Effective Rule of Law Requires Construction of

A Social Norm of Legal Obedience

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Introduction. Criminalization is a frequent remedy against harmful social practices. Often it fails. Imperial states in the past, and today wealthy and powerful states and the international organizations they influence, pressure and sometimes basically coerce weaker states into adopting criminal prohibition of longstanding and widespread social norms. Leaders of countries with weak social norms of legal obedience, knowing that an unpopular new law will go unobeyed and unenforced, are more likely to bow to external pressure to enact it. International human rights scorecards count enactment of a criminal prohibition as an achievement, but, excepting regular laments about nonenforcement of the law, tend not to consider whether such prohibition is having a beneficial effect. Using criminalization as the metric of success also creates the illusion that a difficult social challenge has been met, and thus inadvertently discourages allocation of resources to nonlegal methods more likely to achieve the goal of harm reduction.

One could find hundreds of examples all around the world of legal failure to change harmful social norms. Here is a perfunctory sample. I do not mean to single anyone out for criticism, only to illustrate a common pattern. Female genital cutting is contrary to law or policy in almost all major practicing countries. Such laws are rarely enforced and have had little effect; in cross-national comparisons, there is no relationship between stricter laws or more rigorous enforcement on the one hand, and decreases in the practice on the other (Boyle and Corl 2010, 199-201). Many such laws are enacted as a condition of receiving aid from national and international donors, including the U.S., the I.M.F., and the World Bank (Boyle 2002). Caste discrimination has been illegal since the adoption of the Indian Constitution in 1950, and although there is progress, such discrimination is still common. The diagnosis? “The anti-discrimination efforts have been impotent through poor enforcement and a general lack of political will. The police and the low level judiciary have been at the center of the failure to prevent caste discrimination” (Sarkin and Koenig 2010, 550). Prominent among proposed solutions: the international community, especially bilateral pressure from other states, should “push” India towards compliance with international human rights norms (575-576). In India, underage marriage has been illegal since 1929 (the Child Marriage Restraint Act: girls 14, boys 18), since 1955 (the Hindu Marriage Act: girls 18, boys 21), and since 2006 (the Prohibition of Child Marriage Act). Yet, 47% of girls are married before age 18 (http://www.icrw.org/child-marriage-facts-and-figures). I suggest that 80 years of legal failure to deter underage marriage should prompt a reexamination of assumptions.

The main assumption at fault we can call the doctrine of legal centralism (criticized by Ellickson 1994, Galligan 2003, Williamson 1983): the belief that in most places most people obey most laws, and hence that the law is always the best way to bring about social change and to reduce social harms. The belief is false. The law is often not obeyed, and law is often not the best way to bring about beneficial social change. People are not objects which respond to written instructions. They are agents who act for reasons.

More than because of the threat of legal punishment, people obey the law because they fear the disapproval of their social group if they violate the
law, and because they generally see themselves as moral beings who want to do the right thing as they perceive it. (Robinson 2000)

Legal centralism overlooks the moral and especially the social motivations for legal obedience. The remainder of the essay explicates the strengths and weaknesses of legal and social methods of global development, expanding on the following points.

Criminalization is an appropriate response to a criminal injustice, a deviation from accepted norms, its harmful consequences intended, knowingly committed by identifiable individuals, whose wrongdoing should be punished. It is not an appropriate response to a structural injustice, in compliance with accepted norms, its harmful consequences unintended byproducts, and caused by everyone and no one. The proper remedy for a harmful social norm is organized social change, not fault, blame, punishment.

Effective rule of law requires a social norm of legal obedience in the population. Between Western Europe and Eastern Europe, for example, legal penalties and moral respect for the rule of law are equivalent. In the West, there are reciprocal expectations of legal obedience in the population, but in the East, there are reciprocal expectations of legal disobedience. Bribery and corruption in the East are morally condemned but socially necessary. They can only be changed by a shift in reciprocal expectations among a large enough portion of the population, a seemingly impossible task.

