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Michael Faure* and Laarni Escresa

1. Introduction
The law and economics literature has for many years now pointed out that incentives guiding the behavior of individuals can not only emerge from formal rules of law, but also from social norms. An important focus in that respect is on stigma, namely that a particular behavior which would violate (social) norms would impose a negative label (stigma) upon the perpetrator of the norm. The basic idea is that fear of this negative labeling would provide ex ante incentives to individuals to avoid the stigma.

This idea also has a strong intuitive appeal. Individuals care about their reputation in social interaction. Moreover, a loss of reputation can also impose serious costs upon individuals.

It is the role of reputation and the mirror image of this, the loss of reputation or stigma, which are the focus of this chapter. Attention to stigma has of course not only been paid in the law and economics literature. Erving Goffman wrote a seminal work called *Stigma* where he qualified those who have been shamed as “discredible”, referring to the fact that an alienation of an offender takes place as a result of the stigma (Goffman, 1963, 41–2).

The law and economics literature has increasingly paid attention inter alia to the question of how reputation is created and what particular aspects of social interaction can contribute to a stigmatizing effect in case of the violation of social norms.

There is one particular domain in the law which has as a particular feature that it is supposed to stigmatize the perpetrator and hence intentionally stigmatizes deviant behavior in order to provide incentives for compliance. This is the domain of the criminal law. The question that has been addressed in the literature is what it is that makes the criminal law have such a stigmatizing effect and how, to put it differently, can criminal law (via its stigmatizing effect) contribute to compliance with social norms.

In addition to this – largely theoretical, but to some extent empirical – literature, the question has also been asked how the notion of stigma in

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criminal law fits into the well-known economic theories of crime. Stigma could impose additional costs on the perpetrator which could hence amount to an additional penalty, in addition to the sanction which is formally imposed through the criminal legal system (e.g. a fine or non-monetary sanction, such as imprisonment). The question arises under what conditions a conviction through a criminal court could have such a stigmatizing effect and hence what the role of this stigma might be within the economic model of crime.

In recent years some have taken the idea of the stigmatizing effect of criminal law further and have suggested that an important function of the criminal law should be the “naming and shaming” of perpetrators, which would serve a variety of functions (such as punishment, retribution and deterrence, but to some extent also reintegration and restoration). This raises questions as to whether such “naming and shaming” can be effective as an instrument of crime control. There are increasingly empirical studies, from criminologists, among others looking at this phenomenon.

In sum, this chapter will review the way in which stigma can also be seen as a source of norms, providing incentives for compliant behavior. A crucial question in that respect is of course what affects stigma and to what extent the law itself (e.g. by criminalizing particular behavior) may contribute to this stigmatizing effect. The chapter touches upon this topic by reviewing both the empirical as well as the theoretical literature. Particular attention will also be paid to legal and criminological literature that addresses the question of whether intentionally imposing stigma (via naming and shaming of perpetrators) may contribute to the goals of crime control policy.

The chapter is structured as follows: after this introduction (Section 1), the way in which stigma is created will be sketched in the light of the literature on social norms (Section 2). Next particular attention is paid to the role of stigma in criminal law (Section 3) by addressing under what conditions (the expressive value of) criminal law can (theoretically) contribute to creating stigma and providing incentives for compliance with (social) norms.

The later sections will address stigma from a law and economics perspective, focusing in Section 4 on the way in which stigma fits into the (traditional) economic analysis of crime. Section 5 will provide some policy considerations and more particularly review the literature on stigma as an instrument of “naming and shaming”. Section 6 concludes.

2. Stigma and Social Norms

The word stigma refers to an identifying mark of disgrace, and its etymology derives from the Greek and Latin word meaning a mark made on the skin by puncturing or through burning with a hot metal rod. Social stigma, on the other hand, as referred to in this chapter, is the sanction, usually informal, ranging from mere disapproval to social ostracization imposed on an individual by
second parties for violating a particular social norm or for possessing an attribute or a characteristic that is considered to be devalued in a particular context and time (Crocker et al., 1998; Link and Phelan, 2001; Posner, 2000). Referring to social stigma as a type of sanction avoids the problem of arriving at a description that is merely tautological.

There are two challenges that had to be encountered in the law and economics analysis of social stigma. The first concerns the nature of the sanction. Unlike formal monetary sanctions, which the courts and formal law enforcement agencies typically base on the actual harm or damage, the metric of social stigma, while it may at times also be based on the harm, is largely determined through a social process. Hence, there are some acts where the ensuing physical harm may be low but the social stigma is high.¹ On the other hand, Rasmusen’s seminal article (1996) on stigma and crime arises from an unobservable characteristic, the individual’s marginal productivity of labor that is important in an employment relationship. The ensuing stigma is correlated with the difference in the average wage between the convicted and the unconvicted groups of the population. Social stigma, on the other hand, is more general than economic stigma and the attribute with which individuals are judged is related to the individual’s worthiness in embarking on or maintaining social partnerships. Thus, according to Link and Phelan, any study on social stigma is necessarily multidisciplinary.

To the extent that a social norm can be defined as the expected average behavior of individuals (Ellickson, 2001), one can claim that social stigma, that is, the informal sanction imposed on an individual, is based on deviation from the average behavior or trait of the population.² Cooter (1998) also emphasizes the number of individuals following a rule considered to be a social norm. Similarly, what attributes or characteristics should constitute an average trait that an average person should possess in a society is also determined by a social process. Defining social stigma as a deviation from the average necessarily implies that its existence and size depend to a large extent on the strategic behavior of individuals and hence, the game-theoretic tools of economic analysis and equilibrium conditions would help shed light through providing a positive analysis and deriving conditions under which social stigma may be present.

