

## Introduction

Social order may be regulated from above by the law, but its foundation is built on norms and customs which combat social disarray, allowing people to make meaningful and productive uses of their time and resources. The law's ability to promote a just social order can never be fully understood without taking account of the concurrent influence of these informal social practices. In spite of this, much jurisprudential writing has been devoid of sustained discussion of norms and customs, focusing instead on individuals and governments. Individuals are thought to be the locus of moral responsibility and rational decision making, while governments are thought to be the source of legal obligations that form the institutional backdrop against which moral and rational behavior occur. In concentrating on the small individual below and the vast, looming state above, those mid-sized objects of the social world – norms and customs – have been neglected.<sup>1</sup>

Recently, legal theorists have begun to pay attention to social norms.<sup>2</sup> The new legal literature draws on important work emanating from the social sciences as well as from moral and political philosophy, evolutionary biology, and anthropology.<sup>3</sup> Nearly all the new work by legal scholars utilizes rational choice methodology. This book also presents an analysis in the rational choice tradition albeit one that incorporates moral theory into the analysis as well. One of the underlying themes in this book is the compatibility of rational and moral analysis.

The present work seeks an equilibrium between theory and legal application.<sup>4</sup> Part One develops a philosophical conception of norms, which is then put to the test by applying it to tort law, first at an intermediate level of analysis in Part Two and then at a micro level of analysis in Part Three.<sup>5</sup>

Part One develops what will be called the *pattern conception* of social norms. First, I argue that the traditional conception of norms as rulelike linguistic entities is faulty. Instead, norms must be understood as patterns of rationally governed behavior maintained in groups by acts of conformity. Even though rules understood as linguistic entities still play a role in the pattern conception, patterned, conformative behavior is the essence of a norm.

Informal game theory, which characterizes human behavior in terms of strategic relationships between pairs or groups of people, will be utilized in the analysis of norms and customs. Peoples' patterns of behavior are modeled as *iterated games* among *players*. By showing how these players might rationally conform to certain practices, informal game-theoretic models offer a mechanism for explaining how these practices may be maintained over time. This is significant as plausible mechanisms of this sort are in short supply in social science and social theory.<sup>6</sup>

Structurally speaking, social norms are either strategic or nonstrategic. I divide strategic norms into two groups: those consisting of patterns of behavior maintained by sanctions and those consisting of patterns of behavior maintained without sanctions. The former are *sanction-driven norms* and the latter are *coordination norms*.

The sanction-driven norm is a broader structure than the Prisoner's Dilemma or collective action norm. The collective action problem is considered by some to represent one of the fundamental paradoxes of rationality.<sup>7</sup> The paradox is thought to reside in the fact that there is a divergence between individual and collective rationality; the collective of individuals will each do better if all contribute toward the production of certain important collective goods such as lighthouses, military defense, and roads, than if no one does, and yet for each individual it is rational to defect from cooperation. Individual defection is a *dominant strategy*, that is, each does better by not cooperating, regardless of the choice made by others. Consequently, a rational actor will attempt to *free ride* on the efforts of others. But because each has this preference, all will free ride, and the collective good will not be produced. The focus here is not on collective goods that are physical objects such as lighthouses but rather on norms and customs. Norms and customs are not goods in the usual sense; nevertheless, their provision may constitute a collective action problem.

Sanction-driven norms may solve collective action problems. They may solve a wider array of problems as well, such as the game of Chicken, or Ellickson's Specialized Labor Game.<sup>8</sup>

Norms scholars in the legal academy have shown a particular interest in sanction-driven norms, though not under that rubric. Ellickson provides an account of how close-knit groups can develop efficient norms resulting from the mutual sanctioning that is made possible by the repeated and overlapping interactions among members of a close-knit group. Richard McAdams develops an esteem-based account of sanctioning. Esteem sanctions are essentially free and are thus capable of solving the second-order collective action problem that is widely understood to arise with respect to the use of sanctions to solve a first-order collective action problem. Eric Posner argues that norms help solve iterated collective action problems by allowing people with low discount rates to identify one another by means of signaling. What these accounts have in common under the theory of norms that will be developed in Part One is that

each description of the process of norm emergence or maintenance integrally involves sanctions, and so the resulting norm is a sanction-driven norm.

