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# The Alignment of Law and Norms: Of Mirrors, Bulwarks, and Pressure Valves

## **Abstract**

Why does law mirror norms sometimes, but other times not? This article examines two types of intervening factors that sometimes cause a persistent misalignment between law and norms: pressure valves and bulwarks.

Pressure valves are mechanisms that relieve the pressure placed on the law to change despite a gap with social norms. Pressure valves are found in two distinct social phenomena.

First, pressure on law to change to reflect social norms is relieved when law is not enforced against behavior that is illegal, but socially acceptable. Formally deviant acts that are socially acceptable often do not generate an enforcement response. Legal institutions tend to enforce not law, but limits of socially acceptable deviance from the law. Because the popular experience of law lies in its enforcement, the gap between law and norms is not experienced to the majority of the populace if standards of social acceptability, rather than law, are enforced.

Second, pressure on law to change to reflect social norms is relieved when social norms are enforced against behavior that is legal but socially unacceptable. If legal behavior that is socially unacceptable is successfully sanctioned through norm enforcement, it will not occur, and the pressure to change the law to reflect norms will be lessened.

In contrast to pressure valves, bulwarks are forces that buttress the resistance of law against pressure to change, despite a gap between law and social norms. There are at least two identifiable bulwarks.

First, political capture prevents a change in law to reflect social norms when the mechanisms of legal change are controlled by a highly-interested minority group that benefits from the law as is. Political capture will buttress law against pressure to align with norms.

The second bulwark is the protection of fundamental rights, through which non-democratic institutions such as courts remove from the purview of popular will some behaviors that are socially unacceptable. Through the recognition of fundamental rights, courts protect the legality of some behaviors despite their violation of social norms.

Gaps between law and social norms are neither intrinsically good nor intrinsically bad; all depends on their cause. If we can predictably identify which factors are preventing law from changing to reflect social norms, we will at least have a better understanding of the relationship between law and society. Better yet, we may be alerted to warning signs that any particular persistent gap is a bug rather than a feature of the system.

## **Keywords**

Norms, Selective enforcement, Acceptable deviance, Mirror thesis, Vigilantism

## **Disciplines**

Jurisprudence

## The Alignment of Law and Norms: Of Mirrors, Bulwarks, and Pressure Valves

*Mark A. Edwards\**

### I. INTRODUCTION

It has long been argued that law is derived from social norms.<sup>1</sup> If that is true, law and norms should reflect each other. Brian Tamanaha refers to this as “the mirror thesis:” law is a formalized reflection of informal social norms.<sup>2</sup>

But as Tamanaha and many others have persuasively argued, the mirror thesis is frequently, demonstrably inaccurate. There are often significant gaps between law and norms.<sup>3</sup>

Perhaps gaps are due only to time; eventually, law will change to reflect norms. And, indeed, sometimes that is actually observable; norms evolve and law follows.

But not always. Sometimes gaps between law and norms are persistent. What accounts for that persistence? Why does law change to reflect norms sometimes, but other times not?

This article attempts to answer that question. It argues that most of the time, a gap between law and social norms does, in fact, place pressure on the law to change to better reflect social norms. However, there are predictable, identifiable intervening factors that may cause persistent gaps. This article attempts to identify those factors, and to predict when they might cause a persistent gap between law and norms.

This article argues that the intervening factors come in two types: “bulwarks” and “pressure valves.”

Pressure valves are mechanisms that relieve the pressure placed on the law to change despite a gap with social norms. There are at least two identifiable types of pressure valves.

One type of pressure valve is selective enforcement. Pressure on law to change to reflect social norms is relieved when law is not enforced

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<sup>1</sup> See, e.g., MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed. & trans., Harvard Univ. Press 1954); Niklas Luhmann, *A Sociological Theory of Law* 82 (1985); see also Joseph Raz, *The Authority of Law: Essays on Law and Morality* 105 (1979)

<sup>2</sup> See BRIAN TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 2 (2001).

<sup>3</sup> *Id.* at 109.

against behavior that is illegal, but socially acceptable.<sup>4</sup> Formally illegal acts that are socially acceptable often do not generate an enforcement response. Legal institutions tend to enforce not law, but limits of socially acceptable deviance from the law. Because the popular experience of law lies in its enforcement, the gap between law and norms is not experienced by the majority of the populace if standards of social acceptability, rather than law, are enforced.

A second type of pressure valve is vigilantism. Pressure on law to change to reflect social norms is relieved when social norms are enforced against behavior that is legal but socially unacceptable. If legal behavior that is socially unacceptable is successfully sanctioned through norm enforcement, it will not occur, and the pressure to change the law to reflect norms will be lessened.

Bulwarks are forces that buttress the resistance of law against pressure to change, despite a gap between law and social norms. Like pressure valves, bulwarks come in at least two identifiable types.

One type of bulwark is political capture, which prevents a change in law to reflect social norms when the mechanisms of legal change are controlled by a highly-interested minority group that benefits from the law as is. Political capture will buttress law against pressure to align with norms. Generations of political and social science scholars have recognized the existence of political capture.<sup>5</sup>

A second bulwark is the protection of fundamental rights, through which non-democratic institutions such as courts remove from the purview of popular will the power to legally sanction some behaviors that are socially unacceptable. In other words, through the recognition of fundamental rights, courts protect the legality of some behaviors despite their violation of social norms.

This Article argues that gaps between law and social norms are neither intrinsically good nor intrinsically bad; all depends on their cause. If we can predictably identify which factors are preventing law from changing to reflect social norms, we will at least have a better understanding of the relationship between law and society. Better yet, we may be alerted to warning signs that any particular persistent gap is a bug rather than a feature of the system.

Gaps that persist because of the protection of fundamental rights are

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<sup>4</sup> See Mark A. Edwards, *Acceptable Deviance and Property Rights*, 43 CONN. L. REV. 457 (2010); Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49 (2006).

<sup>5</sup> See, e.g., Alan Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 LAW & SOC'Y REV. 39 (1985); Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. Leg. Educ. 505 (1986); see also generally, DANIEL A. FARBER AND PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

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usually a feature of the system. Gaps due to political capture are generally bugs. Gaps due to the non-enforcement of law against behavior that is formally deviant but socially acceptable may be harmless, but may also indicate a dangerous and pernicious bug: the selective enforcement of formal law against minority populations for behavior that is generally socially acceptable. We should be alert to that possibility whenever we see enforcement at the bounds of socially acceptable deviance rather than law. Finally, gaps between law and norms that persist because of informal sanctions against behaviors that are legal but socially unacceptable may be harmless, but they may also indicate the presence of a bug: the circumvention of the protection of fundamental rights through acts of vigilantism.

Section II of this article reviews the literature of the mirrors thesis and its critiques. Section III explores the use of prediction as means for understanding the dynamic relationship between law and society. Section IV discusses the application of predictive models to the mirror thesis. Section V examines the typologies of bulwarks and pressure valves that cause persistent gaps between law and social norms. Section VI analyzes the danger signals that may allow us to predict that any particular persistent gap is a bug in the system rather than a feature.

## II. THE MIRROR THESIS & GAPS BETWEEN LAW AND NORMS

Norms, it is frequently supposed, pre-exist law, which eventually grows from norms and evolves to mirror them.<sup>6</sup> Law is said to mirror social norms because law is the formal embodiment of a society's informal preferences, desires, and notions of order and justice. Indeed, Max Weber described law as the institutionalized enforcement of norms.<sup>7</sup> Similarly, Joseph Raz defines law as "an institutionalized normative system,"<sup>8</sup> and Kent Greenawalt has gone so far as to assume that law reflects dominant cultural norms, unless it is "imposed from the outside by an alien power."<sup>9</sup> As Brian Tamanaha has explained, "almost every major strain of Western legal and social theory has articulated, or taken for granted, an account of the relationship between law and society as one of close integration and association. It is widely assumed that law reflects and mirrors society, and operates to maintain social order."<sup>10</sup>

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<sup>6</sup> Tamanaha, *supra* note 2, at 52 ("According to this account, positive law emerges, in the haze of long forgotten yesteryear, as a distinct mechanism of institutionalized norm enforcement out of the customary order that prevailed in pre-political society.")

<sup>7</sup> Weber, *supra* note 1, at 13.

<sup>8</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 105 (1979).

<sup>9</sup> KENT GREENAWALT, *LAW AND OBJECTIVITY* 165 (1992).

<sup>10</sup> Tamanaha, *supra* note 2, at 51.

Tamanaha calls this “the mirror thesis.”<sup>11</sup> In Tamanaha’s view, the mirror thesis has several distinct but closely related and sometimes overlapping versions: “(1) as a historical matter, positive law evolved out of a social order controlled mostly by customs and habits; (2) the content of positive law norms are the products of, or derived from, customs and practices; (3) positive laws which are inconsistent with customs, usages or habits will be ineffectual or illegitimate; and, at the extreme, (4) customs, habits, and usages *are* law.”<sup>12</sup> Roscoe Pound seems to have had something very much like the mirror thesis in mind when he noted that in any conflict between law and social norms, social norms would eventually prevail.<sup>13</sup>

As Tamanaha argues, there are reasons to doubt the empirical accuracy of the mirror thesis. Tamanaha argues that there exists a “fundamental disconnect between law and society” for at least three reasons.<sup>14</sup> First, legal systems may represent the interests of those who control political and economic systems, without reference to the norms of a given society. This would happen in a society in which the popular will could not be expressed democratically into law. As Tamanaha notes, the most well-known and strident of these views is the Marxist critique of capitalist legal systems. Marx himself described the content of capitalist law as merely the expressed will of the ruling classes, designed to reinforce the social conditions that created its privilege.<sup>15</sup>

Second, legal systems in the post-colonial world are as likely to have been imposed by (or copied from) a foreign culture, as they are to grow organically from the norms of a particular society or culture. Tamanaha’s experience in Yap, Micronesia, where law had been transplanted from the United States, is illustrative: “The day-to-day behaviour of the people was not governed by state law, but by their own cultural norms. Social order was maintained by sources other than state law. They did not identify with the legal system in any way.”<sup>16</sup> In his view, “the majority of state legal systems in existence today originated through imposition from outside or were created by imitation by local authorities to meet the threat posed by conquest from outside powers.”<sup>17</sup> And indeed, Tamanaha’s claims are borne out in Stuart Banner’s careful studies of the interaction between

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<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.* at 5. That last and most extreme position is perhaps most closely identified with Ehrlich, who maintained that law that does not mirror social norms “has lost its superior entitlement to the claim of being the law, and the label must be given back, or at least shared with the ‘living law,’ the actually lived social norms” that order society. *Id.* at 31.

<sup>13</sup> Roscoe Pound, *The Need for a Sociological Jurisprudence*, 19 GREEN BAG 607, 615 (1907).

<sup>14</sup> Tamanaha, *supra* note 2, at 109.

