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A Group Identity Theory of Social Norms and Its Implications

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A Group Identity Theory of Social Norms and Its Implications

Alex Geisinger*

Over the past five years law and economics scholarship has embraced the concept of social norms. Norms, or behavioral rules supported by a pattern of informal sanctions, can serve both as a source of law and a tool for effective behavioral change. To use norms in such ways, however, requires a complete understanding of how they form and how they interact with legal standards. To date there have been two theories in the legal literature that attempt to explain how norms form. Both of these theories conceive of norms forming in the traditional rational choice sense from the interaction of self-interested individuals.

This Article argues that rational choice does not explain all norm origin and development. Rather, it argues that rational choice provides only one part of the story of norms. The Article develops a complimentary theory of norm formation based on the notion that people conceive of themselves not just as individuals, but also as members of groups. This "group identity theory" provides a much different picture of norm formation and development than that of rational choice. The Article ultimately examines the implications of this new model for how norms can be used in regulation.

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*Do I contradict myself?
Very well then I contradict myself;
(I am large, I contain multitudes.)*

I. INTRODUCTION

One of the core concerns of law and economics is how to ensure the optimal provision of public goods to people who are assumed to behave selfishly.² Rational choice theory, the traditional behavioral model of law and economics, assumes that people choose rationally between opportunities to maximize their own utility in accordance with their own preferences.³ Such self-interested people will, in turn, tend to free ride on the production of public goods by others.⁴ As a result, public goods such as education, a clean environment, and protection from criminals are undersupplied and social welfare suffers.⁵ Law, of course, is traditionally viewed as providing the solution to this collective-action problem.⁶ By creating direct incentives, such as tax abatements for nonpolluters, or disincentives, such as incarceration for criminals, law creates the external incentives necessary to bring individual interests into alignment with social needs.⁷ Indeed, "[f]rom criminal law to environmental law, from tax fraud to business fraud, from regulation of the professions to regulation of the Internet, this is the story that animates American policymaking."⁸

1. WALT WHITMAN, *Song of Myself*, in WHITMAN: POEMS 87, 184 (1994).

2. See generally MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 9-16 (1965) (identifying the problem of self-interest in the collective action of groups and the provision of public goods).

3. HAL R. VARIAN, *INTERMEDIATE MICRO ECONOMICS* 70 (1987). The model assumes preferences are complete, reflexive, and transitive. Choices are made by considering the expected utility associated with each opportunity and choosing the opportunity that is subjectively believed to maximize one's utility. *Id.*

4. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1139 (2000).

5. Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367, 367 (2002).

6. *Id.*

7. See *id.*

8. *Id.* at 369.

Increasingly, however, the notion that law is needed to align individual and social interests has come into question.⁹ Scholars have uncovered a vast array of socially beneficial behaviors that are not explained by the influence of law but, instead, by the influence of social norms.¹⁰ Social norms have been defined in a number of ways.¹¹

9. Many legal scholars have criticized the rational choice model. See, e.g., Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 669-98 (1979) (arguing that the Coase Theorem offers a better explanation of behavior than the rational action model does); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 387-445 (1981) (arguing that the use of efficiency analysis in entitlement problems is incoherent); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 456-57 (1974) (mocking the assumption that man is a rational maximizer); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 551-52 (1998) (suggesting that the Law and Economics tradition is still important); Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1471-1547 (1998) (arguing that the use of behavioral sciences enhances assumptions in the traditional Law and Economics model); Korobkin & Ulen, *supra* note 4, at 1144 (suggesting that rational choice theory be "revised," not "ripped down").

10. Professor Eric Posner identifies a number of cases in which norms play a role in regulating behavior and adds to the list by discussing normative influence on tax compliance. 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, 1766 (1996) (analyzing contract and commercial law norms); Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, 60 LAW & CONTEMP. PROBS. 73 (1997) [hereinafter Cooter, *Punitive Damages*] (analyzing punitive damages and norms); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 216 (1994) [hereinafter Cooter, *Structural Adjudication*] (analyzing contract and commercial law norms); Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1254 (1999) (analyzing corporate law and norms); Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1070 (1999) (analyzing the effect of status on sex discrimination); Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1, 3 (1999) [hereinafter Hetcher, *Safe Social Norms*] (analyzing tort law norms); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594 (1996) (analyzing 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, 365-88 (1999) (discussing shaming penalties); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1008 (1995) (evaluating antidiscrimination law); Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2240 (1996) (discussing blackmail and privacy); Eric A. Posner, *Family Law and Social Norms*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 256, 256-74 (F.H. Buckley ed., 1999) (discussing family law norms); Eric A. Posner, *The Legal Regulation of Religious Groups*, 2 LEGAL THEORY 33 (1996) (analyzing how law affects the behavior of religious groups); Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998) [hereinafter Posner, *Symbolic, Signals, and Social Norms*] (evaluating 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, *supra*, at 201, 201 (discussing family law norms); Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1232

For purposes of this Article, it suffices to define a norm as a behavioral rule supported by a pattern of informal sanctions.¹² The sanctions can be based on shame or some other type of social ostracism,¹³ or they may come in the form of guilt or other self-bereavement.¹⁴ Norms, therefore, restrain behavior not through direct threat of monetary fines or imprisonment, but through social sanctions that may or may not be internalized.¹⁵ Thus a rule against smoking in public places¹⁶ will deter

(2000) (analyzing traffic regulation norms); Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165, 165 (1997) (studying sumo wrestling norms); 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, 686 (1998) (analyzing bankruptcy laws); John Pfaff, *A Critique of Social Penalties* (2000) (unpublished manuscript, on file with the Virginia Law Review Association) (discussing criminal punishment).

In the past three years, the study of social norms has flourished. See, e.g., Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1236-37 (2001) (examining recycling norms); Christopher W. Carmichael, *Proposals for Reforming the American Electoral System after the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLINE J. PUB. L. & POL'Y 255, 259 (2002) (discussing potential voting laws); Stephen A. Hetcher, *Cyberian Signals*, 36 U. RICH. L. REV. 327, 327 (2002) (explaining privacy interest norms); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 358 (2001) (discussing the lack of consideration of property in social norm theories); Edward Rock & Michael Wachter, *Meeting by Signals, Playing by Norms: Complementary Accounts of Nonlegal Cooperation in Institutions*, 36 U. RICH. L. REV. 423, 425 (2002) (examining employment relationships and cooperation); Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT'L L. 1, 7-8 (2001) (analyzing property rights and prescriptive jurisdictions); W. Bradley Wendel, *Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation*, 77 IND. L.J. 1, 2-3 (2002) (analyzing the methodological claims of social norm theorists); Bryan J. Yeazel, *Bomb-making Manuals on the Internet: Maneuvering a Solution Through First Amendment Jurisprudence*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 279, 292 (2002) (arguing for the regulation of bomb-making manuals available from the Internet).

In addition, several journal symposia have considered the issue of social norms. See Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996); Symposium, *The Legal Construction of Norms*, 86 VA. L. REV. 1577 (2000); Symposium, *Norms & Corporate Law*, 149 U. PA. L. REV. 1607 (2001); Symposium, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 537 (1998).

11. Robert Ellickson, for example, defines a norm as a "rule supported by a pattern of informal sanctions[.]" Ellickson, *supra* note 9, at 549 n.58. Similarly, Eric Posner defines norms as behavioral rules that are enforced by 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).

12. Ellickson, *supra* note 9, at 549 n.58.

13. These are sometimes called "second order" sanctions. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603-04 (2000).

14. These are sometimes called "third order" sanctions. See *id.* at 1604.

15. See *id.* at 1603-04.

16. Perhaps because of the significant change in the social meaning of public smoking, such bans on public smoking have been a favorite of the laws and norms literature.

behavior through the civil penalty that accompanies it, i.e., its direct sanction, but a norm against smoking will also deter such behavior through its effect on the willingness of individuals to shame or otherwise socially ostracize those who violate its prohibition. Moreover, to the extent that such a norm is "internalized," individuals, regardless of the possibility of encountering social sanction, will also be deterred from such activity because of the prospect of guilt.¹⁷

While the ability of norms to explain a vast amount of purportedly socially beneficial behaviors has led to their embrace by a large number of scholars, it is perhaps their promise as a private alternative to law that has made them most attractive.¹⁸ The legal academy is currently experiencing "an almost heretical disenchantment with law"; as it is perceived to be both inefficient and captured by special interests.¹⁹ For example, the process of regulatory standard setting is seen as suffering from its own collective-action problem.²⁰ Obstacles to acting collectively limit the ability of the public to pursue desired regulatory standards and render the law nonresponsive to the public's needs.²¹ Legal standards are also often viewed as demanding socially wasteful uses of resources, while the regulatory regime itself is seen as dissipating the wealth created by free trade.²² The system of social norms holds great promise as a

17. See Scott, *supra* note 13, at 1604.

18. See Kahan, *supra* note 5, at 367-68.

19. *Id.* at 367. See generally Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 323 (2002) (reviewing the move to private systems of regulation).

20. For a general introduction to public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-143 (1991); KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 20-22 (1991); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 134-36 (1974); E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 141 (1960); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-44 (1991).

21. See Carlos E. González, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution*, 80 WASH. U. L.Q. 127, 202 n.212 (2002) (noting that political scientists have amply documented the inability of legislatures to reflect the electorate's preferences).

22. For some general criticisms of the efficiency of current regulation, see generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 3-51 (1993) (identifying an array of inefficient regulations and analyzing the regulatory problems that created them), Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, in *RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION* 167, 177 (Robert W. Hahn ed., 1996) (arguing that a risk-based methodology of establishing regulatory priorities in the field of public health would save 60,000 lives per year for the same amount of money).

replacement to this extremely inadequate system of providing for social welfare.²³

Scholars have advocated the use of norms to regulate in a variety of ways. Some argue simply that norms should supplement or replace law as a comprehensive means of regulating behavior.²⁴ Others have embraced norms as potentially efficient tools of enforcement and deterrence.²⁵ For example, they suggest using social sanctions (or shame) as an alternative means of punishing antisocial behaviors.²⁶

23. Kahan, *supra* note 5, at 367-68.

24. As Dan Kahan has noted:

[The law and social norms] movement seeks to identify psychological and social dynamics that promote contributions to collective goods without the prodding—and hence without the pathologies—of regulatory incentives. Law might have a constructive role to play in fostering these behavioral mechanisms, but otherwise it should simply get out of the way of their natural evolution.

Id. For explicit arguments that norms supplement or obviate the need for law, see ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 137-58 (1991); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1808-09 (2001) (arguing that, to the extent people internalize a norm of trustworthiness, it is not necessary to regulate such standards in corporate law); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724-25 (2001) (analyzing the cotton industry, which almost entirely opts out of the public legal system); Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 1990 (2000); Peter H. Huang & Hom-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 404 (1994).

Others describe how law self-consciously adopts norms as a means of establishing behavioral standards. *See, e.g.*, Bernstein, *supra* note 10, at 1766-68 (noting that the Uniform Commercial Code (U.C.C.) explicitly directs courts to discover and apply norms in reviewing commercial transactions and criticizing that practice); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 834 (2001) (noting that the reasonable person looks to norms, among other things, in considering negligence); Daniel Gilman, *Of Fruitcakes and Patriot Games* 90 GEO. L.J. 2387, 2387 (2002) (noting that norms inform the reasonable person standard in torts and elsewhere); William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 37 (2001) (noting that the reasonable-expectations test substitutes community norms for the common law in determining when property is private for purposes of the Fourth Amendment); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 J. LEGAL STUD. 377, 410-11 (1997) (advocating for the incorporation of business practices into regulation). *But see* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 715-17 (1999) (identifying a varied debate on the extent to which commercial norms should be followed under the U.C.C.).

Finally, others argue that law must track social norms or subject itself to a potential backlash. *See, e.g.*, Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819, 851 (2002); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 967 (1996).

25. *See* Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 617 (1998). For a general discussion of shaming, see *infra* Part V.B.2.

26. *See* Kahan, *supra* note 25, at 617.

Under a shaming system, norm violators are marked (by labels, car bumper stickers, or distinctive clothing), which subjects them to social retribution.²⁷ Such a system, argue its advocates, provides equal or greater deterrence and punishment than incarceration but, because it relies on a system of social sanctioning, at much less cost.²⁸ Similarly, others argue that the state can actually change the “social meaning”²⁹ of certain behaviors by using law expressively to change norms.³⁰ For

27. *Id.*

28. Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2483-84 (1997).