The second challenge concerns the nature of the institution imposing the sanction. Unlike the courts and other formal law enforcement agencies that impose formal monetary sanctions, social stigma is imposed by a loose grouping of individuals that lack the time, the specialized knowledge or the skills to

¹ This is the case for instance for so-called victimless crimes such as prostitution, drug use, abortion, and sodomy which in some jurisdictions are criminalized.
² Social stigma can then be formalized as $\Omega = f(x_i - \bar{x})$, where $x_i$ denotes the individual’s level of activity or attribute and $\bar{x}$ denotes the average activity or attribute.
discern and assign blame. Given these characteristics, they are more likely to possess cognitive biases and rely on heuristics to simplify the time-consuming and complicated tasks involved in imposing a sanction. Empirical studies of jury behavior, for instance, point to the existence of cognitive biases (see Devine, et al., 2007 for a survey). It is therefore also necessary to have a theory of how individuals acquire and process information in ascertaining social distance.

Another issue concerns why second parties may have an incentive to stigmatize an individual. There are two reasons provided in the literature. The first is that the cost of imposing social stigma is assumed to be very low or close to zero (see Rasmusen, 1996). Another reason is that the offending individual has certain characteristics that are important for maintaining and establishing economic and social partnerships and that were unknown or hidden to second parties, but that have been revealed by the commission of a particular act.

While the particular sanction is imposed by second parties, the law and the social planner play a role in determining the social stigma by influencing the social distance. This occurs, first, by affecting expectations about the average behavior or attribute that serves as the standard with which the rest of society compares an offending individual. In this particular case, monetary sanctions indirectly influence social stigma, since higher fines have an impact on the average expected level of activity in a society. In some contexts, when the stigma is based on an unobservable attribute that is correlated with the act, the substantive issues of law may aid in making the relationship between the two clearer and more precise. To the extent that the rest of society tends to rely on heuristics, the law may also facilitate measures like the creation of categories or groups that lead toward greater cognitive efficiency.

2.1 Stigma, Norms and the Role of Information

There are two reasons cited in the literature as to why individuals obey social norms. The first concerns the intrinsic or personal motivation of individuals (Frey and Jegen, 2000; Cooter, 1998; McAdams, 1997; Sunstein, 1996). The second reason is that individuals are concerned about how society perceives them and hence are concerned about the reputational cost of violating a social norm (McAdams, 1997; Posner, 1998).

There are two sources of informational ambiguity with respect to defining and identifying a social norm that is crucial in the imposition of social stigma as a sanction for the norm violator. The first concerns the **announcement**; the process

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3 McAdams refers to it as **esteem**. Sunstein calls it self-conception. This explains some empirical puzzles that can not be adequately explained by the standard classical theory of price incentives. Among them are the blood donation experiment (Mellström and Johannesson, 2008) and the kindergarten experiment (Gneezy and Rustichini, 2000a). In these cases, increasing the price of an activity may even result in crowding out the intrinsic motivation of individuals.
by which people become aware of what constitutes an act that is sanctionable by the norm, given that it is informal and, in most cases, unwritten. The second has to do with communicating that a particular act is now considered wrong by the sanctioning community. When the law coincides with the social norm, then there is little or no informational problem. However, when this is not the case, a picture of how this information is transmitted over individuals should also be provided and the channels of transmission of information are to be identified.

According to McAdams, there are three conditions for norms that can signal the existence of reputation: consensus, detection and publicity. First, there should be agreement within the population about the esteem worthiness of a particular behavior and this could exist when there are venues for group discussion and exit. There should also be means to detect a violation and who violates in order to impose a good or bad reputational benefit and, finally, the information should be well known within the relevant population. All three conditions pertain to the crucial role of information with respect to the announcement of the norm, monitoring and enforcement.

According to Cooter, the net cost of an individual in following a norm depends on the proportion of people observing or violating it. When there is a small proportion of violators, the expected payoff of a norm violator is relatively higher than that of a norm follower. This being the case, more people will be encouraged to violate the norm, increasing the proportion of norm violators, which will lead to a decrease in the expected payoff. This will continue until the point is reached when an individual would be indifferent between following or violating the norm. In this context, a norm serves as a focal point to coordinate people’s expectations and behavior. In this case, norms serve to move the people’s expectations of the average and influence social stigma.

On the other hand, Ellickson describes the process of norm change and the role played by norm agents. Change agents, whose income or wealth are most affected by an exogenous shock, are the first to offer a competing norm. Then norm entrepreneurs, individuals who also enjoy a tangible benefit and who possess technical skills and knowledge regarding the norm, are in the best position to gauge the efficiency or suitability of the emergent norm. Their choice gets communicated to the public and provides a clue to the welfare-enhancing capacity of the norm. This process continues in a nonlinear fashion that further sways the tide towards the adoption of the new norm, a process that could best be described as a cascade. According to Ellickson, it is optimal for an individual,

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4 This defines the equilibrium position. This equilibrium may be stable or unstable depending on the shapes of the cost and benefit curves.


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after observing the actions of those ahead of him, to follow the behavior of the preceding individual without considering the information himself.

The implicit assumption is the existence of bounded rationality on the part of individuals who follow the norm and who, at the same time, impose a sanction upon violators. Since an individual is boundedly rational, he relies on heuristics, such as observing what others do as a convenient approximation for the real population statistic of the average. In this context, monetary fines, although not the direct means by which people impose stigma, play a role in shaping expectations of the average.