<sup>15</sup> *Id.* at 41.

<sup>16</sup> *Id.* at 145.

<sup>17</sup> *Id.* at 69.

colonial and indigenous legal systems in countries such as New Zealand.<sup>18</sup>

Third, legal systems may be created and maintained by legal technocrats—lawyers and bureaucrats—who are guided by norms of their profession rather than their wider culture. Complex regulatory details for particular industries, after all, are unlikely to be traceable to norms of a particular culture.<sup>19</sup>

As a result of these pervasive disconnects between the producers of law and those governed by it, Tamanaha argues that ‘gaps’ between law and social norms are the rule, not exceptions.<sup>20</sup> He rejects “the sense that the presence of a gap consists of a deviation, that even if it is a regular occurrence, it is still an aberrant or marginal phenomenon relative to the normal state of the law.”<sup>21</sup> Eugene Ehrlich, whose concept of “living law” was based upon the distinction between rules of conduct (based on custom) and rules of decision (based on positive law), would also likely predict that the “gaps” far outweigh the convergences between norms and law.<sup>22</sup>

But perhaps Tamanaha’s critique does not so much dispute the mirror thesis as modify it: what the mirror reflects is not the norms of society generally, but rather the interests of the privileged few who are, metaphorically, hogging it. The problem is not that the law does not act as a mirror, but rather that the mirror cannot reflect what it cannot see. The norms of a society may not be reflected in law because its members have no access to the law, other than as its subjects. In the other words, law is still a mirror, but all that it reflects are the interests of those with the power to shape it.

In this way, each counter-example to the mirror thesis seems to be an exception that suggests a useful rule: we might predict that, absent some reason otherwise such as those discussed above, and given sufficient time, the law will mirror the norms of the culture from which it emerges. Moreover, by turning our focus to prediction, it makes little difference

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<sup>18</sup> Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 *LAW & SOC. INQUIRY* 807 (1999). There was, until relatively recently, a trend in western legal scholarship to assume that legal systems that do not look like ours—that are based less on statutory and common law and more upon norm and custom—must be on their way to looking like ours, as they evolve from more primitive to more sophisticated. As Tamanaha says, “If the evolutionary account has initial plausibility, it is the result of the fact that it plays to, and is built upon, stereotypes of what primitive life was like, and upon the common notion that primitive (or non-Western) society stands in relation to modern (or Western) society as a child does to an adult.” Tamanaha, *supra* note 2, at 61.

<sup>19</sup> As Tamanaha argues, “a great deal of economic-related legislation has no counterpart in social customs.” He cites as examples “laws prohibiting monopolistic behavior” and “law relating to the regulation of securities.” *Id.* at 88. In this context, though, it may be that Tamanaha is demanding too exact a correspondence between norms and law. After all, law prohibiting monopolistic behavior may be rooted in norms of fairness, and laws regulating securities may be rooted in norms of honesty.

<sup>20</sup> *Id.* at 132.

<sup>21</sup> *Id.* at 132.

<sup>22</sup> *Id.* at 89 (arguing that the purpose of Ehrlich’s work “was to emphasize that positive law rules and lived social customs regularly diverge”).

whether mirrors or gaps are the exception or the rule. The aim here is not to decide that question, but rather to analyze whether gaps between law and norms occur predictably.

### III. PREDICTION AND THE REALIST LEGACY

Oliver Wendell Holmes is commonly identified as among the first of the prominent American Legal Realists saying openly what many—but not all—may have privately thought: that the common law was not a reduction to words of the dictates of nature and logic, but merely a means of achieving certain ends, designed and implemented by men according to their desires.<sup>23</sup> Because the law is a means to an end, Holmes said, we can predict its path: “the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men” would inevitably determine the path along which the law would develop.<sup>24</sup> The object of studying law, Holmes said, is to predict its path in particular instances: “The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.”<sup>25</sup> To Holmes, according to Posner, law itself was best understood not as a set of rules, but “simply a prediction of how state power will be deployed in particular circumstances”<sup>26</sup> or, as D’Amato describes, “the probability that [a] rule will be affirmed by a court in the future.”<sup>27</sup>

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<sup>23</sup> It is difficult to believe now that the jurisprudence espoused by as staid a figure as Oliver Wendell Holmes was once considered radical, and that a vision of law that seems obvious might have been revolutionary. See Brian Bix, *Legal Philosophy in America*, in *THE OXFORD HANDBOOK OF AMERICAN PHILOSOPHY* 555-6 (2009) (“If it was once subversive to think that extra-legal factors influence judicial decisions, it now seems naive to doubt it. . . . This view now seems so obvious and so much a matter of common sense that it hard to comprehend how it could have once been controversial.”); but see Brian Tamanaha, *The Realism of the ‘Formalist’ Age*, ST. JOHN’S UNIV. SCHOOL OF LAW (Aug. 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=985083](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985083) (arguing persuasively that many legal scholars held views of judicial decision-making that were remarkably “realist” for an allegedly formalist era, and that the caricature of the formalist era was in some ways a strawman used by early Legal Realists to bring their own views into greater relief). Nonetheless, Tamanaha himself has argued that Holmes’s instrumental vision of law stood in opposition to formalist vision of law: that it “is, in some sense, given; that the law is immanent; that the process of law-making is not one of creation but of discovery; that law is not the product of human will; that law has a kind of autonomy and internal integrity; that the law is, in some sense, objectively determined.” BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 5 (2006). Tamanaha’s insight fully deconstructs that view into two strands: one that saw law as the embodiment of natural rights, the other that saw law as the “expression or manifestation of commonly shared values,” a type of refined custom embodying ancient shared values and created through common consent. The first view is antithetical to the Realist vision; the second can, with slight modification, fit comfortably within it.

<sup>24</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (2005).

<sup>25</sup> Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>26</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 223 (1993).

<sup>27</sup> Anthony D’Amato, *A New (and Better) Interpretation of Holmes’s Prediction Theory of Law* 7 (NW. UNIV. SCHOOL OF LAW SCHOLARLY COMMONS, Working Paper No. 763, 2008), <http://>



But it is striking how narrow Holmes's conception of the use of prediction is as a tool of jurisprudence. To Holmes, prediction is used to calculate a rough probability that a judge will decide a particular case in a particular way.<sup>28</sup> Other realists, such as torts scholar Leon Green, broadened the focus of prediction from judge to "factual scenarios—the 'situation-types'—in which harms occur: e.g. 'surgical operations,' 'traffic and transportation' and the like" to predict "patterns of torts decisions for each recurring situation-type that courts encounter."<sup>29</sup> But like Holmes, Green's focus was trier-of-fact centric: he was concerned with predicting how a trier-of-fact would decide a case of a particular situation-type. Neither Holmes nor his followers used prediction as an instrument to anticipate the very thing the title of his most famous work promises: the path of the law itself, beyond how a trier-of-fact was likely to decide any case or type of case.<sup>30</sup> The early realists, in other words, saw prediction as a means to anticipate adjudicatory outcomes, rather than to test our understanding of how and why law exists and changes as it does. This may be the result of the realists' almost singular focus on common law rather than on statutes. This absence is striking, because the path of the law writ large depends much more upon the decisions of legislatures than of courts, even if the courts act simultaneously as instruments of law's interpretation and enforcement.

The absence of prediction regarding what kinds of law might be created by legislatures may also stem in part from a strand of realism identified in particular with the work of Jerome Frank, who argued that the path of law would follow the predilections and idiosyncrasies of the judge.<sup>31</sup> Thus, the path of law was essentially unpredictable in the absence of information about the views of any particular judge and the social milieu in which the judge existed.<sup>32</sup> It may also stem from the realists focus on the

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scholarlycommons.law.northwestern.edu/facultyworkingpapers/163. D'Amato provocatively describes Holmes's prediction theory as a "quantum theory;" as quantum mechanics describes the physical world as a consisting entirely of probabilities, so Holmes described law itself as consisting of probability, and nothing more.

<sup>28</sup> As Duxbury notes, Holmes's conception of the use of prediction is intensely pragmatic: the lawyer uses it to advise a particular client about the likely consequences of a particular course of conduct. Neil Duxbury, *Law and Prediction*, 87 ARCHIVES FOR PHIL. OF LAW AND SOC. POL'Y 402, 409. See also Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can A New World Order Prompt A New Legal Theory?*, 95 CORNELL L. REV. 61, 73 (2009) (describing as "the core claim of realism that doctrine is necessary but insufficient to explain judging.").

<sup>29</sup> Brian Leiter, *American Legal Realism*, in BLACKWELL'S GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 55 (Martin P. Golding and William A. Edmundson, eds., 2004).

<sup>30</sup> First a speech, later published under the title *The Path of the Law* in Harvard Law Review.

<sup>31</sup> See Leiter, *supra* note 29, at 10-11.

<sup>32</sup> In this regard, realists may have fallen prey to an error that Morris Cohen foresaw: "they who scorn the idea of the judge as a logical automaton are apt to fall into the opposite error of exaggerating as irresistible the force of bias or prejudice." Morris Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 638 (1916), quoted in Brian Tamanaha, *Understanding Legal Realism* at 48. But as

problem of properly advising clients, based on predictions about what a judge will do in a particular case.<sup>33</sup> Clients, after all, do not usually care about the historical sweep of the law writ large—they care about winning or losing a particular case, or about engaging in, or not engaging in, a particular course of conduct at a particular point in time.

Other realists, following in Holmes's path, imagined broader uses for prediction in the study of law. First, if it was true that a lawyer might predict a judge's interpretation of the law, and thus the consequences of a particular course of conduct for his client, then it was also true that the state might predict the likelihood that the client would engage in that conduct if apprised of the likely consequences. Thus law could be designed to not merely to punish unwanted conduct, but finely tuned to prevent it, if the state could predict the correct quantum of potential punishment required to deter the client's potential conduct.<sup>34</sup>

Second, and more pertinent for purposes of this article, scholars such as John Bingham considered the use of prediction as a means for the social-scientific study of law.<sup>35</sup> They wrote of the need for "empirical testing: hypotheses had to be tested against observations of the world."<sup>36</sup> But, as Duxbury argues, realists such as Bingham also seem to have had in mind a particular and limited end for the deployment of prediction as a scientific tool: "increased legal certainty and social control."<sup>37</sup> Indeed, prediction is treated less as a means of scientific study and more as "a tool of the pragmatic social engineer, a means by which to achieve more effective social control."<sup>38</sup> In other words, prediction was turned outward, focusing not on the development of law itself but on the law's anticipated effect on the behavior of its subjects.

Public choice theory (including critical legal theory) has at its core a predictive belief: distrustful of the political process, it predicts that capture by powerful interests will produce legislation that serves those interests.

