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NORMS AND INTERESTS

Geoffrey P. Miller

INTRODUCTION

It is perhaps no surprise that some scholars in the law and economics movement have become interested in informal mechanisms for social control. These extra-legal rules, standards, and practices hold
the promise of reflecting a truly private ordering unsullied by the defects that government introduces into the social world. Even the supposed efficiency of the common law would appear to pale in comparison to social norms.² Judges are political creatures whose instincts, prejudices, or ambitions may lead them to adopt rules that serve the interests of particular groups, even at the expense of society as a whole.³ Social norms, on the other hand, appear insulated from the play of interests that introduces inefficiency into all systems of legal regulation. Because they represent a classic case of private ordering, they enjoy “presumptive legitimacy” in our culture.⁴ They seem to approach Hayek’s ideal of spontaneous social organization.⁵

To be sure, not all scholars of social norms adopt an optimistic attitude, even within the law and economics movement. Eric Posner, for example, criticizes the view that social norms are efficient.⁶ Posner argues that norms arise as the result of actions by individuals who attempt to signal others about their propensities to be good or cooperative people.⁷ This signaling behavior, Posner argues, can generate many possible equilibriums.⁸ While some outcomes may be good, others are bad. As examples of bad norms, Posner points to customs such as ethnic violence and conspicuous consumption.⁹ Even if a social norm is efficient at the time it evolves, moreover, the efficiency be found in earlier writers. Bentham, for example, recognized that “ethics” played a key role in the function of social control that coexisted with the domain of positive law. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 310-23 (Spec. ed., Legal Classics Library 1986) (1780).


6. See POSNER, LAW AND SOCIAL NORMS, supra note 1, at 171-73.
7. See id. at 174.
8. See id. at 174-75.
9. See id. at 177.
may not last. Because social norms and customs have inertia, they sometimes linger on even after they have ceased to provide value.  

Some theorists (including Eric Posner) depart from the Hayekian ideal of spontaneous ordering in a different way. Not only is it the case that norms may be inefficient; they are also not created by spontaneous social processes. Instead, norms arise, at least in part, as a result of efforts by “norm entrepreneurs”—self-appointed champions of particular values or rules for behavior. Cass Sunstein, who introduced the phrase into the legal literature, describes norm entrepreneurs as individuals who seek to induce change in accepted behaviors by exploiting popular dissatisfaction with the prevailing pattern. The norm entrepreneur uses a combination of argument, organizing, and symbolic action to persuade others to reject norms with which the norm entrepreneur disagrees. If these efforts are successful, the result can be a rapid change in social practice—a “cascade” or “bandwagon” effect as many people abandon the old norm and come to behave in conformity with a new one. Although Sunstein presents norm entrepreneurs in a positive light, it is obvious that their activities are not always constructive. Racists and bullies can be norm entrepreneurs.

Theorists who emphasize that norms do not always arise spontaneously, or that the effect of norms, however derived, is not always good, tend to see a constructive role for government intervention. Lawrence Lessig’s work is a leading example. Lessig argues that governments can, and inevitably do, influence social norms. If a state flies a Confederate flag over the governor’s mansion, this influences the way people behave around issues of race. Given that official norm

10. See id. at 171 (discussing exchange of “moon cakes” among Chinese); see generally Clayton P. Gillette, Lock-In Effects in Law and Norms, 78 B.U. L. REV. 813, 813 (1998) (discussing how laws and norms can fail to adjust to changing conditions).
11. See POSNER, LAW AND SOCIAL NORMS, supra note 1, at 29-32.
16. See Lawrence Lessig, The Regulation of Social Meaning, 62 U. CHI. L. REV. 943, 947 (1995). Lessig defines “social meaning” as “the semiotic content attached to various actions, or inactions, or statuses, within a particular context.” Id. at 951.
17. See id. at 946-47.
management is to some extent inevitable, the government should influence social norms in a positive direction. For example, the government could encourage people to abandon behaviors based on sexist or racist stereotypes, or could seek to eliminate social pressures to engage in dangerous or self-destructive conduct.

There is thus a wide degree of debate in the literature about the degree to which social norms reflect spontaneous private ordering. Despite the disagreement, however, the literature to date has not recognized a key feature of many social norms: Social norms can—and often do—function as means by which members of interest groups acquire benefits for their members. This concept requires elaboration, and will be discussed at length in the pages that follow. The basic intuition is simple, however: by manipulating social norms, groups can enrich themselves—either monetarily or by obtaining non-pecuniary benefits such as esteem or deference—at the expense of other groups and sometimes of the society as a whole. To the extent that they function as means by which group members acquire benefits, social norms are similar to legislation, regulation, and other types of government action. Accordingly, the theory of public choice, which attempts to explain activities in the political arena, may provide a means for understanding the operation of a wide variety of social norms.

This Article examines social norms from the perspective of public choice theory. Part I places norms in a framework of social control. It sets out a typology of norms and identifies one category, which I refer to as "competitive norms," as being relevant to analysis from a public choice perspective. Part II discusses the processes that can result in competitive norms being dissipated or lost. Part III addresses the efficiency of competitive norms. This Article ends with a brief conclusion.

18. The emergence of competitive group norms of this sort is discussed insightfully in EDNA ULLMANN-MARGALIT, THE EMERGENCE OF NORMS 135-97 (1977) (discussing "norms of partiality"), and ROBERT M. AXELROD, THE COMPLEXITY OF COOPERATION 55-57, 63-64 (1997) (discussing "dominance" processes leading to the evolution of norms). Neither of these analyses uses an explicit public choice framework to analyze the emergence, content, and durability of social norms, however.

I. BACKGROUND AND DEFINITIONS

A. Defining Social Norms

The recent scholarship has failed to coalesce around a precise definition of the term "social norm." A narrow concept of a norm views it as an expected behavioral response to a well-defined situation, backed by threat of a social sanction if the actor's conduct deviates from expectations. So, for example, it may be a norm that people not allow their dogs to foul neighbors' yards. If it happens, reparations are expected. People who fail to behave appropriately with respect to this norm are likely to face a social sanction, such as being rebuked or shunned. Much of the legal literature implicitly draws on this concept of social norms, possibly because legal scholars find the notion of rules backed by threats to be analogous to the social role of law.

Although this concept of social norms is appealing, it is impossible, in practice, to provide a precise line of demarcation between norms and other social practices. The distinction between norms and laws is often blurry. Many social norms are also enforced through the legal process (it's not only illegal to murder someone, but also a violation of a norm). And laws are often enforced through private bargaining, which may follow social norms even while operating in the shadow of the law. Norms also are difficult to distinguish from other, even less formal social activities. For example, it may be a common practice for dinner guests to bring a bottle of wine. While such a gift may be appreciated, failure to bring it may not be considered rude. It would be odd for anyone to rebuke a dinner guest for not bringing a bottle of wine. Is this practice a social norm? One can go further, and observe that norms are difficult to distinguish from all sorts of practices and institutions that serve the general function of social control. These include not only laws, but also education, moral suasion, rituals, attitudes, practices that have not attained the status of custom, and rewards for exceptional conduct.

20. Richard Posner refers to a "social norm" as "a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by threat of legal sanctions, yet is regularly complied with . . . ." POSNER, supra note 4, at 288. Robert Cooter defines the term as "an obligation backed by a social sanction." Robert D. Cooter, Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization, 79 OR. L. REV. 1, 5 (2000).

21. See, e.g., Katharine K. Baker, Sex, Rape, and Shame, 79 B.U. L. REV. 663, 672 (1999) (including within the category of "norms" not only behavioral norms such as "mow your lawn," but also internalized norms such as "be a good neighbor").

It appears, therefore, that social norms can be defined only in an imprecise sense, as a broader or narrower bandwidth on the spectrum of social control techniques.  

These difficulties in giving precision to the concept of social norms create a challenge for analysis. The approach of this Article is to use a fairly inclusive concept of social norms, which includes all practices that are widely observed in the society and that have the effect of influencing individual behavior. However, I focus especially on social practices that have the attribute of appearing rule-governed and subject to social penalty for violation. This strategy recognizes that norms cannot be sharply distinguished from other social control strategies, but also takes into account the fact that the narrower idea of social norms has some content that may be worthy of special attention.

**B. A Typology of Norms**

Social norms can serve a variety of functions, which are often mixed together in the literature. We can distinguish three types of norms.