The Cultura Ciudadana program of the Mockus mayoral administration (now institutionalized in the Colombian NGO Corpovisionarios) invented and refined in practice successful methods to strengthen the social norm of legal obedience in Bogotá, thereby bringing about an effective rule of law which greatly improved the lives of its citizens. How to establish the rule of law in the many settings where it is absent is an urgent question on the international development agenda; and progress is, at best, uncertain. Cultura Ciudadana is unique, both in recognizing the necessity of the social norm of legal obedience, and in showing how to construct it. Elsewhere, I have written about how Bogota’s revival is due more to pedagogical politics than to fashionable theories of democratic deliberation (Mackie Forthcoming). The program requires meticulous analysis from the standpoint of social norms theory. The purpose of this essay, however, is to make known a sound theory and effective practice to strengthen the rule of law where it is weak, an issue of great interest to global policymakers.

Cultura Ciudadana’s doctrine, and civic practice, is the harmonization of moral, social and legal norms. Policy should rely first on moral regulation, next on social regulation, and only as a last resort on legal regulation, and all three systems of regulation should be in harmony with one another.

Criminalization fails where there is no social norm of legal obedience, when a new legal norm is too far from a current social norm, or both. When a new legal norm is too far from a current social norm, law enforcement personnel have reasons not to enforce and citizens have reasons to disobey. Extralegal sanctions, moral and social, in support of legal obedience are absent. A growing number of unenforceable particular laws can
erode obedience to other laws and general legal obedience. It may be more effective to enact a new legal norm closer to the current social norm. Then law enforcement personnel, and citizens, have more reasons to obey. Enacting enforceable laws, integrated with moral and social mobilizations, strengthens the social norm of legal obedience.

Liberal democracies hold the view that a reason to support criminalization of an act is to reduce harm to others. However, criminalization is not justified if the benefit of the harm reduction intended by the law is outweighed by unintended harms done to other important values. Also, criminalization, which threatens deprivation of liberty, is only justified if it is significantly more effective than noncoercive methods of reducing harm, such as change in moral and social norms. Many international campaigns to criminalize social norms would not survive application of standard liberal-democratic principles. Instead of assuming that law is automatically effective, policy design should consider whether and how a law hurts or helps on a topic of concern.

Why do People Obey the Law? Tyler (2009) emphasizes legitimacy as a motivation to obey the law, and urges that we should socialize citizens to internalize moral values, so that we can rely on their voluntary cooperation with legal commands rather than on punishment. In contrast, Gary Becker’s (1968) economic approach to crime and punishment emphasizes the material costs and benefits of the criminal act, and predicts that a citizen would break the law whenever the expected value of the benefits exceeds the expected value of the costs. To deter crime, increase its costs. A more nuanced view is that, across the diverse members of a population, both an acceptance of authority as legitimate and fear of punishment are necessary for a state to achieve stable legal obedience. A study of German respondents (Kroneberg, et al. 2010), for example, finds that the material costs and benefits of crime are irrelevant among the larger part of the population motivated by internalized norms. It’s not that they weigh up normative costs and benefits with the material costs and benefits; if normative considerations apply, material considerations do not. Only a subgroup of the population is governed by material costs and benefits.

There is a tendency in several literatures to neglect the social norm of legal obedience. There are important exceptions to the tendency, notably the scholars of “legal pluralism” (for example, Toomey 2010) Among legal philosophers, H. L. A. Hart (1994, 86) is clear that internalized moral obligation, social pressure, and physical sanctions are among the motivations for legal obedience. Next, consider that extralegal sanctions, moral and social, contribute to the reduction of harmful behavior, legal or illegal. American criminologists have found that the deterrent force of criminal law depends less on the legal sanctions themselves and more on the extralegal sanctions associated with the suspect’s arrest, trial, conviction, or imprisonment (Nagin and Pogarsky 2001, 11 references omitted):

studies investigating extralegal sanctions have shown that a belief that illicit conduct is wrong…and the fear of peer disapproval, embarrassment, or social stigma…discourage offending behavior. Further, several studies
investigating the relative strength of both sanction forms find the conforming influence of extralegal sanctions to be far greater than that from legal sanctions…

These findings are appreciated by some legal theorists, notably Robinson (2000):

The "normative" crime control mechanism, as it might be called, does not shape desires by threat of official sanction, as deterrence does, or through a coercive regime of official therapy or treatment, as traditional rehabilitation does. Nor does it simply give up on altering desire and simply detain or incapacitate the offender. Instead, it works through unofficial avenues to bring the potential offender to see the prohibited conduct as unattractive because it is inconsistent with the norms of family or friends and, even better, with the person's own internalized sense of what is acceptable. Not every potential offender is amenable to this normative pressure, but many non-offenders may obey the law because of it. Thus, code drafters must worry not only about controlling the hardest core amorals among us, but also about maintaining the criminal law's influence in keeping law-abiding that vast proportion of the population for which normative crime control is important, perhaps more important than coercive control.