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Tamanaha explains, just as scholars of the so-called formalist age weren't so enamored of the law's internal logic as we now portray them, so too early realists were not as scornful of traditional legal reasoning as we now imagine them. As Roscoe Pound wrote, "It is just as unreal to refuse to see the extent to which legal technique, with all its faults, applied to authoritative legal materials, with all of their defects, keeps down the logical or irrational element or holds it to tolerable limits in practice," quoted in Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 782 (2009); see also Leiter, *supra* note 29, at 8.

<sup>33</sup> See Leiter, *supra* note 29, at 29.

<sup>34</sup> Duxbury, *supra* note 28, at 411.

<sup>35</sup> *Id.*

<sup>36</sup> Leiter, *supra* note 29, at 3. As Leiter notes, however, for most realists the "commitment to 'science' and 'scientific methods' was more a matter of rhetoric and metaphor than actual scholarly practice." *Id.* at 51.

<sup>37</sup> Duxbury, *supra* note 28, at 411.

<sup>38</sup> *Id.* at 418; see also Hanoch Dagan, *Restitution's Realism*, in PHILOSOPHICAL FOUNDATIONS OF UNJUST ENRICHMENT 54 ("Since Holmes's *The Path of the Law*, realists have placed coerciveness at the center of their conception of law.").

Similarly, neoclassical law-and-economics is at its heart a predictive theory. Assuming, as it does, that an actor is rational, it is predictable that s/he will choose to act in a particular way in response to certain stimuli.<sup>39</sup> However, the assumptions upon which the neoclassical law and economics model is based, and which thus empower it to predict, smack more of formalism than realism in that they seem contentedly divorced from reality.<sup>40</sup> Among those assumptions: that actors behave rationally, that rational actors act in a way that maximizes their wealth, that markets composed of individual rational actors acting to maximize their wealth are self-correcting and express the desires of a society without the necessity of state intervention. As Nourse and Schaffer aptly point out, these assumptions call forth Roscoe Pound's famous denunciation of formalist legal theory as being based upon "rigorous logical deduction from predetermined conceptions in disregard of and often in the teeth of actual facts."<sup>41</sup>

Because the assumptions of the neoclassical law and economics model are unlikely, they call into question the predictive power of the model. Critics of the model, such as those within the behavioral economics school, have attempted to adjust its assumptions by showing that actors cannot be assumed to be rational, and in fact will behave irrationally in predictable ways.<sup>42</sup> However, behavioral economics adherents have fallen short in their efforts to comprehensively address the shortcomings of the neoclassical law and economics model in at least three ways. First, although through cognitive psychology its proponents have been able to identify some limited instances in which actors will behave predictably irrationally, they have not been able to explain a great deal of seemingly irrational behavior. Second, like the law and economics model itself, behavioral economics is "micro" in its focus on the motives of individual actors; it does not offer "macro" level predictions other than as the assumed agglomeration of "micro" predictions. Third, behavioral law and economics shares with its neoclassical predecessor the use of prediction as an outward looking tool: it

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<sup>39</sup> See Milton Friedman, *The Methodology of Positive Economics*, in *Essays in Positive Economics* 4 (1953) (describing the assumption of rational self-interest as "a system of generalizations that can be used to make correct predictions about the consequences of any change in circumstances").

<sup>40</sup> See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 373 (1995) ("A further common criticism of the rational self-interest thesis is that it is clearly contradicted by reality.").

<sup>41</sup> Nourse and Schaffer, *Varieties of New Legal Realism*, 95 *CORNELL L. REV.* 61, 112 (quoting Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 462 (1909)).

<sup>42</sup> See, e.g., Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 *Minn. L. Rev.* 1556 (2004); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 *AM. ECON. REV.* 175 (2003); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 *NW. U. L. REV.* 1227 (2003); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998). Because of this insight, behavioral law and economics adherents tend to countenance a greater role for the state than their neoclassical forebears. If we cannot assume that people behave rationally, and in fact must acknowledge that they will behave irrationally in predictable ways, then private transactions are unlikely to produce an optimal result; the corrective force of the state is needed. See Nourse and Schaffer, *supra* note 41, at 109.

is used to predict the behavior of law's subject in response to law, but not to the path of the law itself.

The potential uses of prediction as a tool of jurisprudence are more expansive than that. Prediction is useful as a means of testing the quality of our understanding of law and legal systems. More or less accurate prediction of the path of the law writ large suggests—but certainly does not establish—that our understanding of the systematic relationship among various forces that influence that path is accurate.<sup>43</sup> More importantly, where the path of law deviates from its predicted course, we may be able to identify the operation of impediments to that course.<sup>44</sup> Moreover, these impediments may themselves arise predictably.

The law and society movement in many ways represents the best of the continuing legal realist tradition. It addresses directly, by a variety of methodologies, the core of the legal realist idea—that law is a “going institution distinguished by the difficult accommodation of three constitutive yet irresolvable tensions: between power and reason, science and craft, and tradition and progress.”<sup>45</sup> It is somewhat startling, then, to see that law and society scholars have not made greater use of prediction as a tool for understanding the path of the law.

I suspect that this is the result of two influences within the law and society movement. First, for critical and other public choice theorists, prediction may be implicit within the foundations of their theory: law will develop in whatever way best serves the interests of those who capture the power to make it.<sup>46</sup> But that view is notably lacking in the nuance that is supposed to characterize both legal realism and law and society scholarship. As Hanoch Dagan writes, legal realism rejects the reductive image of law, which portrays it “as sheer power (or interest, or politics).”<sup>47</sup> Rather, realists argue that law “is also a forum of reason, and that reason poses real—albeit elusive—constraints . . . on the exercise of state power. Law is never only about interest or power politics; it is also an exercise in reason-giving.”<sup>48</sup> At the same time, however, a realistic view of law necessarily requires skepticism that “reason can displace interest, or that law can exclude all force except that of the better argument. . . . [R]eason and coerciveness are deemed to coexist in any credible account of law.” The focus, then, of predicting law's path is not to assume that it will always

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<sup>43</sup> Oscar Kaplan, *Prediction in the Social Sciences*, 7 PHIL. OF SCI. 492, 492 (1940) (“The ability to predict events within its field indicates that a science has reached a high level of development, that its essential facts stand in systematic relationship to each other.”).

<sup>44</sup> See *id.* at 494 (1940) (“[U]nsuccessful prediction” is useful because “until we attempt to predict, we have no way of knowing whether all the operative variables are under observation.”).

<sup>45</sup> Dagan, *supra* note 38, at 3.

<sup>46</sup> See Tushnet, *supra* note 5.

<sup>47</sup> Dagan, *supra* note 38, at 4.

<sup>48</sup> *Id.* at 4.

follow the path of reason, or the path of power. Neither alone can account for law's path.

Second, law and society has embraced study of the law from "the bottom up," focusing not on the law writ large but on the lives of those who live in its shadow.<sup>49</sup> This ethnographic, anthropological focus does not lend itself well to grand theories that predict behavior, which are then tested; rather, the close study of behavior is used to construct theory.<sup>50</sup> The imposition of a theory that is expected to describe the behavior of law's subjects may seem both presumptuous and imperialistic.

To answer that objection, it is important to emphasize that the utility of prediction—as a tool for understanding the forces that determine the path of the law—is not dependent upon the accuracy of its forecasts. Rather, its utility lies in revealing where unforeseen variables are at work, so that our understanding of the forces that determine law's path deepens. In this sense, prediction is more useful, and thus has been used as a tool more successfully, where it is accurate in its forecast in some ways, and inaccurate in others. Prediction, as we should use the term, is simply a tool that promotes discovery.<sup>51</sup> Used in this way, prediction provides a helpful complement to the inductive, bottom-up hypothesis formation characteristic of ethnographic research. Prediction necessarily commits us, however temporarily, to a particular position. Thus it can tell us where we are wrong and suggest where we should dig to find out why. It is not a tool that verifies the accuracy of a theory, other than rarely and incidentally.<sup>52</sup>

In particular, when there exists a gap between law and norms, we can attempt to predict when law will change to reflect norms, and when it will not. That will allow us to test our understanding of the relationship

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<sup>49</sup> See, e.g., SALLY FALK MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* (1978); Christine Harrington and Barbara Yngvesson, *Interpretive Sociolegal Research*, 15 *LAW & SOC. INQUIRY* 135 (1990).

<sup>50</sup> See *id.*; see also LAURA NADER, *THE LIFE OF LAW: ANTHROPOLOGICAL PROJECTS* (2005).

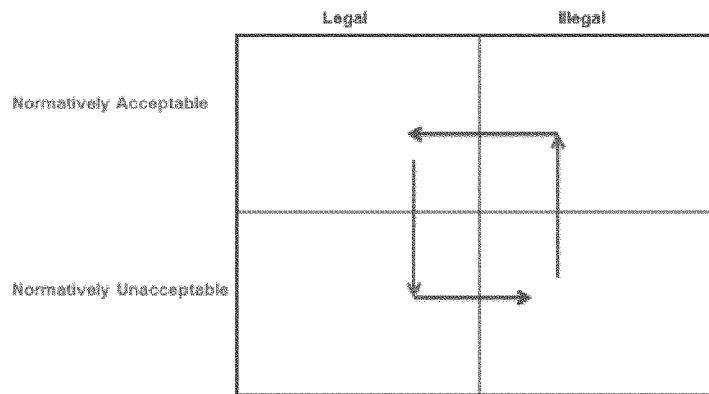
<sup>51</sup> But see Nourse and Schaffer, *supra* note 41, at 85 ("the measure of success of many studies is not 'prediction' and verification (indeed, it can be viewed as the opposite of prediction). Rather, the measure is discovery."). As I understand Nourse and Schaffer, they use the term "prediction" to mean a tool used to verify a theory, whereas "discovery" means the uncovering of previously-not-contemplated, relevant information.

<sup>52</sup> In this sense, prediction is distinct from the epistemological concept known as predictivism. Predictivism, according to Eric Barnes, "hold that, where evidence E confirms theory T, E confirms T more strongly when E is predicted on the basis of T and subsequently confirmed than when E is known in advance of T's formation and 'used,' in some sense, in the formulation of T." Eric Barnes, *Social Predictivism*, 45 *ERKENNTIS* 69, 69 (1996). In other words, predictivism holds that a theory that accurately predicts behavior is more valuable than a theory constructed post-hoc, on the basis of accumulated evidence. The central tenet of predictivism, that "correctly predicting data confers greater confirmation" on a theory than merely "accommodating data" within it, is a matter of considerable controversy. David Harker, *On the Predilections for Predictions*, 59 *BRIT. J. PHIL. SCI.* 429, 429 (2008). What is not controversial, however, is the use of prediction as a tool for promoting the discovery of new data. In my use of the terms, legal ethnographers would be justified in rejecting predictivism, but not in rejecting the use of prediction as a tool that promotes the discovery of new data.

between law and norms, and how their interaction produces social order.