Coordination norms are purely matters of convention. Much of language has this quality. In order to communicate, we need names. But the particular sounds chosen to designate a thing are usually of little consequence. Our lives would not be significantly different if we called a particular kind of four-legged animal a “broof” rather than a “dog.” Similarly, rules of grammar appear largely conventional (although exceedingly complex rules might be inefficient). Conventions are focal points; people care little about which point is chosen, but need a decision. Much as a super-cooled liquid can crystallize almost instantly when even a tiny speck of imperfection is introduced into the solution, so a society can coalesce very rapidly around a convention, which thereafter displays a high degree of resistance to change. Because the point actually selected is a matter of little consequence, norms as conventions can approximate the ideal of spontaneous social ordering.

Some norms are not conventional but still represent practices that do not systematically advantage or disadvantage any particular individual or group. Many norms of politeness fall in this category of

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23. For example, Robert Ellickson appears to treat rituals as one type of social norm. See Ellickson, supra note 1, at 233-34 (discussing “constitutive norms” that hold groups together).

24. A convention is a commonly followed way of doing things, which has no intrinsic value or meaning in itself. On convention, see David K. Lewis, Convention: A Philosophical Study 51 (1969).
nonsystematic norms. People are not supposed to talk with their mouth full. This norm is not arbitrary or conventional. We may assume that the discomfort suffered by others from observing half-chewed food in a person's mouth exceeds the benefit that the eater and his interlocutors gain from his being able to talk before swallowing. If so, the norm against talking with one's mouth full is efficient. For the most part, these norms do not systematically favor or disfavor anyone. Most people find themselves rather randomly in the position of speaking with someone who is eating, or wishing to speak while eating. It is difficult to see how the norm benefits or harms any particular group. Norms of custom in dealings among merchants may also have this character of being efficient and not systematically benefiting any group within the normative community.

Custom may also play a role in identifying efficient rules of tort law.

For still other norms—the ones that are the concern of this Article—it is not the case that people are benefited by the norm at some times and harmed at others. Instead, such norms grant benefits to some and impose costs on others on a group-wide basis in situations where membership in the group is at least relatively stable. An example of such a norm is a custom requiring healthy young people to cede subway seats to people who are old or infirm. This norm, if effective, systematically benefits the elderly and infirm at the expense of the young and healthy. Because the statuses defining the norm are relatively fixed (people do not randomly fluctuate between being young and old), the norm imposes costs on one group of people and gives benefits to another group. I refer to norms falling into this category as "competitive norms."

C. Interests

The category of norms just described bears an obvious similarity to the concept of interest group legislation identified in the theory of public choice. Public choice theory recognizes that people organize politically for mutual advantage. By organizing and then lobbying the


28. See generally TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980) (describing the activities of individuals to obtain benefits from the state).
government, members of an interest group can obtain benefits in the form of subsidies, price controls, and protections against competition. If in the absence of government intervention a person could earn a market wage of twenty dollars per hour, but as a result of a government regulation the person commands twenty-five dollars per hour, that person gets a benefit of five dollars per hour as a result of the political activity that generated the regulation.

While interest group legislation serves some groups, it may also systematically disadvantage others. If an individual or firm has productive assets that cannot quickly be re-deployed to other uses, a change in government policy can reduce the return that the party is able to obtain from those assets. For example, suppose that as a result of pressure from some other group, the government unexpectedly imposes a tax on a firm’s operations at a time when its products are already contracted to buyers at a fixed price. The return the firm can earn is reduced (at least temporarily). This can be seen as a form of detriment which resembles in many respects the more familiar benefits that groups can obtain from political activities.

In this Article, I adapt these concepts of public choice theory to the field of social norms. To do so, it is necessary to speak in terms of utility rather than wealth. The idea is that in life, as well as in business, people acquire a stream of value that includes utility or psychic benefit as well as money. Suppose, for example, that a young woman can play excellent golf, but golf is not much appreciated among the young. Young people prefer to go to rave clubs. The golfer gains pleasure from her sport, but not as much as she would experience if her skills were widely valued among her peers. Then, as a result (let’s say) of Tiger Woods winning four major tournaments in a row, golf becomes popular among young people, and it becomes customary to play a round on weekends. The change in social custom provides a benefit to the golfer by increasing her overall utility beyond what was available under prior customs.

Changes in norms can also create disutility to individuals. Prior to the First World War, for example, Americans of German extraction were proud to advertise their heritage. There were German-American banks, civic associations, and social clubs all over the country. With the entry of the United States into the war, however, public sentiment turned against Germany, and the German-American community found its position in American culture under threat. Norms governing the

30. See id.
celebration of American national holidays were reinterpreted in ways harmful to this community. In this and many other cases, changes in social norms can impose harms on specific groups and thereby reduce their utility.

II. INTEREST GROUPS AND NORMS

The theory of public choice starts from the premise that by lobbying for favorable rules and regulations, organized interest groups seek to obtain benefits for their members or to impose detriments on others. The interest group is thus a basic analytical category for the theory. This section identifies three types of interest groups: industrial lobbies, occupational associations, and broad-based movements.

A. Industrial Lobbies

The most familiar type of interest group discussed in public choice theory is the industrial lobby. This is a coalition of producers in a single industry who join together for lobbying or public information purposes. Examples of such lobbies—chosen more or less randomly from many too numerous to mention—are the Chemical Manufacturers Association, the Securities Industry Association, the National Licensed Beverage Association, and the National Solid Wastes Management Association.

Industrial lobbies sometimes have an interest in obtaining and maintaining competitive norms. One purpose of such norms may be to

31. See, e.g., Ellen M. Litwicki, "Our Hearts Burn With Ardent Love for Two Countries": Ethnicity and Assimilation at Chicago Holiday Celebrations, 1876-1918, 19 J. AM. ETHNIC HIST. 3, 23 (2000).

32. For a discussion of possible responses to this problem see infra Part III.B.

33. The analysis in this section draws on Mancur Olson’s pathbreaking analysis. See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 6-7 (1980).

34. See id. at 141-45.


increase consumer demand. If it is a custom to eat a roast turkey on Thanksgiving, for example, the norm of cooking a turkey will translate into more business for turkey producers. A trade association of turkey growers might find it advantageous to encourage people to include a roast turkey in the holiday feast. Similarily, confectionery, greeting card, and floral industry trade groups may cooperate in promoting new norms, such as a “Sweetest Day” on which people give cards, flowers, or candy to their loved ones. In other cases, industrial lobbies may seek to obtain or maintain competitive norms as a means of fending off threats from a potentially competing product. The dairy industry, for example, for many years attempted to discourage people from serving oleomargarine as a table spread. More commonly, these days, industries do not seek to stamp

39. Turkey producers are, in fact, organized to encourage consumption of the bird, although their activities recently have tended towards encouraging the consumption of turkey as an everyday food—probably because the holiday market is already saturated. In fact, promotion of eating turkey on Thanksgiving is probably counterproductive for turkey producers, because it risks creating a consumer perception that turkey is “only” to be eaten on that holiday. See Penny Yeager, Turkey Growers to Entice More Buying, W. PRODUCER, Mar. 4, 1999 (describing market promotion efforts of turkey growers in Alberta, Canada); see also National Turkey Federation, Consumer, Seasonal Ideas, Fall and Winter Cooking Tips, at http://www.eatturkey.com/consumer/tips.htm (last visited Apr. 27, 2004) (website promoting consumption of turkey as an everyday food and on holidays such as Easter, Mother’s Day, and Cinco de Mayo, but makes little mention of Thanksgiving). A representative of the latter organization explains, in private communication with the author, that Thanksgiving does not need a lot of promotion, the reporters usually generate enough publicity since most newspapers and magazines run articles on turkeys at that time of year. The rest of the year we spend promoting turkey for non-holiday consumption. With all the new convenient cuts of turkey meat we try to make consumers and also chefs aware of the many purposes that turkey offers.

E-mail from Hana Young, Public Relations Assistant, National Turkey Federation (on file with author).

40. Although candy industry sources claim that “Sweetest Day” originated in the public-spirited activities of caring individuals, the hand of industrial self-interest is not hard to detect in the conventional history. Hallmark Cards’ Web site describes the holiday as the invention of a “candy company employee” who distributed sweets to orphans and shut-ins. Later, movie stars promoted the holiday: In the early 1930s, movie star Ann Pennington presented 2,200 Cleveland newspaper boys with boxes of candy to express gratitude for their service to the public. Another movie star, Theda Bara, gave candy to those who came to watch her films at a local theater and then distributed 10,000 additional boxes of candy to patients in Cleveland hospitals. See Hallmark.com, Sweetest Day Facts, at http://pressroom.hallmark.com/sweetest_day.html (last updated Sept. 2003).

