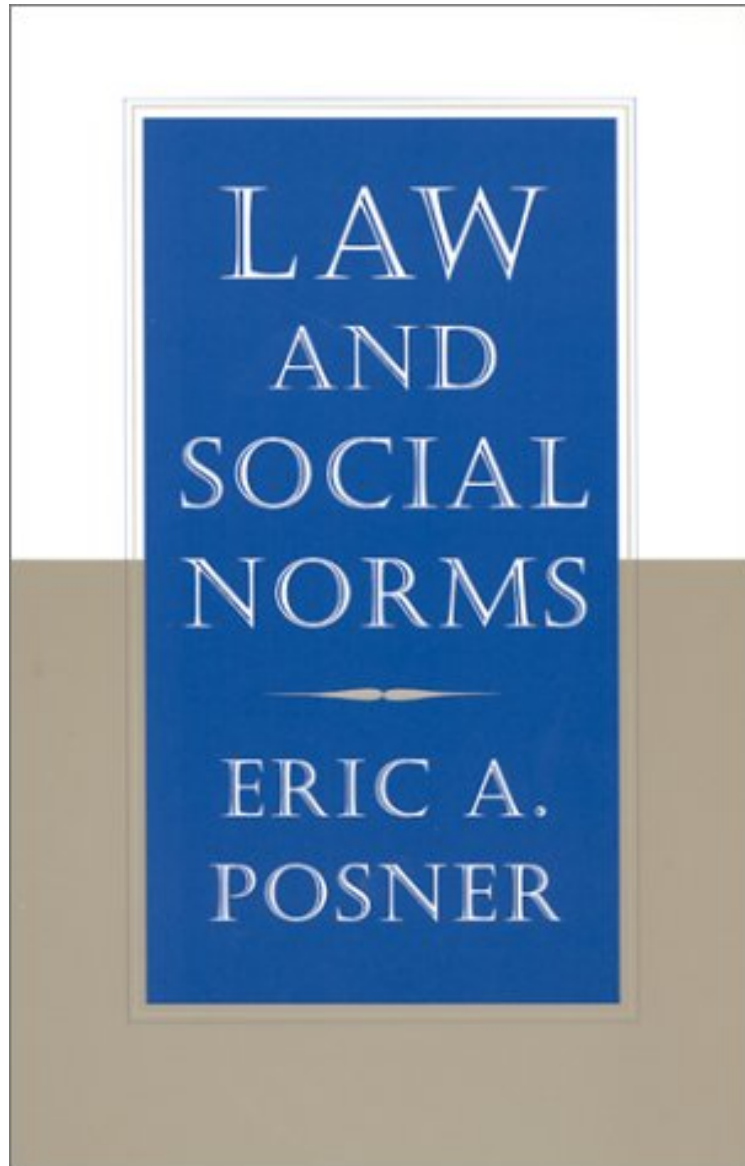


Law and Social Norms

Eric A. Posner

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Eric A. Posner : Law and Social Norms before purchasing it in order to gage whether or not it would be worth my time, and all praised Law and Social Norms:

9 of 10 people found the following review helpful. Reputation is not EnoughBy Herbert GintisEric Posner is a leading American legal scholar. Legal scholars are a special breed of academic. While firmly ensconced in academia, they have no formal training in any scientific discipline, and can be completely ignorant of mathematical formulations of social theory, of statistical hypothesis testing, and the received wisdom of the various disciplines in the social sciences.

