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# A Belief-Change Theory of Expressive Law

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# A Belief Change Theory of Expressive Law

Alex Geisinger\*

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## PART ONE: INTRODUCTION AND ANALYSIS OF EXISTING THEORIES OF EXPRESSIVE LAW AND INTERNALIZATION

### I. INTRODUCTION

For decades law and economics has been well-served by a behavioral model that treats individual preferences as exogenous and conceives of law as affecting behavior only by increasing or decreasing the cost of undertaking a regulated activity.<sup>1</sup> Although somewhat parsimonious,<sup>2</sup> this behavioral theory has provided an effective model for studying the effects of law on behavior.<sup>3</sup> More recently, however, scholars have begun to note the limitations of the existing behavioral theory.<sup>4</sup> As a result, many are now considering how law may affect behavior in ways beyond the traditional costs associated with direct sanctions. These scholars note that laws affect behavior not only by making the behavior more costly, but also by affecting social norms and, consequently, by changing an individual's preferences for undertaking particular acts. According to these social norms theorists, laws can change the social understanding of a particular activity and thus influence what behaviors will or will not be subject to social sanctions. While scholars have uncovered a wealth of activities that are affected by norms,<sup>5</sup> however, an overall theory of how law affects norms has proven more elusive.<sup>6</sup>

The creation of a comprehensive theory that captures law's effect on norms and individual preference is especially difficult because such a theory must consider the way in which law is mediated by the complex process of human emotion and cognition.<sup>7</sup> In particular, this complexity raises concerns about the ability of a comprehensive theory to be used in a positive manner to predict how law will affect norms and preference.<sup>8</sup> Until a theory that can adequately navigate this complexity is created, many scholars will continue to find a parsimonious model that has predictive value to be superior to existing expressive theories which do not.<sup>9</sup>

1. For a detailed description of the behavioral model, see *infra* Sections IV & V.

2. It has been noted that the model cannot explain a number of observed behaviors. See, e.g., Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1647 (2000).

3. See *id.* (noting that the classical model has been a fruitful source of inquiry for law and economics and proven to be a useful predictive tool).

4. See *infra* Section III (setting out the limitations of expressive law theories).

5. See *infra* note 23 (listing a selection of sources regarding norms' effects).

6. For a review and critique of existing theories, see *infra* Section III.

7. Scott, *supra* note 2, at 1604.

8. *Id.* at 1607.

9. See George Stigler & Gary Becker, *De Gustibus Non Est Disputandum*, AM. ECON. REV., Mar. 1977, at 76, 89 (arguing that the treatment of preferences is stable and that nothing useful

This article develops a positive “belief change” theory of law’s effect on social norms and preference. Specifically, it identifies a process by which law impacts norms by changing the certainty of one’s beliefs about the outcomes of a given activity. The article also explains how such effects can be adequately modeled to provide a positive theory of how law affects norms and preference. To help the reader better understand the “belief change” theory, however, the article first provides a general introduction to law, norms, and the concept of expressive law, and outlines some of the major debates that confront the field of behavioral law and economics.

## II. AN INTRODUCTION TO NORMS AND EXPRESSIVE LAW

The standard economic model of human behavior assumes that people choose rationally between alternative opportunities in a way that maximizes their utility in accordance with their individual preferences.<sup>10</sup> According to this model, law can affect behavior in at least two different ways—either by increasing or decreasing a person’s opportunities to satisfy his or her preferences (e.g., changing the individual’s costs of satisfying his/her preferences), or by shaping the individual’s preferences by changing his or her tastes for certain behavior.<sup>11</sup> Traditionally, law and economics scholars have focused on the way in which law affects opportunity. The standard rational choice model applied by these scholars assumes that individuals choose among their preferences rationally—that is, it assumes preferences are complete, reflexive, and transitive. The traditional model further assumes that choices can be manipulated only by acts that expand or contract an opportunity set. Thus, the traditional rational choice model is one of constrained preference satisfaction. Preferences are assumed to be exogenous and immutable and behavior is influenced through the granting of sanctions or subsidies that influence the individual’s opportunities.<sup>12</sup>

Recently, however, law and economics scholars have become dissatisfied with the traditional behavioral model.<sup>13</sup> Some scholars have challenged the

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has come from assumptions of differences in tastes). Interestingly, one of these Nobel laureates recently abandoned this argument. See GARY S. BECKER, ACCOUNTING FOR TASTES (1996).

10. HAL R. VARIAN, INTERMEDIATE MICRO ECONOMICS 70 (1987).

11. Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 1.

12. HAL R. VARIAN, MICRO ECONOMIC ANALYSIS 112–20 (3d ed. 1992).

13. A note of distinction is required here. There is a long history of legal scholarship critical of the rational actor model. See, e.g., Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). However, for those scholars sympathetic to the law and economics tradition, such questioning is of more recent vintage. See, e.g., Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

model's rationality assumption,<sup>14</sup> while other critics argue that the model is ignorant of the process of socialization and the human desire for status, as well as the process by which law may affect preferences for certain behaviors over others.<sup>15</sup> This latter group is particularly interested in the ability of social norms to control or affect behavior and the ability of law to affect social norms and preferences.<sup>16</sup>

The concept "norm" is subject to a variety of definitions.<sup>17</sup> For purposes of this article it is enough to define a norm as a rule supported by a pattern of informal sanctions.<sup>18</sup> The sanctions can be based on shame or some other type of social ostracism,<sup>19</sup> or in the form of guilt or other self-bereavement.<sup>20</sup> Thus, a rule against smoking in public places can affect behavior not just through the civil penalty that accompanies it, that is, its sanction, but also by increasing the willingness of individuals to shame or otherwise socially ostracize those who violate its prohibition.<sup>21</sup> Moreover, to the extent that such a rule results in the "internalization" of the prohibition, individuals will be deterred from such activity because of the prospect of guilt regardless of the possibility of sanction.<sup>22</sup> In recent years the effect of norms on behavior has been considered in a wide variety of contexts.<sup>23</sup>

14. See Ellickson, *supra* note 13; Jolls et al., *supra* note 13 (describing and applying, among other things, a concept of bounded rationality); Korobkin & Ulen, *supra* note 13 (describing and critiquing the different versions of rational choice theory).

15. See generally Dau-Schmidt, *supra* note 11 (arguing that criminal law can better be understood in terms of preference shaping than opportunity shaping); Ellickson, *supra* note 13, at 537, 539–42 (1998) (identifying a number of lacunae in classical law and economics and arguing that these lacunae are major); Daniel A. Farber, *Toward A New Legal Realism*, 68 U. CHI. L. REV. 279, 288 (2001).

16. The seminal work on law and norms is undoubtedly ROBERT A. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Since the publication of that book, there has been an explosion of scholarship on the subject. See *infra* note 23.

17. Robert Ellickson, for example, defines a norm as a rule supported by a pattern of informal sanctions. See Ellickson, *supra* note 13, at 549. Similarly, Eric Posner defines a norm as a rule of behavior enforced by private third parties. See Eric A. Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996). Robert Cooter, on the other hand, defines a norm in the traditional philosophical sense as an obligation. See Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 954 (1997).

18. See Ellickson, *supra* note 13, at 549 n.58.

19. Hereinafter sometimes called a "second order" sanction.

20. Hereinafter sometimes called "third order" sanctions.

21. Bans on public smoking have been a favorite of the laws and norms literature and will be revisited throughout this article.

22. See Scott, *supra* note 2, at 1604.

23. Professor Eric Posner identifies a number of these applications and adds to the list by considering how norms influence tax compliance. See Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1781 n.2 (2000); see also Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (discussing norms in the context of contract and commercial law); Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73 (Summer 1997) (discussing norms in the context of punitive damages); Robert D. Cooter,

; Although less completely developed, the related field of expressive law, or law and social meaning, has also gathered significant attention in recent years.<sup>24</sup> At its broadest, the expressive function of law has been defined as the way in which law affects behavior other than through sanctions.<sup>25</sup> Many expressive law scholars, however, are particularly interested in the ability of law to reflect or change the social meaning of a particular act.<sup>26</sup> Some

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*Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215 (1994) (discussing norms in the context of contract and commercial law); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999) (discussing norms in the context of corporate law); Gertrude M. Fremling & Richard A. Posner, *Status Signaling and the Law, With Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069 (1999) (discussing norms in the context of sex discrimination); Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1 (1999) (discussing norms in the context of torts); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (discussing norms in the context of criminal punishment); Dan M. Kahan & Eric A. Posner, *Shaming White Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999) (discussing norms in the context of criminal punishment); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995) (discussing norms in the context of antidiscrimination law); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237 (1996) (discussing norms in the context of blackmail and privacy); Eric A. Posner, *Family Law and Social Norms*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 256 (F. H. Buckley ed., 1999) (discussing norms in the context of family law); Eric A. Posner, *The Legal Regulation of Religious Groups*, 2 LEGAL THEORY 33 (1996) (discussing norms in the context of religion); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998) (discussing norms in the context of antidiscrimination law and flag burning); Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 201 (F. H. Buckley ed., 1999) (discussing norms in the context of family law); Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231 (2000) (noting the effects of traffic regulation on norms); Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997) (indicating norms associated with Japanese sumo wrestling); Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 U. CHI. L. REV. 685 (1998) (discussing social constructs surrounding bankruptcy).

24. See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1593–94 (2000) [hereinafter Cooter, *Economic Analysis*]; Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 653 (1998); Kahan, *supra* note 23, at 597; Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039 (1999); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725–26 (1998); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471–73 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

25. See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000) (“The thesis is that the law influences behavior independent of the sanctions it threatens to impose, that law works by what it says in addition to what it does.”).

26. See, e.g., Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 680 (1998) (noting that expressive law scholars recognize that the expressive function of law works not through something physical but through a function that is interpretive). In a different article Lessig, for example, argues that a law prohibiting duelers from holding public office worked better than a law that simply outlawed dueling because it ambiguated the objective meaning of choosing not to duel. Lessig, *supra* note 24, at 971. Under the new law, dueling was no longer

authors thus consider the social, or symbolic, meaning of certain legal doctrines or decisions,<sup>27</sup> while others consider the impact that law may have on mediating the social meaning of an activity.<sup>28</sup>

The connection between the study of norms and social meaning is significant. Changing social meaning will have an effect on the acts that members of society sanction and may also affect whether a preference for or against the regulated behavior becomes internalized and therefore subject to third order sanctions. By changing the social meaning of a particular activity, law can potentially influence the probability of a behavior attracting second and third order sanctions.<sup>29</sup> For example, by changing the meaning of riding a motorcycle without a helmet from an exercise of “freedom” to an act of high risk, law may change the likelihood that such a behavior will draw second order sanctions. Indeed, such a change in social meaning may even cause certain people to internalize this new message, thus causing them to feel guilty when they ride without a helmet. Cass Sunstein has suggested that this connection is one of the key concerns of an expressive theory,<sup>30</sup> and Robert Cooter, has considered the norm-shaping role of law to be identical to its expressive role.<sup>31</sup> An understanding of the way in which law affects behavior expressively is, therefore, a key to understanding how law shapes norms.