41. See generally Geoffrey P. Miller, Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine, 77 CAL. L. REV. 83 (1989). As a result of industry lobbying, the federal government effectively required that margarine be colored white—thus presenting an unpalatable resemblance to lard. Some states required that margarine patties be triangular, and one even required that the product be colored pink! See id. at 84 n.3.
out competition from other industries, but rather offer the competing product themselves. An example is the nutritional supplement industry, which competes with over-the-counter and prescription pharmaceuticals. Although the pharmaceutical industry might have attempted to compete with nutritional supplements through norm management (for example, publicizing the dangers, ineffectiveness, and lack of quality standards in nutritional supplements as compared with FDA-regulated pharmaceuticals), several pharmaceutical companies have instead opted to enter the nutritional supplement industry themselves. If an industrial lobby elects to "join-em" rather than "beat-em," it will not engage in norm management activities hostile to the competing product.

Finally, an industrial lobby might attempt to manage social norms in response to attacks, not from competitive products, but rather from the government or coalitions of activist groups. The tobacco industry, for example, fights attempts by anti-smoking advocates to discourage smoking in restaurants and public places. Sometimes the attack is only threatened and the lobby's efforts are directed to warding it off. Producers of "dietary supplements," perhaps in response to public concerns about safety and efficacy, publicize the fact that the federal government extensively regulates their products. The alcoholic beverage industry encourages responsible drinking and warns against underage drinking and drunk driving. Although these messages might seem to discourage consumption of alcohol, they also discourage potential attacks against alcohol consumption that might result in more drastic changes.

B. Occupational Associations

Occupational associations are a second category of interest group recognized in the public choice literature. Like industrial lobbies,
occupational associations are organizations of persons or entities involved in productive activities. They differ from industrial lobbies in several respects, however: (1) their product takes the form of services rather than goods, (2) they are comprised of large numbers of individual members; and (3) their members often claim specialized expertise and skills (e.g., attorneys, physicians, or dentists).

Like industrial lobbies, occupational associations seek competitive norms. The norm-management activities of these lobbies, like those of industrial lobbies, may be intended to increase demand for services. Some examples: an association of fitness instructors promotes norms of staying in shape through exercise; 47 an association of psychologists encourages teens to seek professional help for emotional problems; 48 an association of pharmacists touts the idea that pharmacists improve health. 49 The organized bar, likewise, promotes broad pretrial discovery, thus (arguably) increasing demand for lawyers' services. 50

Occupational associations, like industrial lobbies, may also attempt to meet or deter competition from other service providers. An association of chiropractors, for example, advertises the benefits of chiropractic therapies for problems also treated by medical doctors. 51 An association of psychiatrists denigrates efforts by psychologists to compete in the provision of medical services. 52 Bar organizations stress obligations of confidentiality that give lawyers a competitive advantage over other service providers. 53

49. See Am. Pharmacists Ass'n, Statements & Strategic Objective/Strategies (stating that the vision of the association is to have "[p]harmacists and patients working together to improve medication use and health" and that the mission of the association is to "provide[] information, education, and advocacy to help all pharmacists improve medication use and advance patient care"), at http://www.aphanet.org/about/statements.html (last updated June 18, 2003).
52. See Psychologists' Latest Proposal Appears to Continue Push for Expanded Scope of Practice, PSYCHIATRIC NEWS (Am. Psychiatric Ass'n, Arlington, Va.), Feb. 6, 1998, available at http://www.psych.org/pnews/98-02-06/scope.html (stating that "'this new 'specialty' is more about scope of practice and the continuing effort of some branches of psychology to imply that they are 'medical health professionals' ").
Also like industrial lobbies, occupational associations seek to preempt criticism or attacks that might threaten benefits already in place. For example, attorneys worried about their public image ostentatiously promote norms of public service among the profession.\textsuperscript{54} Masseurs and masseuses, perhaps in response to public perceptions of massage as a cover for prostitution, guide the public to legitimate practitioners boasting the proper qualifications.\textsuperscript{55}

Occupational associations seek other competitive norms that are not commonly observed in the case of industrial lobbies. For example, these associations often attempt to enhance the prestige of their members, especially when the occupation in question enjoys lower status than others offering similar services. Control of terminology is an important part of this exercise. Nurse-practitioners describe themselves as “autonomous health care provider[s].”\textsuperscript{56} Chiropractors state that “[d]octors of Chiropractic are physicians.”\textsuperscript{57} Masseuses and masseurs advertise their services as a “profession,”\textsuperscript{58} a “science,” and a “healing art.”\textsuperscript{59} Each of these groups may well provide valuable benefits to clients; the point is only that their trade associations appear interested in raising the status of members in the public eye.

\textsuperscript{54} For example, the American Bar Association’s decision to require law schools to offer, and students to take, a course in legal ethics was apparently a response to public dissatisfaction with lawyers stemming from the Watergate scandal. See Ronald D. Rotunda, \textit{Teaching Legal Ethics a Quarter of a Century After Watergate}, 51 HASTINGS L.J. 661, 661 (2000). Some might detect a similar motivation in the American Bar Association’s 1986 blue ribbon report on professionalism. This document appeared in the wake of several scandals that had badly eroded public confidence in the legal profession, most notably the Operation Greylord investigation which exposed corruption among judges and attorneys in the Cook County, Illinois court system. See ABA COMM’N ON PROFESSIONALISM, “...IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), reprinted in 112 F.R.D. 243, 287 (1986) [hereinafter ABA COMM’N] (observing that “[t]he recent spate of indictments and convictions of lawyers, judges and other court officials in the Operation Greylord investigation in Chicago was shocking, but the underlying conduct on which the indictments were based is, unfortunately, probably not unique”).

\textsuperscript{55} See Elliot Greene, \textit{Massage Therapy for Health and Fitness}, at http://www.amtamassage.org/publications/massage.html (last visited Apr. 24, 2004) (stating that “[w]hen interviewing a massage therapist you should always feel comfortable asking if they have graduated from a school that is accredited or approved by a credible accrediting agency...are licensed if licensing is required in your area...[or] belong to a credible professional association”).

\textsuperscript{56} See Nurse Practitioners’ Ass’n of Ont., About the NPO, at http://www.npao.org/about.html (last visited Apr. 24, 2004).


\textsuperscript{58} See Am. Massage Therapy Ass’n, Definition of Massage Therapy, at http://www.amtamassage.org/about/definition.html (last visited Apr. 24, 2004).

\textsuperscript{59} Greene, supra note 55.
Occupational associations also attempt to manage norms in such a way as to influence relationships with employers, customers, or others with whom the association deals. An example might be found in the American Medical Association's Code of Medical Ethics. In 2001, the Association's House of Delegates added a new section to this code, which provides that "a physician shall, while caring for a patient, regard responsibility to the patient as paramount." Although seemingly noncontroversial, the provision could influence norms by encouraging physicians to refuse to comply with cost-control measures dictated by the managed care industry. The effect could be to enhance job satisfaction among physicians as well to raise their incomes by increasing demand for their services.

Occupational associations also seek to manage norms of conduct among members in order to root out undesirable customs or practices. Norms regarding "civility" in legal practice provide an example. By discouraging rudeness among lawyers, the bar attempts to improve job satisfaction among its members. The American Medical Association, similarly, encourages physicians to "report physicians deficient in character or competence, or [who] engage in fraud or deception." The effort is evidently to undermine the "code of silence" that discourages physicians from testifying against their colleagues or reporting instances

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60. As compared with industrial lobbies, occupational associations are much more likely to engage in norm management of this sort for two reasons. First, industrial lobbies might face exposure under the antitrust laws if they engaged in joint action to enhance member incomes relative to suppliers or customers. Second, this kind of norm management is likely to generate psychic benefits (e.g., increases in job satisfaction) that are valued by service providers organized in an occupational association, but that are not of similar concern to industrial lobbies which may be composed of publicly held firms.


62. Id. at E-0.01 ("Principles of Medical Ethics").


65. AM. MED. ASS’N, supra note 61, at E-0.01 (“Principles of Medical Ethics”).
of incompetence to appropriate authorities. While these norm management efforts appear intended to benefit clients and patients, they also, arguably, provide benefits to association members by counteracting conditions that members dislike (e.g., peer pressure to behave badly).

C. Broad-Based Movements

A third category of interest group is the broad-based movement. A broad-based movement is a federation composed of many groups and individuals. Like occupational associations and industrial lobbies, broad-based movements engage in collective action in the public arena, in large part by influencing the rules that people and institutions obey. The structure of a broad-based movement is more fluid than the structure of other types of interest groups, however, since there usually is no single organization that speaks for all members. Rather, there is a loose coalition of allied organizations and individuals with somewhat different agendas and constituencies. The members of the movement may differ over many issues, but share a common attribute or interest.