In turn, the coordination norm is a broader structure than the convention. According to David Lewis, conventions have the strategic structure of *proper coordination equilibria* because everyone benefits from participating, and everyone benefits still more from the participation of others.<sup>9</sup> The first feature, Lewis suggests, explains why conventions are self-maintaining. The second explains why conventions become norms. Lewis claims to capture the idea of conventions as first discussed at length by Hume. I will argue, however, that Hume's fundamental insight about the deeply conventional structure of social institutions should be formalized in a more complex manner than Lewis suggests. On my account, proper coordination equilibria are but a subset of *coordination norms*. Coordination norms are patterns of behavior made up of act-types performed to achieve a *coordination benefit*. A coordination norm – though not a proper coordination equilibrium, a coordination equilibrium, or even an equilibrium – may be maintained.

I also postulate a third category of norms, *epistemic norms*, which are best understood in terms of informational economy rather than in strategic terms. People often conform for epistemic reasons, that is, they conform to a pre-existent social practice, rather than expending the effort to gather new information, in order to economize on the cost of information.<sup>10</sup> Other theories have not incorporated strategic and nonstrategic norms into a single account. This approach will be defended against leading norms accounts, such as those of David Lewis, Edna Ullmann-Margalit, Robert Ellickson, Richard McAdams, and Eric Posner.<sup>11</sup>

A fundamental if implicit tenet of much social theory is that conformity to prominent social customs substantially explains human conduct; *Homo sociologicus* is a conforming animal.<sup>12</sup> The notion of conformity scarcely makes an appearance in the work of rational choice theorists.<sup>13</sup> The instinct of these theorists is to view conformity as suspect. The appeal of the rational choice approach is substantially diminished, however, if it cannot be shown to be compatible with the supposition of widespread conformity to norms, as conformity is a fairly straightforward social phenomenon. To paraphrase the epigram from Francis Bacon that begins Part One, while people may have a variety of diverse thoughts running through their heads, the lion's share of their behavior is best explained by reference to reigning norms and customs. The pattern conception of social norms reconciles rational choice with conformative behavior. In other words, *Homo economicus* is also shown to be a conforming animal.

In addition, the pattern conception integrates moral motivation into the rational choice model of norms. Many moral theorists and sociologists have rejected the rational choice approach outright because they have assumed that once moral motivation is postulated, the rational choice framework loses coherence. At root, people are either moral or egoistic, but the twain shall never meet.

In fact, however, in ordinary morality, it is permissible to behave over a wide range of activities in a self-regarding manner. There is then a significant overlap between self-interested behavior and moral behavior. In addition, I will argue that norms, once they are up and running, may generate a variety of moral obligations and other moral relationships, depending on the type of norm at issue, and the moral commitments of the participants.

To the extent that they look at morality at all, rational choice theorists uniformly focus on consequentialist motivation.<sup>14</sup> Rational actors seek to maximize; their utility functions just happen to include the interests of others. An exclusive focus of consequentialist tendencies leads, however, to a cramped conception of moral behavior. By contrast, the theory developed here allows deontological, virtue-theoretic, and everyday moral motivation into the model of norm functioning, along side consequentialist motivation. This assumption has the virtue of realism.

Along with rational choice theorists, moral theorists have neglected to acknowledge the importance of conformity in the lives of ordinary people, for whom Kantian, Aristotelian, or utilitarian reflection is rare, while conformity to dominant moral practices is pervasive. The result is a sterile conception of morality with only a glancing connection to the complex normative texture of most people's lives. The notion of conformity has played almost no role in traditional moral theory. Conformity is suspect. One might easily suppose that conformers are not moral at all; they are merely conforming. The fundamental question then is whether moral actors can consistently conform to norms. If conformity is central to norms, and if norms are to be maintained by moral individuals, conformity must be acceptable to the moral individual.