While providing a means for understanding the norm-shaping and internalization effects of law is probably the most significant pursuit of any expressive theory, such a theory may also provide insight into a number of

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simply a breach of honor that could not be constrained by mere punishment; rather, it was a choice to maintain honor by undertaking one's duty to do civic work. *Id.* Similarly, Cass Sunstein suggests that laws against public smoking may have significantly decreased the amount of young black Americans who smoke by changing the social meaning of smoking from attractive rebelliousness to dirtiness and a willingness to be duped. Sunstein, *supra* note 24, at 2034.

27. See, e.g., Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 1526 (1993) (arguing that the Supreme Court's decision in *Shaw v. Reno*, invalidating a voting district created to enhance the black vote, was correct because government should not “redistrict in a way that conveys the social impression that race consciousness has overridden all other traditionally relevant redistricting values”); Kahan, *supra* note 23, at 597–601 (arguing in favor of imprisonment over other cheaper forms of punishment, such as community service, because of the message of moral condemnation expressed in imprisonment); see also Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1428–62 (2000) (examining expressive theories of constitutional law and regulation).

28. See, e.g., Cooter, *Economic Analysis*, *supra* note 24, at 1579 (considering civic acts such as participating in government, helping the needy, and following the law); Lessig, *supra* note 24, at 964 (considering the different meanings of riding a motorcycle without a helmet); Sunstein, *supra* note 24, at 2032–34 (considering the changing meaning of smoking, littering, and seatbelt wearing).

29. Lessig, *supra* note 26, at 680.

30. Sunstein, *supra* note 24, at 2025.

31. See Adler, *supra* note 27, at 1373.

other issues currently confronting law and norms scholarship. For example, by defining the mechanism by which law affects norms, such a theory will shed light on a distinction between what Lawrence Lessig “playfully”<sup>32</sup> calls the “Old Chicago School” of law and economics and the “New Chicago School.”<sup>33</sup> As Lessig states: “the earliest work on law and norms treated law as unrelated to norms. The lesson of these early works was that norms constrained independently of law.”<sup>34</sup> The New Chicago School, Lessig argues, is skeptical of this conclusion.<sup>35</sup> Instead of creating a wall between laws and norms as the Old Chicago School did, scholars of the New Chicago School consider the way in which law may create, destroy, or reinforce norms.<sup>36</sup> Advocates of this latter approach suggest a link between law and norms.<sup>37</sup> A theory of expressive law can shed significant light on this debate by providing a testable means for analyzing whether law and the norms are linked or separate.

Another significant issue confronting scholars is whether law and norms scholarship can be reconciled with the classical theories of law and economics.<sup>38</sup> As a general matter, Robert Ellickson suggests that the new norms scholarship may signal a paradigm shift in law and economics away from the classical theories.<sup>39</sup> Richard Posner disagrees.<sup>40</sup> To Posner, the work on law and norms simply modifies and enriches existing law and economics theory.<sup>41</sup> Perhaps the main component of this debate concerns the relationship between norms and rational choice theory. The specific issue in question has been stated as follows: can the creation and internalization of norms be understood “as the result of the choices individuals make while

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32. Lessig characterizes his use of the term as “playful.” See Lessig, *supra* note 26, at 661.

33. *Id.*

34. *Id.*

35. *Id.* at 673.

36. See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (arguing that individuals’ perceptions are shaped by the law); Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (explaining that laws specify accepted norms); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996) (stating that norms, rather than laws, have a greater impact on behavior).

37. Lessig, *supra* note 26, at 673.

38. A number of scholars have attempted to develop a theory of law and norms that is consistent with rational choice. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); McAdams, *supra* note 36; see also Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. REV. 903 (1998) (developing a rational choice model of norm internalization).

39. Ellickson, *supra* note 13, at 538–46.

40. Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 564 (1998).

41. *Id.*

(more or less) rationally pursuing their own interests?”<sup>42</sup> One particularly troublesome area in this debate is the way in which norms are internalized. As Robert Scott has recognized, the concept of norm internalization and preference change are synonymous.<sup>43</sup> Thus, identifying if and how law affects preference will provide insight into the continued utility of the rational choice model. If law affects preference frequently and through a process irreconcilable with the rational pursuit of interests, then rational choice theory may indeed no longer play the central role in law and economics that it currently fills.

Finally, a theory of expressive law can also shed light on the existing uncertainty throughout the law and norms literature regarding the concept of social meaning. As law and norm scholars recognize, the way in which law regulates normative constraints is not through something physical but through “something interpretive” (i.e., through its effect on ‘social meaning’).<sup>44</sup> Debate over the ability of law to affect social meaning has a variety of dimensions. At one level, scholars take issue with the concept that meaning itself can be social. Richard Posner, for example, would rather use the concepts “symbolic expression” or “signaling” to describe the process by which law affects meaning. Such concepts, he notes, do not suggest that meaning is somehow invested into an act by law. Rather, meaning is “something that comes ready made in the sound or gesture or practice.”<sup>45</sup> For example, consider the effect of a law against littering. Obeying such a law may be a positive signal to a reference group that values one’s ability to be law-abiding, while it might be a negative signal to a criminal subculture.<sup>46</sup>

Other scholars question whether the concept of “social meaning” adequately captures the effect of law on norms,<sup>47</sup> arguing instead that the term “social reception” more completely captures the phenomenon.<sup>48</sup> A theory of expressive law may shape this debate by identifying the way in which law actually affects social meaning.

In sum, while the developing field of law and norms is positioned to

42. Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 626 (2001) (reviewing ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000)).

43. Scott, *supra* note 2, at 1626 n.51.

44. Lessig, *supra* note 26, at 680.

45. Posner, *supra* note 40, at 563.

46. *Id.* at 555.

47. An important body of literature is developing on the issue whether law has a normative value based on what it expresses, regardless of its consequences. See Adler, *supra* note 27; Matthew D. Adler, *Linguistic Meaning, Nonlinguistic “Expression,” and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes*, 148 U. PA. L. REV. 1577 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). This literature, however, is irrelevant to the positive claim that law can affect behavior other than through sanctions—the claim relevant to most law and norm and expressive law scholarship and the effect of law considered in this article.

48. Ellickson, *supra* note 13, at 549.

provide scholars with a much richer understanding of the effects of law on behavior, current work in the field is being restrained by the lack of an existing theory that explains the relationship between law, norms, and norm internalization. The lack of such a theory fuels a number of debates on the relationship between the "old" and "new" Chicago schools and on the way in which scholars employ the term "social meaning." There is a significant need, therefore, for a theory of the expressive function of law that identifies the mechanism through which law and norms interact and sheds light on these controversies.

### III. EXISTING THEORIES OF EXPRESSIVE LAW AND THEIR LIMITS

#### A. *SETTING THE GROUNDWORK FOR EXPRESSIVE LAW THEORIES*

Law's expressive function has been considered recently by a number of scholars. In particular, both Lawrence Lessig and Cass Sunstein have incorporated concerns for law's expressive function into recent scholarship.<sup>49</sup> In his work, Lessig demonstrates that the social meaning of particular behaviors varies over time and cultures.<sup>50</sup> The state, he argues, can use law to stimulate changes in social meaning. His analyses of law's ability to create such change, however, are illustrative rather than systematic;<sup>51</sup> consisting largely of examples of situations in which law has had such an effect. The most heralded of his examples considers anti-dueling statutes in the south. Lessig argues that statutes simply prohibiting dueling were less effective than statutes that prohibited a dueler from holding public office.<sup>52</sup> The difference in effectiveness, he argues, could be traced to the tradeoff created by the latter statute. Under the former statute, one would still lose one's honor by not accepting a duel; under the latter statute, one was faced with a tradeoff between honor and a sense of public duty. This change in the law, Lessig argues, made the meaning of not accepting a duel more ambiguous, and thus undermined the practice.<sup>53</sup>

Sunstein's work more specifically considers the relationship between expression and norm change. Like Lessig's, Sunstein's work is illustrative and not systematic. Sunstein points to examples such as laws prohibiting or limiting public smoking and suggests that passage of such laws has an expressive effect which changes the social meaning of such behavior from a statement of attractive rebelliousness to demonstration of dirtiness and willingness to be duped.<sup>54</sup> Accepting that law can have an expressive effect,

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49. See Lessig, *supra* note 24; Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996) [hereinafter Lessig, *Social Meaning*]; Sunstein, *supra* note 24.

50. Lessig, *supra* note 24, at 964-73.

51. Scott, *supra* note 2, at 1623.

52. Lessig, *supra* note 24, at 971-72.

53. *Id.* at 970-72.

54. Sunstein, *supra* note 24, at 2034.

Sunstein then asks how such effect can impact norms. He answers this question by suggesting that the change in meaning can result in a norm cascade where preference change reaches a tipping point and a new norm is entrenched.<sup>55</sup>

Picking up where Sunstein left off, a number of scholars have attempted to explain the way in which law has an expressive effect and ultimately may affect norms. In particular, Richard McAdams has written a trio of articles considering the ability of law to have expressive effects. Robert Cooter and Robert Scott considered the effect of law on social meaning and norms as well.

#### B. RICHARD MCADAMS'S THEORIES OF EXPRESSIVE LAW

Richard McAdams is the most prolific writer to date on the expressive role of law. He has considered law's effect on individual attitudes about which behaviors are approved or disapproved (esteemed or disesteemed) by members of society,<sup>56</sup> and on beliefs about the strategies to be played by individuals in games of coordination.<sup>57</sup> In addition, along with Dhammika Dharmapala, McAdams has also attempted to provide theoretical support for the notion that individuals who infer information regarding the subjects of certain legislation are rational.<sup>58</sup>

In his article *A Focal Point Theory of Expressive Law*,<sup>59</sup> McAdams argues that law affects behavior by creating focal points that allow individuals to coordinate<sup>60</sup> their activities. For example, law<sup>61</sup> may solve the cooperation problem of drivers by saying, "Drive on the right hand side of the road."<sup>62</sup> One of McAdams's primary examples of law's effect on coordination games

55. *Id.* at 2026–35; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953–55 (1996); *see also* Scott, *supra* note 2, at 1624.

56. *See generally* Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000).

57. *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1663–72 (2000).

58. *See* Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law* (2002) (unpublished manuscript, on file with the Iowa Law Review).