29. See, e.g., Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 680-81 (1998) [hereinafter Lessig, *New Chicago School*] (noting that 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 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. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 970-72 (1995) [hereinafter Lessig, *Regulation*]. Under the new law, dueling was no longer a simple breach of honor that could not be constrained by mere punishment. *Id.* at 970. Rather, it was a choice to maintain honor by undertaking one's duty to do civic work. *Id.* at 971-72. Similarly, Cass Sunstein suggests that laws against public smoking may have significantly decreased the number of young Black Americans who smoke by changing the social meaning of smoking from attractive rebelliousness to dirtiness and a willingness to be duped. See Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1428-62 (2000) (critically examining expressive theories of constitutional law and regulation); Katharine K. Baker, *Gender, Genes, and Choice: A Comparative Look at Feminism, Evolution, and Economics*, 80 N.C. L. REV. 465, 518-19 (2002) (discussing the divergent social meanings of marital actions depending upon gender); Carlson, *supra* note 10, at 1252 (discussing social meaning in reference to social norms); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1567-68 (2002) (concerning the social meaning of collective guilt); Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 686 (2001) (discussing the social meaning of state action in the context of the Establishment Clause); Steven Hetcher, *Changing the Social Meaning of Privacy in Cyberspace*, 15 HARV. J.L. & TECH. 149, 158-62 (2001) (explaining the shift in the social meaning of on-line data collection); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 837-41 (2002) (noting the relation between changes in criminal law and social meaning); 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, 526 (1993) (arguing that the United States Supreme Court's decision in *Shaw v. Reno*, which invalidated a voting district created to enhance the black vote, was valid because government should not “redistrict in a way that conveys the social impression that race consciousness has overridden all other, traditionally relevant redistricting values”); Sunstein, *supra* note 24, at 911; Michael P. Vandenberg, *The Social Meaning of Environmental Command and Control*, 20 VA. ENVTL. L.J. 191, 192 (2001) (analyzing social meaning and the public's perception of environmental problems); see also Wendel, *supra* note 10, at 62 (arguing that rational choice scholars should apply their theories to the role of social meaning in practical problems).

30. See Robert D. Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1579 (2000) (considering civic acts such as participating in government, helping the needy, and following the law); Lessig,

example, the state may attempt to change norms regarding drug use through public advertisements that characterize drugs as “uncool.”³¹ To the extent the state can change the meaning of certain acts, social sanctions can serve as a cheap and pervasive means of deterring the newly stigmatized behavior.³² Social norms have thus been embraced as holding great promise as a means of establishing and enforcing rules that will effectively promote social well-being.

Underlying the claim that norms provide a superior alternative to the current system of regulation is the implicit assumption that norms are rational. Rational choice theory explains that norms arise from the interaction of rationally self-interested individuals.³³ According to that model, there are times when such individuals find it in their own self-interest to cooperate with others.³⁴ As individuals come together for their own mutual benefit they form groups. The group, in such a model, is understood as an aggregation of the individuals who comprise it and nothing more.³⁵ Norms, in turn, are simply a reflection of the behavioral preferences of the majority of group members.³⁶ People, under such a model, desire to abide by these preferences because positive, gratifying, or rewarding outcomes are associated with working cooperatively with others.³⁷ In other words, people generally desire to be around others because they associate being with others with their own self-gratification and abiding by the norm, in turn, ensures group acceptance.³⁸ As a result, norm enforcement occurs when group members shun or otherwise withhold esteem from a norm violator.³⁹

Such a model provides strong support for the claim that norms be used to replace legislation both as a source of behavioral standards and

Regulation, *supra* note 29, at 964 (considering the different meanings of riding a motorcycle without a helmet); Sunstein, *supra* note 24, at 905-07 (considering the changing meaning of smoking, littering, and seatbelt wearing).

31. See Sunstein, *supra* note 24, at 925-26.

32. See Kahan, *supra* note 28, at 2485-86.

33. For a full analysis of the rational choice model of norm formation, see *infra* Part II.A.

34. ERIC A. POSNER, LAW AND SOCIAL NORMS 46 (2000).

35. See FLOYD HENRY ALLPORT, SOCIAL PSYCHOLOGY 260 (1924).

36. John C. Turner, *Social Categorization and the Self-Concept: A Social-Cognitive Theory of Group Behavior*, in 2 ADVANCES IN GROUP PROCESSES 77, 80 (Edward J. Lawler ed., 1985).

37. See *id.* at 79.

38. See *id.*

39. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 342 (1997) (noting that norms are relatively costless to enforce because they require simply the withholding of esteem).

as an efficient means of enforcing those standards.⁴⁰ Pursuant to a rational choice model, norms are simply an aggregation of individuals' preferences. Normative behavioral standards, unlike the standards created through interest-group politics, will thus reflect the preferences of the majority of the electorate.⁴¹ Moreover, under a rational choice model, norms are more comprehensively and cheaply enforced.⁴² Norm surveillance is undertaken by all group members, not the State, and thus a potential norm violator will be deterred any time he or she may be subject to public surveillance.⁴³ Further, because sanctioning takes the form of withholding esteem or otherwise shunning the norm violator, enforcement is relatively cheap for members of society to undertake.⁴⁴

The issue of whether norms form rationally, however, is a matter of serious dispute in the law and economics community. Many argue that norms cannot be explained through rational choice but instead provide a new behavioral paradigm that may give rise to a "New Chicago School" of law and economics.⁴⁵ Others argue that social norms can be explained as an extension of rational choice theory.⁴⁶ That is, norms can be explained as arising from the interaction of rationally self-interested people. Two efforts to explain the origin and

40. See Kahan, *supra* note 5, at 367-68.

41. I argue that norms are perceived as superior to regulation because of their ability to reflect preference. Others argue that normative standards, because they arise through an evolutionary process, are also more efficient than legislatively created standards. Cf. Posner, *supra* note 11, at 1698 (arguing that norms may not form efficiently due to a variety of factors such as strategic behavior, informational asymmetries, and externalities). See generally Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2034-51 (2001) (outlining the general evolutionary model of norm formation resulting from the interaction of rational individuals, and considering the limits of the evolutionary model).

42. See McAdams, *supra* note 39, at 342 (noting that norms are relatively costless to enforce because they require simply the withholding of esteem).

43. See *id.* at 361-62.

44. See *id.* at 355.

45. See Ellickson, *supra* note 9, at 538-46 (adopting the framework of Thomas Kuhn's *The Structure of Scientific Revolutions* to suggest that social norms may represent a revolutionary paradigm shift for law and economics); see also Lessig, *New Chicago School*, *supra* note 29, at 662-92 (suggesting that the new norms scholarship may give rise to a "New Chicago School" of law and economics). Others question whether a rational choice model of law can account for all cooperation. See Carlson, *supra* note 10, at 1247-48; Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1613-14 (2002).

46. Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 564-65 (1998) (responding to Ellickson, *supra* note 9).

development of norms currently exist.⁴⁷ Yet, while both attempt to describe norms within rational choice terms, evidence suggesting that norms cannot be explained solely by rational choice continues to mount.⁴⁸ The question currently confronting law and norms scholarship is whether or not norms can be explained as a “result of the choices individuals make while (more or less) rationally pursuing their own interests.”⁴⁹

This Article argues that rational choice does not explain all norm origin and development. Rather, it argues that rational choice provides only one part of the story of norms. The Article develops a complimentary theory of norm formation and development based on the notion that individuals conceive of themselves not just as individuals, but also as members of groups. This “group identity theory” provides a much different picture of norm formation and development than that of rational choice.⁵⁰

The group identity theory also carries with it numerous implications for claims that norms be embraced as an alternative means of regulation. The theory suggests that norms do not simply reflect the aggregate preferences of rational individuals. Rather, it suggests that, when group identity is salient, norms reflect exaggerated, stereotypical visions of members of the regulated group—seriously undermining claims that norms provide behavioral standards that reflect individual preference. Similarly, the introduction of group identity into the model of norm formation creates serious concerns for the use of norms as enforcement tools. The group theory suggests that government has a very limited ability to change social meaning and also that the use of tools such as shaming will have the greatest constraining effect on the individuals who least need to be constrained. The group identity theory thus raises serious concerns

47. Richard McAdams was the first to develop a comprehensive theory of norm origin. See McAdams, *supra* note 39, at 343-54. His description of norm formation has had significant influence on norms scholarship. A WESTLAW search of his article produced over 150 citations in the last five years. Robert Scott has recently characterized McAdams' work as the most comprehensive theory of norm origin and development in the literature. Scott, *supra* note 13, at 1604 n.2. More recently, Eric Posner has developed a separate theory of norm creation. POSNER, *supra* note 34, at 5-35. Posner's theory, while of much newer vintage than McAdams', has already generated a significant response, resulting in over 130 cites and a law review symposium in a short period of time. See, e.g., Symposium, *Commentaries on Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 327 (2002). The two theories are described *infra* Part II.

48. See Carlson, *supra* note 10, at 1247-48; Stout, *supra* note 45, at 1613-14.

49. Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 626 (2001) (book review).

50. The group identity model of norm formation is described *infra* Part IV.

regarding claims that norms be relied on as an alternative or supplement to law.

The Article is structured in the following way: First, it will describe the traditional rational choice model of norms. It will then explain the limitations of rational choice theory to account for norms, noting that all experimental evidence suggests that rational choice theories of norm creation underpredicts the amount of cooperation that actually occurs in society. The Article will then provide a model of norms that supplements traditional rational choice accounts of norm creation. Finally, the Article will consider the model's implications for norms as an alternative means of regulation.

II. THE RATIONAL CHOICE THEORY OF NORMS

A. *Rational Choice and Norm Formation*

For decades rational choice has proven to be a successful behavioral model and, with the rise of norm scholarship, has also provided the basic platform from which explanation of norm origin and development has proceeded.⁵¹ Most scholars conceive of norms as arising from cooperation problems that confront rational individuals acting in their own self-interest.⁵² The classic example of a cooperation problem is the prisoner's dilemma.⁵³ The prisoner's dilemma posits two rational, self-interested individuals who must choose between alternate strategies.⁵⁴ Under the circumstances of the game, pursuit of individual self-interest leads to worse results for each individual than if they had cooperated with each other.⁵⁵

Take, for example, the following scenario between players Row and Column, who have been placed in separate cells at the police station and are being questioned.⁵⁶ If one player tells on the other player, the other player will get a sentence of three years, while the

51. McAdams, *supra* note 49, at 625-26 (identifying two groups, those who think of norms in terms of rational choice and those who do not, and recognizing that economists tend to fall into the former camp).

52. See, e.g., Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2126 n.235 (1996); Steven A. Hetcher, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 BERKELEY TECH. L.J. 877, 902-03 (2001); Hechter, *Safe Social Norms*, *supra* note 10, at 7-8; Posner, *Symbols, Signals, and Social Norms*, *supra* note 10, at 797 n.52; Elmer J. Schaefer, *Predicting Defection*, 36 U. RICH. L. REV. 443, 462 (2002).

53. See POSNER, *supra* note 34, at 13-18.

54. See *id.* at 13-15.

55. See *id.* at 14.

56. See *id.* at 13-14 (illustrating this example).

tattler will be let off for cooperation. If neither tells they will both be found guilty of a lesser offense (one year in jail each). If both tell they will both be convicted of a more significant offense (two years each).

		Cooperate (withhold)	Defect (tell)
Cooperate	(withhold)	1/1	3/0
Defect	(tell)	0/3	2/2

Under these circumstances, Row will always tell. Assume first that Column will tell. If Row does not tell he will get three years in jail, but if he does tell, he will only get a two-year sentence. If Column does not tell, Row will get no time in jail if he does tell and one year in jail if he does not tell. Under these circumstances, it is better for the self-interested Row to tell no matter what Column does. The dominant strategy for both players will thus be to tell. As a result, both will receive two years in prison, whereas if they had stayed silent, they would each only get one year in jail. Pursuit of individual self-interest leads to worse results than if they had cooperated and both withheld information.

While defection is the dominant strategy in a one-time play of the prisoner's dilemma, cooperation is a natural result of such a problem in situations where the parties will play the game a substantial number of times.⁵⁷ Assume, for example that Column and Row are a wholesaler and retailer of goods. They desire to create a relationship where Column will supply the goods at a certain cost. If Column delivers the quality of goods agreed upon, both parties will make two. If Column cheats and sends goods of lesser quality, he will make three and Row will make zero but Row will defect and Column will have to look for other cooperative partners. A similar result would occur if Row cheats by, for example, challenging the quality of the goods and withholding full payment. Assuming a desire to play for a number of times, it is better for the parties to cooperate than defect because making two regularly is better than making three a few times but developing a reputation for being untrustworthy and thus losing cooperative opportunities in the future.⁵⁸ As Eric Posner says, "logic shows that the optimal move is always to cooperate."⁵⁹

57. See *id.* at 15-18.

58. See *id.* at 16.

59. *Id.* Posner also suggests that the logic of cooperation extends to games involving more than two players by assuming that everyone has sufficient information about other people's past activities. *Id.* Thus defection from one pairwise transaction will not lead to a "clean slate" in the next pairwise transaction. See *id.*

The rational choice model leads to a particular view of groups and norms. Pursuant to the rational choice perspective, groups are the result of individuals coming together for the mutual satisfaction of their own needs.⁶⁰ The individual is the basic unit of such a conception of the group,⁶¹ and interdependence is the basic force that holds these individuals together.⁶² The group, in this sense, is simply a reflection, or aggregation, of the individuals that comprise it, and the idea of a group as having meaning other than as a collection of individuals is meaningless.⁶³

Rational choice conceptions of social norms reflect this intrinsic individualism. The idea of a social norm within the framework of rational choice is simply the reflection of the aggregate preferences of the individuals that comprise the group.⁶⁴ That is, norms are the reflection of the perceived majority position of any group of individuals and can be determined by simply combining the individual positions of the majority of group members.⁶⁵ Normative pressure, in turn, is based on the mutual attraction that arises between people who are interdependent.⁶⁶ The attraction is rooted in “the operation of a need-satisfaction or ‘reinforcement’ principle: mutual liking between group members reflects the extent to which positive, gratifying, or rewarding outcomes are associated directly or indirectly with being in each other’s company.”⁶⁷ Normative pressure is thus an external force that affects individual behavior only to the extent that one is concerned about others to whom he or she is attracted.⁶⁸ Put simply, if an individual wants to do something she perceives is not condoned by other group members, and there is a sense of mutual liking or

60. See, e.g., MUZAHER SHERIF, *GROUP CONFLICT AND CO-OPERATION: THEIR SOCIAL PSYCHOLOGY* 2 (1967) (illustrating how shared identity and group organization arise as derivative phenomena from interdependence between group members).

