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ESSAY: THE NEWLY DISCOVERED SELF IN ECONOMICS

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1. Introduction

Economics has recently discovered identity. The discovery seems to have been rather abrupt: George Akerlof and Rachel Kranton published a paper in 2000 noting that economics had been ignoring identity, and setting forth a model by which economics could take identity into account.¹ Subsequently, quite a few papers have been written on the subject, and interest is accelerating.²

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¹George Akerlof & Rachel Kranton, *Economics and Identity*, 115 Q. J. ECON. 715 (2000). “This paper introduces identity- a person’s sense of self- into economic analysis. Identity can account for many phenomena that current economics cannot well explain.” *Id.* at 715 Notably, an earlier book also deals with the economics of identity: JANET LANDA, *TRUST, ETHNICITY AND IDENTITY: THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT EXCHANGE* (UNIV. OF MICH. PRESS, 1994). And other work in economics has also considered identity without labeling it as such and expressly including it as such into the utility function. Examples include Ronit Bodner & Drazen Prelec, *Self-Signaling and Diagnostic Utility in Everyday Decision Making*, in I. BROCAS & J. CARILLO EDS, *THE PSYCHOLOGY OF ECONOMIC DECISIONS. VOL 1: RATIONALITY AND WELL-BEING.* (Oxford University Press (2003)), Roland Benabou & Jean Tirole, *Incentives and ProSocial Behavior*, August 2004, available at <http://icf.som.yale.edu/pdf/behavconf04papers/Benabou.pdf>; Roland Benabou & Jean Tirole, *Intrinsic and Extrinsic Motivation*, 70 REV. ECON. STUD. 489 (2003); Roland Benabou & Jean Tirole, *Willpower and Personal Rules*, 112 J. POL. ECON. 848 (2004). These papers consider “self-signaling,” which is conveying information to oneself about one’s character, proclivities, etc., and other concepts that relate to identity.

² There have been 2 subsequent papers by Akerlof and Kranton, George Akerlof & Rachel Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9 (2005) [hereinafter Akerlof & Kranton, *Organizations*] and George Akerlof & Rachel Kranton, *Identity and Schooling: Some Lessons for the Economics of Education*, 40 J. ECON. LIT. 1167 (2002) [hereinafter Akerlof & Kranton, *Schooling*]. Other

Legal scholars have long made use of the concept of identity. However, that concept differs in important ways from economics' concept of identity. Legal scholarship has thus far been interested in the consequences of particular identities, such as race, gender, or religious identity. Not infrequently, an important strain of the analysis is that the identity (say, race, gender or sexual orientation) is immutable, not chosen. Or that there may or may not be a choice involved (say, a particular religious identity) may be largely irrelevant to the analysis. In either case, the issue is that somebody has the identity, somebody else reacts badly to it, and the government figures out which bad reactions it should intervene against and how.³ *By contrast, the economics model focuses more on choices: people choosing particular identities or particular aspects of those identities, or making other choices based in part on identity,⁴ or other people influencing the choice, including by creating and defining particular identities.* Identity is therefore an end – perhaps not an end in itself, but something people might purposively seek. The

papers include Roland Fryer and Matthew Jackson, *A Categorical Model of Cognition and Biased Decision-Making* (NBER WORKING PAPER, November 2004); Howard Bodenhorn & Christopher S. Ruebeck, *The Economics of Identity and The Endogeneity of Race* (NBER WORKING PAPER 9962) (September 2003); Hanming Fang & Glenn C. Loury, *Toward an Economic Theory of Dysfunctional Identity*, COWLES FOUNDATION DISCUSSION PAPER NO. 1483, YALE UNIVERSITY (October 2004); Lanse Minkler & Metin M. Coşgel, *Religious Identity and Consumption*, (working paper, University of Connecticut, 2004), Heather Antecol & Deborah A. Cobb-Clark, *Identity & Racial Harassment* (working paper, May 2004), and Prabirendra Chatterjee & Sudipta Sarangi, *Social Identity and Group Lending*, LSU WORKING PAPER, 2004, available at http://www.bus.lsu.edu/economics/papers/pap04_01.pdf (examining the interaction between economics and identity in microfinance programs). The 2005 American Economics Association meeting featured a panel on economics and identity.