59. McAdams, *supra* note 57.

60. Much of the social and legal theory focuses on cooperation problems, where non-cooperation is the dominant strategy. Unlike cooperation problems, players in a coordination game have common interests, but if they fail to coordinate their activities they will fail fully to satisfy their goals. Individuals separated in a shopping mall, for example, may need to find a place to meet. Such a place would provide the players with a "focal point" to solve their problem.

61. Note that while McAdams recognizes law as only one form of third party communication that provides focal points, he argues that law has advantages over other forms of expression due to its ability to be publicized, its unique character, and because of the reputation of government officials. McAdams, *supra* note 57, at 1668.

62. *Id.* at 1667.

deals with the problem of public smoking. Such a conflict can be modeled as a hawk/dove game. Both the parties are contesting the use of a resource—air—at a particular time and place. The parties have the option in such a confrontation of playing either a hawk or a dove.

Imagine that playing Hawk consists of a willingness to engage in either a physical fight or a heated verbal confrontation for one's preferred outcome and that Dove/Dove means some kind of compromise solution (like flipping a coin to determine whether R can smoke). If this described the situation correctly, then both parties have an interest in avoiding the Hawk/Hawk outcome, although each would prefer to get their way. Anything that makes one equilibrium focal will help the parties to coordinate in avoiding a "scene."<sup>63</sup>

Before the enactment of regulation, McAdams argues, the existing social equilibrium was one in which smokers played hawk and non-smokers dove.<sup>64</sup> Law affects this equilibrium, he argues, by labeling a space as non-smoking and, ultimately, by creating a "competing focal point."<sup>65</sup> Labeling creates a space for non-smokers to gather and results in behavioral change, as most non-smokers will go to the non-smoking areas.<sup>66</sup> The creation of non-smoking areas also serves to destabilize the existing equilibrium. According to McAdams, the new label and new segregation of space taken together will give players a basis for questioning whether the past precedent of smoker playing hawk and non-smoker playing dove continues to apply to future play.<sup>67</sup> No longer will players simply embrace the traditional equilibrium.<sup>68</sup>

Law not only destabilizes the previous equilibrium but also affects what strategies individuals believe will be played by other individuals in the game. As McAdams states:

In short, after the law produces some apparent behavioral compliance, players may no longer see this "game" as the *same* one to which the prior convention applied. The precedent of the "old" game—that smokers play Hawk—still exerts influence; it offers a focal point. But the law *and* the observed behavior create a focal point for non-smokers to play Hawk in no-smoking sections. The latter focal point may be strong enough to change expectations about the strategies smokers and nonsmokers will play, which would change what strategies are played. If nonsmokers play Hawk in these sections in sufficient numbers, they will establish a new

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63. *Id.* at 1685.

64. *Id.* at 1717.

65. *Id.* at 1718.

66. McAdams, *supra* note 57, at 1718.

67. *Id.* at 1720.

68. *Id.*

pure-strategy equilibrium, a convention against smoking. Then the compliance with the law will no longer be fragile; even without legal sanctions, it is enforced by second-party sanctions.<sup>69</sup>

Thus, according to McAdams, law works expressively by destabilizing existing equilibria and by providing focal points for creation of equilibria around new behaviors.<sup>70</sup>

Another basis by which law affects behavior was suggested by McAdams in *An Attitudinal Theory of Expressive Law*.<sup>71</sup> According to the attitudinal theory, law affects behavior by signaling the underlying attitudes of a community or society and thus changing one's understanding of what others will think of her behavior.<sup>72</sup>

The attitudinal theory has three components. First, there is an assumption that an individual's behavior is affected by "what actions she believes others will approve or disapprove."<sup>73</sup> Second, there is a claim that individuals have "imperfect information" about what other people believe to be proper or improper activities.<sup>74</sup> Third, McAdams suggests that "democratically produced legislative outcomes are positively correlated with popular attitudes and therefore provide a signal of those attitudes."<sup>75</sup> Thus, independent of the sanction imposed, the legislative signal can influence behavior by causing people to update their prior beliefs about what others approve and disapprove of.<sup>76</sup>

Finally, McAdams and Dhammapala have recently begun to consider the rationality of updating one's belief based on the passage of a law. In their article, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*,<sup>77</sup> the authors establish a theoretical basis of how the legislative process, by aggregating information in certain circumstances, may create information superior to that possessed by any individual legislator. In such circumstances, they argue, a rational person may change his or her belief about the legislated activity "even though individual legislators are no more informed than individual citizens."<sup>78</sup> To

69. *Id.*

70. *Id.*

71. McAdams, *supra* note 56.

72. *Id.* at 340.

73. *Id.*

74. *Id.*

75. *Id.*

76. McAdams, *supra* note 56, at 340.

77. Dhammapala & McAdams, *supra* note 58. Kenneth Dau-Schmidt has covered similar ground in his analysis of preference change. See Dau-Schmidt, *supra* note 11. Note, however, that Dau-Schmidt argues the process by which law affects preference is akin to the process of conditioning. See *id.* at 5 (stating society will use punishment, reward, and education to instill preference). As will be discussed *infra*, the process of conditioning will have little effect on belief. See *infra* Section V.A.

78. Dhammapala & McAdams, *supra* note 58, at 2.

see why this is so, consider the cigarette smoking example once again. A ban on public smoking, the authors argue, may cause citizens to update their beliefs about the health dangers of second hand smoke, even if the legislature has no greater expertise on the issue than the citizenry.<sup>79</sup>

Consider a stylized analysis of recent laws, enacted primarily at the local level that prohibit public smoking. Initially, suppose there is uncertainty about whether secondary smoke is harmful to nonsmokers. It is known that in the event that it is harmful, the harm suffered by an individual from exposure to secondary smoking is  $D$ . Let  $\pi$  be the common prior belief held by all individuals regarding the probability that secondary smoke is harmful; thus, an individual who is in the vicinity of someone who is smoking suffers an expected harm of  $\pi D$  . . . .

Now suppose that a legislative body passes a law prohibiting public smoking. To isolate the expressive effect— independent of the deterrent effect created by sanctions—assume that it is common knowledge that the law will not be enforced through legal sanction against smokers. Suppose also that this law is enacted following the revelation of new information, available to *both* citizens and legislators, that bears on the probability that secondary smoke is harmful. This new information, however, is perceived by each individual, whether citizen or legislator, with some error, and with some differences of interpretation (viewed, for instance, through the prism of past experiences). Thus, the information held by the legislators is relevant for the citizen's decision about her own behavior, because knowing the legislators' perception of the new information reduces the uncertainty concerning how to interpret the new evidence; the vote on the passage of the ban provides a means for citizens to infer the information held by legislators. Assuming that all legislators share the objective of banning public smoking if and only if it is harmful, and that the legislative process is not influenced by considerations extraneous to the health issue, the passage of the ban indicates that the updated belief denoted ( $\pi^*$ ) of the legislators exceeds the prior belief  $\pi$ . Then, given that ordinary citizens, like legislators, begin with a prior belief of  $\pi$ , the law would cause individuals to update their prior beliefs about  $\pi$  in the light of the new information that is embodied in the law, so that citizens' updated belief  $\pi^*$  will also be

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79. *Id.* at 3–4. The authors emphasize the importance of distinguishing their argument from arguments that the legislature has greater expertise. *Id.* at 2.

higher than the prior ( $\pi^* > \pi$ ). Consequently, each individual exposed to secondary smoke will now expect to suffer  $\pi^*D$ .<sup>80</sup>

Simply put, the authors argue that, in situations where new information creates uncertainty, the passage of a law may cause a rational individual to update her belief about the law's subject matter.<sup>81</sup>

### C. INTERNALIZATION AS THE BASIS OF NORM CHANGE

Like McAdams, Robert Cooter is also interested in the way law may create equilibria around new behavior. Unlike McAdams, however, Cooter's analysis focuses solely on the way law affects a person's preferences. His primary mechanism for exploring the way in which a person may change his preference is the concept of Pareto self-improvement.

According to Cooter, people's preferences are discernable by others, particularly their colleagues, friends, relatives and other close relations.<sup>82</sup> Further, people form relationships that increase opportunities for mutual benefit or for exploitation.<sup>83</sup> Thus, individuals care about other individuals' willingness to conform to moral norms.<sup>84</sup> As a result, a person will internalize a norm when doing so will provide a sufficiently large increase in his or her opportunities.<sup>85</sup> Such a change is a Pareto self-improvement when it makes the person better off as measured by the old preferences as well as the new ones. For example, "becoming more reliable can increase earnings enough to make the person better off as measured by the old preferences (unreliable) and the new preferences (reliable)."<sup>86</sup>

Law, in turn, affects this process in one of two ways. First, by grounding a legal duty in morality, the state may increase an individual's willingness to undertake the specific duty as an expression of his or her civic virtue.<sup>87</sup> Second, individuals who believe they should obey the law may internalize the behavior announced by the new law.<sup>88</sup> Taken together, these two effects can create a tipping point that moves behavior to a new equilibrium.

Let's consider the cigarette smoking example once again. According to Cooter, a law that says "Don't smoke in these places" may change an individual's behavior because of his or her desire to be seen by others as a cooperator, or because of his general belief that the law should be followed. Through a process characterized by Cooter as "murky,"<sup>89</sup> this change

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80. *Id.* at 3–4 (citations omitted).

81. *Id.* at 4.

82. Cooter, *Economic Analysis*, *supra* note 24, at 1594.

83. *Id.* at 1592–93.

84. *Id.* at 1593.

85. *Id.*

86. Cooter, *supra* note 38, at 904–05.

87. Cooter, *Economic Analysis*, *supra* note 24, at 1597.

88. *Id.* at 1598.

89. Cooter, *supra* note 38, at 922.

somehow becomes internalized so that the person's preference changes. The individual emerges from the process with a new and different view of smoking. The law thus influences behavior by identifying specific behaviors that civic-minded or law-abiding citizens may adopt. If enough individuals adopt the new behavior then a tipping point may be reached and a new equilibrium entrenched.<sup>90</sup> In this way, law can change a norm from approving of smoking to opposing it.

D. CRITICISMS OF THE EXPRESSIVE LAW AND INTERNALIZATION THEORIES  
AND THE ARGUMENT FOR RATIONAL CHOICE

Existing theories of law and expression have been criticized as too descriptive, at times non-falsifiable, and for failing to provide a "unified methodological and conceptual apparatus" by which to predict law's expressive effect.<sup>91</sup> Take, for example, McAdams's work on expressive law. This work is intended to highlight certain instances where law may have an expressive effect. In certain circumstances, McAdams argues, law may affect one's attitude toward the subject of a law<sup>92</sup> and, in other circumstances, law may affect one's willingness to play the same role in a game of cooperation as one did before the law was passed.<sup>93</sup> While these analyses provide significant insight into the law's effect on behavior, they do not provide a complete model of behavior that can be applied positively to predict future conduct in any particular situation. Indeed, McAdams himself recognizes this limitation, noting, for example, that his attitudinal theory is "not the only way to explain the expressive effect, and there are almost certainly some effects it cannot explain."<sup>94</sup>

To the extent Cooter's theory of norm internalization attempts to provide a comprehensive vision of how law affects norms, it too has limitations. First, Cooter fails to consider the way in which either of his suggestions regarding how law affects preference will cause a person to internalize the norm associated with the particular law. Indeed, he specifically avoids the question, stating simply that he assumes character is chosen and suggesting that people who choose good character may pursue it by associating with good people and institutions.<sup>95</sup> As a result, Cooter's theory of the relationship between law and norms is non-falsifiable. That is, Cooter cannot differentiate between a person who will obey the law because

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90. Cooter, *Economic Analysis*, *supra* note 24, at 1581.