61. See ALLPORT, *supra* note 35, at 260. This concept has its roots in some of the earliest work of social psychology. As early as 1924, psychologists argued that the individual was the only psychological reality and that there was nothing in the group that was not in the individual. *Id.*

62. See Turner, *supra* note 36, at 79.

63. See ALLPORT, *supra* note 35, at 260.

64. See Turner, *supra* note 36, at 80.

65. See *id.* at 82.

66. See *id.* at 89-90.

67. *Id.* at 79.

68. Note that most rational choice scholars are more blunt in their treatment of the concept of “attraction,” suggesting simply that we care about others’ approval as a means of keeping open opportunities for future mutual cooperation and exploitation. See, e.g., Cooter, *supra* note 30, at 1592-93 (stating that “[b]usiness, politics, love, and war cause people to form relationships with each other. These relationships create opportunities for mutual benefit from cooperation and also opportunities for people to exploit each other.”).

attraction between the individual and the other group members, then the individual risks disapproval from others who she likes.⁶⁹ Accordingly, one seeks to satisfy other group members because of a mutual liking that arises from a perceived sense that being together brings gratification and reward.

Norm change happens in such circumstances in one of two ways: either through the provision of information on consensus beliefs or on objective reality to group members.⁷⁰ Information on consensus beliefs may change an individual's understanding of what activities will incur social sanction.⁷¹ This is understood as "normative" influence. Information may also change one's belief about the actual outcome of a particular behavior and, thus, change the behavior one would prefer to undertake in that situation.⁷² This latter form of influence is "true" influence to the extent that it actually changes the aggregate preference of the individuals in any group.⁷³ If enough

69. JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 20 (1987). It has been noted that

where people perceive, believe, or expect to achieve mutual satisfaction from their association, they will tend to associate in a solidary fashion, to develop positive interpersonal attitudes and to influence each other's attitudes and behaviour on the basis of their power to satisfy needs for information and reward each other.

Id.

70. See Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35, 69-70 (2002); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000); Scott, *supra* note 13, at 1603-04 (arguing that law affects beliefs about majority attitudes); Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law 2* (2001) (unpublished research paper, University of Illinois) (arguing that law can influence beliefs about the outcomes of particular behaviors), available at http://papers.ssrn.com/paper.taf?abstract_id=260996.

71. See McAdams, *supra* note 70, at 339-41; Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1728-29 (2000) (arguing that the law provides focal points that help individuals anticipate how others will respond in certain circumstances); Scott, *supra* note 13, at 1603-04 (arguing that law carries with it information about the majority view and thus educates individuals about the majority's attitudes toward the behavior).

72. See Dharmapala & McAdams, *supra* note 70, at 4 (arguing that individuals may infer new information about activities from legislative decisions to regulate them); Geisinger, *supra* note 70, at 37-38 (arguing generally that legislation can cause a change in certainty about the outcome of one's acts and thus influence preference for undertaking the act or not).

73. See TURNER ET AL., *supra* note 69, at 35-36. "True" refers to the fact that the information actually changes attitudes and preference versus normative change which is seen simply as going along with the group. *Id.* I refer to this as a change in preference. Others may disagree. See Geisinger, *supra* note 70, at 49 (suggesting that some may define preference in terms of "moral" norms only). In any case, the information would work to change attitudes toward a particular behavior. If enough attitudes toward a behavior are changed, a tipping point may be reached and a new norm entrenched. See Scott, *supra* note 13, at 1624.

individual preference is changed, or enough group members change their beliefs about what activities will be sanctioned, a tipping point may be reached and a new norm entrenched around the behavior.⁷⁴

These influences are best understood through an example. Assume that Bob is the parent of a child who, according to the law, is not required to sit in the back seat of the car anymore. Bob must decide whether to continue seating his child in the back seat even though she fits well in the front seat, can use the front seat belt, and Bob would generally prefer to have her up front where he can see her better. Under these assumptions, it would seem likely that Bob would move his child to the front seat. Let us further assume that Bob's preference to move his child to the front seat is shared by the majority of parents in similar situations.

Bob may be influenced to keep his child in the back seat for one of two reasons. First, Bob may hear information from an "expert," or someone else who has a trusted understanding of objective reality, that sitting a child in the front seat is still a more dangerous activity than he had imagined. This, in turn, could influence Bob's analysis of the costs and benefits of sitting his child in the front seat and cause him to change his preference to sitting her in the back seat. This would be a result of "true" influence.⁷⁵ Bob would actually change his mind about which activity he preferred. Further, if the expert influenced enough other parents, then it is possible that a tipping point would be reached and a new norm entrenched around keeping children in the back seat of the car.⁷⁶ Second, Bob may not change his mind about what he prefers in such a situation while a majority of other parents do change. If Bob receives information about the new majority, Bob may still choose to keep his daughter in the back seat if he is concerned about social sanctions from the others. That is, although Bob does not prefer to keep his daughter in the back seat, he has information that a majority of his social group does and he does not want to incur their social sanctions. In such a case, the influence being asserted on Bob is normative. He is not acting out of preference but out of concern for how he is perceived by others.

The rational choice model of behavior thus establishes a very particular view of groups and norm formation with the individual at its core. Norms arise only because rational individuals attain benefits

74. *See id.*

75. *See* TURNER ET AL., *supra* note 69, at 35-36.

76. *See* Scott, *supra* note 13, at 1624.

from interacting with others and thus value others' acceptance.⁷⁷ Failure to act in accordance with the views of others risks social sanctions and serves as a cost to the satisfaction of one's preference.

B. Rational Choice Theories of Norms in the Law and Economics Literature

Few writers have attempted to develop a comprehensive understanding of how norms actually form, and only two primary theories of norm creation currently exist in the law and economics literature.⁷⁸ Both of these theories reflect the rational choice model of norms.⁷⁹

In his article, *The Origin, Development, and Regulation of Norms*, Richard McAdams introduces his theory of norms by first explaining a puzzle of norm origin:

A norm exists as long as the sanctions imposed on violators create an expected cost for noncompliance that exceeds the expected cost of compliance. But if sanctioning is costly, as most analyses assume, the puzzle is to explain why individuals will ever begin to sanction violators or why threats of sanctions are ever credible. It is not sufficient to answer that individuals enforce the norm because they perceive that it benefits the group. Even when the norm benefits the group, a *second-order* collective action problem remains: if others enforce the norm, the individual can gain the norm's benefits without bearing enforcement costs; if others do not enforce the norm, the individual's solo enforcement efforts are wasted. The individual gains only in the rare case where her contribution to enforcement by itself will "make or break" the norm. Otherwise, the individual is better off not bearing enforcement costs.⁸⁰

To McAdams, norms begin with a collective-action problem.⁸¹ Simply put, rational actors should not expend costs to enforce norms.⁸² Either they can free ride on those who are already enforcing the norms or they will waste their time and energy trying to enforce norms

77. See Turner, *supra* note 36, at 79.

78. See McAdams, *supra* note 39, at 343-50; POSNER, *supra* note 34, at 5. Others have attempted to describe facets of norm creation and development. In particular, Robert Cooter has attempted to provide a model of norm internalization that is consistent with rational choice theory. 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, 904-05 (1998).

79. See POSNER, *supra* note 34, at 46; McAdams, *supra* note 39, at 343-50.

80. McAdams, *supra* note 39, at 352-53 (footnotes omitted).

81. See *id.* at 352.

82. See *id.* at 352-53.

individually when others do not.⁸³ In either case, the rational person is generally better off not attempting to enforce a norm than attempting to enforce it.⁸⁴ If this is the case, McAdams queries, then how do norms ever get enforced?⁸⁵

McAdams solves this puzzle by suggesting that norms result from individual preferences for esteem.⁸⁶ If individuals desire the approval of others, he argues, then others “can *costlessly* punish norm violators by withholding from them the esteem they seek.”⁸⁷ From this basic assumption, McAdams identifies three conditions that must be met for norms to exist.⁸⁸ First, there must be “a consensus about the positive or negative esteem worthiness of engaging in [the activity].”⁸⁹ “[T]hat is, either most individuals in the relevant population grant, or most withhold, esteem from those who engage in [the activity].”⁹⁰ Second, there must be some possibility that others will detect an actor engaging in the activity, and third, the consensus position and risk of detection must be well known in the community.⁹¹ Put simply, to get esteem, one must know what acts are worthy of esteem to a majority of relevant individuals and undertake those acts when individuals will see them being done.⁹² McAdam’s theory thus sits squarely within the rational choice tradition.⁹³ Norms are a reflection of a social consensus regarding what behaviors are esteem-worthy.⁹⁴ They are enforced by the consensus through a process of surveillance of others, and they are externally imposed on the norm-violator by others through the withholding of esteem.⁹⁵

Eric Posner’s recent theory of norm creation also reflects the rational choice model.⁹⁶ He argues that norms are the result of

83. *See id.*

84. *Id.* at 354.

85. *See id.* at 352.

86. *Id.* at 355.

87. *Id.*

88. *Id.*

89. *Id.* at 358.

90. *Id.*

91. *Id.*

92. *See id.*

93. *See* McAdams, *supra* note 49, at 626. Indeed, McAdams acknowledges his belief that rational choice can account for all norm creation in a later article. *Id.*

94. *See* McAdams, *supra* note 39, at 364-65.

95. *See id.*

96. *See* POSNER, *supra* note 34, at 46. Posner makes his reliance on rational choice known in defending his theory:

A recurrent objection to the theory . . . is that signaling “can’t be all that there is.” Readers will object that racial discrimination, patriotism, ceremonial

individuals signaling to others that they are “cooperators” who will not defect from cooperation games.⁹⁷ To explain his signaling theory, Posner starts with the prisoner’s dilemma, noting that in repeated play scenarios “logic shows that the optimal move is always to cooperate.”⁹⁸ One key to cooperation, according to Posner, is that individuals have relatively low discount rates.⁹⁹ Parties with low discount rates care more about future payoffs and will generally be willing to invest more in opportunities to cooperate for future benefit.¹⁰⁰ Posner calls individuals with low discount rates, “good types.”¹⁰¹ Individuals who do not value the future (bad types), however, are less willing to cooperate if such cooperation foregoes an immediate benefit of greater size.¹⁰² In the prisoner’s dilemma, described earlier, a bad type would defect because two now is worth more than the highly discounted possibility of five, six, or seven later on.¹⁰³

Good types are more likely to cooperate in a repeated prisoner’s dilemma game because they care more about the future payoffs

gift-giving, clothing fashions, and other complex social phenomena . . . involve more than the efforts of members of a group to signal to each other that they belong to the good type. These behaviors bubble forth from a cauldron of instincts, passions, and deeply ingrained cultural attitudes.

My response is that this book reflects a methodological commitment. My claim is that rational choice theory can shed light on social norms by focusing on the reputational source of behavioral regularities to the exclusion of their cognitive and emotional sources. I do not claim that rational choice theory can offer a complete explanation of social norms or of cooperation. Cognition and emotion are not irrelevant. They are just not well enough understood by psychologists to support a theory of social norms, and repeated but puzzled acknowledgments of their importance would muddy the exposition of the argument without providing any offsetting benefits.

Id.

97. *See id.* at 19.

98. *Id.* at 16. Posner explains the rationality of cooperation in simple, expected-utility terms. *See id.* Yet, interestingly, Posner recognizes in his book that rational individualism alone does not solve cooperation problems. *Id.* at 46. Suggesting that there are a number of factors, such as the inability to properly “interpret each other’s actions” and the inability to choose the proper strategy, that can limit the game’s success. *Id.* at 16-17. He further recognizes that the choice of strategies necessary to “win” the prisoner’s dilemma does not appear to correspond to real world behaviors. *Id.* at 17. He concludes from these observations, however, that the prisoner’s dilemma’s value is not that it shows cooperation will occur from rationality, but that the prisoner’s dilemma does not necessarily defeat cooperation and provides a model for the possibility of cooperation. *Id.*

99. *Id.*

100. *See id.* at 18.

101. *Id.*

102. *Id.*

103. *See id.*

brought by cooperation.¹⁰⁴ Thus, people will always attempt to find good types as partners for cooperative endeavors.¹⁰⁵ Good types distinguish themselves from bad types through signaling.¹⁰⁶ To Posner, virtually any costly action that enables one to be considered a “cooperator” can be a signal.¹⁰⁷ Posner suggests that “[a] large amount of social, family, political, and business behavior can be understood in terms of signals.”¹⁰⁸ For example, virtually all of our manners, from eating with one’s mouth closed to wearing clean clothes to sending holiday cards, are signals.¹⁰⁹ Each of these activities are observable and costly behaviors that society agrees reflect the actor’s value for other members of society.¹¹⁰ Social norms, in turn, are simply the “behavioral regularities that emerge [from this signaling] as people interact with each other in pursuit of their everyday interests.”¹¹¹

Posner’s model is thus built squarely on a rational choice model.¹¹² To him, norms result from individuals signaling their cooperative nature to others for purposes of creating opportunities for long-term individual gain.¹¹³ A group forms based on individual self-interest and, as long as no one defects from the group, it will continue to exist. The group, therefore, is nothing more than an aggregation of the people who comprise it. Norms, as well, are nothing more than the signals of what a cooperator does and does not do.¹¹⁴ While these signals are not externally enforced, they are valid only to the extent that they reflect the understanding of other group members that certain acts show one to be a cooperator while others do not and are useful only to the extent they are observed by other group members.¹¹⁵

104. *Id.*

105. As Posner notes, the good types will prefer matching up with each other and avoiding the bad types, and the bad types will prefer matching up with the good types, and have little or no desire to match up with individuals like themselves. *Id.*

106. *Id.*

107. *See id.* at 22.