A broad-based movement’s unifying concern may be an ideological commitment or belief (e.g., opposition to abortion), a common life situation (e.g., being a senior citizen), a preferred lifestyle (e.g., being a hunter), or sharing a status (e.g., being a member of a social elite). Examples of broad-based movements (among many others) include gays, the elderly, feminists, pro-life activists, environmentalists, animal rights advocates, disabled people, gun enthusiasts, and Christian fundamentalists.

While industrial lobbies and occupational associations engage in norm management activities from time to time, broad-based movements tend to be much more active in attempting to influence social norms. Indeed, management of social norms is a leading activity of many of these movements. Several factors contribute to explaining the focus on norm management among these movements. First, private action can provide a useful supplement, or sometimes an alternative, to government action when it comes to the norms sought by these groups. For example, a group that is seeking to manipulate norms in order to enhance its status vis-à-vis other groups may obtain a better result by working through private parties. While the government may influence social practices affording or denying status to groups, the actual production of status is a decentralized process involving millions of street-level interactions.

66. See Richard N. Pearson, The Role of Custom in Medical Malpractice Cases, 51 IND. L.J. 528, 538 n.54 (1976).
67. See OLSON, supra note 33, at 6-8.
among private individuals. Social norms may be more effective than government programs at accomplishing these objectives. Broad-based movements may also focus on norm management because they have different resources than do industrial lobbies or occupational associations. Broad-based movements include thousands of individuals, many of whom care deeply about the goals and values of the movement. Such individuals have the capacity to influence social norms at the level of day-to-day interactions where norms are actually created and maintained. Industrial lobbies do not have access to legions of volunteers. And while occupational associations may have many members, these people are often members of the association for reasons of professional self-interest and therefore may not want to go out of their way to act as champions of the group’s ideals and goals.

Broad-based movements focus on obtaining three principal kinds of competitive norms: status norms, welfare norms, and ideological norms.

1. Status Norms

Competitive norms sought by broad-based movements prominently include ones that regulate social status. Among the permutations of status manipulation through norms, the following appear to be the most frequent.

Some norms protect superior social status. Usually the group claiming superior status enjoys a privileged position in the culture. Claims of superiority by such elites are typically embodied in norms of deference and condescension that govern interactions between members of the elite and persons from other groups. In a caste system, persons of higher caste expect and demand deference from persons of inferior status. Even without a formalized caste system, markers of status are ubiquitous in human societies and members of high-status groups enjoy the benefits that flow from their position.

Some norms impose detriments that are embodied in the form of inferior social status imposed on a subordinated group. Attitudes towards African-Americans provide the most unfortunate example in American history, but many other groups have also experienced discrimination from time to time, including Chinese, Japanese, Irish, Italians, Germans, and people of any ethnicity who are labeled “deviant” (such as gays). And the United States is far from unique. Japanese culture subordinates

an outcast group, the Burakumin, by shunning them, discouraging intermarriage, and discriminating against them in employment. Similar discrimination against stigmatized groups is common around the world.

In some cases, a group might claim superiority for itself in relationship to other groups even though it is not dominant and even though it may be viewed negatively by other groups. The Nation of Islam, for example, claims superiority for a group, African-Americans, who have historically suffered discrimination at the hands of the broader culture. Here, the pleasurable sense of solidarity that follows from strong in-group identification may provide a benefit to group members even though membership in the group may subject a person to hostility from outside. The very discrimination that identifies and subordinates the group may also play a role in creating a group identity that allows it to organize to increase its status.

Some norms sought by broad-based movements operate to break down the types of benefits just discussed—claims to superior status by some groups, and attributions of inferior status to others. The feminist movement is concerned with enhancing the position of women by liberating them from patriarchal norms that benefit men at the expense of women. Gays seek to overcome biases against homosexuality that result in their being subordinated to heterosexual people. Members of the civil rights movement challenge social norms that symbolize the social inferiority of African-Americans. The religious right fights against hostility in the majority culture against evangelistic Christianity. The Anti-Defamation League seeks to root out anti-

70. See Thomas David Jones, Human Rights: Freedom of Expression and Group Defamation Under British, Canadian, Indian, Nigerian and United States Law—A Comparative Analysis, 18 SUFFOLK TRANSNAT'L L. REV. 427, 549 (1995) (discussing the tenets of the nation of Islam, which include the belief that “African-Americans were superior beings and had a manifest destiny”).
74. See, e.g., Christian Law Ass’n, Door to Door Evangelism, at http://www.christianlaw.org/door-to-door.html (last visited Apr. 24, 2004) (describing how the association defends individuals and organizations that have been prosecuted for preaching their
Semitic attitudes. Anti-abortion groups fight to establish unborn children as human beings entitled to the protection of the law. These and similar norm management activities seek changes in existing status hierarchies by reducing social inequality of various sorts.

2. Welfare Norms

Broad-based movements often seek norms that, while they may not affect people's social status, still increase the welfare of the movements' members. Members of the National Rifle Association favor norms that facilitate ownership of guns. Such norms do not confer status, but rather protect people's ability to enjoy guns. To the extent they are respected, such norms enhance the welfare of gun owners. Environmentalists, similarly, benefit when people observe environment-friendly norms (such as not leaving trash in parks). Because members of this group value a pristine environment, they profit from norms against littering. But the benefit does not confer status. Feminists, similarly, oppose domestic abuse by men. It is not clear whether the status of women would be increased if male-on-female domestic abuse were reduced, but clearly the welfare of many women would be enhanced if men refrain from domestic violence. The disabilities rights movement religious beliefs in public); see also Christian Law Ass'n, About CLA, at http://www.christianlaw.org/about.html (last visited Apr. 24, 2004) (same).

75. The Charter of the Anti-Defamation League states that "[t]he immediate object of the League is to stop, by appeals to reason and conscience and, if necessary, by appeals to law, the defamation of the Jewish people." See Anti-Defamation League, About ADL, at http://www.adl.org/main_about_adl.asp (last visited Apr. 24, 2004).

76. See, e.g., Pro-Life Campaign Comm., Mission, at http://www.prolifecommittee.org/Mission.asp (last visited Apr. 24, 2004) (stating the mission of the committee is "to save unborn children from abortion"); see also Am. Life League, About Us, at http://www.all.org/about/objectiv.htm (last visited Apr. 24, 2004) (stating that to "restore respect for human life in America, we must . . . [e]nhance the personality of the child in the womb").

77. See Nat'l Rifle Ass'n, Who We Are, And What We Do, at http://www.nraila.org/About/NRAILA.aspx (last visited Apr. 24, 2004) (stating that the NRA is committed to "preserving the right of all law-abiding individuals to purchase, possess and use firearms for legitimate purposes").


79. See, e.g., Sierra Club, Sierra Club Purposes and Goals, at http://www.sierraclub.org/policy/goals.asp (last visited Apr. 24, 2004) (stating the purpose of the organization is "to preserve, protect, and enhance the natural environment").

seeks norms that enhance the lives of mobility-impaired people. While such norms may have some relationship to status, their principal function is to increase quality of life.

3. Ideological Norms

Broad-based movements often militate in favor of norms that do not affect members' social status or personal welfare, but that reflect values to which the members of the group are committed. These individuals appear to act altruistically, in the sense that they obtain satisfaction from enhancing the utility of other people or from serving an abstract principle. Their actions, however, can be understood as self-interested within the context of a broader utility theory which includes in an individual's welfare function the utility he or she experiences from any source (including the pleasure a person may get from increases in the welfare of others).

Members of the animal rights movement are an example. They obtain no immediate personal benefit from norms against laboratory testing of animals, but rather experience a sense of the welfare of animals as something they wish to promote. Pro-life activists also fall into this category; their efforts to promote norms favoring childbirth over abortion appear motivated by belief in the immorality of abortion and a desire to protect unborn children. Much of the norm-management activities by environmentalists also fall under this heading. Such people may work to promote norms of respect for the environment (e.g., recycling, use of renewable energy resources), even when their own enjoyment of the outdoors is only minimally improved when others observe such norms.

III. DISSIPATION AND LOSS

The theory of public choice recognizes that the benefits (or detriments) of social norms are not necessarily stable. Even if an interest group obtains such benefits, it may lose some or all of the value over

81. Access to handicapped parking spots is an example. See generally Miller & Singer, supra note * (discussing an efficiency-based justification for handicapped parking regulation as a matter of public policy).

82. See, e.g., People for the Ethical Treatment of Animals, PETA's Mission Statement, at http://www.peta.org/about/mission.asp (last visited Apr. 24, 2004) (stating that the purpose of the organization is to bring attention to the suffering of animals, for instance, in laboratories).