91. Scott, *supra* note 2, at 1607.

92. See Dharmapala & McAdams, *supra* note 58, at 3–4.

93. See McAdams, *supra* note 56, at 339.

94. *Id.* at 340. McAdams makes similar claims in his other works. For example, he describes his focal point theory as one means by which law works expressively and the Condorcet Jury Theorem as a means by which legislation can generate compliance expressively. See Dharmapala & McAdams, *supra* note 58, at 1; McAdams, *supra* note 57, at 1651.

95. Cooter, *supra* note 38, at 922.

she has internalized it, and a person who will obey it for other reasons, such as its sanctioning effects. In this sense, the theory also fails to provide a full and testable mechanism for determining when passage of a law will result in internalization of the law's moral sentiment.

Moreover, Cooter's claim that law, by aligning with morality, will increase civic acts is questionable empirically and also fails to provide a basis for determining when behavior will change as a result of the law versus the moral constraint.<sup>96</sup> Simply put, in situations where law aligns with an uncontested moral sentiment, the law may be obeyed, but it is the existing sentiment that does all or most of the work.<sup>97</sup> The fact that the state is wise enough to elevate the duty to a law will likely have little effect on who obeys the duty.<sup>98</sup> Moreover, claims that individuals will follow law due to their respect for it are also non-falsifiable. Whenever law conflicts with morality, those who value compliance with law are faced with a moral challenge; they must choose to follow the law or to abide by the moral sentiment with which it conflicts.<sup>99</sup> Virtually all law deals with conflicting beliefs. In such a case there is no basis for determining when the law will be followed, when an individual will invoke the moral claims to civil disobedience, or when the law will be followed for another reason, such as fear of its sanctions.<sup>100</sup>

The assumptions underlying Cooter's idea of Pareto self-improvement have also been criticized. For example, Robert Scott argues that preferences are not translucent, even to intimates.<sup>101</sup> Rather, Scott notes that there is a real difference between revealed preference and true preference, and he argues further that the idea that behavior reveals one's true preference is also non-falsifiable. Simply put, whether one is internalizing a preference change or simply mimicking behavior in order to increase his opportunities cannot be proven.

#### 1. The Rational Choice Model of Norms: The Case of the Devoted Dog Lovers

The criticisms of expressive law theories highlight the value to law and economics scholars of rational choice theory—the traditional law and economics model of behavior. Rational choice, although a parsimonious model to the extent that it does not describe all behavior,<sup>102</sup> provides a useful means for predicting behavior and thus allows for a positive theory of

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96. See Scott, *supra* note 2, at 1634.

97. See *id.* at 1633.

98. See *id.* But see McAdams, *supra* note 57, at 1669 (arguing that the publicity attendant to the passage of a law may provide information regarding a duty to individuals who otherwise would not have it).

99. See Scott, *supra* note 2, at 1634.

100. *Id.*

101. *Id.* at 1635.

102. See *infra* notes 117–18.

the effects of law on behavior. Robert Scott has advocated the use of a rational choice model to describe the relationship between law and norms precisely for this reason.<sup>103</sup>

Of particular concern to Scott (regarding the use of expressive law theories) is the distinction between preference-shaping and opportunity-shaping. Rational choice theory assumes that all preference is exogenous.<sup>104</sup> Thus, the role of law in a rational choice theory of norms is to affect one's opportunities.<sup>105</sup> To Scott, attempting to factor into an analysis the way in which law affects preference creates serious complications, for it requires scholars to understand how law is "mediated by social phenomena—social norms and human emotions—that are highly complex and only imperfectly understood."<sup>106</sup> Inability to deal with this complexity, he argues, limits the ability to develop sound predictive theories of expressive law. In Scott's mind, then, parsimony and predictability of theories for use in law and economics trump the use of theories that explain certain behaviors or effects of law, but are necessarily complex and incomplete.

Richard Posner has also raised concerns with theories that ignore rational choice. To him the subject of social norms "can be analyzed fruitfully in terms of economic theory conceived as the theory of rational individual choice."<sup>107</sup> The basis of his concern regarding expressive law, however, is different. He is primarily concerned with the notion underlying the work of some expressive law scholars suggesting that law can affect social meaning.<sup>108</sup> Such a notion, he argues, "implies that meaning is social; it is something that society invests a sound or gesture or practice with rather than something that comes ready-made in the sound or gesture or practice. Social meaning is therefore a redundancy."<sup>109</sup> While Posner recognizes that law may affect the meaning of an act, such as changing the meaning of smoking from being cool to being a dirty addict, the interesting question to him is how such valences change.<sup>110</sup> Focusing on social meaning, he suggests, is not the means to such an understanding.<sup>111</sup> For both Posner and Scott, the basic rational choice model thus continues to provide the most useful tool for the analysis of law's effect on norms.

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103. Scott, *supra* note 2, at 1604–07.

104. See generally VARIAN, *supra* note 10.

105. See Dau-Schmidt, *supra* note 11, at 1.

106. Scott, *supra* note 2, at 1604.

107. Posner, *supra* note 40, at 563.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

*a. The Case of the Devoted Dog Lovers:  
A Rational Choice Model of Law and Norms*

Robert Scott develops a rational choice model in his article on the limits of behavioral theories.<sup>112</sup> He first creates a small fact pattern and then uses rational choice to explain the effect of law on norms that he describes in it. His fact pattern follows:

Bill and Ann Smith are university professors who have a summer home in Maine where they vacation with their four dogs. Upon returning to Maine this past summer, the Smiths took their smallest and most obedient dog out for a walk on a three-mile nature trail that they had previously enjoyed. Upon arriving at the trail head, the Smiths discovered to their dismay that the local "greens" had succeeded in having the township enact an ordinance banning all dogs, leashed or not, from the trail. The ordinance was marked with a large sign with a red line through a figure of a dog, followed by the terms of the ordinance. No sanction was specified, and, as longtime summer residents, they knew that the township had no effective constabulary.

The Smiths engaged in a moral debate. They concluded that their principled commitment to animal rights trumped both their environmental sensibilities and their strong inclination to obey the law, and thus, they proceeded on the trail. Shortly thereafter, the Smiths encountered a neighbor on the trail, one with whom they had enjoyed friendly relations in the past. In calm but insistent terms, the neighbor chastised them for violating the ordinance and challenged them to admit that they had seen and ignored it. Shamed by the incident, they returned home and, in subsequent trips, left the dogs at home.

To this day, the Smiths remain convinced that the ordinance is wrongheaded and equally agreed that, owing to the encounter, they will obey the ordinance in the future. When asked recently if they would have stopped taking the dogs on the trail if, instead of an ordinance, there had been a public announcement from the township that nature lovers with dogs could avoid unpleasant interactions by choosing another trail, the Smiths claimed that such an announcement would not have deterred them. Why not? "Because," they stated, "then we would still have had a right to go on the trail." But, if that is so, weren't they wrong to venture down the path in the first place? "No," they replied (firmly). "We believed that our dogs' rights were a trumping value." Then why did they stop using the trail? "Because we wished to avoid the

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112. See generally Scott, *supra* note 2.

'green police.'" But wouldn't the "green police" create an unpleasant encounter in the case of the public announcement? "So what," they concluded. The neighbors would then have had no "right" to shame them and, under these conditions, the Smiths would be perfectly willing to defend themselves and their dogs even if the interactions were uncomfortable.<sup>113</sup>

Scott recognizes in his hypothetical that the law can change behavior through the process of informal sanctions. The point where he diverges from expressive theories is in how law creates this effect. According to Scott, law has no "expressive" effect in the sense that it "modifies or stimulates the creation of an underlying norm in some way."<sup>114</sup> Rather, he suggests, law affects the Smiths' willingness to walk their dogs on the trail by affecting their estimation of the probability that they will receive second-order sanctions. As he notes:

Prior to the anti-dog ordinance, the Smiths might have estimated the probability that someone would chastise them for bringing dogs on the trail as, say, 1 in 10. Once they see the sign informing them about the ordinance, they will revise their estimate to, perhaps, 1 in 6. Thereafter, once they encounter their neighbors on the trail, they will revise their estimate again, this time to, say, 1 in 2.<sup>115</sup>

To Scott, law is "expressive" only in the Bayesian sense.<sup>116</sup> That is, it doesn't change a norm; rather it provides information regarding the likelihood that people share the sentiment embodied in the law. To an expressive theorist law modifies or stimulates norms; to a rational choice theorist law simply teaches the community about the existing sentiment, thus causing community members to update their beliefs by making clearer to them what the existing community norm is.<sup>117</sup>

As Scott recognizes, the key to an analysis of the relationship between law and norms centers on the relationship between the law itself and the sanctioning behavior. Without a theory that provides an understanding of this relationship, expressive law scholars are left with nothing but unverifiable descriptions of specific instances of norm change. As Scott recognizes, however, the rational choice theory also has its shortcomings. In particular, rational choice does not explain observable behaviors such as voting<sup>118</sup> and also ignores the common experience that social meaning is

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113. *Id.* at 1608–09.

114. *Id.* at 1616–17.

115. *Id.* at 1615.

116. *Id.*

117. Scott recognizes the relationship between his rational choice theory and expressive theories such as McAdams's attitudinal theory. Scott, *supra* note 2, at 1614.

118. *Id.* at 1620.

internally constructed and subject to change.<sup>119</sup> Thus, both stories of normative behavior—the stories told by existing theories of expressive law as well as by rational choice—have their weaknesses. As a result, law and economics scholars continue to search for the “holy grail”—the fertile middle ground between economics and the other behavioral sciences<sup>120</sup>—in an effort to provide a model of behavior and norms that both predicts and explains the richness of human behavior.