108. *Id.*

109. *Id.*

110. *See id.* at 22-23.

111. *Id.* at 26.

112. *See id.*

113. *See id.*

114. *See id.*

115. According to Posner, norms are simply a result of individual signals and have no power unto themselves. *See id.* at 34. This particular aspect of his theory provides significant concern for critics such as McAdams. *See* McAdams, *supra* note 49, at 679 (suggesting that by “[o]mitting values and beliefs about what people ought to do, the model of discount-rate signaling seeks to explain norms without referring to anything normative” and that ultimately, normative motivations are relevant to Posner’s analysis).

The work of both McAdams and Posner expresses the dominant conception of norms as resulting from rational choices made by individuals pursuing their own self-interest.¹¹⁶ Although many individuals may intuitively suspect that norms cannot be explained rationally, the formative models of norm origin and development in the field of law and economics are both constructed in rational choice terms.¹¹⁷

III. LIMITS OF RATIONAL CHOICE MODELS OF NORMS

The idea that group behavior can be explained solely through theories of interdependence for the satisfaction of mutual goals has been convincingly criticized in fields outside of law and economics.¹¹⁸ In particular, research in social psychology on games such as the prisoner's dilemma has shown that cooperation cannot be fully understood within a framework of pursuit of individual self-interest.¹¹⁹

A. *The Prisoner's Dilemma: Rational Self-Interest Does Not Explain All Cooperation*

The prisoner's dilemma is the paradigmatic example of a cooperation problem confronting rational individuals. As previously noted, in a one-game play under the conditions of the game, a rational person acting in his individual interest would favor defecting rather than cooperating.¹²⁰ Thus, both parties in a one-game play would defect, even though the better choice would be to cooperate.¹²¹ However, in a repeat-play scenario, where individuals will have to rely on each other for future benefit, it is assumed that rationality will lead to cooperation.¹²² Game theorists predict that under numerous plays of the game, joint cooperation will be achieved rapidly.¹²³ Simply put, the basic assumption behind the theory is that rational people cooperate when it is rational for them to do so.¹²⁴ Experimental evidence, however, has convincingly disconfirmed this result, suggesting that

116. See POSNER, *supra* note 34, at 46; McAdams, *supra* note 39, at 343-50.

117. See *id.*

118. See generally Turner, *supra* note 36, at 85-86 (identifying a number of researchers who have specifically tested "the hypothesis that positive interdependence for the maximization of self-interest leads to cooperation" and have found the hypothesis lacking).

119. See *id.*

120. See *supra* Part II.A.

121. *Id.*

122. See *id.*

123. Turner, *supra* note 36, at 86.

124. See *id.*

rational choice theory does not account for all observed cooperation in a number of situations.¹²⁵ Moreover, estimates suggest that people cooperate in the prisoner's dilemma game only about thirty to sixty percent of the time.¹²⁶

Many advocates of rational choice theory cite to the work of Robert Axelrod as support for their claim that individual rationality can lead to cooperation.¹²⁷ Axelrod has run a number of ingenious tournaments pitting different individual strategies against one another in computer simulated prisoner's dilemmas.¹²⁸ His goal was to

125. See Carlson, *supra* note 10, at 1247-48 (citing to numerous studies that prove more cooperation occurs in public goods games more than collective action would predict, and concluding that individuals seem willing to act in favor of the collective, rather than the individual, interest); J. RICHARD EISER, *COGNITIVE SOCIAL PSYCHOLOGY: A GUIDEBOOK TO THEORY AND RESEARCH* 201-03 (1980) (reviewing results from prisoner's dilemma studies and stating that the most prominent finding to emerge from experimental reproductions of the prisoner's dilemma has been the failure of the parties to cooperate); see also Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 333-34 (2001) (citing, in support of the argument for norm internalization, to numerous studies where more cooperation occurred than would be predicted by concerns for external sanctions alone).

126. See, e.g., EISER, *supra* note 125, at 201-15; Stout, *supra* note 45, at 1613-14 n.27 (citing to evidence that cooperation occurs forty to sixty percent of the time and questioning what process explains the amount of cooperation we have in society); Warner Wilson, *Reciprocation and Other Techniques for Inducing Cooperation in the Prisoner's Dilemma Game*, 15 J. CONFLICT RESOL. 167, 167-95 (1971).

127. See, e.g., Mark R. Brown, *Deterring Bully Government: A Sovereign Dilemma*, 76 TUL. L. REV. 149, 160 n.59 (2001); Ronald S. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473, 509 n.114 (1997); Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2061 n.17 (1996); Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397, 1502 n.504 (2002); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1302 n.122 (1998).

128. Axelrod has conducted a number of different tournaments. In his first tournament, "Axelrod invited submissions of programmed strategies to a prisoners' game tournament conducted by computer. Each entry played two hundred iterations against all other programs and against a clone of itself." David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 377 (2001). A program by game theorist Anatol Rapoport called "tit for tat," or "TFT," won the tournament. *Id.* TFT starts with a cooperative move, and subsequently its play echoes its opponent's last move. *Id.* Axelrod conducted a second computer tournament, which received four times as many entries. *Id.* at 378. However, prior to the second tournament, the results of the first tournament were disclosed and contestants were allowed to modify their strategies based on the results. The tit-for-tat strategy won again. Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICH. J. INT'L L. 143, 167 (2001). Following the tournaments,

Axelrod ... simulated natural selection ... [with] sixty-three programs by adjusting the number of offspring in each successive round ... based on a strategy's success in the previous round. After one thousand generations of play, weak programs became extinct, and so did some "predatory" programs that had survived by exploiting dwindling programs lower in the food chain. Interestingly,

determine which, if any of these strategies, when pitted against another, may lead to cooperation.¹²⁹ The strategy that, in one form or another, continuously won the Axelrod tournaments is known as tit-for-tat.¹³⁰ The tit-for-tat strategy works as follows: the program always cooperates on the first play and then does whatever the other player does for each following move.¹³¹ If the other player defects, tit-for-tat would defect, if the other player cooperates, so too would tit-for-tat.¹³² The success of tit-for-tat and other programs to produce cooperation in the computer simulations provides significant support to the concept that individual self-interest leads to cooperation.

There are, however, a number of limitations to Axelrod's work. First, nothing in his computer simulations suggests that cooperation actually does occur as a result of the interaction of self-interested individuals.¹³³ Indeed, Axelrod's work has and can be criticized as nonrepresentative of reality.¹³⁴ For example, real-world interaction may involve several entities simultaneously and not simply pairs of

in this game designed to simulate Darwinian natural selection, TFT won again, just as it had in Axelrod's tournaments.

Crump, *supra* note 128, at 378 (footnotes omitted).

129. *See id.*

130. *Id.*

131. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 31 (1984).

132. *Id.* Axelrod concluded from his study that tit for tat was the most successful program for the following reasons: First, it was "nice," in that it was never the first to defect. *Id.* at 33. Second, it was provokable in that it punished defection. *Id.* at 36. Third, it was forgiving in that it punished defection only one time and fourth, it was transparent in that its pattern was easy to figure out. *Id.* This understanding, in turn, can lead one to conclude that norms underlie cooperation. Qualities such as being forgiving and nice, yet also standing up for one's self are all very basic social norms that one can find in such texts as the Bible. *See* Theodore P. Seto, *Intergenerational Decision Making: An Evolutionary Perspective*, 35 *LOY. L.A. L. REV.* 235, 250-51 (2001) (arguing the connection between TFT and the golden rule); *cf.* Jeffrey L. Harrison, *Strategy and Biology: The Continuing Interest in Self-Interest*, 86 *COLUM. L. REV.* 213, 214 n.7 (1986) (book review) (noting that Axelrod prefers TFT to the golden rule because it cannot result in exploitation of its followers). Such an understanding of norms, however, is extremely restrictive because it limits the concept of norms to internalized, foundational moral concepts.

133. Axelrod himself recognizes that his work does not prove cooperation will actually occur. *See* AXELROD, *supra* note 131, at 15-16; *see also* John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 *HARV. INT'L L.J.* 139, 187 (1996) (concluding that Axelrod's computer tournaments only prove the possibility of cooperation); POSNER, *supra* note 34, at 17 (recognizing that Axelrod's work does not show that cooperation actually happens between people but suggesting that the importance of Axelrod's work is that it shows the possibility that self-interest can lead to cooperation).

134. *See* Setear, *supra* note 133, at 187-88.

individuals.¹³⁵ It may not make sense in such cases to punish or reward each player in a large group to secure their cooperation in later plays.¹³⁶ Moreover, computer simulations may not actually reflect the actual type of interaction that occurs between people.¹³⁷ People are emotional and display trust and retribution in ways that computers do not.¹³⁸ Even rational choice advocates recognize that the strategies actually chosen by people in such games may not reflect the rational strategies that work in Axelrod's simulations.¹³⁹ The experimental evidence bears this out, suggesting that the amount of cooperation that occurs is not congruent with what rational choice theory predicts.¹⁴⁰ Axelrod's work can thus be recognized as providing proof of the *possibility* that cooperation can result from the interaction of rationally self-interested individuals,¹⁴¹ but it does not provide proof that cooperation actually occurs between people.

Another limitation to the Axelrod studies is that they do not prove that all cooperation in society occurs as the result of the interaction of rational individuals. Indeed, the experimental evidence all suggests that more cooperation happens than rational choice theory would predict.¹⁴² Thus, even if rational individuals do sometimes cooperate as a matter of self-interest, the evidence suggests that more than rational choice is at work in the process of creating group ideology.

Given the limited support for individual rationality as the sole explanation of cooperation, a long line of researchers have attempted to determine in what situations the players in a mixed-motive game such as the prisoner's dilemma do choose to cooperate.¹⁴³ Virtually all of the solutions uncovered require "manipulation of the relationship between the players to produce a mutually cooperative orientation."¹⁴⁴

135. See *id.* at 182 n.174 (citing RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 141-42 (1986)).

136. *Id.*

137. See Kahan, *supra* note 125, at 333-36 (arguing that human beings do not act in the materially calculating fashion of traditional law and economics but rather in a richer, more emotionally nuanced fashion, and also citing to evidence that human beings choose irrational strategies in certain types of investment games).

138. See *id.* at 335-36 (arguing that trust and reciprocity are keys to solving collective action problems).

139. POSNER, *supra* note 34, at 17.

140. See *supra* notes 125-126 and accompanying text.

141. See sources cited *supra* note 133.

142. See sources cited *supra* notes 125-126.

143. Turner, *supra* note 36, at 86.

144. *Id.* For example, some of the main variables that have created cooperation include:

That is, to cooperate, the individuals must first understand that they will sink or swim together.¹⁴⁵ Thus, while an individual theory of norms would suggest that interdependence leads to cooperation and cooperation to the formation of a group, significant evidence suggests that the "group" idea itself is actually a necessary precondition of cooperation in many situations.¹⁴⁶ People must first see themselves as interconnected and not self-interested before they cooperate in some circumstances.¹⁴⁷ Simply put, evidence suggests that self-interest does not lead to group creation as a solution to mixed-motive games in all cases. Instead, a "group" or collective interest is seen to be a precondition of cooperation.¹⁴⁸ Such a finding suggests that the rational choice model cannot account for the creation of all social norms.¹⁴⁹

B. Rational Choice Cannot Account for Norm Internalization

Another criticism of traditional rational choice theory is its inability to explain certain behaviors usually equated with norm internalization. For some time, advocates of traditional rational choice models of behavior have recognized that leaving tips in roadside diners and city taxis, holding doors open for strangers, voting, and other such behaviors cannot be explained through traditional rational choice theory.¹⁵⁰ A rational person in such a situation would simply not leave

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- (1) Explicit instructions to adopt a cooperative rather than a competitive or "individualistic" orientation . . .
 - (2) [the] [d]egree of communication, face-to-face contact, or anticipated social interaction between players
 - (3) [the] [d]egree of social closeness (e.g., intimacy, friendship) between players [and]
 - (4) [the] [d]egree of perceived similarity, sharing some group membership.

Id. at 86-87. Robyn Dawes has identified a number of factors that increase cooperation after reviewing the experimental literature. Robyn M. Dawes, *Social Dilemmas*, 31 ANN. REV. PSYCHOL. 169, 185-88 (1980). They include: (1) increasing the communication and contact between players, (2) maintaining the smallness of the group, (3) making public rather than private choices, (4) trusting the other player (defined in terms of expecting the other player to cooperate), and (5) appealing to shared norms of acting for the common good. *See id.*

145. *See* Turner, *supra* note 36, at 87-88.

146. *Id.* at 88.

