of formalism in court systems’ working is accompanied by cultural preferences for

to the need to reconcile conflicting rights through litigation, the outcome of which is inherently uncertain.

¹⁵⁶ *Id., id.*

¹⁵⁷ For an argument in this spirit, see Licht, *supra* note 73.

¹⁵⁸ See Rene M. Stulz & Rohan Williamson, *Culture, Openness, and Finance*, J. FIN. ECON. (forthcoming 2003).

¹⁵⁹ Licht, Goldschmidt, & Schwartz, *supra* note 148. Investor protection scores are taken from Rafael La Porta *et al.*, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

low Harmony and high Uncertainty Avoidance—both reflecting societal aversion toward dispute resolution processes whose outcome is indeterminate.¹⁶¹

B. The Rule of Law as a Social Norm

Perhaps the most fundamental question about social norms and the law concerns the relations between the content of the law (“law on the books”) and a general social norm of compliance with the law (“law in action”). Let us return to the Berkeley Hypo at the beginning of the text. The alleged promise of passing a poop-scooper municipal ordinance does not lie in its enforcement, which is certain not to be forthcoming. Rather, students of social norms conjecture, the ordinance’s real effect is to inform people about the right behavior.¹⁶² With the ordinance now in force, the pedestrian feels more confident that cleaning after one’s dog is the right thing – so much so that she is willing to approach a stranger and chastise him. The pedestrian also points to the justification: “It’s the law.” Drawing the rancher’s attention to the legal norm is not meant as a threat but as an argument of moral suasion. The pedestrian apparently assumes that the rancher shares her belief, that the law is a good

¹⁶⁰ The formalism measures are taken from the Lex Mundi project conducted under the auspices of the World Bank by Djankov, La Porta, Lopez-de-Silanes, and Shleifer. See Simeon Djankov et al., *Courts: The Lex Mundi Project*, 118 Q. J. ECON. 453 (2003).

¹⁶¹ The results therefore confirm Oscar Chases’s argument that differences between the American and German civil procedure laws reflect deeper cultural differences captured by Hofstede’s theory and findings. Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1, 17-18 (1997). See also Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861 (1997). See, generally, MIRJAN DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1974-1975) whose study has informed both Chase and Djankov *et al.*

¹⁶² See sources *supra* note 7.

source for guidance about the right behavior.¹⁶³ At least, authors who advance this hypothetical so believe.

The pedestrian's assertion could be persuasive and motivate poop-scooping only if there existed a more fundamental social norm of complying with the law as such rather than for fear of sanction. I call it a rule-of-law social norm. In other words, this assertion relies on an implicit assumption that people are likely to obey particular legal norms (and incur the concomitant costs) because they uphold a deeper, more general norm of obeying the law. Such compliance may be due to whatever mechanism that may be in place, either internal or external. The rule-of-law norm thus serves as the interface between the informal system of social norms and the formal system of legal norms. Only in societies where this norm prevails can the law be used in its expressive mode. Where this interface is absent, the two systems are likely to run out of synch.

Prevalence of the rule-of-law social norm cannot be taken for granted, however. To be sure, the fact that a certain rule of conduct has taken the form of a formal legal rule may increase its normative character – the “ought” statement – in the eyes of many Americans. But even this limited conjecture is not self-evident: If the hypothetical pedestrian directed her rebuke to one of Ellickson's Shasta County ranchers the latter might as well respond with “Is it?” or “So what?” Such a response would reflect the fact that some ranchers were not well-informed about the law and had developed alternative norms to govern relations with their neighbors.

¹⁶³ Note that unlike the law that one should drive on the right-hand side of the road, Berkeley's pooper-scooper ordinance does not serve to select a focal point in a coordination game. Absent potential punishment, it is a dominant strategy not to clean after one's dog.

Recall now the seat-belt use campaign that says “Buckle up! It’s the law.” The Buckle-up signs say nothing about Americans’ tendency to uphold a norm of using seat belts. Yet these signs do provide anecdotal evidence that Americans subscribe to a basic social norm of obeying the law as such. Associating seat belt use with obeying the law does more than just provide drivers with information about potential liability or with a focal point; it seeks to harness the power of the deep-level rule-of-law norm to motivate compliance with the concrete, upper-stratum seat-belt use norm. Massachusetts’s public officials apparently believe that the fact that “it’s the law” can be a potent factor in motivating seat belt use because they believe that American drivers generally share a rule-of-law norm. Likewise, when the Washington Traffic Safety Commission prepares coloring sheets for children that say “Buckle up! It’s the law.”,¹⁶⁴ it bundles these two messages as alternative statements of “It’s good for you.”