It is worth predicting that as a society's norms change, a change in law will eventually follow, not because it is likely to be accurate (though it may be), but because it is useful. Even if we start with the artificial presumption that law will follow and reflect norms, we might be able to predict the circumstances under which it will happen, and the circumstances under which it will not. Nor is this a prescriptive claim that law should mirror social norms; it simply asks whether or not it does, and if not, why not.

Predicted Changes in Law Caused by Change in Norms



#### IV. PREDICTION AND THE MIRROR THESIS

For purposes of this discussion, I need to define some terms. “Formal law” is law (including rules and regulations) that is codified or is the product of judicial decision-making. A “formal sanction” is either a penalty that may be imposed by the state pursuant to its police power, or legal liability that may be imposed by private actors through the facility of a state institution. An “informal sanction” is a cost imposed by private actors, without the facility of state institutions. “Illegal behavior” is behavior that may be subject to a formal sanction. “Normatively acceptable behavior” is behavior that most people in a community, society, or polity find unobjectionable. “Normatively unacceptable behavior” is behavior that most people in a community, society or polity find objectionable.

As we know, according to the mirror thesis, law should evolve to align with norms, so that law mirrors the normative sensibilities of society. From that premise, the simple model below predicts that law change should

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following changes in normative acceptability of behaviors. If behavior that was socially acceptable becomes socially unacceptable, that should prompt a should change in law as well, so that the behavior becomes illegal. Similarly, if behavior that was socially acceptable becomes socially unacceptable, that should prompt a change in law as well, so that the behavior becomes illegal. On the model, that means that if a behavior moves from top to bottom, or bottom to top, it should then (eventually) turn the corner, too.

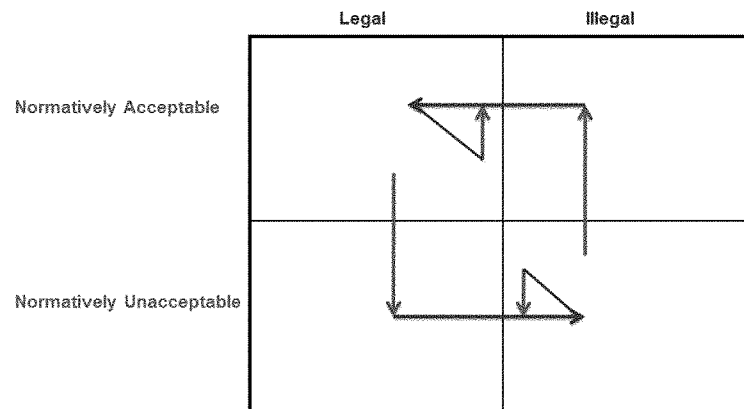
A subtler model would likely recognize that changes in law and changes in norms can become mutually reinforcing. That is true for at least two reasons.

First, the legality of a behavior is often taken as a strong signal of its social acceptability. An authoritative declaration that a behavior is legal may be understood by the general populace as a strong indicator that the behavior both is, and ought to be, socially acceptable. Similarly, an authoritative declaration that a behavior is illegal may be understood by the general populace as a strong indicator that the behavior both is, and ought to be, socially unacceptable. As Tamanaha notes, “law has sometimes taken the lead in opposing or reforming prevailing customs or moral norms” and “has a role in shaping customs and morality.”<sup>53</sup> This type of mutually reinforcing dynamic makes it very difficult to differentiate between the chicken and egg of change: it is hard to say whether changes in law first produced changes in normative acceptability, or changes in normative acceptability first produced changes in law. But regardless of which came first, there is no reason to think this mutually reinforcing cycle does not continue until law and norms are aligned.

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<sup>53</sup> Tamanaha, *supra* note 2, at 7.

**Change in Law (Caused by Change in Norms)  
Reinforces Change in Norms**



Second, law obeying is often considered a normative good in itself, regardless of the content of the law. Therefore, regardless of the social acceptability of the underlying behavior at issue, engaging in it unlawfully may be socially unacceptable.

We can actually observe the mirror thesis in action: changes in limits of normatively acceptable behavior sometimes, eventually, produce changes in law as well. Consider, for example, the legalization of same-sex marriage.

As the data compiled from Gallup and Pew polls below shows, marriage between people of the same gender has moved from being largely socially unacceptable in the United States to being largely socially acceptable. That movement was clear but neither unimpeded nor sudden. It seems beyond doubt that the process of normative and legal change regarding same-sex marriage was sometimes mutually reinforcing, but at other times the movement of normative acceptability was in defiance of legal retrenchment. Between 1998 and 2008, as some state courts recognized the rights of same-sex couples, 30 states passed constitutional amendments banning recognition of same-sex marriages.<sup>54</sup> But as both the Pew and Gallup polls indicate, by sometime around 2011, the normative acceptability of same-sex marriage had definitively changed; a behavior that had once been squarely within the lower-right, normatively

<sup>54</sup> Former U.S. state constitutional amendments banning same-sex unions, [https://en.wikipedia.org/w/index.php?title=Former\\_U.S.\\_state\\_constitutional\\_amendments\\_banning\\_same-sex\\_unions&oldid=676612040](https://en.wikipedia.org/w/index.php?title=Former_U.S._state_constitutional_amendments_banning_same-sex_unions&oldid=676612040) (last visited Aug. 18, 2015).

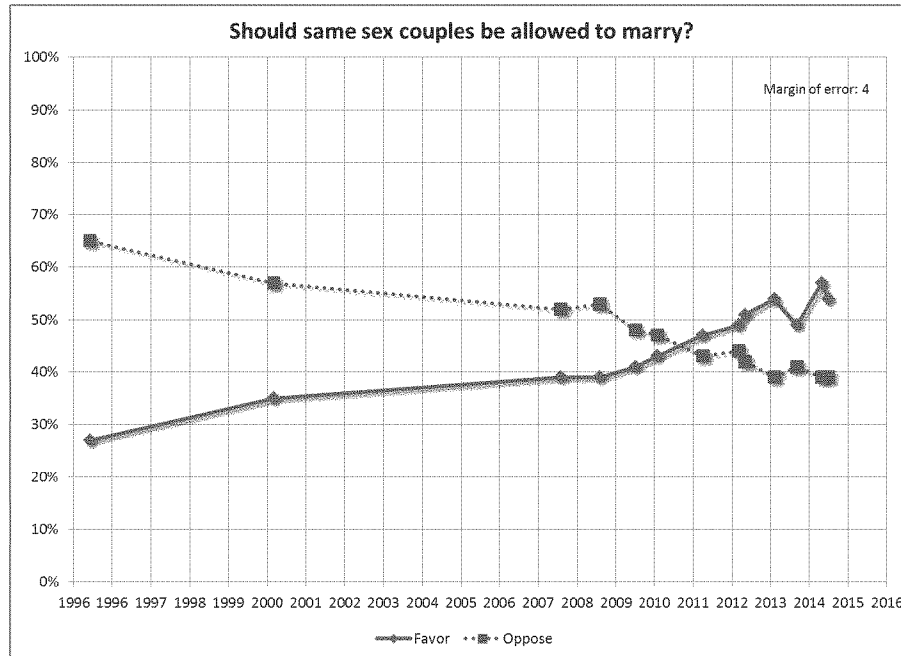


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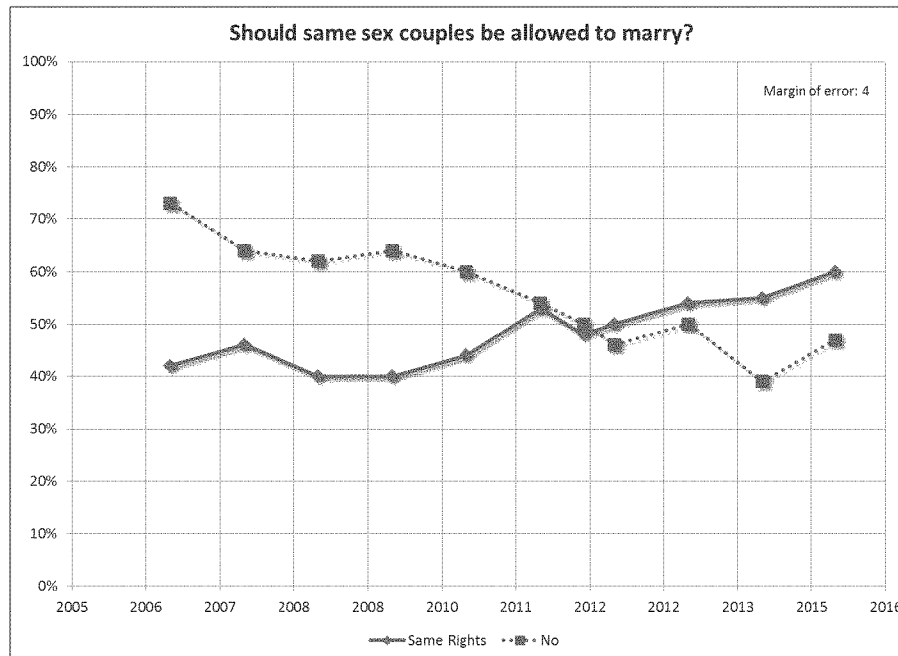
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unacceptable / illegal quadrant of the model, to the upper-right, normatively acceptable / illegal quadrant.



Gallup.<sup>55</sup>

<sup>55</sup> In response to the question, “Do you think marriages between same-sex couples should or should be not recognized by the law as valid, with the same rights as traditional marriages?” *U.S. Support for Gay Marriage Stable after High Court Ruling*, GALLUP (Jul. 17, 2015), <http://www.gallup.com/poll/184217/support-gay-marriage-stable-highcourt-ruling.aspx>.



Pew.<sup>56</sup>

The mirror thesis would predict that over time, following a change in the normative or social acceptability of a behavior, and absent some intervening factor, law should change as well. That change is clearly observable in the context of same-sex marriage. Four years after a same-sex marriage became normatively acceptable, the United States Supreme Court itself recognized that same-sex couples have a constitutionally protected right to marry.<sup>57</sup> Note that occasionally changes in normative acceptability can provoke not merely a change in law but even a change in understanding about fundamental rights. As the model predicts, a movement from the lower-right quadrant to the upper-right quadrant provokes a further movement from the upper-right quadrant to the upper-left quadrant as well.