I will argue that norm conformity, properly construed, is antithetical neither to ordinary morality nor to most critical moral theories. I will make this argument for the first best world from the perspective of the critical theorist, which is the world in which the population of actors share her moral outlook, and for the second best world, the real world, in which the moral actor comes in constant contact with heterogeneous norms constituted of conforming actions by people who represent a variety of moral and nonmoral outlooks.

The moral analysis leads to a typology of norms that parallels the one that emerges from the study of rational norms. There are three basic types: coordination moral norms, saction-driven moral norms, and epistemic moral norms. This parallel structure demonstrates unity of the normative.

Chapter One defends the pattern conception against the dominant *rule conception*. Because norms and customs are behavioral patterns rather than linguistic rules, they have rational structures rather than grammatical structures. Chapter Two develops an account of these structures based on a Hobbesian assumption of narrow self-interest.<sup>15</sup> Chapter Three maintains this motivational assumption but examines the various norm structures from the normative perspective of utilitarian moral theory. Chapter Four then develops an account

based on a broader Humean conception of rationality, one that is consistent with the existence of genuinely moral motivation.<sup>16</sup> This position is called *predominant egoism*.<sup>17</sup> On this motivational assumption, genuinely moral norms may emerge as a result of norm conformity. Finally, Chapter Five examines the potential for norm maintenance based on the motivational assumptions of leading critical moral-theoretic approaches.

In combination, the chapters of Part One will seek to set out an account of norms that unifies rational actor and moral theoretic truths into a coherent whole. The goal is not to defend one particular set of normative assumptions over others. Quite the opposite, the goal is to develop a conception of norms and customs that is not dependent on any particular set of normative assumptions, either assumptions regarding the normative motivations of the actors or assumptions regarding the critical normative goals of the overall system. In Part One, I develop a theory of norms and customs, and in the remainder of the book I test the theory by plugging it into substantive legal debates. If the theory is a good one, it should work well in these applied contexts, serving to illuminate important applied areas of the law. Alternatively, if the account contains wrinkles that need to be ironed out, or is fundamentally wrongheaded beyond repair, these facts should become apparent once we have the opportunity to see the theory in action.

A number of scholars have drawn attention to dysfunctional properties of norms.<sup>18</sup> In Parts Two and Three, the legal norms I examine will be seen to display some significant dysfunctional characteristics. In Part Two, I explore the manner by which norms of significance to tort law, that is, norms that revolve around injury-producing behavior, may emerge and be maintained, despite possessing significantly dangerous characteristics. Part Three looks at a different sort of dysfunctionality, norms that allow for websites to falsely signal respect for user informational privacy, thereby fooling consumers.

Part Two will apply the pattern conception to tort law. Two connected issues will be examined: the proper role for custom in determining negligence, and, the role of the jury in injecting its norms into substantive applications of the reasonable person test. These are the two most significant roles played by custom in tort law.

In this epoch of accelerating change, it might be thought that custom was no longer capable of playing a prominent role in the maintenance of a safe social order, for how can customary practices evolve quickly enough to keep pace with the rapid changes that characterize modern society. In law in particular, it might seem that traditional, informal solutions should be rejected in favor of more rationalized and centralized means of affecting social order.

Just this sort of rejection of the dead hand of the past seems to be the lesson at the heart of the best-known tort case dealing with the rule of custom, *The T. J. Hooper*. In this case, Judge Learned Hand famously observed that industry customs may lag behind what is required by due care.<sup>19</sup> The fact that tug boat

operators customarily did not use radios was not legally dispositive of the issue of negligence, as the whole tug boat industry may have negligently failed to adopt the use of radios as a means of avoiding storm loss. In other words, custom may be evidence as to the proper standard of care, but it is not the standard itself.<sup>20</sup> This standard must be independently ascertained by rational evaluation of all the competing interests involved. Hand seems clearly to be throwing off the yoke of the past as a sure guide to future conduct. Instead, the course of the law's development must be opened to rational appraisal if society is to prevail over the blind prejudices of the past.