## PART TWO: A BELIEF CHANGE THEORY OF EXPRESSIVE LAW

### IV. THE STRUCTURE OF ATTITUDE AND THE SUBJECTIVE NORM

Current theories of expressive law have been criticized as descriptive, limited in scope, and as failing to provide a mechanism by which law can be predicted to have an expressive effect. As some law and economics scholars have argued, a parsimonious model of behavior that provides predictability is better than a more comprehensive model that potentially explains behaviors better but cannot be used in a predictive manner.<sup>121</sup> The next two sections of this article attempt to develop a more comprehensive and predictive theory of expressive law. This section, drawing on the fields of psychology and behavioral theory,<sup>122</sup> develops a general model of behavioral decision-making founded on the relationship between beliefs about, and evaluations of, outcomes of actions. The following section argues that law affects behavioral decisions by influencing these factors.

Psychologists have developed a general model that identifies two factors that affect one's intent to undertake a behavior. The factors are the individual's attitude toward the behavior itself and his or her beliefs about what other people think of the behavior.<sup>123</sup>

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119. *Id.*

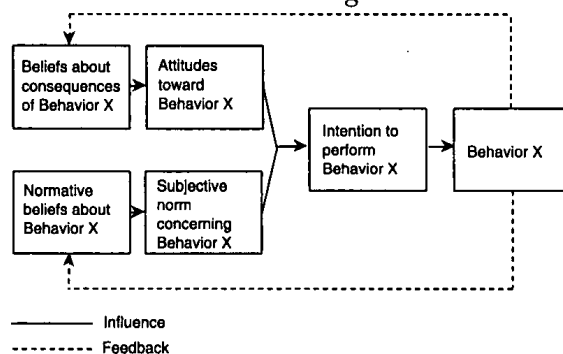
120. *Id.* at 1607.

121. See Scott, *supra* note 2; see also Stigler & Becker, *supra* note 9.

122. See generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

123. MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH* 13–18 (1975).

This “reasoned action” model has been diagrammed as follows:<sup>124</sup>



As the model suggests, an individual decides whether to engage in particular behaviors by reasoning about how good/bad and likely/unlikely the outcomes associated with the behavior will be (called the “behavioral attitude”), while also considering social pressure to engage or not engage in that behavior (called the “subjective norm”). The behavioral attitude and subjective norm combine to determine the intent to act.<sup>125</sup> Thus, understanding one’s attitude toward a behavior and one’s belief about the subjective norm can help to determine<sup>126</sup> one’s desire to undertake the behavior.<sup>127</sup>

124. *Id.* at 16. For additional sources of support for the reasoned action model, see Icek Ajzen & Martin Fishbein, *The Prediction of Behavior from Attitudinal and Normative Variables*, 6 J. EXPERIMENTAL SOC. PSYCHOL. 466 (1970); Icek Ajzen & Martin Fishbein, *Attitudinal and Normative Variables as Predictors of Specific Behaviors*, 27 J. PERSONALITY & SOC. PSYCHOL. 41 (1973). For a recent overview of research in this area, see Icek Ajzen, *The Nature and Operation of Attitudes*, 52 ANN. REV. OF PSYCHOL. 27–58 (2000) (reviewing research published between 1996 and 1999).

125. See RUSSELL VEITCH & DANIEL ARKKELIN, ENVIRONMENTAL PSYCHOLOGY: AN INTERDISCIPLINARY PERSPECTIVE 109 (1995) (explaining the theory and relating it to environmental perception). One interesting aspect of the model is that it helps us understand when attitude and behavior are inconsistent. Inconsistency results when one is predisposed positively toward a behavior but still does not undertake the behavior given the subjective expectations regarding social pressure.

126. The model itself is deceptively simple. In particular, the model conceives of the individual in a vacuum, uninfluenced by social context. Intentions to act rely significantly on social context. For example, an individual may have different attitudes toward an activity based on the normative group to which she belongs. Criminals, for example, think differently about crime than police and an individual may have a different attitude toward pollution in her business community than in her home or family community. For a general analysis of the influence of social context on norms, see ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT (Deborah J. Terry & Michael Hogg eds., 2000). Similarly, the beliefs that are “salient” for any actor rely on a number of external factors. For example, I might have a strong positive attitude toward drinking a glass of water after a hard workout on a hot day and be completely indifferent to such an activity at other times. For an analysis of the concept of salience and its effect on the reasoned action model, see *infra* Section IV.A.2.

127. Note that intending to undertake a behavior and actually acting are not always the same thing. There may be physical limitations to behavior. Thus, I may desire to climb a mountain but weather, geography, or physical exhaustion may keep me from so doing. See

## A. BELIEFS AS THE BUILDING BLOCKS OF ATTITUDE

While the subjective norm is defined in terms of one's beliefs about what others think of a behavior and whether to comply with their expectations,<sup>128</sup> it is more difficult to conceive of the concept of attitude in terms of belief. Attitude toward a behavior can, however, be defined as a function of what individuals believe about the consequences of the behavior, the certainty of their beliefs, and their evaluations (either positive or negative) of those consequences.<sup>129</sup> This relationship can be expressed in the form of an equation where A is the attitude toward behavior O; b is the belief about O (i.e. the subjective certainty that O will result in consequence i); e is the evaluation of the consequence; and n is the number of beliefs:<sup>130</sup>

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generally Lessig, *supra* note 26 (noting that physical limitations may keep us from doing what we want).

128. See VEITCH & ARKKELIN, *supra* note 125, at 109.

129. See FISHBEIN & AJZEN, *supra* note 123, at 29. The elements of the belief based theory are as follows:

- (1) An individual holds many beliefs about a given object; i.e., the object may be seen as related to various attributes, such as other objects, characteristics, goals, etc.
- (2) Associated with each of the attributes is an implicit evaluative response, i.e., an attitude.
- (3) Through conditioning, the evaluative responses are associated with the attitude object.
- (4) The conditioned evaluative responses summate, and thus
- (5) on future occasions the attitude object will elicit this summated evaluative response, i.e., the overall attitude.

*Id.* The theory of belief-based attitude and intent has its roots in the earliest work of Professor Fishbein. See, e.g., Martin Fishbein, *An Investigation of the Relationships Between Beliefs About an Object and the Attitude Toward That Object*, 16 HUM. REL. 233 (1963). For a description of the belief-based theory of attitude and intent formation, this article will rely primarily on FISHBEIN & AJZEN, *supra* note 123, which remains the most comprehensive exegesis of the theory. It should, however, be noted that the theory has been further elaborated in a number of articles—sometimes responding to criticism—by Professors Fishbein, Ajzen, and others. For criticism of the theory, see, for example, Vernon E. Cronen & Richard L. Conville, *Fishbein's Conception of Belief Strength: A Theoretical, Methodological, and Experimental Critique*, 42 SPEECH MONOGRAPHS 143 (1975); Joseph R. Priester & Monique A. Fleming, *Artifact or Meaningful Theoretical Constructs?: Examining Evidence for Nonbelief- and Belief-Based Attitude Change Processes*, 6 J. CONSUMER PSYCHOL. 67, 73–74 (1997). For further exposition and response to these criticisms, see Martin Fishbein & Susan Middlestadt, *Noncognitive Effects on Attitude Formation and Change: Fact or Artifact?*, 4 J. CONSUMER PSYCHOL. 181, 199–201 (1995) (analyzing a number of critical studies and arguing that the contribution of factors other than belief based expectancy-value measures to the prediction of attitude can be seen as a methodological artifact of using inappropriate measures). See also Martin Fishbein & Susan E. Middlestadt, *A Striking Lack of Evidence for Nonbelief-Based Attitude Formation and Change: A Response to Five Commentaries*, 6 J. CONSUMER PSYCHOL. 107, 107–115 (1997) (arguing that most criticism avoids assessing the belief-based structure that underlies attitude formation).

130. FISHBEIN & AJZEN, *supra* note 123, at 29. This theory of beliefs as the basis of attitude can be correlated with the Subjective Expected Utility theory of behavioral science. According to this theory, “when a person has to make a behavioral choice, he will select that alternative which has the highest subjective expected utility, i.e., the alternative which is likely to lead to the most favorable outcomes.” *Id.* at 30. This can be stated as

Consider a simple example of the attitude toward wearing a seatbelt while driving. I may have the following salient<sup>131</sup> belief about the behavior, which I evaluate positively: it will provide more protection in case of an accident; and the following salient beliefs which I evaluate negatively: it will be uncomfortable and it will restrict my movement. The certainty with which I hold these beliefs, in conjunction with my evaluations of each of these outcomes, can determine my attitude regarding the behavior. To see why, assume a simple scale of certainty that runs from 0 (no certainty) to +100 (strong certainty) and a similar scale for evaluation -100 (strong dislike) to +100 (strong like). Applying these factors to the previous seatbelt-wearing example could have the following results:

BELIEF	b	e	be
Restricts Movement	50	-30	-1500
Is Uncomfortable	40	-40	-1600
Will Be Safer In Accident	30	80	2400

$$A_o = \sum b_i e_i = -700$$

Based on these beliefs alone<sup>132</sup> I would be disinclined to wear a seatbelt when driving, but not very strongly so.

### 1. The Anatomy of Belief

Beliefs<sup>133</sup> result from three different but related processes. At their very base, beliefs are formed as the result of a person's direct sensory perception of the world (descriptive belief.) For example, if I see Robert and Tom standing next to each other, I may come to the conclusion that Robert is taller than Tom. This is a simple process of descriptive belief development. Inferential beliefs, on the other hand, are logical conclusions formed from descriptive and other beliefs. Thus, if I see Peter is taller than Robert, I may

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$SEU = \sum_{i=1}^n SP_i U_i$  where "SP<sub>i</sub> is the subjective probability that the choice of this alternative will lead to some outcome i; U<sub>i</sub> is the subjective value or utility of outcome i." *Id.* This model can be recast in terms of beliefs about consequences. That is, SP = b and U = e or as the equation  $A_b = \sum_{i=1}^n b_i e_i$ . *Id.* at 30-31; see also Lynn R. Anderson & Martin Fishbein, *Prediction of Attitude From the Number, Strength, and Evaluative Aspect of Beliefs About the Attitude Object: A Comparison of Summation and Congruity Theories*, 2 J. PERSONALITY & SOC. PSYCHOL. 437, 437-43 (1965) (arguing that basic summation of belief and evaluation yields significantly better predictions of attitude than congruity theory).

131. The notion of salience suggests that only a small number of beliefs will be relevant to a determination of attitude at any one time. See *infra* Section IV.A.2.

132. For a discussion of what beliefs are "salient," i.e., which beliefs affect our attitude, see *infra* Section IV.A.2.