83. See, e.g., Nat'l Right to Life, Mission Statement, at http://www.nrlc.org/Missionstatement.htm (last visited Apr. 24, 2004) (stating the goal of the organization is to protect "innocent human life" in the context of the abortion controversy).
time. Dissipation or loss can occur through two principal mechanisms: market forces and backlash.

A. Market Forces

One familiar way in which benefits of interest group activity can be dissipated is through market forces. Sometimes, dissipation occurs through changes in prices induced by competition. Suppose that an industrial lobby obtains a government subsidy of fifty dollars per unit for its product, the market price of which is one hundred dollars. Members of the lobby have thereby obtained a benefit of fifty dollars per unit. But unless other controls are in place (such as limitations on pricing or output), the benefit is unlikely to be durable. Individual members of the lobby earn a profit on every sale for over fifty dollars. Thus, they will drop the price to increase sales. Forces of competition will drive the market price down from one hundred dollars to something close to fifty dollars. As far as the producers are concerned, the benefits have been dissipated (although they have been acquired by consumers).

Suppose, alternatively, that the government, at the behest of an interest group, legally requires that the members of the group charge above-market prices for its services. In such a case, members of the interest group can obtain benefits in the form of cartel profits. However, because members are earning an above-market return for their efforts, they have an incentive to seek as much business as possible. In order to increase market share, they are likely to engage in “non-price competition” by giving their customers items of value that are not regulated by the price control (toasters for opening bank accounts, excellent food on price-regulated airline routes, tickets to playoff games for corporate purchasing officers, etc.). One effect of these “gifts” is to dissipate profits by driving the real price of the service back towards the market-clearing rate.

84. For example, bar associations used to promulgate legally enforceable minimum fee schedules for attorneys. But see Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975) (declaring the practice to violate federal antitrust principles). Banks used to operate under a federal law that prohibited them from paying interest on checking accounts, thus creating, effectively, a buyer’s monopsony. See Geoffrey P. Miller, Banking Regulation: The Future of the Dual Banking System, 53 BROOK. L. REV. 1, 2 (1987); Kenneth E. Scott, The Uncertain Course of Bank Deregulation, REGISTER, May-June 1981, at 40, 42.


86. Prices can also adjust more directly, if the regulated firm offers cash refunds, either in the form of rebates, or simply by passing the money under the table. Rebates were so pervasive in the
Sometimes, profits can be dissipated as a result of competitively-induced changes in production. Suppose, for example, that the government requires that all trucks install an alarm that sounds whenever a driver tailgates another vehicle. The regulation greatly increases demand for alarm systems. Suppose further that only a few firms produce the systems, and that existing plants are already operating at capacity. Over the short run the effect of the regulation will be to provide profits for producers of alarm systems, since the increase in demand will drive prices above the previous market price. Over the longer run, however, firms in the industry will increase capacity (e.g., by building new factories or expanding existing ones). New firms are also likely to enter if barriers to entry are not prohibitive. As the supply of alarm systems increases, the price will return to a competitive equilibrium and the benefits will dissipate.

Suppose, finally, that firms in an industry join together in a cartel (secretly, of course, so as to avoid prosecution under the antitrust laws). They agree to restrict output by assigning fixed quotas to each member of the cartel. If the cartel includes all firms in the industry and the total output allowed under the quota system is below the amount demanded by consumers under free competition, the effect will be to raise prices and create monopoly profits for the cartel’s members.  

If the restrictions on output are effective, the profits will not be dissipated because of increases in supply. However, unless there are effective policing mechanisms in place, this arrangement is unlikely to be stable. Cartel members will cheat on their quotas by increasing output. And new firms, observing the profits being made by the cartel’s members, will enter the market with their own products. Cheating by cartel members and entry by nonmembers will eventually dissipate the profits and drive prices back towards a market-clearing level.

Let’s now consider how some of these market forces might work to dissipate benefits that are protected by social norms, looking first at industrial lobbies and then at occupational associations and broad-based movements.

1. Industrial Lobbies

Industrial lobbies, as we have seen, sometimes manipulate norms in order to increase consumer demand for a product. If they do succeed in

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88. See supra notes 39-40 and accompanying text.
increasing demand, the result, in the short term, is likely to be increased profits resulting from a run-up in price. Over the longer term, however, producers are likely to increase production to meet the increased demand, and new firms may enter the industry. As the quantity supplied goes up, the price will eventually drop back to market-clearing levels. Thus, unless barriers to entry in the industry are high, the strategy of increasing demand is likely to generate profits only in the relatively short term. However, the dissipation of profits does not mean that the industrial lobby will cease its attempts to stimulate consumer demand. Because other competing groups seek to gain market share, the industrial lobby needs to keep up its activities in order to avoid the losses that would result if demand for the industry's product slackened and the industry could not adjust rapidly to the change.

2. Occupational Associations

Occupational associations also face the danger that benefits they obtain through norm management may be dissipated through market forces. We saw, for example, that such associations sometimes seek competitive norms that enhance the status of the profession or enhance job satisfaction of association members. These benefits can have the same general effect as a subsidy. The association's members receive the same amount of money from customers in exchange for a product that has been produced at lower cost. However, the benefit may not be durable because the association members now have an incentive to drop their prices, since they can make themselves better off still by obtaining more customers. If the market for the service in question is relatively efficient, a drop in price by one service provider will require others to meet the competition. Alternatively, or in conjunction with price reductions, increases in status may make the profession appear more appealing to young people who are making career decisions. More people enter the field. With the new entry, competition drives prices down, while the influx of new practitioners dilutes the value of the occupation's newly acquired status. Eventually the benefits attributable to the increased job satisfaction are largely dissipated through price competition.

3. Broad-Based Movements

Broad-based movements, too, face the threat that market forces will dissipate benefits they receive from competitive norms. The principal

89. See supra notes 55-66 and accompanying text.
danger is that the benefits will be dissipated by entry from outside. If outsiders are able to join the favored group without limitation, the high status or greater convenience enjoyed by the former insiders will be diluted and, eventually, will vanish altogether.

For example, if being a member of a particular social class is desirable, it can be expected that people of lower status will attempt to migrate upward. This, in fact, happens frequently. People who make money in trade or business seek to convert wealth into status—for example, by marrying their children off to aristocrats, becoming philanthropists, or purchasing country estates. Many eventually do break into higher strata of society.90 Thus, when we observe a group enjoying durably high status, we can infer that there are significant barriers to entry into the group.

For barriers to entry into a high-status group to be effective, there must be some means to distinguish between people who are members of the group and people who are not. The key is the presence or absence of the relevant marker. The effectiveness of the entry barrier is a function of how costly it is for someone with the “wrong” attributes to make the changes necessary in order to display the “right” ones.

Sometimes, the identifying markers are based on physical conditions that are impossible to emulate. Suppose that in a given culture, people who are tall or old enjoy high status. There is little danger that the benefits enjoyed by tall or old people will dissipate because of entry, because people cannot easily make themselves taller or older than they are. Similarly, if skin tone or other signatures of racial background mark status, it may be difficult for a person of the “wrong” type to disguise his heritage in order to “pass” as a member of the elite group. Gender is also often tagged to status: men may enjoy deference and privileges as compared with women.91 The brute facts of anatomy protect men against dissipation of their status benefits through migration of women into the higher-status gender.

In these and similar cases, barriers to entry into the high-status group are high. But they are not infinite. Although a young person cannot make himself old, he can wear makeup, put talcum powder in his hair, and act and dress in a conservative manner, and thus fool people

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91. See Linda K. Kerber, “A Constitutional Right to be Treated Like . . . Ladies”: Women, Civic Obligation and Military, 1993 U. Chi. L. Sch. Roundtable 95, 96, 120-21 (1993) (noting that women were either denied the right to serve on juries or discouraged therefrom, denied state and federal civil service jobs, and denied military jobs and training).
about his chronological age. A short person cannot make himself tall, but he might wear platform shoes. Parents who wish their children to be tall might take care to provide them with proper diet and might even resort to growth hormones to induce increases in height. Gender, too, is not quite immutable. The barriers to entry into the status of being "male" are high, but not absolute. Women have always been able to "pass" as men—indeed, the folk traditions of many countries contain stories of such successful deceptions. Today, a woman can become an anatomical man by undergoing gender-reassignment surgery. The fact that it is hard to imagine a person changing gender solely for status reasons is merely an indication that the barriers to entry are usually prohibitive in the relevant range: people would experience too many other costs to make the change worthwhile.

Some physical status markers are only hard to change, but not exceedingly so. Being thin is a status marker in American culture, while being "fat" is stigmatized. Some fat people can, by willpower and hard work, make themselves thin. But the barriers to entry are still high as attested by the billions of dollars spent each year on diet, exercise, and medications by people hoping to gain status by losing weight, or fearful of losing status by gaining weight.