Moreover, they publish long, weighty, footnote-laden papers in law review journals that, rather than being peer-reviewed, are reviewed by law students with doubtless less expertise in the behavioral sciences than the professors whose work they judge. As such, we do not generally expect the social sciences research of legal scholars to be of great interest to researchers in the various behavioral disciplines. However, the same conditions that deprive legal scholars from the rigors of the scientific disciplines allow them to develop exciting transdisciplinary ideas with a speculative freedom that is simply not open to an economist, psychologist, or other member of the standard disciplines. Moreover, the behavioral disciplines are less "scientific" than they prefer to consider themselves, because they disagree in the fundamentals—a situation that would never be tolerated in the natural sciences. So, we perhaps have much to learn from the legal scholars. We can learn especially much when the scholar concerned has delved deeply in the professional literature, and wields the analytical tools with deftness and insight, yet without the grim tenacity of maintaining disciplinary boundaries so characteristic of the disciplinary academic. Eric Posner is just such a legal scholar. This is a work in the grand tradition of "law and economics," which began with the brilliant Coase Theorem, and was championed by the multitalented jurist Richard Posner. This strand of legal theory follows general equilibrium economic theory in assuming that all social relations are market exchanges and all individuals are standard "rational economic actors" who seek to maximize some combination of wealth, consumption of goods and services, and leisure. The assumption that all economic social relations are market relations was sorely challenged in the last quarter of the 20th century, during which time game theory and theoretical institutional analysis analyzed the non-market social forces in the economy. More recently, the assumption of the standard rational self-interest economic actor has been challenged by "behavioral law and economics," which holds that individuals are not the "rational decision-makers" depicted by Ronald Coase and Richard Posner. Eric Posner does not assume individuals are necessarily self-interested, but his contribution is clearly on the side of the rational actor model rather than behavioral economics. Posner, on the other hand, takes informal social relationships and game theory extremely seriously, so we might consider him to be in the tradition of Oliver Williamson in stressing that individuals cannot assume costless contract enforcement by the judiciary. "The law," claims Posner, "is always imposed against a background stream of nonlegal regulation—enforced by gossip, disapproval, ostracism, and violence—which itself produces important collective goods." (p. 4) How refreshing! The book is full of such oft ignored truths. This is Posner's great virtue: we must evaluate legal rules not as compared with Hobbes' state of nature (in which life is poor, nasty, brutish and short), but rather with evolved nonlegal social institutions that regulate and adjudicate the relations among individuals and organizations in daily life. Posner has a theory, presented at the outset of the book—a theme of which virtually every chapter is a variation. The theory is that there are good types and bad types of people. The bad types have a short time horizon, and will cheat you if they can, without concern for the fact that you will not deal with them ever again. The good types value future returns, and are honest today so that they may get to deal with you again tomorrow. The point is that if one values the future, one can ensure high returns in the future by nurturing a reputation for honesty and fairness. For Posner, it is the complex web of reputational social relationships that ensure agreements, not the legal system. Indeed, the legal system works best, suggests Posner, when it reinforces prosocial informal norms that reward honesty and commitment. This is a very interesting thesis, and surely a partial truth. But, it presents a problem. Many students of modern society believe the rule of law is an indispensable aspect of social efficiency and justice. What role does the judiciary play at all, in Posner's model? The answer is provided in Chapter 9, "Contract Law and Commercial Behavior." Posner argues that when parties to a contract sue for redress in formal courts, they are ensuring that both they and the defendant will incur considerable costs, and the outcome of the suit is unlikely to depend much on the quality of the suit. Judges, says Posner, simply do not know enough about the intricacies of particular lines of trade to judge competently on specific issues. Rather, says Posner, the courts serve as credible threats of imposing serious costs on a co-contractor who violates an implicit agreement. The courts thus give individual firms a costly but highly effective means of deterring opportunistic behavior of a co-contractor. When economic conditions change so that one party to a contract might gain by abandoning his obligations, the mutual threat of litigation serves as a credible threat serving contract enforcement. Even though judicial pursuit is costly, incurring the cost will reinforce the reputation of a contracting party in the eyes of other potential partners (the so-called chain-store strategy). Posner has made a thorough study of the signaling literature in game theory, and applies it adroitly in several parts of the book. When there are both good types and bad types competing for your attention, a signal that is costly and can only benefit someone with a long time horizon may serve to create a "separating equilibrium" in which all the good types send the signal and the bad type do not. For instance, giving an expensive gift to a potential partner, requiring a long-term relationship before the profits from the exchange repay the gift, is a sure sign of a good type. There are many insights to be gained from Posner's reputational signaling theory, but it is plausible only when at least one party to the exchange is a single individual, and when the encounter is repeated and renewed at a high rate. We normally have large numbers of encounters with individuals and firms that we will never encounter again, yet often we are treated fairly and considerately by these one-shot partners, who have no reputational interest in compliance to social norms of fairness and reciprocity. Posner cannot explain such behavior at all. Part of the reason anonymous individuals and firms exhibit compliant behavior when reputational issues are absent is the law itself: there are penalties for