2.2 Stigma and the Signaling of Unobservable Attributes

The seminal article on stigma (Rasmusen, 1996) is based on a characteristic that is crucial in an employment relationship. This attribute is unobservable by the firm and a criminal conviction sends a signal to the employer about the true type of the individual concerned. In the moral hazard problem, a criminal has lower marginal productivity than a non-criminal. Committing a crime becomes more tempting when the difference between the wage of the convicted and the average of the non-convicted population is small. In the adverse selection case, the incentive to commit a crime becomes dependent on the proportion of the criminal type in the population.

On the other hand, social stigma is more general than economic stigma and the reason for imposing it concerns not only economic partnerships but social partnerships. Thus, unobservable attributes that are considered as important in social partnerships serve as the basis for the imposition of the social stigma. Benabou and Tirole (2006) identified an individual’s intrinsic cost or level of personal motivation as one basis. More pro-socially oriented individuals suffer greater intrinsic cost when violating a norm or a law, which makes them more suitable partners. Given that all individuals face the same monetary sanctions and in a situation where they all get the same monetary benefits, the only explanation for why some individuals obey or violate a law or a norm is the differences in their intrinsic cost. Thus, individuals reveal their true pro-social or anti-social orientation when they commit an act.

However, the mapping between the act and the type does not necessarily involve a one-to-one correspondence, but is filtered through the lens of society, as well as the cognitive limitations of the individuals or groups of individuals imposing the stigma. This issue has been explored by Escresa and Palestini (2010), who posit that the existence of social stigma is rooted in the

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7 Individuals face computational limitations when faced with a decision. They cannot compute the utility they will get for every expected contingency and they have physical and mental limitations. See, for instance, Kahneman (2003) and Simon (1991).
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judgment heuristics adopted by the rest of society as a way of simplifying the complicated and time-consuming task of imposing social stigma, in particular, where individuals employ heuristics in order to simplify the task of attributing causality (Sloman, 2005; Pearl, 2000) and classification (Kahneman, 2003).

Empirical studies have shown that most individuals tend to overemphasize the role of individual attributes or personality predispositions as the underlying reason for the commission of an act and give less weight to external or situational factors which may have contributed to its occurrence. This particular cognitive bias is known in the psychological literature as the fundamental attribution error.

Attribution theory seeks to provide an understanding of how people make causal inferences concerning the information they possess. It provides an explanation of how people attribute the observable behavior of others and what they perceive to be its underlying cause. It is concerned with how the “man on the street” provides casual answers to these questions and, for this reason, it is sometimes referred to as “naive psychology”. According to Nisbett and Ross (1980), the person and his disposition is the most cognitively available and representative heuristic. Since the act and the actor are immediately perceivable, it is easy to establish a causal link between the two.

In imposing the informal sanction, however, it is not enough for society to learn about the individual’s personality type or attributes. The rest of society compares the individual’s disposition or type to the average of the population. If the individual type is believed to have the same attributes as the average person, then there exists no stigma.

This implies that the rest of society can make a rational and logical ranking of individual types along different multidimensional aspects. For instance, an individual type can be thought of as a vector, since a person can be classified as good or bad with respect to his profession, or to his role in the family and community. On the other hand, criminal law may collapse social stigma into a scalar value, being a good or bad person. However, in a situation where this is too costly for the individual, the rest of society instead resorts to assigning a heuristic attribute to the target attribute (Kahneman and Frederick, 2002)

8 The classic experiment is Jones and Harris. See also Morris, Larrick and Su (1999).
9 See also Morris and Larrick, (1995) for a review of how people try to explain other individuals' behavior. This is also known as inference discounting (Kelley, 1967).
Succeeding studies tried to understand under what conditions this bias could exist, taking into account judgmental uncertainty, ability and motivation (Devine, 1989) and individual accountability (Tetlock, 1985). The conclusion is that there is a strong initial tendency to explain the observed behavior of others in terms of individual disposition and to discount situational factors (Kelley, 1967), especially when the acts committed deviate from widely accepted social norms (Jones and Davis, 1965). Although this particular bias tends to be adjusted as additional information is provided, the rigidity does not completely disappear.
10 For a general view of causal attribution, see Sloman (2005) and Pearl (2000).
which is more salient to the observer. This attribute substitution becomes more apparent in the context of groups, since the characteristics of the group become more associated with the individual.

Experiments in psychology have shown that when individuals think of a set, or a group, to the extent that the group is homogeneous enough to have a prototype, this information becomes more accessible to them (Posner and Keele, 1968; and Rosch and Mervis, 1975). The prototype heuristic is the attribution of the average salient features of the group to the individual. Thus, when an individual becomes convicted of a crime, his individual type becomes associated with the average characteristics of the set of the convicted. Hence, the conditions under which social stigma exists as an additional sanction in law can be described by a separating equilibrium, wherein the expectations of the rest of society with regard to the type of individuals who will violate the legal standard is also the best strategy for that particular individual.

Apart from cognitive limitations, the mapping between the attribute and the act is also dependent on social norms. According to Sunstein (1996), norms provide a system or a code by which to interpret the wrongness or goodness of a particular act. Individuals play specific roles in society and they form their expectations on how they should and ought to behave based on their respective roles.11

In this respect, the substantive issues of law play a more crucial role than monetary sanctions. Lessig (1995) posits that law affects social norms mainly through how society interprets these acts. Thus, the law is concerned with the regulation of an act’s social meaning. Social meaning is a semiotic resource that can guide or constrain individual behavior. It can be constructed and history provides a wealth of cases where the government or other groups have used it to pursue a certain objective. In eighteenth century England, for instance, criminal penalties were meted out to individuals who dressed outside their designated class.12

One method involves directly changing the social meaning of the act and the other operates indirectly through a change in the frequency with which an act is observed in society. Semiotic technique proceeds by changing the social meaning of an act directly by “tying” it to or associating it with another act or institution that possesses the intended social meaning. The previous example works this way. Criminal acts carry stigma and tying improper dressing to

11 Doctors, for instance, have sworn to save lives and protect the health of their patients and society therefore expects a doctor to perform this role. Similarly, bankers and financial advisors are expected to take care of the wealth and assets of their clients. Social norms, that is, the behavior and rules of conduct that are followed by the majority, are therefore very role-specific.