³ Cites. Add also reference to Kimberle Crenshaw's work on intersectionality, where the point is that a person has two (or more) identities that 'intersect.' (See, in this regard, Mary Eaton, [cite] ("The court, having seen the rouge [on a gay black man who liked to wear makeup], couldn't see the noir." (explaining the court's reasoning in ruling against a black man who claimed discrimination on the basis of race.))

⁴ The Chatterjee paper, *supra* note 2, examines how the results of microcredit lending practices, including whether the participants have joint and several liability, might be influenced by the participants' social identities.

economics model necessarily recognizes, of course, that people are constrained in their choice of identity – but, again, much focus is on the possibility of choice, albeit perhaps under some sort of constraint.

Of course, identity is not just an economic or legal concept: it is enormously important in many social sciences⁵ and in the humanities as well. And law itself, both in the scholarly realm and in the real world, has made broad, albeit implicit, use of the concept; consider in this regard the Federal Rule of Evidence limitation on the use of ‘character’ evidence,⁶ presumably because whether something is ‘the sort of thing somebody might do’ is not supposed to be considered in deciding whether he did in fact do it. But my focus here is on identity as an economic concept. In this essay, I consider what the new economics of identity has to say to legal scholarship. Taking identity into account suggests tantalizing ways of approaching important legal questions.

While economics’ focus on “identity” is new, there is considerable overlap with existing literature on social norms, especially internalized norms, social meaning, expressive law, and ‘crowding out’ of intrinsic motivations by extrinsic rewards and punishments.⁷ And

⁵ “Sociologists and anthropologists have long relied on identity to understand human behavior...” Chatterjee and Sarangi, *supra* note 2, at 3. The authors go on to note that “economics has begun to develop formal models to further our understanding of social identity.” *Id.* at 3. The psychological literature is particularly voluminous. But much of it, and more broadly, much of the social science literature, explores complexities of identity that are beyond what is needed for my purposes and indeed, are antithetical to the economics ethos of parsimonious modeling.

⁶ Federal Rules of Evidence §404

⁷ See, e.g., Benabou & Tirole and Bodner & Prelec, *supra* note 1. See also [other papers by Benabou, Fehr, Falk, J. Note too that Cass Sunstein speaks of “norm communities” and “social roles,” both of which can be seen as identities. But, as I argue in the text, the social aspect is more prominent in these

this is not surprising: the common thread is taking into account human motivations that differ from classically instrumental ones. But there are significant differences. While the new economics of identity includes identities such as ‘jock,’ ‘burnout’ and ‘nerd,’⁸ it also includes traditional identities based on gender, race, etc. The former are far more comprehensively described as collections of social norms than are the latter.

Also, norms are necessarily importantly social⁹ – indeed, the terms ‘norms’ and ‘social norms’ are often used interchangeably. Norms are also typically enforced by some social sanction, whether or not they are also internalized. It’s easy to imagine a norm enforced only by social sanction; it’s almost impossible to imagine a norm that isn’t thusly enforced, even if internalization becomes an important part of the enforcement process. By contrast, identity is necessarily importantly personal: it is, in Akerlof & Kranton’s definition, a person’s sense of self.¹⁰

Taking identity into account offers additional payoffs to analyses as to how behavior can best be influenced. I explore several contexts in which identity analysis might be particularly worthwhile. This essay proceeds as follows. Section 2 discusses the

conceptualizations than it is in the identity conceptualization. See Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 913 (1996)

⁸ See Akerlof & Kranton, *Schooling*, *supra* note 2. Note that Akerlof and Kranton use terminology a bit differently than I do: they use the term ‘social categories’ rather than ‘identities.’ In their parlance, one gets an ‘identity payoff’ from achieving the ideal type of a particular social category. For my purposes, since one aspect of identity I want to stress is the individual and less social aspect, I use the term ‘identity’ rather than ‘social category.’