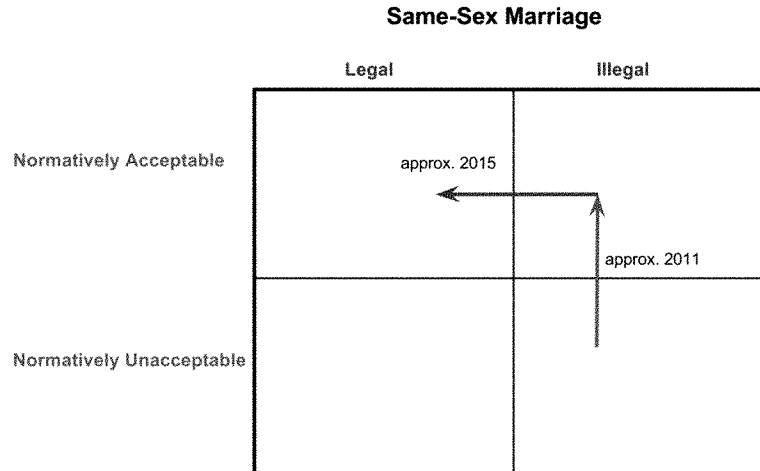
<sup>56</sup> Compilation of Pew Research Center polls in response the question "Do you strongly favor, favor, oppose or strongly oppose allowing gays and lesbians to marry legally?" compiled by PollingReport.com, <http://www.pollingreport.com/civil.htm>.

<sup>57</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

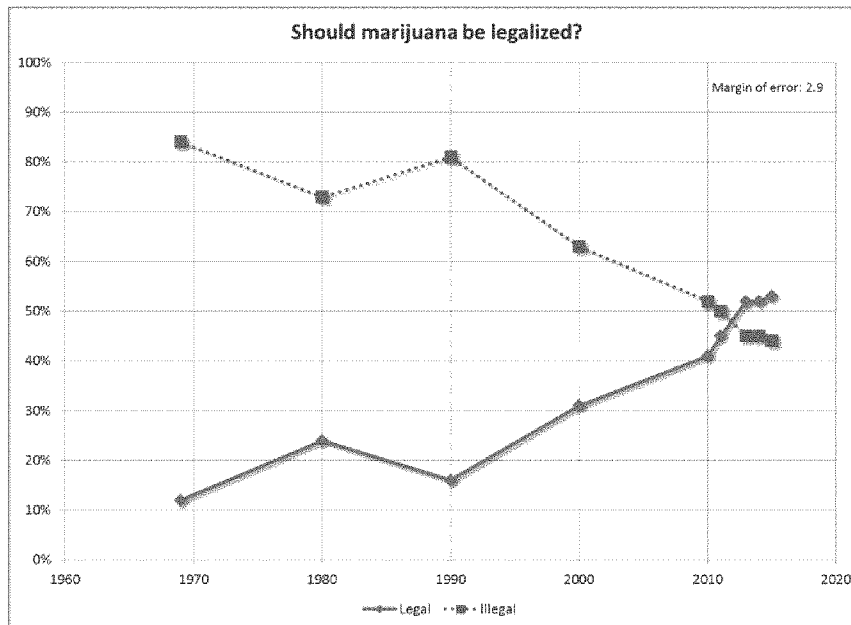
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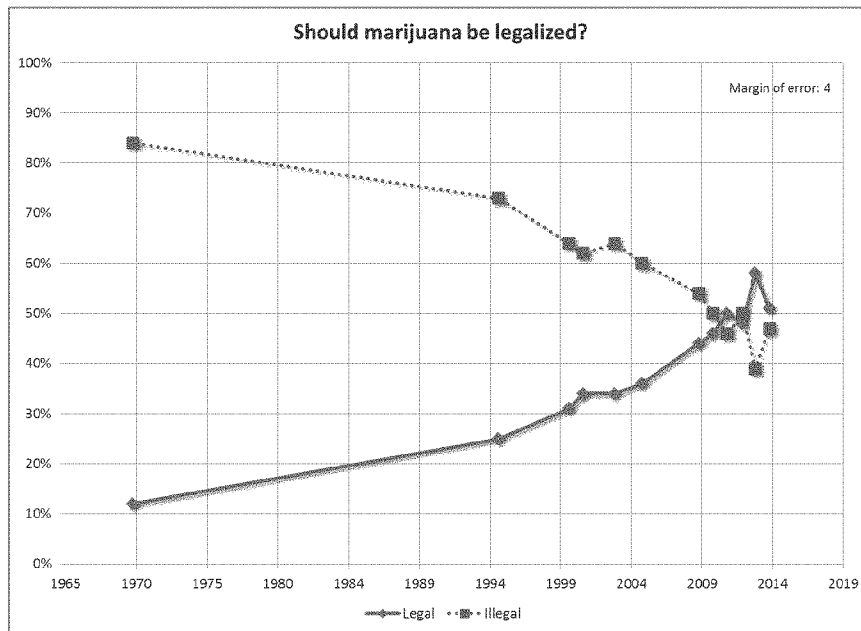


The legalization of medical marijuana use shows a similar pattern. Throughout the 1990s and 2000s a vast but ever-narrowing majority of respondents opposed legalization of medical marijuana use.



Pew.<sup>58</sup>

<sup>58</sup> Compilation of Pew Research Center polls in response the question "Do you think the use of marijuana should be made legal, or not?" compiled by PollingReport.com, <http://>



Gallup.<sup>59</sup>

Sometime around 2011 support for legalization moved into the majority, and law followed in Colorado among other jurisdictions.<sup>60</sup>

[www.pollingreport.com/drugs.htm](http://www.pollingreport.com/drugs.htm).

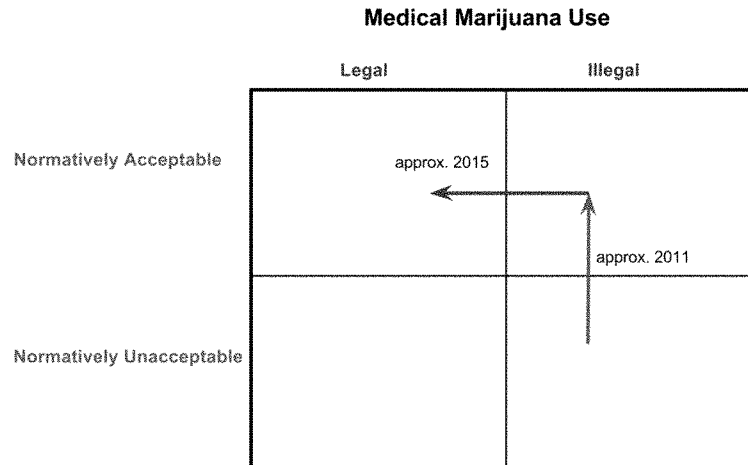
<sup>59</sup> Compilation of Gallup Polls in response the question "Do you think the use of marijuana should be made legal, or not?" compiled by PollingReport.com, <http://www.pollingreport.com/drugs.htm>.

<sup>60</sup> A note of caution is important here: for purposes of this analysis I am using support for the legality of marijuana use as a proxy for the normative acceptability of marijuana use, but it is only a proxy. Certainly another interpretation of the data is possible: that support for legalization represent a more libertarian turn in politics, as opposed to a change in the normative acceptability of marijuana use.

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## V. BULWARKS AND PRESSURE VALVES

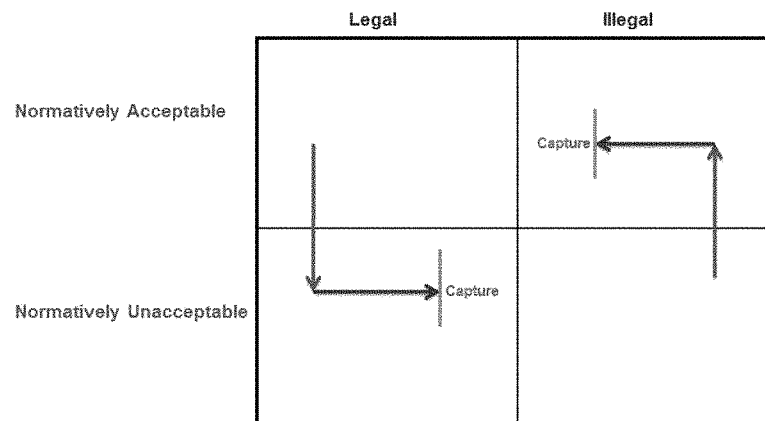
### A. Bulwarks

Bulwarks buttress law against pressure to change, despite a gap between law and social norms. Because of bulwarks, behaviors that are normatively unacceptable nonetheless remain legal. Broadly, there are two types of bulwarks: political capture and the protection of fundamental rights.

#### i. Capture

One bulwark against legal change is capture of the mechanisms of change by those highly motivated to prevent it. Success for them means a persistent misalignment of law and norms. This is a version of public choice theory that is quite similar in many ways to the Marxist critique of capitalist legal systems (or rather, the Marxist critique fits neatly within the idea of public choice theory). Using our simple model, this phenomenon would look like this:

**Bulwarks that Prevent Changes in Law to Reflect Norms:  
Political Capture**



Consistent outrage over airline industry practices such as overbooking flights and subsequently ‘bumping’ passengers seems to indicate the violation of a deeply held norm—which might be characterized as ‘a deal is a deal.’ Passengers consistently indicate bewilderment and outrage when they discover that airlines have sold the same seat to more than one person.

Overbooking flights is very profitable for airlines.<sup>61</sup> Tickets purchased many weeks in advance of a flight are often much less expensive than tickets purchased shortly before a flight; therefore, by overbooking, airlines can sell the same seat to different passengers at different rates and obtain a higher price for the seat.<sup>62</sup> The fear of overbooking allows airlines to up-sell to customers who are willing to pay extra to eliminate the risk that they will be bumped.<sup>63</sup>

Passengers who are involuntarily bumped are entitled to cash compensation under regulations promulgated by the United States Department of Transportation.<sup>64</sup> However, many passengers are unaware of those regulations, and airlines routinely avoid compensating involuntarily

<sup>61</sup> See Sabri Ben-Achour, *Why in the World do Airlines Overbook Tickets?*, [www.marketplace.org/topics/business/why-world-do-airlines-overbook-tickets](http://www.marketplace.org/topics/business/why-world-do-airlines-overbook-tickets).

<sup>62</sup> See *When to Buy Airline Tickets—Based on 1.5 Billion Airfares*, CHEAPAIR.COM, [www.cheapair.com/blog/travel-tips/when-to-buy-airline-tickets-based-on-1-5-billion-airfares/](http://www.cheapair.com/blog/travel-tips/when-to-buy-airline-tickets-based-on-1-5-billion-airfares/)

<sup>63</sup> See *Want a Seat Assignment on Delta? It Could Cost You*. MONEY.CNN.COM, [www.Money.cnn.com/2015/08/19/pf/delta-basic-economy-tickets/](http://www.Money.cnn.com/2015/08/19/pf/delta-basic-economy-tickets/).

<sup>64</sup> See Alexander Anolik, *The Obligations of Airlines and the Rights of Passengers*, ABA JOURNAL, Aug. 12, 2015, <http://www.americanbar.org/groups/gpsolo/publications.html>.

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bumped passengers by soliciting volunteers who are offered inexpensive vouchers.<sup>65</sup> A person who is bumped voluntarily is not entitled to any form of compensation. Thus most bumped volunteers receive much less compensation than they would if they were involuntarily bumped.

