A Group Identity Theory of Social Norms and Its Implications

Alex Geisinger

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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.

I. INTRODUCTION

II. THE RATIONAL CHOICE THEORY OF NORMS
   A. Rational Choice and Norm Formation
   B. Rational Choice Theories of Norms in the Law and Economics Literature

III. LIMITS OF RATIONAL CHOICE MODELS OF NORMS
   A. The Prisoner's Dilemma: Rational Self-Interest Does Not Explain All Cooperation
   B. Rational Choice Cannot Account for Norm Internalization
   C. Rational Choice Ignores Mounting Evidence of a Dual Notion of Self

IV. A GROUP IDENTITY MODEL OF SOCIAL NORMS

V. IMPLICATIONS OF A GROUP IDENTITY THEORY OF NORMS
   A. The Rational Choice Basis for Norms as Regulation
   B. Normative Behavioral Standards and Group Identity

1. The Concept of Indeterminate Preference
2. The Limits of Shaming Sanctions

* Professor of Law, Valparaiso Law School. The author would like to thank Ian Ayres, Peter Huang, and Eric Posner for their extremely valuable input on earlier versions of the Article. The Article also greatly benefited from faculty input at colloquia at William and Mary and Valparaiso University. All errors are, of course, the author's.
3. Government’s Ability to Regulate Social Meaning ...................................................... 650

VI. CONCLUSION .............................................................................................................. 652

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. 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. Such self-interested people will, in turn, tend to free ride on the production of public goods by others. As a result, public goods such as education, a clean environment, and protection from criminals are undersupplied and social welfare suffers. Law, of course, is traditionally viewed as providing the solution to this collective-action problem. 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. 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.”

1. WALT WHITMAN, Song of Myself, in WHITMAN: POEMS 87, 184 (1994).
3. HAL R. VARIAN, INTERMEDIATE MICROECONOMICS 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.
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. 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. Social norms have been defined in a number of ways.


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


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


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.
22. For some general criticisms of the efficiency of current regulation, see generally STEPHEN BREYER, BREAKING THE VITIOUS 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.  

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. Others have embraced norms as potentially efficient tools of enforcement and deterrence. For example, they suggest using social sanctions (or shame) as an alternative means of punishing antisocial behaviors.

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.


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 (2001); Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903, 967 (1996).


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.\textsuperscript{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.\textsuperscript{28} Similarly, others argue that the state can actually change the "social meaning" of certain behaviors by using law expressively to change norms.\textsuperscript{29} For

\begin{itemize}
  \item \textsuperscript{27} Id.
  \item \textsuperscript{30} See Robert D. Cooter, \textit{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.”

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. 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. According to that model, there are times when such individuals find it in their own self-interest to cooperate with others. 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. Norms, in turn, are simply a reflection of the behavioral preferences of the majority of group members. People, under such a model, desire to abide by these preferences because positive, gratifying, or rewarding outcomes are associated with working cooperatively with others. 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. As a result, norm enforcement occurs when group members shun or otherwise withhold esteem from a norm violator.

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).

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).
37. See id. at 79.
38. See id.
as an efficient means of enforcing those standards.\textsuperscript{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.\textsuperscript{41} Moreover, under a rational choice model, norms are more comprehensively and cheaply enforced.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45} Others argue that social norms can be explained as an extension of rational choice theory.\textsuperscript{46} That is, norms can be explained as arising from the interaction of rationally self-interested people. Two efforts to explain the origin and

\textsuperscript{40} See Kahan, supra note 5, at 367-68.

\textsuperscript{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. \textit{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, \textit{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).

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

\textsuperscript{43} See id. at 361-62.

\textsuperscript{44} See id. at 355.

\textsuperscript{45} See Ellickson, supra note 9, at 538-46 (adopting the framework of Thomas Kuhn's \textit{The Structure of Scientific Revolutions} to suggest that social norms may represent a revolutionary paradigm shift for law and economics); \textit{see also} Lessig, \textit{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, \textit{Judges as Altruistic Hierarchs}, 43 WM. & MARY L. REV. 1605, 1613-14 (2002).

development of norms currently exist. 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. 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."

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.

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.


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. Most scholars conceive of norms as arising from cooperation problems that confront rational individuals acting in their own self-interest. The classic example of a cooperation problem is the prisoner’s dilemma. The prisoner’s dilemma posits two rational, self-interested individuals who must choose between alternate strategies. 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.

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. 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).


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).

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<th>Cooperate (withhold)</th>
<th>Defect (tell)</th>
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<td>Defect (tell)</td>
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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. 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. As Eric Posner says, “logic shows that the optimal move is always to cooperate.”