It turns out, however, that custom runs deeper in tort law than is suggested by the rendition of Hand just alluded to. While the role of custom in tort has not diminished, it has changed. Part Two begins in Chapter Six with a look at the historical and jurisprudential underpinnings of the rule of custom. The shifting relationship between custom and law is first examined. At one time, certain customs were law itself – customary law. Custom no longer has this exalted status; nevertheless, customs may serve as sources of law. Chapter Six examines the historically important example of customary easements in land. Looking at the strategic structures of some prominent examples of customary land usages, we will see that the norms motivating the courts' decisions regarding these usages appear to be a mixture of consequentialist and nonconsequentialist impulses. In particular, in certain sorts of situations involving induced detrimental reliance on the part of customary users of land, courts have been inclined to find customary easements. The role of custom in this instance is striking; what would otherwise be a tortious trespass instead becomes a use by right.

Chapters Seven through Nine explore the development of the modern *rule of custom*. The rule of custom has played a venerable role in tort doctrine. Modern tort law mainly follows the negligence standard according to which one will be found liable only if one acted negligently in causing an injury. Negligence is the failure to exhibit due care or ordinary care. Leading early cases established the connection between “ordinary” behavior and “customary behavior.”<sup>21</sup> Ordinary behavior is simply customary behavior. Courts look to whether an injurious action conformed to an accepted custom or social norm in determining whether an action was negligent. Injurers attempt to establish their conformity to custom as evidence of due care while victims attempt to establish the injurer's failure to conform as evidence of negligence.

Leading decisions by Holmes and Hand expanded the role of custom by holding that custom may not only be dispositive regarding the question of negligence but also convey less powerful yet relevant *evidence* regarding negligence.<sup>22</sup> This finding in effect expanded the options of courts to apply the rule of custom in a more nuanced fashion. Modern tort law has alternatively endorsed two main rules of custom, which I label the *per se* and the *evidentiary* rules. The introductory doctrinal discussion in Chapter Seven focuses on the manner in which the older *per se* rule, whereby conformity to custom established the fact of due

care, was replaced by an evidentiary rule, which holds that conformity may be evidence of, but is not dispositive of, due care.

Understanding why the evidentiary rule won out will be helpful in gaining a larger perspective on the relationship between custom and tort, as an adequate account of why courts have gravitated toward the evidentiary rule has remained elusive. Chapter Seven considers two initially plausible candidates. The first, developed in the classic article, *Custom and Negligence*, by Clarence Morris, argues that juries will be less biased against defendants in their deliberations when they are made to appreciate that the defendant's injurious behavior conforms to widespread industry practices.<sup>23</sup> The second account is the traditional, positive economic account of Landes and Posner, which predicts that the per se rule will be found in situations in which there is actual or potential bargaining between the parties, but not otherwise.<sup>24</sup> When parties are able to bargain, they will be able to reach welfare-maximizing agreements on their own, and these agreements will be represented in customary practices. Accordingly, courts should insulate the practices by means of the per se rule.

I will argue that each of these accounts fails to explain the emergence of the evidentiary rule as the dominant modern rule. Morris' account fails to explain why there may be genuine reasons that conformity to custom has epistemic value with regard to the issue of negligence, once concerns regarding jury bias have been factored in. Landes and Posner's account wrongly predicts that the per se rule will prevail in bargaining contexts. I will demonstrate that the evidentiary rule is the dominant modern rule in both bargaining and non-bargaining contexts. Moreover, Landes and Posner's account does not explain the main exception to the modern rule of custom, which applies the per se rule to the injuries caused by physicians and other professionals, despite the fact that they are neither more nor less likely than nonprofessionals to engage in the sort of bargaining discussed by Landes and Posner. By contrast, I will offer an explanation for this phenomena that draws on the important rational structure of tort law. I will argue that the norms of physicians and other professionals are often given strong deference, due to the *superior epistemic warrant* possessed by those knowledgeable in a field requiring expert training. In other words, my account relies on the supposition that certain important norms of professionals have epistemic structures.