The practice remains perfectly legal despite its apparent normative unacceptability, and despite several efforts at legal reform.<sup>66</sup> Moreover, passengers have no private right of action under either federal law or regulation, and state law is entirely preempted.<sup>67</sup> Lacking other recourse, some passengers have taken extreme measures in protest.<sup>68</sup> It seems clear that if it were not for the considerable influence of the airline industry, the normative unacceptability of the practice would have led to it being declared unlawful under most circumstances.

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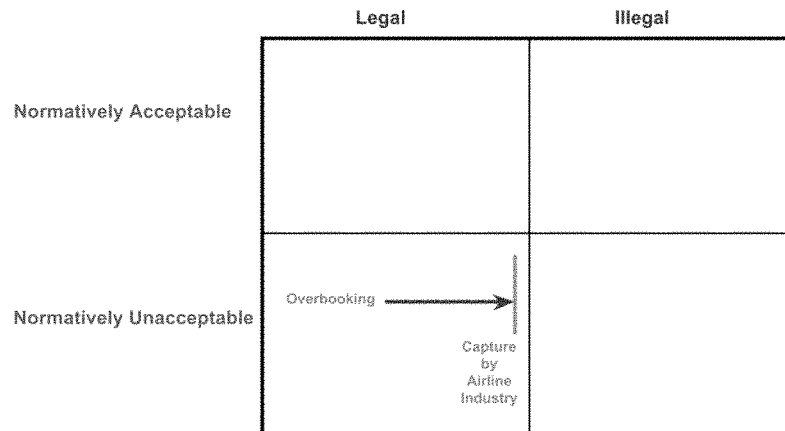
<sup>65</sup> *Id.*

<sup>66</sup> See Anolik, *supra* note 64 (“Insulation from state consumer protection laws, inefficient enforcement of federal law, and Congress’s refusal to pass a Passenger Rights Bill has allowed air carriers to cut services year after year without compensation.”).

<sup>67</sup> See *Morales v. Trans World Airlines*, 504 U.S. 374 (1992) (holding that federal law preempts any attempts by states to regulate airline services).

<sup>68</sup> See Jessica Roy, *Man Strips Naked in Protest after Being Bumped from Jamaica-Bound Flight*, N.Y. MAGAZINE (May 21, 2015, 12:37 PM), <http://nymag.com/daily/intelligencer/2015/05/man-protests-overbooked-flight-by-stripping.html#>.

### Airline Overbooking



#### ii. Protection of Fundamental Rights

A second bulwark against the movement of law to align with norms is the protection of fundamental rights by courts. In many ways, the most important duty courts perform is the defiance of the popular will. When courts are so engaged, they act as bulwarks against the alignment of norms and law.

One example of these phenomena might be American flag burning. It seems beyond question that in the United States it is generally socially unacceptable to burn the American flag. Forty-eight states had passed laws making it illegal to desecrate the American flag before such laws were struck down by the United States Supreme Court in *Texas v. Johnson* as a violation of the First Amendment.<sup>69</sup> The general outrage generated by the decision placed enormous pressure on Congress to change law to align with norms. In 1989, Congress passed the Flag Protection Act, criminalizing the desecration of the American flag at the federal level.<sup>70</sup> In 1990, however, in *United States v. Eichman*, the United States Supreme Court struck the Act down as a violation of the First Amendment.<sup>71</sup> In the years following, Gallup polls show that between 1995 and 2006 public support for a Constitutional amendment banning flag desecration never dipped below

<sup>69</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>70</sup> Flag Protection Act, 18 U.S.C.A. § 700.

<sup>71</sup> *United States v. Eichman*, 496 U.S. 310 (1990).



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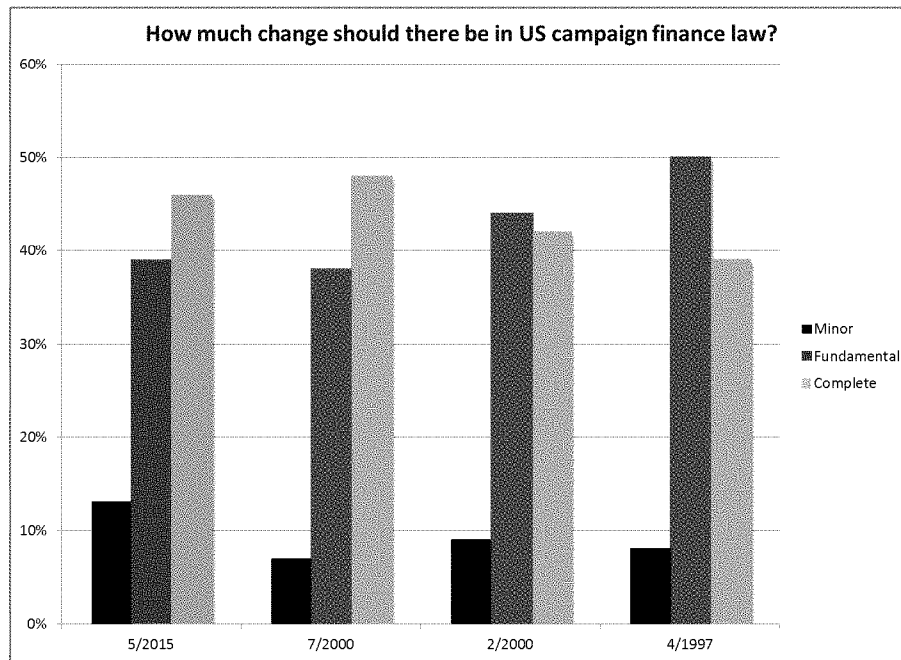
fifty-five percent, clearly indicating that flag desecration remained normatively unacceptable.<sup>72</sup> However, because the Supreme Court has acted to protect fundamental rights, the gap between law and norms persists. Unless support grows, proponents of aligning law with norms are unlikely to succeed in obtaining the super-majority necessary to enact a Constitutional amendment.

Another example might be campaign finance law. As the data below shows, there can be no doubt that most Americans think the law of campaign finance is fundamentally unfair. In a CBS / New York Times poll released in June 2015, zero percent of respondents thought current campaign finance law did not require any change.<sup>73</sup> Only thirteen percent thought minor changes were needed; 39% said fundamental changes were needed; and fully forty-six percent said the entire system needed to be rebuilt. Even more astonishing is that these extreme numbers have been quite consistent for the 18 years the poll has been conducted.

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<sup>72</sup> Gallup Religion and Social Trends, July 6, 1999, *Most Americans would Give Old Glory Legal Protection*, <http://www.gallup.com/poll/3739/Most-Americans-Would-Give-Old-Glory-Legal-Protection.aspx>.

<sup>73</sup> The New York Times / CBS News Poll, May 28-31, 2015, in response to question 34, “Which of the following three statements comes closest to expressing your overall view of the way political campaigns are funded in the United States: 1) On the whole, the system for funding political campaigns works pretty well and only minor changes are necessary to make it work better. 2) There are some good things in the system for funding political campaigns but fundamental changes are needed. 3) The system for funding political campaigns has so much wrong with it that we need to completely rebuild it.”, available at [http://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html?\\_r=0](http://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html?_r=0).



New York Times / CBS News Poll.<sup>74</sup>

In particular, respondents overwhelmingly felt that in order to make elections in the United States fairer, there should be limits imposed on the amount on money that both individuals and groups could contribute to campaigns.

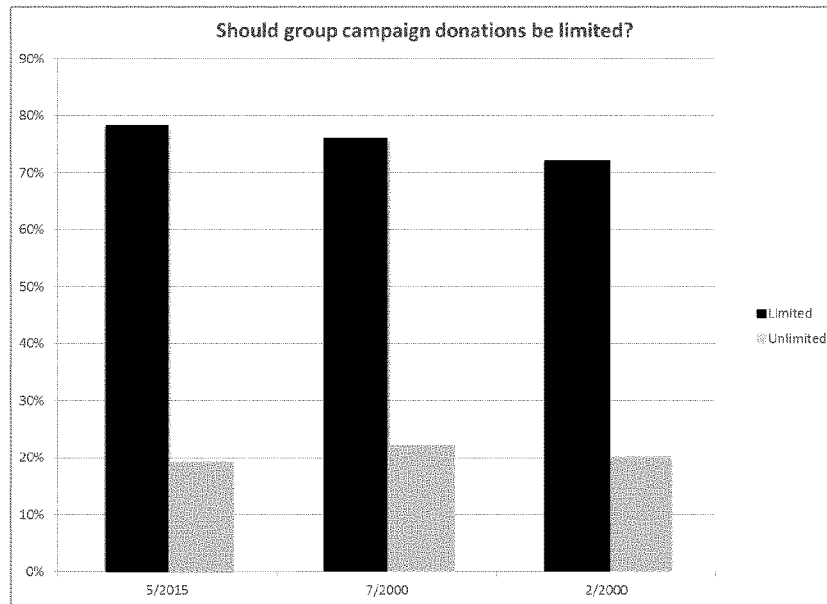
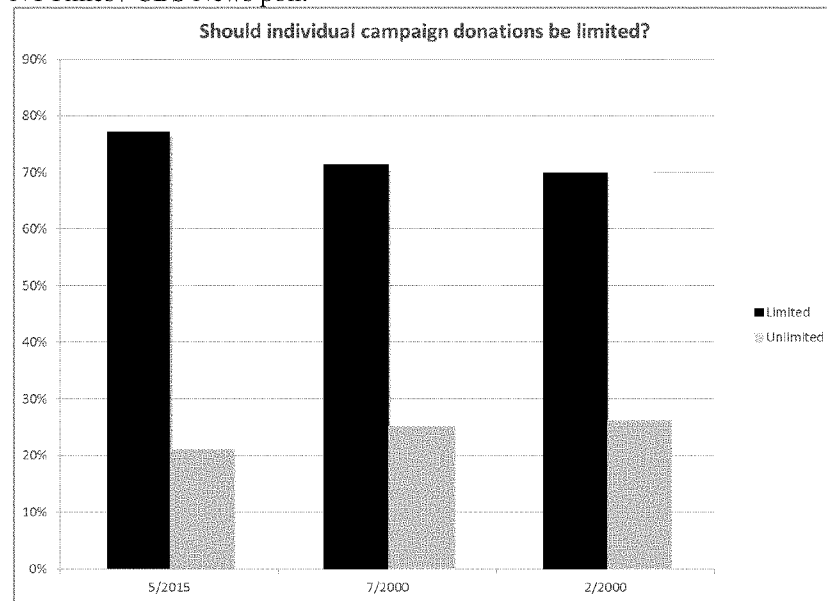
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<sup>74</sup> *Id.*

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NYTimes / CBS News poll.<sup>75</sup>NYTimes / CBS poll.<sup>76</sup>

<sup>75</sup> The New York Times / CBS News Poll, May 28-31, 2015 in response to question 36, "Which one of the following two positions on campaign financing do you favor more: Limiting the amount of money individuals can contribute to political campaigns, or allowing individuals to contribute as much money to political campaigns as they'd like?", available at <http://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html>.

