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The Origin, Development, and Regulation of Norms

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THE ORIGIN, DEVELOPMENT, AND REGULATION OF NORMS

Richard H. McAdams*

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For decades, sociologists have employed the concept of social norms to explain how society shapes individual behavior.¹ In recent years, economists and rational choice theorists in philosophy and political science have started to use individual behavior to explain the origin and function of norms.² For many in this group, the focus

1. See, e.g., DONALD BLACK, *THE BEHAVIOR OF LAW* (1976); EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Karen E. Fields trans., The Free Press 1995) (1965); TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1912); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 27 (Talcott Parsons trans., 1958); Judith Blake & Kingsley Davis, *Norms, Values and Sanctions*, in *HANDBOOK OF MODERN SOCIOLOGY* 456 (Robert E.L. Faris ed., 1964); Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 *AM. SOC. REV.* 161 (1960). For an early example of norms discussion in social psychology, see MUZAFER SHERIF, *THE PSYCHOLOGY OF SOCIAL NORMS* (1936).

2. For examples within the field of economics, see GARY S. BECKER, *ACCOUNTING FOR TASTES* 225-30 (1996); ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE* (1986); George A. Akerlof, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, 94 *Q.J. ECON.* 749 (1980); B. Douglas Bernheim, *A Theory of Conformity*, 102 *J. POL. ECON.* 841 (1994); Ken Binmore & Larry Samuelson, *An Economist's Perspective on the Evolution of Norms*, 150 *J. INST. & THEORETICAL ECON.* 45 (1994). For examples within philosophy, see EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977); Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 *ETHICS* 725 (1990). A recent collection of economic and philosophical writings is *THE DYNAMICS OF NORMS* (Cristina Bicchieri et al. eds., 1997). For examples within political science, see DENNIS CHONG, *COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT* (1991); RUSSELL

of study is the interaction of law and norms, of formal and informal rules. Exemplified by Robert Ellickson's *Order Without Law*,³ this literature uses norms to develop more robust explanations of behavior and to predict more accurately the effect of legal rules. Norms turn out to matter in legal analysis for many reasons. Sometimes norms govern behavior irrespective of the legal rule, making the choice of a formal rule surprisingly unimportant.⁴ Sometimes legal rules facilitate or impede the enforcement of a norm, and the selection of the formal rule matters in entirely new ways, the exact consequence depending on whether the formal rule strengthens or weakens a desirable or undesirable norm.⁵ Indeed, in some cases, new norms arise in the presence of different legal rules, making the relevant policy choice one between two or more law-norm combinations.⁶

Roughly speaking, by *norms* this literature refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.⁷ Law-and-norms scholars view these informal rules as ubiquitous. Though relatively recent, the economics literature uses norms to explain an incredible variety of positive and normative issues: the informal resolution of property disputes among rancher neighbors in Shasta County, California,⁸ the preference of the diamond industry for nonlegal means of contract enforcement,⁹ the stability of racial discrimination in competitive markets,¹⁰ the effectiveness of various anti-dueling

HARDIN, ONE FOR ALL: THE LOGIC OF GROUP CONFLICT (1995); Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095 (1986). In addition, sociologists occasionally use a rational choice perspective to address norms. See, e.g., JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY chs. 10, 11, 30 (1990); Michael Hechter, *The Attainment of Solidarity in Intentional Communities*, 2 RATIONALITY & SOC. 142 (1990). Political philosopher Jon Elster, on the other hand, uses rational choice concepts in many respects but defines norms as motivations that are not outcome oriented. See JON ELSTER, THE CEMENT OF SOCIETY 98-100 (1989).

3. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Regarding other law and economics literature on norms, see *infra* notes 19-38 and accompanying text.

4. See *infra* note 39 and accompanying text.

5. See *infra* notes 35, 40-43 and accompanying text.

6. See *infra* note 42.

7. Not everyone defines norms in this way. Some count legal rules as norms; others exclude not only legal rules but the formal rules of private organizations. See *infra* notes 54-59 and accompanying text.

8. See ELICKSON, *supra* note 3, at 40-81.

9. See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

10. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1064-71 (1995).

statutes from the previous century and safe-sex education efforts from this one,¹¹ the reason people vote,¹² the transitional difficulties in moving from a Marxist to a market economy,¹³ the general efficiency of the common law,¹⁴ and the operation of the elder share regime governing sumo wrestling in Japan.¹⁵

One reasonably might wonder from even this incomplete list if a single social science construct is actually capable of illuminating so many different behaviors and legal rules. Because law-and-economics theorists use norms to address such different problems — diamond selling and dueling, sexual customs and voting — perhaps they are using the term *norms* to mean different things.¹⁶ And because these theorists offer norms to explain otherwise puzzling phenomena, there is the related risk, as Cass Sunstein warns, “that a reference to social norms will become a conclusory response to any apparently anomalous results.”¹⁷ If norms explain too much, in other words, there is a danger they really explain nothing.

I do not believe this risk has been realized, but there is a danger that it will be. In this article, I advocate the use of norms in economic analysis of law. Norms are a vitally useful tool for explaining behavior and predicting the effect of legal rules.

11. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 968-72, 1019-25 (1995); see also Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996) (using norms to explain changes in smoking behavior, recycling patterns, and gender roles in America).

12. See Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2136, 2138-64 (1996).

13. See Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2062-63 (1996).

14. See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1690-94 (1996).

15. See Mark D. West, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, 26 J. LEGAL STUD. 165 (1997).

16. David Charny has already suggested as much: “[O]ne might question whether it is useful to use the same term (‘norms’) for comprehensive and relatively complex regimes as for more informal and diffuse sanctioning systems. With the systems that Bernstein and Ramseyer describe, we are quite far from the bucolic expanses of Shasta County . . .” David Charny, *Illusions of a Spontaneous Order: “Norms” in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1845 (1996). Charny is contrasting Ellickson’s discussion of norms in Shasta County, California, see ELLICKSON, *supra* note 3, with Lisa Bernstein’s work on the business norms enforced by the National Grain and Feed Association, see Bernstein, *supra* note 9, and Mark Ramseyer’s work on product liability norms enforced by Japan’s Product Safety Council, see J. Mark Ramseyer, *Products Liability Through Private Ordering: Notes on a Japanese Experiment*, 144 U. PA. L. REV. 1823 (1996). While Shasta County norms exist without “a centralized agency for formulating or enforcing rules,” the norms addressed by Bernstein and Ramseyer arise within a centralized “‘state-like’ agency.” See Charny, *supra*, at 1845. Charny’s comment identifies a crucial distinction, one that I discuss below.

17. Sunstein, *supra* note 11, at 945.

Ellickson was right to have criticized law and economics in 1991 for having largely ignored informal means of social control,¹⁸ and much still remains to be done in applying economics to understanding the complex mix of legal and norm-based rules. But because norms are a relatively new subject for law and economics, there is as yet no consensus about certain basic theoretical propositions, including, most importantly, the *meaning* of norm. My goal is to remedy some fundamental ambiguities in the term *norm* — ambiguities that give this literature an unnecessarily ad hoc appearance and limit our understanding of the connections between law and norms. Toward this end, I offer a particular theory of the origin and growth of norms, and I derive some implications the theory has for how law can govern norms.

Part I introduces this new law-and-norms literature, by which I mean the economic study of the interaction of formal (legal) and informal (norm-based) rules. I provide a provisional definition of *norm* and identify the puzzle of its origin. Part II offers a simple model. In the theory I propose, the initial force behind norm creation is the desire individuals have for *respect* or *prestige*, that is, for the relative *esteem* of others. Withholding esteem is, under certain conditions, a costless means of inflicting costs on others. These costs are often extremely small; their insignificance compared to material incentives is probably what explains the tendency of economic theories to ignore them altogether. But Part II demonstrates that dynamic forces can cause the weak desire for esteem to produce powerful norms, sometimes because individuals struggle to avoid deviance, sometimes because they compete to be heroic. Identifying the stages in this process permits some analytical clarity that is currently lacking, or so I argue in Part III, where I use these stages of norm development to resolve some troubling ambiguities in the literature over the meaning of norms. The esteem model offers a way to unite what may appear to be unrelated strands of the literature concerning internalized and non-internalized norms, broadly and narrowly defined norms, and group and societal norms. Finally, in Part IV, I point out some of the model's immediate implications for the legal regulation of norms. Though norms can be either socially productive or unproductive, the esteem theory identifies new situations in which norms reduce

18. Ellickson criticized both the extreme law and society claim that norms determine behavior to the exclusion of law ("legal peripheralism") and the extreme law and economics claim that law determines behavior to the exclusion of norms ("legal centralism") and instead focused on which "controller" is more powerful in particular contexts. See ELLICKSON, *supra* note 3, at 137-55.

social welfare. The model also reveals how law can regulate norms: strengthening norms through the *expressive* function of law and impeding norms with legal protections of privacy.

I. THE ECONOMICS OF NORMS AND NORM ORIGIN

A. *The New Economic Literature on Law & Norms*

In the 1980s, rational choice theorists in various disciplines began to study norms.¹⁹ Within law and economics,²⁰ Janet Landa and Robert Cooter sought to explain why, in parts of Asia, ethnic minorities tended to dominate the middleman position in many industries.²¹ They concluded that these "ethnically homogenous middlemen groups" succeed in nations without reliable legal enforcement of contracts because the groups' social connectedness give their members a unique means of (informally) sanctioning contract breaches by other group members.²² About the same time, Robert Ellickson began investigating how ranchers in Shasta County, California, settle property disputes. Ultimately, Ellickson concluded that these ranchers enforce informal norm-based rules for disputes involving cattle trespass and boundary fences and thus resolve certain conflicts without the legal regime.²³ In several arti-

19. Norms appeared both to challenge the idea of rational choice and to explain puzzling amounts of cooperation and social order. See ELSTER, *supra* note 2; SUGDEN, *supra* note 2; Axelrod, *supra* note 2. For a recent summary of the economic literature, see Eric Posner, *Efficient Norms*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (Peter Newman ed., forthcoming 1998).

20. Steven Cheung may deserve credit for offering the first law and economics analysis of a norm. See Steven N.S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11 (1973). A decade before rational choice theorists began studying norms, Cheung reported a custom governing beekeeping by apple orchard owners in rural Washington. Because some bees will fly off one orchard and pollinate trees on another orchard, each farmer has an incentive to keep fewer bees than is necessary for his orchard, with the expectation that bees from surrounding farms will make up the shortfall. To prevent the overall shortage of bees that would occur if everyone followed this strategy, an informally enforced custom requires orchard owners to keep a proportionate share of bees during the pollination period. See *id.* at 30. Another early example is Warren F. Schwartz et al., *The Duel: Can These Gentlemen Be Acting Efficiently?*, 8 J. LEGAL STUD. 321 (1984). Long before this belated discovery of norms, law and society scholars discussed informal social sanctions and their relationship to legal rules. See, e.g., Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

21. See Robert Cooter & Janet T. Landa, *Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law*, 4 INTL. REV. L. & ECON. 15 (1984); Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349 (1981); see also JANET TAI LANDA, TRUST, ETHNICITY, AND IDENTITY (1994); Jack L. Carr & Janet T. Landa, *The Economics of Symbols, Clan Names, and Religion*, 12 J. LEGAL STUD. 135 (1983); Sumner J. La Croix, *Homogenous Middleman Groups: What Determines the Homogeneity?*, 5 J.L. ECON. & ORG. 211 (1989).

22. See Cooter & Landa, *supra* note 21, at 21; Landa, *supra* note 21, at 355-57.

23. See ELLICKSON, *supra* note 3, at 40-81. On the other hand, where the conditions are not appropriate for norms, legal rules still govern the relevant conduct. See *id.* at 82-103

cles²⁴ and in his book, *Order Without Law*, Ellickson generalizes these results, explaining how law and norms are alternative means of social control, each providing a mechanism for overcoming pervasive problems of collective action.²⁵

Order Without Law created, or at least anticipated, a burgeoning new subfield of legal studies.²⁶ Much of the economic work continues in contract law, which sometimes explicitly references business norms. Lisa Bernstein, for example, studies how American merchants — from diamond sellers to grain distributors — deter contract breaches and resolve disputes without resort to the legal system.²⁷ Robert Cooter proposes that courts enforce the

(discussing disputes regarding highway collisions involving livestock). Ellickson also recounts how whalers in the eighteenth and nineteenth centuries used norms to resolve disputes over the ownership of whales. *See id.* at 191-206; *see also id.* at 218-19 (regarding a similar discussion of Maine lobstermen, based on JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988)).

24. *See* Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623 (1986); Robert Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 *J. LEGAL STUD.* 67 (1987); Robert Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 *J.L. ECON. & ORG.* 83 (1989).

25. *See* ELICKSON, *supra* note 3, at 123-36, 167-83. Collective action problems arise when there is a disparity between the individual behavior that maximizes the welfare of the group and the behavior that maximizes the welfare of an individual in the group. Given some activity, a “group has a collective action problem if it is better for all if some do it than if nobody does, but better for each not to do it.” JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 126 (1989). Examples may include voting, driving within the speed limit, and conserving water in a time of scarcity. *See* RUSSELL HARDIN, *COLLECTIVE ACTION* 8-9, 16-22 (1982); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 5-22 (1965).

26. The growing interest in norms is not limited to law and economics. Recent work by a variety of legal scholars focuses on norms. *See, e.g.*, Anita Bernstein, *Better Living Through Crime and Tort*, 76 *B.U. L. REV.* 169, 177-80 (1996); Herbert Jacob, *The Elusive Shadow of the Law*, 26 *L. & SOC. REV.* 565 (1992); William K. Jones, *A Theory of Social Norms*, 1994 *U. ILL. L. REV.* 545; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U. L. REV.* 453 (1997); Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the “Gypsies,”* 103 *YALE L.J.* 323 (1993). Some scholars use norms as a means of critiquing economic theories. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning and Deterrence*, 83 *VA. L. REV.* 349 (1997) (using social norms to criticize economic theories of deterrence); Sunstein, *supra* note 11 (using norms to criticize the economic concept of a preference).

27. In contrast to Landa’s and Cooter’s early work, which emphasized the importance of norms in underdeveloped legal systems, Bernstein finds that norms govern commercial behavior in the United States in industries where merchants sometimes shun the expensive judicial machinery for enforcing contracts. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 *U. PA. L. REV.* 1765 (1996); Bernstein, *supra* note 9. Robert Scott had made this point in an earlier and influential article. *See* Robert Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 *CAL. L. REV.* 2005, 2040-42 (1987); *see also* Robert Scott, *A Relational Theory of Default Rules for Commercial Contracts*, 19 *J. LEGAL STUD.* 597, 613-15 (1990) (discussing norms of reciprocity and their implications for selecting optional default rules). Other commentators also discuss how norms govern commercial relationships. *See, e.g.*, David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 *HARV. L. REV.* 373 (1990); Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 *U. PA. L. REV.* 1859 (1996); Jody S. Kraus, *Legal Design and the Evolution of Commercial Norms*, 26 *J. LEGAL*

otherwise underenforced norms of an industry by directly incorporating them into the legal rules governing contracts in that industry, at least where the structural circumstances make it likely the norm is efficient.²⁸

Outside the law of contracts, the literature continues to grow.²⁹ Theorists have explored the relevance of norms to various public law issues: whether weakened voting norms justify mandatory voting laws,³⁰ whether norms of reciprocity explain why government must compensate for its takings,³¹ and whether the criminal prohibition of blackmail is efficient.³² More generally, Lawrence Les-

STUD. 377 (1997); Geoffrey P. Miller, *Contracts of Genesis*, 22 J. LEGAL STUD. 15 (1993); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 159-60 (1996).

28. See Cooter, *supra* note 14. Cooter's proposal is in tension with the claim made by Bernstein that industrial groups may prefer to preserve the exclusivity of private dispute resolution mechanisms by forbidding lawsuits between members. See Bernstein, *supra* note 27, at 1788 ("[R]ational transactors might deliberately leave aspects of their contracting relationship to be governed, in whole or in part, by extralegal commitments and sanctions."); Bernstein, *supra* note 9, at 124-27, 134 (describing diamond bourse rule against the litigation of disputes). Edward Rock and Michael Wachter similarly argue that courts should not attempt to enforce the norm of American labor markets that employees may be discharged only "for cause," because they doubt that judges can gain the local knowledge necessary to enforce the norm competently. See Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996); see also Richard Craswell, *Do Trade Customs Exist?*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 24-25 (Jody Kraus & Steven Walt eds., forthcoming 1997) (arguing that trade customs take the form of general rules that require "judgment" and case-by-case "balancing" of interests by those in the trade rather than "bright-line rules" judges can discover and apply).

29. Judge Richard Posner recently joined the fray. See Richard A. Posner, *Social Norms and the Law: An Economic Approach*, AM. ECON. REV., May 1997, at 365. Ellickson continues to study informal control of land use through neighborhood or "street" norms. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); see also Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1 (1997) (criticizing Ellickson's proposal to define "chronic street nuisance" by reference to community norms). Informal regulation of land is of considerable interest to many nonlegal scholars. See, e.g., ELINOR OSTROM ET AL., RULES, GAMES, AND COMMON-POOL RESOURCES (1994).

30. See Hasen, *supra* note 12. Hasen's work, and many of those referred to in this section, see *infra* notes 31-35, were part of a recent symposium in the *University of Pennsylvania Law Review*. See Symposium, *Law, Economics, & Norms*, 144 U. PA. L. REV. 1643 (1996).

31. See Pildes, *supra* note 13, at 2069-73. Saul Levmore also compares legal and norm-based rules governing anonymous communication in society and concludes that law is unable to mirror the nuances of the norm-based rule. See Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191 (1996) (suggesting that norms permit anonymity more frequently than law because only norms can enforce complex obligations of "intermediation" that ameliorate the harms of anonymity).

32. See Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2266-91 (1996).

sig³³ and Cass Sunstein³⁴ have discussed government efforts to “manage” social norms. Sunstein uses norms to explain the “expressive” function of law: by “making a statement,” law can strengthen the norms it embodies and weaken those it condemns. One might therefore justify government coercion as a means of impeding unwanted norms or facilitating desirable norms.³⁵ Lessig emphasizes the need for the state to consider the “social meaning” of behavior it seeks to regulate. Law can influence behavior by changing the norms that determine the meaning ascribed to behavior; often one cannot predict the effect of law, he claims, without considering this interpretive dimension.³⁶

The value of this scholarship must be measured within each area of law it addresses, but the literature does point strongly toward a particular research agenda: those who study law should study norms. Where norms govern individual behavior, one cannot correctly assess the effect of formal, state-enforced rules without understanding the informal rules also at work. In many ways, this point is very old: legal scholars have always paid some attention,

33. See Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Lessig, *supra* note 11.

34. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Sunstein, *supra* note 11.

35. As Sunstein explains:

[L]aw might attempt to express a judgment about the underlying activity in such a way as to alter social norms. . . . Through time, place, and manner restrictions or flat bans, for example, the law might attempt to portray behavior like smoking, using drugs, or engaging in unsafe sex as a sign of individual weakness.

Sunstein, *supra* note 34, at 2034-35. Sunstein also uses norms to challenge the coherence of the economic concept of a *preference*. See Sunstein, *supra* note 11, at 931-39. In contrast, my theory of norm origin begins with the economic idea of a preference, namely the preference for *esteem*. See *infra* text accompanying notes 78-83.

36. See Lessig, *supra* note 11. Lessig claims that one way law changes social meaning is by “ambiguation,” where law renders the meaning of an act less clear by providing an alternative meaning. See *id.* at 1010-12. For example, if almost no one wears a seat belt, then wearing a belt in another person’s car *means* (signals) that one distrusts the driver’s abilities; because people wish to avoid giving offense, this meaning decreases seat belt use. See *id.* at 952. If the state mandates seat belt use, however, the meaning of this behavior becomes more ambiguous because the seat belt user may now be acting solely to comply with the law. By “ambiguating” the meaning, the law renders it less likely that wearing a seatbelt will give offense and decreases the costs of the behavior. See *id.* at 1011-12.

Another technique is “tying,” through which law may add meaning to one behavior by connecting it to another. See Lessig, *supra* note 11, at 1009-10. Lessig uses Dan Kahan’s discussion of criminal fines as an example. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996). Kahan says that fines fail to express (adequately) condemnation of the behavior being fined. See *id.* at 620. A fine also looks like a “price,” and making one pay a price for an activity does not condemn the activity. See *id.* at 621. Kahan recommends combining criminal fines with a small prison term or a “shaming” sanction, such as stigmatizing publicity. See *id.* at 649-52. Lessig concurs, claiming that “[b]y tying the fine to some other unambiguously condemnatory punishment, one reduces on the margin the ambiguity in fining. . . .” Lessig, *supra* note 33, at 2188.

sometimes enormous attention, to social or business customs, conventions, mores, and the like.³⁷ But the new law and norms literature re-states and sharpens the point. Norms matter to legal analysis because (1) sometimes norms control individual behavior to the exclusion of law, (2) sometimes norms and law together influence behavior, and (3) sometimes norms and law influence each other.³⁸

Consider each possibility. First, a norm may govern behavior so tightly that the choice between (plausible) legal rules is irrelevant. Ellickson, for example, discovered that different property regimes in Shasta County had no effect on the way neighbors resolved certain disputes because the same norm governed regardless of the legal rule.³⁹ In these situations, any effort expended to refine the legal rule is simply wasted. Second, norms frequently matter because the legal and norm-based rules each independently influence behavior. Law and norms frequently reinforce each other by obligating the same behavior — both, for example, obligate tax-

37. An obvious example is Karl Llewellyn's effort to model article 2 of the Uniform Commercial Code on business norms. See, e.g., Bernstein, *supra* note 27, at 1768 n.6 (listing sources addressing Llewellyn's efforts to incorporate norms into the law). Tort rules also incorporate community norms. See, e.g., Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 3, 4 (1992); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 974-78 (1989) (arguing that the privacy tort enforces community norms of "civility").

Criminal law scholars often have discussed the social norms or values legal rules enforce, not just in the context of enforcing morality, see, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965), but also in explaining fundamental doctrinal elements such as mens rea, see, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 121-31 (1968); Robinson & Darley, *supra* note 26, at 479-82. Conversely, various scholars observe the use of criminal law to change norms. For example, Brian Simpson suggests that the 602 A.D. laws of the English King Ethelbert, the "earliest set of written laws of any Germanic people in Europe," were an attempt to displace the "feud," the customary duty one had to avenge the death of a family member. See A.W.B. SIMPSON, *The Laws of Ethelbert*, in *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 1, 2, 12-13 (1987) ("What the laws of Ethelbert were concerned to introduce into society was a new idea — that it was not wrong to take money instead of blood."); cf. HARDIN, *supra* note 2, at 91-100 (discussing how the prohibition of dueling contributed to the demise of the norms of honor and revenge that obligated aristocrats to duel); A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984) (discussing how the state used the case of *Regina v. Dudley & Stephens* to expand the norm against killing by nullifying the custom allowing cannibalism by those lost at sea).

38. Thus, norms are irrelevant only in the fourth possible case, when the legal rule governs individual behavior exclusively, because there is no preexisting norm governing such behavior, no norm that arises as a consequence of the legal rule, and no norm influencing what legal rule is adopted.

39. See ELLICKSON, *supra* note 3, at 40-64.

paying⁴⁰ and forbid theft⁴¹ — and sometimes undermine each other by obligating inconsistent behavior — as where law obligates one to disclose the illegal activities of colleagues but the collegial norm obligates silence.⁴² When laws and norms obligate different but consistent behaviors, the interaction can be quite interesting and complex.⁴³

40. See, e.g., Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 401-02 (1994) (reviewing studies on tax compliance).

41. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME* 16, 65, 191 (1995). But see THOMAS GABOR, 'EVERYBODY DOES IT!' CRIME BY THE PUBLIC 73-97 (1994) (discussing the frequency of and rationalizations for, amateur theft such as insurance fraud, employee pilfering, tax evasion, shoplifting, and "hotel linen lifting").

42. See, e.g., JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 108-12 (1993) (describing the code of silence among police officers that prevents one from "informing" on the misconduct of another); *Report of the Mollen Commission to Investigate Allegations of Police Corruption in New York City*, in *ANATOMY OF FAILURE: A PATH FOR SUCCESS* 53-58 (1994) (finding a pervasive "code of silence" that is strongest in "crime-ridden precincts where officers most depend upon each other for their safety each day"); Richard N. Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 IND. L.J. 528 (1976) (describing doctors' unwillingness to testify against other doctors); Carl R. Robinson, *Why the Conspiracy of Silence Won't Die*, MED. ECON., Feb. 20, 1984, at 180 (same); cf. West, *supra* note 15, at 166 (discussing the secrecy maintained by the Japan Sumo Association).

Another obvious example is violence, where law forbids an assault required by norms of honor. See, e.g., HARDIN, *supra* note 2, at 91-100; RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* 13-22, 92-93 (1996); Jon Elster, *Norms of Revenge*, 100 ETHICS 862 (1990) (discussing norms of honor supporting the practice of dueling and the blood feud).

43. For example, assume that a law obligates individuals to appear for jury duty when called and a norm prevents lying. Without the law, a person wishing to avoid serving would refuse to appear; without the norm, a person who appeared could avoid serving by telling undetectable lies during voir dire about her inability to be impartial. The law and the norm thus achieve a result together — inducing jury service — that neither could produce in isolation.

As another example, consider the combination of common law larceny, which prohibits the taking of another's property only when accompanied by the intent to permanently deprive the owner thereof, see MODEL PENAL CODE § 223.2 cmt. 6 (1980), with a norm among many neighbors and co-workers not to take property of another without permission, even temporarily. Because neighbors and coworkers might be the only people who could convince a jury they took someone's property with the intent to return it, and because these individuals are the ones subject to the norm, the combination of the legal and norm-based rule may provide reasonable security of personal property even though each rule alone seems inadequate. The criminal rule permits temporary taking, while the norm may simply be too weak to prevent lucrative permanent taking even by neighbors. Of course, the criminal rule could be — and in some jurisdictions has been — expanded so that the legal prohibition, including the tort of conversion that already applies to temporary taking, would by itself deter temporary taking. But if one wishes to conserve criminal law only for those wrongs for which punishment is strictly necessary, then norms may help explain why the common law of larceny did not ban temporary taking.

For a third example, see McAdams, *supra* note 32, at 2266-91 (defending the prohibition of blackmail based on its interactive effect with privacy norms).

Perhaps of greatest interest, the law can influence the norm.⁴⁴ Some theorists advocate using law *intentionally* to govern or shape norms. Cooter, for example, advocates “decentralizing law” by incorporating business norms directly into contract rules governing the industry in which the norm arises.⁴⁵ Various scholars claim that legally restricting public smoking may strengthen an antismoking norm,⁴⁶ that Title VII impedes enforcement of undesirable norms of race discrimination,⁴⁷ and that bans on dueling worked to end norms obligating the duel.⁴⁸ In general, if legal rules sometimes change or create norms, one cannot adequately compare an existing legal rule with its alternatives without considering how a change in the legal rule may affect the relevant norms.

The literature also identifies the danger that law may *unintentionally* change norms. Some express concern that courts will undermine the very norms they seek to enforce, given that judges lack the local knowledge to understand the norm properly.⁴⁹ More often, the effect on norms arises from the state’s attempt to regulate something else. Eric Posner, for example, suggests that legal rules often have indirect and unintended effects on the power that groups have over their members, which in turn affects the power of such groups to enforce their norms.⁵⁰ Other scholars make similar claims.⁵¹

44. This third category also includes the influence of norms on the production of legal rules. I will focus on the effect noted in the text, but of course judicial norms affect the production of legal opinions, and lobbying-legislative norms affect the production of statutes. See, e.g., Erin O’Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993); Posner, *supra* note 29, at 365.

45. Cooter limits his proposition to situations in which the norm passes a “structural” test for efficiency. See Cooter, *supra* note 14, at 1694.

46. See, e.g., Sunstein, *supra* note 34, at 2033-36.

47. See McAdams, *supra* note 10, at 1074-82.

48. See Lessig, *supra* note 11, at 968-72.

49. See Bernstein, *supra* note 27, at 1796-1807 (asserting that grain merchants may prefer that courts enforce formal rules rather than attempt to ascertain and enforce the norms of the grain merchants); Pildes, *supra* note 13, at 2073-76 (noting that inherent differences in group and state enforcement of a rule often suggest that state enforcement of the norm would be counterproductive); Rock & Wachter, *supra* note 28, at 1932-40 (arguing courts could not enforce norm of “for-cause” firing).

50. See Posner, *supra* note 27, at 147-48.

51. Richard Pildes warns of the unintended destruction of social capital through law. See Pildes, *supra* note 13. He suggests, for example, that modern urban planning created buildings that destroyed the conditions for “street” norms vital to urban welfare. See *id.* at 2067-69 (relying on JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961)). Jacobs’s and Pildes’s argument is that urban planning produced buildings that intentionally avoided attracting people to the streets, ignoring the fact that populated streets were an essential condition for norms regulating street behavior.

I have argued previously that the criminal prohibition of blackmail unintentionally facilitates the ability of close-knit groups to sanction violators in the public manner necessary to

In sum, formal and informal rules form a complex web of incentives that influence behavior; a new economics literature has begun to view norms as central to the study of law.

B. *The Meaning of "Norms" in the New Literature*

In other disciplines, considerable effort has gone into defining exactly what constitutes a *norm*.⁵² The economic literature continues to struggle over the issue.⁵³ Although my use of the term will become clearer as I develop a theory of how such influences arise, I state here a few preliminary points concerning definition.

To begin, the economic literature distinguishes norms from legal rules.⁵⁴ Although law may affect the strength of norm enforcement, norms are enforced by some means other than legal sanctions. If recycling were a norm, for example, we would not mean that — or at least not merely mean that — the state punishes the failure to recycle but rather that the obligation to recycle is enforced by a nongovernmental sanction — as when individuals internalize the duty and feel guilt from failing to recycle or when individuals privately punish those who do not recycle.