Should the World Bank therefore finance mass production of Massachusetts-style Buckle-up signs in developing countries to encourage the use of seat belts? In my mind, it should not. Such signs may be effective only in societies whose cultural values are compatible with the rule-of-law social norm. Cultures in certain countries may emphasize other values and in particular, values that are opposed to those underlying the rule-of-law norm. Installing Buckle-up signs in such countries may even have a counter-effect by making local drivers resentful to seat belt use if the local culture does not emphasize the values that underlie the rule-of-law social norm. These same drivers, however, might heed to signs that said “Buckle up! It’s noble.”

¹⁶⁴ See *supra* note 2.

even though many Americans may find such signs silly or tasteless. To see why, let us briefly go back to first principles – a task undertaken in the following section.

C. The Rule of Law as a Norm of Governance

The rule of law obviously means more than just obeying municipal ordinances and their like. The rule of law is a complex concept on which many jurisprudence scholars differ. Indeed, the term “rule of law” itself is not used as such in every country. For instance, the German parallel *Rechtsstaat* and the French parallel *Legalité* each carry a somewhat different meaning. The most basic aspect of the rule of law is sometimes referred to as the “formalistic” or “procedural” aspect,¹⁶⁵ or, more colloquially, as “law and order”. This aspect deals with the degree to which the behavior of individual persons and government authorities complies with formal legal rules. It is immaterial whether the rules are morally unjust or what political process (democratic or other) produced them.¹⁶⁶ The only question is whether the rules are respected. The implicit assumption is that ordinarily—i.e., absent severe moral dilemmas—they should be. Conceptualizing the rule of law as a social norm implies that in societies that subscribe to this norm, private enforcement will complement or even substitute state enforcement of particular legal rules, as suggested by the Berkeley Hypo. This is the sense which underlies Cooter’s call for promoting the rule-of-law state as opposed to the rule of state law.¹⁶⁷

The rule of law is part of a larger family of norms that purport to regulate the exercise of power. Probably, it is the most fundamental norm among these norms. In

¹⁶⁵ See LON L. FULLER, *THE MORALITY OF LAW* ch. 2 (1964; revised ed 1969); JOHN RAWLS, *A THEORY OF JUSTICE* 154 (1971).

¹⁶⁶ See JOSEPH RAZ, *THE AUTHORITY OF LAW* 212-14 (1979).

the public sphere, the norm against sale of public office is but one particular example. In the private sphere, norms against self-dealing in widely-held corporations also belong to this category.¹⁶⁸ The entire family of norms of this type may be entitled “norms of governance”. The balance of this Section discusses the concept of governance and connects it to the pyramidal model and the value dimension framework.

The rule of law principle prescribes legitimate modes of wielding power; that is, it deals with use and abuse of power in the Hohfeldian meaning of this term.¹⁶⁹ The essence of the rule of law is that power ought to be used only in ways allowed by the law.¹⁷⁰ The types of power covered by the rule-of-law norm vary greatly. They range from long-term positions of power held by the state itself (as reflected in the German term *Rechtsstaat*) or state organs (as in the separation of powers doctrine), to holding a public office. This continuum goes on to holding an executive office in a business corporation and to short-term, fleeting situations that allow for opportunistic behavior. Typical short-term situations occur, for instance, during sequential performance of contractual obligations, or when performance is unobservable or unverifiable.

¹⁶⁷ Cooter, *supra* note 152.

¹⁶⁸ Compare Cooter & Eisenberg, *supra* note 129 (discussing norms within corporations).

¹⁶⁹ In the 1910s, Wesley Hohfeld advanced an elegant diagrammatic model of dyadic relationships between legal statuses that included a dyadic relationship between power and liability. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (hereinafter Hohfeld 1913); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). According to Hohfeld, “[the] person (or persons) whose volitional control is paramount may be said to have the (legal) power to affect the particular change of legal relations that is involved in the problem.” Hohfeld 1913, *id.*, at 44. Liability is simply a correlative concept of power, denoting the status of the other party as subject to the first party’s power. Hohfeld later consolidated his model in WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING*, (W.W. Cook, ed. 1919; reprint 1964). For a general analysis of Hohfeld’s framework, see ANDREW HALPIN, *RIGHTS AND LAW: ANALYSIS AND THEORY* (1997).