133. A belief is a conviction or feeling of the truth of some proposition or the reality of some being or phenomenon. WEBSTER'S NEW INT'L DICTIONARY 200 (3d ed. 1993).

conclude that Peter is also taller than Tom, even if I do not see them together. This belief, is simply the result of applying logical processes to prior belief. Finally, beliefs may be formed based on information provided by a third party. Thus, if my friend tells me that Peter is taller than Tom, I may reach such a conclusion regardless of pre-existing knowledge of Tom and Peter's heights. Similarly, after a period of economic prosperity, if I read in a reputable newspaper that unemployment rates are consistently increasing, it is likely that I will change my belief about unemployment rates specifically. Further, through inferential processes, this information will also influence my belief regarding the robustness of the American economy in general.

Beliefs about consequences of behavior can be held with different degrees of certainty. In the case of informational belief, the trustworthiness of the speaker and other factors will affect certainty.<sup>134</sup> In the case of inferential beliefs, one's certainty is a function of either probabilistic or evaluative consistency.<sup>135</sup> Evaluative consistency is a function of whether individuals evaluate objects or behaviors positively or negatively in relation to one another. Negative or positive evaluations tend to be consistently held. Thus, if someone positively values religious freedom but has a negative attitude toward China, she is likely to form the inferential belief that China has no religious freedom.<sup>136</sup> Such a conclusion maintains the relation between her evaluation of China and religious freedom. Probabilistic consistency, on the other hand, refers to the logic used to develop an inferential belief. The better the logical reasoning, the more certainty with which a belief is held.<sup>137</sup> For example:

[A] person might hold the following two beliefs.

1. The People's Republic of China is a communist country.
2. Communist countries do not have religious freedom.

On the basis of these beliefs he might form the following inference.

China does not have religious freedom.<sup>138</sup>

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134. Note that the willingness to accept information is itself a function of descriptive and inferential belief regarding the trustworthiness and veracity of the source of the information. Thus, if a gossip magazine writes that Tom Cruise and Madonna are having a baby, one may be less willing to accept this information than if it were published by the *New York Times*. Further, a message's information may be mediated by its ability to be comprehended and the attention given to it by its audience. See FISHBEIN & AJZEN, *supra* note 123, at 452 (examining the significance of source factors in the production of communication effects and the persuasion process).

135. *Id.* at 145.

136. *Id.* at 144.

137. Note however that probabilistic consistency does not need to exactly follow the rules of formal logic. *Id.* at 145.

138. *Id.*

Such a conclusion is logically consistent and thus likely will be held with a similarly high degree of certainty.<sup>139</sup> In sum, beliefs are created in one of three ways: by direct experience, through inferential reasoning, or through the provision of information by third parties. Further, belief formation is constrained by either logical or evaluative consistency and belief certainty is itself a function of these factors. Thus, while individual beliefs change, individuals are not blank slates; their prior experience and evaluations will affect their ability to change their attitudes and will also affect the certainty with which they hold their beliefs.

## 2. The Notion of Salience

One significant limitation on the effective use of a belief change theory is the fact that any behavior is associated with a virtually limitless number of beliefs, thus significantly limiting the ability to analyze the effect law will have on attitude. However, only a relatively small number of beliefs affect our attitude.<sup>140</sup> Due to limited attention span, apprehension, and information processing abilities, individuals can only process a small number of beliefs at any single time.<sup>141</sup> Thus, although an individual may have a large number of beliefs that, if given time, she could recall about a particular behavior and its consequences, only a maximum of between five and nine of these beliefs underlie her attitude.<sup>142</sup> While a perfect theory of how beliefs become salient has not yet been developed, a number of factors that inform this determination have been uncovered. Generally, when asked what she thinks about a behavior, an individual's first stated beliefs are her salient beliefs.<sup>143</sup> Moreover, only about five to nine beliefs can be salient at any one time and salient beliefs tend to develop a pattern of certainty. Thus, when looking at the first nine beliefs, one can determine where the salient ones end by looking for the point where certainty becomes random.<sup>144</sup> Therefore, although not absolutely determinable, salient beliefs at any one time<sup>145</sup> can be identified with a relatively high degree of certainty.<sup>146</sup>

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139. Note as well that the certainty of inferential beliefs is additive; thus, if one does not believe with certainty that communist countries have no religious freedom, their lack of certainty will transfer to their concluding belief. FISHBEIN & AJZEN, *supra* note 123, at 144.

140. *Id.* at 218.

141. *Id.*

142. *Id.*

143. *Id.*

144. FISHBEIN & AJZEN, *supra* note 123, at 218.

145. As previously mentioned, which beliefs become salient at any one time depends on a number of external factors. See *supra* note 126 and accompanying text.

146. New research in cognitive psychology may also provide some understanding of why certain beliefs are or become salient. Research on heuristics, or cognitive shortcuts, used to overcome limited information processing abilities, suggests for example that the more available information about a particular subject is, the more likely the information will be salient. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*,

### 3. The Basis of Evaluation

The certainty of one's salient beliefs about the consequences of one's behavior does not complete the analysis of attitude. Rather, certainty of consequences must be paired with evaluation of consequences to develop a proper model of attitude. Evaluation of a consequence simply means that one thinks positively or negatively about the consequence of an action. Returning to our analysis of attitude toward wearing a seatbelt, we can see that certain consequences of wearing a seatbelt are positively evaluated (e.g. safety), while certain consequences are negatively evaluated (discomfort).

Evaluations of consequences are formed by standard processes of conditioning.<sup>147</sup> These processes include: operant conditioning, classical conditioning, and vicarious conditioning.<sup>148</sup> Generally, the theory of operant conditioning holds that a behavior that is followed by positive consequences will increase due to received positive reinforcement, while behaviors that lead to negative consequences will be extinguished. The theory of vicarious conditioning suggests that individuals can learn what behaviors lead to positive rewards and what behaviors lead to negative rewards by observing what other people do and how they are rewarded, and that individuals will imitate behavior that is positively rewarded. The model of classical conditioning suggests that a neutral stimulus (a conditioned stimulus) paired with a stimulus that elicits an affective response will acquire the same ability to produce the response.<sup>149</sup> Thus, I may feel that my own safety is a good thing because I have been positively rewarded as a child whenever I do something to stay out of danger (e.g., receiving praise for not putting my hand near a hot stove or not running down stairs). I may also have seen other people being rewarded for similar activity. Similarly, I may feel that my own safety is a good thing because I have been hurt before and don't like the feelings that accompany an injury. One's history of either positive or negative conditioning regarding certain outcomes will, in turn, affect the degree to which one positively or negatively evaluates the outcome.

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112 HARV. L. REV. 1420, 1433 (1999). Indeed, salience is often equated with availability. Korobkin & Ulen, *supra* note 13, at 1087–88.

147. FISHBEIN & AJZEN, *supra* note 123, at 277 (noting that attribute evaluations, in the end, must be accounted for by the process of conditioning). Many scholars have relied on theories of conditioning to explain attitude formation. See, e.g., Dau-Schmidt, *supra* note 11, at 5. One of the more significant implications of the distinction between belief and evaluation is that law will be much more likely to affect attitude through its effect on belief rather than its effect on evaluation because evaluative responses will tend to change more slowly than belief. See *infra* Section V.A.

148. VEITCH & ARKKELIN, *supra* note 125, at 105–07.

149. *Id.*

*B. BELIEFS AND EVALUATIONS AS THE BASIS OF  
THE SUBJECTIVE NORM AND ATTITUDE*

Positive or negative evaluation of behavioral consequences, together with the certainty of one's belief about the likelihood of the consequences, comprise the basic elements of attitude. Similarly, evaluation and certainty also affect the subjective norm.<sup>150</sup> Indeed, the subjective norm component of the reasoned action model is defined simply as one's belief about what other people think of the behavior and, in turn, the social consequences of actually undertaking the behavior.<sup>151</sup> The certainty of one's belief about what other people think of the behavior, combined with her evaluation of the disapproval or approval she expects to receive, thus completes the general belief based theory of intent. Consider once again the example of wearing a seatbelt. Assuming concerns regarding others' attitudes are a salient factor, one can factor in the subjective norm in the following way:

BELIEF	b	e	be
Restricts Movement	50	-30	-1500
Is Uncomfortable	40	-40	-1600
Will Be Safer In Accident	30	80	2400
Wearing a Seatbelt Will Result in Positive Social Feedback	10	50	500

$$A_o = \sum b_i e_i = -200$$

A belief-change theory encompasses beliefs about consequences associated with undertaking a particular behavior. Included in these consequences are concerns regarding the subjective norm, i.e., the likelihood that one will be subjected to positive or negative feedback for undertaking the act. The belief-change theory further requires that the likelihood of a particular consequence be paired with the evaluation of the consequence. By establishing these factors for a relevant group of individuals, one can generally determine their desire to undertake the relevant behavior.<sup>152</sup>

150. The subjective norm, together with attitude, are the components of one's intent to act pursuant to the reasoned action model of behavior. *See supra* note 124.

151. *See supra* note 125 and accompanying text.

152. A number of tests have been used to measure the variety of salient beliefs a particular population of people may hold regarding any particular behavior. These tests include: attitude scaling; disguised techniques, such as error-choice technique, estimation of others' responses, and the bogus-pipeline technique; analyzing physiologic responses; and reasoning cognitive structure. *See generally* FISHBEIN & AJZEN, *supra* note 123, at 53-106 (outlining various measurement techniques).

## V. LAW AND BELIEF CHANGE

## A. HOW LAW AFFECTS BELIEF

It follows from the previous model of belief change that law or law-making can affect behavior in two ways: by either affecting the certainty of a belief or by affecting evaluations of consequences. The remaining sections of this article focus on the ability of law to affect belief certainty as opposed to consequence evaluation. While, as a general matter, law may affect our evaluations of behavioral outcomes by changing the reward system associated with a behavior, law's ability to do so is quite indirect in most cases. Our evaluations of consequences are built on a lifetime of conditioning, including feedback received from family and friends. The positive or negative feedback or associations received by law and its enforcement will initially be limited.<sup>153</sup> Note, however, that to the extent law may be responsible for a norm shift in society,<sup>154</sup> law may result in evaluative change through the conditioning people receive from their family and friends. Simply put, for purposes of measuring the likely effect of law over a short-term period of perhaps a few years, the effects of law on certainty of belief are much more significant than the effects of law on evaluation. To the extent that law will affect a norm shift, however, it is likely to affect evaluation of future generations.

Law can more directly affect the certainty with which a belief is held by providing information or by influencing the inferential reasoning process.<sup>155</sup> Note, however, that, in terms of its ability to provide information, the passage of a law itself may not be the main source of information. Rather, publicity about the reasons for the passage of a law will be the main source of information provision. Take, for example, the publicity of data on smoking risks or the risks of driving without a seatbelt. If we have trusted the sources of the information, (say, for example, we generally trust the Surgeon General and Department of Transportation),<sup>156</sup> and the information they provide us is significant, such information can cause us to change our attitude toward these activities. For example, using the variables outlined earlier, suppose the following beliefs are held both prior to and following

153. Evaluation should not, however, be confused with preference. *See infra* note 162 (describing the difference between evaluation and preference).