Second, I follow the literature that views norms as obligations. Robert Cooter excludes, for example, the statistical notion of a norm as *merely* a central tendency of behavior. Many regularities exist — even intentionally — without being obligatory.⁵⁵ As Cooter puts it: “[M]en take off their hats when they enter a furnace room or a church. Taking off your hat to escape the heat is different from taking off your hat to satisfy an obligation. The former is [merely] a regularity and the latter is a norm.”⁵⁶

further norm internalization, and to generate the norm criticism necessary to “repeal” dysfunctional norms. See McAdams, *supra* note 32, at 2243-64; see also Wendy J. Gordon, *Norms of Communication and Commodification*, 144 U. PA. L. REV. 2321, 2329-34 (1996) (critiquing these claims).

52. See, e.g., ELSTER, *supra* note 2, at 97-151; Blake & Davis, *supra* note 1.

53. See Posner, *supra* note 19 (summarizing several recent theories).

54. *But see* Jones, *supra* note 26, at 546 (defining norms to include “all rules and standards, without regard to their origins or means of enforcement”).

55. Individuals may intentionally adhere to a regularity for reasons *other than* its being an obligation. For example, those who wish to hitchhike hold up their hand with the thumb extended not because the failure to do so is sanctioned by guilt or condemnation, but because they will otherwise fail to communicate to motorists their desire for a ride. People with imperfect information often follow the majority behavior, not from fear of sanctions, but because they assume the majority is less likely to be mistaken. In both examples, following the regularity is prudent; deviating from it carries risks, though not the risk of sanction. Hence, the intentional regularity or “convention” is not an obligation and not, in my use of the term, a norm. Elster makes this distinction. See ELSTER, *supra* note 2, at 101-02.

56. Cooter, *supra* note 14, at 1656 (footnote omitted). The removal of a hat in a furnace room is not a duty the individual owes to other members of the community. The regularity is

Third, nonlegal obligations may be created and enforced in a centralized or decentralized manner. Centralized private organizations, such as a diamond bourse, enforce relatively formal, usually written, rules,⁵⁷ while groups and entire societies often enforce highly informal rules, such as the property norms ranchers follow in Shasta County.⁵⁸ The distinction is important because some theorists prefer to use the term *norms* to refer only to decentralized rules and regard *organizational rules* as a set of obligations falling between centralized law and decentralized norms.⁵⁹ However the terminological matter is resolved, this article focuses on informal, decentralized obligations. Such obligations describe virtually all the norms arising at a societal level⁶⁰ and within informal groups,⁶¹ and some of the norms arising informally within highly structured groups.⁶² These are also the norms for which the meaning is most obscure — a function of their informality — and for which a theory of origin is therefore likely to have the greatest payoff.⁶³

merely the result of a common disposition to feel uncomfortably hot wearing a hat in a furnace room. But church members regard hat-removal as a duty that men owe to the church. One who violates an obligation is sanctioned for that reason by human agency — the violator either receives an internal self-sanction, such as guilt, or others punish the violation.

57. See Bernstein, *supra* note 9, at 119-32.

58. See ELLICKSON, *supra* note 3, at 40-81.

59. Ellickson divides social control into first-party (involving one's personal ethics), second-party (involving self-help by an aggrieved party), and third-party control. See *id.* at 130-31. He then notes three sources of third-party control: governments provide legal rules, organizations provide organizational rules, and "social forces" provide norm-based rules. See *id.* at 131. In this taxonomy, organizational rules therefore are not "norms." See *id.* This distinction has not, however, generally been observed, a point that David Charny has recently criticized. See *supra* note 16.

As long as the distinction between formal and informal norms is observed, I would prefer to use *norms* to refer to *any* nonstate obligation. The whole literature has in common the claim that legal analysis should reflect the existence of nonlegal obligations. A single term is useful for making this point: "Remember norms" is easier than "Remember norms and also organizational rules."

60. For example, social norms defining gender roles, obligating voting, and proscribing rudeness are enforced informally.

61. For example, the Shasta County ranchers Ellickson studied are a close-knit group without a formal structure. See ELLICKSON, *supra* note 3, at 52-64. Neighbors are often groups in this sense, as are students at a particular high school, workers in a firm, city dwellers who share a religious faith, and professors of a given discipline.

62. Bernstein, for example, notes that some trading rules within formal organizations remain informal. See Bernstein, *supra* note 27, at 1775 n.32, 1777-78 n.43; see also Craswell, *supra* note 28, at 25-26.

63. Informal norms are, in a sense, more fundamental. Once an organization arises, the origin of its rules is explained simply by the formal processes of rule creation within the organization — perhaps aided by borrowing from public choice analysis of governmental rulemaking, see Charny, *supra* note 16, at 1848. The difficult question is how the organization originated. My model of the origin of decentralized norms may bear on this question, in that the processes creating informal norms within groups may, over time, produce a centralized structure to the group which can then promulgate formal rules. Further, if one thinks of organizational rules as a hybrid of centralized law and decentralized norms, the initial ques-

C. *The Puzzle of Norm Origin and Its Relevance for Law*

Despite the fact that norms govern behavior throughout society, the *origin* of norms is, for economists, something of a puzzle. Typically, the new literature simply sets the issue aside. The decision to concentrate on the operation of extant norms is certainly defensible: we gain much by empirical studies of particular norms.⁶⁴ Nonetheless, I believe it is fruitful for legal theory to focus on the more elemental question: How do norms initially arise?

For economics, this question poses some difficulty. If one takes for granted that individuals enforce norms, it is easy to see why they persist. 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.⁶⁵ 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 problem⁶⁶ 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.⁶⁷

tion is how to explain the origin and function of the two pure cases; one can then explain the hybrid case in terms of these cases.

64. The fact of a norm's existence is entirely sufficient to establish many propositions important to legal analysis. Moreover, had the early work on norms not been rigorously empirical, many rational choice scholars might have found the idea of norm-based behavior easy to dismiss as theoretically improbable or insignificant. Finally, any theory of origin must ultimately be tested against empirical data concerning particular norms.

65. Sanctioning is not necessary if threats to sanction are credible. But given the collective action problem described in the paragraph, it is not clear why anyone should take such threats seriously.

66. Regarding collective action generally, see HARDIN, *supra* note 25; OLSON, *supra* note 25.

67. More precisely, the individual will bear the costs of enforcement only when (1) she perceives that her decision to sanction a violator would, given other events, create a norm and her failure to sanction would prevent the norm, and (2) her benefit from having the norm would exceed her cost from enforcing it. Given uncertainty, one might instead say that the individual perceives the gain from enforcing the norm to be the probability of being the "make or break" actor multiplied by the gain she receives from having the norm. Outside of very small groups, the probability of being the "make or break" actor is very low. See ELSTER, *supra* note 2, at 44.

One could try to answer this analysis by asserting that there are secondary norms obligating enforcement of primary norms. But this merely pushes the second-order collective action problem back to a third level, begging the question of why anyone would bear the costs to sanction those who failed to sanction primary norm violators. See *id.*

Otherwise, the individual is better off not bearing enforcement costs.⁶⁸

To illustrate, imagine a behavior with negative externalities — that is, effects that impose nonconsensual costs on others.⁶⁹ Littering, for example, imposes costs on those who encounter the litter in any way they regard as unpleasant. Suppose that the total gains derived from a given act of littering are worth twenty-five cents — the value the litterer places on not holding the garbage until she finds a receptacle for it — and the total average costs are one dollar, based on a one-cent cost incurred by the litterer and each of, on average, ninety-nine others who encounter the litter. Even though littering is socially costly, it is common because a litterer gains all the benefits but incurs only a fraction of the costs. One might expect a no-littering norm in this context: given the costs the behavior imposes on everyone, the group would benefit if it spent the costs necessary to sanction litterers effectively.⁷⁰ But the dynamic that causes the littering problem is likely to prevent a solution. The most any one individual will spend to deter an act of littering is one cent, which is quite probably not sufficient by itself to raise the expected costs of littering above twenty-five cents.⁷¹ Thus, a norm

68. The problem is not solved by positing universal altruism. If everyone were highly altruistic, there would be no collective action problems recognized as such. Anyone who has observed traffic gridlock, littering, or water shortages should admit that selfishness is sufficiently strong to cause such problems. The question is, given that selfish individuals often fail to generate norms, how is it that they sometimes do?

One answer is that there are varying degrees of altruism in individuals and varying distributions of individuals among groups, so that one group, but not another, may produce a norm requiring a certain level of sacrifice, and one group may produce some norms but not others that require even more sacrifice. This solution would resolve the puzzle but without explaining much of what we observe about norms. For example, if norms depended entirely on altruism, we would not observe strong norms within criminal groups nor guilt among those who have internalized a norm they intellectually understand is no longer beneficial to the group. Nor does an altruism model yield much new insight into norms — for example, it does not predict the existence of unnecessary and inefficient norms, nor the expressive value of law, each of which is explained in Part IV.

69. This is precisely where James Coleman expects norms to arise, given other conditions that he identifies. See COLEMAN, *supra* note 2, at 251 (“[T]he genesis of a norm is based in externalities of an action which cannot be overcome by simple transactions that would put control of the action in the hands of those experiencing the externalities.”).

70. Because the group loses 75 cents from each act of littering, the group would benefit if it could deter an act of littering for anything less than 75 cents. This seems highly probable, given that the litterer gains only 25 cents.

71. I say only “quite probably” because there is no necessary connection between the costs borne by the one who imposes a sanction and the costs borne by the one receiving the sanction. As others have noted, the former cost is often less than the latter, as where a vandal bears little cost to inflict substantial damage to an automobile. See HARDIN, *supra* note 2, at 52-53. Sanctioning is made more effective by this potential multiplier effect, which, in theory, could support a norm even in the textual example. For example, if the 1¢ cost borne by the sanctioner inflicted a 24¢ loss on the litterer, then this 24¢ loss, combined with the 1¢ loss the litterer already bears, would offset any benefit from the act. For costly sanc-

can arise only if many individuals sanction litterers. But when an effective sanction requires the action of many individuals, each one reasons that her sanctioning decision will neither make nor break the norm, so she is better off not bearing sanctioning costs. The second-order collective action problem persists.

This is the puzzle that any rational choice theory of norm origin must solve. I do not suggest that the puzzle has, up to now, remained unsolvable. Various theorists have made considerable progress in explaining the formation of norms;⁷² in all likelihood, there is no *single* appropriate theory, but different explanations appropriate to different norms.⁷³ Thus, after I present my “esteem” theory of norm origin, I explain how it may be synthesized with Robert Cooter’s theory of norm “internalization.”⁷⁴ I then demonstrate the usefulness of the esteem theory, so conceived, in two ways. Part III contends that the esteem theory of norm formation can resolve troubling ambiguities over the meaning of the term *norm* and provide a basis for unifying the growing body of literature on the subject. Second, as explained above, arguably the most important relationship between law and norms is the ability of law to shape norms. Yet if we do not know how norms first arise, it would seem implausible to think we could predict how legal rules might change a particular norm. Part IV contends that an esteem theory of norm origin is useful to understand both when norm shaping is desirable and how it can be achieved.

tions, I doubt the real world multipliers are often so great, especially because many cases where the multiples would be greatest — for example, vandalism and physical assaults — are themselves subject to criminal and tort sanctions which reduce the multiplier. Finally, when the multiplier effect is sufficiently great, there still may remain a holdout problem: Sanctioning now generates positive returns, but the returns are even greater for those who do not sanction but who enjoy the benefits of someone else sanctioning the litterer.

In the end, it may still be possible for norms to arise from costly sanctioning aided by a multiplier effect. My thesis, however, is not that the esteem theory of norm origin is strictly necessary to explain any norm, but that the esteem model solves the origin puzzle in a way that explains more of what we observe about norms.

72. Within law and economics, the first is Robert Cooter. See Robert D. Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC’Y. 50 (1995) [hereinafter Cooter, *Unified Theory*]; Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INTL. REV. L. & ECON. 215 (1994) [hereinafter Cooter, *Structural Adjudication*]; Cooter, *supra* note 14. I discuss his theory *infra* section III.A, contrasting and synthesizing it with my own. See also BECKER, *supra* note 2 (presenting an internalization theory); Kraus, *supra* note 27 (presenting an evolutionary theory); Eric Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. (forthcoming 1998) (presenting a signaling model of norms). See generally Posner, *supra* note 19 (reviewing existing economic theories of origin).

73. See Posner, *supra* note 19, at 5.

74. See *infra* section III.A.

II. AN ESTEEM THEORY OF NORMS

This Part presents the “esteem” theory of norms. Section II.A presents the initial conditions under which the desire for esteem creates a norm. People can solve the second-order collective action problem because, at the earliest level, they can *costlessly* punish norm violators by withholding from them the esteem they seek. If many people agree that a behavior deserves disapproval, if there is an inherent risk the behavior will be detected, and if this agreement and risk are well-known, then the pattern of disapproval itself creates costs to the behavior. When sufficiently large, these costs produce a norm against the behavior.⁷⁵ Though esteem forces may be weak, Section II.B notes several reasons why the resulting norms may be strong: conformity is self-reinforcing because the esteem sanction for deviance increases as conformity increases, individuals compete for “hero” status by leading the group to more demanding norms, and esteem competition can produce secondary norms requiring material enforcement of primary norms. I organize the discussion temporally, emphasizing the developmental stages of a norm.

A. *An Esteem Theory of Norm Origin*

My thesis is that norms arise because people seek the esteem of others.⁷⁶ In this section, I describe what I mean by the preference for esteem and explain the conditions under which this preference will produce a norm.

1. *The Preference for Esteem*

Suppose people seek *esteem*: the good opinion or respect of others. Assume, in other words, that an individual’s utility depends in part on the opinion that she perceives others to hold of her.⁷⁷ In

75. As I explain *infra* text accompanying notes 119-23, the same analysis applies to explain how *approval* of behavior produces a norm obligating that behavior.

76. I made this claim briefly in a previous article, *see* McAdams, *supra* note 10, at 1028, though without any detail concerning the conditions necessary for norms to arise or for esteem sanctions to develop into material sanctions. Since that time I discovered an earlier publication by philosopher Philip Pettit making the same point. *See* Pettit, *supra* note 2, at 739-40 (claiming that people value approval and that disapproval is a costless means of sanctioning that can produce norms). Pettit’s article is part of a 1990 ΕΤΗΧΙΣ symposium. *See Symposium on Norms in Moral and Social Theory*, 100 ΕΤΗΧΙΣ 725 (1990). My model relies on his approach, though I rely on a “relative” component to esteem seeking to explain various developmental stages of a norm: how esteem competition can increase the standard required by the norm, produce secondary enforcement norms, and leverage purely esteem sanctions into material sanctions.

77. It is obvious that people sometimes seek the good opinion of others as a means to an end. Achieving a material end — for example, making a sale or getting a pay raise — often

prior articles, I have reviewed social science findings and anecdotal evidence supporting this claim. This evidence shows that people pay for status goods to signal their wealth or “good taste,”⁷⁸ that people incur material costs to cooperate in situations where their only reward is the respect and admiration of their peers,⁷⁹ and that individuals conform their behavior or judgment to the unanimous view of those around them in order to avoid the disesteem accorded “deviants.”⁸⁰ Here, I will not review further evidence but merely assume that individuals value esteem.⁸¹ The norms literature provides substantial evidence that norms influence behavior and, if the esteem theory usefully explains norms, this will be justification enough for the assumption.⁸² Indeed, though I believe people sometimes value esteem quite highly, for the purpose of explaining norms it is sufficient to assume that people place only a small value on the opinion of others.⁸³

requires first obtaining the good opinion of the person who has the power to confer the material end. But my assumption is that individuals also value esteem as an end.

78. See Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 38-44, 48 (1992); see also *id.* at 31-37 (reviewing social psychology evidence supporting theories of social comparison and relative deprivation); *id.* at 44-48 (reviewing economic data supporting relative income theories of savings, wages, and risk-taking).

79. See McAdams, *supra* note 10, at 1009-19 (reviewing evidence of cooperation in experimental prisoner's dilemmas and real world collective action problems).

80. See McAdams, *supra* note 32, at 2250 nn.40-41 (describing findings of conformity experiments); see also Kahan, *supra* note 26, at 352, 353-56 (reviewing social psychology evidence of “social influence” — that is, the fact “that individuals tend to conform their conduct to that of other individuals”).

81. This assumption is intentionally reductive and possibly unrealistic in that it collapses many plausible distinctions between the kinds of esteem individuals seek. For example, I assume throughout this article that an individual will care more about certain kinds of opinions than others — for example, that one cares more about what others think of her intellect than integrity, or vice versa — and will care about the opinions of certain people more than others — that is, one cares more about her friend's opinion of her than a stranger's opinion of her. But my assumption is that there is a single preference for esteem and that these different sources of esteem are substitutes for one another. This simplifying assumption could be discarded in favor of a more complex view of esteem, but I do not believe it would affect the main conclusions of this article.

82. One might object on sociobiological grounds that humans, as animals, would not independently value nonmaterial ends. To the contrary, however, the material and reproductive rewards for being of high status are sufficiently great that it is perfectly consistent with evolutionary theory that animals would instinctually seek status as an end in itself, rather than rely on complex calculations to determine exactly how much status seeking will maximize reproduction. See, e.g., Amy Wax, *Against Nature — On Robert Wright's The Moral Animal*, 63 *U. CHI. L. REV.* 307, 318-22 (1996); see also FRANS DE WAAL, *GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS* 92 (1996) (“Respect for rules and norms can develop only when the opinions and reactions of others matter.”).

83. I place less weight than Pettit on the magnitude of the desire for esteem. See Pettit, *supra* note 2, at 745 (assuming “that people are moved *in great part*, though not exclusively, by a concern that others not think badly of them and, if possible, that they think well of them.” (emphasis added)). As I claim in the next paragraph, people desire *relative* esteem, and as I explain *infra* section II.B.1, competition for relative esteem can produce powerful norms even if the desire for esteem is not strong.

A crucial feature of esteem seeking is that individuals care how they are evaluated *in comparison to others*. This relative element can arise because the preference for esteem is inherently relative; that is, because the taste itself is relative — for example, “I want to be thought of as the best.” But even if the desire for esteem were a conventional, absolute preference — for example, “I want to be thought of as principled” — a person will care how others evaluate her in comparison to others if esteem is scarce. In other words, if *A* wishes *B* to “think well” of her but *B*, for whatever reason, only grants such esteem to a few individuals, *A* will have to compete with others for *B*’s esteem. For example, assuming that no one is completely principled, being thought of as “principled” actually means being relatively principled, as compared with some average. In either event, one frequently gains prestige or admiration only by being somehow better than most. One often avoids dishonor or embarrassment only by being at least as good as some, and possibly as good as the average.⁸⁴

The remainder of this Part demonstrates how the esteem-seeking assumption is useful in explaining norms origin. The essential point is that denying esteem is a costless means of punishing norm violators.⁸⁵ But several conditions are still necessary for norms to emerge.

84. Thus, an individual’s utility is a function of this relative esteem (e), and the material goods (g) she trades off with esteem: $U_i = f(g_i, e_i)$.

85. Other norm theorists note the obvious fact that disapproval is used as a norm sanction. See, e.g., Axelrod, *supra* note 2, at 1096, 1105-06; Jones, *supra* note 26, at 566-67 (“[T]he individual’s concern about her standing among her peers is the means by which the group’s norms are enforced.”). But except for Pettit, *supra* note 2, at 733, they do not claim that esteem is costless and therefore the source of norm origin. See, e.g., ELSTER, *supra* note 2, at 133 (arguing that expressing disapproval “requires energy and attention that might be used for other purposes” and that “[o]ne may alienate or provoke the target individual, at some cost or risk to oneself”). I respond below to this point by noting circumstances where expression is costless and where esteem judgments are inferred without expression. See *infra* section II.B.2.

One may object that esteeming others, even without expression, is costly because it interferes with one’s self-esteem. If individuals care how they rate in comparison to others, which is my claim, approving others might mean less room for approving oneself. Perhaps one maximizes utility by disapproving everyone but oneself. To state these points is nearly sufficient to refute them, but I raise them to point out the special effect of esteem: unlike material wealth, there is no benefit to “hoarding” all of one’s approval. As an empirical matter, I deny that an individual who grants all human beings the same disapproval enjoys greater utility than one who especially approves certain others. Up to some point, individuals do not lose and may even *gain* utility by finding others worthy of their approval. There may be a limit to how much esteem one can “hand out” without starting to suffer diminished self-approval, but there is some positive level of approval that is costless to provide. See McAdams, *supra* note 10, at 1024-26. That will suffice, I argue below, to produce norms.

2. *The Conditions for Esteem-Based Norms*

Under the right conditions, the desire for esteem produces a norm. For some behavior X in some population of individuals, a norm may arise if (1) there is a consensus about the positive or negative esteem worthiness of engaging in X (that is, either most individuals in the relevant population grant, or most withhold, esteem from those who engage in X);⁸⁶ (2) there is some risk that others will detect whether one engages in X ;⁸⁷ and (3) the existence of this consensus and risk of detection is well-known within the relevant population.⁸⁸ When these conditions exist, the desire for esteem necessarily creates costs of or benefits from engaging in X . If the consensus is that X deserves esteem, a norm will arise if the esteem benefits exceed, for most people, the costs of engaging in X . Conversely, if the consensus condemns X , a norm will arise if, for most people, the esteem costs exceed the benefits of engaging in X . Consider each condition in greater detail.

Consensus. The first condition is a consensus within the population about the esteem worthiness of certain behavior. Let me first emphasize that I am not assuming my conclusion. The existence of a consensus does not mean that the norm already exists. Instead, I assume that — *independent of and prior to any norm* — individuals have *some* evaluative opinions about others; they are not utterly indifferent to all traits and behaviors. All that is necessary is that people are opinionated, some of their opinions are directed at the behavior of others, and sometimes most members of a population share the same opinion. Indeed, it is not strictly necessary that the consensus include a majority. For example, suppose a large minority of the population strongly disapproves certain behavior and the majority is indifferent. Without an offsetting set of people who approve the behavior, there would be a net cost to violating the minority view, assuming the other norm conditions exist. All that is required is that the majority of those who hold an opinion share the same opinion.⁸⁹

86. I modify this assumption below, where I suggest that something less than a majority consensus can also produce an esteem norm. See *infra* note 89 and accompanying text.

87. This condition includes the case where the risk of detection is zero, but only because the individual engaging in X bears positive costs of concealment.

88. This condition can be relaxed to include the case where the consensus is not publicized but the cost of communicating one's esteem or disesteem after X occurs is zero.

89. With a more complex model, even a majority of those who hold an opinion would not be necessary. Individuals value differently the esteem of different people and approve and disapprove with differing levels of intensity. Thus, the net cost of a behavior depends not only on the number of people who approve or disapprove it, but how much the actor values the esteem of these people and how intensely they react to the conduct. In theory, a truly

Consider how easily a consensus may arise. Even if evaluative beliefs about behavior or traits were randomly distributed, there would be some occasions where most individuals held the same belief about a particular behavior. But there are at least three forces that sometimes cause individuals to converge on a common belief about a behavior. Philip Pettit suggests the first mechanism, which I label “selfish esteem allocation.” He says that individuals typically “approve[] of nearly everyone who benefits him in some respect through performing a collectively beneficial action and disapprove[] of nearly everyone who harms him through performing a collectively nonbeneficial action.”⁹⁰ In other words, because granting esteem is costless, an individual may as well grant esteem in ways that reinforce behaviors that benefit the individual and punish those that harm him. A homeowner esteems neighbors who maintain their house and yard and thereby raise area property values and disapproves those who operate loud machinery at night and thereby disturb her sleep. When everyone, or a substantial majority, perceives that a behavior generates positive or negative externalities, selfish esteem allocation produces a consensus. Thus, because all homeowners perceive the benefit they receive from being surrounded by well-kept houses, the neighborhood consensus favors house and yard maintenance. Because most homeowners find loud nighttime noise disruptive, the consensus condemns such behavior.⁹¹

minority view might produce a norm. For example, 20% of a group or society might produce a norm *against* a behavior, despite the fact that 60% approve the behavior and the remainder are indifferent, if the 20% made more intense esteem judgments than the 60% or if most individuals care more about gaining the approval of the members of the 20% than the approval of members of the 60%. I explore the matter further *infra* text accompanying notes 109-10, 165-76.

90. Pettit, *supra* note 2, at 744.

91. One may raise the following objection: People perceive the actions of others as being harmful or not, in part, based on norms. If so, perceptions determined by norms cannot explain how norms arise. For example, an individual may enjoy the look of roses. But if the local norm says that a homeowner gets to plant on her property whatever flowers she wants, A may not perceive herself as being “harmed” by her neighbor’s decision to plant poppies. At the same time, she may perceive herself aggrieved by her neighbor’s decision to display lawn ornaments because the norm forbids them — that is, the consensus is that they are gaudy. The argument suggests that a consensus based on perceived self-interest cannot arise *before*, and thereby explain, a norm.

The problem, however, is not with the esteem theory. The general problem for any theory of origin is that we live in a world so thoroughly pervaded by norms that it is difficult to even imagine a *normless* world in which the theory can then explain how the first norms arise. All the interesting real world examples involve new norms arising *against the background of existing norms*. Thus, the esteem theory may be viewed in two ways. First, in a hypothetical normless world, norms would arise under the conditions I identify. Even if some subtle forms of harm would not be recognized as such without norms defining rights and responsibilities, it is likely that an individual would perceive that some behaviors — physical violence against her, the involuntary taking of food she has gathered, and so on —

Second, group discussion may produce (and publicize) a consensus. This process may simply be selfish esteem allocation at the collective level, if some individuals convince enough others of the fact that a behavior benefits or harms the members of the group. It may be more complex, as when some members of a group that already shares a morality or aesthetic convince enough others that a specific behavior is required or prohibited by the common ethic. Individuals may "convince" others because they provide new information or argument that effectively changes beliefs about such matters, or because the others, fearing loss of esteem, feel pressure to conform to what is apparently the dominant view.⁹² Whether described as gossip,⁹³ "voice,"⁹⁴ or signaling,⁹⁵ individuals thus influence each other in the creation of consensus.

A final process that creates consensus is *exit*. Once selfish esteem allocation produces some minimal consensus within a group, individuals who wish to act contrary to the consensus may leave the group, possibly to join groups of like-minded individuals. This mechanism only applies to groups one can readily leave — not, for example, a prison or, for most people, the very large group that constitutes a society. For smaller groups, however, exit may be possible, albeit costly, and can cause such groups to become quite homogenous, as people sort themselves according to shared beliefs, values, and commitments.⁹⁶

harm her. Second, in the real world, given a rich baseline of norms that may have arisen by esteem or other processes, new norms arise when the conditions I identify exist. Even if preexisting norms influence the perception of a new harm, the esteem theory explains how this perception produces a new norm. As to this latter point, see *infra* text accompanying notes 150-61.

92. See Kahan, *supra* note 26, at 352-56; McAdams, *supra* note 32, at 2250 nn.40-41.

93. See, e.g., McAdams, *supra* note 32, at 2244, 2256-58 (discussing the role of gossip in the formation of norms); Barbara Yngvesson, *The Reasonable Man and the Unreasonable Gossip: On the Flexibility of (Legal) Concepts and the Elasticity of (Legal) Time*, in CROSS-EXAMINATIONS: ESSAYS IN MEMORY OF MAX GLUCKMAN 133, 153-54 (P.H. Gulliver ed., 1978).

94. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 4 (1970) (describing "voice" as an alternative means to "exit" by which individuals influence firms); McAdams, *supra* note 32, at 2258 (discussing "voice" as means by which individuals in a group affect its norms).

95. See, e.g., Cooter, *supra* note 14, at 1666. The means of producing a consensus are highly relevant to predicting whether norms are likely to be efficient. Selfish esteem allocation, with or without discussion, may appear to produce efficient norms because it will approve behaviors with positive externalities and disapprove behaviors with negative externalities. But given informational and strategic problems, the process can produce inefficient norms. See *infra* section IV.C.

96. Exit is therefore relevant to predicting whether norms are likely to be efficient. One might think individuals are more likely to exit groups with norms that retard group welfare. Thus, groups with norms that benefit the group would gain in size while groups with ineffi-

Inherent Risk of Detection. The second condition is an inherent risk that anyone who engages in the behavior at issue will be detected. I say “inherent” to emphasize that this risk exists without anyone bearing a cost to create the risk of discovery, at least not for the purpose of creating or enforcing a norm. One may object that there will always be costs, at least opportunity costs, to gaining such information;⁹⁷ if so, one cannot costlessly sanction another because one must first invest in determining who merits disesteem. But a norm may still arise without anyone bearing a cost to enforce it if the necessary information is acquired as a byproduct of some other activity. Because this is often the case, there is frequently no *marginal* cost to using such information for esteem judgments.

In the course of pursuing various interests, we often accidentally acquire information about others, especially about their more public behavior.⁹⁸ Without making any effort to do so, an individual may observe one neighbor throwing litter on the sidewalk and another raising money door-to-door for charity, one coworker organizing office car pools and another crossing a picket line.⁹⁹ Moreover, independent of any norm, an individual will sometimes intentionally invest in detecting the behavior of those who harm her interests. For obvious reasons, an employer will invest in determining which employee is stealing from the firm. Similarly, an apartment dweller will seek to discover the source of disturbingly loud music if she believes it is sufficiently likely that she can cause the stereo owner to lower the volume by threats or bribes. In general, when an individual suffers from another’s behavior that she may be able to change, she has a reason to invest in detecting it. Accidental or not, once she acquires the information, an individual can then costlessly withhold esteem from one whose conduct she disapproves.

cient norms would shrink. But the evolutionary process is complex and may still produce inefficient norms. See *infra* section IV.C.