147. *See id.*

148. *See id.*

149. *See id.* at 89.

150. For a discussion of the problem of tipping, see Levmore, *supra* note 24, at 1997 (discussing tipping practices). For a discussion of the problem of voting, see Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2136-37 (1996). For a general discussion of the limitations of rational choice to predict behavior, see Korobkin & Ulen, *supra* note 4, at 1054-59.

a tip or otherwise act against his or her self-interest.¹⁵¹ Yet, obviously, such behaviors frequently occur.¹⁵²

Scholars have attempted to explain these behaviors by suggesting that in certain cases, norms, which are usually externally enforced, become internalized as a preference.¹⁵³ Failure to act in accordance with the internalized norm results in feelings of guilt.¹⁵⁴ A satisfactory explanation of how internalization occurs, however, still eludes rational choice theorists. Robert Cooter, perhaps the most prolific internalization scholar in legal academia and an advocate of rational choice, for example, has described the process as “murky.”¹⁵⁵ Cooter suggested at one point that people who want to internalize good traits can associate with good people¹⁵⁶ and at another point that unanimous endorsements of behavior “will convince some members of the community to internalize the obligation, and to inculcate it in the young.”¹⁵⁷ Others choose simply to avoid considering the process altogether.¹⁵⁸ The process of internalization thus remains unexplained within rational choice terms. Inability to explain how norms become internalized suggests that rational choice cannot account for all norm creation nor for all the ways in which norms affect behavior.

151. See Levmore, *supra* note 24, at 1997.

152. See McAdams, *supra* note 39, at 334-86 (arguing that internalization is not necessary to explain all norms but that it is necessary to explain some frequently observed behaviors).

153. GARY S. BECKER, ACCOUNTING FOR TASTES 225 (1996); see also Huang & Wu, *supra* note 24, at 392-96.

154. See McAdams, *supra* note 39, at 376-77 (noting that internalization is usually explained by an internal guilt mechanism that is activated by certain behaviors); see also Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 870 n.108 (1999) (noting various internalization theories). Others have attempted to connect the process of internalization to an internal understanding of proper or “right” behavior. See *id.* (citing THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM 77-89 (1970)); see also Robert Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC’Y 50, 61-63 (1995) (discussing theories of internalization); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 45-46 (1989) (explaining theories of internalization).

155. Cooter has written extensively on internalization. See, e.g., Cooter, *supra* note 78, at 919-29; Cooter, *supra* note 30, at 1592; Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1694-95 (1996).

156. See Cooter, *supra* note 78, at 922.

157. See Cooter, *Structural Adjudication*, *supra* note 10, at 224.

158. See Huang & Wu, *supra* note 24, at 404. I have recently explained how law affects preference by acting on our beliefs about the consequences of certain actions. While such a change in preference can reach a tipping point that, in turn, entrenches a norm, such a process does not explain how socially created ideas may become internalized. See Geisinger, *supra* note 70, at 44-45.

C. *Rational Choice Ignores Mounting Evidence of a Dual Notion of Self*

Finally, the rational choice perspective simply ignores mounting experimental evidence that suggests that individuals do not conceive of themselves solely in individualistic terms.¹⁵⁹ People conceive of themselves as both autonomous individuals and members of groups.¹⁶⁰ According to researchers, this dualistic sense of self has two potential causes.¹⁶¹ Either there could be only one location in the brain where self-cognitions are stored and culture affects the amount of individual versus self-cognitions stored there, or there could be two places in the brain where self-cognitions are stored and culture affects the accessibility of these locations.¹⁶² Experimental consensus is now forming around the dual-location theory.¹⁶³

The dual-location theory finds support from studies that demonstrate that individual versus collective self-cognition can be activated (or primed) by external stimuli.¹⁶⁴ That is, one can change the identity which controls self-understanding by bringing a particular identity to the forefront of the conscious mind.¹⁶⁵ In one study, for example, the identity of “elderly” was primed for different groups of individuals who then walked down a hallway slower than when the “elderly” identity had not been primed for them.¹⁶⁶ If just one location

159. See David Trafimow, Harry C. Triandis & Sharon G. Goto, *Some Tests of the Distinction Between the Private Self and the Collective Self*, 60 J. PERSONALITY & SOC. PSYCHOL. 649, 649 (1991).

160. See *id.*; see also David Trafimow, *A Theory of Attitudes, Subjective Norms, and Private Versus Collective Self-Concepts*, in ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT: THE ROLE OF NORMS AND GROUP MEMBERSHIP 47, 53 (Deborah J. Terry & Michael A. Hogg eds., 2000).

161. See Trafimow, Triandis & Goto, *supra* note 159, at 649-50.

162. See *id.*; Trafimow, *supra* note 160, at 53.

163. See Theodore M. Singelis, *The Measurement of Independent and Interdependent Self-Construals*, 20 PERSONALITY & SOC. PSYCHOL. BULL. 580, 583 (1994); Trafimow, *supra* note 160, at 53-54; David Trafimow, Ellen S. Silverman, Ruth Mei-Tai Fan & Josephine Shui Fun Law, *The Effects of Language and Priming on the Relative Accessibility of the Private Self and the Collective Self*, 28 J. CROSS-CULTURAL PSYCHOL. 107, 121 (1997).

164. See John A. Bargh, Mark Chen & Lara Burrows, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 239-42 (1996); Oscar Ybarra & David Trafimow, *How Priming the Private Self or Collective Self Affects the Relative Weights of Attitudes and Subjective Norms*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 362, 368 (1998) (providing direct evidence for the differential priming of the individual and collective self-concepts).

165. See Bargh, Chen & Burrows, *supra* note 164, at 239.

166. *Id.* at 236-37; see also JOSEPH P. FORGAS & KIPLING D. WILLIAMS, *SOCIAL INFLUENCE: DIRECT AND INDIRECT PROCESSES* 134 (2001) (providing a general discussion of the vast experimental proof of the phenomenon).

of self existed in the brain, and culture affected the level of individual versus group orientation of the individual, then one would not expect to see shifts in the level of self versus group orientation within an individual. Instead, differences would only exist between individuals. The existence of both an individual and social concept of self suggests that attempts to explain normatively-induced behavior by considering only individual identity, and without consideration of social or group identity, is of limited benefit.

Traditional rational approaches to group formation and norms are thus, at best, limited. Such approaches cannot account for all group formation, cannot explain a number of observed behaviors, and are contradicted by a developing body of psychological evidence. Yet the rational actor model continues to dominate virtually all conceptions of norms and norm formation.¹⁶⁷ Continuing down a path that conceives of norms only as the result of group formation by rational, self-interested actors may provide some more useful insights into norm-influenced behavior. Failing to consider other models of norm formation, however, will certainly limit the overall understanding of how norms are formed and how they function. The next Part of this Article will introduce a different understanding of norm formation to establish the foundation for a more comprehensive behavioral theory of norms. The following Parts will consider the implications of this new model for law and norms scholarship.

IV. A GROUP IDENTITY MODEL OF SOCIAL NORMS

A theory of norms based on individual rationality provides a limited model of norm formation and cannot explain certain observed behaviors. While the individualist model accounts for some norm creation, it is, at best, only one part of the norm creation picture. Numerous experiments have suggested that the idea of group formation may actually be a necessary precondition of cooperation in some circumstances,¹⁶⁸ and it is becoming an accepted principle of cognitive psychology that people conceive of themselves not just as autonomous individuals, but also as members of a variety of groups.¹⁶⁹

167. See sources cited *supra* note 47.

168. See Turner, *supra* note 36, at 88.

169. See Michael A. Hogg, Deborah J. Terry & Katherine M. White, *A Tale of Two Theories: A Critical Comparison of Identity Theory with Social Identity Theory*, 58 SOC. PSYCHOL. Q. 255, 262 (1995) (characterizing the difference as between the personal and social self); Harry C. Triandis, *The Self and Social Behavior in Differing Social Contexts*, 96 PSYCHOL. REV. 506, 507 (1989) (characterizing the difference as between the private and collective self).

A complete theory of norms must account for this dual understanding of self. This Part will draw on this developing understanding of the "self" concept to create a group-identity model of norm creation and change.

A group-based theory of norms provides a much different view of norm creation than does an individualist theory. In simple terms, the social identity theory places the group within the individual instead of the individual within the group.¹⁷⁰ The model, broadly outlined, suggests that norms can arise as a result of an individual's self-categorization as a member of a particular group.¹⁷¹ This categorization, in turn, leads the individual to identify and assimilate the group prototype (or norm).¹⁷² Assimilation results in a process of depersonalization, whereby individual behavior is replaced by group-guided behavior.¹⁷³

The group identity theory is based on theories of social identity and self-categorization developed in the field of social psychology.¹⁷⁴ The starting point of a group identity theory of norms is categorization. The process of categorization is "fundamental to the adaptive functioning of the human organism, as it serves to structure the potentially infinite variability of stimuli into a more manageable number of distinct categories."¹⁷⁵ It satisfies a basic need for cognitive parsimony.¹⁷⁶ We cannot process all stimuli in the world at all times. Categorization enables us to simplify these stimuli to a manageable level. Accordingly, we categorize objects, individuals, and even ourselves, as a means of understanding and adapting to a complex world.

170. See Hogg, Terry & White, *supra* note 169, at 259.

171. See *id.* at 259-60.

172. *Id.* at 260.

173. *Id.* at 261.

174. See *id.* at 259-62. These two concepts are deeply related. The central tenet of social identity theory is "that belonging to a group . . . is largely a *psychological* state which is quite distinct from that of being a unique and separate individual, and that it confers *social identity*, or a shared/collective representation of who one is and how one should behave." MICHAEL A. HOGG & DOMINIC ABRAMS, *SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES* 3 (1988). Self-categorization expands on the notion of social identity by specifically analyzing the process by which individuals come to conceive of themselves as members of groups. See Hogg, Terry & White, *supra* note 169, at 260. It takes, as its point of departure, the basic cognitive need to categorize stimuli in order to understand and adapt to a complex environment and extrapolates from this basic cognitive process a means by which personal identity changes along a continuum from individual identity to group identity. See *id.* at 260-61. See generally TURNER ET AL., *supra* note 69, at 42-67.

175. HOGG & ABRAMS, *supra* note 174, at 19.

176. *Id.* at 72-73.

We create categories by identifying similarities and differences among and between a body of diverse stimuli.¹⁷⁷ Category formation follows the principle of metacontrast;

that is, within any given frame of reference (in any situation comprising some definite pool of psychologically significant stimuli), any collection of stimuli is more likely to be categorized as an entity (i.e., grouped as identical) to the degree that the differences between those stimuli on relevant dimensions of comparison . . . are perceived as less than the differences between that collection and other stimuli . . .¹⁷⁸

Category formation is thus a process of comparing similarities and differences along relevant dimensions. Groups form around perceived shared similarities and are delimited by differences from others.

Categorization carries with it a particular cognitive effect. The process of bringing into focus a complex world results in accentuating shared characteristics within a category and exaggerating differences between categories.¹⁷⁹ The accentuation effect can be explained by the fact that individuals do not make judgments in a vacuum. Rather, they use other relevant factors to aid their judgment.¹⁸⁰ The seminal experiment establishing the existence of the accentuation phenomenon was done by Tajfel and Wilkes.¹⁸¹ They asked their subjects to judge the length of eight lines arranged from shorter to longer.¹⁸² The four shorter lines were labeled *A* and the four longer lines were labeled *B*.¹⁸³ The subjects greatly over-exaggerated the difference between the *A* and *B* lines and also over-exaggerated the similarity of length between lines of the same group.¹⁸⁴ Such exaggeration did not occur when the lines were presented unlabeled, nor when the *A/B* labeling was random (not correlated with length), thus limiting the relevance of the

177. TURNER ET AL., *supra* note 69, at 46.

178. *Id.* at 46-47.

179. *Id.* The accentuation effect has been well established experimentally. *See, e.g.*, WILLIAM DOISE, *GROUPS AND INDIVIDUALS: EXPLANATIONS IN SOCIAL PSYCHOLOGY* 128-43 (Douglas Graham trans., Cambridge University Press 1978) (1976) (reviewing the variety of studies that have found such an effect and also providing new experimental support for the effect); Henri Tajfel, A.A. Sheikh & R.C. Gardner, *Content of Stereotypes and the Inference of Similarity Between Members of Stereotyped Groups*, 22 ACTA PSYCHOLOGICA 191, 191-94 (1964) (establishing the accentuation effect in the context of social perception as well as physical perception).

180. *See* HOGG & ABRAMS, *supra* note 174, at 70.

181. *Id.* at 19.

182. *Id.* at 19-20.

183. *Id.* at 20.

184. *Id.*

peripheral dimension (grouping as *A* or *B*) to the measure of length.¹⁸⁵ The peripheral dimension of labeling thus influenced perception of the relevant dimension of line length by causing the length to be of exaggerated difference between groups and exaggerated similarity within a group.¹⁸⁶

The process of accentuation (or exaggerating ingroup similarities and outgroup differences) inherent in categorization results in a conception of the group along prototypical or stereotypical dimensions. That is, individual characteristics of group members are perceptually deemphasized, while the relevant shared similarities of group members is emphasized and accentuated.¹⁸⁷ The group is not perceived simply as an amalgam of individuals, but as a group that itself is defined by an exaggerated vision of shared traits and deemphasis of individual ones.¹⁸⁸ Consider, as an example, the group "university professors." Drawing on stereotypes, we may expect a professor to be bookish and perhaps a bit socially inept, to dress in a tweed jacket, and to be a bit absent-minded. Obviously, not all, and perhaps not even most university professors share many of these traits and, to the extent they do, the degree to which they reflect these traits is often likely to be much less than our perception suggests. The group "university professors," however, is not known by reference to its actual members. It is known as a single stereotype that accentuates bookishness, social ineptness, and absentmindedness (all traits of individuals who spend long periods of time reading scholarly texts) while deemphasizing traits, such as physical strength, more readily associated with outgroups such as laborers. The group "university professors" thus generally has a prototype. Indeed, to the extent someone who acts like a construction worker identifies himself as a university professor, we would perceive him as not "typical."