<sup>76</sup> The New York Times / CBS News Poll, May 28-31, 2015 in response to question 38,

So: if vast majorities find unlimited campaign contributions unfair and thus normatively objectionable, why hasn't the law changed to reflect norms? In this instance, it depends upon who you ask, and when. Until the 2010 *Citizens United* decision, many might have said the bulwark supporting law's resistance to this change was a political process captured by the most powerful campaign contributors.<sup>77</sup> In its *Citizens United* decision, however, the Supreme Court established by a 5-4 majority that campaign contributions are encompassed within, and thus protected by, the fundamental right of free speech.<sup>78</sup>

#### B. Pressure Valves

In addition to bulwarks, there are "pressure valves" that can relieve the pressure place on law to change to align with norms. Pressure valves perform the opposite function of bulwarks: they relieve the pressure on law to change when illegal behaviors are normatively acceptable. To understand pressure valves, it is critical to understand two related but distinct phenomena.

The first phenomenon is the non-enforcement of law against behaviors that are "acceptably deviant"; that is, behaviors that are illegal but normatively acceptable. In the model, those behaviors reside in the upper right quadrant. Acceptable deviance can take many forms and is so persistent and pervasive in our lives that we hardly notice it. As Tamanaha says, "the strongest argument in favor of dropping the requirement of general obedience (in defining law) is that this condition is inconsistent with social reality."<sup>79</sup> People's behavior is often bounded by the limits of normative acceptability rather than the law.

Interestingly, sanctions are often imposed on behavior that is outside the boundaries of normative acceptability, rather than the law. Behavior that is illegal but normatively acceptable doesn't usually trigger formal sanctions; behavior that is both illegal and normatively unacceptable often does. Behavior that is legal but normatively unacceptable often triggers informal sanctions; behavior that is normatively acceptable, whether legal or illegal, usually does not.

We can see that in such commonplace behavior as driving.

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"Currently, groups not affiliated with a candidate are able to spend unlimited amounts money on advertisements during a political campaign. Do you think this kind of spending should be limited by law, or should it remain unlimited?", available at <http://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html>

<sup>77</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>78</sup> *Id.*

<sup>79</sup> Tamanaha, *supra* note 2, at 145.

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**Traffic Law & Driving**

	Legal	Illegal
Normatively Acceptable	65 mph	65 - 79 mph
Normatively Unacceptable	< 65 mph	> 79 mph

As the model above suggests, it is generally both legal to drive 65 mph and socially acceptable (although just barely). On the other hand, it is both illegal and generally socially unacceptable to drive much over 80 mph. Doing so might well trigger both informal social sanctions—such as harsh looks from other drivers or muttered curses—and a formal enforcement response from the state, in the form of a speeding citation.

Take a moment to consider how extraordinary this commonplace behavior really is. The state goes to the highly unusual effort of informing its citizenry about the content of the law. Yet each person knows, without being told, that the law as written does not, ultimately, set the boundaries of behavior. The social acceptability of behavior sets its boundaries. And it is all so commonplace, that most that most of us have lived with it our entire lives and never even noticed.

Even more extraordinary, the state implicitly acknowledges that system, and actually sanctions behavior that is outside the boundaries of social acceptability, rather than merely outside the law. In fact, when the state violates this implicit agreement by actually enforcing law rather than the limits of social acceptability, the reaction is often outrage. For example, the town of Waldo, Florida became known nationwide as a notorious speed trap for consistently enforcing the actual speed limit on U.S. Route 301.<sup>80</sup>

<sup>80</sup> See Jim Saunders, *Florida Moves to Thwart Speed-Trap Towns like Waldo*, ORLANDO SENTINEL (March 5, 2015, 12:00 PM), [www.orlandosentinel.com/news/politics/os-florida-endspeed-traps-20150305-story.html](http://www.orlandosentinel.com/news/politics/os-florida-endspeed-traps-20150305-story.html).

Public outrage was so great that private citizens erected a roadside billboard outside of town warning drivers, and the town eventually disbanded the police force entirely when it was revealed that the department had been using a ticket quota system.<sup>81</sup>

The second phenomenon is the enforcement of norms against behaviors that we might call “unacceptably compliant;” that is, behaviors that are legal but socially unacceptable. In the model, those behaviors ride in the lower left quadrant. Again, consider driving: driving much under 65 mph, though legal, is *very* likely to trigger an informal enforcement response through social sanctions, in the form of tailgating, flashing lights, and or obscene gestures.

Driving behavior also helps illustrate some of the dangers that can arise in the presence of pressure valves. The first is the danger of selective enforcement. The second is the danger of vigilantism.

**‘Pressure Valves’ that Relieve Pressure on Law to  
Change to Reflect Norms**

	Legal	Illegal
Normatively Acceptable		Selective Enforcement
Normatively Unacceptable	Vigilantism	

i. Selective enforcement

The first potentially dangerous ‘pressure valve’ arises in the form of selective enforcement. In other words, illegal but normatively acceptable behavior might not provoke a change in law if the law is only selectively enforced against insular groups. For the public, “the life of the law is in its

<sup>81</sup> See *Waldo Votes to Disband its Police Department*, TAMPA BAY TIMES (Sep. 30, 2014, 11:10 PM), <http://www.tampabay.com/news/publicsafety/waldo-votes-to-disband-its-police-department/2200182>.

enforcement.”<sup>82</sup> Selective enforcement places the pressure of divergence entirely on selected groups. When illegal but normatively acceptable behavior does not trigger an enforcement response – as is frequently the case, since normative acceptability often drives enforcement—the majority will not be motivated to change the law to reflect normative acceptability, because it will not experience the divergence between normative acceptability and law. That makes selective enforcement particularly pernicious, because it is unlikely to cure itself through the political process.

For example, consider the example of driving behavior discussed above. There is little incentive to change speed limits to reflect normatively acceptable behavior, because speed limits are not actually enforced for the majority of drivers in this country. Instead, the limits of acceptable deviance are enforced.

But that is not true for all groups. Speed limits are routinely enforced selectively, and often on the basis of the race of the driver. Racial profiling of drivers is so pervasive that “driving while Black” has become part of the common lexicon.<sup>83</sup> For example, in *Whren v. United States*, the Supreme Court heard the case of two African-American men who had been stopped for a minor traffic violation.<sup>84</sup> The defendants argued that the stop could only have been motivated by their race, since their driving behavior, although formally illegal, was well within the boundaries of acceptable deviance and therefore would not have caused an enforcement response, absent some other factor.<sup>85</sup> The Court acknowledged that the defendants’ argument might well be true, but held that the Fourth Amendment did not require an inquiry into police officers’ subjective motivations in enforcing the law.<sup>86</sup> Rather, the Court held that the only question relevant to the officers’ motivation to conduct the stop was whether they had a reasonable belief that the defendants had engaged in formally illegal behavior.<sup>87</sup>

As the controversy in Waldo, Florida demonstrates, if formal speed limits are enforced across the board, the pressure to change quickly becomes irresistible. On the other hand, if formal law is enforced only selectively, there is no pressure caused by the divergence of legality and normative acceptability. We can predict that victims of selective enforcement find no redress through the political process.

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<sup>82</sup> Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 514 (1912).

<sup>83</sup> See Christopher Ingraham, *You Really Can Get Pulled Over for Driving While Black*, *Federal Statistics Show*, WASH. POST (Sept. 9, 2014), [www.washingtonpost.com/news/wonkblog/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/](http://www.washingtonpost.com/news/wonkblog/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/).

<sup>84</sup> *Whren v. U.S.*, 517 U.S. 806, 806 (1996).

<sup>85</sup> *Id.* at 813-14.

<sup>86</sup> *Id.* 813-16.

<sup>87</sup> *Id.*

## ii. Vigilantism

Behavior that is legal but socially unacceptable might be prevented through the informal enforcement of social norms. This occurs in varying degrees of extremity, culminating in violent vigilantism. If informal sanctions in the form of vigilante acts successfully prevent legal but normatively unacceptable behavior from occurring, then the tension created by the divergence of legality and normative acceptability is relieved and with it, the pressure on law to change.

Vigilantism is “a reaction to real or perceived deviance.”<sup>88</sup> Criminologists have identified two distinct forms of vigilantism. Crime control vigilantism occurs when private parties attempt to enforce criminal laws that they consider under-enforced by state instrumentalities. By contrast, social control vigilantism occurs in order to control behaviors that are not illegal, and therefore not subject to enforcement actions by state instrumentalities, but violate social norms.<sup>89</sup>

Vigilantism in such cases is an effort at “norm enforcement, albeit in ways inconsistent with the rational legal system.”<sup>90</sup> The offenses at which vigilantism is directed in such cases are not breaches of the law, but breaches of normatively acceptable behavior. Since the state only enforces law, vigilantes attempt to enforce those norms through social control.

One example of social control vigilantism is violence against lawful abortion providers. As the data below show, Americans’ beliefs with regard to abortion are both deeply divided and remarkably intractable. To a large minority of Americans, obtaining or providing an abortion is tantamount to murder and therefore deeply unacceptable normatively. Regardless, opponents of choice have been unable to achieve either a majority position democratically, or to convince courts that the right to choose is not protected by a woman’s fundamental right of privacy.

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<sup>88</sup> Les Johnston, *What is Vigilantism?*, 36 BRITISH J. OF CRIMINOLOGY 220, 229 (1996).

<sup>89</sup> *Id.* at 228.