97. As Avery Katz observes, norms “embody and convey information” — information about what behavior is obligatory and what punishment is appropriate for contrary behavior. See Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1749 (1996). Norm enforcement also requires information about who has violated the norm. See *id.* But because “information is a classic public good,” inevitably enjoyed by those who have not contributed to its creation, there are inadequate incentives for optimal investment in creating or distributing such information. See *id.*

98. See Pettit, *supra* note 2, at 739, 743-44 (“[P]eople do not have to identify violators intentionally; they just have to be around in sufficient numbers to make it likely that violators will be noticed.”).

99. Similarly, an employer may monitor employees for productivity and discover substance abuse or audit expense accounts and discover coworkers having an adulterous affair.

In some circumstances, detection by an individual will affect the esteem judgment of only that individual. But when individuals share a consensus, some of them will enjoy passing on information about violations of the consensus. The conversation we call “gossip” is often experienced as a benefit, not a cost,¹⁰⁰ and it usually consists of information about how others have deviated from ordinary behavior. As long as there is a sufficient supply of “gossips” within the relevant population, the risk that another will discover one’s deviant behavior creates an almost equal risk that a great many individuals will learn of that discovery. In sum, when individuals can detect violations of the consensus only by making investments for that purpose, esteem concerns will not produce a norm; but for various behaviors, (marginal) monitoring costs are zero.

Publicity. The third condition is that the first two conditions — consensus and risk of detection — are well known within the relevant population.¹⁰¹ If an individual is ignorant of the consensus, or incorrectly believes there is no risk of detection, then she could act contrary to the consensus without, to her knowledge, risking any disapproval. If most people were ignorant, then the consensus could not produce a norm. Quite possibly, mass ignorance is not an equilibrium, because if individuals express their disapproval (or approval), it will soon become clear what the consensus is, as well as the fact that the behavior (or its absence) is detectable. But where a consensus exists against a behavior, expression of disapproval is not inevitable. Where there is doubt about what the consensus is, there are esteem risks to expressing what may turn out to be a mi-

100. The esteem theory helps to explain the benefit. Of course, people who collect information through gossip will sometimes be able to trade that information for something they value. But also, because individuals seek relative esteem, the spread of discrediting information serves another end: lowering the esteem of others makes one look better by comparison. See McAdams, *supra* note 32, at 2279 (describing gossip as a means of acquiring relative position for oneself or one’s family); *id.* at 2244 & n.20 (noting that gossip is pervasive in many societies).

101. The best example of a consensus being well known is where its existence is “common knowledge” within the group, so that there is not only a consensus about *X* but also a consensus that this consensus exists, a consensus that the consensus about the consensus exists, and so forth, infinitely. See, e.g., ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 44 (2d ed. 1994). Common knowledge is not, however, necessary for norms to arise. If *A* believes (1) that the majority of individuals disapprove littering, and (2) that there is a risk that littering will be detected, then she will perceive a cost to littering even if no one else is aware the consensus exists. Common knowledge may intensify the norm, however, in what might be termed the “you-know-better” effect: if it is common knowledge that most people disapprove of littering, then the disapproval when *A* is detected littering is greater because *A*’s decision to litter, contrary to a *known* consensus, signals *A*’s disregard for the opinion of those in the majority. Such disregard is insulting; members of the majority will likely disapprove of *A* more intensely when they know she previously knew of their opinion (and knew they knew, and so on).

nority opinion.¹⁰² These costs may prevent the communication necessary to publicize the consensus and produce a norm.¹⁰³

Indeed, the sensitivity of norms to information scarcity yields some interesting implications explored below. The risks of speaking out against an apparent consensus and the possibility that the true consensus is unknown or misunderstood are quite relevant to explaining rapid norm change, rules protecting dissent, and the expressive function of law. But for now, note only that the publicity condition is attainable. First, communication of *approval* is rarely costly and is often pleasurable. Thus, people are not likely to remain ignorant of a consensus favoring conduct. Second, some behavior is so socially destructive — random violence, for example — that most people may just assume that disapproval is virtually universal.¹⁰⁴ Third, when there is doubt about what opinions other participants in a conversation hold because they have not revealed their views by words or deeds, communicating one's views may carry as much chance of approval as disapproval. If expressing one's opinions generates utility merely because people like conversation — and surely some do — then the expected benefits from speaking out will often be positive.¹⁰⁵ Fourth, there are gossip strategies that sometimes work to eliminate the risks of expression. By beginning with literally nonevaluative statements or questions,¹⁰⁶ perhaps with cryptic tones or facial expressions, an individual can imply evaluations without committing to them. Or one can provisionally and equivocally criticize behavior merely by withholding statements of approval, while praising contrasting behavior. Each participant thereby “tests the waters” and gains information about

102. See TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES* (1995); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1716-17 (1996). On the other hand, once the consensus is well known, expressions of disapproval are not necessary.

103. This problem is particularly acute when the risk of disapproval deters people from expressing criticism of *existing* norms, which is unfortunate when the norm is inefficient. See Lessig, *supra* note 11, at 997-99; McAdams, *supra* note 32, at 2259 (“Because the probability that any one member’s criticism will change the norm is very low, public criticism of norms is a public good apt to be undersupplied.”); Posner, *supra* note 102, at 1718 (“For fear that others will incorrectly sanction the person who makes the first move, everyone has an incentive not to act.”).

104. Even if others say nothing, “[w]e know what [others] know of us and, ascribing similar standards to them, we know whether they are likely to think well or badly” Pettit, *supra* note 2, at 740.

105. In other words, if the risk of gaining approval from stating one’s views equals, or is almost as great as, the risk of losing approval, then the positive utility from the act of expression will tip the balance in favor of expressing one’s views.

106. For example: “Did you hear that *A* was asked to leave the party because he brought a male date?” The statement could express disapproval of *A* or disapproval of the ones who asked *A* to leave (or neither).

what others probably believe before stating a position.¹⁰⁷ In the end, the publicity condition will not always exist, but the barriers are neither necessary nor probable.¹⁰⁸

The Esteem Norm. If individuals desire esteem, and if these three conditions exist, it necessarily follows that one who violates a consensus incurs a cost. If the consensus is that behavior *X* is commendable and the absence of *X* is deplorable, and the consensus is well known, then *A* will deduce that others will think less of her if they detect her failure to do *X*. The esteem cost is the probability that a violation of the consensus will be detected multiplied by the value of the esteem that would then be lost. A *norm* arises when, for most individuals in the population, this esteem cost exceeds the cost of following the consensus. Thus, if most group members prefer bearing the cost of doing *X* to the esteem cost of failing to do *X*, most members will do *X*. Under these circumstances, we can say there is an esteem-based norm obligating individuals to do *X*.

Note how the desire for esteem makes it possible, though not inevitable, that the group will solve the second-order collective action problem identified above. The barrier to norm formation arises from the assumption that any sanction must be costly to impose. If one can costlessly impose a small loss on others by withholding esteem, or costlessly impose a small gain by granting esteem, there is no incentive to free ride. One may as well allocate esteem selfishly to discourage behavior from which one suffers, like littering, or encourage behavior from which one benefits, like recycling. There is no guarantee that this esteem allocation will produce a norm; the outcome also depends on the exact value individuals place on esteem, the strength of the consensus, the pub-

107. Those studying lynch mobs and wildcat strikes, for example, have noted that the early stages consist of very subtle, noncommittal signals between group members of their intentions. See ROGER BROWN, *SOCIAL PSYCHOLOGY* 754-56 (1965) (describing the "milling" phase of a lynch mob); RICK FANTASIA, *CULTURES OF SOLIDARITY* 82-85 (1988) (describing the hesitant beginnings of a wildcat strike). See generally CHONG, *supra* note 2, at 103-40 (discussing how individuals in such groups use noncommittal signals to solve their coordination problems). Thus, gossip at least sometimes can produce the publicized consensus necessary to esteem-based norms. For a more general discussion of gossip and norms, see McAdams, *supra* note 32.

108. Consider two more reasons. First, one gains *some* information about the opinions of others simply from observing their conduct — for example, that an individual does not litter and picks up others' litter probably means they disapprove of littering, and that a person always wears clothes in public makes it more likely that she thinks that being nude in public is inappropriate or does not have an opinion on the matter. Minimal information may be enough to make the expected benefits of expressing one's opinion exceed the expected costs. Second, rebuking a person of whom one disapproves may be pleasurable except for the reprisal or disapproval one receives in return, but that cost may be avoided by censuring anonymously or by gossiping in such a way as to prevent the target from holding one accountable as the source of the gossip.

licity of these latter two facts, and the cost of complying with the consensus — for example, by recycling or not littering.

To illustrate, recall the facts of the littering hypothetical.¹⁰⁹ A no-littering norm would arise, for example, if the average litterer values the esteem lost from each neighbor at five cents, she believes she will lose esteem from twenty neighbors if her littering is detected, and the probability of such detection is twenty-five percent. At this point, the expected cost of littering is twenty-five cents, equal to the expected benefit. Note that the neighbors who disapprove of littering need *not* be a majority. As long as there are no neighbors who approve littering, we can ignore what fraction of the neighborhood population the twenty represent. My use of littering as an example, and the numbers I have arbitrarily assigned — a few cents for esteem, a few more as the private return for littering — may suggest that esteem can produce only the weakest of norms, curtailing only the most trivial of behaviors. In the section that follows, I explain how esteem competition can leverage a weak concern for esteem into powerful norms. For now, however, the example demonstrates the power of aggregation: even a meager concern for esteem can affect behavior, when multiplied by a large number of people whose esteem is contingent on that behavior.¹¹⁰

B. *The Power of Esteem Sanctions*

To summarize the model thus far: The key feature of esteem is that individuals do not always bear a cost by granting different levels of esteem to others. Because the cost is often zero, esteem sanctions are not necessarily subject to the second-order collective action problem that makes the explanation of norms difficult. An individual maximizes her utility neither by hoarding all her esteem nor by granting equal esteem to everyone.

In this section I elaborate the model by identifying certain mechanisms that magnify the power of esteem sanctions. All of these arise from the fact that esteem is a *relative* good. First, I explain the *feedback effect*. People competing to be “well thought of” compared to others discover that the cost of their noncompliance

109. See *supra* text accompanying note 70.

110. For simplicity, the example assumes that the litterer values the esteem of each neighbor equally. Obviously, people value the esteem of some individuals more than others. See *infra* notes 174-76. Also, even if *A* does not distinguish between neighbors *per se*, there might be a declining marginal return to esteem, so that *A* incurs more marginal disutility from the first disapproving neighbor than from the twentieth. These complications do not affect the example, however, as long as the total loss incurred from all the neighbors' disapproval is one dollar.

— the status loss from deviance — increases as compliance increases. The status gain from compliance also decreases as compliance increases, but individuals can achieve or maintain high — or “hero” — status by leading the way to new and higher levels of norm compliance. Second, I explain how esteem sanctioning can produce material sanctioning. When people disapprove of those who approve norm violators, they produce secondary norms obligating enforcement of primary norms by disapproving primary norm violators. The pursuit of “hero” status and the feedback effect generally can cause individuals to incur costs inflicting *material* sanctions on norm violators. In the end, competition for relative esteem can transform a weak behavioral standard into a very demanding one.

1. *Esteem Competition and the Feedback Effect: Compliance Raises the Costs of Noncompliance*

Consider first how esteem, by itself, can produce an increasingly powerful norm. Because the desire for esteem is relative, competition for esteem can progressively raise the standard the norm imposes. I first consider the simple case where a norm arises *after* there is already a behavioral regularity consistent with the consensus. I then address the “hero” who creates a norm with no prior regularity.

a. Norms from Regularities: Competition to Avoid Deviance. A behavioral regularity often exists without a norm. For example, most people in a community may refrain from smoking tobacco or wearing fur before there arises any consensus disapproving these behaviors. Once a consensus is known, however, it creates new costs to these behaviors. At this point, esteem competition can produce a strong norm.

Because esteem is relative, the intensity of disesteem directed at those who engage in a disapproved behavior is partly a function of the total number of people who are thought to engage in that behavior. If twenty percent of the population is thought to violate the initial norm against smoking or fur, then violating that norm will place one in the bottom quintile of the group with respect to that criterion of esteem.¹¹¹ But if only two percent are believed to be smokers or fur wearers, then one falls to the bottom two percent for

111. If following norm *X* were the only criterion, then the violation would by itself place one in the bottom quintile; if there are multiple criteria, then the effect is more complicated.

that criteria.¹¹² Other things being equal, the latter represents a greater esteem cost than the former; the more deviant the violation, the more it appalls group sentiment.¹¹³

Thus, because individuals value esteem relatively, the more a behavior negatively distinguishes them from others, the more costly it is.¹¹⁴ The result is that one individual's decision to refrain from engaging in *X* has the externality of raising the price that others must then pay for engaging in that behavior. I call this externality

112. This assumes people have a generally accurate idea of how much *X* occurs. That would be the case if the activity were public or produced publicly observable negative externalities, as does littering or overconsumption of resources in times of scarcity.

113. Huang and Wu make a similar point in the context of corruption norms: "[T]he more prevalent corruption is, the less intense is the remorse suffered from corrupt behavior; and conversely, the less corruption there is, the more regret from violating a social norm not to be corrupt." Huang & Wu, *supra* note 40, at 393. But there is an important difference in the feedback effects we are discussing. Huang and Wu assume that individuals already have internalized a norm against the behavior — corruption — and their model then explains only how the degree of remorse depends on the perceived number of violators. My claim is that the initial norm can arise prior to internalization merely from the risk of disapproval and that the intensity of disapproval any individual feels will depend on the perceived number of violators. This distinction reveals an ambiguity in Huang and Wu's model. They cannot mean that an individual feels remorse for engaging in *any* behavior in which most people do not engage — for example, sky diving. They most likely mean that individuals feel more remorse for behavior *that is disapproved* when less people engage in the behavior. Yet, even without remorse, this disapproval may produce a norm. Indeed, I argue below that esteem norms sometimes must precede internalization. See *infra* text accompanying notes 140-43.

114. Empirical evidence suggests, for example, that individuals are more likely to comply with laws when they believe others comply. Huang and Wu review studies finding this effect in tax compliance: an individual's willingness to comply depends on whether he thinks others pay their taxes. See Huang & Wu, *supra* note 40, at 401-02. Another study sought to measure social disapproval as one component of criminal deterrence by asking subjects whether they had committed certain categories of crime — including littering, illegal gambling, theft, drunk driving, and battery — and how many of the five adults they knew best had committed such crimes. See Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 330 (1980). The study found that the subject's perception of the certainty and severity of punishment and the immorality of the conduct each affected compliance, but not as much as the perception that peers did not commit the offense. See *id.* at 331, 334.

More generally, considerable evidence supports the importance of peer disapproval to deterrence. See Donna M. Bishop, *Legal and Extralegal Barriers to Delinquency: A Panel Analysis*, 22 CRIMINOLOGY 403 (1984); Herbert Jacob, *Deterrent Effects of Formal and Informal Sanctions*, in POLICY IMPLEMENTATION 69 (John Brigham & Don W. Brown eds., 1980); Kirk R. Williams & Richard Hawkings, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & SOC'Y. REV. 545, 565-66 (1986). But see Harold G. Grasmick et al., *Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions*, 31 CRIMINOLOGY 41 (1993) (finding that internalized norms enforced by guilt or remorse explain the decline in drunk driving but that the threat of social disapproval does not). At one point in his well-known study, Tom Tyler appears to minimize the importance of peer disapproval as compared to moral commitments or certainty of punishment. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 44 (1990). But, as Tyler reports, his data shows that peer disapproval significantly affects "self-reported behavioral compliance with the law." *Id.* at 45 (reporting correlations "for morality, $r = .42$; for peer disapproval, $r = .34$; for certainty of punishment, $r = .28$ "); see also *id.* at 63-64; 238-39 n.2.

the *feedback effect* of norm compliance.¹¹⁵ For example, if the initial discovery of a consensus against *X* produces an expected esteem cost of one dollar for engaging in *X*, that will cause individuals who value the activity less than one dollar to cease doing *X* or to exit the group. But once that subset drops out, compliance rises and the disesteem for engaging in *X* is concentrated on fewer individuals; because fewer smoke or wear fur, one is now more (negatively) distinguished by smoking or fur wearing. The expected esteem cost necessarily rises above one dollar, and there may be an additional subset of individuals who no longer value *X* sufficiently to bear the esteem costs of doing it. Each subset that ceases the disapproved behavior raises the costs of that behavior for those who remain.

This process can produce the discontinuous effect Thomas Schelling calls "tipping."¹¹⁶ Suppose an initial equilibrium in which twenty percent of a population wears fur despite disapproval by many of the remaining eighty percent. This means that those in the twenty percent receive enough pleasure from fur to outweigh the resulting censure. But if fur consumption for any reason falls below twenty percent — because, for example, the price of fur storage rises or the consensus gains greater publicity — the disesteem costs would rise. For a simple example, imagine that for all fur wearers, the disesteem costs would exceed their consumer surplus once the consumption rate fell to fifteen percent. Thus, while small increases in the cost of fur usually produce only small decreases in consumption, a cost increase that reduces consumption from sixteen percent to (initially) fifteen percent would have a dramatic effect. Once the fifteen percent tipping point is reached, the more concentrated disapproval cost now deters all remaining consumption.¹¹⁷ The feedback effect can also produce such discontinuous results in the opposite direction: small increases in norm violations may cause per-person disesteem costs to fall sufficiently to produce a dramatic rise in norm violations. Thus, the feedback effect can rapidly strengthen or weaken a norm.¹¹⁸ But the former consequence is

115. See Kahan, *supra* note 26, at 352-61 (discussing this effect in the context of criminal deterrence).

116. See THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 92-94, 98-99 (1978).

117. A more complex but realistic case would follow the stages described above, in which only a few consumers at a time cease wearing fur, in each case causing the per-person disesteem costs to rise and prompting another round of norm compliance.

118. This point is important in explaining the fragility of norms. See *infra* section IV.A. It is also the point emphasized by Kahan with respect to criminal deterrence: an increase in

most relevant here: even if the concern for esteem is weak, once it begins to drive behavior, it can produce a powerful norm.

The same is true where the norm favors a behavior. Again, imagine there is a behavioral regularity prior to there being a norm. For example, many neighbors may have "well-groomed" yards to satisfy their selfish aesthetic preferences prior to the emergence of a neighborhood norm obligating yard care. Or many alumni may donate to their alma mater out of altruism before a norm arises obligating such conduct. Once the neighbors or alumni discover the consensus exists favoring such behavior, those who contribute more than average (time to yard care or money to their school) gain esteem and those who contribute less than average lose esteem. Everyone can now produce esteem benefits — gaining approval or avoiding disapproval — by contributing more. The new incentives will raise the average contribution. The feedback effect is that one person's new norm compliance raises the average and lowers everyone else's relative position. One individual's contribution thus provides an incentive for others to contribute. Obviously, the contributions do not rise infinitely, but they stop only when no one can gain by additional contributions, when the opportunity costs of one's time or money exceed any esteem return.

b. Regularities from Norms: Competition to Be Heroic. In the previous examples, many people already behave in conformity with the consensus before the norm arises. But esteem competition can also produce a norm without a preexisting regularity. Suppose that there is a newly expressed, idealistic consensus in favor of some behavior that no one has yet been willing to undertake, because, while it benefits the group, it is costly for the individual. For example, assume that no one is yet willing to bear the costs of recycling, but discussion has produced a societal consensus that recycling benefits future generations and is therefore commendable.¹¹⁹ Alternatively, suppose that recent events cause neighbors to recognize the need for a neighborhood crime watch patrol or to organize park maintenance work, though initially no one offers to contribute. Thus, individuals recognize that certain behavior is worthy of esteem before anyone engages in the behavior.

The esteem theory can explain how norms arise in this setting. The first few members to bear the cost of the idealized behavior *X*

crime lowers the effect of informal sanctioning, thus producing a further increase in crime. See Kahan, *supra* note 26, at 361.

119. Perhaps the members of society think it will contribute to the welfare of future generations or that it shows respect for the deity that created the earth.

may capture the status of “hero.”¹²⁰ The few who act in conformity with the publicly expressed consensus each may earn very high esteem. Of course, “first movers” take the risk that no one will follow. If very few individuals contribute labor to patrol the neighborhood or to recycle, the joint return may be negligible, and the sacrifice by these individuals may seem senseless and naive. Foolish idealism is often not esteemed. But part of the reason first movers gain esteem when others do follow their lead is the understanding that they risked losing esteem if others did not.¹²¹

Others will follow the lead of first movers if the esteem benefits outweigh the material costs of undertaking the idealized behavior. Admittedly, the esteem return falls as it becomes more common; ordinary behavior cannot be heroic. But despite this decline, the esteem benefits may exceed the costs. The benefits of being, for example, one of the ten percent or twenty-five percent who patrol the neighborhood or recycle, while not as great as the initial hero status, may nonetheless be larger for some individuals than the value of the labor sacrificed. More important, an individual’s decision to engage in *X* has the externality of raising the price others must now pay for refusing to engage in that behavior. In other words, when everyone refused to undertake *X*, the esteem loss from that decision was zero. But where some engage in the idealized activity, those who do not are negatively distinguished and now bear some loss of esteem.

The combination of these two forces may produce a norm. To demonstrate, consider a highly stylized recycling scenario. Imagine that *A*, *B*, and *C* initially esteem each other equally and no one recycles. Through discussion, they discover that they share a consensus that recycling is an activity worthy of esteem. Assume that recycling costs three dollars per person per time period, and that each values the esteem ranks per time period as follows:¹²²

120. See WILLIAM J. GOODE, *THE CELEBRATION OF HEROES: PRESTIGE AS A SOCIAL CONTROL SYSTEM* 344-45 (1978).

121. See CHONG, *supra* note 2, at 125-30 (discussing this problem in context of the civil rights movement, where leaders risked appearing foolish but those who motivated mass action won respect).

122. That the esteem return is zero when all recycle would follow if the entire society consists of *A*, *B*, and *C*. In that case, recycling earns no relative esteem. On the other hand, if *A*, *B*, and *C* are merely three members of a social group whose members care particularly about the esteem of each other — for example, a group of friends — then they might esteem each other more highly *relative to their esteem for the rest of society* if all recycled than if none recycled. Also, others in society might esteem them more for all recycling. In either case, if the expected return when all recycle becomes positive, then the outcome predicted in the text, universal recycling, becomes even more likely.

Esteem from being the only recycler:	+\$4
Esteem from being one of two recyclers:	+\$2
Esteem when all or none recycle:	\$0
Esteem from being one of two non-recyclers:	-\$2
Esteem from being the only non-recycler:	-\$4

The structure of these incentives will cause all three individuals to recycle, even though that outcome costs each three dollars and ultimately produces for each no status gain. In game-theoretic terms, recycling is *dominant* because it is the best move for each individual no matter what move the others make. Consider *A*'s decision. If both *B* and *C* recycle in the next time period, *A* is better off recycling for three dollars and avoiding the four-dollar loss of being the least esteemed. If neither *B* nor *C* recycle, *A* is better off recycling and gaining the four-dollar benefit of being the most esteemed. If only one of the others recycles, *A* is better off recycling, which provides a four-dollar benefit by moving her from an esteem position she values at *minus* two dollars to an esteem position she values at *plus* two dollars. Because the same logic applies to the decisions of *B* and *C*, all three will recycle.

Thus, even though an individual cannot gain relative status by engaging in the same behavior as everyone else, the desire for relative status can lead everyone in a group to feel obligated to engage in a behavior. Indeed, if recycling were not thought to be desirable, the individuals would benefit from a state-enforced contract with each other to refrain from recycling. Then they could circumvent what might be viewed as an unfortunate "prisoner's dilemma," avoid the three-dollar cost of recycling, and wind up in the same (equal) esteem position they are in when everyone recycles. But the norm arose because there was a consensus that recycling was worthy of esteem. If recycling is esteemed because individuals generally believe it produces net benefits to the group despite net costs to recyclers, then they will welcome the dynamic created by esteem competition because it solves the collective action problem that otherwise prevented recycling.¹²³

123. That they welcome it, however, does *not* mean that the *level* of recycling produced by esteem competition is efficient. To the contrary, the three-dollar contribution produced in this example could still be less or more than the optimal amount. Cf. Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 Wis. L. Rev. 567, 589 (noting that status competition may cause gratuitous contributions to public goods that are higher or lower than the optimal amount); see also discussion *infra* section IV.C.

The crucial point for norms theory is that esteem competition can cause a norm to arise without a preexisting behavioral regularity, or more accurately, when the regularity is precisely the opposite of the norm ultimately produced.

2. *Material Enforcement of Esteem-Based Norms*

Though esteem norms initially arise because third parties can costlessly sanction one who acts contrary to the consensus, esteem can also explain why third parties sometimes *do* bear costs to enforce norms. The initial step is that a primary norm, an obligation to do or not do *X*, may produce a subsidiary enforcement norm. A secondary norm arises when individuals lower their opinion of those who fail to censure primary norm violators. Once that occurs, the dynamic described in the previous subsection then can cause individuals to bear material costs to comply with secondary enforcement norms. In other words, esteem can cause people to bear costs to inflict material costs on norm violators.

a. The Emergence of Secondary Enforcement Norms. Assume *A* violates a norm. At first, *B* may continue to have and express esteem for *A* for various reasons, including that *B* does not share in the consensus. But when individuals genuinely believe *A* has acted badly, they will usually think badly of anyone who expressly condones *A*'s violation or who continues to think as highly of *A* as she did before *A*'s norm violation. Where most people disapprove of racism or abortion, for example, they are likely to also disapprove of those who fail ever to condemn such things.¹²⁴ The primary consensus that behavior *X* merits disapproval is therefore likely to lead to a secondary consensus that those who expressly approve, or fail to disapprove, of the perpetrators of *X* merit disapproval. One reason is selfish norm production: if the first approval patterns arise because behavior *X* harms the society or group, the secondary approval patterns arise because failing to enforce the norm by condemning violators also harms the society or group. The voice or exit that produced the primary consensus could produce the secondary consensus as well.

The secondary consensus — that condoning norm violations deserves disapproval — will become a secondary enforcement norm if

124. Obviously, there are counterexamples: People may accept that an individual does not express disapproval of a family member; most people may even approve of such familial loyalty. But the general point remains: Absent such an exception, where arguably other norms have come into play, the general tendency is to disapprove those who approve of norm violators.

the other conditions of norm creation exist: (1) that there is some risk that one's condoning of norm violators will be discovered without others bearing monitoring costs, and (2) that this risk and the secondary consensus are sufficiently well known. The existence of the secondary consensus will often be easily inferred from the existence of the primary consensus.

One might raise the following objection: It is easy to conceal from third parties the fact that one still esteems a norm violator. What is not easy, however, is to pretend *publicly* to disapprove of *A* without actually harming *A*. Third parties may employ the familiar political strategy of calling for an individual to "take a stand," publicly asking *B* if she agrees with the consensus and disapproves *A*'s violation. Asking such questions makes it costly to avoid condemning the violator. A refusal to answer is taken to mean the individual condones the violation. There are countless examples where this occurs — where individuals ask others to make statements, adopt resolutions, sign petitions, and participate in other symbolic actions, in order to prove that they do not condone someone else's conduct.¹²⁵ Even if the responders only feign disapproval, they still convey disapproval and create a secondary enforcement norm — that is, the fear of disapproval obligates individuals to condemn the violation of a primary norm.

b. From Esteem Sanctions to Material Sanctions. For some norms, individuals incur material costs to inflict a material sanction

125. In many cases, one set of individuals calls upon another set to criticize or disavow a third group that the first considers to be racist. See, e.g., Hiawatha Bray, *America Online Rapped for Allowing Pro-Klan Site*, THE BOSTON GLOBE, Apr. 9, 1997, at A1, A14 (reporting that the Anti-Defamation League criticized America Online for allowing one of its subscribers to create a Ku Klux Klan site); David A. Paterson, *White Outrage, Black Suspicion*, N.Y. TIMES, Mar. 20, 1994, at E17 (discussing white demands that blacks condemn Louis Farrakhan for racism and noting that "[f]or generations, whites have called on black leaders to denounce other blacks' offensive or radical ideas"); Editorial, *Undo Damage in the 4th*, ATLANTA J.-CONST., Oct. 17, 1996 (calling on the incumbent congresswoman to "repudiate[]" her father and end his role in her campaign because he called her opponent "a racist Jew" and reporting that the opponent criticized the incumbent for her refusal to vote for a congressional resolution condemning an aide to Louis Farrakhan).

Consider also the responses to a 1995 National Rifle Association's (NRA) fundraising letter that referred to agents of the Bureau of Alcohol, Tobacco and Firearms as "jack-booted thugs." Life-long NRA member George Bush resigned his membership in protest, see *Whose Thugs, Whose Jack-Boots?*, ECONOMIST, May 20, 1995, at 27, thereby preempting any possible criticism for appearing to join or condone the statement. The NRA eventually apologized. See *id.* at 28. President Clinton responded by stating that the NRA should prove the sincerity of its apology by giving the money raised by the letter to the family survivors of slain peace officers. See Martin Kasindorf, *Truly Sorry? Clinton to NRA: Donate Your 'Ill-Gotten' Funding*, NEWSDAY, May 20, 1995, at A07. This tactic illustrates the difficulty of disavowing one's own actions: Because "talk is cheap," third parties may not believe self-serving statements unless they are made convincing by costly action. See *infra* text accompanying notes 126-27.

on norm violators. Boycotts, for example, require individuals to forgo advantageous transactions with the boycott target. Here is where the secondary collective action problem seems most pronounced. Even if one concedes my argument up to this point, one might object that esteem is a trivial matter compared to such material enforcement. But esteem explains these sanctions. Material sanctions are merely the logical culmination of the prior two stages of norm development: just as competition for relative esteem may increase the material cost that members are willing to bear to comply with a primary norm, esteem competition may increase the cost that members are willing to assume to comply with the secondary obligation to enforce the primary norm.