Not only makers of the law, but all those who design policies and programs should be mindful of the interplay among the moral, social, and legal aspects of community regulation.

Is it Right to Criminalize a Social Norm? Iris Marion Young (2011) offered a social connection model of responsibility and community action, in place of the liability model of responsibility which faults, blames, and punishes individuals. I shall illustrate her ideas by comparing the structural injustice of dowry to the criminal injustice of dowry deaths in India (borrowing from Brendan Mackie 2005). Dowry is a practice wherein the bride’s family is expected to make sizable, even lavish, gifts to the groom’s family, both at marriage and thereafter. Since all families expect dowry for marriage, to forego it would make the daughter difficult to impossible to marry. It is a social norm, held in place by reciprocal expectations in the population. Because girl children will marry out and not contribute resources in the future to the natal household, and because the natal family is additionally burdened with dowry obligations, the birth of a daughter is a loss compared to the birth of a son. The practice is a major cause of female inequality, incentivizing families to devalue the girl-child, to neglect her health, education, and welfare, to commit female feticide and even infanticide. Dowry death is practiced by a tiny minority of groom’s families, who systematically extort further payments from the bride’s family by threat of abuse, murder, or forced suicide of the wife.

Dowry death is a criminal injustice. It is ghastly but rare; the frequency is not well measured, but seems to be about 5,000 deaths a year, and even if it were ten times that number it would still be far less frequent than dowry.
Those who commit dowry death are a minority who deviate from widely accepted social norms. The harmful consequences of their actions are fully intended. One or a few individuals are culpable in a dowry death. The remedy is backward-looking: punishment of guilty individuals, for the purposes of retribution, deterrence, or both. Dowry itself, however, is a structural injustice. The prevalence of dowry in rural India from 1960 to 1995 was about 93% (Anderson 2007). Those who engage in the practice of dowry are in compliance with a widely practiced social norm, followed even by those who oppose it. The harmful consequences of the norm on the welfare of women are largely unintended byproducts. The practice exists as a matter of shared responsibility among all in the community of reciprocal expectation. It can change only if the reciprocal expectations among those in the community change. The remedy is forward looking: organized community change of the norm.

Legal centralism would apply the liability model of responsibility to dowry death, where the model’s assumptions are appropriate and would probably reduce harm. Legal centralism would also unreflectively apply the liability model to a structural injustice such as dowry, where the model’s assumptions are inappropriate, and could even increase overall harm. To threaten the vast majority of some population with the deprivation of liberty is harmful, is more harmful if the law is ineffective because unenforceable, and is yet more harmful if the disobeyed law contributes to a weakening of the social norm of legal obedience. To criminalize a harmful social norm can be, on balance, a moral wrong.

Whether or not it is right to criminalize harmful social norms, is it effective to do so? Law often fails at this task. I suggest that such failure occurs in settings where there is a weak or absent social norm of legal obedience (or even where there is a social norm of legal disobedience); or when a new legal norm is too far from the current social norm; or both.

**Where There is No Social Norm of Legal Obedience.** The discord between legal norms and social norms is well documented in post-Soviet Europe. It is also a problem in some postcolonial regimes, for similar reasons. Galligan (2003) calls it a double pathology. For the Soviet regimes, and sometimes their imperial predecessors, law was purely instrumental, based only on threatened and actual punishment. Law was alien and external to the population; the state itself acted arbitrarily and was not constrained by law. Widespread social norms of getting around the law emerged in response, norms of bribery and corruption that would be pathological in better political circumstances.