In many cases, physical status markers are not present, so that it is impossible to tell, just by looking at a person, whether or not he is a member of the elite group. In such cases, members of elites tend to establish social markers of group membership in order to guard against gate-crashing. Consider "coming out" (as a debutante), graduation from the "best" schools, country club memberships, attending an elite church or synagogue, or serving on the board of a famous charity. These attributes can be observed by other members of the elite, and used as a basis for accepting or rejecting a candidate for membership. They share the characteristics that they are reliable indicators of status and that they are difficult to emulate by persons of lower status.

92. An example may be found in the many stories of women who dress as warriors, fool their comrades, and by exceptional valor in battle demonstrate the unfairness of their exclusion from men's estate. See, e.g., SARAH ROSETTA WAKEMAN, UNCOMMON SOLDIER (Lauren Cook Burgess ed., 1994) (reprinting letters of a woman who disguised herself as a man to fight as Union soldier in Civil War).


Accent, language, manners, and taste are also important status markers. People of high status often speak and act differently than people of low status. Eliza Doolittle was able with a little bit of luck to pass for a member of the gentry despite her cockney roots. But the premise of *My Fair Lady* is that language barriers were, in general, a reliable barrier to entry. Eliza’s success was due to the intensive personal tutoring of Henry Higgins, who although lacking in personal sensitivity was a renowned expert in linguistics.

Regardless of how the qualifications of a person seeking admission are established, the group’s members are likely to exercise caution in allowing new entry, since each new member threatens to dilute the benefits enjoyed by the rest. It is hard for newcomers to “break in” to high society. Even if they are rich, they may be spurned as “gauche” or “nouveau.” Joining an elite club may require several sponsors, and others may blackball an applicant. Parents are likely to discourage their children from falling in love with persons of lower status (although, as thousands of romance novels attest, these efforts sometimes fail). Often it takes generations for families to move up the social ladder.

Ethnic elites also tend to guard against new entry, even when physical differences between groups are inconsequential. Concerns about maintaining the “purity” of a group, hostile attitudes towards intermarriage with lower-status groups, suspicion about whether strangers who claim membership are *bona fide*, and similar attitudes can be understood as responses to the threat of benefit dissipation through entry. Even groups that enjoy limited benefits from social norms, such as rights of access or convenience, are also likely to police against benefit dissipation through entry. Disabled people, for example, engage in vigorous attempts to prevent able-bodied people from occupying parking spaces reserved for the handicapped.95

Negative status norms raise the opposite problem for the beneficiaries: not the risk that people will enter the favored group, but rather the danger that people will exit a disfavored group. When people remain in a discriminated group, notwithstanding discrimination, it is usually because there are barriers to exit that correspond to the barriers to entry that maintain the standing of elites. Again, the key factor is the nature of the markers that identify a person as a member of the stigmatized group. Physical status markers are often important. For example, during segregation, African-Americans in the United States could be identified by physical features (facial anatomy, skin tone, etc.)

and shunned or stigmatized on that basis. Although a few light-skinned African-Americans may have been able to “pass” into the category of White, most could not.\(^{96}\)

Sometimes, the status marker is behavior. A gay person can live “in the closet”—marry a person of the opposite sex, have children, and present the outward appearance of being heterosexual. Such a person has exited the social status of being gay in order to avoid stigmatization. However, people adopt this strategy at a cost because they are inhibited from expressing an important part of their identity. For many, exit is too costly—especially as the stigma associated with homosexuality fades. They adopt an active gay lifestyle, and may by “coming out” pre-commit themselves never to return to the closet.

In some cases, the barriers to exit from a stigmatized group are based only on social markers rather than anatomy or behavior. Consider the Burakumin in Japan, referred to above.\(^{97}\) These people are physically indistinguishable from other ethnic Japanese.\(^{98}\) Given that they suffer multiple disadvantages in Japanese culture, why do they not exit Burakumin status? If all Burakumin abandoned ship, the social detriments imposed on this group would dissipate, as would whatever benefits discrimination against this group creates for others. In fact, Japanese culture is keenly attuned to the possibility that the Burakumin will dissipate their status by melding in with the general culture. To make sure that this doesn’t happen, prospective employers and marriage partners consult various sources (family registers, temple registers and Burakumin lists) to check up on the family lineage of a person whose \textit{bona fides} are unknown.\(^{99}\) Barriers to exit are thereby maintained.

The problem of benefit dissipation through market forces is a concern only when the benefits in question are limited within the relevant range. If the benefit is not so limited, market forces cannot dissipate it. Benefits protected by status norms, as we have seen, are limited within the relevant range. However, welfare norms and ideological norms are much less vulnerable to market dissipation.

Turning first to welfare norms, consider the case of gun enthusiasts. Suppose that the society originally discourages gun ownership but that, as a result of changes in norms, the climate suddenly becomes more

\(^{96}\) \textit{See}, e.g., Cheryl I. Harris, \textit{Whiteness as Property}, 106 Harv. L. Rev. 1707, 1712-13 (1993).

\(^{97}\) \textit{See supra} text accompanying note 69.

\(^{98}\) \textit{See} UpHam, \textit{supra} note 69, at 79.

receptive to guns. The welfare of gun owners is thereby enhanced. Migration is likely in such a case: people who were not previously gun owners may decide to take up the hobby. But such migration would not threaten the benefits enjoyed by existing gun owners. One person's enjoyment of guns is not limited by the fact that another person also enjoys guns. In fact, as more people become gun owners, the pleasure of owning a gun can increase because there will be more people with whom he can share an interest. Furthermore, increases in the ranks of gun owners would enhance their political and social power, thus creating possibilities for even greater public acceptance of guns in the future.

Suppose, on the other hand, that gun owners originally enjoy a favorable climate for their hobby, but that gun collecting suddenly becomes stigmatized. This change in norms could result in migration in the form of exit as people who formerly collected guns find other things to do with their time. But the out-migration would not dissipate the benefits enjoyed by people who dislike guns. On the contrary, as gun owners give up their weapons, people who dislike guns are benefited, not harmed, because there are fewer guns around. Overall, exit from the disadvantaged group would not seem to dissipate significant welfare benefits for members of the privileged group.\textsuperscript{100}

Or consider feminists. A core item on the feminist agenda has been to fight against domestic violence by men.\textsuperscript{101} If men eschew violence, the welfare of many women will increase. But this does not create benefits that are subject to dissipation by entry. The increase in one woman's welfare is not threatened if other women also experience the same benefit. On the contrary, reductions in violent behavior towards previously victimized women would probably enhance the sense of security experienced by women overall, even those who were not previously the victims of domestic violence.

What about environmentalists? Suppose people begin to observe norms that contribute to a cleaner environment. Many an environmentalists' satisfaction in life will be increased—for example, because they can take greater pleasure in the outdoors. Because of the norm change, people may enter the ranks of environmentalists by

\textsuperscript{100} With respect to gun owners, the effects of out-migration are not so clear. Those who exit presumably do so in order to avoid future discomfort in the form of social disapproval. In this sense out-migration can dissipate detriments to some extent, although because the person who migrates is cutting his losses, the decision to exit doesn't avoid a loss of utility. As to those who remain gun owners, the fact that others have exited is likely to impose further costs because they lose valued opportunities to share their enthusiasm with others.

\textsuperscript{101} See supra text accompanying note 80.
discovering in themselves a concern for pure air and water. But there is little threat of dissipation, because anyone can take pleasure in a more pristine environment without interfering with the enjoyment by anyone else (at least until the parks become overcrowded). If, on the other hand, people became less rather than more respectful of the outdoors, the change would be deleterious for environmentalists, but the possibility of exit out of the ranks of environmentalists would not appear particularly likely to dissipate the benefits enjoyed by those into whose ranks the former environmentalists migrate.

Turning now to ideological norms, we find that benefit dissipation through migration is also unlikely. Suppose that a member of the religious right values prayer in public schools, even though she does not have young children. If as a result of activism by the religious right, schools implement prayers, the person obtains satisfaction based on commitment to a particular ideology. Although some entry or exit from public schools may occur as a result of this change—teachers and students who do not like prayer in school may leave, and others who value it may enter—the effect on the believer advocate is not likely to be significant. Benefits in this setting are unlikely to be dissipated by entry or exit.

An environmentalist, similarly, may be committed to certain ideological goals, the realization of which will be of little personal benefit. He may, for example, believe strongly in the importance of preserving the wilderness even though he never leaves the city. If the culture adopts norms that serve this goal—for example, if people harshly stigmatize developers in pristine areas—then more people may become environmentalists, but this fact would not dissipate the satisfaction the person feels as a result of the anti-development norm.