As a simple example, consider a norm involving dichotomous behavior — for example, a norm forbidding divorce, litigation against a group member, or marriage to someone outside the group. When a publicized consensus first arises, a group member can gain heightened esteem by publicly bearing greater-than-average costs to comply with the consensus. But once virtually everyone complies, compliance is necessary merely to avoid disesteem. Also, a group member loses esteem not only by violating the norm, but to a lesser extent, by failing to disapprove of others who violate the norm.

At this point, a member can gain elevated esteem by publicly incurring greater-than-average costs to express disapproval of norm violators. If average costs are zero, because initially the only sanction is disesteem, one may earn high esteem by conspicuously undertaking some material costs to sanction a norm violator. As before, the first mover — the first to shoulder a material burden to sanction a violator — may gain a “hero” status. Competition for esteem then may induce others to incur material costs to sanction norm violators or to exit the group. In either case, esteem competition may increase the average expenditure on norm enforcement, potentially to the point where members must incur some material costs enforcing norms merely to maintain an average level of esteem.

To illustrate how esteem sanctions can be leveraged into material sanctions, consider the following example: *A* trades with five individuals — the *Bs* — and all *Bs* interact socially with *A*, with one another, and with another large group of people — the *Cs*. When *A* violates the norm, all the *Bs* and *Cs* know they must condemn *A* in order to avoid social disapproval. Each individual can discharge her obligation to enforce the norm by expressing disapproval of *A*.

But by virtue of their trading relationship, the *Bs* have a special opportunity. To gain “hero” status, one of the five *Bs* might take the added step of reducing her trades with *A*, to the material detriment of both *A* and the *B*. The first move in this direction may sacrifice only a trivial, symbolic amount.¹²⁶ But a tiny reduction in trade may be sufficient when others refuse to make any material sacrifice. The point is that an individual may “purchase” substantial status for being the only one to bear a tangible, if initially minuscule, cost to enforce the norm.¹²⁷

Once the move to material sanctions is made — once esteem is leveraged to produce nonesteem punishments — the same competitive dynamics described above in the recycling example can ratchet up the level of material sanctions.¹²⁸ After one *B* sanctions *A* by a minor and temporary reduction in trade, the competition for esteem may cause all the *Bs* to make the same reduction in trade. If the initial reduction in trade is trivial, one of the *Bs* may attempt to recapture the first-mover hero status by reducing trade more than the others. Indeed, even though the *Cs* lack a trading relationship with *A*, they may join in the esteem competition by looking for other means of sanctioning *A* materially, such as boycotting *Bs* who fail to boycott *A*. As above, the outcome of this process depends on a number of variables, including the value each individual places on esteem and the other opportunities that she has for producing esteem. But esteem is itself capable of explaining the imposition of nonesteem sanctions including substantial material sanctions.

126. To make this transition to material sanctions even smoother, imagine that the first time it happens, the material cost to the trader *B* is nonexistent because she was already planning to reduce trade with *A* for other reasons known only to her. But because the *Cs* and other *Bs* believe — and reward with esteem — *B*'s false claim that she reduced trade to punish *A* for her norm violation, the effect is the same. The next time the violation occurs, the same reaction will be expected.

127. For example, in the Jim Crow South, social norms obligating whites to subordinate blacks in various ways were enforced by threats of economic sanctions against whites who violated these norms. See JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 48-49 (3d ed. reprint with new introduction, The University of Wisconsin Press 1988) (1937); ARTHUR F. RAPER, *THE TRAGEDY OF LYNCHING* 20, 244-46 (1933). The above analysis suggests that the material boycotts were in turn enforced by threats of social sanctions — that is, ostracism and shaming. See, e.g., DOLLARD, *supra* at 46-48, 349-50, 354 (1937). See generally McAdams, *supra* note 10, at 1039-42, 1046-48, 1050-51 (discussing racial norms applicable to whites in the Jim Crow South).

128. Note also that once the norm arises, this analysis can explain why individuals might bear costs to acquire information for the purpose of detecting norm violations.

III. USING THE ESTEEM MODEL TO CLARIFY AND UNIFY THE NEW NORMS LITERATURE

Notwithstanding the considerable attention to law and norms, indeed, partly because of so much recent and diverse writing, the economics literature remains ambiguous. Explicitly or implicitly, theorists employ different concepts of what norms are and how they arise. As noted in Part I, norms are defined in much of the literature as informal, nonlegal obligations, sometimes with the addition of organizational rules. Yet the term remains obscure in at least three ways: *norm* is used to refer to nonlegal obligations (1) enforced by different kinds of sanctions, (2) described at different levels of generality, and (3) arising in different kinds of populations. In this Part, I address each issue. I suggest that the esteem theory can provide some valuable clarification, uniting what might seem to be unrelated strands of the new literature. First, I demonstrate that esteem processes can lead to norm *internalization*. In so doing, I contrast and reconcile the esteem theory with the alternative internalization model of norm origin. Second, the distinction between esteem-enforced and internalized norms reveals a relationship between norms that arise at different levels of generality: narrow esteem-based norms often *implement* or give meaning to broad internalized norms. The theory thus reconciles the norms literature with Lawrence Lessig's insistence on the importance of social meaning. Third, because the conditions for esteem-based norms can arise among small groups or an entire society, the esteem theory explains both group and societal norms and predicts certain differences between them.

A. *Contrasting and Reconciling Esteem Processes with Internalization of Norms*

Previously, I alluded to the possibility of several economic resolutions of the puzzle of norm origin. One alternative explanation is internalization. Internalization theories posit that an individual acquires a preference for conformity to a behavioral standard and suffers some psychological cost — guilt is an appropriate term — when she fails to conform, whether or not others are aware of her violation.¹²⁹ Robert Cooter's internalization theory is the first explana-

129. See, e.g., BECKER, *supra* note 2, at 225 ("Norms are those common values of a group which influence an individual's behavior through being internalized as preferences."); see also ROBERT H. FRANK, *PASSIONS WITHIN REASON* 152-61 (1988); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 45-46 (1989); Huang & Wu, *supra* note 40, at 392-96.

tion of norm origin in the law and economics literature.¹³⁰ This kind of explanation appears to be in tension with those — like the esteem model — that emphasize *external* enforcement sanctions.¹³¹ In this section, I contrast Cooter's model with the esteem model, point out how esteem can explain many norms internalization cannot explain, and then present a way of uniting the two theories into a common framework.

According to Cooter, "a social norm is ineffective in a community and does not exist unless people internalize it."¹³² The crucial question for any internalization theory is how this process — a form of preference change — occurs. The question is difficult. In particular, if preference change is too common, it makes economic analysis of preference satisfaction quite difficult.¹³³ Cooter's answer avoids the problem by predicting internalization only under restrictive circumstances. He says a "unanimous endorsement" of certain conduct "will convince some members of the community to internalize the obligation, and to inculcate it in the young."¹³⁴

The internalization thesis is probably also the most common explanation of norm origin outside of economics. See, e.g., DURKHEIM, *supra* note 1; Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985).

130. See Cooter, *supra* note 14; Cooter, *Structural Adjudication*, *supra* note 72. Ellickson speculates about norm origin but does not offer an account. See ELLICKSON, *supra* note 3, at 237-38 (suggesting that "[p]erhaps . . . a few virtuous leaders" are willing to selflessly bear costs to enforce norms); Ellickson, *supra* note 129, at 45-46 (briefly discussing norm internalization). Huang and Wu discuss "remorse" as the internal cost individuals bear for violating norms, but they do not attempt to explain the initial internalization process by which one becomes potentially remorseful. See Huang & Wu, *supra* note 40, at 404 ("[W]e did not study the origin of emotions or norms."). For more recent theories, see Kraus, *supra* note 27 (presenting an evolutionary theory); Posner, *supra* note 19 (reviewing economic theories of norms); Posner, *supra* note 72 (presenting a signaling theory). I do not review all these alternative theories. Rather, I argue for the esteem theory on the grounds provided in Parts III and IV, *infra*.

131. I am not the first to emphasize reputational sanctions as the crucial means of norm enforcement. See, e.g., Sunstein, *supra* note 11, at 914-21. Sunstein also takes note of internal enforcement, particularly to enforce social roles. See *id.* at 922. But his extended discussion of norm change makes clear that he relies on external enforcement in a way Cooter does not. See *id.* at 921 (observing that norms "tax and subsidize" behavior with reputational effects). In the end, however, Sunstein explicitly avoids offering a theory of norm origin. See *id.* at 915 n.38.

132. Cooter, *supra* note 14, at 1665.

133. Economists generally assume stable preferences. See generally BECKER, *supra* note 2, at 3-4; George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, AM. ECON. REV., March 1977, at 76, 76. One of the few exceptions prior to Cooter is Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1. In general, Cooter advocates a more complex economic description of individuals, replacing the "thin self" with a "thick self." See Cooter, *Structural Adjudication*, *supra* note 72, at 221-22; see also Robert D. Cooter, *Lapses, Conflict, and Akrasia in Torts and Crimes: Towards an Economic Theory of the Will*, 11 INTL. REV. L. & ECON. 149 (1991).

134. Cooter, *Structural Adjudication*, *supra* note 72, at 224.

When will a group signal *unanimous* agreement on anything? Cooter says unanimous expression will occur when group members face a collective action problem in which there is, for everyone, one optimal signal.¹³⁵ Regarding lying, for example, no one will advocate that everyone be permitted to lie, nor would anyone planning to lie advocate an exception for herself for fear of revealing and thereby defeating her strategy. Thus, there is likely to be a universally *expressed* consensus against lying and a no-lying norm will be internalized.¹³⁶ Not only do individuals who internalize an obligation automatically incur a cost if they violate the norm, whether or not others detect their violation, but Cooter says that those who internalize the norm are willing to bear small costs to enforce it against others.¹³⁷

I agree that internalization has a role to play in norm enforcement and I welcome Cooter's efforts to bring the challenging subject of preference change into law and economics. But I believe internalization is neither necessary nor sufficient to explain many norms.

First, internalization is not necessary to explain norms. I think Cooter is wrong when he says that a social norm "does not exist" absent internalization.¹³⁸ As prior sections demonstrate, external sanctions — initially, the simple denial of esteem — can generate norms.¹³⁹

135. See Cooter, *supra* note 14, at 1666; Cooter, *Unified Social Theory*, *supra* note 72, at 64.

136. Cooter's example is not lying but rather an "agency game" in which the player who moves first — the principal — can invest or not invest, and the party who moves second — the agent — can then cooperate or appropriate (steal). See Cooter, *supra* note 14, at 1657-77. Once the principal invests, the agent is best off appropriating the investment. See *id.* at 1658. Foreseeing this result, the principal will not invest and both parties forgo an economic trade that could serve to their mutual benefit. See *id.* But if the game is repeated, Cooter observes that the equilibrium result may be a stable level of cooperation and defection. See *id.* at 1660. At this point Cooter introduces norms:

[E]very agent has an incentive to provide signals that induce principals to invest. Every agent will signal 'cooperation,' regardless of whether his real strategy is cooperation or appropriation. Consequently, a consensus will arise in the community about how agents ought to act. Such a consensus will convince some members of the community to internalize the norm and to ingrain it in the young. Thus a new norm will emerge in the community.

Cooter, *supra* note 14, at 1666; see also Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 Sw. U. L. REV. 443, 448-49 (1994) (discussing an agency game that has a "pure signaling equilibrium" . . . in which "everyone has an incentive to signal the same strategy" (emphasis added)).

137. See Cooter, *supra* note 14, at 1668.

138. *Id.* at 1665; see also BECKER, *supra* note 2, at 225 (defining norms as "those common values of a group which influence an individual's behavior through being internalized as preferences").

139. Perhaps it would be more accurate to say that my model explains norms by positing only one internalized desire — the preference for esteem — rather than claiming that an

Second, internalization is not sufficient to explain the many norms that arise without a unanimous consensus.¹⁴⁰ Some norms, for example, apply to and burden only one subset of the population in which they arise, often for the benefit of a subset to which they do not apply. Thus, norms obligate women to change their surname on marriage, care for children, and tolerate physical abuse. Norms against public smoking constrain smokers to the benefit of non-smokers and norms obligating heterosexuality, while technically applying to everyone, restrict the freedom of homosexuals only. None of these matters could plausibly have commanded a unanimous consensus *before* the norm existed; the many who would be better off without the norm would have said so.¹⁴¹ Nor can a prior unanimous agreement explain all norms that do apply equally to everyone in a population. Societal norms at least weakly condemn overt

individual must internalize a preference for each behavior a norm requires. In this sense, the model makes the conventional, though not inevitable, economic assumption that preferences are exogenous to the model (of norms) under discussion. Given a preference for esteem, under certain circumstances, norms will arise, including powerful norms enforced by material sanctions.

140. Cooter appears to concede this much at one point where he limits his theory of norms to "business norms" arising within "business communit[ies]." See Cooter, *Structural Adjudication*, *supra* note 72, at 224; *cf. id.* ("[M]any acts are private in the sense that they do not affect others. The regulation of private acts by social norms is extensive in some kinds of communities, especially churches."). In another article, Cooter states: "My theory predicts that community norms will emerge when signaling and public goods converge, whereas divergence between them will yield a stew of public opinion." Cooter, *supra* note 14, at 1676. This appears to state a general point that something like a unanimous expression of consensus is necessary for norms, but in the next sentence he limits the prediction to "business norms." See *id.* at 1676.

141. For these norms, women, smokers, and homosexuals would not just be better off from being able to free ride off the enforcement efforts of others, but would be better off if *no one* enforced the norm. After the norm exists, there may be costs to criticizing it, see *infra* text accompanying note 192, but before the norm arises, there would be no such costs.

Indeed, Cooter expresses puzzlement specifically about gender norms. See Cooter, *supra* note 14, at 1685. He says that he suspects that where discriminatory norms arise, "the injurers must have power over the means of representation," enabling the "dominant group to frame the public debate by which norms evolve." *Id.* But he does not explain the importance of "representation" and "public debate," which are not explicitly a part of his internalization theory. See *id.* (stating that "[l]imitations of space" prevent his developing the point more fully).

Elsewhere, Cooter states that "domination" of one group by another "typically requires support from internalized social norms, rather than being based upon pure power. For example, the domination of women by men probably requires most men and some women to believe in the rightness of patriarchy." Cooter, *Unified Social Theory*, *supra* note 72, at 65. Cooter's point seems right to me, but internalization still does not explain how the norms defining gender roles first arose, given that half the population had no reason to signal their approval. Indeed, Cooter makes another claim that exacerbates this deficiency. Analogizing men and other dominant groups to cartels, Cooter says that such norms tend to be unstable absent legal enforcement: "The signaling equilibrium loses its purity when someone gains an advantage by signalling defection from the norm. Once [this occurs], the norm may decay and the cartel may unwind." *Id.* If the signalling equilibrium is so delicate, then the ability to produce internalized norms with a nontrivial number of dissenters seems doomed. The origin of these dominance norms requires some other explanation.

race discrimination, consumption of pornography, and use of marijuana; yet there have always been some who conspicuously defended these things. Their dissent did not prevent a norm from arising.

The esteem model can explain the origin of these norms. As stated above, nothing like unanimity is necessary; a simple consensus may be sufficient.¹⁴² Indeed, in Part IV, I suggest that one danger every society faces is a number of “unnecessary” norms by which one group constrains the freedom of another.¹⁴³

Although I believe internalization is neither necessary for norms nor sufficient to explain certain norms, internalization of norms obviously occurs and sometimes provides the only explanation for behavior. Thus, I believe we should recognize both processes in the creation and enforcement of norms. We might use *shame* to designate the disesteem an individual receives from those who believe she has violated a norm, regardless of whether she has actually violated the norm, and *guilt* to designate the psychological discomfort a violation causes one who has internalized the norm, regardless of whether others think she has violated the norm.¹⁴⁴

But rather than think of esteem competition and internalization as each creating a separate sphere of norms, I propose synthesizing the theories as follows: Imagine a process in which esteem frequently produces the norm and internalization operates as a later reinforcing mechanism.¹⁴⁵ In Cooter’s model, norms are internal-

142. Indeed, as I explain *supra* note 89 and accompanying text, under some circumstances even a minority of the population could produce a norm.

143. Also, in Part IV, I suggest that esteem theories can better explain why norm criticism can produce rapid change in norms, what Sunstein calls “norm cascades.” See Sunstein, *supra* note 11, at 912.

144. The distinction I make between esteem concerns and internalization follows a distinction recognized by some sociologists and social psychologists who study deterrence. At least since Dennis H. Wrong, *The Oversocialized Conception of Man in Modern Sociology*, 26 AM. SOC. REV. 183 (1961), researchers measuring deterrence have distinguished between internalized moral commitments and social disapproval as sources of deterrence — with the threat of legal punishments providing a third source of deterrence. See also TYLER, *supra* note 114, at 44-45, 57 & 238-39 n.2, 63-64 (noting a three-part distinction in the source of legal compliance among moral commitment to law, peer disapproval, and fear of legal punishment); Robinson & Darley, *supra* note 26, at 468 (noting nonlegal sanctions include the fear of disapproval by one’s social group and internalized moral standards). On the other hand, emotion theorists have described and distinguished “guilt” and “shame” in much richer terms than I do here. See, e.g., June Price Tangney, *Recent Advances in the Empirical Study of Shame and Guilt*, 38 AM. BEHAV. SCIENTIST 1132 (1995).

145. Note that internalization is plausible only if many people already act in accordance with the expressed consensus. The contrary case is one of widespread hypocrisy, where everyone advocates a course of action they do not follow, or everyone says they disapprove of certain conduct in which they continue to engage. I doubt that anyone would internalize a consensus no one follows. But the “hero” status available in such circumstances means that esteem competition can produce norms, despite the absence of a preexisting regularity. See

ized because there is a "pure signalling equilibrium" when everyone agrees on what is the appropriate behavior.¹⁴⁶ For reasons stated in Part II, this consensus, as well as a *nonunanimous* consensus, can cause the immediate emergence of esteem-based norms, without or before the additional step of internalization. While internalization takes time,¹⁴⁷ there will be an esteem cost to acting contrary to a consensus as soon as it, and the inherent risk of detection, becomes well-known. If, for most people, the cost is higher than the benefit of acting against the consensus, a norm will quickly emerge. This ordering — shame before guilt — conforms with those psychological theories that imagine that shaming and disapproval — external sanctions — are precisely what produce internalization.¹⁴⁸

Thus, though I emphasize the importance of esteem, let me reiterate that, by *norm* I mean a decentralized behavioral standard that individuals feel obligated to follow, and generally do follow, for the esteem reasons described above, *or* because the obligation is internalized, or both.¹⁴⁹ Without internalization, one obeys the norm to avoid external sanctions made possible by the desire for esteem, though the sanctions may in fact include material punishments. After internalization, there is yet another cost to violating a norm: guilt. The individual feels psychological discomfort whether or not others detect her violation. Internalization can occur as the first step in norm production, but I suggest that it frequently follows the creation of the norm by esteem processes.

supra text accompanying notes 119-23. Thus, where selfish strategies in evolutionary equilibrium would otherwise fail to produce a regularity in accord with the consensus, esteem competition can create the regularity, which, over time, is internalized.

146. See Cooter, *Structural Adjudication*, *supra* note 71, at 224.

147. An individual does not change preferences overnight. Indeed, Cooter imagines that much norm internalization occurs in childhood, so the process might take a considerable number of years and, for new norms, might require a generation to complete. See Cooter, *supra* note 14, at 1661-62.

148. See JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* 75-78 (1989) ("[S]haming and repentance build consciences which internally deter criminal behavior even in the absence of any shaming associated with an offense."); JEROME KAGAN, *THE NATURE OF THE CHILD* 145-49 (1984) (discussing how violations of standards result in emotional experiences that may create internal standards within the child); Robinson & Darley, *supra* note 26, at 469 ("Children are trained by a powerful socialization process into internalizing the beliefs represented in the social norms of the culture to which they belong.").

149. For clarity of discussion, one should specify whether or not a significant proportion of individuals have internalized the norm at issue.

B. *Explaining Norm Generality and Social Meaning: Concrete Esteem Norms Implement Abstract Internalized Norms*

Another ambiguity in the literature is the proper level of generality to use in defining a norm. Is a norm appropriately described in narrow behavioral terms — “In public places, clean up after your dog” — or more abstractly — “Don’t litter” — or even more abstractly — “Be a good neighbor”? Is the right description that “friends should be loyal” — a general one — or that a person is obligated to perform specific acts: to listen attentively to a friend’s troubles, to water her plants when she is away, to drive her home when she is intoxicated, and so on? Theorists employ arbitrarily different levels of generality, sometimes describing norms narrowly and sometimes broadly, without acknowledging the definitional choices being made.¹⁵⁰

Sometimes — perhaps most of the time — broad norms are simply collections of narrow norms. Thus, there is no ambiguity; the relationship is simply one of set to subset. Within the broad category of neighbor norms is a subcategory of no-littering norms, one of which is “clean up after your dog.” When this is true, little is lost by ignoring the broad norm and focusing only on the norm that most directly governs behavior. In this section, however, I argue that the relationship between narrow and broad norms can be more

150. Narrowly described norms include, for example, the obligation to pay a certain proportion of boundary fence costs, *see* ELLICKSON, *supra* note 3, at 65-81, to refrain from suing other members of the industrial group, *see* Bernstein, *supra* note 9, at 148-51, or to clean up after one’s dog, *see* Cooter, *supra* note 14, at 1675; Sunstein, *supra* note 11, at 955-59. Broadly described norms include, for example, the duty to “do one’s share,” *see* McAdams, *supra* note 32, at 2252-53, to treat others with a reciprocal fairness, *see* Pildes, *supra* note 13, at 2063-64, and to follow one’s role as a neighbor, friend, or wife, *see* Sunstein, *supra* note 11, at 921-22.

To illustrate the definitional choice more clearly, consider the custom in the Jim Crow South by which whites refused to address blacks by their last names or with the titles — Mr., Miss, Mrs. — they used for each other and that blacks used for whites. *See* McAdams, *supra* note 10, at 1040-41 nn.142, 146. How should this norm be described? One could narrowly define the norm as requiring exactly this behavior — an obligation to call blacks by their first names — or one could describe the behavior as part of a broader norm — a duty of “good” white southerners to contribute to racial hierarchy. In some sense, both descriptions are correct, but the two descriptions exist at different levels of generality, and ambiguity is created by using the term “norm” without distinguishing between these levels. In this section, I propose that narrow “concrete” norms often implement broad “abstract” norms. The broader norm defines the social meaning of the behavior the narrow norm requires. Thus, in the Jim Crow South, there was an abstract norm among whites to contribute to racial hierarchy and a set of concrete norms implementing this end, including the obligation to call blacks by their first name. As I explain in the text, it is important to use *both* the broad and narrow descriptions, and to identify their relationship, when the broad norm is internalized but the narrow norm is not.

complicated and that it is sometimes important to consider broad and narrow norms in combination.¹⁵¹

My thesis is that an abstract norm can be internalized while the concrete behavioral norms implementing the abstract norm are not internalized. Where this occurs, one cannot understand or predict behavior subject to norms without considering both the concrete and abstract norms *and* the relation between them. Narrow, concrete norms based solely on esteem — which are not internalized — often define the *meaning* of a specific behavior by defining that behavior as complying with or violating an internalized abstract norm. Thus, an antilittering norm may work because a consensus arises that littering violates the internalized norm to be a “good neighbor”; after the littering norm is internalized, a clean-up-after-your-dog norm may arise because of a consensus that to do otherwise is littering. If this is right, the distinction matters because the esteem norm, enforced by external sanctions, could determine compliance with an internalized norm, enforced by guilt.

The point here is one of timing: If internalization occurs at all, it is likely to occur first at the abstract level and only later at a concrete level. The more abstract the norm, the more likely it is that it embodies the kind of sentiment — like be “a loyal friend” or “a good neighbor” — that commands immediate unanimous agreement. Such unanimity, Cooter claims, produces internalization.¹⁵² Moreover, the norms that persist long enough to be internalized will be those that are least sensitive to changes in the conditions that create norms — the least sensitive, for example, to changes in what others perceive is in their interest to esteem. Old and stable norms will tend to be abstract because the more concrete the norm is, the more likely it will change as conditions change. Reciprocal obligations like “do one’s share” and fundamental social-role duties like “be a good neighbor” can survive from generation to generation, from place to place. Specific behaviors that define doing one’s share or that constitute being a good neighbor change more readily.¹⁵³ Thus, a person may feel obligated to perform a certain act

151. Indeed, the problem of norm generality underlies Lessig’s complaint about the economic literature on norms: that understanding norms requires the consideration of “social meaning.” See Lessig, *supra* note 33, at 2182-84.

152. See *supra* text accompanying notes 132-37.

153. When neighbors enjoy large private yards and public spaces, for example, the failure to clean up after one’s dog may hardly register. In an urban area with crowded sidewalk space and infrequent public cleanings, the same failure quickly becomes a reason for denying esteem.

because a concrete, esteem-based norm defines the act as necessary to comply with an abstract internalized norm.¹⁵⁴

If an esteem norm defines what counts as a violation of the abstract norm, an individual will feel guilt when she violates the norm, but only so long as the esteem-based norm defines her conduct as a violation of the abstract norm. Tipping provides an example. Assume an American leaves a bartender a tip in the United States because a norm requires such behavior and she would feel guilt otherwise. Yet, quite possibly, she feels no guilt for failing to tip a bartender when visiting Australia, a country where such tipping is not customary. In the United States, the tipping norm implements an abstract norm against stealing, but because the American has *not* internalized the concrete obligation, she has a clean conscience when leaving no tip in a country where no one expects her to — that is, where the concrete norms implementing the no-stealing norm do not include an obligation to tip bartenders.¹⁵⁵ The peculiar feature of this abstract-concrete norm combination is that the individual feels guilt if she violates a concrete norm she has not internalized. But she feels guilt only to the extent that her violation of the concrete norm operates as a violation of the abstract norm.¹⁵⁶

If this hybrid of internalized abstract norm and noninternalized concrete norm is possible, one must study and describe norms using both levels of generality. I believe the combination is common. Many people internalize obligations like “do one’s share” or “be respectful of others,” but not the specific behaviors necessary to fulfill those obligations. Social roles often exist in this manner: in-

154. In other words, when people internalize a norm like “be a good neighbor,” the obligation is too vague to compel any particular behavior. One feels an obligation to do *something* to prove one is a “good neighbor” and will feel guilt otherwise, but the specific action one must take is not internalized. An esteem-based norm then supplies the means of proving oneself to comply with the abstract norm.

155. Lessig would say that in the United States, but not in Australia, failing to tip in this context “means” one is stealing. See Lessig, *supra* note 11.

156. Religious dietary norms provide another example. Assume that prior to 1962, when Vatican II abandoned the requirement that Catholics abstain from meat consumption on Fridays, three Catholics, *A*, *B*, and *C*, generally followed this Catholic norm. *A*, however, ate meat on Fridays and violated other obligations whenever she was confident her violation would not be detected by other Catholics; she suffered no guilt because she had not internalized Catholic norms. *B* and *C* abstained from eating meat even when they knew their consumption would not be detected and felt guilt on a few occasions when they violated the edict by accident. But immediately after Vatican II, *B* began eating meat on Fridays while *C* (my mother-in-law) did not; indeed, *C* still felt guilt if she accidentally violated this repealed rule. *C* had internalized the abstract obligation to be a “good Catholic” and the concrete obligation to abstain from meat on Fridays. *B*, on the other hand, had internalized the general duty to be a good Catholic but not the concrete duty regarding meat consumption. She felt guilt only when, prior to Vatican II, most Catholics believed that good Catholics did not engage in this concrete behavior.

dividuals internalize societal norms such as “be a loyal friend,” “be a good wife,” or “be a man,” and occupational norms, setting the standard of a “fair judge,” “good union man,” or “cutting edge artist.”¹⁵⁷ It is possible to internalize some specific behavioral standards associated with these higher level obligations. But frequently the norms that implement the abstract norms are not internalized. The “loyal friend” defends the right of his friend to drink, even when driving, and feels guilt if he does not, until the esteem-based norm changes to “friends don’t let friends drive drunk.”¹⁵⁸

Thus, while guilt arises only from violating an obligation one has internalized, when the obligation is vaguely defined, what counts as a violation may depend on what others think is a violation. The result is that esteem-based norms matter even more; though esteem is an external sanction, esteem-based expectations can invoke internal sanctions. Moreover, while an internalized duty cannot change overnight, there can be sudden changes in when people feel guilt for a particular behavior. As I explain below, these abstract-concrete norm combinations are useful to explain norm change and the role of law in norm change.

This approach to describing norms facilitates a synthesis of the esteem theory with Lawrence Lessig’s discussion of social meaning.¹⁵⁹ Lessig observes that the costs and benefits of an act depend in part on its *social meaning*. The passenger who buckles her seatbelt bears a cost in a society in which her act signals an insulting mistrust of the driver, but no such cost and perhaps a benefit where her act signals good judgment. The person who drives while intoxicated bears a cost in a society in which his act signals social irresponsibility, but no cost and perhaps a benefit where his act signals a fun-loving attitude. In each case, what an act “signals” depends on the norms that define the act’s social meaning. Lessig has criticized the existing norms literature for failing to account for the significance of social meaning.¹⁶⁰

In the esteem theory, social meaning refers to the relationship between a specific behavioral norm and the abstract internalized

157. See Sunstein, *supra* note 11, at 921-25.

158. For simplicity, all of my examples have assumed that there are only two levels of generality — concrete or abstract. It is more likely that there is a continuum. The “don’t litter” norm is a good example. It implements the abstract norm “be a good neighbor,” but it is also somewhat abstract itself, leaving open the question of exactly what constitutes littering. Thus, a more concrete norm, “clean up after your dog,” gives additional meaning to the “don’t litter” norm.