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crime carries with it the same association. Ambiguation, on the other hand, assigns to an act a second meaning that undermines its original meaning. While tying aims at clarification of an act, the latter intends to blur its present social meaning.

Behavioral technique changes social meaning indirectly by changing the frequency with which the performance of a particular act is observed and, in the process, expectations and its meaning change. Inducing certain behavior over time will eventually affect these meanings. A law that inhibits an individual from performing an act that will result in the construction or reinforcement of a social meaning changes expectations and, hence, achieves deterrence. The other technique works the opposite way by encouraging the ritualistic performance of an act in order to change social meaning.

3. Stigma and Criminal Law

Criminal law is often regarded as the branch of law that has the greatest capacity to stigmatize certain behavior (see, for instance, Shoham and Rahav, 1982). According to Hart, “what distinguishes a criminal from a civil sanction and all that distinguishes it, is the judgment of community condemnation which accompanies and justifies its imposition”.13 This captures succinctly what is echoed by many in the field regarding the stigmatizing aspect that is unique to criminal law.14

The previous section showed under what conditions social stigma exists as an additional sanction. This section describes the institutional properties of criminal law and explores the extent to which the creation of such conditions is facilitated. Since social stigma is based on a measure of social distance, or the deviation of a criminal act or attribute from the average expectations of society, criminal law serves to reduce the uncertainty involved in the process of its determination. This involves recognizing the complex relationships between cognition on the one hand and institutions (see Knight and North, 1997).

3.1 Punishment

3.1.1 Avoid crowding out of intrinsic incentives or personal motivation

Punishment under criminal law may be suited to avoid the crowding out of personal or intrinsic motivation. Although personal motivation is commonly studied in the literature within the context of conferring honor and encouraging voluntary and pro-social activities such as blood donation and voting during elections, the same mechanism applies to conferring dishonor and shame on

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13 Hart (1958); emphasis added.
14 This may also be subject to debate as some tort scholars claim that civil sanctions also carry social stigma.
anti-social activities. Transposing the analogy to criminal law, most people do not refrain from committing a criminal act because they want to avoid high monetary fines or being imprisoned. They have internalized the law. If, for instance, murder were to be decriminalized, we probably wouldn’t see a significant rise in intentional killings. Although these are factors that enter their decision-making, most individuals do not commit a crime because they have internalized the norm of non-performance of a criminal act. Hence, the state does not spend too many resources enforcing the crime of murder because the norm of not killing another person has been internalized.

Criminalizing a certain act that is not perceived negatively within certain groups could stoke the intrinsic motivation and lead to more acts of this nature being committed instead of a decrease being observed. If criminal penalties were low, then the personal motivation of doing it could crowd out the prevailing price effect and hence lead to a backfiring of monetary incentives. Gneezy and Rustichini (2000b) attributed the increase in late pickups of children by their parents when a fine was introduced to the fact that the fine was not high enough. Criminal law avoids this by imposing a very high fine, coupled with the possibility of imprisonment intended to punish the offender. This would ensure that, when a certain act is criminalized, the backfiring of incentives associated with low fines in a situation where personal or intrinsic motivation is already at play would not occur.

3.1.2 Inducing norm cascade

With regard to the origin and evolution of social norms, a punitive sanction ensures that change agents – individuals who derive a direct monetary benefit from changing or maintaining a certain social norm – would be deterred from carrying out the act. Change agents have a crucial role to play in norm cascades. To the extent that a social norm is observed largely because a sizable proportion of the population also observes it, the higher is the population ratio that observes a norm, the more likely it is that it will be selected as the prevailing norm to regulate a certain behavior. However, in order for a new norm to emerge, there should be a number of

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15 See Cooter, 2000. In effect, most of the acts that are governed by criminal law have been internalized by most individuals in the population.

16 The role of religion in socialization and the fact that most religions forbid the killing of an individual have contributed toward the internalization of this norm.

17 This is what happened when proposals for the criminalization of file-sharing through the internet surfaced during the 1990s (David, 2010). The number of file downloads made through non-authorized sources increased during this period. Prior to the proposal, a norm of sharing had already developed among internet users, who treated the exchange of digital music and software as fostering a certain altruistic and communitarian spirit (Feldman and Nadler, 2006).

18 See also Gneezy and Rustichini (2000b).

19 See also Ellickson (2001) and Sunstein (1996).
individuals who would be willing to commit to enforcing it. They are called norm entrepreneurs. Commitment to and enforcement of a norm is not costless and change agents – persons who enjoy direct material or non-material benefit from it – are in the best position to supply a new norm.

When an exogenous shock changes the costs and benefits of a particular act among individuals, a number of different norms usually arise and compete with each other to regulate the particular behavior. Punishment ensures that a number of individuals would be deterred from performing a certain act to a sufficient extent to create or destroy a new norm. Some of the critics of criminalization claim that society would suffer from overdeterrence, as it would also discourage efficient transactions. However, if the aim of society is to affect or influence social norms and its observance depends on the proportion of people committing and enforcing it, then criminalization may also serve this goal by sufficiently deterring norm entrepreneurs.