Or consider an animal rights advocate. She obtains no immediate personal benefit if animals are protected. Her benefit, as we have seen, is ideological in nature. Suppose that as result of the activities of animal rights advocates, the culture adopts norms that stigmatize harm to animals—for example, it becomes extremely unfashionable to wear mink. The benefit that the animal rights advocate obtains from this norm change is not subject to dissipation through entry or exit. Even if more people decide to join the ranks of animal rights advocates as a result of

102. See supra text accompanying note 82.
the norm change, this will probably have a positive rather than a negative impact on the individual.\footnote{103}

B. Backlash

Sometimes, efforts by interest groups to obtain competitive norms spark backlash from other groups.\footnote{104} Backlash appears to occur according to the following scenario. An interest group becomes organized and obtains competitive norms that benefit the group's members and harms others. The people who are harmed, however, are not organized. They do not have a strong sense of group identity and engage in no organized efforts to fight the activities of the broad-based movement. Thus the first group can obtain generous benefits for its members, and imposes significant harms on others. However, over time the people being disadvantaged by the group's activities become aware that the first group is acting in ways that are detrimental to their welfare. They begin to organize resistance to the competing group. Once organized, they attempt not only to prevent further inroads, but also to roll back gains the first group has achieved. This is the process of "backlash."\footnote{105}

Many activities of industrial lobbies and occupational associations appear directed at controlling backlash risk. Chemical manufacturers, for example, face the danger that they will be blamed by the public for polluting the environment. A bad spill could spark outrage, resulting in actions in the public and private spheres harmful to the manufacturers. To minimize this risk, the trade association of chemical manufacturers actively portrays itself as concerned about the environment and eager to participate in efforts to control pollution.\footnote{106} The alcoholic beverage industry, similarly, is aware of the possibility of public backlash against drinking (the history of Prohibition provides a good object lesson here). Possibly in an effort to reduce the risk of backlash, trade associations in

\footnotesize{103. Of course, mink-lovers may end up organizing a backlash against the norm, a topic addressed at infra notes 106-19 and accompanying text.}

\footnotesize{104. See, e.g., SUSAN FALUDI, BACKLASH (1991); see also Mark J. Roe, Backlash, 98 COLUM. L. REV. 217 (1998).}

\footnotesize{105. See generally FALUDI, supra note 104, at 46-226 (discussing the process of backlash with respect to the women's rights movement in America).}

\footnotesize{106. See CHEM. MFRS. ASS'N, A POLLUTION PREVENTION REPORT FROM THE CHEMICAL MANUFACTURERS ASSOCIATION, available at http://web.archive.org/web/20021017143855/http://es.epa.gov/ program/regional/trade/cma-rprt.html (last visited Apr. 24, 2004) (touting the industry's commitment to continuously improve its management of chemicals to improve safety, health, and environmental quality in ways that respond to public concerns).}
the industry promote programs to encourage responsible drinking and to discourage drinking and driving. When an industry fails to take suitable protections against backlash, the result can be damaging—as the tobacco industry learned when a broad-based movement of public health advocates, trial attorneys, and individuals opposed to smoking eventually coalesced into a powerful lobby against the product.108

Although all types of interest groups face backlash risk, the problem is especially pronounced in the case of broad-based movements. First, backlash is more likely for broad-based movements because they lack the centralized organization that typifies industrial lobbies and occupational associations. Broad-based movements tend to be loose coalitions of organizations, groups, and individuals who differ in many respects but who agree on certain common principles. Although they may be directed, to some extent, by an umbrella organization (such as the Leadership Conference on Civil Rights), the activities of broad-based movements depend on the interest and commitment of volunteers. Often such volunteers, as the people most committed to the goals of the movement, are more extreme in their views than are other members of the movement. One consequence of these features is that broad-based movements become most active at times when the membership’s attention is drawn to a particular issue or event.109 In such circumstances, the group’s power may temporarily be large, and its leaders, themselves more radical than the average member, may seek and then obtain changes in norms that are not viable over the long run. They believe it advisable to “strike while the iron is hot” in order to obtain maximum benefits for the group. However, this strategy may be shortsighted. Over time, the events that gave rise to the surge in support and interest among the members fade from memory. The group loses some of its power in the political and social system. Meanwhile, people who have been harmed by the group’s activities begin to organize. The opposing group


109. The nomination of Robert Bork to the United States Supreme Court, for example, was a catalyst for intense activism by broad-based movements both on the left and the right of the United States political spectrum. See, e.g., MICHAEL PERTSCHUK & WENDY SCHAETZEL, THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION (1989) (presenting views of opponents). Another example is the case of “partial birth abortions” which have been heavily stressed by pro-life campaigners, even though such abortions are rarely performed.
gains political power and influence. Eventually, the opposition is able to roll back the previous gains made by the first group.

Backlash is also more of a danger for broad-based movements because of the nature of the opposition. Industrial lobbies and occupational associations usually—although not always—confront other industrial lobbies or occupational associations when they seek to manage social norms. The American Bankers Association, for example, knows that to obtain certain benefits earnestly desired by its members, it will have to defeat the political power of the securities industry or the insurance industry. The trade group of psychiatrists comes into conflict with the trade group of psychologists over issues going to the competitive positions of the two specialties. In situations such as these, neither group is likely to obtain benefits that spark backlash. Whatever benefits the group obtains come over the organized opposition of the competing group, a factor that severely limits the possibilities for gain, but that also automatically controls backlash risk. The benefits will be limited in scope. Moreover, because the competing group is already in existence, it is unlikely that whatever benefits are obtained will spark the formation of a new, previously unorganized interest group. Thus, when benefits are obtained through a process of competition among organized groups, it is unlikely that the effect will be to create backlash.

In the case of broad-based movements, in contrast, a given movement may not encounter organized opposition at the beginning. Because it is very difficult to organize a broad-based movement for effective political action (due to free-rider effects), it will often be the case that the “field” of interests is relatively unpopulated at first. Thus, when a broad-based movement becomes established, it may find it relatively easy to gain benefits through political and norm-management activities. Over time, however, other groups may arise to contest the gains made by the broad-based movement.

A classic example of backlash against a broad-based movement is the case of affirmative action. For many years, the civil rights movement faced only minimal opposition from other broad-based movements. Segregationists were in retreat, and anyone brave enough to raise a voice against civil rights initiatives risked being stigmatized as a “racist.”

However, when the civil rights movement ceased to seek only equality, but also certain types of favored treatment, the effort sparked backlash. A popular revolt against affirmative action broke out. The result has been initiatives such as California's Proposition 209 and the Hopwood litigation, as well as the Michigan affirmative action challenge, Gratz v. Bollinger. Although the outcome of the fight over affirmative action is as yet unclear, it is evident that the backlash threatens to erode the benefits originally obtained by the civil rights movement.

Another example of backlash may have occurred in the case of feminism. Feminists have influenced culture in many respects, resulting in changes that arguably benefit women at the expense of men whose patriarchal privileges have been eroded as a result of changes in social norms. As long as the activities of feminists were not too threatening to men, they did not face organized opposition. But when feminists sought to obtain an Equal Rights Amendment to the Constitution, opposition against feminist goals coalesced into concerted political action that defeated the initiative. Some feminists, such as Susan Faludi, believe that the gains of feminism continue to face more general threat from male backlash.

The gay rights movement has also faced backlash. Social conservatives, who were once content to remain quiet, became vocal in opposition to homosexual rights once gays began to obtain significant victories in the political and the cultural arenas. Although the Supreme Court, in Romer and Lawrence, protected some of the gains made by the gay rights movement, the future of the gay rights agenda, in both the public and private or norm-based sphere, is today much cloudier as a result of the conservative backlash.

112. Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000) (involving non-minority applicants challenging race-conscious admission standards at the University of Texas Law School).

113. 539 U.S. 244 (2003).

114. See JANE J. MANSBRIDGE, WHY WE LOST THE ERA 8-9 (1986). For discussion of the contemporary “men’s movement,” see, for example, MICHAEL A. MESSNER, POLITICS OF MASCULINITIES: MEN IN MOVEMENTS 1-3 (1997).