A social norm is constructed from what an individual believes that others do (Bicchieri 2005 -- empirical expectations, Cialdini and Trost 1998 – descriptive norms) and what an individual believes others think he has an obligation to do (Bicchieri – normative expectations, Cialdini – injunctive norms). Empirical expectations and normative expectations are often aligned, but they can diverge: picture a table full of smokers sitting under a no smoking sign. When they diverge, people tend to do what they believe others do rather than to do what they believe others think they have an obligation to do (Bicchieri, Cialdini).
Reciprocal expectations of legal disobedience in a population are locked in, no few members of the population can opt for obedience if others do not, even as the political regime that originally created such expectations vanishes from the scene. I know of no better illustration than the following remarks by Oleg Bocharov, chairman of the Legality and Security Commission of the Russian Duma, Moscow (quoted in Kurkchiyan 2003).

Ask any law-abiding citizen when corruption in Russia will diminish, and he will reply: when fines are made reasonable and the procedure of paying them simple. But he does not believe that the time will come when the inspector will stop soliciting bribes. The inspector on his part will tell you that he will stop soliciting bribes when he is paid a normal living wage. But he does not believe that the businessman will start paying taxes. The businessman says that he will start paying tax to the treasury and not to the inspector when taxes are reasonable and the state comes to show concern for him. But he does not trust the politicians and the bureaucrats. The politician tells you that he will agree to tax reform when the treasury gets enough revenue to pay decent salaries and social benefits. And then there will be growing social protest against bribery. But he does not believe that will happen.

Kurkchiyan contrasts a society whose members, I would put it, happen to be born into reciprocal expectations of legal obedience: “there is a strong belief that most of the people function most of the time according to the rule of law…and that to break the law, or even to bend it, is socially disgraceful” (28); to a society whose members happen to be born into reciprocal expectations of legal disobedience: “people generally assume that everybody else is routinely disobeying the law. People are generally disrespectful, or believe that everyone else is, of all the agencies and agents of the law” (29).

Legal disobedience, says Kurkchiyan, citing population surveys and systematic interviews, is contrary to the moral values of most post-Soviet citizens. They morally endorse the rule of law as much as do their Western European neighbors (Galligan 2003, 1). If they expected that enough others would comply with the law, they would abandon bribery and corruption. They disobey, “not because they want to, but because they feel they must if they are to manage their lives and reach their personal goals under the conditions imposed on them by the society around them” (Kurkchiyan, 31). I add that whether one is born into circumstances of legal obedience or of legal disobedience is a matter of luck, not of personal virtue.

Thus, what is needed to overcome a “culture” of legal disobedience is probably not moral reform of the citizenry (and if such reform were needed and did succeed, it still would not be sufficient). What is needed is a shift from reciprocal expectations of disobedience in the community to reciprocal expectations of obedience to the law. One “does not believe that will happen,” but Mockus’ Cultura Ciudadana shows us how to help it happen.
The Harmonization of Norms. Mockus (No Date, p. 15) talks about a shortcut culture among some Colombians, sometimes using means that are immoral or illegal, such as corruption or violence. Sometimes the harmful shortcut is forbidden by law, but not by moral or social norms. Illegal shortcuts can even elicit social esteem, acceptance, approval; there can be a social norm of legal disobedience. This leads Mockus to propose the doctrine, and civic practice, of the harmonization of moral, social, and legal norms. By this, we mean neither the harmonization of all norms across society, nor their harmonization within the individual. Rather, in response to a particular harm, legitimate and effective regulation requires that the applicable moral, social, and legal norms are in harmony rather than discord. He distinguishes three regulatory systems, and the main reasons to obey in each. His scheme posits emotions as motivators, which I think is mistaken: emotions properly interweave with beliefs to form judgments, but an emotion in isolation usually is not and should not be a sufficient reason to act (compare Hart 1994, 180). Here is my amended version of the scheme.

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<th>Legal Norms</th>
<th>Moral Norms</th>
<th>Social Norms</th>
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<tr>
<td><strong>Positive Reasons</strong></td>
<td>Respect for the law</td>
<td>Good conscience</td>
<td>Esteem Acceptance</td>
</tr>
<tr>
<td><strong>Negative Reasons</strong></td>
<td>Legal penalties</td>
<td>Bad conscience</td>
<td>Disesteem Rejection</td>
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<td><strong>A typical emotion in a violator</strong></td>
<td>Fear</td>
<td>Guilt</td>
<td>Shame</td>
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Javier Guillot (2012) of Corpovisionarios illustrates how the three regulatory systems apply to different actions. To help a blind person cross the street is legally, morally, and socially permitted. In Colombia, to overpay taxes would be both legal and moral, but would invite social ridicule. It is legal for a very Catholic woman to obtain an abortion in another country, although it would be morally and socially condemned. Sometimes aggressive flirting is socially accepted, and legal, but would be considered immoral as well. In the past, bribing a police officer would be socially accepted or even expected in Bogotá, although illegal and immoral. Informal construction of neighborhoods was socially and morally condoned, although illegal. A destitute woman requiring an abortion might do so in good conscience, even though the act is socially and legally discouraged.