3.2 Substantive Issues

Individuals are aware that their choices and their actions convey a particular meaning to society. Communities try to encourage or suppress the meaning of a particular act through laws and it appears that criminal law has been a suitable vehicle to carry out this societal objective (Kahan, 1998). Once an act has been criminalized, the meaning of the act becomes obscured, since it becomes associated with crimes that are traditionally considered heinous and abominable such as theft and murder. Criminals are also perceived to be individuals possessing a range of negative characteristics from being grossly negligent, amoral, wicked, and evil. This is bolstered by the requirement of intent or mens rea in the act. A certain stigma is then created, however small and ambiguous at the start of the criminalization process.

In this respect, criminalization can be considered as a semiotic technique to change a particular meaning that works either by tying or by ambiguation. However, most newly criminalized acts are morally neutral and do not carry such negative connotations. In the case of insider trading, there is already a general and within group perception that the act is wrong and making it criminal only clarifies the extent of the wrongness. In contrast, in the case of criminalizing file-sharing, within the small cybernet community, this act is considered to be altruistic and to be fostering a norm of free exchange. Criminalizing provides an alternative way of interpreting the act, blurring the original meaning.

As more people are deterred, so the criminalized act becomes a rarity. People’s expectations regarding the criminalized act change by changing people’s behavioral patterns. While it might take a long time for criminal law

to change the frequency of an act through stigma, this phenomenon becomes more apparent with decriminalization. With the decriminalization of sexually related offenses such as sodomy, people have become more open over displaying their sexual preferences and as it has become more and more commonplace, people’s expectations regarding the act and the individuals behind the act have also changed.

Punishment also carries a signification\(^{21}\) that society wishes to condemn this act in a way that is different from merely imposing compensatory fines. Aside from this, the process of criminal adjudication that starts with a public debate in the legislature ensures that consensus, one of the main requirements for norm creation, is achieved.

To summarize, criminal law has another value aside from deterrence and it has to do with changing or constructing social meanings of a certain act, affecting social norms and inducing stigma. However, for this to work, it seems that there is a key pervading assumption that either has been left out or has been implicit throughout. This assumption, which we think should be recognized and made more explicit, concerns bounded rationality on the part of individuals in distinguishing what constitutes a wrongful act.\(^{22}\)

3.3 High Standard of Proof
Choosing to obey a law or not, or choosing which of the competing norms to follow based on the individual cost-benefit calculus, is a difficult and challenging task. At the theoretical level, this is already a challenging task. In real life situations, individuals can not be expected to act like the perfectly rational decision-maker because of constraints they face with respect to processing information and in formulating and solving problems.\(^{23}\) Individuals are “boundedly rational” and rely on heuristics\(^{24}\) to aid and facilitate everyday decision-making.

An exogenous shock or structural change might make a certain act more harmful and if a huge part of the harm is externalized, a benevolent government could regulate behavior. From the economic point of view, criminalization is different from other forms of regulation because it does not price behavior and there are a number of economic justifications why this should and should not be the case.\(^{25}\) An individual could not make this calculation for herself, but when she becomes aware that a certain act is criminalized, then the act joins

\(^{21}\) Kahan (1998).
\(^{22}\) This would also make it easier to reconcile with economic rationality.
\(^{23}\) See Kahneman (2003) and Fox and Tversky (1995).
\(^{24}\) Heuristics are “rules of thumb,” educated guesses, intuitive judgments or simply common sense.
\(^{25}\) For an excellent discussion, see Bowles, Faure and Garoupa (2008).
the ranks of other acts that are bad and very harmful and, hence, she reaches the conclusion that the particular act is just as bad. Consequently, persons who commit it are tagged as criminals and, hence, deserve to be ostracized and stigmatized. This is called representative heuristics.\(^{26}\)

Merely enacting a law may not be sufficient for an individual to become aware of the criminalized act and what exactly constitutes it. Prosecution and conviction transpires in the public sphere and engages the attention of individuals. Awareness becomes complete when there is conviction. Since the intensity of the stigma accorded to the individual depends on how far his action has deviated from what an individual person would normally do, then proof beyond reasonable doubt ensures that the stigma will be high.

3.4 Informational Asymmetry and the High Legal Standard

Individuals are heterogeneous regarding to what extent they are intrinsically motivated. Some individuals are very personally motivated and will follow a rule even if there is no fine or punishment for its violation simply because they derive positive utility from doing so. Individuals who are more intrinsically motivated make good economic partners or good members of a group, as the transaction and enforcement cost of engaging in a productive activity with them is lower. However, the individual type is known only to the person and is unobservable to the others. On the other hand, acts by individuals are observable. Society can make inferences with regard to a person’s individual type based on whether or not he or she carried out a particular act. In our case, this is based on whether or not he or she committed a criminal act. Thus, committing or not committing a crime sends a signal of the individual type.

Thus, in order to be considered as a good signal of type, criminal standards should be set in such a way that it would be cheap enough for the high type to pass up the opportunity and tempting enough for the low type to seize it. Committing a crime is a signal that a person is of low type and it is through this mechanism that criminal law could invoke stigma or disrepute. If the standard also includes acts that confer honor or provide no clue to the type of the individual, the standard becomes a fuzzy signal and would not be welfare enhancing.