In the process of evaluating Landes and Posner's account, it will become apparent that informal game theory helps to provide a better explanation of negligence law's use of social custom. On the account that I will set out, there are four relevant modalities of the rule of custom. The per se rule may be justified when the custom at issue is thought to be efficient, as this rule will protect the conforming action from going to the jury where the injurer might be found to be negligent. The evidentiary rule will make more sense when the custom at issue is not optimal but welfare-enhancing nevertheless, as this rule encourages juries to give deference to the custom, while at the same time allowing the jury

to find negligence if a superior custom appears attainable. The evidentiary rule may take a weak form under which conformity is evidence of due care or a strong form under which conformity serves as a rebuttable presumption of due care. Finally, the rule that accords conformity no priority may be suitable if the custom at issue is either neutral or detrimental to the production of welfare.

The goal will be to determine the efficiency conditions for the sorts of norms and customs that matter to tort law. This task is complex for not only are there four versions of the rule of custom, but there are also three different rational structures of customs to which these versions may apply. Practically all previous applications of informal game theory to law have focused on the Prisoner's Dilemma (PD) or collective action problem.<sup>25</sup> One would naturally suppose that tort law would take an interest in PD-structured customs because tort law is concerned with injuries, and many PD customs present a situation in which a person is repeatedly in a position to cause injury to others, either by failing to conform to a safe PD custom or by conforming to a dangerous PD custom. While PD customs, and sanction-driven customs more generally, are indeed of great interest, the examples I consider will demonstrate that epistemic customs and coordination customs may also be important sources of injuries and so are equally of concern to tort law.

In order to determine whether a custom in a particular case is efficient, courts will need to know which type of custom is involved, as different sets of *welfare-maximization markers* apply to each of the three types of custom. Factors such as whether the incidence of injury falls on conformers or third parties, whether either or both of these groups are close-knit, whether the conformer has superior epistemic warrant, whether the Kaldor-Hicks test favors conformers, and whether an optimizing alternative practice is available matter differentially depending on the type of custom at issue.

Combining various possible rules of custom, various possible rational structures of custom, and the various welfare markers, thirty-seven distinct modalities of tort custom will be identified in Chapter Nine. The development of this schema calls into doubt the basic justification of the dominance accorded to the evidentiary rule by Holmes, Hand, and their modern followers. After all, only eight of the thirty-seven applications of the rule of custom call for the evidentiary rule. The *per se* rule is preferable for nineteen of the situations; the no-priority rule, for ten of the situations; and the presumption-shifting rule, for eight of the situations.

The conclusion will be irresistible, then, that welfare-maximizing courts will need to pay attention to a number of features of customs, and not simply whether there was a bargaining situation between the parties or a sanctioning situation surrounding the parties. In general, courts have not demonstrated a sophisticated understanding of the relevant complexities of customs. Although courts have to some extent accorded different legal treatment to some of the different types of custom, to all appearances they have done so by means of an



intuitive methodology that fails to articulate explicitly the rationale for applying particular rules to particular structures.

The analysis in Chapters Seven through Nine labors under the assumption that courts are intent to maximize welfare in their decisions regarding the choice of the particular version of the rule of custom to apply in particular cases. Notice that this assumption is neutral regarding the motivations of the various other actors besides the judges. The lay members of the community may all be narrowly self-interested utility maximizers, they may be predominant egoists, or they may exhibit some other species of motivation entirely. The last two chapters of Part Two will develop a more substantive account with regard to the motivations of at least some of the participants other than judges, namely, the jurors. I will argue that jurors, and their norms and customs, play a crucial yet generally underappreciated role in negligence law, at least as judged by the two dominant accounts, the economic account and the corrective justice account.