Corpovisionarios presents this scheme in its pedagogical engagements and surveys, and asks people to say what one reason moves you to obey the law, and what one reason moves others to obey the law. The typical modal responses in Colombia are that I obey the law for moral reasons, but that others obey the law to avoid legal penalties (Guillot 2012). This is consistent with a set of findings in social psychology that people tend to think of themselves as intrinsically motivated and of others as extrinsically motivated (summarized in Feldman 2011, pp. 29-36). Guillot suggests that people might
mistakenly demand that the state apply harsh legal penalties, when in fact moral appeals would be more effective in the community.

In the shortcut culture, says Mockus (No Date), discord between harmful social norm and beneficial legal norm is frequent. The obeyed social norm trumps the disobeyed legal norm; people are more likely to do what others do than to do what others believe they are obligated to do. The Cultura Ciudadana seeks to harmonize beneficial moral, social, and legal norms. Individual moral principles can be revised in individual and collective deliberations, the concientización already practiced in Latin America. The greatest innovation in Bogotá was municipal efforts to change social norms in the city. Mockus proposed: since we don’t obey legal norms, let’s change social norms. The pedagogical politics advocated by Mockus can also promote public discussion of justifications for existing or proposed law, and law enforcement can resort to pedagogy before force. New legislation and its legal enforcement should be accompanied by moral and social mobilization.

Municipal administration and law enforcement were reformed, and the state became more responsive. The city code was thoroughly revised, to promote first moral self-regulation, next mutual social regulation, with law enforcement as the last resort. A core moral value appropriate to a pluralistic society was celebrated: human life is sacred. Controversial revisions of social and legal norms were justified in part by reference to that core moral norm. Homicide was reduced by harmonizing moral, social, and legal remedies, as were traffic fatalities. Tax collection was substantially increased by harmonizing remedies, including a request that citizens voluntarily pay 110% of municipal taxes due. The direct effect was that 63,000 from all social classes made the voluntary contribution; the attendant moral and social mobilization had the much larger indirect effect of a dramatic increase in tax compliance. Says Mockus (No Date),

Voluntary contributions are also the basis for a pedagogy by example. Social and moral norms of approval, admiration and self-gratification come into play….There is a shift from a situation where paying taxes is a tiresome obligation to one where there are reasons to feel proud and to congratulate people who contribute. The strategy of mobilizing pride and social approval is a useful alternative to legal sanctions….In fact, a good part of the collection strategy in the Finance Secretary was based on persuasion, not coercion.

The state itself became more legal and respectful of citizens, inviting reciprocation from them. The social norm of legal obedience to particular firearm laws, traffic laws, tax-collection laws – an increasing number of individuals believing that an increasing number of individuals comply with the law – was strengthened with respect to each particular law. I propose that, just as multiple disobedience to particular laws can feed disobedience to law in general, multiple changes in obedience to particular laws can feed obedience to law in general. That has been the subjective impression in Bogotá, which went from one of the most violent cities on earth to a better (yet imperfect) place.
For a group to escape the social trap of legal disobedience, enough people must believe that enough people are becoming obedient to the law. This is the purpose of many of the superficially disparate and zany methods of Cultura Ciudadana. In this essay, focused on the importance of the social norm of legal obedience to the rule of law, there is not space to report the content of those intriguing methods.

**When the New Legal Norm is too Far from the Current Social Norm.** What happens if a law criminalizes a behavior supported as a social norm among most of the population or some insular part of it? The “criminal law’s audience,” says Stuntz (2000, 1871), “is…law enforcers, not ordinary citizens….popular norms…regulate the conduct of the citizenry.” Law enforcers do not enforce a new law too far from the current social norm (adapted from Kahan). Police and prosecutors are usually granted discretion to selectively enforce the laws, and are limited in resources. As a result, they will pursue crimes that enforcers and the local community most want to be punished. Judges and juries additionally will be reluctant to punish when crimes that they think are worse are punished less or not at all by the courts. Recall the hypothesis reported in the introduction to this essay, that the failure of laws against caste discrimination in India is due to inaction by local police and courts. Finally, legal enforcement could even strengthen the harmful social norm by increasing public knowledge of the fact that many don’t obey the law against it (Carbonara, et al. 2008).