3.5 Bounded Rationality and Cognitive Biases in Ascertaining Harmful and Wrongful Behavior

When there is perfect information and people face no computational limitations in processing them, then distinguishing a harmful activity would not be a problem for society. Similarly, proving causality between an act and the

\(^{26}\). Note that this is related to Lessig’s semiotic technique. In fact, Lessig’s tools for changing social meanings, for example, semiotic and behavioral technique could be considered as a subset of heuristics.
ensuing harm would be easy. Criminal law appears to be a heuristic device that allows individuals to choose the act that maximizes both individual utility and social welfare. When individuals learn that an act had been criminalized, and since all crimes are extremely harmful, he circumvents the process of complex computation, he now regards the act as extremely harmful.

4. Stigma and Crime

4.1 Belief in the Stigmatizing Effects of Criminal Law

Having sketched out in the previous section how the creation of stigma interrelates with crime and criminal law, we will now elaborate further on this issue by reviewing some of the economic literature that points to the fact that criminal law, but more particularly a conviction through the criminal procedure, leads to a “shaming” which imposes an additional cost (supplementary to any legal consequences such as a fine) upon the offender. The way in which this stigma is imposed (or that reputation is harmed) and the conditions under which this takes place has been the subject of many studies.

Lawyers traditionally stress that an important difference between criminal law and remedies of a different nature (administrative or civil) is that the criminal sanction has the capacity to “shame” the offender: the criminal conviction conveys condemnation and disgrace (Hedman, 1991, 896). This stigmatizing effect is indeed considered to be unique to criminal law. A recent European directive (2008/99 of 19 November 2008, OJ, L328/28 of 6.12.2008) (forcing Member States to introduce criminal penalties on the violation of legislation implementing European environmental law) expresses this as follows:

Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.

This quote shows that policy makers attach importance to the idea that criminal law stigmatizes and that they attach a positive value to it. The most straightforward reason is that stigma increases the costs of crime: in fact, it supplements the legal sanction with social sanction and thus increases the total sanction (see Cooter, 2000, 15). Stigma does therefore fit into the traditional economic theory of crime, since it adds to deterrence.

4.2 Economic Perspective on Stigma

This point, that criminal law creates a social stigma, has been stressed in many studies. Economists stress that the benefit of stigma (from a criminal policy perspective) is that it shares with fines the advantage of deterring the
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Social stigma may consist of economic stigma (e.g., a reduction in future income resulting from a criminal record) and social stigma (manifested in increased difficulties in social interaction) (Rasmusen, 1996). Stigmatization is in principle, considered as an effective means of reducing crime and could thus be used by government in a crime policy (Funk, 2004). However, the extent to which stigmatization is actually able to impose additional costs on the offender, as the literature generally holds, depends very much on the specific context of the case, the offence and the offender (see Massaro, 1991). Economists have spent a lot of effort attempting to identify the circumstances that could explain why stigmatization may work better in some contexts than in others. This has resulted in a large number of empirical studies that attempt to quantify the reputational losses resulting from a conviction or, more broadly, the additional costs that go beyond the formal sanction resulting from a criminal conviction.

More particularly, the basic story of why corporations suffer a (reputational) loss beyond the formal sanction which is imposed is presented in the seminal papers by Klein and Leffler (1981) and Shapiro (1983). According to these models, a reputational penalty is imposed upon a firm that is, for example, convicted of fraud. Since customers or other related parties (such as employees) feel cheated by the convicted firm, they will either refuse to deal with the offending corporation or change their willingness to pay and hence only pay a lower price for the product or service offered by the offender. Related parties, so this theoretical literature holds, hence will impose a reputational penalty upon the offending corporation. The reason is the breach of trust by the offender (see also Cannas, Masala and Micocci, 2009). The literature concerning these reputation models has also been summarized by Engelen and Van Essen (2011, 3–5).

However, Karpoff and Lott have shown that a criminal conviction only imposes this reputational penalty in case the offence is one that harms parties that are related to the offender (such as customers or employees). If damage would, on the other hand, be inflicted upon third parties that do not stand in a relationship with the offender, the reputational penalty would not be imposed (Karpoff and Lott, 1993, but also Alexander, 1999 and Engelen and Van Essen, 2010). Alexander showed convincingly in an empirical study that when corporations are convicted of crimes causing damage to related parties, a significant reputational penalty will be inflicted, as can be shown in stock-price declines (Alexander, 1999, 491). She advances various reasons why corporations suffer these so-called market place losses (the term is from Recca, 2004, 879), arguing inter alia that a reputational penalty is imposed when consumer expectations are not met (Alexander, 1999, 492–6). This can be supported, for example, by studies showing losses in shareholder wealth after defective product...
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recalls (Jarrell and Peltzman, 1985), but also by studies concerning poisoning by Tylenol (Mitchell, 1989) or airline crashes (Mitchell and Maloney, 1989), all subsequently leading to losses in shareholder wealth. The evidence shows that the same reputational penalty would not be inflicted in case of a conviction for offences which would cause harm to unrelated (third) parties (see the evidence presented by Alexander, 1999, but also Engelen and Van Essen, 2011, 5).

4.3 Quantifying Stigma

Many empirical papers have subsequently attempted to quantify the reputational losses that either individuals (but mostly firms) suffer as a result of a criminal conviction (an excellent overview of this empirical research is provided in Engelen and Van Essen, 2011, 5–15). A problem with some of the research is that some studies measure the total monetary costs resulting from a criminal conviction, without distinguishing between the court-imposed penalty and the reputational losses. However, some studies do make this distinction. Alexander, for example, finds that the reputational penalty (measured in a decline of stock prices) was over four times the average court-imposed penalty (but all for cases where related parties were affected by the crime; see Alexander, 1999, 507). A recent study by Armour, Mayer and Polo (2010) finds that in the case of announcement of enforcement by the UK’s financial services authority and the London stock exchange, the reputational sanction (in the sense of the stock price impact) was on average nine times larger than the financial penalties imposed by the authority. However, they also found that these reputational losses are confined to misconduct that directly affects parties who trade with the firm (customers and investors). The announcement of a fine for wrongdoing that affects third parties has only a weakly positive effect on stock prices.