As we categorize other people, we also categorize ourselves.¹⁸⁹ Determining to which group one belongs is a subjective process when one self-categorizes. It depends partly on how well an individual

185. *Id.*

186. *See id.*

187. *Id.* In the context of individualistic group formation, stereotypes are seen simply as the result of bias or misinformation on the part of group members. *See id.* at 86.

188. *See id.* at 73-74.

189. Self-categorization is defined as a cognitive grouping of oneself and some class of stimuli as identical in contrast to some other group of stimuli. *See Turner, supra* note 36, at 94-95.

perceives that he or she “fits” a particular category.¹⁹⁰ “Fit” is primarily guided by the principle of metacontrast. That is, one categorizes oneself as a member of a group to the extent that one perceives him or herself as sharing the stereotypical characteristics of the group, and not sharing the characteristics of other groups along relevant dimensions.¹⁹¹

The process of self-categorization also leads to depersonalization of identity,¹⁹² where we begin to understand ourselves less as unique individuals and more as embodying the perceived stereotypical traits of the category with which we identify.¹⁹³ Categorization of oneself as a group member is, of course, still a process of categorization. It subjects one to the same accentuation processes that “increase the perceived identity (similarity, equivalence, interchangeability) between self and ingroup members (and difference from outgroup members) and so *depersonalize* individual self-perception on the stereotypical dimensions which define the relevant ingroup membership.”¹⁹⁴ The individual’s self-perception in such circumstances switches away from perception of self as a unique individual and toward a perception of self as an exemplar of some social category.¹⁹⁵ It is a change from the “personal to the social level of identity, a change in the nature and content of the self-concept.”¹⁹⁶

Depersonalization is thus a process of self-stereotyping, where the individual perceives him or herself more as an exemplar of a particular category than as a unique individual.¹⁹⁷ In this way the group stereotype becomes the norm. That is, the perceived characteristics of the group become a set of behaviors that one adopts in identifying oneself as a group member. These behaviors act not just descriptively

190. See TURNER ET AL., *supra* note 69, at 54-55. “Fit” generally refers to the degree to which reality actually matches the criteria which define the category. See *id.* at 55. “For example, a person would not be perceived as ‘French’ if he or she did not look, speak, or act in the ways the perceiver stereotypically defines as ‘French.’” *Id.*

191. See *id.* at 54-55. “Fit,” of course, is contextual and dynamic. It occurs against a reference point of categories whose contrast of similarities and differences is always in flux. Penelope J. Oakes, *Perceiving People as Group Members: The Role of Fit in the Salience of Social Categorizations*, 30 BRIT. J. SOC. PSYCHOL. 125, 142 (1991).

Note as well that there is a social comparative dimension of group identification. See TURNER ET AL., *supra* note 69, at 57-65. People may aspire to certain categories because they are perceived as superior to the category with which one currently self-identifies. See *id.* To the extent one does not share the characteristics of the aspired-to group, however, he will not see himself as group normative, and he will feel to a degree like an “outsider.” See *id.*

192. TURNER ET AL., *supra* note 69, at 49-50.

193. *Id.* at 50-56.

194. Turner, *supra* note 36, at 99.

195. TURNER ET AL., *supra* note 69, at 50.

196. *Id.* at 51.

197. *Id.* at 50.

but proscriptively; the process of perceiving oneself as a group member is a process of acting in accordance with the group norm.¹⁹⁸ This is not to suggest that group identification somehow sublimates or overcomes the individual sense of self. Rather, it represents a shift along a continuum that is activated when group membership becomes salient.¹⁹⁹ One does not lose individual identity, rather one changes from a more individual identity to a more social identity.²⁰⁰ At the midpoint of the continuum, the self-identity becomes less salient than the group identity.²⁰¹

Similarly, we may be able to maintain only a limited number of social identifications at any one time. The concept of "salience" suggests that only a small number of social identities can be held simultaneously. Due to limited attention span, comprehension, and information processing abilities, individuals can only process a small amount of information at once.²⁰² Thus, although an individual may have a large number of different social identities, only a small number of these identities are cognitively available at any one time.²⁰³ Take, as an example, a person who defines herself as a baseball fan. She may go through many days without conceiving of herself in this group context. Belonging to the group of "baseball fans," however, may be made salient by going to a stadium to see her favorite team play a game.²⁰⁴ Although a perfect theory of how beliefs become salient has not yet been developed, a number of factors that inform this determination have been uncovered. In particular, the notion of priming suggests that exposure to group-relevant stimuli may make the particular group identity more cognitively available.²⁰⁵

198. *Id.*

199. *Id.* at 49-50.

200. *See id.*

201. *Id.* An important distinction must be made between acting as an individual and adopting a group identity that is stereotypically individualistic. Drawing on stereotypes, one may act in business, for example, as a rational, self-interested individual because one perceives this to be the stereotype of a businessperson. Thus at times, social identity may still foster acting in terms of one's own rational self-interest.

202. MARTIN FISHBEIN & ICEK AJZEN, BELIEF, ATTITUDE, INTENTION AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH 218 (1975).

203. *Id.*

204. The factors that may make her identity as a baseball fan salient are numerous. She could, for example, overhear a discussion at work regarding baseball and join in, or she could be watching the sports report on her television, or she could see kids playing baseball on her way home from work. Salience is simply the result of the identity being brought to the forefront of one's mind. Note, however, that researchers have recognized the inability to keep many salient thoughts at one time. *Id.*

205. For a general explanation of priming, see the sources cited *supra* note 166. Research on heuristics, or cognitive shortcuts used to overcome limited information

In a situation where one's individual identity is salient, she may interact with someone differently than when she is acting pursuant to a salient group identity. Take, again, our baseball fan who goes to see her team play. As she categorizes herself within the group stereotype she will act less in accordance with her own individual preference and instead identify with the group norm. Assume that she perceives the norm to be that baseball fans eat hot dogs and drink beer. She may, therefore, buy a hot dog and beer before going into the bleachers to sit, even if she does not usually eat hot dogs and prefers to drink wine. She did not lose her individual identity, but, instead, has moved along a continuum between personal and group selves. Adopting the group self she acts more in conjunction with the group stereotype (baseball fans drink beer, not wine). Acting in this way serves as proof that her self-categorization is correct and generally validates her categorization of the world.

Different interactions will also create different normative behaviors. For example, if our baseball fan categorizes herself as a law professor, in situations where the identity "law professor" is salient, (say in interacting with a student in her office), she may conceive of herself partly in terms of her perceived professor stereotype and act as she thinks a professor does. However, if the professor were also a member of a softball team that competed in a local league and the student was a member of a competing team, the professor may interact differently with the student on the field than in her office because she is being guided by a different social identity.

Note the differences between the group and individual theories of norms. An individual theory of norms would suggest that eating hot dogs and drinking beer at a baseball game is simply a reflection of the preferences of the majority of individuals who comprise the group "baseball fans." Normative pressure would thus be exerted on the woman to "fit in" with the majority, who she believed to like beer and hot dogs more than wine and cheese. In this sense, the norm is not a group stereotype that is constructed and adhered to as a member of the group, but, rather, is a social pressure from external observers assumed to have different preferences than the self.²⁰⁶

processing abilities, suggests, for example, that the more available information about a particular subject is, the more likely the information will be salient. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 662-63 (1999). Indeed, salience is often equated with availability. *Id.*

206. See TURNER ET AL., *supra* note 69, at 25.

Under a group identity theory, norms result from a basic cognitive need to categorize the world and the self.²⁰⁷ Such categorization leads to accentuation (or stereotyping) of ingroup similarities and outgroup differences.²⁰⁸ Self-categorization is, in turn, a "cognitive representation of self as identical to or interchangeable with other members of the group ... on dimensions which characterize ... or are stereotypical of the group."²⁰⁹ That is, self-categorization is the process by which a person adopts group norms as a facet of her own self-understanding.²¹⁰ The social identity theory thus provides a completely different vision of norm creation that supplements the rational choice model and is "activated" when individuals conceive of themselves as group members instead of as individuals.

The group identity theory of norms not only provides an alternative understanding of norms and group pressure that supplements rational choice theory, it also provides a mechanism for explaining the illusive process of norm internalization. Under individual identity models, norms are generally seen as externally enforced.²¹¹ The idea of external enforcement grows out of the concept of interdependence underlying the rational choice theory of groups. Interdependence results in attraction to others based on a sense of mutual gratification that arises from cooperative attainment of goals.²¹² One is concerned about others' perceptions of her behavior because of this sense of mutual gratification and thus will experience social pressure to conform to group norms whenever others may be able to witness her activities. Failure to do so may not reflect well on her ability to be a cooperative partner. Under a group identity model, norms are not externally enforced. Rather, norm "enforcement" results from an individual's identification with a group. Such identification results in the process of depersonalization, where the individual self becomes less cognitively prominent than the group self.²¹³ The individual, in essence, conceives of herself within the group stereotype and her actions and behaviors follow this conception.

207. See *id.* at 49-51.

208. See *id.* at 51-54.

209. M.A. Hogg & J.C. Turner, *Interpersonal Attraction, Social Identification and Psychological Group Formation*, 15 EUR. J. SOC. PSYCHOL. 51 (1985).

210. See TURNER ET AL., *supra* note 69, at 49-54.

211. See *supra* note 68 and accompanying text; see also sources cited *supra* note 47.

212. See *supra* note 67 and accompanying text.

213. See TURNER ET AL., *supra* note 69, at 49-51.

Let's return to our baseball fan. She may choose, while home alone and watching a baseball game on television, to drink a beer instead of wine. She will not do this because of the potential for external rebuke, as there is no one else there to observe her behavior. She may do it simply because "it feels right" to have a beer while watching a baseball game. She is, in essence, acting in accordance with her perceived norm. Being in the public domain, such as when she is at a game, might increase her likelihood of drinking beer instead of wine. In this situation, both individual and group identity are likely at play. First, she may not want to be sanctioned by external observers. Second, the group identity "baseball fan" may be more cognitively apparent and thus more controlling of her normative behavior. The important point, however, is that at times external observation is not necessary for her behavior to be normatively controlled. Simply identifying with a particular stereotype can itself result in preference for a particular behavior.

The group theory of norms thus provides a complement to traditional rational choice theory. It develops a mechanism of norm formation activated by social, instead of individual, identity. It also helps to explain more completely the origin and development of norms, reflects experimental evidence of a dual notion of self, and explains internalized behaviors that have yet to be explained by rational choice theory.

V. IMPLICATIONS OF A GROUP IDENTITY THEORY OF NORMS

A. *The Rational Choice Basis for Norms as Regulation*

Many scholars have suggested using norms to supplement or replace law.²¹⁴ The overwhelming attraction of normative theories of regulation reflects, in part, a strong "disenchantment with law percolating within the legal academy."²¹⁵ At the core of this disenchantment is a belief that law provides an extremely inefficient and, at times, biased means of ensuring social well-being that does not reflect the needs of the electorate.²¹⁶ To understand this disenchantment we must briefly examine the problem of public goods. A core understanding of law and economics is that rational, self-interested individuals will generally fail to ensure production of public goods at

214. See sources cited *supra* note 24.

215. Kahan, *supra* note 5, at 367; see also *supra* notes 19-22.

216. See sources cited *supra* note 22.

efficient levels.²¹⁷ Such individuals will free ride on the efforts of others, resulting in an inefficiently low production of such goods.²¹⁸ The role of law, of course, is to provide external incentives or disincentives to bring individual and social goals into alignment.²¹⁹

Of serious concern to economists is the inefficiency and perceived bias of the legal system as a source of such incentives. Regulatory standards themselves are frequently criticized as inefficient, creating greater social cost than benefit, thus resulting in a net social-welfare loss, while the maintenance of costly regulatory regimes also dissipates the wealth created by free markets.²²⁰ The process by which regulation is created also suffers from its own collective action problem.²²¹ Public choice scholars have demonstrated that obstacles such as transaction costs and strategic behavior limit the ability of individual citizens to pursue regulation that satisfies their preferences.²²² As a result, wealthy elites and institutions that do not suffer from these types of cooperation problems are better able to obtain legislation that satisfies their interests.²²³

Social norms provide a private alternative to the flawed regulatory system. Like law, the private incentives and disincentives created by norms also work as external restraints that align individual self-interest with group needs. The restraints, however, are based on social sanction instead of on money or liberty-based incentives.²²⁴ Simply put, whether I choose to pay my taxes or choose not to steal a person's car because I fear social sanction, or fear being jailed or fined (legal sanction), does not matter—each restraint serves to bring my behavior into alignment with social goals.