Citizens tend not to obey a law too far from local social norms. If the law is also too far from one’s moral norms, then the law’s legitimacy is weak, and although (on some accounts) the obligation to obey the law just because it is the law still applies, there is no further moral motivation arising from the content of the particular law. The citizen knows that law enforcers are unlikely to enforce. Social reasons to obey are weak or absent. The citizen knows that the new law is backed only by legal sanctions, not by extralegal sanctions of greater force. For all these reasons the citizen knows that many others will not obey the law. The citizen, especially if she is disadvantaged by compliance, may ask, If others don’t obey, then why should I? Finally, a legal norm can be an outside option that works to increase the bargaining power of the weak living under local community social norms, a magnet pulling the social norm in the direction of the legal norm, but not if the legal norm is so far away that the threat to seek its enforcement is not credible to other members of the local community (Platteau).

Stuntz (2000) says that if there is pressure from above to enforce, it will likely be against the weaker parts of the community. He examines the prohibition of alcohol in the United States from 1920 to 1933. There was enough moral and social motivation to enact Prohibition, which added legal sanctions to existing moral and social sanctions. The legal norm, however, undermined moral and social regulation of alcohol consumption. Since vice is everywhere, enforcement is inevitably selective. Law enforcers are tempted to take the cheapest course of action, and thus enforced prohibition in poor urban neighborhoods, and not among the middle and upper classes. Differential enforcement against the urban poor created a contempt for the law among them. Violations of laws associated with Prohibition and its enforcement were no longer socially stigmatized, collapsing the criminal prohibition’s deterrent force, according to Stuntz.
The same counterdeterrent effects are reported today in poor urban neighborhoods in the U.S. exposed to differential enforcement of law, notably enforcement of drug laws in African-American communities. The U.S. incarceration rate is the highest in the world, 25% of it for drug violations. This has two effects, according to Fagan and Meares (2008). First, state budgets are limited, and increasing expenditure on formal legal controls means decreasing expenditure on activity that supports informal social controls in the community, such as for health, education, and welfare. Second, “high rates of punishment produce ‘stigma erosion’”: the deterrent force of extralegal negative sanctions for law violation vanish, requiring ever greater enforcement effort and harsher legal punishments. I add that there can even result a new norm of pride and approval for having been imprisoned, and an outlaw culture regulated by strong social norms including one of more general defiance of the law.

Thus, even if there were the political will to zealously enforce an unpopular legal norm, the results would likely be perverse. What can be done is to enact a new legal norm closer to the current social norm (Kahan 2000). For law enforcers, and for citizens too, their respect for the law in general is of greater weight than the moderate departure of the legal norm from the current social norm. The citizen expects that some citizens will comply voluntarily, that law enforcers will enforce, and that some would apply social pressure on the disobedient. An effective legal norm also works as an outside option strengthening the bargaining of the weak living under local community social norms (Platteau).

Here are some examples. In Bogotá, which suffered from high firearms mortality, it was politically and legally impractical to ban them. Yet Mockus was able to ban firearms on weekends (when, in association with alcoholic revelry, more shootings occurred). This was both practically enforceable and a prompt for many local discussions about the purposes and benefits of firearms regulation, thereby strengthening moral and social regulation of firearms in public. His administration also organized voluntary surrender of firearms, among several other elements of an integrated moral-social-legal mobilization to reduce violence. Gabon, and Senegal, former French colonies, banned the practice of polygamy, with little effect. Each shifted to a more moderate – and effective – regime of monogamy or polygamy as a choice in the initial marriage contract (Platteau). In Ghana, a more moderate law bestowing inheritance rights on women and children was more effective than the previous extreme law (Platteau). Ostrom (see review by Cox et al., 2010) observed across many cultures that local community regulation of tragedy-of-the-commons dilemmas (use of common pasture, forest, fishery) relies on negative sanctions that are initially mild and gradually increase.