Various other studies examine the reputational losses resulting from sanctions following corporate fraud (hence leading to harm for related parties). One of the first and often quoted studies in this respect is by Karpoff and Lott (1993) who found that the equity loss for fraud consisted of 90% reputational penalties and only approximately 10% expected legal penalties. Engelen recently showed a negative stock price effect of −1.5% on the day of a newspaper announcement of an illegal insider trading practice (Engelen, 2009). Evidence of a reputational effect due to internal fraud events is also presented by Cannas, Masala and Micocci (2009) and in a Dutch study by Van den Broek, Kemp, Verschoor and Devries (2010). Violation of anti-monopoly law in the Netherlands leads on average to a loss of market value of 2.3%, where the reputation effect was again substantially higher than the legal penalty. The size of the reputational penalty can, however, depend very much on context and more particularly on the question of how fraud is perceived within the particular cultural context in which the fraudulent event occurred. Recently, Tanimura and Okamoto compared the reputational losses (in terms of market values) of Japanese firms involved in
corporate scandals with similar results in US studies. On the one hand, they provide empirical evidence of substantial reputational losses suffered by firms involved in corporate scandals and, moreover, they show that these losses were comparatively larger in Japan than for similar incidents in the US, because in Japan social shame was a more powerful regulator than in the US (Tanimura and Okamoto, 2010).

Other studies also show the basic point made in the Karpoff and Lott (1993) paper, namely, that these reputational losses will only occur when the offence could harm related parties, but not when only third parties are involved. A typical example is environmental harm. Karpoff, Lott and Wehrley (2005) show that firms accused of environmental violations do suffer a loss in market value. However, they argue that these losses are of similar magnitude to the legal penalties imposed. Hence, the loss in market value results only from the legal penalty and not from reputational penalties. A similar result was found in a study by Jones and Rubin: a reputation effect (in the sense of residual losses beyond the legal penalty imposed) can only be found if the offences cause harm to persons directly affected by the firm’s conduct. Environmental incidents do not lead to any significant reputational penalty (Jones and Rubin, 2001). This does not, of course, mean that there may not be other negative effects resulting from a conviction for environmental violations. Decker, for example, showed that corporations that had been convicted for environmental offenses had more difficulties obtaining an environmental permit in the future (Decker, 2003).

Although most studies concerning reputational losses focus on corporations, some also attempt to measure the total costs resulting from a conviction for individuals. Individuals can obviously suffer substantial costs in addition to the formal penalty imposed. Depending upon the nature of the sanction (fine or imprisonment), the sanction could involve not only lost income (during the period of imprisonment), but also reduced legitimate earnings in the future. The issue has been empirically tested in a well-known study by Lott (1992). His study, looking at the effects of drug conviction, shows a total penalty which is much larger than the combination of fines and the foregone income costs of imprisonment. The reduction of legitimate earnings once the convict returns to the labour force accounts for between 35 and 96% of the total pecuniary penalty (Lott, 1993, 160). For individuals too, the loss of reputation resulting from a criminal conviction could substantially increase the total monetary penalty.

After having discussed some of the empirical evidence presented in economic studies concerning the (measurable) reputational effects of a criminal conviction (showing that there is economic support for the assumption that stigma imposed by a conviction does lead to additional costs), we will now ask how these studies can be used at the policy level.
5. Naming and Shaming

5.1 Reputational versus Formal Penalties
A first question that could be asked is how the insight from the previous studies (that the stigma inflicted through criminal law imposes real costs on the convicted) could be used in crime policy (as, for example, suggested by Funk, 2004). One consequence is that, according to Alexander, but also many other scholars, the fact that reputational damage will occur (especially when the offence causes harm to related parties) should be taken into account when fixing the optimal formal penalty to be imposed by courts. The studies presented in Section 4 show that, in some cases, reputational penalties can be between four to ten times as high as the formal penalty (fine) imposed by the court. One consequence may be that if this were disregarded, the formal sanction would be relatively too high (a point strongly advocated by Fischel and Sykes, 1996): they argue that a duplication of criminal and reputational penalties for corporate misconduct would lead to overdeterrence. Also, Alexander argues that a practical implication of the importance of reputational losses is that the judicial system could achieve socially optimal deterrence by setting penalties for corporate crimes against customers and other related parties at a substantial discount. Not doing so would lead to overdeterrence (Alexander, 1999, 490). Recca (2004) criticizes the federal sentencing guidelines for not taking into account reputational or “market place losses”, which would thus lead to overdeterrence. However, many scholars also point to the fact that the “shaming” effect of criminal law may equally drive a stigmatized ex-convict towards recidivism. To remedy that problem, Funk (2004) argues that harsher punishment should be imposed on repeat offenders. Harel and Clement (2007) also show the paradoxical result that increasing the rate of detection could actually reduce the effect of stigmatization. Their reasoning is that when more people are detected, more will belong to the category of “stigmatized”, as a result of which the group of stigmatized will increase and stigmatization may lose its effectiveness.