115. See, e.g., SYLVIA BASHEVKIN, WOMEN ON THE DEFENSIVE 5-6 (1998); FALUDI, supra note 106, at xviii–xix.


IV. EFFICIENCY

The fact that a rule may protect a benefit does not establish whether or not that benefit is inefficient. In this respect, these norms bear a close resemblance to many more formal legal rules. For example, the law might provide that power plants may not burn high-sulfur coal. Such a law may create benefits for producers of low-sulfur coal, since it increases the demand (and therefore the price) of this product. The recipients of the benefits are likely to argue that the law is justified on environmental grounds. They might argue that the public benefits of banning high-sulfur coal (cleaner air) exceed the public costs (more costly electric power and the environmental harm created by alternative sources of energy). On the other hand, critics of the rule may argue that the benefits outweigh the costs, and claim that the reason for the rule’s existence is lobbying by the benefited interest. In this case, as in many cases, whether or not the law benefits or harms the public welfare may be a complex question for which there are no easy answers.

The same problems arise in the evaluation of the efficiency of competitive norms. The mere fact that a norm protects the interests of a particular group is not enough, in itself, to establish that the norm is efficient. To determine whether or not a given norm is efficient, we need to ask the following questions: (1) does the group that obtains the benefit value the benefit much more than the groups that give it up, and (2) do transaction costs prohibit bargaining solutions to the problem?

A. Costs and Benefits

Initially, in evaluating the efficiency of a competitive norm, it is necessary to inquire as to who is benefited and who is harmed by the practice, and to evaluate the magnitude of the costs and benefits. If the benefits outweigh the costs, the norm cannot be ruled out as inefficient, although further questions (discussed below) must then be addressed.

First, let’s look at industrial lobbies. Many efforts at norm management by industrial lobbies appear as relatively naked examples of special interest benefits without much in the way of public interest justification. Yet proponents are likely to argue that the practices in fact are beneficial to the public. Greeting card manufacturers who

119. Efforts to stave off competition from competing products appear to fall in this category. See supra notes 41-42 and accompanying text.
promote "Sweetest Day" may claim that people want an opportunity to express affection. The creation of a focal point for the exchange of affectionate messages may provide people with a valuable opportunity to enhance relationships with loved ones. The dairy industry argued, in the fight over oleomargarine, that there was a danger of consumer confusion between margarine and butter, and that the public would be better off if margarine were marked in some way that distinguished it from the traditional spread. \(^{120}\) Thus, even in the case of competitive norms promoted by industrial lobbies, it may not be possible to determine whether or not a given norm is efficient from a social point of view.

The analysis of norms protecting the interests of occupational associations is similarly ambiguous. Take the example, noted previously, of the recent addition to the American Medical Association's *Principles of Medical Ethics*, which requires physicians to "regard responsibility to the patient as paramount." \(^{121}\) This rule might be justified, from an efficiency standpoint, on the theory that it overcomes an externality that arises when a health maintenance organization seeks to cut corners on patient care in order to save money. On the other hand, a critic could argue that its major function is to increase physician income, and that the value to patients, in terms of increased care, is swamped by the costs, in terms of expensive and medically unnecessary procedures that the rule will allow. Or consider efforts of the organized bar to promote civility, also discussed above. \(^{122}\) These can be justified as valuable tools for combating an undesirable equilibrium in which attorneys are effectively forced to act rudely to one another despite the wish of most to be polite. As bad behavior drives out good in a forensic equivalent of Gresham's Law, \(^{123}\) both attorneys and their clients lose as a result of reduced job satisfaction and increased legal fees. On the other hand, a critic of civility codes may argue that they harm clients by reducing the zeal of representation in an adversary system and by triggering socially wasteful collateral litigation. \(^{124}\) Without more evidence, it is impossible to judge which of these views is correct (although we may be able to make an educated guess). The welfare implications are ambiguous.

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120. *See* Miller, *supra* note 41.
121. *See supra* note 62 and accompanying text.
122. *See supra* note 64 and accompanying text.
123. Gresham's Law is the economic observation that "when two coins are equal in debt-paying value but unequal in intrinsic value, the one having the lesser intrinsic value tends to remain in circulation and the other to be hoarded." *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 500 (8th ed. 1979).
124. *See* Aspen, *supra* note 64, at 256-58, 263-64 (describing, but rejecting, these criticisms).
Finally, consider broad-based movements. Some norms protecting broad-based interests appear to pass this initial test for efficiency. Take our example of a rule requiring younger and healthy people to yield their subway seats to old or infirm people.\textsuperscript{125} This norm is easily explained on efficiency grounds: the old or sick person is likely to value the seat much more than the young and healthy person, and the transaction costs of arranging an exchange of the seat for some type of consideration are likely to be prohibitive.\textsuperscript{126} Provided that they are not inefficient in other respects, norms of this type can be justified as beneficial to the society as a whole.

In other cases, however, competitive norms cannot easily be justified on efficiency grounds. For example, in the Jim Crow South, African-Americans had to sit at the back of buses. In addition to the stigmatizing message of being relegated to the rear, the back of the bus was a less desirable place to sit because one had to walk further—sometimes maneuvering past other passengers—in order to reach the seat. It is hard to see any general social value from this arrangement. A number of efficient norms could be imagined with respect to bus seating. If the bus is not going to be crowded, one might suppose that the best rule is that people sit as close to the door as possible. If the bus is going to be crowded, the best approach might be that people take the seat closest to the rear in order to minimize overcrowding in the front. But a rule requiring persons of one race to move to the back of the bus, even when the bus is not crowded, is unlikely to be socially efficient. There is no reason to suppose that European-Americans valued the convenience of sitting in front of the bus more than African-Americans valued it. The rule did not maximize the convenience of the public. Instead, it provided benefits to European-Americans, who could take pleasure at their superior social status, and harms to African-Americans, for whom the social practice was a constant reminder of discrimination.

For other competitive norms, it is more difficult to tell whether the benefited group gains more than other groups lose. Take the old rule that “children should be seen and not heard.” This norm imposed costs on children who were discouraged from their natural inclination to make noise. Presumably it was intended to benefit adults, whose ears would be spared if children obeyed the admonition. Thus, the norm can be seen as a benefit for adults. Someone who wanted to justify the norm on

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\textsuperscript{125} See discussion supra Part I.B.
\textsuperscript{126} Another example is the norm of respecting parking spaces set aside for handicapped people. See Levmore, supra note 1, at 2005; Miller & Singer, supra note *, at 86-87.
efficiency grounds could easily come up with a plausible explanation. If adults suffer more from hearing children make loud noises than children suffer from being restrained, then the rule might benefit society as a whole. Similarly, if administration of the rule on children has educational value, in that it trains them to become more productive adults, then it might be viewed as efficient even if the short-term harm to children exceeded the short-term benefit to adults. But because the values of these costs and benefits are completely uncertain, it is impossible to tell whether or not the norm is socially efficient.  

B. Transaction Costs

Even if we conclude that a given competitive norm can be justified from a simple efficiency standpoint, on the ground that the benefited group gains more than other groups lose, this is not the end of the analysis. If transaction costs are very low, then a market transaction between the parties is likely to be a more efficient means for allocating the benefit than allocation through the operation of a norm.

However, it will rarely be the case that transaction costs are low in the context of social norms. The meaning involved in social relationships is often so complex that simple market transactions for the purchase and sale of benefits would be nearly impossible. Moreover, because of the large numbers of people involved in the implementation of social norms, the problems of bargaining would ordinarily be intractable. Thus, the existence of a potential market solution will rarely be an objection to the efficiency of a competitive norm.

CONCLUSION

This Article has examined social norms from the perspective of public choice theory. It has identified a category of competitive norms that appear susceptible to analysis from this perspective, and illustrated various ways in which industrial lobbies, occupational associations, and broad-based movements seek to manage such norms for the benefit of their members. It has demonstrated that benefits protected by social norms, like benefits protected by statutes or regulations, are sometimes

127. Those who enforced the norm, at the time it was operating, probably would have asserted that it was a good rule for the society, but they were also the rule’s beneficiaries.

128. See, e.g., Cass R. Sunstein, On the Expressive Function of Law, 144 U. PA. L. REV. 2021, 2037 (1996) (observing that “if someone asks an adult neighbor to shovel his walk or to mow his lawn in return for money, the request will often be regarded as an insult, because it is based on an inappropriate valuation of the neighbor”).
dissipated as a result of market forces or backlash. The mechanisms by which benefits are dissipated differ depending on the nature of the interest group and the type of benefit involved. Competitive norms are not necessarily either efficient or inefficient. The welfare analysis depends instead on consideration of whether the net benefits to the parties outweigh the costs and whether transaction costs preclude market transactions.

Overall, this Article contributes to the literature on social norms. Competitive norms often do not represent an idealized product of spontaneous social ordering. They serve the interests of particular groups. In this respect, competitive norms resemble the laws and regulations that organized interest groups obtain through the political process. Public choice theory provides a framework for understanding the operation of these important mechanisms of social control.