Also, following Kahan (2000), we could turn what I call the legal-social-legal ratchet. Enact a moderate new legal norm. It is more respected, more enforced by legal and social sanctions, and more obeyed. As obedience increases, those motivated to do what others do obey as well. The effective law sparks discussions about its purposes, and if there are good reasons to believe that one is obligated to follow it, then they gain in salience. Changing moral and social attitudes lead politically to a moderately stronger
new legal norm, which pulls the social norm further towards it. Still later, a stronger legal norm can be enacted, and so on. Kahan traces the strengthening of legal and social norms in the U.S. over 30 years regulating public smoking, domestic violence, and sexual harassment in the workplace. If one were to transplant strong antismoking regulation from a country with a long history of the ratchet, to a country with no history of the ratchet, the regulation would fail, as I am told happened in Albania. The U.S. ratchets described by Kahan were not deliberately designed, but were the result of the forces of change clashing with the forces of tradition. When the forces of change gain an extraordinary advantage, such as when a stronger power pressures a weaker one, ineffective law can result. Advocacy of the ratchet is not motivated by conservative sentiments, but by a concern that law effectively obtain its intended results. Sometimes of course, the situation requires that strong laws be enacted immediately.

Many international institutions have ongoing agendas of imposing laws on states, on the legal-centralist assumption that law reliably causes social change. A first-best alternative would be for these institutions instead to support harmonizing moral-social-legal engagements carefully designed to respect autonomy and to minimize harm. There is some motion in this direction; for example, a bill pending before the U.S. Congress contemplates an array of programs to prevent underage marriage (including pressure for criminalization) which, with vision, could be implemented in an integrated fashion (H.R. 6087: International Protecting Girls by Preventing Child Marriage Act of 2012; 112th Congress, 2011–2012; text as of July 9, 2012). Legal centralism is so firmly entrenched, however, that we should also consider second-best alternatives. If institutional imperatives continue to require criminalization of harmful social norms, then enforcement of the law often should be explicitly moderate. For example, the law can state that its penalties will begin to apply five years hence; or can increase penalties gradually over time; or officials could convict violators but suspend penalties; or by declared policy it would only be enforced in egregious circumstances; or only enforced at the request of local communities or women’s associations; or a violation would trigger official-local community consultations.

Whether moderation in substance, scope, penalties, enforcement are appropriate depends upon the context. For example, in Sudan and the Horn of Africa some policy influentials proposed substitution of an intermediate form of FGC for the extreme form. Those familiar with the practice and with successful abandonments elsewhere correctly opposed this attempt at moderation: research showed that there was widespread confusion about what would count as intermediate, whether an intermediate form were actually adopted would be impractical to verify, and the social effort required for successful abandonment of the practice altogether would be about the same as the social effort required for moving to an intermediate form.

**Minimize Harm.** What justifies coercively interfering with an individual’s liberty by arrest, trial, fine, reparations, imprisonment? For liberal democracies, it is usually justified by some version of John Stuart Mill’s harm principle. Which version is best is controversial, but let’s fix on Feinberg’s (1987, 26) prominent formulation. He says,
It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.

Reducing harm to others is a good reason to support criminalization of an action. Not all harm to others is wrong; for example, J.S. Mill argued that there are winners and losers in honest economic competition, but that overall such competition is better for society. If an action that harms others is wrong overall, the question remains whether law and its enforcement do greater wrong to other values. Romantic betrayal is quite harmful, but for the state to criminalize it would be a cure worse than the disease; even if we’d tolerate the police and courts poking their nose into intimate relations, the legal process is ill suited to discover the truth, if any, in such disputes. Criminalization of a harmful social norm could result in greater harm, for example, to family relations, or to religious freedom, or to social peace. If, due to unpopular pressures from outside or within the country unenforceable prohibitions are regularly enacted, then that would erode people’s general respect for the law, doing greater harm in other realms. The harms that a law and its enforcement impose on citizens are not justified if that law is not actually effective in reducing the harms it is intended to punish. Even if a law were effective, we must consider whether nonlegal methods could be at least as effective and applied with less harm to other values. Many purportedly liberal international efforts to “push” and “pressure” weaker states into adopting criminal prohibition of harmful social norms would not survive application of the harm principle, would be illiberal.