cheating, scamming, and assaulting unwary individuals, and in some societies these penalties are quite effective and seriously enforced. This is called "the rule of law." A more complete theory than Posner's would model the interaction of the rule of law and private reputational equilibria. Part of the reason anonymous individuals and firms exhibit compliant behavior is that many individuals embrace such character virtues as honesty, helpfulness, considerateness, and promise-keeping for their own sake, and many firms promote these virtues as well, in the not unreasonable belief that the culture of virtue is most likely profitable in the long run. Posner's discussion of these and related issues is weak and out of date. He entertains the possibility that altruism is an important source of compliance, but he does not review the exciting literature in this area that has emerged since 1995 or so. He discusses the internalization of norms as a source of publically shared social values, but he quickly abandons any reliance on such a force. For an example of how Posner's total reliance on a reputation theory compromises his analysis, take the case of voting, discussed in Chapter 7. Posner correctly notes that "Voting is essentially a symbolic act, since an individual's vote has virtually no influence on the outcome of an election" (p. 112). Posner's theory is that people develop a reputation as "good types" worthy of building lasting relationships, by voting and conforming to other acts symbolic of patriotism (e.g., respecting the flag). But, voting is not very costly and one could always lie and claim to have voted without incurring the costs. Nor is there any evidence that people who do not vote or display the flag are "bad types" in the sense of being poor potential partners to social exchange. An alternative plausible theory is that people vote because they consider it a privilege and a duty to do so, and they approve of other who vote because they share basic values with these individuals. People prefer to deal with those with whom they share value in principle, not because they will gain higher material or reputational rewards thereby. My point, ignored by Posner, is that culture matters, and we do indeed internalize norms in a good society that induce us to behave in a prosocial manner. Of course we care about our reputations, but most of us care as much about our self-image, and about how others view us quite independent from how this affects our wealth and material ease. From the point of view of social policy, Posner's model must be supplemented by an appreciation for the rule of law in itself and the key role of culture in promoting normative behavior. Countries in which the rule of law is weak cannot repair the situation with reputational networks alone, and where corruption, dishonesty, and other forms of cheating are condoned and even appreciated, reputational networks will thrive, but life for the majority of individuals will be nasty, brutish, and short.

10 of 15 people found the following review helpful. My book of the year! By Yung-chien Chang Using Signal Theory, Eric Posner provides a unified analytical structure of all kinds of social norms. This book is not a monotone; instead, it compares and criticizes other previous theories of this theme. So it persuades me. Law and Social Norm is not a book full of abstract theory. In the second part, the legal application, the author goes deep into various problems, ex. discrimination and contract law, and give a lucid explanations of the origin and cause of those phenomena. In the third part, the author discusses some normative problems. A reader like me would find his discussion of commodification and autonomy fascinating. This is my book of the year!

What is the role of law in a society in which order is maintained mostly through social norms, trust, and nonlegal sanctions? Eric Posner argues that social norms are sometimes desirable yet sometimes odious, and that the law is critical to enhancing good social norms and undermining bad ones. But he also argues that the proper regulation of social norms is a delicate and complex task, and that current understanding of social norms is inadequate for guiding judges and lawmakers. What is needed, and what this book offers, is a model of the relationship between law and social norms. The model shows that people's concern with establishing cooperative relationships leads them to engage in certain kinds of imitative behavior. The resulting behavioral patterns are called social norms. Posner applies the model to several areas of law that involve the regulation of social norms, including laws governing gift-giving and nonprofit organizations; family law; criminal law; laws governing speech, voting, and discrimination; and contract law. Among the engaging questions posed are: Would the legalization of gay marriage harm traditional married couples? Is it beneficial to shame criminals? Why should the law reward those who make charitable contributions? Would people vote more if non-voters were penalized? The author approaches these questions using the tools of game theory, but his arguments are simply stated and make no technical demands on the reader.