The rational choice model of social norms suggests that norms can accomplish the goal of producing social goods in a relatively efficient manner that is not subject to the procedural biases inherent in legislating. The model assumes that norms are constructed by rational individuals who accurately process relevant information about objective reality and thus establish welfare-enhancing preferences that guide their behavior.²²⁵ Norms are simply a reflection of the

217. See Kahan, *supra* note 5, at 369.

218. *Id.*

219. See *supra* note 7 and accompanying text.

220. See *supra* note 22 and accompanying text.

221. See *supra* notes 20-21 and accompanying text.

222. See González, *supra* note 21, at 202 n.212.

223. See *supra* notes 20-21 and accompanying text.

224. See *supra* notes 12-14 and accompanying text.

225. See *supra* notes 57-59 and 73 and accompanying text.

aggregated preferences of individual group members.²²⁶ Pursuant to such a view, norms reflect majority preferences and adopting them as behavioral standards ensures that law reflects the desires of the electorate instead of the interests of powerful special interests.²²⁷

Moreover, while norms are relatively stable, such a view allows for change in norms when a change in majority preference occurs because of the creation of new information. Consider as an example of this flexibility how rational choice might describe recent changes in cigarette-smoking norms.²²⁸ Originally, people may have preferred to smoke cigarettes because of the benefits such behavior provided. Information on the health effects of smoking was not fully available at that time. The norm at that time was thus that cigarette smoking was socially acceptable. However, as more information on the health effects of smoking (objective reality) became available, people changed their beliefs about smoking to include significant concerns about these negative consequences. Rational individuals, processing available information on the costs and benefits of smoking, began to change their preferences regarding smoking. At some point in time enough individuals changed their preferences that a tipping point was reached and a new norm against smoking became entrenched. The new norm reflects the preferences of the majority, who now choose not to smoke. Norms are thus both a stable and flexible means of ensuring that the needs of the electorate are reflected in regulation. This vision of how norms form and change strongly supports claims that normative behavioral standards be used to supplement or replace law.²²⁹

The rational choice model also treats norms as cheaply and comprehensively enforced. Because individuals associate rewarding outcomes with being in each other's company, under the rational choice model virtually every group member is a potential norm enforcer. Similarly, norm enforcement under such a model is extremely inexpensive; it occurs simply because a person (that is, a potential cooperator) withholds esteem from, or otherwise shuns, the norm violator.²³⁰ This view of norms has led some to argue that the state can effectively regulate behavior by changing the social meaning

226. See *supra* notes 64-65 and accompanying text.

227. Even if there were a basis for adopting the preferences of the majority as a basis of establishing behavioral standards, it would still be impossible to determine accurately what the preferences of the majority are. In particular, the fact that people behave a particular way does not necessarily reflect their preference for undertaking a particular behavior.

228. This is, of course, an example of "true" influence.

229. See *supra* note 24 and accompanying text.

230. See *supra* notes 42, 65-68 and accompanying text.

of destructive behaviors, thus efficiently overcoming the information limitations or other problems that result in destructive norms.²³¹ For example, the state may try to change the meaning of riding a motorcycle without a helmet from a statement of one's "coolness" to a statement of "stupidity."²³² To the extent it is successful, social surveillance and sanctioning will serve to efficiently enforce the new behavioral standard.²³³ Others have suggested that norms be harnessed as a means of deterring or punishing antisocial behaviors.²³⁴ Marking a person as a norm violator subjects the person to social retribution. Such a system provides equal or greater deterrence and punishment than incarceration, but at much less cost.²³⁵

Pursuant to the rational choice model, norms reflect the electorate's preference and are efficient to enforce.²³⁶ The rational choice model thus paints a compelling picture of social norms as fixing some of the most significant problems of the current legislative system.

B. Normative Behavioral Standards and Group Identity

The rational choice theory of norms provides a compelling argument for the adoption of a private ordering system to provide for collective well-being in place of the current system of government regulation. The group identity theory of norms, however, suggests that many of these "self-conscious"²³⁷ uses of norms cannot accomplish the stated goals of regulating either more efficiently or rationally. The following Parts will consider how the group identity theory impacts the potential uses of norms in regulation. The first Subpart will consider claims that norms reflect preference, while later Parts will consider claims regarding the efficiency of norms as enforcement tools.

1. The Concept of Indeterminate Preference

Recently, scholars have raised questions regarding the ability of rational choice to explain norm creation.²³⁸ All cooperation cannot be

231. See *supra* note 30 and accompanying text.

232. I provide an earlier example of such a change relating to the use of drugs. See *id.*

233. See Kahan, *supra* note 25, at 617.

234. See *id.*

235. See *supra* note 28 and accompanying text.

236. See *supra* Part V.A.

237. I adopt this term from Kahan, *supra* note 5.

238. See *supra* Part III.A.

explained solely in terms of rational individuals pursuing their own self-interest.²³⁹ The group identity theory explains the limited ability of rational choice to account for norm creation by identifying the individual self as only one instantiation of self along a continuum.²⁴⁰ At times we interact with others more or less as unique individuals and at other times we perceive of ourselves, more or less, as group members. When group identity is salient, we adopt a prescriptive stereotypical belief structure as a result of our cognitive need to understand ourselves and our world, and not because of a need to cooperate for mutual benefit.²⁴¹ Norms emerge from this process of categorization and do not simply reflect the aggregated preferences of the individuals who comprise a particular group.²⁴² Group identity thus results in norm creation through a completely different process than does individual identity.

To the extent that group identity supplements individual identity, social norms cannot simply be explained as the result of choices made by individuals while more or less rationally pursuing their own interests. Rather, in those instances, self-identification with a perceived stereotype explains normative behavior. For example, a parent who might usually believe that spanking is a valid punishment may still choose not to spank a badly-behaving child while home alone²⁴³ because she identifies herself as a good parent and generally perceives that good parents do not spank their children. Her self-identification as a good parent leads her to internalize a preference for not spanking and to act in accordance with it. Failing to act in accordance with the stereotype would cause her to question her own self-categorization as a good parent because she would not be acting as she thinks good parents do.²⁴⁴

A group identity theory of norms suggests that preference will change for individuals depending upon the social identity that is salient to them at the time. Pursuant to the theory, when group identity is salient, norms become proscriptive as a matter of internal cognitive processes. If I conceive of myself as a group member, the process of identifying with a group leads to depersonalization, an understanding

239. *See supra* Part I.

240. *See* Turner, *supra* note 36, at 99.

241. *See id.* at 101.

242. *See id.* at 99.

243. We make this assumption to avoid the one made by rational choice theories that norms are enforced externally. *See supra* Part II.A.

244. For a comprehensive discussion of how failure to abide by a norm may lead to cognitive dissonance, see *infra* Part V.B.3.

of myself not as a unique individual but as a reflection of a group prototype. I understand myself at different times as a parent, professor, baseball fan, and art lover. Preference under such a theory changes frequently. For example, when my identity as "baseball fan" is salient (perhaps when I am watching a game), I may prefer to drink beer. When my role as "art lover" is salient (perhaps when I am reading an art book), I may instead prefer to drink wine. Under a group identity theory, different group identities carry with them different preferences.

The idea that preference is not immutable, but can change with a change in the salience of group identification, suggests that rational choice cannot provide meaningful determinations of the effects of regulatory decisions on social welfare.²⁴⁵ Consider a simple example of a regulatory decision on whether a piece of public land should be leased to the Walt Disney Company for development as a ski resort.²⁴⁶ Bill lives in a town near the land in question. Bill is a businessman and considers himself to be a good Christian. He is also a father of two children and a member of the town's Chamber of Commerce. Bill has a number of different social identities that may influence his preference for how the land is used. As a Christian, Bill may identify

245. See Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 301 (2001) (book review); McAdams, *supra* note 39, at 377 (noting that "if preference change is too common, it makes economic analysis of preference satisfaction quite difficult").

246. See *Sierra Club v. Morton*, 405 U.S. 727 (1972). Mark Sagoff first suggested that individuals may express different preferences depending on how they perceive themselves (in this case, whether they are voting or paying for a particular good and thus thinking of themselves as citizen or consumer) in a well known experiment utilizing this case. MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 50-51 (1998). While teaching an environmental ethics course, Mark Sagoff had students read the United States Supreme Court's opinion in *Sierra Club v. Morton*. *Id.* at 50. That case involved a decision by the U.S. Forest Service to lease Mineral King Valley, a quasi-wilderness area in Sequoia National Forest, to Walt Disney Enterprises for the development of a ski resort. *Id.* Six students were willing to visit the area as long as the area remained undeveloped. *Id.* Students unwilling to visit the undeveloped area cited such drawbacks as a lack of movies and an abundance of mosquitoes. *Id.* Many more students were willing to visit the area if it were developed according to Disney's plans. *Id.* at 51. The students were more interested in skiing, après ski saunas, and encounter sessions than an unspoiled wilderness. *Id.* However, when confronted with questions concerning environmental policies based upon satisfaction of consumer demands, the class nearly unanimously responded

that the Disney plan was loathsome and despicable, that the Forest Service had violated a public trust by approving it, and that the values for which we stand as a nation compel us to preserve the little wilderness we have for its own sake and as a heritage for future generations.

Id. In other words, what the students as individuals wanted for themselves was quite different from what they thought we should do, collectively, as a nation. See *id.*

with the transcendental view of nature.²⁴⁷ That is, he may believe that nature is a pure reflection of God's work on earth and that the less touched by the hand of man, the easier it is to transcend the earthly realm and commune with God.²⁴⁸ As a Christian, Bill may thus prefer the land not be developed. As a member of the Chamber of Commerce, Bill may generally prefer development to lack of development and thus prefer the land be developed. As a citizen or civic leader, Bill may believe the land should be preserved "for its own sake and as a heritage for future generations."²⁴⁹ Bill's social roles as parent and neighbor may also affect his preferences. Simply put, whichever social identity is currently salient may change Bill's preference for how the land is used.

One might argue that Bill can somehow reflect on his decision and reach one compromise preference that balances all of his different identities.²⁵⁰ Such an argument simply ignores experimental evidence regarding construction of identity and the notion of salience. Cognitive psychologists have long recognized that people have limited ability to process information.²⁵¹ Indeed, it is generally believed that we can be cognitively aware of only four or five thoughts at any one time.²⁵² Given our limited information-processing abilities, we simply cannot consider cognitively our variety of social identities and the variety of thoughts each creates at one time. The salience of group identity at the time of decision making thus becomes of paramount importance to our determination of preference. Salience is generally equated with cognitive availability.²⁵³ For example, a person may be Catholic, but her Catholic identity may not be salient for a number of days. When she walks into a church or takes part in a discussion regarding religion or morals, her Catholic identity may be "primed."²⁵⁴ At such a moment, the social identity of "Catholic" will serve to guide her normatively in a way that it had not for the previous days. As different social identities are primed, they will reflect only one of a number of preferences. Asking Bill which use of the land he prefers

247. For a general description of the transcendental view of nature, see MAX OELSCHLAEGER, *THE IDEA OF WILDERNESS: FROM PREHISTORY TO THE AGE OF ECOLOGY* 133-71 (1991).

248. *See id.* at 135-36.

249. *See* Sagoff, *supra* note 246, at 51.

250. I thank my colleague John Duffy for pointing out this important issue to me.

251. *See supra* notes 203-205 and accompanying text (discussing the concept of salience generally).

252. Geisinger, *supra* note 70, at 60 (citing FISHBEIN & AJZEN, *supra* note 202, at 218).

253. *Id.*; *see also* sources cited *supra* note 205.

254. *See supra* note 164 and accompanying text.

when he is walking out of Church may thus elicit a much different response than catching him in the parking lot after a Chamber of Commerce meeting. Bill actually prefers different results depending on the identity that is currently guiding him. As social psychologists have established, there is no single “individual” Bill that rationally processes and compromises all costs and benefits. Rather, there is “schizophrenic” Bill, who has many different preferences and readily moves between them as different group identities become salient. As recognized by Walt Whitman over a century ago, human beings are self-contradictory; we contain multitudes.²⁵⁵ Arguing that normative-based legislation can reflect the aggregated preferences of a majority of individuals at any particular time misses this point. Rather, regulation that embodies norms simply privileges one group identity over others. It cannot be said that such decisions actually reflect the true preferences of the electorate.²⁵⁶

The group identity theory also provides a basis for concluding that preference is formed irrationally and thus that norm-based regulation will result in either over- or underregulation of a particular activity. When social identity is salient, norms result from accentuation processes inherent in categorization. Accentuation suggests that the core characteristics of any group will be exaggerated.²⁵⁷ Consider, for example, a regulator charged with enacting existing preferences who is called on to develop municipal solid-waste regulation. Assume such facilities are characteristically dirty and smelly. The accentuation effect suggests these core characteristics will be cognitively overemphasized in constructing the category “waste dumps.” That is, norms will reflect dumps as being more dirty and smelly than they actually are. Relying on social norms that exaggerate these characteristics would, in turn, result in overregulation of such facilities, as a regulator would choose more protective standards than would be chosen if people actually processed information rationally. Interestingly, this is the type of “irrationality”

255. See WHITMAN, *supra* note 1, at 184.

256. See Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1566-67 (2002). A similar argument can be made regarding the use of cost-benefit analysis or other regulatory tools that attempt to gauge social welfare by measuring an individual's willingness to pay. *Id.* (noting that cost-benefit analysis assumes that willingness to pay reflects value). To the extent such an effort chooses to gauge an individual's value at any one time, it is measuring only one value of many. See *id.* The means by which value is elicited also becomes extremely important. Calling someone at home, for example, may elicit a much different valuation than calling someone at work or stopping them in the local mall while they are shopping.