Needless to say, even countries that subscribe to a rule-of-law norm may differ considerably in the circumstances to which they apply this norm.

Traditionally, “governance” connoted authoritative direction or control, with clear public/political connotations and a focus on the executive branch of government.¹⁷¹ The term became popular during the 1990s mainly as a consequence of the World Bank’s institutional reform agenda. A representative World Bank definition reads as follows:

“We define governance as the traditions and institutions by which authority in a country is exercised for the common good. This includes (i) the process by which those in authority are selected, monitored and replaced, (ii) the capacity of the government to effectively manage its resources and implement sound policies, and (iii) the respect of citizens and the state for the institutions that govern economic and social interactions among them.”¹⁷²

The World Bank’s agenda concentrates on promoting the rule of law and accountability and curbing corruption with a view to fostering economic development. The international financial institutions and the United Nations often prefer to define “good governance” – a usage that more explicitly reflects the teleological, purposive character of the definition.¹⁷³ While I concur with the gist of

¹⁷⁰ ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (8th ed., 1914).

¹⁷¹ Merriam-Webster’s Collegiate Dictionary (internet edition), <<http://www.m-w.com/>>

¹⁷² WORLD BANK GROUP, *GOVERNANCE, FINANCE AND REGULATION* (2003), <<http://www.worldbank.org/wbi/wbigf/governance.html>>.

¹⁷³ See WORLD BANK, *GOVERNANCE: THE WORLD BANK’S EXPERIENCE* vii (1994) (“Good governance is epitomized by predictable, open, and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law.”); INTERNATIONAL MONETARY FUND, *DECLARATION OF PARTNERSHIP FOR*

the definitions—namely, the modes of wielding power and responses thereto—one may note that they focus almost exclusively on exercising power in the public sphere.

Limiting the definitions of governance to the public sphere renders them unnecessarily narrow. Governance in the private sphere—as in corporate governance, for instance—also consists of rules and structures for wielding power over other people’s interests, namely, for tackling the agency problem.¹⁷⁴ Compliance with legal rules, loyal corporate stewardship, and accountability could be guiding principles – and social norms – for private interactions just as these norms could apply to the public service. Norms about abuse of market power by dominant firms is another example for norms of governance in the private sphere, which also exemplifies the ambiguity of the private/public distinction.¹⁷⁵

Numerous social interactions involve people and institutions in different power positions, in the very broad sense used here. A central feature of such interactions, on which societies may differ, is the degree to which these interactions are unilateral or bilateral. A unilateral interaction occurs when the exercise of power is not accompanied by the affected party’s prior awareness of or consent. In a bilateral interaction, the affected party is aware of the exercise of power or gives its consent to

SUSTAINABLE GLOBAL GROWTH (1996) (“promoting good governance in all its aspects, including by ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption.”); Kofi Annan, *The Quiet Revolution*, 4 GLOBAL GOVERNANCE 123, 123 (1998) (“U.N. programs now target virtually all the key elements of good governance: safeguarding the rule of law; verifying elections; training police; monitoring human rights; fostering investments; and promoting accountable administration.”). The British Council endorses an expansive definition for its worldwide governance program: “[t]he process whereby elements in society wield power and authority, and influence and enact policies and decisions concerning public life, and economic and social development. Governance is a broader notion than government. Governance involves interaction between these formal institutions and those of civil society.”) BRITISH COUNCIL, BRITISH COUNCIL ON GOVERNANCE (2001), <<http://www.britishcouncil.lk/governance/>>.

¹⁷⁴ See Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737 (1997).

it. Bilateral interactions may be viewed as relatively more transparent; unilateral interactions are more opaque. In general, societies that emphasize pursuit of individual preferences and view individual persons as equal would endeavor to establish a more transparent environment such that individual members of society would be able to better plan their moves. In contrast, societies that put less emphasis on these values will more easily accommodate opaque wielding of power.