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. The individual is the basic unit of such a conception of the group, and interdependence is the basic force that holds these individuals together. 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.

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. 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. Normative pressure, in turn, is based on the mutual attraction that arises between people who are interdependent. 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. 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. 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., MUZAFER 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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{74} See id.

\textsuperscript{75} See TURNER ET AL., \textit{supra} note 69, at 35-36.

\textsuperscript{76} See Scott, \textit{supra} note 13, at 1624.
from interacting with others and thus value others' acceptance.\textsuperscript{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.

\textbf{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.\textsuperscript{78} Both of these theories reflect the rational choice model of norms.\textsuperscript{79}

In his article, \textit{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.\textsuperscript{80}

To McAdams, norms begin with a collective-action problem.\textsuperscript{81} Simply put, rational actors should not expend costs to enforce norms.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{77} See Turner, \textit{supra} note 36, at 79.
\item \textsuperscript{78} See McAdams, \textit{supra} note 39, at 343-50; Posner, \textit{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, \textit{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).
\item \textsuperscript{79} See Posner, \textit{supra} note 34, at 46; McAdams, \textit{supra} note 39, at 343-50.
\item \textsuperscript{80} McAdams, \textit{supra} note 39, at 352-53 (footnotes omitted).
\item \textsuperscript{81} See \textit{id.} at 352.
\item \textsuperscript{82} See \textit{id.} at 352-53.
\end{itemize}
individually when others do not. In either case, the rational person is generally better off not attempting to enforce a norm than attempting to enforce it. If this is the case, McAdams queries, then how do norms ever get enforced?

McAdams solves this puzzle by suggesting that norms result from individual preferences for esteem. If individuals desire the approval of others, he argues, then others "can costlessly punish norm violators by withholding from them the esteem they seek." From this basic assumption, McAdams identifies three conditions that must be met for norms to exist. First, there must be "a consensus about the positive or negative esteem worthiness of engaging in [the activity]." [T]hat is, either most individuals in the relevant population grant, or most withhold, esteem from those who engage in [the activity]. 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. 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. McAdam's theory thus sits squarely within the rational choice tradition. Norms are a reflection of a social consensus regarding what behaviors are esteem-worthy. 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.

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

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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. 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." One key to cooperation, according to Posner, is that individuals have relatively low discount rates. 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. Posner calls individuals with low discount rates, "good types." 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. 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.

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. Good types distinguish themselves from bad types through signaling. To Posner, virtually any costly action that enables one to be considered a "cooperator" can be a signal. Posner suggests that "[a] large amount of social, family, political, and business behavior can be understood in terms of signals." For example, virtually all of our manners, from eating with one's mouth closed to wearing clean clothes to sending holiday cards, are signals. Each of these activities are observable and costly behaviors that society agrees reflect the actor's value for other members of society. 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."

Posner's model is thus built squarely on a rational choice model. To him, norms result from individuals signaling their cooperative nature to others for purposes of creating opportunities for long-term individual gain. 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. 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.

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.\textsuperscript{125} Moreover, estimates suggest that people cooperate in the prisoner’s dilemma game only about thirty to sixty percent of the time.\textsuperscript{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.\textsuperscript{127} Axelrod has run a number of ingenious tournaments pitting different individual strategies against one another in computer simulated prisoner’s dilemmas.\textsuperscript{128} His goal was to

\begin{itemize}
  \item[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).
  \item[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, Reciprocity and Other Techniques for Inducing Cooperation in the Prisoner’s Dilemma Game, 15 J. Conflict Resol. 167, 167-95 (1971).
  \item[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. \textit{Id.} TFT starts with a cooperative move, and subsequently its play echoes its opponent’s last move. \textit{Id.} Axelrod conducted a second computer tournament, which received four times as many entries. \textit{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. The strategy that, in one form or another, continuously won the Axelrod tournaments is known as tit-for-tat. 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. If the other player defects, tit-for-tat would defect, if the other player cooperates, so too would tit-for-tat. 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. Indeed, Axelrod’s work has and can be criticized as nonrepresentative of reality. 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.
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 provocable in that it punished defection. Id. at 36. Third, it was forgiving in that it punished defection only once 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.\textsuperscript{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.\textsuperscript{136} Moreover, computer simulations may not actually reflect the actual type of interaction that occurs between people.\textsuperscript{137} People are emotional and display trust and retribution in ways that computers do not.\textsuperscript{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.\textsuperscript{139} The experimental evidence bears this out, suggesting that the amount of cooperation that occurs is not congruent with what rational choice theory predicts.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{143} Virtually all of the solutions uncovered require "manipulation of the relationship between the players to produce a mutually cooperative orientation."\textsuperscript{144}