257. See *supra* notes 179, 187 and accompanying text.

that many experts argue against in other contexts as resulting in a misuse of resources.²⁵⁸ Reliance on norms to regulate will thus result in the same type of misallocation of resources that norm advocates are hoping to avoid through the adoption of norm-based regulatory standards.

2. The Limits of Shaming Sanctions

The use of shame as an alternative means of deterring and punishing antisocial behaviors has also increased in conjunction with the embrace of social norms.²⁵⁹ Shaming penalties use social meaning

258. See BREYER, *supra* note 22, at 33. Critics generally argue that public irrationality in regulating risks results from the influence of heuristics—cognitive shortcuts that limit individual's abilities to properly determine the likelihood that a particular event of concern, such as a nuclear meltdown or a plane crash, will occur. See, e.g., Tengs & Graham, *supra* note 22, at 177-80.

259. See Kahan, *supra* note 10, at 631. The use of shaming sanctions has been increasing steadily. *Id.* With their increased use has come a wealth of scholarly interest. *Alternative Punishments: Resistance and Inroads*, 111 HARV. L. REV. 1967, 1967-90 (1998) (discussing various aspects of alternative sanctions, including shaming); Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 695-714 (1999) (arguing that shaming should work as an alternative sanction for rape); Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 966-74 (1999) (discussing why shaming works as a deterrent in corporate settings); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 762-83 (1998) (arguing that shaming sanctions, as used in less public displays, are effective as educational devices); Bernard E. Harcourt, *Placing Shame in Context: A Response to Thomas Scheff on Community Conferences and Therapeutic Jurisprudence*, 67 REVISTA JURÍDICA UNIVERSIDAD DE PUERTO RICO 627, 627-34 (1998) (arguing that shaming proponents place too much emphasis on the role of the emotion of shame in the criminal justice system); Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 312 (2001) (discussing apologies as effective shaming sanctions); Paul G. Mahoney, *Norms and Signals: Some Skeptical Observations*, 36 U. RICH. L. REV. 387, 396-97 (2002) (arguing that shaming sanctions do not fit entirely within signaling theories); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2157-2242 (2001) (explaining why retributivism is hostile to shaming sanctions); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 675 (1997) (warning that shaming is only effective as a sanction in certain types of cultures); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1883 (1991) (explaining five conditions which must exist for effective shaming); John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047, 1047-58 (2000) (arguing that shame already exists in the federal sentencing system and challenging many of Dan Kahan's presumptions, especially that all white collar criminals fit into his model); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1823-66 (2001) (discussing the effectiveness of shaming sanctions in a corporate environment); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1956-2055 (2001) (discussing the benefits and detriments of using alternative sanctions, such as shaming, as a way of regulating lawyers); Deni Smith Garcia, Comment, *Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 105-29

to punish and deter.²⁶⁰ They harness existing social norms as a means of efficiently curbing antisocial behaviors.²⁶¹ Shaming sanctions include such punishments as requiring bumper stickers to be placed on the cars of drunk drivers, publicizing the names of toxic waste dumpers, and using signs or distinctive clothing to identify sex offenders.²⁶² These penalties substitute the costs of social sanction for incarceration. Such sanctions are, of course, most attractive because they are comparatively inexpensive as compared to incarceration. Moreover, shaming advocates argue that shaming is superior to other alternative sanctions, such as fines or community service, because shaming carries with it a sense of moral approbation and is thus more politically acceptable.²⁶³

Shaming, of course, is built on a relatively rational view of human behavior. The theory assumes that labeling someone provides information regarding that individual to other members of the community. By violating a norm, a person so labeled will be viewed to some degree as socially deviant. Assuming norms are rationally constructed and reflect individual preference, the more widely held and deeply preferred the particular norm is, the more likely the individual will receive the social approbation and lose opportunities for future cooperative endeavors. For example, assuming a deeply and widely held belief that sexual abuse of children is bad and a less deeply and broadly held antilittering norm, a person will be more deterred from child sex offenses than littering. Failure to abide by the widely held norm will ensure a loss of cooperation from a large number of people, most of whom strongly believe such acts are wrong and socially unacceptable. In this way the "punishment" fits the crime.

As a theory that reflects rational choice, shaming of course suffers from some of the same limitations as those theories that argue

(1999) (discussing shaming through a law and literature approach, specifically the work of Nathaniel Hawthorne); Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 863 (1999) (arguing that shaming sanctions do not violate the Eighth Amendment); Barbara Clare Morton, Note, *Bringing Skeletons out of the Closet and into the Light—"Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 97 (2001) (noting the recent resurgence of "Scarlett-Letter" sentencing); Mark Spatz, Comment, *Shame's Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 843-49 (2002) (discussing how shaming sanctions are arbitrary and how they violate notions of even-handed punishment).

260. See Kahan, *supra* note 25, at 617.

261. See *id.*

262. *Id.*

263. See Kahan, *supra* note 10, at 635.

for direct regulatory adoption of norms. The primary concern arises from the fact that groups are stereotyped and are not simply a reflection of the individuals that comprise them. Labeling an individual a litterer, for example, does not carry with it the meaning "this person littered." Rather it carries with it the stereotypical vision of one who litters. As previously discussed, the accentuation affect inherent in categorization will increase the similarities of the group and decrease the differences. Thus, labeling someone a litterer subjects him or her to a stereotypical perception of character that is likely to be much more egregious along relevant dimensions than the person's acts would suggest.

Such labeling also treats all litterers alike by connecting them to a particular stereotypical vision, resulting in significantly unequal punishment and inefficient deterrence. Let us assume that the stereotype of a litterer includes a belief that such people do not care about the environment. Let us also take two people, Mary and Teresa, who have both violated an antilittering law and were caught. Assume that Mary defines herself as an "environmentalist." Because of this self-identification, she tends to act in accordance with her internalized vision of an environmentalist as someone who does not litter and thus litters infrequently. The other person, Teresa, does not define herself as an environmentalist; she litters regularly and has little care for environmental protection. Labeling Mary a "litterer" will have a much greater impact on self-understanding and esteem²⁶⁴ from others than labeling Teresa. In essence, labeling them both as "litterers" will punish one much more than the other.²⁶⁵

Similarly, labeling both of these people as "litterers" will result in only marginal deterrence. Mary identifies herself as an "environmentalist" and thus generally acts within her own perception of an environmentalist as someone who does not litter. Social norms associated with her group identity thus constrain her from littering in almost all situations already. On the other hand, Teresa does not see herself as an environmentalist and is not constrained by the norms of the environmentalist group. Teresa is the person whose activities should be regulated yet, as we have just seen, labeling her a litterer will have little deterrent effect! Shaming sanctions are thus, by their

264. In this sense, publishing the fact that she is a litterer would also affect Mary in the traditional sense of affecting the esteem she would receive from her friends.

265. Equal use of shaming sanctions would thus require judges to be able to judge a person's character, a task that rules of evidence restrict and that even highly esteemed judges may prefer to avoid.

nature, aimed at the wrong people. They will have the least deterrent effect on the greatest norm violators and the greatest effect on the individuals who least contribute to a loss of social welfare.

3. Government's Ability to Regulate Social Meaning

The power of norms to control behavior has led many scholars to consider ways to use the state's power to change or harness the social meaning of an activity.²⁶⁶ The group theory of norms has implications for such efforts.

Expressive theorists argue that the state, through lawmaking or other means, can alter the normative meaning of particular acts as a means of more efficiently constraining behavior.²⁶⁷ To the extent that norms create a cost or benefit for undertaking a behavior, changing whether certain behaviors are normatively sanctioned or supported will help deter or increase those behaviors by making them more or less costly. Expressive theorists have, for example, suggested that state action has changed the meaning of cigarette smoking, riding a motorcycle without a helmet, wearing seatbelts, and dueling, with a resultant change in what behaviors are socially sanctioned.²⁶⁸

Government has increasingly turned to this tactic in an effort to change a variety of behaviors. For example, we are told by celebrities in television ads that "smoking is not cool" or "just say no to drugs."²⁶⁹ We are also told that alcohol and drinking and driving are bad and that voting and being a designated driver are good. All of these are efforts to stigmatize or destigmatize activities to change their social meaning. Yet, the state's efforts to play "norm entrepreneur"²⁷⁰ often meet with resistance.²⁷¹

266. See *supra* notes 26-30 and accompanying text (discussing theories of expressive law).

267. See *id.*

268. See sources cited *supra* note 30.

269. See Lessig, *Regulation*, *supra* note 29, at 965.

270. The term "norm entrepreneur" was coined by Professor Cass Sunstein and refers to people interested in changing the social meaning of an activity. See Sunstein, *supra* note 24, at 909.

271. *Id.* at 918. Mark Tushnet provides a telling example of this phenomenon regarding a classic 1980s advertisement where a (usually famous) individual holds up an egg and states "this is your brain." Mark Tushnet, "Everything Old Is New Again": *Early Reflections on the "New Chicago School"*, 1998 WIS. L. REV. 579, 588. The individual then cracks the egg into a pan and fries it, stating "this is your brain on drugs." Tushnet notes that to some teenagers, the ad became somewhat of a joke, resulting in the response "this is your brain on drugs with a side of bacon." *Id.* at 588 n.29.

The social identity model provides an understanding of why government fails as a norm entrepreneur. Pursuant to the social identity model, influence is the result of a process of conforming to ingroup norms. To understand this, it is first necessary to return to the notion of social identity. Consider a person who categorizes herself as a member of a particular group. This person would expect other group members to respond similarly to stimuli that are relevant to group identity.²⁷² Failure to react similarly would result in a questioning of group membership.²⁷³ For example, if a person who identified herself as a baseball fan drank wine and ate cheese at a game, while everyone else had beer and hot dogs, this disparity may cause her to question her self-understanding as a baseball fan. Thus, there is a general incentive for people who identify with a group to express conformity with ingroup norms.²⁷⁴ Failure to conform would result in uncertainty about one's categorization of the world and of oneself and, ultimately, results in significant cognitive dissonance.²⁷⁵

Conflict between group members is significant for the same reason. Because of the expectation that like people act alike, a perception that two group members differ in response to a particular relevant stimulus creates similar discomfort.²⁷⁶ Messages regarding stimuli from outgroup sources, however, do not meet with the same kind of cognitive uncertainty.²⁷⁷ Instead, the different attitude toward drugs, cigarettes, and alcohol can be discounted by ingroup members as the attitude of "others"—that is, the attitude of nongroup members.²⁷⁸ Because we do not have the same expectation to agree with unlike individuals as like ones, such a message causes little or no cognitive dissonance and thus has little or no persuasive effect.

272. TURNER ET AL., *supra* note 69, at 28.

273. *See* Turner, *supra* note 36, at 102-03.

274. *See id.* at 99-100. A large body of evidence supporting this conclusion has been developed. *See* ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT: THE ROLE OF NORMS AND GROUP MEMBERSHIP, *supra* note 160, at 157.

275. Michael A. Hogg & John C. Turner, *Social Identity and Conformity: A Theory of Referent Information Influence*, in 2 CURRENT ISSUES IN EUROPEAN SOCIAL PSYCHOLOGY 139, 148-50 (Willem Doise & Serge Moscovici eds., 1987).

276. *See* Turner, *supra* note 36, at 107-10.

277. *See id.*

278. There is significant experimental support for the claim that ingroup communications are much more influential than outgroup communications. *See generally* ATTITUDES, BEHAVIOR, AND SOCIAL CONTEXT: THE ROLE OF NORMS AND GROUP MEMBERSHIP, *supra* note 160, at 135-201.

Government's ability to play the role of norm entrepreneur is at best extremely limited.²⁷⁹ Government is not usually an ingroup source and its messages as an outgroup source will be discounted.²⁸⁰ The group identity model thus suggests that the state should not focus its resources on efforts to change social meaning. To the extent the state does expend resources to change social meaning, the message must be delivered by "ingroup members" that can effectively capture the stereotype of the group without having to change their own behavior.

VI. CONCLUSION

No one would be surprised to hear that law is seriously imperfect. Yet dissatisfaction with the current system of providing social welfare along with the mere assumption that all human behavior can be explained in terms of rational self-interest are not reason enough to blindly favor the adoption of norms as a supplement or replacement to regulation. The group identity theory provides great cause to question the value of such a move. Rather than the panacea perceived by some, analysis of the group identity theory suggests that adopting norm-based regulation will simply replace one set of imperfections with another.

279. This is not meant to suggest that government does not have power to influence norms by, for example, providing individuals with information about objective reality.

280. Efforts to use celebrities, while displaying an intuitive understanding of their power for individuals who see themselves as "cool" or otherwise identify with them, are also likely to be discounted by recipients. If Keith Richards or Curt Cobain (before his untimely death), for example, say "do not do drugs," this message may still be discounted in one of two ways. First, a recipient may decide that the messenger has changed; that is, that he is no longer a group member. Second, the messenger may be characterized as disingenuous—not saying "do not do drugs" because he really believes it, but for some other reason. Therefore, the key to this type of normative persuasion is based on the messenger's ability to reformulate the stereotype. That is, to remain "cool" while not doing drugs.