⁹ Indeed, in Eric Posner’s book *Law and Social Norms*, he develops an account of norms which is necessarily social: norms are ways to signal to others one’s status as a cooperator and desirable partner in future dealings. See ERIC POSNER, *LAW AND SOCIAL NORMS*, HARVARD UNIVERSITY PRESS (2000).

¹⁰ See Akerlof & Kranton, *supra* note 1.

economic concept of identity, arguing that identity readily can and should be treated as part of a person's utility function. My discussion extends the concept as developed thus far, including by characterizing identity as a category which can be understood using concepts developed in psychology for categorizations more broadly. Section 3 discusses contexts in which identity considerations may be particularly important, and compares and contrasts identity analysis with other approaches. Section 4 considers some further applications. Section 5 concludes.

2. The Economics Concept of Identity

I use Akerlof and Kranton's definition of identity: identity is a person's sense of self.¹¹

There is considerable literature on people's abilities and proclivities to convince others (and presumably themselves) that they are good,¹² other-regarding, or skilled in various respects.¹³ But identity considerations are far more pervasive, as the new literature recognizes. Some identities are indeed self-serving, but others are neutral (for instance,

¹¹ Akerlof & Kranton, *supra* note 1, at 715. This definition does not purport to be comprehensive or even to offer much in the way of explanation or elucidation – it merely relabels. [But nothing in my analysis turns on attempting a more detailed description.]

¹² A considerable literature exists on the behavior typically exemplifying the 'civic minded' identity; one line of papers refers to the behavior as "pro-social" behavior. *See, e.g.*, Roland Benabou & Jean Tirole, *Incentives and ProSocial Behavior*, August 2004, available at <http://icf.som.yale.edu/pdf/behavconf04papers/Benabou.pdf> For my purposes, identity and behavior ought to be distinguished, even if there is considerable overlap between the two. The identity- the label- can provide an independent source of benefit, over and above benefits from the esteem and increased opportunities for cooperation with others, and the psychic satisfactions of being other-regarding. Furthermore, once we consider 'having the identity' as a category separate from behaving in particular ways, we can consider the selection criteria for the category, and how to change them to be more or less inclusive. I discuss this issue further in Claire A. Hill, *Beyond Mistakes: The Next Wave of Behavioral Law and Economics*, 29 QUEEN'S LAW JOURNAL 563 (2004)

¹³ Cites. *See also* Benabou & Tirole, *supra* note 6, at 2.

being of a particular gender or religion); some might even seem counterproductive. Some identities are chosen; others are not.¹⁴ But any identity may be valued - a person who considers herself to be a loser may feel alienated if she has a sudden run of success and may seek to reaffirm that she's 'really' a loser.¹⁵

A person's identity shapes the way she sees the world. Simple confirmation bias might accomplish this result,¹⁶ but a broader need to make sense of the world and provide a coherent and stable narrative for one's view of one's self and one's choices surely factor in as well. Chatterjee and Sarangi characterize Amartya Sen as arguing that "social identity has two roles: a delineating role, which affects formulations of ideas and conduct and a perceptual role, which is concerned with the way an agent perceives the world."¹⁷

More broadly, a person may seek, consciously or unconsciously, to preserve her identity or risk feeling discomfort or anxiety. If person X, a member of a racial group that is in a small minority, seeks to abide by norms of the majority group in a manner that violates the norms of the minority group in order to get benefits such as better employment opportunities, she may bear considerable costs; that this is so has been remarked upon

¹⁴ Some identities are traditionally not a subject of choice, but in particular instances may be. *See, e.g.*, Bodenhorn & Christopher S. Ruebeck, *supra* note 2, discussing people able to choose between a black or mulatto identity. And of course some people do choose their gender in a literal sense, although the purported choice, in their accounts, simply makes the outer body reflect the innate true gender. *See, e.g.*, DEIRDRE MCCLOSKEY, *CROSSING* (U. CHICAGO PRESS, 1999); JAN MORRIS, *CONUNDRUM* (HENRY HOLT & CO., 1987).