\textsuperscript{135} See id. at 182 n.174 (citing RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS 141-42 (1986)).
\textsuperscript{136} Id.
\textsuperscript{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).
\textsuperscript{138} See id. at 335-36 (arguing that trust and reciprocity are keys to solving collective action problems).
\textsuperscript{139} POSNER, supra note 34, at 17.
\textsuperscript{140} See supra notes 125-126 and accompanying text.
\textsuperscript{141} See sources cited supra note 133.
\textsuperscript{142} See sources cited supra notes 125-126.
\textsuperscript{143} Turner, supra note 36, at 86.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{146} People must first see themselves as interconnected and not self-interested before they cooperate in some circumstances.\textsuperscript{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.\textsuperscript{148} Such a finding suggests that the rational choice model cannot account for the creation of all social norms.\textsuperscript{149}

\textbf{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.\textsuperscript{150} A rational person in such a situation would simply not leave

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

\textit{Id.} at 86-87. Robyn Dawes has identified a number of factors that increase cooperation after reviewing the experimental literature. Robyn M. Dawes, \textit{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. \textit{See id.}

\textsuperscript{145} \textit{See Turner, supra note 36, at 87-88.}

\textsuperscript{146} \textit{Id. at 88.}

\textsuperscript{147} \textit{See id.}

\textsuperscript{148} \textit{See id.}

\textsuperscript{149} \textit{See id. at 89.}

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

Scholars have attempted to explain these behaviors by suggesting that in certain cases, norms, which are usually externally enforced, become internalized as a preference. Failure to act in accordance with the internalized norm results in feelings of guilt. 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." Cooter suggested at one point that people who want to internalize good traits can associate with good people 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." Others choose simply to avoid considering the process altogether. 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.


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. People conceive of themselves as both autonomous individuals and members of groups. According to researchers, this dualistic sense of self has two potential causes. 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. Experimental consensus is now forming around the dual-location theory.

The dual-location theory finds support from studies that demonstrate that individual versus collective self-cognition can be activated (or primed) by external stimuli. That is, one can change the identity which controls self-understanding by bringing a particular identity to the forefront of the conscious mind. 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. If just one location


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


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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{169}

\textsuperscript{167} See sources cited supra note 47.
\textsuperscript{168} See Turner, supra note 36, at 88.
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. 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. This categorization, in turn, leads the individual to identify and assimilate the group prototype (or norm). Assimilation results in a process of depersonalization, whereby individual behavior is replaced by group-guided behavior.

The group identity theory is based on theories of social identity and self-categorization developed in the field of social psychology. 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." It satisfies a basic need for cognitive parsimony. 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." MICHAIL 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.\textsuperscript{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 . . . .\textsuperscript{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.\textsuperscript{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.\textsuperscript{180} The seminal experiment establishing the existence of the accentuation phenomenon was done by Tajfel and Wilkes.\textsuperscript{181} They asked their subjects to judge the length of eight lines arranged from shorter to longer.\textsuperscript{182} The four shorter lines were labeled $A$ and the four longer lines were labeled $B$.\textsuperscript{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.\textsuperscript{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

\begin{flushleft}
\textsuperscript{177} TURNER ET AL., supra note 69, at 46.
\textsuperscript{178} Id. at 46-47.
\textsuperscript{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. Sheikl & 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).
\textsuperscript{180} See HOGG & ABRAMS, supra note 174, at 70.
\textsuperscript{181} Id. at 19.
\textsuperscript{182} Id. at 19-20.
\textsuperscript{183} Id. at 20.
\textsuperscript{184} Id.
peripheral dimension (grouping as A or B) to the measure of length.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{189} Determining to which group one belongs is a subjective process when one self-categorizes. It depends partly on how well an individual

\begin{itemize}
\item \textsuperscript{185} Id.
\item \textsuperscript{186} See id.
\item \textsuperscript{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.
\item \textsuperscript{188} See id. at 73-74.
\item \textsuperscript{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.
\end{itemize}
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.


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.