The imposition of legal centralism is the most coercive form of the social-engineering approach to global development assistance which treats humans as objects. Noncoercive methods can also be objectionably paternalistic, supplying resources on condition that the recipients perform particular actions, or supplying biased and one-sided information in order to “manipulate” the “behavior” of the “targets.” The indirect, autonomy-respecting, capacity-enhancing approach to development aspires to engage humans as agents (Ellerman 2006). Would it be improperly paternalistic for a state to engage in a public pedagogy intended to alter moral and social norms among its citizens? Not necessarily. As we have seen, it can be justified to coerce in order to minimize harm to others, to protect the conditions of their autonomy. To deploy public pedagogy to minimize the same harms must be at least as justified as coercion. The liberal democratic state is obliged to refrain from coercively interfering with the right of free expression. Yet the state’s expressive powers – as educator, speaker, spender – can, within limits, be legitimately deployed in support of the basic rights, such as to life, liberty, and equality, that are presupposed by the liberal democratic state (Brettschneider 2012).

Law Can Retard or Hasten Change in a Harmful Social Norm. Ellickson (1994) studied how ranchers in Shasta County, California, USA, settled cattle ranging disputes, and found that they followed local social norms, and not the applicable legal norms, indeed, there was a social norm against resort to legal remedy. In face-to-face relations among equals, and assuming little harm to people outside the group, favoring social
norms over legal norms could easily make most people better off. In populous anonymous settings undergoing change, however, a beneficial system of social norms is less likely to emerge, and spontaneous correction of harmful social norms is even less likely. The state is needed to foster and coordinate a moral, social, and legal framework among pluralistic and anonymous citizens (adapted from Galligan 2003, 13).

There are manifold relationships between legal norms and social norms (McAdams and Rasmusen 2007). Here are some of interest in this context. Independently of its regulatory purpose, a law can have expressive purpose (McAdams 2000): law can indicate that society judges something wrong, and thereby be a reason for people to morally reevaluate the prohibited action, as well as to socially regulate compliance. In contrast, an unpopular and ineffective law can drive harmful activity underground, perhaps carried on under more dangerous conditions. A law can do more harm than it prevents by foreclosing the possibility of honest public discussion, making more effective moral and social methods of regulation impossible to undertake. Laws against female genital cutting, for example, drive the practice underground, and lead parents to cut their daughters at younger ages; the threat of prosecution can cause survey respondents to falsely report abandonment (Boyle and Corl 2010, 200). Biased survey responses create the illusion of harm reduction.

The interplay between legal norm and social norm in any particular context requires careful study. Shell-Duncan et al. (2012), for example, scrutinize the relations between the legal norm and social norms regulating FGC in Senegal (I add personal knowledge about events as well). In Senegal, shortly after the first organized community abandonments of FGC, the President unexpectedly rushed to enact legislation harshly criminalizing the practice. The communities which had acted socially to abandon FGC opposed the law, on the grounds that other communities should, and would, voluntarily abandon it after due consideration. The new law did discourage public discussion and progress on voluntary approaches for some time. In response to popular outcry, the government indicated that the law was more aspirational, expressive in intent, that it would only be enforced in quite narrow circumstances: a few were arrested but not prosecuted, later a few were prosecuted but given suspended sentences, and later some circumcisers were jailed but released early. As time went by, the law in its expressive aspect was sometimes offered as one reason for voluntary community abandonment. As well, the law became a resource in communities which had voluntarily abandoned: potential transgressors could be warned that they would be taken to the police. The combination of social and legal sanction is potent (see also UNFPA-UNICEF No Date on the insufficiency of law alone).

**Conclusion.** For those who would advance the realization of human rights, there are good moral and practical reasons to discard legal centralism and take up a contextually variable and integrated moral-social-legal approach to the reduction of harm. General legal disobedience can do great harm. Effective rule of law is absent in many settings. To bring it about requires construction of a social norm of legal obedience. Mockus’ *Cultura Ciudidana* show us how to do that. It is worthy of study, elaboration, refinement, and dissemination.
References


Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law.”  


UNFPA-UNICEF Joint Programme on FGM/C. No Date. “Senegal: Human Rights Key to Ending FGM/C; Legislation is Just One Aspect of an Effective Campaign.”


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