154. *See infra* Section V.B.

155. Laws can, of course, also be a source of descriptive belief. However, because descriptive beliefs are sensory experiences of the subject of one's belief, such descriptive beliefs will only affect our attitude toward the law itself. Thus reading a law may affect my belief about how laws are structured (for example, laws always have titles) or the subject of the law (that is, this law regulates seatbelt wearing) but nothing more.

156. Indeed, to the extent we view an entity such as the Department of Transportation as releasing information that seems against its own interest we are likely to trust the information more. *See supra* Section IV.A.2 (discussing what beliefs are "salient" and, therefore, affect a person's attitude).

dissemination of information from the Department of Transportation:

PRE-DEPARTMENT OF TRANSPORTATION INFO. WEARING SEAT BELT

BELIEF	b	e	be
Restricts Movement	50	-30	-1500
Is Uncomfortable	40	-40	-1600
Wearing a Seatbelt Will Result in Positive Social Feedback	10	50	500
Will Be Safer in Accident	30	80	2400

$$A_o = \sum b_i e_i = -200$$

POST DEPARTMENT OF TRANSPORTATION INFO. WEARING SEAT BELT

BELIEF	b	e	be
Restricts Movement	50	-30	-1500
Is Uncomfortable	40	-40	-1600
Wearing a Seatbelt Will Result in Positive Social Feedback	10	50	500
Will Be Safer in Accident	70	80	5600

$$A_o = \sum b_i e_i = 3000$$

Such simple information may result in a change of attitude and thus a positive predisposition toward wearing a seatbelt for some people.

More significantly, the inferential process may lead us to change the certainty of a belief based on the passage of law without new information. Take, for example, the belief about wearing a seatbelt after the passage of a law requiring manufacturers to place seat belts in automobiles and requiring individuals to wear them. One may undergo an inferential process in such a case that looks like this: Manufacturers are against requiring seatbelts in cars. Manufacturers make significant donations to legislators' campaigns. The legislators passed a law requiring seatbelts anyhow. Thus, seatbelts must be a good thing.<sup>157</sup> One may further this understanding by conjoining it with existing knowledge about the purpose of seatbelts being to protect a car's passengers and infer that seatbelts are good because they are effective safety equipment.

The legislative process is thus likely to affect attitudes toward a particular behavior by both providing new information regarding the subject

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157. One may recast Dharmapala and McAdams's use of the *Condorcet Jury Theorem* as one example of inferential belief change.

of the behavior and by influencing the logical process underlying belief creation and change. Similar processes can affect the subjective norm as well. For example, if reputable sources provide actual information on the number of people in favor of a particular piece of legislation, this may cause individuals to update their beliefs on the majority view. Passage of law may also affect the subjective norm through inferential processes. Thus, if an individual believes that law is the result of majoritarian practice, one should conclude, through inferential processes, that a newly passed law reflects a majority of people's attitudes toward the subject of the law. Similarly, if an individual believes that members of society will sanction actions that violate a rule based on a general belief that the law should be followed, the individual will change his or her belief regarding the subjective norm when a new law is passed.

In sum, the belief change theory identifies a number of mechanisms by which the passage of law may affect behavior in ways other than through direct sanction. Passage of a law will likely affect attitudes toward the behavior by increasing or decreasing the certainty with which beliefs regarding a behavior are held. Passage of a law may also affect an individual's belief about the subjective norm, thus increasing or decreasing the likelihood that the individual will undertake the behavior. Furthermore, the effects on belief certainty about a particular behavior or the subjective norm are measurable and can be combined in a meaningful way to predict the outcome of such changes on an individual's intent to undertake a behavior.<sup>158</sup> The belief change theory, therefore, provides a comprehensive and predictable means of analyzing the non-sanctioning effects of a law.

*B. BELIEF CHANGE AS A BASIS FOR PREDICTING THE NORMATIVE EFFECTS OF  
LAW: EXPLAINING INTERNALIZATION AND RECONCILING EXPRESSIVE LAW WITH  
RATIONAL CHOICE THEORY*

The framework developed in the previous section enables us to understand aspects of the relationship of law and norms that have proved to be elusive to previous theories. In particular, belief change explains the process of norm internalization and provides a richer and more complete understanding of how law affects the subjective norm. The framework also provides insight into a number of issues currently confronting law and norms scholars.

1. Explaining Internalization

Explaining the process of internalization of norms is of particular importance to any theory of expressive law. Internalization is an observed behavior that must be accounted for but has, so far, proved elusive to expressive law scholars. Inability to explain internalization is a major reason

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158. See *supra* note 125.

why some scholars advocate the superiority of a rational choice model in analyzing the effects of law on behavior. Also, inability to explain the link between law and norm internalization continues to support claims that norms regulate behavior independent of law. The belief change theory offers a different mechanism for explaining internalization. Pursuant to the theory, internalization is the result of changes in beliefs that affect one's attitudes toward a subject behavior. In other words, returning to the reasoned action model of behavior,<sup>159</sup> internalization happens when law is acting on attitude and not on the subjective norm. To add some context to the discussion of internalization and see how belief-change results in internalization, let's revisit the case of the devoted dog lovers and consider Bob. Bob has lived in town for over twenty years and knows many of the local residents well. He knows everyone on the town council well and knows that almost all of them are dog-lovers who walked their dogs on the town trail in question. Bob does not own a dog or any other pet. He does not walk the trail very often but generally believes that dogs and people on trails get along fine together. He has, however, heard a number of people in town griping over problems created by dogs on the trail. When Bob first hears of the new ordinance, he is surprised, particularly because of his knowledge regarding the members of the town council. Bob surmises that, indeed, dogs must be causing a significant number of problems on the trail. That is, the certainty with which he holds these beliefs has increased, while the certainty of his previous belief that dogs and people got along together on the trail may have decreased. He thus changes his opinion that dogs should be allowed on the trail. If Bob does go for a walk on the trail and encounters individuals walking their dogs he may ostracize them not because the law has provided him information on the majority view regarding dogs versus trees, but because the law has changed his preference for a certain behavior.<sup>160</sup> Bob has internalized his understanding to the extent that he now prefers trees to dogs. This preference change is due to the effect passage of the law had on his belief regarding the impact dogs have on the trail and its users. If Bob were placed into a position where he had to walk a dog on the trail, he would feel guilt as a result of this change. In essence, he would be doing something he believed to be wrong.

Some may take exception to the claim that a preference has been

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159. See *supra* note 124.

160. This example points out one problem with the rational choice example that supports a belief-based versus a purely information-based role for law in influencing norms. Assume the Smiths do not go through a change in preference when they receive the "information" contained in the new ordinance. If they do not change preference, they will not expect others with similar preferences to change them; thus they would not rationally expect that they will be ostracized more. Rather, the key is that, because of a belief in majoritarian politics or some other inference that they draw from the passage of the law, they now believe that they will be ostracized more.

changed in this case; instead asserting that only a belief has been changed and that preference has remained the same.<sup>161</sup> Such a claim, however, fails to recognize the distinction between a belief change that affects attitude and a belief change that affects the subjective norm or creates another constraint on preference realization. Let's take a simple example of the latter. Assume that I believe that the fine for violation of a law forbidding an act I wish to undertake changes from \$100 to \$10,000. This simple change in belief would act as a constraint on satisfaction of my preference. Similarly, if I believe more people will sanction my activity, this belief change in the subjective norm will constrain my preference satisfaction. On the other hand, let's say that I change my belief from "dogs should be allowed to walk on trails" to "dogs should not be allowed to walk on trails." This change directly affects preference. I now get more utility from not walking a dog on a trail than from walking a dog on a trail. In this case, the law has not worked to change my belief regarding the constraints on my behavior, it has actually changed what activity I prefer.<sup>162</sup> Belief change thus provides an alternative model to rational choice theory and further identifies a direct link between law creation and norm internalization.

The belief-change theory not only develops a model of how law affects preference, it also provides a means to distinguish between the effect of law and information on preference. According to the belief change theory, the passage of a law is not the only way to effect a change in preference. Often times the information created to inform lawmaking will be a powerful tool for effecting such a change. For example, if the surgeon general announces that a large-scale study has found second-hand smoke to be as dangerous as first-hand smoke, people who trust the surgeon general<sup>163</sup> may update their belief about the harm they are experiencing from nearby smokers. This information can by itself be enough to effect norm change. Such an observation suggests that government objectives for protecting health might be much better realized through funding research and providing information than through law creation. This is particularly the case if the source of the information will be someone trusted by a majority of the population.

On the other hand, there are also situations where passage of a law may

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161. I thank Richard McAdams for pointing out this important point.

162. See VARIAN, *supra* note 10, at 52. Varian notes that utility is seen simply as a reflection of preference. In other words, when making a choice between different sets of goods or behavior, utility is greater for the behaviors I would prefer. It is possible that the understanding of scholars on this issue is confused by the perceived link between preference and evaluation change. As described above, evaluation, which is the result of different types of conditioning and is thus hard to change, is not the only component of preference.

163. The conditions in which information from a source will cause belief change require, among other things, that the speaker be trusted to be speaking the truth and that the message be understandable. See *supra* Section IV.A.2. Similarly, evaluative consistency may constrain the logical reasoning processes that guide inferential belief change.

have a desired normative impact without the provision of any new information. The belief change theory suggests that changes in attitude resulting primarily from inferences drawn from a law's passage happen in at least two situations. In the first, two competing beliefs about a particular behavior exist; one that would lean toward undertaking the behavior, the other that would lean against it. The passage of a law would vindicate one of these beliefs, thus affecting the belief in a large number of "fence sitters" (that is, people with no strong belief either way). The change in numbers could, in turn, result in the retrenchment of a norm around a new equilibrium.

Another favorite of expressive law advocates, the law requiring people to wear motorcycle helmets, provides a broader example of how law may have this effect. Not wearing a motorcycle helmet while riding was perceived primarily in two different ways before the passage of a law requiring helmets to be worn. On the one hand, it was believed to be a statement of individual freedom. On the other hand, it was believed to be unsafe. Passage of a law vindicated one belief over another. That is, passage of a law requiring helmets to be worn increased individual certainty regarding the safety of riding with a helmet. As a number of people updated their belief in the safety of motorcycle helmets, a tipping point was reached and a norm was entrenched around a new behavior (wearing a helmet while riding).<sup>164</sup> Simply put, more people will now prefer riding with helmets because of the updated belief. Note that, for motorcycle riders for whom the law changed belief, the fact that they may not be "caught" and thus subjected to second-order sanctions, does not mean that they will not undertake the behavior of wearing a helmet. In other words, belief change in these cases can be equated with norm internalization or preference change.<sup>165</sup> Indeed, concerns about safety will keep them wearing their helmets even if they are riding in a remote area with nobody else around.