159. See Lessig, *supra* note 11; Lessig, *supra* note 33.

160. See Lessig, *supra* note 33.

norm it implements. The social meaning of an abstract norm is defined by the set of specific behavioral norms one is obligated to follow to be considered in compliance with the abstract norm. Thus, in some neighborhoods, failing to clean up after one's dog has no particular meaning; in others, the omission "means" one is a bad neighbor. In some neighborhoods, asking lots of questions shows a friendly interest and means one is a good neighbor; in other neighborhoods, asking unnecessary questions is nosy and means that one is a poor neighbor. In general, esteem-enforced concrete norms provide meaning to internalized abstract norms.¹⁶¹

C. *A Unified Theory of Group and Societal Norms*

The norms literature is divided between those who discuss *group* norms — mostly private law scholars¹⁶² — and those who discuss *societal* norms — mostly public law scholars.¹⁶³ Sometimes theorists speak of "norms" without clearly identifying the kind of population in which the norms arise. But even when they do identify the population, it is not clear from the literature how group norms and societal norms¹⁶⁴ are related: if generalizations can be made about both or if they are essentially distinct phenomena. Indeed, many group norms are exactly contrary to societal norms — Christian Scientist norms, for example, oppose the use of medical

161. Sometimes concrete norms affect the meaning of a behavior merely by determining its frequency. For example, where there is no norm obligating seat belt use and very few people "buckle up," such conduct will inevitably signal the passenger's unusually high fear of the situation including a mistrust of the driver. But where the average passenger follows a norm requiring seat belt use, drivers will make no such inference. Indeed, the average driver will also wear a seat belt.

162. The property norms Ellickson found in Shasta County, for example, govern what he describes as a "close-knit" group. See ELLICKSON, *supra* note 3, at 181; see also Bernstein, *supra* note 9, at 119-21; Cooter, *supra* note 14, at 1646; McAdams, *supra* note 32, at 2241-42.

163. Sunstein discusses norms defining various "social roles," such as that of waiter, wife, or friend. See Sunstein, *supra* note 11, at 921-22 (listing also the roles of doctor, employee, law school dean, colleague, and student). He says these roles are "accompanied by a remarkably complex network of appropriate norms." *Id.* at 921. One could conceivably read Sunstein as envisioning only group norms because he recognizes that "subcultures" have their own norms. See *id.* at 918-20. But his primary level of analysis clearly remains a norm that arises at the *societal* level. He observes, for example, that rapid norm changes ("cascades") occurred with "the election of Ronald Reagan, the use of the term 'liberal' as one of opprobrium, the rise of the feminist movement, and the current assault on affirmative action." *Id.* at 912. These are obviously broad social changes, not merely changes within a close-knit group.

164. I say "societal" norm rather than "social" because I think the term "social norm" is already widely used to refer to any kind of informal norm, including group norms. In other words, many distinguish *social* norms from *legal* norms. I suggest that we clearly subdivide social norms into group norms — including the formal norms of organizations — and societal norms.

technology that society obligates parents to use for their children,¹⁶⁵ “skinheads” express a code of racial supremacy rejected by American society,¹⁶⁶ and some police forces enforce a “code of silence” to conceal their members’ wrongdoing from society’s legal sanctions.¹⁶⁷ For some groups, this connection is intentional; the group obligates conduct *because* it violates a societal norm.¹⁶⁸ Teenage norms, for example, often obligate rejection of the societal norms of adults.¹⁶⁹ Can a single theory explain both societal norms and also such contrary group norms?

The esteem theory can explain norms arising within groups and societies, even where the group and societal norms stand in opposition to each other. If both norm types arise from the same processes, the esteem theory unifies the public and private law literature on norms, showing that they share more than a common terminology. Recall that the conditions necessary for esteem-based norms are: (1) a consensus about the esteem-worthiness of engaging in *X*, (2) an inherent risk that others will detect whether one engages in *X*, and (3) that the existence of the first two conditions is well known within the population.¹⁷⁰ The first point is that there is no necessary barrier to these conditions arising within an entire so-

165. See CATHERINE L. ALBANESE, *AMERICA: RELIGIONS AND RELIGION* 237 (2d ed. 1992); Nathan A. Talbot, *The Position of the Christian Science Church*, 309 *NEW ENG. J. MED.* 1641 (1983).

166. See Michael Janofsky, *Skinhead Violence Is Worldwide and Growing, a Report Finds*, *N.Y. TIMES*, June 28, 1995, at A1 (citing ANTI-DEFAMATION LEAGUE, *THE SKINHEAD INTERNATIONAL: A WORLDWIDE SURVEY OF NEW-NAZI SKINHEADS* (1995)).

167. See *supra* note 42. These norms are enforced primarily by esteem processes. Skolnick and Fyfe characterize the police code of silence as merely “an extreme version of a phenomenon that exists in all human groups”:

[W]e know of no other cases [other than one where the authors actually reject the purported link between informing and being shot] in which police have punished those who betrayed the code of silence with anything as extreme as a shooting. Instead, the code . . . typically is enforced by the threat of shunning, by fear that *informing* will lead to exposure of one’s own derelictions, and by fear that colleagues’ assistance may be withheld in emergencies.

SKOLNICK & FYFE, *supra* note 42, at 110, 112. The latter two punishments are merely to withhold from the informer the benefits of other group norms — those who inform on a “rat” or fail to aid a “rat” will not be punished for violating norms prohibiting informing and obligating assistance. See Rick Bragg, *Blue Wall of Silence: Graft Shielded Behind Old Code*, *N.Y. TIMES*, Apr. 26, 1994, at B1 (describing the use of ostracism to enforce the code of silence).

168. As Sunstein says, “some people *like* to incur the disapproval that follows norm violation, and hence some people like to ‘flout convention’ by rejecting prevailing norms by, for example, smoking, playing loud music in public, or wearing unusual clothes.” Sunstein, *supra* note 11, at 918.

169. See, e.g., COLEMAN, *supra* note 2, at 257-58 (discussing teen dress codes as a means of differentiating and declaring subgroup identity both to other members and to nonmembers).

170. See *supra* text accompanying notes 86-110.

ciety, so that the same theory explains group and societal norms. Second, a different consensus can arise in a society and in the groups within the society, so that different populations can have different and conflicting norms. The norm conditions identify why group norms are often so much stronger than societal norms that the group can openly defy social norms and withstand and possibly enjoy the resulting disapproval.

None of the norm conditions are as likely for a society as a closely knit or even loosely knit group, but all may occur. A majority of individuals in an entire society may come to regard certain behavior as praiseworthy or blameworthy. If nothing else, selfish esteem allocation may cause most people to disapprove behaviors with obvious external costs — such as cutting in line or failing to wait one's turn — and to approve behaviors with obvious external benefits — such as pausing to hold open a door one has just passed through for the person walking immediately behind. Additionally, some behaviors are sufficiently public, such as the examples just given, that the risk of detection is quite high. Finally, the prior two conditions will sometimes be well known throughout a society. When the external costs are obvious and the behavior is public, people may simply and correctly *assume* the conduct is generally disapproved. In less obvious cases, formal education or mass media may publicize the consensus against a behavior. Thus, the esteem processes identified above can produce a societal as well as a group norm.

Of the three conditions, the third — publicity — presents the most significant potential barrier to a societal norm creation. When the existence of the consensus or the risk of detection is less than obvious, even a strong consensus may never produce a norm. In particular, those who do not share the consensus may doubt its existence and thereby remain uninfluenced by the risk of societal disapproval. In Part IV, I claim that this potential publicity barrier is crucial to understanding the “expressive” function of law: the esteem model implies that legislation creates and strengthens societal norms by publicizing a social consensus.¹⁷¹

Esteem can also explain the stability of group norms that conflict with societal norms. That conflict arises is no surprise: all that is required is that a group consist predominantly of people who oppose the societal consensus. Random forces could produce this re-

171. See *infra* text accompanying notes 206-27. Conversely, I also suggest that privacy rights may be viewed as a means of preventing or weakening societal norms. See *infra* text accompanying notes 285-96.

sult. More obviously, individuals who share an unconventional view or a generally unconventional outlook may seek one another's company. The question then is not why group and societal norms ever conflict, but how — if societal norms have any force — groups can openly and persistently flout such norms.

The simple answer is that group norms are frequently much stronger than societal norms. People "like" to violate societal norms when their group norms obligate such violations and when they gain more from the group than they lose from society. The esteem model identifies why one frequently gains more from following group norms than societal norms. For several reasons, groups usually have stronger norms than societies. First, groups tend to be more homogenous than society and therefore tend to enjoy a stronger consensus.¹⁷² Ninety percent of society might condemn racism or cocaine consumption, but a small group may be composed entirely of members of the contrary ten percent. Second, any consensus that exists will be easier to publicize within a small group than a large one.¹⁷³ Third, the interaction that defines group members but not strangers raises the likelihood that a group member will detect — without bearing costs for purposes of monitoring — whether another member has violated a consensus.

Finally, even when all three conditions exist, a norm arises only if the value of esteem is sufficiently great in comparison to the costs of complying with the consensus. Societal norms exploit the advantage of aggregation: a small concern for each stranger's opinion multiplied by a large number of strangers who may detect a violation. But groups obviously enjoy the advantage that their members value the esteem of fellow members more highly than that of strangers. On average, the smaller the group, the more intensely esteem is valued. There are many reasons for this obvious fact, but consider just two. First, other things equal, an individual cares more about well-informed opinions than less-informed opinions. The more that one individual knows about another, the harder it is for the latter to discount the opinion of the former as possibly mis-

172. Like-minded people often form groups on the basis of shared views. Conversely, dissension causes exit from a small group more easily than exit from an entire society. Even if random forces produce the evaluative beliefs of group members, small groups will exhibit more deviation than larger groups.

173. Very small groups can gather in one place and discuss an issue. Even for larger groups, gossip may be sufficient to permit each member to learn the common view of a particular behavior. The more interaction between members, the closer-knit the group, and the more opportunity for gossip. See McAdams, *supra* note 32, at 2244 n.21, 2288 n.133.

taken.¹⁷⁴ By definition, members of an individual's group have more information about the individual than do strangers, and thus the esteem of group members tends to matter a great deal more. Second, other things equal, the more an individual esteems another, the more she values the opinion the other holds of her.¹⁷⁵ Because people generally seek to interact with those they esteem, and often form groups because of common interests, an individual will value her group members' esteem more than the esteem of strangers.¹⁷⁶

Thus, the relative advantages that small, close-knit groups enjoy in enforcing norms make it possible for them to enforce norms that run contrary to the norms of society. Given the differences, groups should succeed more often than societies in enforcing their norms with material sanctions; societal norms will frequently reach equilibrium without material sanctions and enforcement will consist of a relatively weak esteem loss. The focus on esteem, however, provides a unified theory of group and societal norms, even where the norms exist in conflict.

* * *

By explaining how norms first arise, the esteem model clarifies the meaning and function of norms. The model unifies what appears to be disparate scholarship on group and societal norms, illuminates the relationship between concrete and abstract norms, and integrates the separate notions of internal and external sanctions. If the model succeeds, the primary gain should be to future

174. For two people A and B , let $v_{A/B}$ be the value that A places on B 's opinion of A and let $r_{B/A}$ be the relative rank that B accords to A . A 's utility from B 's esteem of A is a function of the product of these variables, $v_{A/B}(r_{B/A})$. The text points out that $v_{A/B}$ is likely to vary directly with the amount of information A believes that B has about A .

175. In the terminology of the preceding note, $v_{A/B}$ is likely to vary directly with $v_{B/A}$.

176. More generally, even though individuals seek high esteem in comparison to others, esteem is frequently a positive-sum and *not* zero-sum good. In other words, the total utility derived from esteem in society is not fixed; individuals can often produce more esteem utility for themselves than they take away from others. For example, individuals who value A 's opinion highly will invest more to gain her approval than those who value A 's opinion less. Those who invest less will lose relative standing in A 's judgment, but they will not care as much about the decrease as those who gained standing. As a second example, individuals who expect A to rank them highly, or who know that she already does, will interact more with A so that she will know them better and they will place greater value on her opinion of them — given the assumptions stated *supra* note 174 and accompanying text. Raising the value one places on A 's opinion benefits these individuals without affecting the esteem A grants other individuals or the value they place on her opinion. Social groups exploit both mechanisms for creating esteem: individuals seek to join groups with those they expect will grant them high esteem, and group interaction causes members to value the esteem of fellow members more highly. Thus, social groups might be analogized to firms for the production of esteem, a power that allows them to enforce powerful norms. For a description of when esteem competition is zero-sum, see McAdams, *supra* note 78, at 48-59.

research on particular law and norm interactions. There are, however, some immediate implications for law.

IV. REGULATING NORMS

Those who study law should study norms; one reason for this is that an important function of law is to shape or regulate norms. Understanding norm origin should provide insight into both how and why law might perform this function. Much of the new norms literature discusses how law might change norms, yet without a theory of origin — of the conditions that produce norms — it seems unlikely one could predict the effect of legal change on a given norm. Moreover, any justification for changing a norm is likely to be at least somewhat controversial. A theory of origin should help identify the conditions under which dysfunctional norms are likely to arise, conditions which may signal the need for legal intervention.

This Part addresses these matters in the following order. Section IV.A applies the esteem theory of origin to the general issue of norm change and in particular seeks to explain how *criticism* can produce norm change. Given this understanding, section IV.B explains in some detail how the state may strengthen norms through what is conventionally known as the “expressive” function of law. Because of inherent difficulties in publicizing a consensus across an entire society, the theory predicts the importance of symbolic legislation. The final two sections explore the “dark side” of norms. Section IV.C explains why esteem competition will produce previously unappreciated forms of norm inefficiency: unnecessary and “zealous” norms. Section IV.D suggests how law can impede such undesirable norms by protecting privacy.

A. *The Esteem Model and Norm Change*

Not so long ago in the United States, people smoked cigarettes virtually anywhere and disposed of their ashes and butts on the floors of public buildings.¹⁷⁷ Public mores condemned unmarried cohabitation, women expected and received the titles “Miss” and “Mrs.” according to their marital status,¹⁷⁸ and, at least in the

177. See William P. Nelson, Risk Talk, Rights Talk and the Social Production of Second-hand Smoke 12 (unpublished manuscript, on file with author) (“From the end of the [Second World] war through the early 1970s, American public space was undeniably smoking space.”).

178. In 1973, eighty-two percent of women and sixty-eight percent of men expressed a preference for these titles over the title “Ms.” 6 The Roper Center for Public Opinion Research, *People, Opinions & Polls: American Popular Culture*, PUB. PERSP., Aug./Sept. 1995, at

South, custom demanded that whites call blacks by their first names and accord them no titles of respect.¹⁷⁹ Today public opinion largely tolerates unmarried cohabitation,¹⁸⁰ restricts smoking and cigarette litter, and condemns those who overtly discriminate on the basis of race,¹⁸¹ and many young women expect and receive the title "Ms." whether married or not.¹⁸² Such changes are commonplace.¹⁸³ That norms can rise and fall in such a relatively short timespan is quite important to legal theory. At the least, legal analysis is more complex if one cannot assume the permanence of the background norms that influence individual behavior in combination with, or to the exclusion of, law. At most, legal innovation contributes — intentionally or not — to norm change.

The question is, once a norm has evolved to the point where there are secondary enforcement norms obligating individuals to enforce the primary norm, how does a group or society ever abandon the norm for a new behavioral standard? In this section I argue that sudden norm shifts are predicted by the esteem model of norms. I discuss two agents of change: fluctuations in enforcement costs and norm criticism.

37, 41 (1995) [hereinafter Roper Center]. Similarly, at one time, married women invariably took their husband's surname. See Esther Suarez, *A Woman's Freedom to Choose Her Surname: Is It Really a Matter of Choice?*, 18 WOMEN'S RTS. L. REP. 233, 234 (1997) (reporting that Lucy Stone in 1855 was the first American woman to keep her name after marriage and that courts frequently refused to recognize such efforts).

179. In other words, whites did not use titles such as "Mr.," "Mrs.," or "Reverend." See JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 181, 187, 346 (3d ed. 1957); NEIL R. McMILLEN, *DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW* 23-24 (1989).

180. See IRVING J. SLOAN, *LIVING TOGETHER: UNMARRIEDS AND THE LAW* at v-vi (1980) (reporting "increased social acceptance"); Matthew J. Smith, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1057-58 (1992) (noting sharp increase in numbers of unmarried cohabitants between 1960 and 1989).

181. See Lawrence Bobo, *Group Conflict, Prejudice, and the Paradox of Contemporary Racial Attitudes*, in *ELIMINATING RACISM* 85, 88 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988) ("A substantial majority of white Americans in 1942 approved of the blatantly discriminatory proposition that 'white people should have the first chance at any kind of job,' whereas in 1972 nearly 100% of whites in a national survey rejected that statement."). See generally HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* 71-138 (1985) (discussing trends in white racial attitudes between 1942 and 1983).

182. By 1993, the percentage of women preferring the terms "Mrs." and "Miss" fell to 52%, down from 82% 20 years earlier. The percentage for men fell from 68% to 46%. See Roper Center, *supra* note 178, at 41. Similarly, the number of women keeping their surname after marriage is rising. See Karen S. Peterson, *Married Moniker is a Matter of Choice*, USA TODAY, Aug. 28, 1990, at 5D; Suzanne Schlosberg, *Commitments in the Name of Love*, L.A. TIMES, May 22, 1995, at E3.

183. These large-scale social changes are matched by equally significant shifts within smaller groups such as neighborhoods, churches, and industrial organizations, not to mention entirely new collections such as internet newsgroups.

1. *Changes In Enforcement Costs*

If a norm is internalized by virtually everyone in the group or society, the possibility for *rapid* change is quite limited.¹⁸⁴ Cooter explains how sudden change can occur if many have internalized the norm but a large minority or small majority have not; all that is necessary is an abrupt change in the costs of enforcing the norm.¹⁸⁵ Where esteem competition produces a secondary enforcement norm with material sanctions, the same fluctuation can explain abandonment of such norms. Indeed, enforcement costs matter more directly to norms when all of the costs of violation are, for everyone, entirely external. If enforcement costs rise above the value of the esteem one loses by refusing to enforce the primary norm, the secondary enforcement norm will unravel. There may still be a weak primary norm if everyone knows they will be less esteemed for behaving contrary to the norm; but the norm may be dramatically weaker.

For example, a community may enforce a norm against abortion. For many in the community, the norm is internalized. But assume that external enforcement is still necessary because some women have not internalized the norm and others who have internalized it would get an abortion — despite the attendant guilt — under certain circumstances that may arise.¹⁸⁶ To deter these women, the community informally monitors who visits a local family planning clinic and sanctions those suspected of abortion. The external sanctions work and the abortion rate is nearly zero.

Now suppose the availability of a new drug like RU-486 allows women to obtain abortions with visits to their regular doctor rather than a clinic, which in turn, raises substantially the cost of detecting

184. Where guilt afflicts everyone, there may be virtually no need for external sanctions, and thus changes in the level of external sanctions will not produce any immediate change in behavior. If a norm originally arose as a result of external sanctions, and over the generations the norm is internalized by virtually everyone, it is possible that a sharp rise in enforcement costs would *eventually* eliminate the norm. This might happen because the few who had not internalized the norm now find they can violate it with impunity. Their impunity may gradually lower the psychological commitment others feel for the norm. But because internalization takes time, such an unraveling would also take considerable time.

185. See Cooter, *supra* note 14, at 1669-75. In Cooter's model, an individual who has internalized a norm is willing to bear small, but only small, costs to enforce it against those who have not internalized the norm. Thus, if a norm is internalized when enforcement costs are low, external shocks may raise the cost of enforcement above the point some people are willing to bear. They will cease enforcing the norm. With fewer enforcing the norm, the per-person costs of enforcement rise again, possibly causing more individuals to drop out of enforcement efforts. A rapid and significant change in enforcement costs could then produce a rapid abandonment of the norm.

186. The fact that people have internalized a norm does not mean they never violate it, but only that they bear an internal cost when they do.

an abortion.¹⁸⁷ The expected loss of esteem would fall, potentially to the point where it no longer deterred anyone from seeking a pill-induced abortion. If the community generally comes to believe that many unidentified women have used a pill to secure an abortion, the disesteem given to women who are known to have aborted a pregnancy (because they go to an abortion clinic) will then be spread over a larger group. The feedback effect of decreased compliance will lower even the esteem sanction for women whose abortions become publicly known. The group's anti-abortion norm might entirely unravel.¹⁸⁸

2. Norm Criticism

Criticism seems to play an important role in norm change. Sunstein, for example, observes the existence of sudden and dramatic norm changes — “cascades” — brought about by “norm entrepreneurs,” opinion leaders who explicitly aim to shape norms. He cites as examples the sudden “use of the term ‘liberal’ as one of opprobrium,” the abrupt abandonment of affirmative action, and “the rise of the feminist movement.”¹⁸⁹ If norms were enforced only by those who have internalized them, as Cooter claims, criticism of norms should not have this effect. Those who accept a norm to the point where violating it makes them feel guilt are not likely to be receptive to norm criticism. Even if they were, the change should

187. As used to induce an abortion, RU486 consists of “three 200 mg. tablets of mifepristone . . . followed two days later by an injection or suppository of progesterone,” the combination of which causes “the lining of the uterus to dissolve, resulting in an aborting menstruation.” Adele Clarke & Theresa Montini, *The Many Faces of RU486: Tales of Situated Knowledge and Technological Contestations*, 18 *SCI. TECH. & HUM. VALUES* 42, 46 (1993). I say “suppose” RU486 raises the cost of detecting abortions because there are many uncertainties about the actual effect of the drug. First, as currently contemplated, the use of RU486 requires as many medical visits as a surgical abortion. See *id.* at 46-47. Thus, any privacy advantage would have to come from the fact that visiting a doctor's office instead of a clinic provides far more ambiguous evidence of one's purpose. Second, RU486 is “claimed to be safe for abortion only if used up to about the eighth week of pregnancy.” *Id.* at 46. Thus, in the United States, about half of current abortions could be performed by RU486. See M. Klitsch, *Antiprogestins and the Abortion Controversy: A Progress Report*, 23 *FAM. PLAN. PERSP.* 275, 277 (1991). Notwithstanding these limitations, antiabortion groups appear to fear RU486, in part, for its ability to make abortions more private. See Clarke & Montini, *supra*, at 57 (“[T]he Vatican is reported to have said that ‘a way of killing with no risk for the assassin has finally been found.’”).

188. The example suggests other ways in which monitoring costs affect norms. For example, the fewer the sites for obtaining an abortion in a given area, the easier it is to monitor all abortions. Thus, an increase in the number of abortion clinics or the availability (including affordability) of abortions in general hospitals could also raise the costs of enforcing anti-abortion norms.

189. Sunstein, *supra* note 11, at 912; see also Posner, *supra* note 72, at 6-9 (discussing norm entrepreneurs and norm change). Note that Sunstein seems to imagine norms arising *without* a unanimously expressed view, as is required by Cooter's model. See *supra* text accompanying note 146.

occur only gradually, as criticism slowly loosens the emotional hold the norm has on those who have internalized it.¹⁹⁰ Some other mechanism is needed to explain how norms rise and fall in response to criticism.

The esteem model explains two ways that criticism can produce rapid norm change. Most simply, criticism may provide new information that changes the underlying consensus. A person may esteem behavior *X* because she believes certain facts about *X*; perhaps she believes she benefits as a consequence of others engaging in *X*. If so, demonstrating the falsity of her factual beliefs will undermine the consensus and the norm.¹⁹¹ If the new information circulates quickly, it will lead to very sudden changes in esteem-based norms.

The distinction between abstract norms, which are often internalized, and concrete norms, which are often not internalized, further illuminates the point. Individuals commonly understand and justify concrete norms by reference to abstract norms: "I keep my mouth shut because I am a 'loyal friend'"; "I piled sand bags on the flood wall because I wanted to do 'my share.'" When that is the case, there is a built-in standard for evaluating the concrete norm: Does it genuinely serve the abstract norm? If the critic can show that it does not — that despite the concrete norm, recycling actually harms future generations, or that enabling friends to drive while intoxicated endangers the friend to whom one is loyal (and by endangering others in the community, undermines a commitment to be a "good citizen") — then her criticism will change the norm. Here the "information" the critic supplies need not be factual data,

190. People do not develop internal guilt-driven commitments overnight. The same is presumably true of *disinternalization*, the process by which people abandon their emotional commitment to a norm. Beliefs can change instantly, but guilt inclinations cannot. If so, norm criticism should not have any rapid effect on the willingness of those who have internalized the norm to follow or enforce it.

As previously stated, Cooter's internalization model can account for rapid norm change based on abrupt exogenous changes in enforcement costs. See *supra* note 185. He notes that among the costs of enforcing a norm is the fact that "[t]he person who spontaneously punishes someone . . . usually runs some risk of confrontation or revenge." Cooter, *supra* note 14, at 1670. The risk of confrontation depends on the number of people who have internalized the norm; the risk "fall[s] as the proportion of people willing to act as punishers increases." *Id.* But if the norm is enforced only by those who have internalized it, there is no obvious reason why criticism should affect the number of people enforcing the norm, and thus the costs of enforcement. At least, there is no reason for criticism to work quickly.

191. This is not to say that criticism will easily change people's views even when they are false. When possible, people tend to interpret information in a manner that sustains their existing beliefs. See *infra* note 210. But if the contrary evidence is sufficiently powerful or dramatic, people cannot interpret it away, and the norm will change.

but may be a more powerful analysis of the relationship between concrete behavior and the abstract norm.

Second, criticism can cause rapid norm change by revealing new information about what the consensus actually is. This point follows from the distinction between two norm conditions: the existence of a consensus and knowledge of the consensus. If there were perfect information about a consensus, then sudden norm change could occur only with a sudden change in the consensus. But given the possible disparity between the *actual* and the *perceived* consensus, there can be rapid norm change even if the actual consensus remains constant. For example, suppose the consensus tolerates behavior *X* — most individuals neither approve nor disapprove *X* — but most people falsely believe the consensus condemns *X*. This norm is highly unstable, depending on continued misperception of the true consensus. Criticism may induce a new discussion of the behavior that provides that information, quickly revealing the true nature of the consensus.

Of course, if criticism were always immediately forthcoming, the resultant norm change would not be very dramatic because there would never be a significant gap between the actual and perceived consensus. But criticism is not always readily provided. The problem is that a norm critic often incurs costs by challenging the prevailing view. Hence, when individuals privately disagree with a norm, they often publicly pretend to support it.¹⁹² The norm may grow increasingly unstable, until criticism supplies the occasion for large numbers of people to admit their true beliefs and discover that the actual consensus is not what they had thought.¹⁹³

192. See Lessig, *supra* note 11, at 997-99; McAdams, *supra* note 32, at 2259; Posner, *supra* note 102, at 1718.

193. This analysis is substantially clarified, however, by distinguishing between group and societal norms. The too-little-criticism story fits best with group, not societal, norms. Close-knit groups enjoy various advantages over societies in enforcing norms, *see supra* text accompanying notes 172-76, and are therefore more likely to be accompanied by powerful secondary enforcement norms. Under these circumstances, one who disagrees with her group's norm has a real reason to withhold her criticism.

Societal norms, however, tend to be weaker, allowing groups to sustain norms contrary to societal norms. *See supra* text accompanying notes 172-76. Accordingly, there is usually some group willing to criticize openly and vigorously any societal norm. In this setting, "too much" criticism can produce the same norm instability as "too little," creating the same potential for rapid change. That nearly every norm has critics makes it easy for individuals to discount criticism as that of a small, noisy, and radical group — the "extremist element." Norm supporters often succeed at portraying critics as unrepresentative of the "mainstream," even when support for the norm is genuinely eroding. Thus, individuals who oppose the norm may continue to feign support for it. The disparity between the consensus and the perceived consensus may make the norm highly unstable, subject to significant change should the error in perception be corrected.

I defer discussing examples until later, when I address ways in which the law can exploit norm instability. For now, note how the analysis supports the liberal value of tolerance. The First Amendment restricts the state's ability to punish dissent. To some degree, norms of tolerance similarly obligate private actors to withhold punishment from those who speak against, but do not violate, a norm.¹⁹⁴ This tolerance is not only important in the political arena to facilitate an open debate about governmental decisions. Tolerance is also important to allow criticism to influence group and societal norms. First, criticism may point out new facts or perspectives that persuade individuals to change their evaluative assessments and thereby change the consensus underlying a norm. Second, criticism may reveal that the perceived consensus differs from the actual consensus, thereby changing the norm to fit the consensus. Tolerance norms, both legal and social, make it possible for critics to challenge existing norms continuously; by putting subjects on the "public agenda," the consensus is measured and remeasured. Tolerating dissent thus increases the odds that any poorly informed or improperly perceived consensus will be detected and eliminated.

In sum, esteem-based norms are less stable than internalized norms. Sunstein's claim that norm criticism can cause "norm cascades" is not in tension with Cooter's claim that norms are internalized: it is simply the *non*internalized esteem-based norms that criticism can change quickly.