The power of either litigant to request a jury is both a practically universal and a practically unique feature of American tort law. Despite the fact that most cases settle, the prospect of a case going to trial is always in the background, influencing litigation tactics, expected outcomes, and therefore settlement negotiations.<sup>26</sup> In Chapter Ten, I develop a five-stage account of the jury's role in a tort suit that makes its way through trial. I will argue that the practice of tort law gives the informal social norms of jurors an essential role in constituting the actual substance of the negligence standard. As a causal matter, it is this *de facto* standard, serving as an instantiation of the abstractly formulated formal standard promulgated by the judge via the jury instructions, that determines the final outcome in tort suits.

Because the *de facto* standard plays an essential role in the outcome of tort litigation, any entitlement created by the litigation is causally influenced in its creation from below by juror norms, as well as from above by the jury instructions conveying the formal liability standard. The bottom/up component of this bidirectional causal process will be referred to as the *jury norm effect*. Chapter Ten will provide an account of the particular substantive normative forces that are typically unleashed by means of the jury norm effect. These forces will be seen to include everyday analogs of strict liability and direct causation, comparative negligence and redistribution. In their efforts to provide a unified normative account, the dominant paradigms fail to notice these *sui generis* normative forces that fill out the substantive content of negligence determinations.

Given the jury's important role in the actual practice of tort law, there is a puzzle; why is so little attention paid to the jury in the dominant accounts of negligence? I will argue that the answer to this question is that these accounts exhibit a bias that in another context Robert Ellickson has labeled "legal centralism."<sup>27</sup> Legal centralists wrongly focus on top/down formal explanations of the source of liability entitlements at the expense of bottom/up explanations

that would take account of the casual impacts of informal social norms, such as those that might flow from the deliberations of juries.

Chapter Eleven will look in greater detail at the dominant accounts of tort – the economic account and the corrective justice account – and the means by which each fails to pay proper attention to the important role played by juror norms. The economic conception receives its fullest expression in the *Restatement (Third) of Torts*.<sup>28</sup> The *Restatement* only countenances a role for social norms in the special situation in which there is an instantiated custom in place, such that either the defendant pleads conformity as a defense or the plaintiff seeks to demonstrate lack of conformity as evidence of negligence. What is missing is any acknowledgment of the prevasive role that social norms play in providing grist for the jury's concrete application of the reasonable person standard. This process may occur not only in situations in which custom is explicitly introduced as evidence by one of the parties, but in all situations in which lay juries deliberate.

The *Restatement's* account is misguided, apparently due to its legal centralism, which leads the restaters to assume, largely without argument, the dominant causal efficacy of the Hand Test interpretation of the reasonable person standard on the deliberations of juries, and hence on the outcomes of negligence suits. Based on the analysis and empirical evidence examined in Chapter Ten, I will argue to the contrary that there is every reason to suppose that jurors do not engage in Hand Test analysis but instead draw from their heterogeneous array of everyday norms and customs when providing concrete substance to the abstract reasonable person standard in order to come to a decision on the issue of negligence. This discussion will conclude with an examination of an innovative attempt by Stephen Gilles to insulate the dominant conception from the line of criticism I offer. Gilles argues that, properly understood, the Hand Test actually involves a morally attractive Hand Norm that will tend to be expressed as a result of factor balancing by juries. Despite the attractiveness of this *First Restatement* approach as compared to the *Restatement* approach, it will in the end be rejected as well.

Next, Chapter Eleven will examine the corrective justice approach to negligence, focusing on Jules Coleman's influential account. Coleman sets out to provide a pragmatic explanation of tort law that is sensitive to the two-party structure of litigation and the justice concerns raised by one party's injury of the other party. The jury plays no role in Coleman's account. It thus remains to be explained why real-world juries would promote solely or mainly corrective justice norms.

I will conclude that there is a need for a new negligence account that accords the jury conceptual space commensurate with its role in the actual legal institution of tort law as practiced in America. The jury norm effect allows the norms of ordinary people to exert a direct causal effect over formal, legal outcomes. From the perspective of democratic theory, this is an anti-elitist, liberal feature