The rule of law seems to be the most fundamental norm of governance, in both its legal and social norm versions. The rule of law stipulates that the law must govern the use of power—that is, the people in power positions should consult the law, as opposed to tradition or advice from elders (or their personal interests), in their exercise of power. More concretely, the rule of law entails that people are entitled to rights and freedoms—to the extent that they are stipulated by the law—e.g., of property and contract, and in democracies, also of speech. In a rule-of-law state, these rights and freedoms are protected from encroachment by the state’s overwhelming power or by other citizens.

The upshot of the rule-of-law norm is that people can better plan their independent moves in a complex world. They can more safely assume that their contracts will be honored and their property be protected. People may also feel free openly to express what is on their mind, provided that they do not defame other societal members. They can further assume that public services, including adjudication of disputes, will be rendered in a predictable manner, unaffected by personal connections.

¹⁷⁵ See, generally, AMERICAN LEGAL REALISM 98-123 (William W. Fisher et al. eds 1993).

D. Testable Hypotheses and Some Evidence

The pyramidal model suggests that the cultural environment promotes and facilitates the emergence and perpetuation of particular norms of governance. The prevailing values broadly define what is desirable in a society. Modes of wielding power that are compatible with prevailing value emphases are therefore more likely to be accepted as normative. This compatibility provides the norms of governance with legitimacy. Such legitimacy is necessary to trigger social incentive mechanisms for rewarding compliant behavior and for punishing deviant behavior. Governance norms that are incompatible with the cultural value environment will lack legitimacy and are therefore unlikely to take root.

One can thus proceed to derive testable hypotheses about cultural preferences that would be more conducive (or inimical) to a social norm that calls on people to obey the law.

Endorsing the rule of law as an overarching norm is consistent with societal emphasis on values of Autonomy and Egalitarianism in Schwartz's model. The gist of the Autonomy value types is the perception of people as bounded entities who find meaning in their own uniqueness. When the rule-of-law state provides people with a comprehensive set of rights and freedoms and effectively enforces them, it does exactly that. This, I believe, is the rationale underlying Richard Posner's endorsement of "schooling children in... law-abidingness [and] respect for rights" as part of an "education that emphasizes the acquisition of knowledge and intellectual skills."¹⁷⁶ Law-abidingness and respect for rights rely on a deeper societal emphasis on

¹⁷⁶ See Posner, *supra* note 52, at 367.

Autonomy (which the quotation mentions the intellectual aspect thereof).

Emphasizing Egalitarianism is compatible with the rule-of-law norm as it reflects a perception of societal members as moral equals, entitled to equal protection under the law. In contrast, the rule-of-law norm is less likely to prevail in societies that emphasize Embeddedness, in which respect for tradition, honoring elders, and obedience are dominant values.

In Hofstede's model, the rule-of-law norm is mostly compatible with societal emphases on Individualism and low Power Distance. Societal members in individualistic societies are expected, if not urged, to pursue their own (sometime selfish) goals in life. A rule-of-law state provides a better environment for them to achieve these goals by setting a legal framework that allows every person to have her fair chance to do that. Societies high on Collectivism find less importance in protecting individual members' interests and satisfying their preferences. Collectivism expresses a premise that the interests of a wider group take precedence over individual members' interests. High Power Distance implies, *inter alia*, legitimation of people taking advantage of power positions. In the present context, this would be done notwithstanding formal legal rules that provide otherwise. At the individual level, people in high Power Distance societies may not like to be taken advantage of yet accept this as a fact of life in their social environment.

The present analysis does not purport to reject existing theories on why people obey the law. Rather, my goal is to put such theories in a general universal context such that they could be applied more effectively both domestically (in the United States) and in other countries. A case in point is Tom Tyler's influential study *Why*

*People Obey the Law*¹⁷⁷ and subsequent research with colleagues. Briefly, it has been shown that Americans are more likely to uphold legal injunctions, even at a personal cost, when they perceive the process that yielded such injunctions as fair. Issues found to be of particular importance to subjects are the opportunity to participate and provide input, the neutrality of procedure, and being treated with dignity, respect, and honesty.¹⁷⁸