B. *Facilitating Efficient Norms: The Expressive Function of Law*

By whatever normative criteria one uses, some group and societal norms are desirable and some are not. Sometimes norms are the cure; sometimes the disease. In the next sections I discuss how esteem competition produces inefficient norms and what the law can do to weaken such norms. For now, assume we identify a "good" norm. One important question is what the state might do to strengthen such a norm. The obvious answer is that the law can strengthen a norm by imposing sanctions on those who violate it. Less obviously, however, the law can strengthen a norm merely by

194. A strong tolerance norm might permit individuals to criticize but not violate the norm. A weak tolerance norm might still permit an individual to question the norm without disapproval, as long as she relents and endorses the norm if her criticism fails to persuade others. Even this limited privilege of dissent would work to moderate norm enforcement if most people already secretly believed the norm was dysfunctional and if the criticism spread quickly enough. But sometimes secondary enforcement norms obligate intolerance of norm critics. Some groups will punish any criticism of their norms and virtually all groups have some norms — taboos — for which they tolerate no criticism.

“expressing” it, without providing any enforcement. In this section I follow other theorists in contending that law can strengthen esteem norms by expressing them and, further, that norms help to explain how the “expressive” function of law works. In particular, the esteem model of norm origin clarifies how legal expression matters.

That law has an “expressive” or symbolic function is an old idea.¹⁹⁵ This view resists the simple claim that law directs behavior only because the state inflicts a cost on violators. Of course, law alters behavior when the state threatens to enforce its rules, at least ultimately, by force. But law also expresses normative principles and symbolizes societal values, and these moralizing features may affect behavior. Under this view, for example, criminal punishments do not merely state *prices* for prohibited behaviors. Rather, as *sanctions*, punishments express society’s condemnation of the behavior.¹⁹⁶ Demanding a price means that the behavior is deemed acceptable so long as the price is paid; imposing a sanction expresses that a behavior is unacceptable even for one willing to incur the sanction. By expressive function of law, I mean that the distinction between prices and sanctions affects behavior: that imposing a given cost on behavior actually deters more if the law imposing the cost expresses condemnation of the behavior.¹⁹⁷

This claim, however, is vague. How exactly does legal condemnation affect behavior, other than by threat of sanctions? A good explanation must avoid two overly simple answers: (1) that people feel an internalized duty to obey the law, whatever its content; or (2) that people feel guilt violating a law that states an obligation they have already internalized. The first answer is undoubtedly true to some degree; some people feel guilt when violating any law.¹⁹⁸ But if that were the only explanation for the law’s expressive function, it would imply that any law is as successful on that score as any other law, which is surely false because some people feel no guilt for failing to obey a law they think is unwise or unjust. The second answer superficially ties the expressive function to the

195. See, e.g., Johs Andenaes, *General Prevention — Illusion or Reality?*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 176, 179-80 (1952); Nigel Walker & Michael Argyle, *Does the Law Affect Moral Judgments?*, 4 BRIT. J. CRIMINOLOGY 570, 570 (1963-64).

196. See Kahan, *supra* note 36, at 593; see also Kenneth G. Dau-Schmidt, *Legal Prohibitions as More than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, in LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES 153 (Robin Paul Malloy & Christopher K. Braun eds., 1995).

197. Whether a legal sanction expresses condemnation is a complex matter, but criminal laws enforced by prison terms generally do. See Kahan, *supra* note 36, at 621.

198. See TYLER, *supra* note 114, at 37.

content of the law. But if law breaking invoked guilt only when the individual had already internalized the substantive obligation — when she thought the behavior was “wrong” before it was illegal — then legal condemnation would have no independent moralizing effect. The law would add nothing but the threat of punishment.

Recently, several theorists have suggested that the expressive function of law works by affecting norms.¹⁹⁹ If law expresses the community’s adherence to a norm, law may affect behavior by strengthening the nonlegal enforcement of the norm. Perhaps the law’s expression of a norm even induces some individuals to internalize the norm. Thus, these theorists contend, in effect, that legal expression influences behavior by influencing norms. Paul Robinson and John Darley make these claims about the criminal law: when a statute fits sufficiently with existing retributive norms defining who deserves punishment, it is perceived as “just” and then “nurtures” those norms.²⁰⁰ Criminal legislation and enforcement influences “what the social group thinks” by sending “messages” about the existence and content of the norm.²⁰¹ Further, when criminal law speaks with “moral credibility” or legitimacy about issues of right and wrong, it influences “what its members internalize.”²⁰²

Robinson and Darley provide what is, to date, the most comprehensive social science account of law as a norm-shaping tool.²⁰³ But they too fail to supply some important details about norm governance. Robinson and Darley are adamant that law cannot create new norms but only nurture existing ones.²⁰⁴ But if public support predates the criminal law, which is also generally required by our political system, then how does legislation *add* to the public support

199. See Huang & Wu, *supra* note 40, at 404 (“[T]he route by which laws create and maintain order is through the creation or alteration of social norms. . . . [O]ur thesis is that decentralized order is accomplished by internalizing as social norms those laws that are just and perceived to be fair.”); Lessig, *supra* note 11, at 1012-14; Robinson & Darley, *supra* note 26, at 471 (“Criminal law in particular can influence the norms . . . that are internalized by the individual. Criminal law’s influence comes from being a societal mechanism . . . by which the force of internal moral principles is strengthened.”); Sunstein, *supra* note 34, at 2031 (asserting that the law’s stand for or against a given behavior affects the strength of norms for or against that behavior, as the prohibition of public smoking and organ selling may strengthen norms restricting smoking and the uses of money).

200. See Robinson & Darley, *supra* note 26, at 471-77. Their overall project is to supply a utilitarian justification for basing the criminal law on the principles of just deserts actually held by the public.

201. See *id.* at 471-74.

202. See *id.* at 471, 474-76.

203. Their account is based on social psychology, not economics.

204. See Robinson & Darley, *supra* note 26, at 473.

for the norm it embodies?²⁰⁵ Without a general theory of societal norms, it is difficult to say in detail how the law affects such norms.

If the esteem theory is correct, it suggests two specific ways that statutes create and strengthen norms: (1) lawmaking publicizes a societal consensus, and (2) law provides the concrete norms that define compliance with internalized abstract norms.

1. *Overcoming the Publicity Barrier: How Law Signals a Consensus*

The esteem model predicts that many in society may remain ignorant of a consensus. Law can communicate to these individuals the esteem consequences of their behavior.

The publicity barrier. The determinative obstacle to societal norm formation is frequently the fact that a consensus is not well known. Recall that one essential condition for an esteem-based norm is the *publicity* of the consensus regarding the esteem worthiness of a behavior.²⁰⁶ Absent publicity, individuals will not perceive the consensus and it will not create the expected costs or benefits to behavior necessary to produce a norm. When the group at issue is very large — for example, the population of an entire society — the publicity condition can be quite difficult to satisfy. Obviously most individuals cannot directly poll even a large fraction of everyone else in society. Nor can one obtain through gossip the immense quantity of data such opinions represent. Sometimes people attempt to infer society's views from the relatively small group of people they know. If the actual consensus is very strong, then this technique will probably work. Suppose ninety-five percent of society believes that letting one's dog run unleashed or playing loud music in public is socially irresponsible behavior deserving disapproval. No matter what an individual is inclined to believe, with a consensus so strong, she is likely to realize that she encounters many people who think such behaviors merit disapproval for every individual who is indifferent or thinks they are worthy of esteem.

If the consensus is weak, however, — say, only fifty-five percent — then casual observation is not likely to detect it. The relatively few people an individual knows will only rarely be statistically rep-

205. Robinson and Darley say that public debate "educates" the public and strengthens the "shared public understanding." See *id.* at 472, 476. But they remain vague about exactly how this occurs. One would not expect, for example, that losing the debate causes the opponents to change their minds.

206. See *supra* text accompanying notes 101-08.

representative of the entire society.²⁰⁷ If people were no more likely to underestimate than to overestimate the consensus — if the error were randomly distributed — then the average belief would still match the actual consensus. But the error is not random. People tend to find reinforcement of their own views in the views of their peers because they associate disproportionately with like-minded individuals²⁰⁸ or they selectively interpret information to validate their existing views.²⁰⁹ The result, according to psychologists, is that people have an exaggerated sense of the typicality of their views, a bias aptly named the “false consensus” effect.²¹⁰ Thus, for issues that closely divide society, it is entirely possible that those in a large minority can easily believe that they are in a small majority. When everyone in society can believe they are in the majority on an issue, the desire for esteem will frequently produce only a weak norm, if it produces any norm at all.

For example, if fifty-five percent of the population believes recycling is commendable and *all* of this group recycles, there may be a weak recycling norm. But the norm is not likely to evolve and strengthen in the ways described in Part II if those who oppose recycling believe they are in the majority. This group perceives a lower esteem gain from recycling than actually exists and might

207. See Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 *PSYCHOL. REV.* 237 (1973).

208. See BERNARD R. BERELSON ET AL., *VOTING* 83 (1954); R. ROBERT HUCKFELDT & JOHN SPRAGUE, *CITIZENS, POLITICS, AND SOCIAL COMMUNICATION: INFORMATION AND INFLUENCE IN AN ELECTION CAMPAIGN* 46-50 (1995).

209. See THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 49-72 (1991); DAVID PEARS, *MOTIVATED IRRATIONALITY* 41-66 (1984); JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* (1992).

210. “The false consensus effect refers to the tendency for people’s own beliefs, values, and habits to bias their estimates of how widely such views and habits are shared by others.” GILOVICH, *supra* note 209, at 113. In one study, for example, university students were asked if “they would be willing to walk around campus wearing a large sandwich-board sign bearing the message ‘REPENT.’” *Id.* at 114 (describing L. Ross, et al., *The False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 *J. EXP. SOC. PSYCH.* 279 (1977)). After stating their willingness or unwillingness, they were asked to estimate the percentage of students who would agree to do the same. On average, “[t]hose who agreed to wear the sign thought that 60% would do so,” but “those who refused thought that only 27% would agree . . .” *Id.*

Psychologists attribute the false consensus effect to both cognitive error and motivational bias. The cognitive error arises when one generalizes from personal experience, which is based primarily on one’s acquaintances and friends — people who tend to be disproportionately like oneself. See Steven J. Sherman et al., *The False Consensus Effect in Estimates of Smoking Prevalence*, 9 *PERSONALITY & SOC. PSYCHOL. BULL.* 197, 198 (1983). The motivational factor is that “[b]y distorting consensus in a way that makes one’s own judgements and behaviors appear relatively more common, one can feel that one’s choices are valid, appropriate, and reasonable.” *Id.* See generally GILOVICH, *supra* note 209, at 112-22 (reviewing psychology literature); Gary Marks, *Thinking One’s Abilities Are Unique and One’s Opinions Are Common*, 10 *PERSONALITY & SOC. PSYCHOL. BULL.* 203 (1984).

even perceive that no esteem gain exists because they believe that a sufficient number of their group regards recycling negatively — for being a foolish or trendy waste of time — rather than neutrally. Thus, the weak norm may remain in equilibrium. Even this outcome is optimistic. Imagine that some of the fifty-five percent who believe recycling is commendable nonetheless fail to recycle — for them the costs of recycling still outweigh the esteem benefits. Quite possibly, then, there is no norm at all: most people do not recycle despite a narrow consensus that such behavior merits esteem. Given the relative values of esteem and costs of recycling, this result could hold even when a strong norm would have emerged if there were sufficient publicity of the existing consensus. In sum, lack of publicity will often be a determinative obstacle to societal norm formation.

Signaling a Consensus. Law can overcome this barrier.²¹¹ In a democratic society, the process leading up to and including the enactment of legislation can publicize the existence of a societal consensus. In the push for legislative action, an accurate counting of opinion matters. Legislators care what their constituents think about the conduct at issue. Their decision to enact or not to enact legislation, as reported through the media, declares to the public a winning side, usually consistent with what the electoral majority wanted.²¹² Legislative conduct may thus provide unmistakable evidence of a consensus. Provided that the other two conditions for norm formation are present (inherent risk of detection and awareness of that risk), publicizing that most people disapprove of a certain behavior will create a new expected cost to acting in violation of the (previously unknown) consensus.²¹³ In short, legislation is a

211. I do not mean to imply that *only* law can publicize a consensus. Even in a pluralistic or fragmented society, public education and mass media — including, at the simplest level, news reports of polling data — will sometimes work to publicize an underlying consensus. In a society with little or no written language, a ritualized song may provide the publicity necessary to create or enforce norms. See Geoffrey P. Miller, *The Song of Deborah: A Legal-Economic Analysis*, 144 U. PA. L. REV. 2293, 2294 (1996) (claiming that the biblical Song of Deborah was probably “an oral recollection, in a kind of intertribal account book, of how different groups complied with a norm of mutual support” in a loose military alliance, and that its poetic form aided memorization). My claim is only that all mechanisms are imperfect and that in some contexts, law can significantly and suddenly increase awareness of a societal consensus.

212. Caveats are noted below. See *infra* text accompanying notes 214-16.

213. There is evidence that any publicity has this effect. Educational campaigns work to change behavior even when the only information conveyed is social disapproval. For example, one study found that an antilittering campaign that sought to evoke shame and embarrassment increased compliance with antilittering laws, though legal sanctions remained the same. See Harold G. Grasmick et al., *Shame and Embarrassment as Deterrents to Noncompliance with the Law: The Case of an Antilittering Campaign*, 23 ENV'T. & BEHAV. 233 (1991). Another series of studies found that merely reminding an individual of an antilittering norm

signal of consensus. The signal may provide the missing ingredient for norm formation.

Of course, legislation often fails to represent a consensus. In a representative democracy, majority electoral support is neither a necessary nor sufficient condition for enacting legislation.²¹⁴ Certainly the public perceives that “special interests” prevail all too often, particularly in Congress. Further, the public learns of legislative activity primarily through media; if the media does not sufficiently cover an enactment, the law will not publicize a consensus. These complications and others mean that law only sometimes can create or strengthen a norm. But that is precisely the point. The expressive function of law does not always work, and the esteem theory identifies the conditions under which it will. When the media widely covers a legislative battle and the public perceives that the outcome is dictated largely by popularity,²¹⁵ the resulting enactment provides convincing evidence of a societal consensus.²¹⁶ When the condition of publicity is lacking, but the other norm conditions are present, lawmaking provides the jolt necessary to create a new norm, or strengthen an old one. After signalling a consensus,

significantly decreased the amount of littering. See Robert B. Cialdini et al., *A Focus Theory of Normative Conduct*, 24 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 201 (1991). In one of these studies, when flyers were placed on cars, subjects were significantly less likely to toss them on the ground when the flyer contained an antilittering message than when it contained a pro-museum message. See *id.* at 216-17. In another study, subjects who saw a person pick up a piece of refuse that was not her own and dispose of it properly were significantly less likely to litter than were members of the control group. See *id.* at 222-23.

214. Given the number of nonvoters, majority electoral support need not represent a majority consensus of adult Americans.

215. A majority opinion is not essential. See *supra* note 89. Intensity of preference also matters to esteem. If only 40% oppose certain conduct, that could produce an esteem norm if the 40% thought the conduct utterly abominable, while 55% were indifferent, and only 5% weakly approved it. For this reason, the existence of legislative logrolling — where legislators trade away votes on matters they care less about for votes on matters they care more about — does not work against the publicity theory of law proposed here. The law’s passage may represent a victory for a minority, but if the law demonstrates the preference intensities of the sort just described, it could still provide the publicity needed for a new norm.

This point illustrates another reason why legislation serves as a powerful signal. Those in the minority may dismiss polls if the polls do not measure intensity of belief concerning a behavior. But when polls do report intensity along some scale, the complexity of the results makes it difficult to determine the net effect of the behavior on the esteem one would receive. Legislation is sensitive to intensity of opinion, but a legislative ban is not so difficult to interpret. Legislation translates the complex poll into a simple directive.

216. Indeed, if “special interests” are associated with one side of a legislative struggle, a victory against them sends a more powerful signal of consensus. Thus, antismoking legislation may signal disapproval of smoking with particular clarity and intensity, because it is perceived that the tobacco industry would have prevailed absent a strong consensus against their interests.

esteem competition may produce a norm through the mechanisms described in Part II.²¹⁷

Consider, for example, antismoking ordinances.²¹⁸ The esteem theory explains how these laws strengthened norms against public smoking. At one time, American society rewarded cigarette smoking with a minor degree of status and tolerated smoking in virtually any setting. Because smoking was regarded either positively or neutrally by most Americans, few expressed objections to smoking in public, and those who did appeared to be rudely insisting on an idiosyncratic sensitivity. Over time, sentiment about public smoking changed, as fewer people smoked²¹⁹ and more people came to view smokers as unhappy addicts and to consider second-hand smoke dangerous.²²⁰ At some point, a majority of the population came to disapprove of smoking in certain public places.²²¹

For antismoking norms to arise, however, individuals had to recognize this shift in attitudes. Quite likely, because the shift was

217. Where cases or statutes are not well suited to publicize a consensus, however, there is little weight to criticisms or defenses of the law based on what it may *mean* to people. For this reason, some arguments about the symbolic effects of law are overstated. The signal sent by state actors using peremptory challenges based on gender, for example, is more ambiguous than claimed in *J.E.B. v. Alabama*, 511 U.S. 127, 140-142 (1994). In *J.E.B.*, the majority of the Court, in holding such peremptories unconstitutional, said they would send a "message" "ratify[ing] and reforc[ing]" gender stereotypes. Whatever the merits of the ruling, this particular claim is questionable given that most of the public is never aware of the details of jury selection and most courtroom observers probably cannot distinguish between the exercise of for-cause and peremptory challenges. Even if people recognize that a state lawyer is using a peremptory challenge in this manner, there is no reason to assume that they will view this *individual's* conduct as new evidence of a consensus approving gender stereotypes. At least, the basis for such an inference is far weaker than when a legislature acts.

There are arguments in response to each of these claims, and other arguments in support of *J.E.B.* My point is simply that not all symbolic arguments are equal and the esteem theory helps to distinguish weak from strong claims. Contrast, for example, the unambiguous symbolism reviewed in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (holding unconstitutional state support of male-only military school), and *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) (holding unconstitutional state support of female-only nursing school). Excluding one gender from training for a role traditionally occupied by the other is very likely to publicize gender stereotypes and support related norms because the entry requirements for public schools are well known.

218. Smoking norms are much discussed of late. See Bernstein, *supra* note 26, at 175-77; Cooter, *supra* note 14, at 1674-75; Sunstein, *supra* note 34, at 2034-35.

219. The percentage of Americans who smoke fell from 42% in 1955 to 26% in 1991. See *Smoked Out*, *ECONOMIST*, Mar. 26, 1994, at 29, 29.

220. See generally *SMOKING POLICY: LAW, POLITICS, AND CULTURE* (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

221. According to a Bureau of National Affairs Study, the percentage of businesses banning indoor smoking on the job rose from 2% in 1986 to 34% in 1993. See *Smoked Out*, *supra* note 219, at 30. In February 1993, McDonald's began prohibiting smoking at all of its 1400 wholly owned restaurants; by March, one-third of its 7700 franchises and several competitors had followed suit. See *id.* at 29. The proportion of Americans supporting a *total* ban on smoking indoors doubled from 1983 to 1993, when the number reached 35%. See *id.* at 29.

gradual, smokers did not detect the new consensus when it first arose. Particularly for those who began the habit when it was widely accepted, only compelling evidence of attitude change would convince them of the new consensus.²²² Of course, if individuals in the new majority consistently confronted public smokers with their complaints, their large numbers would provide the necessary evidence. But even nonsmokers who were part of the new consensus may have remained uncertain of how third parties would perceive their request that someone stop engaging in a still common, and commonly tolerated, behavior. Before the new consensus was publicized, the first to speak out against the old consensus risked censure. Thus, even after the consensus changed, absent publicity, smokers perceived no esteem loss from public smoking and third parties continued to interpret requests to stop as rude.

With this background, we can understand how antismoking laws worked.²²³ Local and state legislative victories — especially against a well-financed tobacco lobby — signalled a new consensus: that cigarette smoke is annoying and dangerous, and exposing others to smoke is offensive and antisocial. Legislation provides the kind of compelling, if not jarring, evidence of attitude change that is difficult for the smoker to ignore. The next time a person in a public area asks a smoker to desist, the smoker is far more likely to infer that strangers around her will disapprove of her refusal and not of the nonsmoker's request. Conversely, because nonsmokers are likely to make the same assessment, they are more likely to make such requests. Over time, smokers will predict that smoking in public is so likely to lead to an objection that they do not even test the issue. Initially, the effect might be limited, but as more smokers comply with requests to stop smoking and as more smokers comply without a request, those who persist in smoking receive a greater share of the disapproval, making it increasingly costly to hold out. To some degree — I would guess a substantial one — the law is self-enforcing.²²⁴ Or, more precisely, the law strengthens a norm to the point where most of the enforcement is informal.

222. Smokers would likely interpret the evidence they encountered (complaints) as being consistent with their current beliefs that complainers are hypersensitive or rude, especially for those who disproportionately associated with other smokers or with nonsmokers of the same generation.

223. They do work, largely without legal enforcement. See Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY*, *supra* note 220, at 69, 71-76.

224. Kagan and Skolnick make this point, at least as applied to nonsmokers:

[F]ormal rules serve an important *communication* function, overcoming the familiar problem of pluralistic ignorance and inaction. Even if, in 1983, most nonsmokers (and

The esteem theory thus explains at least part of the expressive function of law. Not surprisingly perhaps, other norms scholars, including Cooter, use the smoking example, also to suggest that anti-smoking laws work informally to deter public smoking even without state enforcement. Yet Cooter's theory does not really explain this result. He observes:

Officials almost never enforce these rules [against smoking in public buildings.] The posting of the ordinances, however, apparently causes citizens to enforce the rules against violators. Knowing this, most smokers conform to the rules. . . . [E]nactment of the anti-smoking ordinance lowered the perceived cost of confrontation in complaining to smokers, which . . . caused the system to tip into a new equilibrium with a higher level of conformity.²²⁵

Even as Cooter describes it, the role of internalization in this change is unclear or nonexistent. First, there was nothing like a *unanimous* consensus of opinion or expression of opinion about public smoking before or immediately after enactment of the laws he discusses, so the example does not easily fit within his theory of the internalization process.²²⁶ Even if there had been such consensus, it remains unclear in his account why a change in the law is also necessary, or even helpful, to bring about internalization.²²⁷ Finally, Cooter does not answer the fundamental question of why complaining is a cost, or at least why it is sufficiently costly that, absent a statute, those who do not wish to be exposed to second-hand smoke would not complain.

many smokers) favored restrictions on smoking in the workplace . . . individual nonsmokers may not have realized the *extent* of support for such rules, and hence may not have felt emboldened to complain directly to smokers. The enactment of ordinances and workplace rules told nonsmokers that they had a *right* to breath air that was free of smoke.

Id. at 86.

225. Cooter, *supra* note 14, at 1674-75. His other example concerns a "pooper-scooper" law requiring dog owners to clean up after their dogs. "Enactment of the law clarified vague social norms concerning courtesy. After the law's passage, people became more aggressive about enforcing what common courtesy demands. Apparently it is easier to say 'Obey the law' than to say 'Don't be so rude.'" *Id.* at 1675. As explained in the text, however, the crucial change is not merely being able to say "obey the law," but that the change in law makes it easier to say "don't be so rude."

226. See Cooter, *Structural Adjudication*, *supra* note 72, at 224 (claiming that internalization follows "unanimous endorsement" of a particular behavior). Perhaps he imagines a universal consensus just among nonsmokers: nonsmokers became more willing to bear costs to enforce the norm, and with more of them enforcing the norm, the per-person enforcement costs fell. But there was not a universal consensus even among nonsmokers before the non-smoking ordinances became common. See Kagan & Skolnick, *supra* note 223, at 82 (reporting that in 1985, 85% of nonsmokers and 62% of smokers agreed that smokers should "refrain from smoking in the presence of nonsmokers").

227. Nor is it clear why some statutes seem more effective than others at producing non-legal enforcement.

The esteem theory helps to explain Cooter's example. The cost of complaining is an esteem cost — one cares how the recipient of the complaint and third parties are likely to react. The lack of a universal consensus is precisely why the statute is helpful in producing the norm: without an ordinance, the consensus was sufficiently weak that people were in doubt as to its existence. The change in law did not immediately cause internalization, but it did immediately reveal the true nature of the consensus, signaling the negative esteem consequences of public smoking. Because the ordinance informs those inclined to complain how most people view the matter, the esteem costs of complaining are lower.

2. *Using Law to Evokè Guilt: Tapping into Abstract Norms*

Publicizing a consensus will not, by itself, cause individuals to feel guilt from violating the law. Yet Robinson and Darley are surely right that criminal law sometimes causes people to feel guilt from violating obligations they had not internalized prior to enactment of the law.²²⁸ Does the esteem theory explain how law can produce this motive for compliance? I believe so. If the law publicizes a consensus that certain behavior is required in order to comply with an abstract internalized norm, then violating the concrete (legal and esteem-based) obligation will produce guilt.

As an example, consider legislation requiring parents to use child safety seats when transporting children in automobiles.²²⁹ One may reasonably doubt that these laws induce private, informal enforcement as the smoking bans do. The persons who gain from parental compliance with the legislation — young children — are not likely to complain more because the state passes a law.²³⁰ The expressive function can still work, though in a different way. Recall my claim that violation of noninternalized norms may elicit guilt if those norms give substantive meaning to abstract, internalized obligations.²³¹ One social role many in our society internalize is that of

228. They claim that criminal law, if morally credible, causes individuals to internalize the law "at the borderline of criminal activity, where there may be some ambiguity as to whether the conduct really is wrong." Robinson & Darley, *supra* note 26, at 475-76. They give examples such as insider trading, drunk driving, and exceeding the speed limit. *See id.* at 476. The claim is that individuals defer to law's judgment that these behaviors are immoral.

229. *See, e.g.*, CAL. VEH. CODE § 27360 (Deering 1996), amended by Act of July 28, 1997, ch. 153, 1997 Cal. Legis. Serv. 153 (West); FLA. STAT. ANN. § 316.613 (West 1996); MONT. CODE ANN. § 61-9-420 (1995), amended by Act of April 29, 1997, ch. 431, 1997 Mont. Laws 431.

230. Moreover, whereas public smoking is observable to many third parties, most of whom also may be adversely affected by the smoke, a significantly fewer number of people will notice or care much about other parents' compliance with child safety seat legislation.

231. *See supra* text accompanying note 158.

“parent”; many feel guilt if they believe they fail to be a “good” mother or father. Like most abstract norms, the vagueness of these obligations makes them easily internalized but provides little concrete behavioral guidance. Yet concrete esteem norms give many meanings to this obligation: in some communities, the consensus dictates that a “good parent” reads to his or her children, teaches them table manners, takes them to church, and provides them with a “safe environment.”

If this account is correct, then the expressive function of law can work to define further the roles that are enforced by guilt. A law obligating the use of child safety devices expresses a new consensus that the absence of such devices exposes a child to unacceptably high risks contrary to minimally acceptable parental behavior. The vagueness of the internalized obligation generally allows parents great flexibility to rationalize their behavior as consistent with their obligations. But when society announces its belief that a concrete behavior is required of parents, rationalization becomes more difficult.²³² If one accepts that being a good parent requires *something*, then it is difficult to resist the (apparently) informed judgment of others about what child safety requires, at least when one is not independently knowledgeable of the precise risks involved. Thus, the law expresses a consensus and creates an esteem-based norm defining good parental behavior. For some parents, complying with the law is then necessary to avoid guilt.²³³ Even absent external, informal enforcement, the law can elicit internal enforcement.²³⁴

232. Still, if one believes that the legislature frequently errs or that the manufacturers of child safety seats simply lobbied effectively against an apathetic and poorly informed majority, then one might still rationalize noncompliance with parental obligation. Even so, the law then has made rationalization more complex and, for many parents, more difficult.

233. Consider a thought experiment: An automobile kills a child who was not wearing a safety seat in circumstances where the device probably would have prevented death. You were the parent/driver. You were completely without fault in causing the accident. Would you not expect your sense of guilt over this event to be greater if a recent law had obligated you to use a safety seat? The enactment of such a law may prompt some parents to consider the same morbid thought experiment on their own and to decide to comply so that if the worst of events should occur, they will have some peace of mind that they did what they could to prevent it.

234. The examples in this section all involve the expressive effect of a *new* legislative prohibition or proscription. Legislative tinkering with existing statutes — enactments committing new resources to the investigation of violations, raising sanctions, or expanding the scope of the prohibition or proscription — may also regulate norms. These changes may signal that the consensus has strengthened, that the approval or disapproval of the regulated conduct is broader or deeper than when the legislature originally acted. Reforms of drunk driving laws, for example, might exploit the expressive function; even if higher maximum penalties do not raise the average prison sentence, they might signal stronger disapproval of the activity. See Grasmick et al., *supra* note 114, at 61-62.

C. Norm Efficiency and the Problem of Excessive Conformity

Economic theorists explicitly debate the likely efficiency of norms.²³⁵ Robert Ellickson defends the thesis that group norms tend to maximize the welfare of the group in which they arise.²³⁶ Similarly, Cooter claims that norms arise when there is a unanimous signal of consensus as to the appropriate behavior, which typically occurs only when a behavior benefits the group as a whole.²³⁷ Both theorists note several qualifications to their claim — for example, that group norms may benefit the group by harming those outside the group — but both are fairly optimistic about norms.²³⁸ Other theorists are less sanguine. Russell Hardin, for example, claims that the most common and powerful group norms are norms of “exclusion,” the very norms that benefit the group at the expense of those excluded.²³⁹ Eric Posner bases his skepticism about norm efficiency on the pervasive problems of information and strategic behavior that sometimes cause market failure.²⁴⁰

235. See generally Posner, *supra* note 102. By efficiency, the literature sometimes means Pareto Optimality because the norm makes some or all in the group better off and no one worse off. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 966 (13th ed. 1989). Even though everyone may prefer to be allowed to violate the norm while everyone else obeys it, no one prefers not having the norm and many prefer having it. But whenever the norm imposes net costs on some individuals, the efficiency claim is then — explicitly or implicitly — based on the more controversial Kaldor-Hicks criteria — that those who benefit from the norm gain sufficiently that they could, although they need not, compensate those who lose from it, when the benefits and losses are measured by willingness-to-pay. See EDITH STOKEY & RICHARD ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* 279-80 (1978). Obviously, one can use other moral theories to evaluate particular norms. I use Kaldor-Hicks efficiency criteria as a rough measure of utility maximization, but with the caveat that in some contexts, wealth disparities render willingness-to-pay an inaccurate guide to utility.