5.2 Usefulness of “Shaming” Sanctions
A second question at the policy level is whether these studies showing that criminal law leads to reputational losses should lead to the consequence that the courts should impose shaming sanctions, thus adding to the reputational loss. This idea, which gains increasing popularity in some legal circles, is sometimes referred to as “naming and shaming”. The concept of “reintegrative shaming” has been introduced in the work of the well-known criminologist John Braithwaite (1989). Braithwaite introduced the notion of “reintegrative shaming”, which should reaffirm the morality of the offender and restore the offender in society. A “disintegrative” shaming would only label convicts as outcasts and lead to recidivism.
Many examples can now be found of laws which allow judges to “shame” a convict. A well-known example is “Megan’s law”, which prescribes that residents be warned about sexual offenders moving into an area. This encourages stigmatization of sexual offenders (see Funk, 2004, 716). Other examples include offenders wearing signs announcing their crimes in busy public areas, advertising offenses in local newspapers or placing stickers on offenders’ cars publicizing their convictions for drunk driving (Anonymous, 2003, 2187–88). Some scholars are enthusiastic about this “shaming” and hold that it can be a low-cost alternative to imprisonment. In particular, those (criminal lawyers) who wish to fight prison sanctions have suggested naming and shaming as a useful alternative (see, for example, Kahan, 1996). A literature overview shows that the deterrent effect of this shaming approach is open to debate (Anonymous, 2189–94). Some argue that shaming may be useful, more particularly in cases where fines cannot be used, given that many offenders will be judgement proof (Shavell, 1985). Shaming penalties may have the advantage that they reinforce the community’s norms against criminality and hence also have a general deterrent effect on individuals other than the shamed offender (Kahan, 1996). Others are more critical, arguing that in the US, shaming penalties will not deter, since the cultural prerequisites for effective shaming are lacking (Massaro, 1991).

One danger of shaming is that it may alienate the offender from existing communities, pushing him towards criminal subcultures and hence increase the danger of recidivism (Anonymous, 2003, 2201).

Some (more particularly, Posner, 1985, 1228) especially doubt that shaming will deter corporate crime because “a corporation can act only through individuals, and there is a constant turnover of these individuals”. Buell (2006), on the other hand, argues that entity criminal liability can have a “blaming function”. Law should, in his view, therefore be constructed to convey blame on the entity.

5.3 Shaming via Administrative Sanctions?
At the beginning of Section 4, we mentioned that the literature stresses that criminal law in particular would have a stigmatizing effect and that other legal remedies would lack such an effect. However, increasingly, administrative agencies also wish to impose shaming sanctions or, to put it differently, they impose a (financial) penalty, but deliberately publicize their action, knowing that this will lead to an additional reputational sanction. See, in this respect, for example the behaviour of the UK’s financial services authority and the London stock exchange, who can decide to announce enforcement when they have levied a penalty (see Armour, Mayer and Polo, 2010). Also the Netherlands anti-monopoly commission often publicizes their actions on purpose, with a view to creating a stigmatizing effect and hence adding to the total penalty as a result
of reputational losses (Van den Broek, Kemp, Verschoor and Devries, 2010). Increasingly, also, administrative agencies choose to “blacklist” perpetrators.

We mentioned earlier that some stress that an advantage of stigma is that it can lead to additional deterrence at no cost to society. This is, however, not entirely correct. Naming and shaming can lead to substantial error costs. Unjustly qualifying a perpetrator (more particularly a corporation) as a violator could lead, as the numbers show, to substantial costs, which can only be corrected if the announcement later is shown to be wrong. Faure, Ogus and Philipsen (2009, 176) have held that it would be inappropriate to use naming and shaming in the context of an administrative decision, unless the latter is followed by a definitive ruling by a court. The reason is that error costs can escalate if the agency has reached an incorrect decision, and reversing it on appeal will not significantly reduce the harm arising from adverse publicity. Hence, so they argue, stigmatizing sanctions should only be used in the criminal process, which can reduce the risk of wrongful convictions (Faure, Ogus and Philipsen, 2009, 179).

As can be seen, this advice is apparently not followed in practice, since often administrative agencies intentionally use shaming strategies. In particular cases, this may lead to substantial risks for administrative agencies. For example, the behaviour of the Dutch anti-competition authority (NMA), which published the names of suspected violators, was held by a civil court to be careless, as a result of which the administrative agency was held liable for the resulting damage (Pijnacker-Hordijk, 2006). Naming and shaming strategies could hence entail substantial liability risks for an agency.

Finally, we should mention a study that looks at the question of how the reputational harm of a defiant corporation should be measured in the legal system, based on stock market data (de Villiers, 2009).

6. Concluding Remarks

The law and economics literature on social norms has flourished over the last decades. However, not much attention has been paid to the particular informal sanction that is associated with norm violation, social stigma. On the other hand, economic stigma enjoys a much more focused attention in the literature (see for instance, Rasmusen, 1996; Funk, 2004; and Harel and Clement, 2007). This chapter aims to gather together the related literature within law and economics in order to provide us with a better understanding of social stigma, a subject that is widely discussed in other social sciences. We first identified the conceptual problems that inhibit or prevent further research in law and economic studies and then looked at the literature that addressed and helped clarify these issues. Thus, apart from serving as a review, this chapter is also an exploration of the possible research agenda for the future, as it looks at the gaps that need to be filled.

To conclude, this chapter looks at the law and economics literature on social stigma and, owing to the literature’s focus on economic stigma, this chapter
pieces together the literature that may contribute to its positive and normative analysis. Thus, it draws from different strands of the literature. This is not surprising, as the social process behind social stigma is underscored and hence, its study inevitably involves a multidisciplinary approach. In the process, the chapter shows that there are gaps that have to be filled in order to arrive at a more cohesive analysis and, as such, is a promising field for future research.

**Bibliography**


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