Obvious as they may seem to many Americans, these issues—like Posner’s assertion—strongly express values of Autonomy and Egalitarianism. These values prevail in English speaking countries, and even more so in Western Europe, but are much less prevalent in other regions of the world.¹⁷⁹ One should therefore exercise caution in drawing policy implications for other countries from the American findings. While people in other countries may share the desire to be treated respectfully, their judgment parameters for what this means likely will reflect their different cultural profile.¹⁸⁰ Similar considerations should apply to law abidingness in multicultural societies. Tyler and his colleagues have expressed guarded optimism in this regard with respect to the United States,¹⁸¹ but these views may need to be

¹⁷⁷ TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

¹⁷⁸ See, e.g., Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 115 (Mark Zanna Ed. 1992); Tom R. Tyler, *Citizen Discontent with Legal Procedures*, 45 *AM. J. COMP. L.* 871 (1997); Tom Tyler, *Obeying the Law in America: Procedural Justice and the Sense of Fairness*, *ISSUES OF DEMOCRACY*, July 2001, available at <<http://usinfo.state.gov/journals/itdhr/0701/jide/tyler.htm>>.

¹⁷⁹ Shalom H. Schwartz, *Mapping and Interpreting Cultural Differences around the World*, in *COMPARING CULTURES* (Henk Vinken, Joseph Soeters & Peter Ester Eds., forthcoming 2003).

¹⁸⁰ E. Allan Lind, Yuen J. Huo, & Tom R. Tyler, ... *And Justice for All: Ethnicity, Gender and Preferences for Dispute Resolution Procedure*. 18 *L. & HUMAN BEHAVIOR* 269 (1994) found that Americans, Germans, and Hong Kong Chinese subjects exhibited minor difference in evaluating the fairness of procedures. Note, however, that Germany is a West European country and that Hong Kong has been under strong British influence for a long period.

¹⁸¹ Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 *L. & SOC’L INQUIRY* 983 (2000); Yuen J. Huo, Heather J. Smith, Tom R. Tyler,

reassessed in light of recent evidence on value differences among ethnic groups in the U.S.¹⁸² Relatedly, Tyler, E. Allan Lind, and Yuen Huo noted that effectiveness of dispute resolution procedures may depend on respondents' position on Hofstede's Power Distance value dimension.¹⁸³

More recently, several scholars have connected experimental economics and insights from social norms analysis to law-abidingness. Iris Bohnet and Robert Cooter examined the effect of framing a negative payoff as a legal penalty on social dilemma games in sample of American students.¹⁸⁴ They find that such framing is helpful in games with multiple equilibria. Bohnet and Cooter conclude that before making a law whose enforcement is ineffective (such as a ban on smoking or littering in public places), lawmakers must "understand citizens very well," because such laws hinge on "the underlying normative system."¹⁸⁵ Using a sample of Swiss students, Jean-Robert Tyran and Lars Feld have demonstrated that people may obey a rule backed only by mild sanctions if it is accepted in a referendum.¹⁸⁶ Lastly, Richard McAdams and Janice Nadler examine the idea that law operates expressively by creating focal points

& E. Allan Lind, *Superordinate Identification, Subgroup Identification, and Justice Concerns*, 7 PSYCHOL. SCIENCE 40 (1996).

¹⁸² Heather M. Coon & Markus Kemmelmeier, *Cultural Orientations in the United States*, 32 J. CROSS-CULTURAL PSYCHOL. 348 (2001) (documenting differences in individualism and collectivism between the four largest ethnic groups in the United States).

¹⁸³ See Tom R. Tyler, E. Allan Lind, & Yuen J. Huo, *Cultural Values and Authority Relations: The Psychology of Conflict Resolution across Cultures*, 6 PSYCHOL. PUBLIC POLICY & L. 1138 (2000); see also E. Allan Lind, Tom R. Tyler, & Yuen J. Huo, *Procedural Context and Culture: Variations in the Antecedents of Procedural Justice Judgments*, 73 J. PERSONALITY & SOC'L PSYCHOL. 767 (1997).

¹⁸⁴ See Iris Bohnet & Robert D. Cooter, *Expressive Law: Framing or Equilibrium Selection?* (Working paper 2003).

¹⁸⁵ *Id.*, at 18-19.