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.\textsuperscript{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.\textsuperscript{199} One does not lose individual identity, rather one changes from a more individual identity to a more social identity.\textsuperscript{200} At the midpoint of the continuum, the self-identity becomes less salient than the group identity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{205}

\begin{itemize}
\item \textsuperscript{198} \textit{Id.}
\item \textsuperscript{199} \textit{Id.} at 49-50.
\item \textsuperscript{200} \textit{See id.}
\item \textsuperscript{201} \textit{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.
\item \textsuperscript{202} Martin Fishbein & Icek Ajzen, \textit{Belief, Attitude, Intention and Behavior: An Introduction to Theory and Research} 218 (1975).
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{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. \textit{Id.}
\item \textsuperscript{205} For a general explanation of priming, see the sources cited \textit{supra} note 166. Research on heuristics, or cognitive shortcuts used to overcome limited information
\end{itemize}
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.\textsuperscript{206}

Under a group identity theory, norms result from a basic cognitive need to categorize the world and the self. Such categorization leads to accentuation (or stereotyping) of ingroup similarities and outgroup differences. 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." That is, self-categorization is the process by which a person adopts group norms as a facet of her own self-understanding. 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. 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. 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. 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.
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.\textsuperscript{214} The overwhelming attraction of normative theories of regulation reflects, in part, a strong "disenchantment with law percolating within the legal academy."\textsuperscript{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.\textsuperscript{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

\textsuperscript{214} See sources cited supra note 24.
\textsuperscript{215} Kahan, supra note 5, at 367; see also supra notes 19-22.
\textsuperscript{216} See sources cited supra note 22.
efficient levels.\textsuperscript{217} Such individuals will free ride on the efforts of others, resulting in an inefficiently low production of such goods.\textsuperscript{218} The role of law, of course, is to provide external incentives or disincentives to bring individual and social goals into alignment.\textsuperscript{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.\textsuperscript{220} The process by which regulation is created also suffers from its own collective action problem.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{225} Norms are simply a reflection of the

\textsuperscript{217} See Kahan, supra note 5, at 369.
\textsuperscript{218} Id.
\textsuperscript{219} See supra note 7 and accompanying text.
\textsuperscript{220} See supra note 22 and accompanying text.
\textsuperscript{221} See supra notes 20-21 and accompanying text.
\textsuperscript{222} See González, supra note 21, at 202 n.212.
\textsuperscript{223} See supra notes 20-21 and accompanying text.
\textsuperscript{224} See supra notes 12-14 and accompanying text.
\textsuperscript{225} See supra notes 57-59 and 73 and accompanying text.
aggregated preferences of individual group members.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{230} This view of norms has led some to argue that the state can effectively regulate behavior by changing the social meaning

\textsuperscript{226} See supra notes 64-65 and accompanying text.

\textsuperscript{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 in a particular way does not necessarily reflect their preference for undertaking a particular behavior.

\textsuperscript{228} This is, of course, an example of “true” influence.

\textsuperscript{229} See supra note 24 and accompanying text.

\textsuperscript{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.\textsuperscript{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."\textsuperscript{232} To the extent it is successful, social surveillance and sanctioning will serve to efficiently enforce the new behavioral standard.\textsuperscript{233} Others have suggested that norms be harnessed as a means of deterring or punishing antisocial behaviors.\textsuperscript{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.\textsuperscript{235}

Pursuant to the rational choice model, norms reflect the electorate's preference and are efficient to enforce.\textsuperscript{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.

\textbf{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"\textsuperscript{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.\textsuperscript{238} All cooperation cannot be

\begin{itemize}
  \item[231.] See supra note 30 and accompanying text.
  \item[232.] I provide an earlier example of such a change relating to the use of drugs. See id.
  \item[233.] See Kahan, supra note 25, at 617.
  \item[234.] See id.
  \item[235.] See supra note 28 and accompanying text.
  \item[236.] See supra Part V.A.
  \item[237.] I adopt this term from Kahan, supra note 5.
  \item[238.] See supra Part III.A.
\end{itemize}
explained solely in terms of rational individuals pursuing their own self-interest. 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. 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. Norms emerge from this process of categorization and do not simply reflect the aggregated preferences of the individuals who comprise a particular group. 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 alone 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.

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 unspoilt 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.

\(^{246}\) 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. 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. 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." 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. 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. Indeed, it is generally believed that we can be cognitively aware of only four or five thoughts at any one time. 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. 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." 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

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. 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.

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. 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 affect 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. 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. 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., Tenga & Graham, supra note 22, at 177-80.

to punish and deter. They harness existing social norms as a means of efficiently curbing antisocial behaviors. 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. 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.

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


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 esteem\textsuperscript{264} from others than labeling Teresa. In essence, labeling them both as "litterers" will punish one much more than the other.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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. 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. 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.

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.”
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” often meet with
resistance.

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
breaks 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. Failure to react similarly would result in a questioning of group membership. 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. Failure to conform would result in uncertainty about one's categorization of the world and of oneself and, ultimately, results in significant cognitive dissonance.

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. Messages regarding stimuli from outgroup sources, however, do not meet with the same kind of cognitive uncertainty. 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. 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.

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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.
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.\textsuperscript{279} Government is not usually an ingroup source and its messages as an outgroup source will be discounted.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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.