From Library Journal In this excellent book, Posner (law, Univ. of Chicago) raises such fundamental questions as why people conform to social norms and why they generally refrain from antisocial behavior even when the law is absent. He then proposes a methodology for the systematic analysis of social norms. Posner uses models of nonlegal collective action to show the possibilities underlying cooperative behavior. He demonstrates how varied dimensions of nonformal, i.e., nongovernmental, strategies can resolve many types of social conflicts. Posner considers numerous theoretical and practical problems in the current study of relationships between social norms and law, offering new avenues toward understanding these relationships. His book uses a game-theory approach to revise lawyers' and scholars' views about the relationships between social norms and the law. This interesting and novel analysis is highly recommended for academic libraries. D Steven Puro, St. Louis Univ. Copyright 2000 Reed Business Information, Inc. From Kirkus s In the tradition of the Chicago School of law and economics, Posner (Law/Univ. of Chicago) offers

an insightful study of the relationship between legal regulation and social norms. Game theory has transformed the study of market behavior, but it has had little impact as yet on legal theory. Posner starts by observing that most forms of collective behavior occur independently of legal rules: indeed, without a system of law, people would still engage in cooperative and selfish behaviors. Posner uses game theory and empirical studies to establish a model of nonlegal collective behavior, arguing that much social interaction consists of a kind of signaling game, in which people convey their willingness to conform to social norms and demonstrate their desirability as potential partners in social enterprises. According to Posner, people will conform to such norms (and may even suppress individual preferences or cheating behavior) as rational decisions made in order to receive long-term benefits (economic and otherwise), independent of any consideration of legal incentives. With mixed success, the author then examines the usefulness of this model for an understanding of particular issues in contracts and commercial law, torts, criminal law, and politics. For instance, Posner attempts to use the signaling model to explain why courts enforce commercial contracts but not gratuitous promises (he speculates, with no historical evidence, that this doctrine developed when common law courts deferred to nonlegal mechanisms on promise enforcement) and why shaming punishments don't work (they may become badges of merit in communities that mistrust the government). Finally, Posner critically examines the relationship between social norms and policymaking (especially government attempts to change social norms). Posner argues that law can often be understood as an attempt to use social norms, and he discerns a gradual trend toward displacement of nonlegal by legal regulation (which, he contends, should not be deplored, as is currently fashionable, but celebrated). A stimulating application of game theory to law, equally valuable for social scientists and those interested in legal theory. -- Copyright 2000 Kirkus Associates, LP. All rights reserved. Eric Posner wishes to improve the economic analysis of law by incorporating into it a more rigorous understanding of the impact on behavior of the social meaning of action. In his lucidly written and sharply argued book on the relation between law and 'non-legal mechanisms of cooperation,' Posner contends that many conceptual confusions and embarrassing puzzles that have been generated by the economic analysis of law can be cleared up, and the research paradigm as a whole can be advanced, by taking account of the pervasive and powerful role of social norms." (Peter Berkowitz New Republic) Posner, in seeking to establish the central importance of what he calls 'social norms,' gives the example of Christmas fruit cake: People bake fruit cakes, exchange them and sometimes try to eat them. No law requires this. And few enjoy it (as Posner stipulates). Yet people still manufacture them; such, Posner concludes, is the power of social norms which function as signals that players have won an advantage in the competitive 'game' of life...[Posner's] book concludes that social norms have evolved as arbitrarily as peacock's tails have, and with much the same purpose--to signal their holders' desirability as partners for strategic cooperation. Failure to conform to social norms reveals unreliability, even though--or, more precisely, because--such norms are fundamentally arbitrary and costly to maintain." (M.N.S. Sellers Washington Post) Eric Posner has written a bold and provocative thesis about one of the most important and fastest developing areas of legal scholarship. He has a powerful structure that states his thesis elegantly, acknowledges alternative views, applies his theories to a host of legal fields, and collects normative legal implications. Law and Social Norms should become one of the standard references to norm theory. (Ian Ayers, Yale Law School) Eric Posner discusses the leading issues on the agenda for research on law and social norms, providing detail and references that many scholars will value...Law and Social Norms aims at insights into a broad array of moral behavior based upon an economic vision of man, and it is a valuable source for hypotheses and insights about many normative facts and institutions. (Robert Cooter, University of California, Berkeley) With its innovative use of signaling models, Law and Social Norms makes a significant contribution to economic and legal theory. Using a parsimonious account of human behavior, Eric Posner pushes the domain of economics to include subjects recently considered only by sociologists, anthropologists, and psychologists. At a time when economics is struggling over how best to explain group solidarity, conformity, and social norms, this book promises to be influential in determining the path economic theorists take. (Richard H. McAdams, University of Illinois College of Law)