¹⁸⁶ See Jean-Robert Tyran & Lars P. Feld, *Why People Obey the Law: Experimental Evidence from the Provision of Public Goods* (Working paper 2001).

in games with multiple equilibria. These authors find that this effect was stronger when the expressing agent was selected by a merit-based process.¹⁸⁷

The results of these studies are consistent with the present theory. In various degrees of explicitness, each of these studies relies on some underlying normative premise shared by the subjects of each experiment as a precondition for compliance that not driven by deterrence. Bohnet and Cooter indeed make this point their central conclusion. In Tyran and Feld's study, one cannot avoid noting that by conducting a referendum among Swiss subjects these researchers likely have invoked the strong societal emphases on Autonomy and Egalitarianism that a referendum embodies, especially in Switzerland. This experimental setting is conceptually similar to (indeed bolder than) experiments in which psychologists have triggered subjects' cultural affiliation by making that culture more salient to them.¹⁸⁸ McAdams and Nadler's finding, that a merit-based selection of the person suggesting the focal point, indirectly implies that group judgment as to what would be considered merit-based likely will vary across social groups and cultures.

The above hypotheses suggest that from a cultural value perspective, the rule of law may not be perceived as a universal good in all societies. Under the present analysis, the law serves as an independent source of guidance about the right behavior, available to all on equal terms. Societies whose cultural values emphasize

¹⁸⁷ See Richard H. McAdams & Janice Nadler, A Third Model of Legal Compliance: Testing for Expressive Effects in a Hawk/Dove Game (Working paper 2003).

¹⁸⁸ See Ying yi Hong, Michael W. Morris, Chi-yue Chiu, & Veronica Benet-Martinez, *Multicultural Minds: A Dynamic Constructivist Approach to Culture and Cognition*, 55 AM. PSYCHOLOGIST 709 (2000). These researchers primed Chinese-American bi-cultural participants with iconic images associated with either Chinese or American cultures. It was shown that when implicit cultural theories were applicable to the stimulus, priming manipulation influenced participants' judgments.

Embeddedness and Hierarchy, or Collectivism and Power Distance, would direct societal members to seek guidance in other sources, primarily in superiors' or elderly people's advice. There is evidence that this is indeed the case.

Social psychologists who compared American subjects with East Asian (especially Chinese and Korean) subjects agree that the former are more individualistic than the latter.¹⁸⁹ Korea's scores on Hofstede's dimensions reflect societal preferences for high Collectivism, high Uncertainty Avoidance, moderately high Power Distance, moderate Masculinity, and high Long-term Orientation.¹⁹⁰ Korea also scores higher than the U.S. on Embeddedness versus Autonomy. In the Schwartz data, Korea's scores reflect societal preferences for Embeddedness over Autonomy, and for Hierarchy over Egalitarianism, and for Mastery over Harmony.¹⁹¹

These differences on the Individualism-Collectivism and Autonomy-Embeddedness dimensions are accompanied by significant differences in numerous issues.¹⁹² Eun-Yeong Na has found that "Koreans (especially non-experts) tend to respect Confucian ethics more than the codified laws. Thus, Koreans might aid in their fathers' or bosses' illegal activities even if they clearly know the illegal nature of such activities." Na avers that "Koreans are not willing to abandon their important

¹⁸⁹ See Richard E. Nisbett et al., *Cultures as Systems of Thought: Holistic versus Analytic Cognition*, 108 PSYCHOL. REV. 291 (2001); Kaiping Peng, Daniel R. Ames & Eric Knowles, *Culture and Human Inference*, in HANDBOOK OF CULTURE AND PSYCHOLOGY 245 (D. Matsumoto ed., 2001); Alan P. Fiske et al., *The Cultural Matrix of Social Psychology*, in HANDBOOK OF SOCIAL PSYCHOLOGY 915 (D. T. Gilbert, S. T. Fiske & G. Lindzey eds., 4th ed. 1998). In their conceptualization of individualism and collectivism these studies rely primarily on Hazel R. Markus & Shinobu Kitayama, *Culture and the Self: Implication for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991).

¹⁹⁰ HOFSTEDE, CULTURE'S CONSEQUENCES, *supra* note 86 at 500.