236. “[M]embers of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.” ELLICKSON, *supra* note 3, at 167.

237. See Cooter, *Structural Adjudication*, *supra* note 72, at 224.

238. James Coleman’s thesis is similar. See COLEMAN, *supra* note 2, at 249-58.

239. See HARDIN, *supra* note 2, at 107. Exclusionary norms define the boundaries of the group.

240. See Posner, *supra* note 102, at 1711-25. See also Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995) (using the concept of a network externality to show how commercial norms may be suboptimal); Lewis A. Kornhauser, *Are There Cracks in the Foundations of Spontaneous Order?*, 67 N.Y.U. L. REV. 647 (1992) (reviewing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991)) (criticizing Ellickson’s claim that norms tend to promote group welfare). In addition, David Charny observes that when norms arise from centralized processes within formal organizations — such as industry-wide trade associations — they are likely to be plagued by the inefficiencies that public choice theory attributes to legislative rulemaking. See Charny, *supra* note 16, at 1848. In the end, however, Charny says that he is

skeptical that economic analysis can generate, through notions such as ‘efficiency,’ a useful set of social judgments about norms. There are simply too many unobservable variables, particularly those that bear on the ‘noneconomic’ motivations and preferences that must play a role in the start-up and the effectiveness of complex sanctioning systems.

Though the esteem model by no means resolves the debate over norm efficiency, it sheds some light on the subject, providing additional reasons for pessimism. In this section, I briefly summarize what existing efficiency analysis predicts about esteem norms and then identify two reasons that the drive for esteem uniquely produces certain kinds of inefficient norms. At either a group or societal level, esteem competition can produce both unnecessary “nosy” norms and excessive levels of conformity.

Initially, one might expect esteem norms to exist only when they benefit the population in which they arise. The first condition for an esteem-based norm is a consensus that some behavior merits esteem or disesteem. Section II.A.2 identified reasons why individuals would tend to reach a consensus that served their own general ends: selfish esteem allocation, voice, and exit.²⁴¹ *Selfish esteem allocation* means individuals tend to esteem people for acts that benefit them more than for acts that harm them. Thus, if a behavior has either beneficial or harmful externalities, and each individual recognizes this fact, the resulting esteem allocation — rewarding behavior with positive externalities and punishing behavior with negative externalities — will produce norms that benefit the whole.²⁴² *Voice* merely adds the fact that individuals do not make esteem decisions in a vacuum but rather discuss the esteem worthiness of behavior with others. Thus, one individual’s recognition of the relevant externalities may be communicated to others. Finally, exit may favor efficient norms: if individuals can leave unsuccessful groups or societies, then evolutionary pressures will reward groups or societies with efficient norms.²⁴³

Each of these mechanisms, however, is subject to significant limitations. First, selfish esteem allocation will produce efficient norms only if individuals correctly perceive the external costs or benefits of a particular behavior. Others have observed that informational problems will sometimes prevent this understanding and produce inefficient norms.²⁴⁴ Second, though *voice* or discussion allows individuals to pool their information and insight, the result could be a

Charny, *supra* note 16, at 1857-58.

241. See *supra* text accompanying notes 90-96.

242. See COLEMAN, *supra* note 2, at 249-58; Pettit, *supra* note 2, at 744.

243. In evolutionary terms, groups are *hosts* for competing norms. The number of groups using a norm and the size of those groups increase as long as the norm provides the group a return that exceeds the average for nearby groups. Individuals in groups with below-average returns exit their group to join groups with above-average returns or to form new groups emulating those with above-average returns. See Axelrod, *supra* note 2, at 1097-98.

244. See Posner, *supra* note 102, at 1711-13. Though people need not consciously perceive the technical dynamics of a collective action problem, if they fail to recognize the ad-

worse decision rather than a better one.²⁴⁵ When disagreement arises, there is no guarantee that the individual with the better grasp of the situation will be the one whom others find persuasive.²⁴⁶ Third, evolutionary pressures are subject to a host of problems, the most significant of which is that they work to achieve only local and not global maxima.²⁴⁷

vantage of cooperation, they will not produce a norm that solves it. They also may perceive a problem where none exists and produce an unnecessary and inefficient norm.

245. See, e.g., IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (1983) (claiming that the desire for agreement within cohesive groups can override judgment and cause bad decisions); Posner, *supra* note 102, at 1713-19 (discussing strategic problems that arise regarding norms when individuals in a group have different interests in the behavior at issue).

246. There is a political model that addresses the question of whether groups make better or worse decisions than individuals. Condorcet's Jury Theorem predicts that "under certain conditions a majority of a group, with limited information about a pair of alternatives, is more likely to choose the 'better' alternative than any one member of the group." Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 *AM. J. POL. SCI.* 617, 617 (1992). Condorcet meant the theorem as a defense of democratic decisionmaking; recent work attempts to determine whether the conditions under which it holds apply to legislatures. One could ask the same question about the processes producing norms.

The theorem's conditions are as follows: Assume that (1) a group is choosing between two alternatives; (2) one alternative is unambiguously better for every member of the group than the other; (3) no member knows with certainty which is the better alternative; (4) the probability of a member voting for the better alternative is statistically independent of the votes of other members; and (5) for each member, the probability of voting for the correct alternative is greater than 50%. Under these circumstances, the probability that the majority picks the correct alternative is larger than the probability that any one member picks the correct alternative and approaches certainty as the size of the majority gets large. The point is entirely statistical: If a weighted coin lands heads with a probability of 51% and is flipped an odd number of times, then the probability that the majority outcome is heads is greater than 51%. Similarly, if the probability that a given individual is correct is 51%, and the majority exceeds the minority by 20 votes, the probability the majority is correct is 69%. See Iain McLean & Fiona Hewitt, *Introduction*, in *CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY* 3, 36 (Iain McLean & Fiona Hewitt eds., 1994).

Under an esteem theory, norms arise as the result of many individual decisions to favor a particular rule. In a sense, individuals (initially) "vote" for a norm. Thus, with imperfect information, if the average individual has a better-than-even chance of making the correct choice, the resulting norm is even more likely to be efficient. This result complicates the claim that imperfect information impedes the creation of efficient norms. Even so, the implications for efficiency are not genuinely optimistic. There are many restrictions on the theorem, and these limits explain why norms might be inefficient. For example, the theorem assumes that the choice is between only two alternatives and that, with perfect knowledge, everyone would prefer the same alternative. The theorem also assumes that individual votes are statistically independent. If votes instead are correlated, so that one voter tends to be correct when the others are correct and wrong when the others are wrong, then the theorem's conclusions do not hold. "Votes" regarding norms are likely to be highly correlated, especially within small groups. Because norm "votes" are public, the esteem theory suggests that once a particular outcome seems probable, people may vote that way to avoid disapproval from what they expect will be a majority.

247. If the first steps toward the efficient norm (a "global maximum") cause a decline in group welfare, then the groups making such a change may be abandoned before they reach the point of increasing returns. See Cooter, *supra* note 14, at 1687-88. Similarly, for some norms, efficiency will depend greatly on how many people in a group or society follow the norm rule; in such cases, there will be no advantage to incremental adoption of the efficient norm and no reason to suppose that a decentralized process will induce a sufficient number

Regardless of the outcome of this analysis, the esteem model predicts two new and specific ways in which norms will be inefficient. Esteem competition will sometimes produce norms that are entirely unnecessary and will sometimes produce a level of norm compliance that is excessive. One of the virtues of the esteem model of norms is that it predicts some of the inefficient norm-based behaviors that are otherwise difficult to explain.

1. *Unnecessary Norms: The Problem of Needless Conformity*

Collective action problems arise because of a gap between the behavior that maximizes an individual's welfare and the behavior that maximizes the group's welfare.²⁴⁸ Norms engage rational choice theorists because they offer potential solutions to such problems. When the gap occurs, norms may add incentives that cause individual self interest to align with group interest. Given this framework, the efficiency debate tends to focus on two issues: (1) how often norms actually make this alignment occur, given informational and strategic problems, and (2) whether society wants the group to achieve the alignment, given that group welfare and social welfare may also not align. Largely omitted from this debate is the possibility that norms arise when there never was any gap — when there is no collective action problem to solve, either well or badly. The existing debate ignores the danger of simply unnecessary norms.²⁴⁹

If esteem competition is the source of norms, norms will *not* arise *only* because a group "needs" them. People are opinionated. They tend to think well or badly of others for all sorts of reasons. All kinds of judgments can produce a norm. When the norm does not arise to solve a collective action problem, the norms are necessarily inefficient because the costs incurred in obeying and enforcing such norms produce no social benefit. Two examples will help make the point.

to adopt the rule all at once. See Klausner, *supra* note 240, at 774-88; see also Kraus, *supra* note 27, at 392-408 (explaining how evolutionary pressures create commercial norms that are often better than individual learning but still suboptimal); Posner, *supra* note 102, at 1707-10, 1723-24 (discussing reasons why evolutionary processes may not achieve efficiency).

248. See *supra* note 25.

249. Coleman's analysis seems to foreclose completely this possibility, because he describes norms as arising only when "demanded" by the need to control externalities. Coleman says norms arise when the positive or negative "externalities of an action . . . cannot be overcome by simple transactions that would put control of the action in the hands of those experiencing the externalities." COLEMAN, *supra* note 2, at 251, 249-60 (discussing "The First Condition: Externalities of Actions and the Demand for a Norm").

First, an individual will frequently approve of those who obtain the sort of ends that she seeks. If people who seek material wealth grant esteem according to how much material wealth others accumulate, the resulting norms may be inefficient.²⁵⁰ Imagine a world where the market works smoothly to supply individuals with optimal incentives for behavior; material benefits induce individuals to work at the efficient level. A consensus that pecuniary success merits esteem may produce norms obligating individuals to reach the prevailing standard of wealth; the group shames those who fail to achieve the standard and honors those who earn higher amounts. Because the market was previously efficient, this norm is needless and inefficient. To earn honor and avoid shame, individuals now work more. Their greater sacrifice of leisure is wasted because: (1) the material incentives had previously induced the efficient level of work, and (2) additional income only raises the average standard of living, thus ensuring that the esteem benefits for new pecuniary successes are matched by esteem losses for new pecuniary failures.²⁵¹

A more general example involves *other-regarding* preferences. While a person's preference for her own consumption is *self-regarding*, a preference is *other-regarding* when it is directed toward the consumption decisions of another.²⁵² Though economic theorists frequently discuss only the self-regarding preferences at issue in a given context, nothing in the efficiency criteria requires discounting other-regarding preferences.²⁵³ Many believe, however, that the former preferences tend to be stronger than the latter. When this is

250. See generally ROBERT FRANK, CHOOSING THE RIGHT POND (1985); THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (1899).

251. See McAdams, *supra* note 78, at 48-59. A crucial feature of this example is that the esteemed trait is valued only in relative terms. There is no esteem given to one who earns a \$50,000 income except according to how that income compares to the average.

252. Of course, another's consumption may interfere with one's own consumption, as when two children fight over the last cookie. A preference is not *other-regarding* unless it necessarily concerns the consumption of others. As I have commented elsewhere:

A person's desire to drive at high speeds and not to eat broccoli are self-regarding preferences because the preference may be satisfied without any other individual engaging in an act of consumption. Conversely, the preference that others avoid reading *Madame Bovary* or that others eat sufficient food to live are necessarily *not* satisfied unless other people engage or refrain from engaging in certain consumptive activities.

McAdams, *supra* note 78, at 7-8; cf. Robert A. Pollak, *Interdependent Preferences*, 66 AM. ECON. REV. 309, 309 (1976) (asserting that "interdependent preferences" are "preferences which depend on other people's consumption").

253. For example, Calabresi and Melamed imagine that "moralisms" — their term for certain other-regarding preferences — could justify legal rules of inalienability, like a ban on selling human kidneys. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972); see also Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 937-49, 959-65 (1985).

true, and when self- and other-regarding preferences are mutually exclusive, satisfying the latter would clearly be inefficient. For this reason, economists often object to state-enforced prohibitions that they perceive as nothing more than an electoral majority imposing its other-regarding preferences on an electoral minority. Examples include bans on interracial marriage or sodomy. The problem the esteem model identifies is that, *even without state enforcement*, majorities may impose their other-regarding preferences on minorities through norms, even when doing so is not efficient.²⁵⁴

To illustrate, suppose that in a close-knit neighborhood composed of 100 adults, each adult has some set of consistent self-regarding and other-regarding preferences. By *consistent* I mean that, for some behavior, what they prefer for themselves, they prefer for others.²⁵⁵ Thus, eighty neighbors prefer not to date members of other races and also prefer that others not date members of a different race; eighty prefer that in their own marriage, or marriage-to-be, the woman takes the man's surname and also believe that married women generally should do so; and eighty prefer not to eat meat and prefer that others not do so. In each case, the remaining twenty have contrary preferences: they desire interracial dates and prefer that others are so inclined; they prefer that the woman in their marriage keep her surname and that married women generally do so; they eat meat and prefer that others are carnivorous. Finally, assume that each person's preference concerning her own consumption is so strong compared to her preferences for the consumption of others that the efficient outcome is for all individuals to "suit themselves." That would be the case, for example, with the following values:²⁵⁶ (1) each person would pay \$100 to satisfy her self-regarding preference for dating, naming, or diet; (2) each person would pay one dollar to satisfy her other-regarding preference on these matters, by inducing one neighbor to behave in accord with it. Thus, if transaction costs were zero, the

254. The mere fact that a norm enforces other-regarding preferences does not mean it must be inefficient. It is possible that satisfying the majority's strong other-regarding preferences by deterring the minority from satisfying its weak self-regarding preferences produces an efficiency gain.

255. The point made here does not depend upon everyone having such *consistent* preferences. Even if only some of the majority who prefer *X* for themselves also prefer *X* for others, they may impose their other-regarding preferences if their population is still larger than the minority and the other conditions exist. But I make the textual example numerically simpler with the consistency assumption.

256. Here is a good point to note again that I use Kaldor-Hicks efficiency as a rough guide to utility, which would probably be accurate in this context if these neighbors have more or less equal wealth.

most any person would *be offered* to refrain from satisfying her self-regarding preference is eighty dollars — the amount the eighty in the majority would offer to one in the minority — too little to induce any of the minority to forego interracial dating or meat, or to enter a marriage where the woman took the man's surname.

In these situations, there is no *need* for a norm, yet norms can arise. Consider interracial dating. Given selfish esteem allocation and the majority's other-regarding preference, the majority will likely esteem those who date only their own race over those who date interracially. There is only a short step between most people preferring that others behave a certain way and a consensus that such behavior merits esteem.²⁵⁷ Assume that this consensus is made public through gossip and that everyone knows it is very probable that neighbors will, without bearing monitoring costs for that purpose, detect whether others date interracially. Even though the eighty-person majority is willing to pay no more than eighty dollars to change the behavior of any member of the twenty-person minority, the esteem competition may give the majority greater leverage. If each neighbor values the disesteem created by violating the other-regarding preferences of one neighbor at, say, \$1.50, then losing the esteem of eighty neighbors is a \$120 cost, more than enough to induce a neighbor to forgo satisfying a preference she values at \$100, given a detection risk of over eighty-three percent. Even if the only sanction is disesteem, the norm may be sufficient to obligate neighbors to forego interracial dating. The minority then conforms to the majority's other-regarding preference, although the minority loses \$2,000 and the majority gains only \$1,600.²⁵⁸ Thus, the group is better off without this "*nosy*" norm than with it.²⁵⁹

257. But there is a step, because it is possible that a group has norms of tolerance precisely to avoid turning other-regarding preferences into binding norms. See *supra* text accompanying note 194.

258. Each of the 80 in the majority gains \$20 from having each of the 20 in the minority comply, while each of the twenty loses \$100 from compliance. Thus, the group would benefit if some obstacle blocked the conditions for creating this norm — including a contrary norm of tolerance, discussed *infra* text accompanying note 265. Of course, the minority receives a \$2,400 esteem benefit by complying with the norm, but this comes entirely from avoiding a threat of disesteem that would not exist in the absence of the norm.

259. Katz provides an entirely different reason to expect needless conformity. See Katz, *supra* note 97, at 1750-51. An individual may generally signal how constrained she is by social norms — in my terms, how much she values esteem — by visibly conforming with any particular norm. Thus, she may conform to a norm where compliance is highly visible in order to signal that she is also likely to conform to norms where compliance is less visible. At Katz puts it, individuals may obey a norm "they do not respect" in order to signal conformity with norms "they do [respect]." See *id.* at 1751. One might add that group norms may arise exactly for this reason, as a test for determining whether each individual sufficiently values

The same dynamic can also produce a nosy naming norm and a nosy diet norm in this neighborhood. In general, norms may impose needless conformity when a majority turns its weak other-regarding preferences into social obligations.²⁶⁰ The majority gains little from changing the minority behavior and not enough to offset the minority's loss, but selfish esteem allocation still produces the norm because esteem provides them a "free" resource for inducing conformity. The resulting norms are unnecessary and inefficient.

Note that the majorities do not necessarily consist of the same individuals for each behavior. Thus, with a sufficient number of overlapping nosy norms, everyone may be in the minority on some issue and there may be no one in the neighborhood completely free from such constraints. Indeed, strictly speaking, a majority is not even necessary to create a norm because of the differing value placed on the esteem of different individuals.²⁶¹ The opinion of those who are highly esteemed tends to be valued more than the opinion of those who receive low esteem. Thus, high-status individuals will have relatively more influence on the creation of new norms. If wealth is generally respected, for example, the wealthy will have disproportionate power in creating norms, including nosy norms. This fact may help explain norms that apply to and burden women for the benefit of men. Though men do not constitute a numerical majority, they are a very large minority that possesses disproportionate wealth and other indicia of status.²⁶²

The above examples of nosy norms are controversial ones in the 1990s, but the analysis applies to behaviors that may seem rather trivial — whether one prefers bowling or chess, short hair or long, wood floors or carpet, and so on. If the dynamic identified occurs over a wide range of behaviors, the accumulation of trivial con-

the esteem of fellow group members. See Laurence R. Iannaccone, *Sacrifice and Stigma: Reducing Free-Riding in Cults, Communes, and Other Collectives*, 100 J. POL. ECON. 271, 274-76 (1992). But it is not clear that this kind of conformity is inefficient. If a visible test reliably predicts compliance with a norm for which violations are more difficult to detect, and the latter norm benefits the group, then the group may be better off having the former norm.

260. Note that the problem is entirely one of differing interests in the norm and not lack of information; the norm arises in the above examples even with perfect information.

261. A majority consensus is not strictly necessary for a second reason: differing intensities of disapproval. See *supra* note 89 and accompanying text.

262. Recall that the origin of these norms cannot be explained by Cooter's internalization model. See *supra* text accompanying notes 140-43. Of course, the esteem theory does not explain how men initially acquired greater status. The historical explanation is beyond the scope of this article, though it undoubtedly includes historic restrictions that prevented women from acquiring wealth or political power. My point, however, is that once the disparity in status arises, disapproval from men is more costly (to men and women) than disapproval from women. At this point, selfish esteem allocation is sufficient to produce norms obligating women to behave in ways that benefit men.

straints could produce a very restrictive and seriously inefficient set of nosy norms. This implication explains the complaint that some societies are too “conformist.”²⁶³ For example, John Stuart Mill, though remembered chiefly as a critic of governmental interference with liberty, recognized an equal threat to liberty from public opinion and custom, in other words, from norms:

Like other tyrannies, the tyranny of the majority was at first, and is still vulgarly, held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant — society collectively over the separate individuals who compose it — its means of tyrannizing are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them [That protection] is as indispensable to a good condition of human affairs as protection against political despotism.²⁶⁴

It is not entirely clear what “protection” Mill had in mind, but he certainly meant to include *norms* of tolerance. In the United States, norms of individuality, among other things, advocate tolerance of individual differences. These norms may be understood as a check on the tendency of nosy norms to impose needless con-

263. As John Stuart Mill noted:

In our times, from the highest class of society down to the lowest, everyone lives as under the eye of a hostile and dreaded censorship. Not only in what concerns others, but in what concerns only themselves, the individual or the family do not ask themselves, what do I prefer? or, what would suit my character and disposition? or, what would allow the best and highest in me to have fair play and enable it to grow and thrive? They ask themselves, what is suitable to my position? what is usually done by persons of my station and pecuniary circumstances? or (worse still) what is usually done by persons of a station and circumstances superior to mine? I do not mean that they choose what is customary in preference to what suits their own inclination. It does not occur to them to have any inclination except for what is customary. Thus the mind itself is bowed to the yoke: even in what people do for pleasure, conformity is the first thing thought of; they like in crowds; they exercise choice only among things commonly done; peculiarity of taste, eccentricity of conduct are shunned equally with crimes, until by dint of not following their nature they have no nature to follow

JOHN STUART MILL, *ON LIBERTY* 58 (Hackett Publishing 1978).

264. *Id.* at 4-5. Thus, when Mill states his principle of liberty — that prevention of harm to others is the only legitimate reason to interfere with an individual’s liberty — he explicitly includes as interference not only “physical force in the form of legal penalties” but also “the moral coercion of public opinion.” *Id.*

formity.²⁶⁵ Another form of protection is governmental self-restraint. Given the power law has to strengthen norms by expressing them through legislation, we can expect majorities to seek legislation to bolster nosy norms.²⁶⁶ Even entirely symbolic legislation — laws with no material enforcement — may significantly affect the power of such norms. Constitutional restraints on purely symbolic legislation may be necessary to prevent majorities from using the state to strengthen nosy norms.²⁶⁷ One example is the “no-endorsement” interpretation of the Establishment Clause.²⁶⁸ Be-

265. That tolerance norms serve this function does not mean that they are necessarily efficient. As explained in the next section, a norm may encourage an initially useful activity beyond an optimal level; the harm from excessive amounts of the activity could exceed the harm from insufficient amounts that occur without the norm. A norm could encourage a form of tolerance to the point where a group or society would be better off without it.

266. Although majorities can enforce nosy norms solely by the allocation of esteem, without the need for state assistance, it can surely bind minorities more effectively with such aid. Joseph Gusfield observes: “Affirmation through law and governmental acts expresses the public worth of one subculture’s norms relative to those of others, demonstrating which cultures have legitimacy and public domination. Accordingly, it enhances the social status of groups carrying the affirmed culture and degrades groups carrying that which is condemned as deviant.” Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 58 (1968).

267. In other words, the problem of nosy norms means that it is not sufficient to restrain the state’s tendency to overuse its powers of coercive regulation. If majorities can constrain minorities through norms, and the state can strengthen norms by the expressive power of law, then the democratic state will also tend to overuse its powers of expression. Lessig is correct, in my view, in claiming that government cannot avoid establishing orthodoxy. See Lessig, *supra* note 11, at 946-47, 1034-36. My point is simply that constitutional doctrines are and should be sensitive to majority misuse of this function.

268. Some members of the Supreme Court hold that the Establishment Clause bars the government from action that “endorses” religion. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2126-28 (1996) (discussing history of the endorsement test in Supreme Court Establishment Clause opinions in recent years). I express no opinion on the proper interpretation of the Establishment Clause or the particular formulation of “endorsement” the Court employs. For criticisms, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 127-34 (1992); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test*, 86 MICH. L. REV. 266 (1987). I only note that the theory presented here generally supports placing some limits on the expressive power of law and that religion is an area in which majorities might wish to use that power to create or strengthen nosy norms (as I define them).

Equal protection law may also be viewed as limiting the use of the expressive power of law to enforce nosy norms regarding race or gender. Some gender cases explicitly ask whether the statute or governmental action signals approval or disapproval of existing gender stereotypes. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 140-42 (1994) (“When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. . . . The message it sends . . . is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions”); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (“By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW’s admissions policy lends credibility to the old view that women, not men, should become nurses. . . .”). But see *supra* note 217 (quibbling with *J.E.B.*). Obviously, one can also view *Brown v. Board of Education*, 347 U.S. 483 (1954), as condemning Jim Crow segregation because it expressed the superiority of

low, I argue for an additional “protection” from nosy norms — legal entitlements to privacy.

2. *Zealous Norms: The Problem of Excessive Conformity*

Even when a norm arises in response to a collective action problem, the esteem theory predicts a second kind of inefficiency. The efficiency of a norm depends not only on whether it commands the efficient *kind* of behavior, but whether it commands the efficient *level* of that behavior.²⁶⁹ Esteem competition may produce *too much* individual effort to address a collective-action problem.²⁷⁰

In general, once a norm arises that obligates individuals to engage in some level of behavior *X*, esteem competition can raise the level of *X* beyond the optimal point. This point was implicit in section II.B. In the recycling example, esteem competition raised the average contribution to recycling. When *A*, *B*, and *C* each knew that their esteem would depend, in part, on how much they contributed relative to the others, and when each could observe how much the others contributed, contributions to recycling escalated. *There is no reason to suppose the equilibrium contribution matches the op-*

Whites and thereby supported racial caste norms. See, e.g., Charles L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424-26 (1960).

269. Elster provides a simple example of a norm causing an inefficiently high level of an otherwise efficient behavior: “A group of friends who are cleaning up after a party might actually finish the job faster if some of them relax instead with a drink, but the norm against free riding might overwhelm considerations of efficiency.” ELSTER, *supra* note 2, at 190. He concludes: “In situations that lack a coercive institution, the norm of fairness could drive cooperation beyond the optimal point.” *Id.* at 191. Given Elster’s view of norms as not being “outcome oriented,” *see id.* at 98, he does not attribute the problem to esteem competition or any other individually rational motivation.

270. James Coleman uses a motive like esteem to explain “zeal,” that is, to explain why an individual sometimes contributes more to a group activity than she does to a comparable individual activity. See COLEMAN, *supra* note 2, at 273-76. Coleman’s example is team sports, where he observes that despite the incentives for free riding — individuals bear all the costs of practice and exertion but share the benefits of victory — “team members often work harder than do participants in individual sports activities.” *Id.* at 274. Coleman explains zeal as arising because team members offer each other “encouragement” or “gratitude,” which provides a new incentive for working harder. *See id.* at 277.

To some degree, this subsection uses Coleman’s idea to explain Elster’s observation, *see supra* note 269, about inefficient norms. Encouragement and gratitude are obviously expressions of what I call esteem. But where Coleman begins by saying they cost the bestower “very little,” *id.*, I begin with the claim that these expressions — along with expressions and inferences of disapproval — are sometimes costless. In addition, though Coleman says zeal may produce an “excess” of contributions, *see id.* at 277, he does not link this point to his discussion of norm inefficiency. *See id.* at 260-64. Instead, he thinks pure “conjoint” norms — in which each group member potentially benefits from and is obligated to follow the norm — are efficient. *See id.* at 247 (defining conjoint norm); *id.* at 260 (suggesting efficiency of all pure conjoint norms). To the contrary, however, my textual examples suggest that such norms can be inefficient. *See infra* text accompanying notes 274-84.

*timal contribution.*²⁷¹ In the example, *A*, *B*, and *C* each contributed slightly less than four dollars to recycling; in equilibrium, anything less would cause them to lose four dollars in status. Yet this four dollars bears no relationship to the optimal contribution. It could be more or less.

One may ask why individuals correctly perceive the optimal kind of behavior, but do not also correctly perceive and enforce the optimal level of that behavior? *Ex ante*, the answer is information costs. Although individuals may know enough to perceive that some behavior is efficient — a realization that eventually produces a norm — they could easily lack sufficient information to determine either how much behavior is optimal or how much behavior esteem allocation will ultimately produce. Given that the initial problem is too little of the activity, this ignorance can cause individuals to esteem others strictly according to their level of the activity — for example, the amount they clean up or the amount they recycle. In equilibrium, this esteem allocation may then produce excessive investment in the activity.

Now an *ex post* question arises: Once the norm becomes harmful, why do individuals not recognize as much and scale down the norm? Here, the problem is strategic. Once the norm exists, there is a price to norm criticism. For strong norms, secondary enforcement norms will typically require punishing anyone who challenges the primary norm.²⁷² Thus, esteem competition can make very costly any individual behavior designed to “brake” the escalation of norm enforcement.²⁷³ Inefficiently high norm activity levels may therefore be an equilibrium.

Return to the recycling example. Suppose the optimal contribution is \$3 per person. Not recognizing this fact or not knowing what

271. See Posner, *supra* note 123, at 589. For the group, the optimal contribution to recycling is the point at which any further contributions create more total social costs than total social benefits. But escalation ends, and an equilibrium is achieved, only when the private cost of further recycling is greater than the private benefits of the esteem it would produce or the disesteem it would avoid.

272. See *supra* notes 103, 192 and accompanying text. It might be possible for a group to avoid this problem by enforcing “tolerance” or free speech norms that permit some dissent. See *supra* note 194 and accompanying text.