A second situation in which law can affect norms through inferential belief change entails circumstances where individuals do not have competing beliefs, but rather have little information on a particular behavior. In such cases law can entrench a certain belief, leading to the establishment of a strong social norm. Consider, for example, the use of car

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164. Indeed, further support for this understanding of law's effect on behavior can be found in the ability of the belief-change theory to account for the way in which law affects social meaning. A number of advocates of expressive law argue that the passage of a law can change the meaning associated with a particular activity. Many of these advocates use motorcycle helmets and cigarette smoking as prime examples of how law may have an expressive effect. *See* Pildes, *supra* note 24, at 726 (noting that social meanings and norms define rights). Although they state this intuitively, these advocates have yet to uncover a mechanism describing how this happens. Belief change provides such a mechanism. *See infra* notes 181–83 and accompanying text.

165. *See supra* note 161.

seats for children.<sup>166</sup> Before the passage of a law some people may have used car seats while others may have believed seatbelting children into cars or keeping them in the back seat was also a safe means for transporting children in a car. The passage of a law requiring the use of car seats may have caused the latter group to update their beliefs regarding the use of car seats. As these people updated their beliefs a new norm around car seat use was entrenched due to a change in preference. Now, individuals will use car seats because they get greater utility from their use than from not using them.<sup>167</sup> The pattern of preference has changed and will, in turn, affect what activity gets sanctioned by members of society. Belief change thus suggests that there are many situations where the normative impacts of law passage will be substantial, regardless of whether new information on the regulated behavior exists.

The belief change theory does not, however, end at describing the process of internalization and identifying when such internalization is likely to occur. It also identifies a mechanism that more fully explains the effect of law on the subjective norm than existing theories do. Generally, the belief change theory suggests that law can both provide information and change belief about the subjective norm. It is necessary to distinguish between these two functions of law. On the one hand, the theory suggests that the legislative process may provide information on an existing majority view to individuals; on the other it suggests that passage of a law may influence what people believe the majority view to be. In this sense, law is not just a source of information, as some rational choice scholars argue,<sup>168</sup> but also a means of influencing what people think about others' attitudes toward a particular behavior. In other words, in some cases law may serve to create a normative constraint on opportunity even when the norm does not exist.<sup>169</sup>

Both Richard McAdams and Robert Scott have developed theories of how law affects the subjective norm. In his attitudinal theory, McAdams argues that legislative outcomes are positively correlated with popular

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166. Richard McAdams has suggested that car seat use may be the result of norms in a previous article. See McAdams, *supra* note 36, at 407–08.

167. It is important to recognize that in both of the above cases no new information was needed or provided. Rather, law worked on preference without new information. This stands in contrast to the argument of Dharmapala and McAdams in their article on the *Condorcet Jury Theorem* that passage of a law can provide a means for understanding new information. See Dharmapala & McAdams, *supra* note 58. As the belief change theory clarifies, inference from passage of law and from provision of information are two separate cognitive functions and law passage can affect preference through either or both mechanisms.

168. See Scott, *supra* note 2.

169. This observation has significant implications for those who question whether law affects norms only through the process of internalization. Law can change a norm by affecting the subjective norm through inferential means. Such a law acts as a restraint on opportunity. Further, such a law is not simply providing information on existing norms. The law would thus effect a norm change without changing preference.

outcomes.<sup>170</sup> Thus, the passage of a law will inform people what the majority view is regarding a particular issue.<sup>171</sup> For those who underestimated the number of people who support the acts embodied in the law, the law will serve as a signal that their prior estimate was improper. This view also correlates with Robert Scott's rational choice account of norms and law.<sup>172</sup> Indeed, the claim being made by both theories is that law can cause people to update their beliefs about the likelihood of being sanctioned because law carries with it a statement of majority sentiment.<sup>173</sup> Robert Scott has noted this similarity, stating that, to the extent others may call this process an expressive effect, the difference between rational choice and expressivism is merely semantic.<sup>174</sup>

The process described by both McAdams and Scott, however, can be more completely understood within the framework of belief change as only one form of inferential belief change regarding the subjective norm. That is, for people who believe that law reflects majority values, the passage of a law will cause them to infer through logical processes that the majority supports the behavioral restriction or incentive advanced by the law. As the belief change theory makes clear, however, and thus differs from McAdams and Scott, this is only one way in which passage of a law will affect the subjective norm. Belief-change provides a complementary, and perhaps more persuasive explanation of how law passage affects the subjective norm. It suggests that it is more likely that most people will reassess the likelihood of encountering social pressure when a law is passed because they believe that most other people believe law, in general, should be followed.<sup>175</sup>

Connecting a change in the subjective norm to factors other than a belief that law provides information on the majority view has a number of consequences for the likelihood that law will affect norms. First, it suggests that, to the extent a belief that people should be law-abiding is widely-held, the passage of any law will have an effect on the subjective norm. Second, this mechanism is not subject to the constraints of public choice theory. McAdams recognizes the implications of public choice for theories such as

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170. See McAdams, *supra* note 56.

171. *Id.*

172. See *supra* note 117.

173. The real difference concerns whether law creates or modifies a norm or simply communicates an existing sentiment. See *supra* notes 116–17 and accompanying text. The belief change theory supports the expressive claim that law can actually modify or create norms.

174. Scott, *supra* note 2, at 1614. McAdams also explicitly places himself in the rational choice camp. See McAdams, *supra* note 42, at 626.

175. Robert Cooter has suggested that people might internalize a legal command due to a general desire to follow law. Cooter does not attempt to describe a means by which this might happen; instead characterizing the process of internalization as "murky." See Cooter, *supra* note 38, at 922. The belief change theory, however, suggests that the desire to follow law has no impact on internalization. Rather, the desire to follow law will affect the subjective norm, thus not changing preference but simply acting as a constraint on preference satisfaction.

his attitudinal theory, which rely on the claim that law affects norms by carrying information on majority views.<sup>176</sup> He first describes public choice theory, which claims that the legislative process has been captured by special interest groups and thus is not reflective of popular attitudes.<sup>177</sup> He then notes that some public choice advocates suggest that the phenomenon of legislative domination by special interests is absolute while others argue it is only partial.<sup>178</sup> If such dominance were complete, he concedes, the legislature would not be interested in public opinion and the public would not view legislation as a signal of public attitude.<sup>179</sup> He resolves this dilemma, in part, by embracing the weak form of public choice—that is, he argues that public opinion still affects legislative decision-making to some degree, and thus that there is a correlation between legislation and public opinion.<sup>180</sup> Given at least a partial belief that law does not reflect majority sentiment, it is possible that law affects the subjective norm more through its action on the belief that individuals should abide by the law than through its communication of majority sentiment. Regardless of which mechanism plays the primary role, however, this alternative provides an addition to the mechanism identified by McAdams and Scott, ultimately suggesting that law may have a more significant effect on norms than scholars have previously envisioned.

This insight, is, of course, further supported by the recognition that law can also effect a change in preference and thus also change what activities are actually approved or disapproved by members of society. The cognitive processes of belief change, when taken together, suggest a rather strong relationship between law-creation and norms. Recognition of law's power as a source of norm change tends to support the claims of many "New Chicago School" members that law's effect on social meaning be taken seriously in modeling and analyzing the effects of legislation.

The belief change theory also recognizes Judge Posner's concerns regarding the idea that meaning can be formed socially.<sup>181</sup> The theory does

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176. See McAdams, *supra* note 56, at 360–61. Interestingly, while belief change provides a different mechanism for analyzing the way in which the passage of law affects the subjective norm, it also provides insight into the issue of law's correlation with public opinion. In particular, belief change recognizes that the validity of the strong or weak version of public choice is irrelevant to the effect of law on the subjective norm. Rather, what matters is whether individuals believe that law correlates with majority opinion. Thus, if people of a general level of education who are not exposed to public choice theory still believe that law is the result of representational democracy, they will believe that law reflects majority opinion in many cases regardless of whether it does or does not.

177. *Id.*

178. *Id.*

179. *Id.* at 361.

180. *Id.*

181. See Posner, *supra* note 40, at 563.

not assert that law expresses a particular meaning.<sup>182</sup> Rather, it identifies the means by which individual valences of meaning change. The belief-change mechanism accounts for changes in social meaning by suggesting that, at a particular point, law increases the certainty of particular beliefs about an activity while decreasing other beliefs about it. Thus, before the passage of a law requiring motorcycle helmets to be worn, the belief in the increased safety of helmets may have been low. Passage of the law would increase belief certainty regarding safety. As a result, the most certain belief regarding riding without a helmet may change from a statement of freedom to a statement of lack of safety. The meaning of cigarette smoking also changes as beliefs about the health effects of smoking increase and, ultimately, overcome the belief that smoking is sophisticated.

Similarly, the theory recognizes that the same law will have different effects on people, given their different experience.<sup>183</sup> Thus, while the law provides information regarding majority sentiment to the Smiths, affecting their subjective norm and constraining their opportunities, it also results in internalization of a new preference for trees over dogs in Bob. The Dooleys, in turn, who believe strongly that most people value respect for the law, may infer that a large number of people will sanction dog walking on the trail due to passage of the law and update their beliefs accordingly. Finally, for the Joneses, who share all of these beliefs, the law will affect them in all of these different ways. Belief change thus recognizes that law can have a variety of effects on people based on their own belief and experience, while identifying a mechanism for analyzing such change. The theory thus accomplishes its analysis of norm creation by embracing the richness and complexity of human experience while also providing a basis for positive analysis of law.

## VI. CONCLUSION

Research providing normative or expressive reasons for the creation of law has exploded in recent years. All of this research, however, suffers from underlying debates regarding how and whether lawmaking actually effects changes in norms. Models of the normative effects of law have provided limited guidance to those interested in these matters. The belief change theory provides an understanding of the relationship between law and

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182. For concerns regarding whether law can express a particular meaning, see generally Adler, *supra* note 27.

183. One may raise a criticism of belief change by noting that its predictability is weakened by the fact that each person is different and has a different body of belief that a law will influence. Such a criticism, of course, ignores the fact that people share beliefs. Thus, concerns about the variety of beliefs may influence the size of the population analyzed to determine how law will affect belief change but does not compromise the basic mechanism established by the theory.

norms and suggests that concerns over the normative effects of law are well founded.

According to the belief-change model, law can stimulate significant second and third order sanctions. Thus, contrary to the general characterization of law as solely creating a direct cost for certain socially-undesirable actions, the belief change theory suggests that often times law is enforced through social sanction or internalized guilt. The ability to harness these second and third order effects can have a substantial impact on law creation and enforcement. Belief-change provides a rich model on which to base future inquiry into these impacts.