¹⁹¹ Shalom H. Schwartz, Relations of Culture to Social Structure, Demography and Policy in the Study of Nations, Invited Lecture Delivered at the 25th International Congress of Applied Psychology, Singapore, July 2002 (on file with author).

interpersonal relationships just to abide by the law.”¹⁹³ Comparing Americans’ and Koreans’ positions toward the law, Na and Elizabeth Loftus in a separate study have shown that Korean undergraduate students showed negative attitudes toward law and low trust in the legal system. Koreans also had less positive attitudes toward strict enforcement of law than did Americans.¹⁹⁴ Granted, Korea’s transformation toward democratization and market economy may exert pressure also on its cultural orientation and general attitudes toward the law.¹⁹⁵ It is not clear, however, how much these changes can fundamentally change the Korean culture.¹⁹⁶

Finally, in a large cross-sectional study with Goldschmidt and Schwartz,¹⁹⁷ we find that levels of perceived legality (rule of law), non-corruption, and democratic accountability strongly and systematically correlate with higher Individualism and lower Power Distance in Hofstede’s model. Better governance norms also correlate with higher Autonomy and Egalitarianism in Schwartz’s model. These are the cultural values that Confucian countries tend to *de-emphasize*. In a regional comparison, Far Eastern countries on average score significantly lower on all measures of governance relative to English-speaking and West European countries. The societal emphases

¹⁹² For reviews, *see*, e.g., Nisbett et al., *supra* note 189.

¹⁹³ Eun-Yeong Na & Elizabeth F. Loftus, *Attitudes Toward Law and Prisoners, Conservative-Authoritarianism, Attribution, and Internal-External Locus of Control: Korean and American Law Students and Undergraduates*, 29 J. CROSS-CULTURAL PSYCHOL. 595 (1998) (citing Eun-Yeong Na, *A Psychological Analysis of Legal Beliefs in Korean Law Experts and Non-Experts*, 14 LAW & SOCIETY 176 (1997) (in Korean)).

¹⁹⁴ Na & Loftus, *id.* Similar but less stark differences were found in samples of law students.

¹⁹⁵ For a general insightful discussion of the current situation in Korea, *see* Chaihark Hahm, *Law, Culture, and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253 (2003).

¹⁹⁶ *See* Jae-Ho Cha, *Aspects of Individualism and Collectivism in Korea*, in INDIVIDUALISM AND COLLECTIVISM: THEORY, METHOD, AND APPLICATIONS 157, 170 (Uichol Kim et al. Eds. 1994) (finding that despite changes toward Individualism, Koreans in both young and old age groups were on the whole collectivist in absolute terms).

¹⁹⁷ Licht, Goldschmidt, & Schwartz, *supra* note 73.

reflected in these findings are compatible with diametrical views about the rule of law as a desirable basis of social order that were expounded generations ago by Socrates and Confucius.¹⁹⁸ Overall, these findings lend support to the model presented in this Article.

VI. CONCLUSION

This Article argues that social norms need to be analyzed as an interdependent system rather than isolated regularities. The study of social norms and their relation to the law should benefit from implementing a notional model of a pyramid of social norms that relies on the psychology of values. Adopting the framework advanced in this Article is compatible with the different views of social norms currently proposed by law and economics scholars – namely, external, exchange-based theories and internal, morality-based theories. The present model may thus serve as a bridge toward a unified theory of social norms. Beyond advancing social norms theory, the proposed framework also holds a promise for advancing our understanding of the relations between social norms and the law and between social norms and the overwhelming concept of culture.

The foregoing analysis of the rule of law can be repeated along the same lines with respect to other norms of governance. The pyramidal model implies that inasmuch as other norms have a similar effect on governance systems, they are likely

