

NORMS AND THE LAW

This book contains perspectives of world-renowned scholars from the fields of law, economics, and political science about the relationship between law and norms. The authors take different approaches by using a wide variety of perspectives from law, legal history, neoclassical economics, new institutional economics, game theory, political science, cognitive science, and philosophy. The essays examine the relationship between norms and the law in four different contexts. Part One consists of essays that use the perspectives of cognitive science and behavioral economics to analyze norms that influence the law. In Part Two, the authors use three different types of common property to examine cooperative norms. Part Three contains essays that deal with the constraints imposed by norms on the judiciary. Finally, Part Four examines the influence formal law has on norms.

John N. Drobak earned Bachelor of Science degrees in electrical engineering and management science from the Massachusetts Institute of Technology and a law degree from Stanford University. He joined the law faculty at Washington University in 1979, where he served as Associate Dean from 1986 to 1990, and now holds appointments as the George Alexander Madill Professor of Law in the School of Law and also in the Department of Economics in Arts and Sciences. He is the director of the Center for Interdisciplinary Studies in the School of Law, a fellow in the Center in Political Economy in Arts and Sciences, and former co-director of the Business, Law, and Economics Center in the John M. Olin School of Business. In his pro bono work, he consulted with Vaclav Klaus, then Finance Minister of Czechoslovakia and now President of the Czech Republic, in connection with Czechoslovakia's voucher privatization of large government enterprises and with the Republic of Georgia in connection with the drafting of a new constitution.



Norms and the Law

Edited by

JOHN N. DROBAK

Washington University School of Law





CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press 32 Avenue of the Americas, New York, NY 10013-2473, USA www.cambridge.org Information on this title: www.cambridge.org/9780521862257

© Cambridge University Press 2006

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2006

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data

Norms and the law / edited by John N. Drobak.

p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-521-86225-7 (hardback)
ISBN-10: 0-521-86225-6 (hardback)
ISBN-13: 978-0-521-68079-0 (pbk.)
ISBN-10: 0-521-68079-4 (pbk.)
1. Law — Social aspects. 2. Social norms. I. Drobak, John N. II. Title.
K370.N67 2006
340'.115 — dc22 2006001220
ISBN-13 978-0-521-86225-7 hardback
ISBN-10 0-521-86225-6 hardback
ISBN-13 978-0-521-68079-0 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

ISBN-10 0-521-68079-4 paperback



Contents

List	t of Contributors	page vii
Ack	knowledgments	ix
	roduction	1
PAR	RT ONE. RATIONALITY AND NORMS	
1	Social Norms and Other-Regarding Preferences	13
2	Damages, Norms, and Punishment	35
3	Cognitive Science and the Study of the "Rules of the Game" in a World of Uncertainty	48
PAR	RT TWO. NORMS OF THE COMMONS	
4	Norms of the Household	59
5	.commons	89
6	How Norms Help Reduce the Tragedy of the Commons: A Multi-Layer Framework for Analyzing Field Experiments Juan-Camilo Cárdenas and Elinor Ostrom	105
PAR	RT THREE. JUDICIAL NORMS	
7	Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act	139

V



vi	Con	ıtents
8	Judicial Independence in a Democracy: Institutionalizing Judicial Restraint	161
9	Black Judges and Ascriptive Group Identification	. 208
10	Judicial Norms: A Judge's Perspective	. 230
PAF	RT FOUR. THE INFLUENCE OF LAW ON NORMS	
11	Normative Evaluation and Legal Analogues	· 247
References		267
Ind	ex	291



Contributors

Kathryn Abrams, Herma Hill Kay Distinguished Professor, University of California at Berkeley School of Law

Juan-Camilo Cárdenas, Facultad de Economia-CEDE, Universidad de Los Andes, Bogota, Columbia

Harry T. Edwards, Circuit Judge and Chief Judge Emeritus, United States Court of Appeals for the District of Columbia Circuit

Robert C. Ellickson, Walter E. Meyer Professor of Property and Urban Law, Yale Law School

John Ferejohn, Carolyn S. G. Munro Professor of Political Science, Stanford University, and Visiting Professor of Law and Politics, New York University School of Law

Lawrence M. Friedman, Marion Rice Kirkwood Professor, Stanford Law School

Larry D. Kramer, Richard E. Lang Professor of Law and Dean, Stanford Law School

Lawrence Lessig, C. Wendell and Edith Carlsmith Professor of Law, Stanford Law School

Douglass C. North, Spencer T. Olin Professor in Arts and Science, Washington University

Elinor Ostrom, Arthur F. Bentley Professor of Political Science, Indiana University

vii



viii Contributors

Amartya Sen, Lamont University Professor and Professor of Economics and Philosophy, Harvard University

Lynn A. Stout, Professor, University of California at Los Angeles School of Law

Cass R. Sunstein, Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago, Law School and Department of Political Science



Acknowledgments

The essays in this book were initially presented at the inaugural conference of the Center for Interdisciplinary Studies at the Washington University School of Law. This book would not have been possible without the sponsorship and financial support of the Center. Linda McClain, who coordinated the conference for the Center, was instrumental to the success of that program. I am indebted to Hannah Fleener, a 2006 graduate of the Washington University School of Law, for her editorial assistance and to Jane Bettlach and Beverly Owens for their preparation of the manuscript. I appreciate the advice of Gary Libecap and an anonymous referee who reviewed the manuscript and the support of John Berger, my editor at the Cambridge University Press. Finally, I want to thank the authors of the essays in this book for their hard work, patience, and creativity. They are the ones who gave life to this book.

John N. Drobak