273. Despite the potential for excess, norm enforcement frequently reaches equilibrium *before* the actual contribution equals the optimal contribution. In this case, the group is better off with the esteem competition than without it, though the group will be better off still if it can elicit further contributions. Even when the equilibrium standard *exceeds* the optimal standard, the norm may improve group welfare. The norm becomes harmful to the group only if the cost of excessive contributions — “overshooting” the optimum — is greater than the cost of insufficient contributions falling below the optimum. But the esteem model of norms predicts that this form of inefficiency will sometimes occur.

contribution aggregate esteem production will elicit, individuals allocate esteem in the manner described, and the average contribution to recycling rises to \$3.50. At this point, some community members may first realize that this level is excessive. But this recognition will not necessarily correct the norm, nor even slow a further rise in average contributions. Secondary enforcement norms may deter individuals from criticizing the excessiveness of the norm. Even if one individual recognizes that \$3.50 is too high a contribution, she may be unwilling to say so because unless her criticism is instantly persuasive, she will be sanctioned for failing to condemn — indeed for implicitly praising — those who contribute less than the present, average amount. Those who advocate “moderation” of escalating norm compliance sometimes succeed only in providing the norm’s most zealous advocates further opportunity to raise the level of norm compliance by condemning those who advocate moderation.²⁷⁴ Without effective criticism, everyone may continue to contribute the \$3.50 even if the group would be better off without any recycling norm and even if many in the group recognize as much.²⁷⁵

Consider two further examples. One is a code of silence, such as the one forbidding police officers from disclosing the misdeeds of other officers.²⁷⁶ Obviously, *some* code of silence serves the inter-

274. Michael Klarman describes this phenomenon on a much larger scale. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 97-129 (1994). He recounts how, in the wake of *Brown*, white Southern politicians condemned moderation and “struggled against one another to occupy the most extreme position on the racial spectrum.” *Id.* at 98. Yet this backlash, he claims, produced the federal civil rights legislation entirely contrary to the interests of those politicians’ constituents. See *id.* at 129-49.

275. There is a second way excessive conformity may be an equilibrium, though only in the weaker sense that the group would gain from less conformity but is still better off with the norm than without it. Discontinuities in the activity the norm governs may force the group to choose between too little and too much of the activity. Assume, for example, that people can recycle only in units of \$2, the average cost for holding one collection container for the relevant time and then properly disposing of its contents. If the optimal level is an average of \$3 per person per time period, it is unlikely that decentralized esteem decisions can produce the precise esteem differential between \$2 contributors and \$4 contributors to maintain an equal number of each.

The most promising solution would be to “take turns,” where everyone alternates between \$2 and \$4 contributions. But such norms only sometimes solve the problem. When the group switches to turn taking, the risk of detecting a norm violation falls because detection requires keeping track of another’s behavior in the prior as well as the current time period. Especially in a large group, the difference will sometimes be decisive, as the expected sanction falls below the benefit of the violation. In these cases, the group must choose among norms requiring the same behavior of every person in every time period. But because of the discontinuity, there is no such behavior that leads to the optimal outcome. Thus, if the group gains more from above-optimal than below-optimal contributions, the inefficient norm will remain an equilibrium. In general, when the optimal norm is too complex to enforce effectively, under- or overinclusiveness is inevitable.

276. See *supra* note 42 (discussing police and doctor codes of silence).

ests of the group. Up to a point, the members of a group will benefit by secrecy norms that protect members from being sanctioned for harming nonmembers. But this is true only up to a point, because nonmembers may eventually respond to cooperative silence in ways that harm the group as a whole. For example, the Mollen Commission, which investigated police corruption in New York, reported that “most honest cops will not report serious corruption” even though “they despise corrupt cops and silently hope that they will be removed from the ranks.”²⁷⁷ The Report continues: “It is not surprising that the honest cop wants corrupt cops off the job. The consequences of corruption for honest cops are grave: it taints their reputations, destroys their morale, and, most important, jeopardizes their safety.”²⁷⁸ In other words, serious corruption among police officers damages the reputation of all police officers; officers who have internalized societal or professional obligations to avoid serious criminality are demoralized by working alongside criminals; and citizens who are victimized by some police are more likely to be hostile and violent toward all police.²⁷⁹

Esteem competition helps to explain how this excessive norm arises. Assume that, initially, most but not all individuals who join a police force have internalized norms against serious crime. Even a generally law-abiding police officer might forgive and expect others to forgive minor crimes by police officers: minor assaults that are not legally justified, for example, when an officer “loses” his temper and punches a suspect who ran away and caused the officer chasing him to injure himself; or when an officer accepts minor gifts intended to curry favor with the police, such as a single free beer at a neighborhood tavern. If the law-abiding officers esteem those who conceal information to protect officers in these cases, a silence norm will likely arise. Moreover, informing on fellow officers is a public activity; the consensus and risk of detection are likely to be well-known within a police precinct and because police interact intensely in small groups, they tend to value highly

277. *Mollen Commission Report*, *supra* note 42, at 56-57 (“[T]he most devastating consequence of the code of silence is that it prevents the vast majority of honest officers from doing what they inwardly want to do: help keep their Department corruption free.”).

278. *Id.* at 57. The report quotes one Internal Affairs report stating that the code “does not always reflect solely tolerance for corruption or a misplaced group loyalty. In many instances it is motivated purely by self-interest and self-protection: a fear of the consequence of breaking the norms of loyalty and silence.” *Id.* at 56.

279. *See id.* at 57 (quoting one officer’s representative explanation that “I wouldn’t want to run across a drug dealer who’s been ripped off [by cops] one time too many.”).

the esteem of fellow officers. Initially, the code of silence serves the group interest, though it is contrary to society's interests.

One can easily imagine that police officers do not anticipate what the optimal level of silence is in advance, nor what level of silence the norm will produce. Thus, they allocate esteem according to a simple rule: do not "rat" on fellow officers. Once some norm arises, esteem competition may require a code of silence for increasing levels of criminality.²⁸⁰ Once enforcement reaches an excessive level, it may be too late to correct the problem informally. Anyone who advocates informing risks being suspected as an informer and treated accordingly. In the end, the norm may prevent officers from revealing even the most serious wrongdoing by other officers — such as taking bribes, stealing from criminals, or seriously assaulting suspects — even though the ultimate effect on the group from such corruption is negative.

The once-common practice of dueling provides a second example of how competitive norm compliance causes inefficiency. Other norms theorists note that, in Europe and the United States, dueling provided benefits to the aristocrats and upper classes in which the custom arose.²⁸¹ Dueling resolved disputes in a way that preserved the honor of both parties. Given rules that minimized the risk of death, dueling frequently allowed parties to avoid either a more deadly fight or the acceptance of an insult that would undermine their social status. Most importantly, dueling ostentatiously distinguished the elite classes from the classes that did not and were not permitted to duel. Nonetheless, in the decades before dueling was abolished, in various places, the costs of dueling grew very high as the level of insult necessary to trigger a duel fell over time. Ultimately, dueling reached a point where even the most trivial and unintentional slight could compel one to choose between unbearable social disgrace and potentially lethal combat. At that point, it appears that the costs of the dueling norm exceeded its benefits, that the incremental distinction the upper classes gained was no longer worth the mortal peril they suffered.²⁸²

280. The code itself produces a rise in criminality, particularly by those who have not internalized norms against crime, by lowering the risk that corruption is punished.

281. See HARDIN, *supra* note 2, at 91-100; Elster, *supra* note 42, at 868; Lessig, *supra* note 11, at 968-72; Posner, *supra* note 102, at 1736-40; Schwartz et al., *supra* note 20, at 321-25.

282. See HARDIN, *supra* note 2, at 93, 101-02 (discussing how dueling norms escalated so that frivolous affronts were sufficient to cause a duel); Posner, *supra* note 102, at 1737-39 (claiming that the practice of dueling outlasted its usefulness, which ended when the state acquired a monopoly on the legitimate use of force).

As the esteem model explains, though the system initially benefitted the group, zealous competition for esteem produced excessive levels of sacrifice for the norm. The dueling norm arose because a certain level of insult among elite men required resolution. Esteem competition lowered the level of insult needed to trigger the duel. If the optimal trigger for the upper class was t , A could credibly claim to have a greater sense of honor by challenging others to a duel for insults less than t , or by claiming that those who accepted insults less than t lacked honor. In a society that values esteem highly, the potential gain to an individual from this strategy may, for a time, be quite high, while to criticize escalation of the norm may be prohibitively costly.²⁸³ Thus, there was no reason for the equilibrium duel trigger to match the optimal trigger. Hence, the level of insult that triggered a duel fell so low that the group as a whole was made worse off because of the norm.²⁸⁴

In sum, although esteem norms can be efficient, there is no reason to think, on average, that they are. One must evaluate the efficiency of particular norms. The remainder of this Part suggests one way that law can impede inefficient norms.

D. *Impeding Inefficient Norms with Privacy Rights*

Some group and societal norms are undesirable, judged by efficiency, the morality of the behavior they compel or forbid, or some other normative criteria. When confronted with undesirable norms, the state might respond quite directly by prohibiting the behavior the norm requires or requiring behavior the norm prohibits.²⁸⁵ But the state may also attack norms in less obvious ways, one of which I

283. As Lessig notes, once one is challenged to a duel, criticizing the norm by refusing the challenge is obviously very costly. *See id.* at 970. Before one is challenged, the costs are less, but then so is the incentive to criticize.

284. Adolescent behavior provides a final example of norm escalation. Teens often have a very rigid sense of appropriate clothing, music, free-time activity, attitude, and so on. One may be tempted to say that the norms that enforce these (broadly speaking) fashion choices are "needless" and for this reason inefficient. But that is not necessarily true. Teenagers may gain by having norms that distinguish them from the adult culture that accords them a lower status. By working together in creating teen norms, including music or clothing norms that ostentatiously reject adult standards, teenagers achieve more independence as a group than they could individually. Coleman makes exactly this point, *see* COLEMAN, *supra* note 2, at 257-58, though he does not link it to his discussion of "zealotry," *see id.* at 490-95. Yet even though these norms might bring some benefit to the group in which they arise, the *level* at which they are enforced is probably inefficient. When social commentators decry the "peer pressure" that induces teenagers to take up smoking or refuse to work hard in school, they are identifying a norm that requires "excessive" conformity. The norms that reward these behaviors might have initially advanced the welfare of teenagers, but esteem competition leads to norms that "excessively" reject adult norms, to the net detriment of the group.

285. *See, e.g.,* McAdams, *supra* note 10, at 1081-82 (suggesting this rational for Title VII).

will explore here. The state might attempt to deprive individuals of the information necessary to norm enforcement — that is, information that a consensus exists or that it has been violated in a particular case. In other words, the law might employ rights of privacy.

1. *The Economics of Privacy and Norms*

Economic theorists are generally skeptical of privacy claims.²⁸⁶ Unlike protection against defamatory falsehoods, the right to conceal true facts about oneself appears to facilitate fraud — broadly understood to include any economic or social deception. Judge Richard Posner's view is illustrative.²⁸⁷ He asserts that law should protect the privacy of "embarrassing" but not "discrediting" facts. Discrediting facts are those that impair reputation in a way that "reduces one's opportunities for favorable transactions;" embarrassing facts are those that are not discrediting but still "are not part of one's constructed public self."²⁸⁸ Because he means "transactions" quite broadly, including all social as well as business transactions, he ultimately favors only a very limited privacy right. For example, discrediting information includes the fact that an individual had a sex-change operation, is a bisexual, or was once a prostitute, for these are "facts about a person that may cause others to shun him, whether rightly or wrongly."²⁸⁹

The esteem theory of norms implies a more complex view of privacy. Whether enforced by law or norms, privacy directly affects two conditions of norm formation: (1) the publicity of the behavioral consensus, and (2) the risk that violating such a consensus will be detected. If most people consider certain realms private, they may not discuss them sufficiently to determine whether any consensus exists about what behavior within those realms deserves esteem. In other words, privacy may facilitate the *false consensus effect*²⁹⁰

286. See, e.g., Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393 (1978); George J. Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623, 640 (1980) (claiming that "support for the privacy laws remains opaque"). See generally Symposium, *The Law and Economics of Privacy*, 9 J. LEGAL STUD. 621 (1980). But see Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2396-2402 (1996).

287. Judge Posner has written extensively about privacy. See, e.g., Richard A. Posner, *The Economics of Privacy*, AM. ECON. REV., May 1981, at 405; Posner, *supra* note 286; see also Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1229-35 (7th Cir. 1993) (Posner, C.J.). I focus on his most recent writings in RICHARD A. POSNER, *OVERCOMING LAW* 531-51 (1995).

288. POSNER, *supra* note 287, at 539.

289. *Id.* at 539 (stating the sex change and bisexuality examples); see also *id.* at 541 (disapproving of *Melvin v. Reid*, 297 P. 91 (Cal. App. 1931), which allowed damages for revealing, among other things, that a woman had previously been a prostitute).

290. See *supra* note 210 and accompanying text.

that impedes norm formation. More obviously, when a consensus is known, privacy reduces the risk that an offending act will be detected and thereby makes norm enforcement against such acts more difficult. Thus, privacy is a means of norm regulation. When privacy rights impede an undesirable norm, this effect can provide an economic justification for those rights.²⁹¹ If facts are discrediting in Posner's sense because they would cause others to "shun" one who violated an *inefficient* norm, their concealment would likely be efficient.²⁹²

At a general level, the probable efficiency of privacy depends on the probable inefficiency of norms. The esteem model predicts the widespread existence of unnecessary *nosy* norms by which majorities enforce their other-regarding preferences on minorities.²⁹³ Privacy rights cannot prevent many of these conformity pressures because privacy is impractical when the behavior at issue is inherently public. One cannot expect to keep secret facts like one's hair style, the exterior of one's home in an urban area, or the nature of the clothes one wears when shopping.²⁹⁴ But privacy rights may prevent acquisition or dissemination of information that is not necessarily public — as, for example, one's religion or sexuality. In these cases, norm formation and enforcement depends on the circulation of information about a consensus and cooperative disclosure and gossip by those who acquire evidence of its violation. Privacy rights in such areas may impede both discovery of the consensus and of its violation, seriously impeding norm formation and enforcement. At a general level, then, a complete economic analysis of privacy rights must include the possibilities (1) that the area protected would, without privacy rights, be inefficiently regulated by nosy norms;²⁹⁵ and (2) that the area subject to privacy already is

291. When such rights block an efficient norm, the costs of privacy are even higher than previous analyses suggest.

292. As I indicate below, one would have to weigh the advantage from diminished norm enforcement against the disadvantage of losing information for other valuable purposes.

293. Norms may impose such needless conformity on matters great (for example, religion), and small (for example, hair style). Conformity on even trivial matters may, by accumulation, still produce substantial rigidity in behavior, a conformity "penetrating much more deeply into the details of life" than can the state. MILL, *supra* note 263, at 4.

294. One should therefore expect nosy norms to arise in such contexts. But norms themselves provide a possible solution to the problem of inefficient norms. Previously, I discussed norms for tolerating norm criticism. See *supra* note 194 and accompanying text. In some groups, a similar tolerance norm recognizes the right to be different in certain respects. Whenever someone says something like, "That's *his* business," they express a norm against enforcing one's other-regarding preferences. This norm curtails the problem of unnecessary norms, though it may also block desirable norms.

295. See Murphy, *supra* note 286, at 2397-98 ("Given anonymity, people will do what they want.").

regulated by nosy norms, but that inefficient enforcement of the norms would increase absent privacy rights.

There is, however, one other connection between privacy and norms, a substantial complication caused by the *feedback effect* discussed above.²⁹⁶ Once most individuals in a population believe a consensus exists, privacy conceals any changes in the consensus. This effect can be quite important. But I defer discussing it in detail until the next subsection, where I address all these points in the context of a particular example.

2. *An Illustration: Privacy, "Outing," and Norms of Sexual Behavior*

One obvious set of privacy issues concerns sexuality.²⁹⁷ Many people harbor significant other-regarding preferences on the subject of sex — including but not limited to the sex of the partner one seeks. In *Sex and Reason*, Richard Posner characterizes many of the arguments for restricting sexual freedom, or at least much of the emotion behind such restrictions, as based on these other-regarding preferences.²⁹⁸ Expressing skepticism of government regulation based on such preferences, he advocates a libertarian approach to sexual matters, and rejects, for example, the criminal prohibition of prostitution, homosexual acts between consenting adults, and abortion during the early months of pregnancy.²⁹⁹ At least for homosexuality, he also explicitly rejects nonlegal forms of social intolerance — that is, societal and group norms against homosexuality.³⁰⁰ These are controversial issues, but I will assume the validity of Posner's argument for sexual freedom in order to criticize his efficiency argument against privacy. Given the potential for nosy norms that restrict sexual freedom, it would appear that sexual privacy might undermine the very norms Posner thinks are inefficient.

To understand my claim, consider Posner's privacy argument in more detail. Posner recognizes that many people argue for privacy, including sexual privacy, by assuming that those who acquire secret information will use it unfairly or unwisely. Thus, he concludes that the judges in *Melvin v. Reid*³⁰¹ — a case in which the defendants

296. See *supra* text accompanying notes 111-18.

297. Sexual behavior is not inherently public, so nosy sexual norms cannot be enforced without cooperative disclosure and gossip.

298. See RICHARD A. POSNER, *SEX AND REASON* 201-04 (1992) (stating that disgust is often the only basis for sex regulation).

299. *Id.* at 441.

300. *Id.* at 307-09 (advocating social tolerance of homosexuality).

301. 297 P. 91 (Cal. App. 1931).

had publicized; among other things, that the plaintiff had once been a prostitute — “may have felt that people would give too much weight to the plaintiff’s past in predicting her future behavior.”³⁰² But he rejects this point as “just the kind of paternalistic, and in the circumstances none too plausible, attitude toward market behavior . . . that the economist generally thinks an inappropriate basis for government regulation.”³⁰³ In other words, Posner and others have confidence that, in equilibrium, the market will “count” past prostitution, and other information, efficiently. If, for example, an employer wishes to use past prostitution as a proxy to predict the future productivity of potential employees, then the market will reward those who weigh the evidence rationally and punish those who give it more or less weight than it deserves.³⁰⁴ As for private shunning, Posner implies that if most people treat the information as irrelevant, then the “market” in “personal relationships” will punish an idiosyncratic neighbor or friend who decides to shun the former prostitute. On the other hand, if most people do shun her, Posner condemns as paternalistic a governmental decision to second guess this reaction.

Judge Posner’s privacy argument either completely ignores the existence of norms or assumes an implausibly strong claim about their efficiency.³⁰⁵ In either case, it overlooks the problem of nosy norms identified in section IV.C. The shunning he identifies is a visible manifestation of denying someone esteem, an enforcement mechanism of esteem-based norms. If the norm produced is inefficient, if it is *nosy*, there is a straightforward economic argument for protecting the privacy of information necessary for norm enforcement. Indeed, individuals are most willing and able to enforce their other-regarding preferences precisely within what Posner calls the personal relationship “market” — between friends, neighbors, and other social acquaintances. This fact is hardly a basis for assuming that the use of discrediting information in such markets is efficient.

302. POSNER, *supra* note 287, at 541. Another fact the defendant revealed was that the plaintiff had been charged with murder but acquitted. I read Posner’s rejection of the argument to apply to both the murder charge and the prostitution.

303. *Id.* at 541-42.

304. As Richard Murphy observes, this analysis is exactly parallel to the economic claim that the market will punish employers who discriminate irrationally on the basis of race. See Murphy, *supra* note 286, at 2400; see also GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST DISCRIMINATION LAWS* (1992).

305. Not that Judge Posner has actually ignored norms. See Posner, *supra* note 29. In that recent article he specifically notes that privacy impedes norm enforcement, though he does not discuss how that may bear on his prior writings on privacy. See *id.* at 368.

Much of Posner's *Sex and Reason* argues, for example, that society would be better off if people did not shun gays and lesbians.³⁰⁶ Under this analysis, norms obligating heterosexuality are *nosy*, and people use information about other people's sexual orientation inefficiently. If *Sex and Reason* is correct, the same is true of prostitution and abortion — the economic argument for allowing parties to choose these activities implicitly criticizes norms that deter them. Posner may be wrong in his defense of prostitution and abortion, but if he is right, and if some communities shun prostitutes, their customers, abortion providers, and women who obtain abortions, then the resulting nosy norms deter efficient conduct. Government might respond to these norms by forbidding discrimination (in employment, housing, etc.) against those involved in these unpopular activities. Posner expresses skepticism of this approach as a means of protecting gays and lesbians from discriminatory norms.³⁰⁷ But he does not consider that expanded legal rights to privacy might serve as a legal substitute. The ability of gays and lesbians to control discrediting information, information that leads to shunning, would substantially undermine the nosy norms they face. The same holds true for those involved in prostitution or abortion.

A thorough efficiency analysis must also consider the cost of privacy: Secrecy means that information necessary to satisfy *self*-regarding preferences does not freely circulate. Thus, as Posner points out, secrecy makes it more difficult for gay men and lesbians to find suitable partners. For abortion, secrecy means women do not fully share information about abortion providers, a fact that undoubtedly diminishes the competitive pressures that typically benefit customers.³⁰⁸ One must weigh the benefits of denying information to those who might use it to enforce a nosy norm against the costs of denying information to those who would use it to satisfy their self-regarding preferences in violation of the norm. There are, however, several reasons to think that the benefits of privacy predominate. First, the reason for suspecting that a norm based on other-regarding preferences is inefficient is the intuition

306. See POSNER, *supra* note 298, at 307. He does not attribute all this intolerance to state action. Although (largely unenforced) laws against homosexual acts express and strengthen norms of heterosexuality, Posner does not think they are necessary to sustain them. He notes, for example, that in the Netherlands, a nation much more tolerant of homosexuality than the United States, "decades of official tolerance have not eliminated social intolerance." *Id.* at 307.

307. See *id.* at 323.

308. The same would be true if prostitution were legal: secrecy would deny men information about places of prostitution.

that self-regarding preferences are much stronger. If so, gays and lesbians should bear more search costs to satisfy their self-regarding preferences than their adversaries will bear to satisfy their other-regarding preferences and enforce the prohibitory norm. A small increment of additional information costs may severely damage the norm while only marginally affecting the market for sexual partners. Second, privacy rights may be waived. Thus, if an individual decides the costs of privacy exceed the benefits in a particular context, she can forgo privacy and disclose the information necessary to satisfy her self-regarding preference.³⁰⁹ In sum, the case for privacy rights remains quite plausible.³¹⁰

There is, however, a final and important wrinkle, one that underlies the debate over "outing" of gays and lesbians.³¹¹ The esteem model suggests one circumstance in which the effect of privacy could *strengthen* a norm. Privacy rights may preserve a norm by concealing from public view a rising number of norm violations that, if known, would weaken the norm. This point follows from the *feedback effect* discussed in Part II.³¹² Because esteem is desired in a relative sense, the disapproval one feels as one of the two percent who acts against the consensus is stronger than what one feels as one of the twenty percent who acts against the consensus, all else being equal. Thus, information about a consensus creates feedback: when more conform, the esteem cost for violators increases, potentially causing cycles where still more comply and the cost rises further. When compliance drops, the disesteem a violator receives is less intense, potentially causing cycles in which fewer comply and the cost of violation decreases further. Privacy rights may influence this feedback effect by depriving the public of information about the extent of norm violations.³¹³ It is not possible to

309. The reverse is not true: If information about gays and lesbians circulates freely, they cannot erase the information from public awareness.

310. If one thinks legal privacy protections are nonetheless inefficient, one must explain why privacy *norms* are not also inefficient, though I doubt that many people would want to live without them. Although unevenly enforced, group and societal norms discourage (1) asking strangers, casual acquaintances, and even friends about their sexual preferences, predilections, and experiences; (2) eavesdropping or "spying" to learn such facts; and (3) publicizing intimate facts — or photographs — acquired through sexual encounters with an individual. The question whether a privacy right is efficient is similar to asking whether such privacy norms are efficient. The legal right may be viewed as strengthening privacy norms.

311. See, e.g., LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* (1993); WARREN JOHANSSON, *OUTING: SHATTERING THE CONSPIRACY OF SILENCE* (1994); John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 *YALE L.J.* 747 (1992).

312. See *supra* text accompanying notes 111-18.

313. Similarly, imagine that the number of violations remains constant but that privacy requires the public to guess at the number of violations. If the public underestimates norm

say in the abstract how this would affect a particular norm. When the number of violators is growing and privacy prevents the public from recognizing that the consensus is weakening, privacy rights work to preserve the norm. Conversely, when violations are falling and privacy prevents the public from recognizing that the consensus is growing, privacy rights prevent the norm from strengthening.

Thus, if one believes that heterosexuals who enforce norms against gays and lesbians (“homophobes”) tend to underestimate the prevalence of homosexuality, one strategy for attacking the norm is to reveal how frequently it is violated. The call to come “out of the closet” is one means of revealing the higher frequency of violations; involuntarily “outing” gays and lesbians is another. Both strategies arguably serve to disprove common stereotypes about gays and lesbians. Many homophobes are able to preserve their distorted and negative images of gays and lesbians by the fact that they rarely or never encounter a contradicting image: someone they know is homosexual but who does not conform to the stereotype. Some hope that outing will provide evidence that forces the homophobe to abandon the stereotype, and with it, abandon the disapproval of homosexuality. This line of thinking strikes me as optimistic; certainly many people are able to hold negative stereotypes of women and African Americans despite their never having been in the closet. But there is a second point about stereotypes: even if outing only causes homophobes to replace extreme stereotypes with more subtle ones, falsifying the extreme stereotype forces the homophobe to realize that there may be far *more* gays and lesbians than was previously thought possible — because strangers who do not manifest the extreme stereotype could still be gay or lesbian. The changed stereotype thus may create a feedback effect, in which the increased frequency of perceived violations weakens the norm.

Outing and privacy are always two possible alternative strategies for attacking an existing norm.³¹⁴ Privacy tries to drive down the risk of detection to the point where the norm is unenforceable. Outing tries to raise the risk of detection to the point where the consensus is revealed to be far weaker than previously believed.³¹⁵

violations — assuming, for example, that most or all norm violators are detected when very few actually are — then abandoning privacy will reveal more violations and lower the intensity of disapproval for each violator. But if the public overestimates norm violations, abandoning privacy will reveal more norm compliance and strengthen the norm.

314. Privacy is also a strategy to prevent a norm from arising.

315. A person who exits the closet both implicitly criticizes the norm and proclaims it to be weak.

Viewed in this way, the effectiveness of a strategy depends greatly on how strong the consensus really is. If the consensus is sufficiently strong, the revelation of violators will produce a flood of new sanctioning, and while each individual may be punished less, the norm may still reach a new equilibrium at a high level of punishment. Moreover, outing is risky because it may provide the norm enforcers with new information that raises the risk of detection for those who did not leave the closet.³¹⁶ Whatever one thinks of outing as a strategy for gays and lesbians in the 1990s, I assume few would or did advocate the strategy in the 1950s, when the consensus was probably strong enough to withstand such an attack. Greater tolerance in the 1990s makes the strategy now plausible. On the other hand, while privacy is the superior strategy when the nosy consensus is strong — or before it arises or is well known — privacy may perpetuate a norm long after the consensus starts to dissipate. A noisy minority may continue to enforce the norm against the occasional individual whose privacy is accidentally lost and give the appearance of a consensus. A low probability of punishment combined with privacy rights may keep most violators in the closet at a time when mass exit would destroy the norm.

* * *

In sum, the existence of esteem-based norms matters greatly to privacy regulation. A complete analysis of privacy must ask whether the information restrained might otherwise be used to create or enforce a norm and, if so, whether the norm is efficient. When inefficient, the benefits of privacy — weakening a norm that impedes satisfaction of self-regarding preferences — may exceed its costs — the increase in search costs necessary to satisfy those preferences. Finally, the privacy strategy should be compared to a possible outing strategy: if individuals are willing to use the latter and if the norm is already weak, privacy may only perpetuate the norm. But where the norm is genuinely powerful, or where private outing behavior is unlikely, privacy may be the superior means of weakening the norm.

316. Judge Posner says, for example, that the extreme stereotypes make homosexuals invisible to homophobes, when additional tolerance may make detection easier. See POSNER, *supra* note 298, at 292.

CONCLUSION

This article has two goals. One is to clarify and unify the disparate scholarship on norms: group and societal norms, broad and narrow norms, externally and internally enforced norms. The second is to identify new connections between law and norms, particularly the use of law to regulate norms. For each goal, my strategy has been to identify a particular theory of norm origin. Given the assumption that people seek esteem as an end, I argue that norms are inevitable. Sometimes many people grant esteem or withhold esteem from the same behavior, while there is a risk that acts contrary to this consensus will be detected, and the consensus and risk are well known. When these conditions hold, even a weak concern for esteem from any one individual can create significant costs to acting against the consensus. When the private costs exceed the private benefits of violating the consensus, a norm emerges. Over time, competition for relative esteem may strengthen the norm, produce secondary enforcement norms — sometimes backed by material sanctions — and even cause the norm to be internalized.

The esteem theory is not the only plausible theory of norm origin. But it serves the two goals of this article. First, the esteem model resolves certain ambiguities and contradictions in the literature. It explains the origin of both group and societal norms, as well as the occasional conflict between them, and identifies a crucial relationship between narrow and broad norms: concrete esteem-based norms often define the meaning of abstract internalized norms. While preserving a place for internalization, the esteem model can explain phenomena internalization models cannot: the existence of norms that arose without unanimous consensus and the ability of criticism to produce rapid norm change. Thus, by providing a common theory of origin, the esteem model helps to unify the disparate parts of the new norms literature.

Second, the esteem model has immediate implications for norm regulation. The desire for esteem predicts certain kinds of inefficient norms — unnecessary and excessive — omitted from the existing debate. The model also identifies several ways in which information is crucial to norm origin. Thus, law can manipulate norms by manipulating information, as when law creates or strengthens a norm by publicizing the existence of a consensus or when law blocks or weakens a norm by facilitating the concealment of information necessary to norm enforcement. Privacy turns out to be highly relevant to regulating norms; in some situations, the use of privacy rights may usefully restrict norm enforcement.