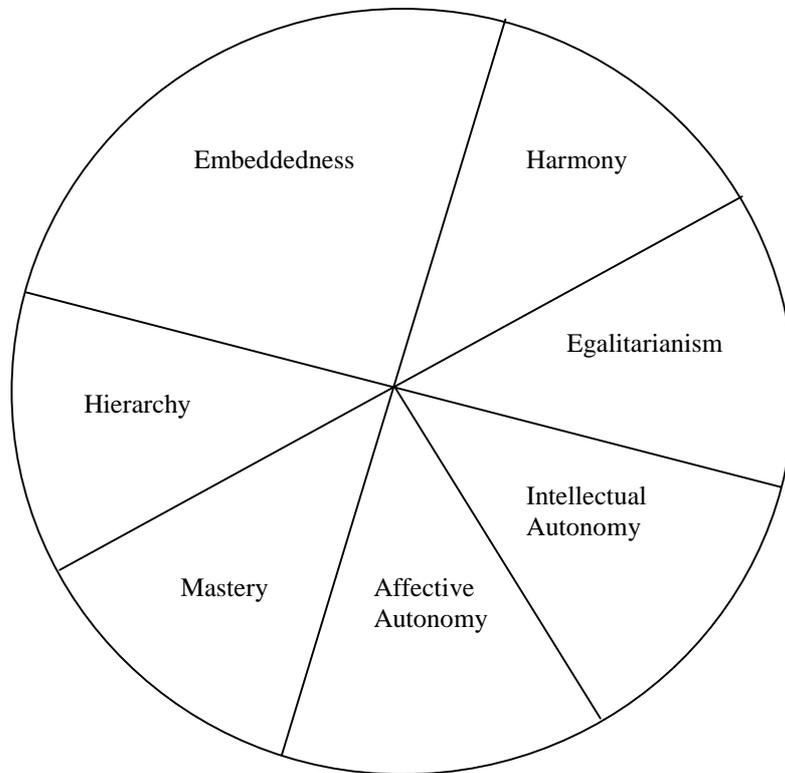
¹⁹⁸ Socrates's refusal to escape from jail after the city of Athens sentences him to death is often presented as the classic exposition of arguments for the duty to obey the law and, generally, for the importance of the rule of law for social order. At about the same time, in equally powerful terms Confucius derided the rule of law as a means for establishing social order in China. On Socrates, *see, e.g.*, M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1972-1973); Philip Soper, *Another Look at the Crito*, 41 AM. J. JURIS. 103 (1996); Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929 (1984); on Confucius *see, e.g.*, William P. Alford, *On the Limits of 'Grand Theory' in Comparative Law*, 61

to exhibit similar correlations with value dimensions to those that were posited with regard to the rule of law. To the extent that the hypotheses advanced in this Article are confirmed by empirical evidence, such evidence will imply that instilling a rule-of-law norm in countries where it currently does not prevail would to be a daunting task. People in such countries may find the content of the rule-of-law norm attractive yet incompatible with the social environment in which they live. Development programs aimed to promote the rule-of-law state paradigm (or rely on it) therefore must take into account the cultural environment to which they are targeted.

WASH. L. REV. 945 (1986); Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125 (1999-2000).

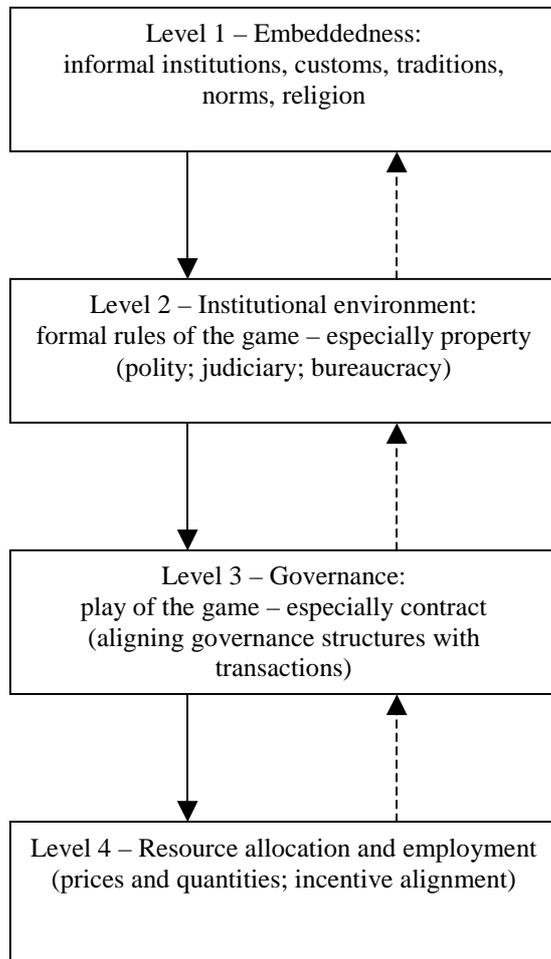
FIGURES

Figure 1. The Schwartz Model of Relations Among Cultural Orientations



Based on Shalom H. Schwartz, *Cultural Value Differences: Some Implications for Work*, 48 APPL'D PSYCHOL. INT'L REV. 23 (1999).

Figure 2. The Williamson Model of Social Institutions



Based on Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595 (2000).