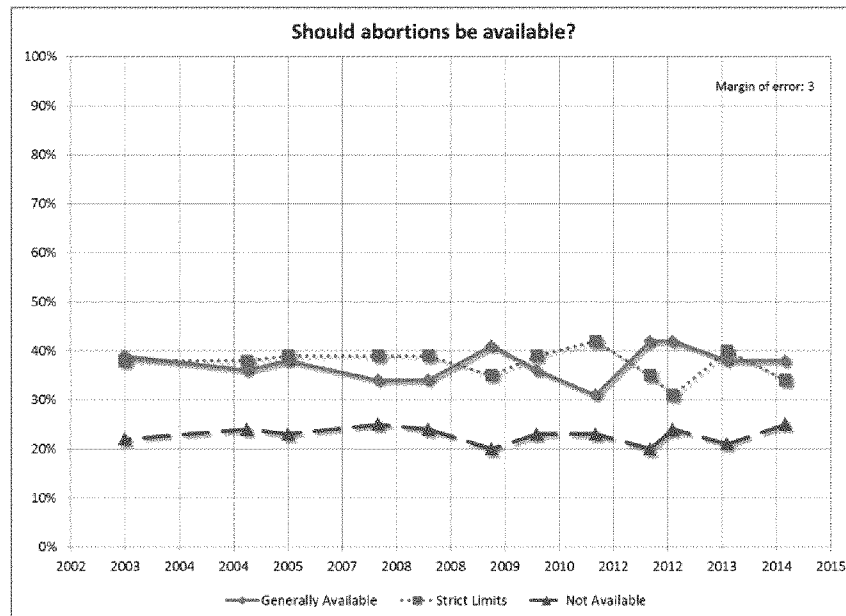
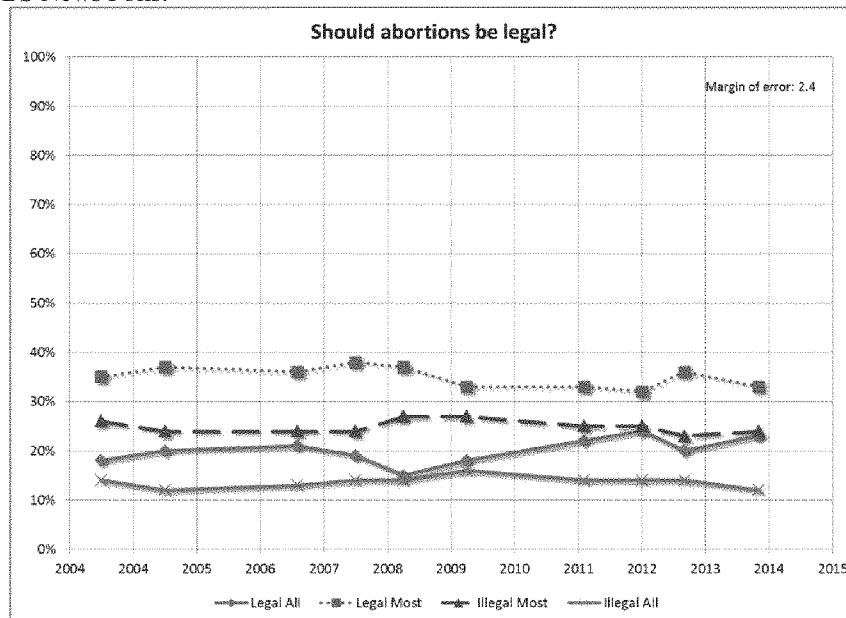
<sup>90</sup> J. Paul Grayson, *Vigilantism in Canada and the United States*, 16 LEGAL STUDIES F. 21 (1992).



2014]

*The Alignment of Law and Norms*

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CBS News Polls.<sup>91</sup>Quinnipiac University Polls.<sup>92</sup>

<sup>91</sup> Compilation of CBS News polls in response the question ““Which of these comes closest to your view? Abortion should be generally available to those who want it. OR, Abortion should be available, but under stricter limits than it is now. OR, Abortion should not be permitted.” compiled by PollingReport.com, <http://www.pollingreport.com/abortion.htm>, pp. 2.

<sup>92</sup> Compilation of Quinnipiac University polls in response the question “Do you think abortion

Unable to use law to enforce their normative preferences, some opponents of choice have turned to vigilantism as a substitute. In effect, vigilantism in this sense elevates the vigilantes' normative preferences to the status of law, which vigilantes then enforce. For example, the former slogan of the antiabortion activist group Operation Rescue made very clear that its members were to treat lawful behavior—obtaining or providing an abortion—as though it was unlawful: “If you think abortion is murder, act like it.”<sup>93</sup>

According to the Bureau of Alcohol, Tobacco and Firearms, there were more than 300 vigilante attacks on abortion providers in the United States between 1973 and 2003.<sup>94</sup> In response to the attacks, in 1994 the United States passed the Freedom of Access to Clinic Entrances Act, making it criminal offense to block abortion clinic access.<sup>95</sup> Nonetheless, violent attacks – arsons, bombings, shootings, assaults and murders—on providers and provider facilities have continued. For example, in 2009, prominent abortion provider George Tiller was assassinated by an antiabortion activist with ties to Operation Rescue.<sup>96</sup>

Of 1043 counties in the United States with abortion providers, only 14 percent experienced violent attacks, but almost half of those experienced more than one attack.<sup>97</sup> The area around Houston, Texas experienced the most attacks.<sup>98</sup> This suggests that in areas where abortion is most normatively objectionable, vigilantism is most likely.

Violent anti-abortion vigilantism has had success in enforcing its vision of normative unacceptability. In areas where abortion providers have been murdered, clinic-based abortions have declined by over 60 percent.<sup>99</sup> In counties in which non-murderous attacks have occurred, clinic-based abortion rates dropped by approximately 9 percent.<sup>100</sup> Moreover, the effect of violence on abortion rates has been is long lasting in the counties where the violence occurs.<sup>101</sup>

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should be legal in all cases, legal in most cases, illegal in most cases, or illegal in all cases?” compiled by PollingReport.com, <http://www.pollingreport.com/abortion.htm>, pp. 2-3.

<sup>93</sup> See Mireille Jacobson and Heather Royer, *Aftershocks: The Impact of Clinic Violence on Abortion Services* (Nat'l Bureau of Econ. Research, Working Paper No. 16603, 2010), <http://www.nber.org/papers/w16603.pdf> at 6.

<sup>94</sup> *Id.* at 1.

<sup>95</sup> See 18 U.S.C. § 248.

<sup>96</sup> See Operation Rescue Adviser Helped Tiller Suspect Track Doctor's Court Dates, *MCCLATCHY DC* (June 3, 2009), <http://www.mcclatchydc.com/news/nation-world/national/article24540694.html>.

<sup>97</sup> Jacobson and Royer, *supra* note 97, at 7.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.* at 32.

## VI. CONCLUSION

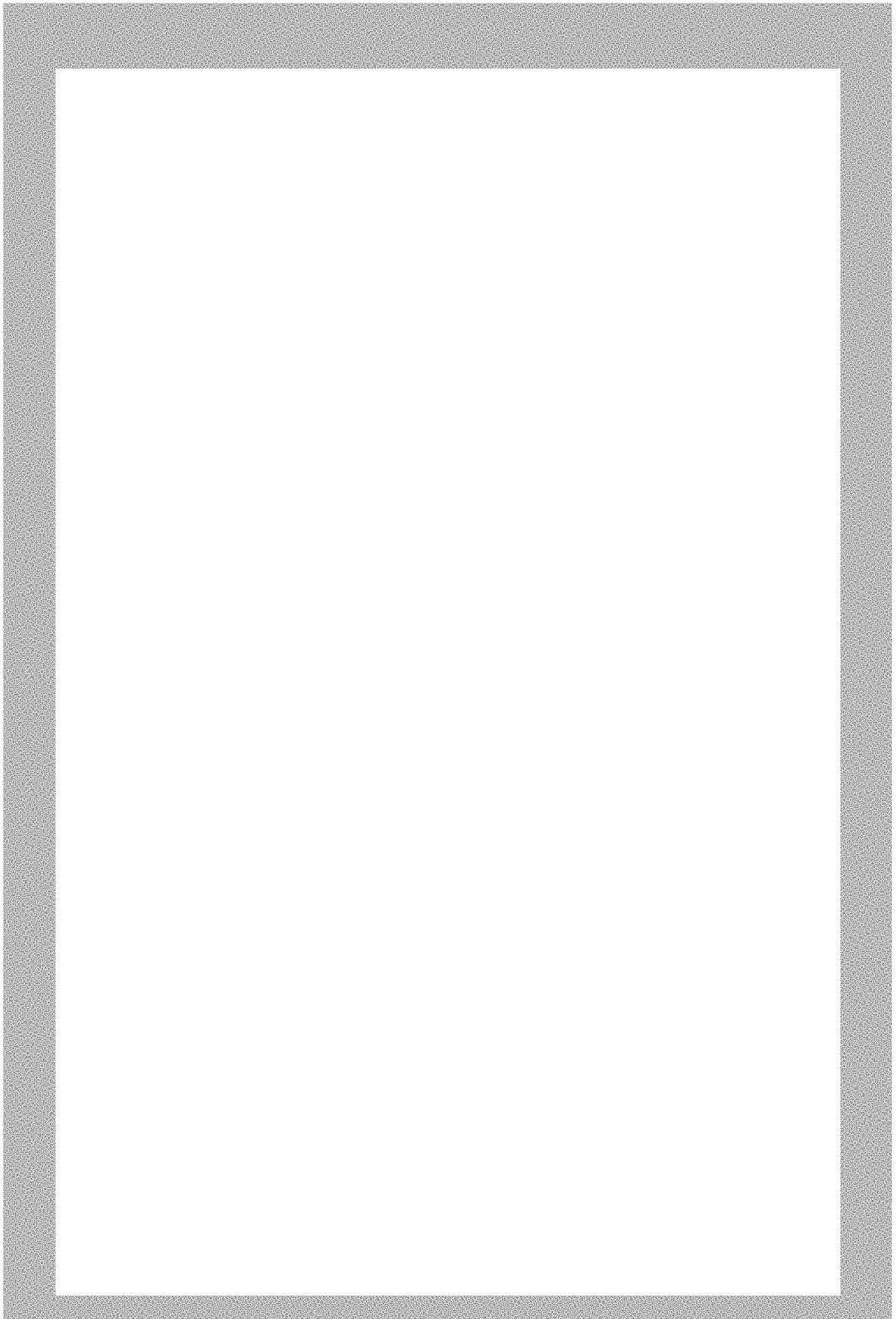
If the mirror thesis is correct, law should reflect norms. We can thus predict that over time, if behaviors that were once both normatively unacceptable and illegal become normatively acceptable, they should become legal as well. Similarly, if behaviors that were once normatively acceptable and legal become normatively unacceptable, they should become illegal as well. That is to say, law should evolve to align with norms.

However, there are also predictable reasons why law might not evolve to align with norms. Persistent gaps sometimes occur, so that some behaviors that are normatively acceptable nonetheless remain illegal. Similarly, sometimes behaviors that are normatively unacceptable nonetheless remain legal.

Bulwarks are phenomena—such as the protection of fundamental rights, and the capture of the political process by interest groups—that help resist the pressure on law to align with norms, allowing behaviors that are normatively unacceptable to remain legal. Pressure valves are phenomena—such as the non-enforcement of law against acceptably deviant behavior, or the enforcement of norms against unacceptably compliant behavior—that help relieve the pressure on law to align with norms. Non-enforcement of law allows the persistence of illegal behaviors that are normatively acceptable. Enforcement of norms can prevent legal behaviors that are normatively unacceptable.

Persistent gaps between law and norms may be either features or bugs in the system. Gaps that persist because of the protection of fundamental rights are features of the system. Gaps that persist because of political capture are usually bugs. Gaps that persist because of ‘pressure valves’ may be either features or bugs, and their presence should alert us to possibility of two particular dangers: selective enforcement and vigilantism.

In this way, we can use the mirror thesis and prediction both to better understand the relationship between law and society, and to look for dangers that might otherwise remain obscured.



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