¹⁵ [is 'loser' in any sense a social identity? What might follow if it were?]

¹⁶ cite

¹⁷ Chatterjee & Sarangi, *supra* note 2, at 3.

many times, but economists such as Akerlof & Kranton and Roland Fryer¹⁸ formalize it in economic terms. Akerlof and Kranton also translate into economic language the intuition that a the behavior of a person in a particular group (minority; gender) in abiding by another group's norms or flouting the norms of her own group may produce an externality, affecting others in either or both groups.¹⁹

People have many identities,²⁰ some of which conflict. Consider the familiar conflict between present and future-regardingness; it can be seen as a conflict among identities,²¹ as can, relatedly, seeing oneself as a disciplined sort of person, readily forsaking present pleasure for future advantage vs. seeing oneself as more 'living in the moment' and pleasure-seeking.²² Consider, too, the contrast and possible conflict between an identity as 'good citizen and law abiding person' and one as 'somebody who has arrived' as

¹⁸ See, e.g. Fryer and Jackson, *supra* note 2

¹⁹ Akerlof & Kranton, *supra* note ___.

²⁰ Economics Professor Paul Seabright argues in a recent book, *THE COMPANY OF STRANGERS: A NATURAL HISTORY OF ECONOMIC LIFE* (PRINCETON UNIV. PRESS, 2004), that: "An individual no longer had a single public identity as the occupant of a place in a known order but rather had multiple public identities...It is one of the recurring refrains of modern life that as the individual comes to rely more and more upon others to supply the necessities of his daily existence, he can no longer simply borrow from others the narrative that is to make sense of his life but must fashion his own." *Id.* at 92.

²¹ To some extent, the territory is well-trod; some of the work has referred to warring 'selves.' Indeed, a seminal article by Jon Elster, *Weakness of Will and the Free-Rider Problem*, 1 *ECON & PHIL* 231 (1985) discusses 'multiple selves' such as the present self that wants gratification now and the future-regarding self that is willing to save and forego. My view is similar to that espoused in Douglas Glen Whitman, *Meta-Preferences and Multiple Selves*, working paper, available at <http://www.csun.edu/~dgdw61315/MPMS4.pdf>: that for many analytic purposes, that it's two 'selves' that are warring is no different than any other trade-offs in the utility function.

²² The problem of present vs. future has been considered using many different frameworks and vocabularies. One of the most popular involves discount rates; the literature is voluminous. [cites] (And there are, of course, the many articles on different rates of discounting, some of which speak to these types of issues. [cites]) (For an argument that hyperbolic discounting is rational from an evolutionary perspective, see Owen Jones & Tim Goldsmith, *Law and Behavioral Biology*, *COLUM. L. REV.* (forthcoming, 2005)). And there are many other approaches: See, e.g., Loewenstein et. al. [*Animal Spirits: Affect and Deliberative Processes in Economic Behavior*;][*Out of Control: Visceral Influences on Behavior*],

evidenced by material possessions. (And of course, there are the well-worn discussions of the conflict between what some regard as a traditional “female” identity and certain hard-driving careers.²³)

The identity payoff will aggregate all the relevant costs and benefits; sometimes the aggregation will be a simple sum, and other times, the aggregation will net an identity benefit against another identity cost. An example of the latter might be an entertainer from a culture whose norms discourage such a career choice. (This contrasts with the Fryer example above, in which there are identity costs from a career choice that offers benefits, but not identity benefits.)

An identity formulation provides a set of intuitively appealing reasons for purposive action, especially action whose classically instrumental payoff is obscure. Why would an employee ever prefer a ‘perk’ to money? Why might she prefer being named ‘employee of the month’ over a raise? Sometimes, status and esteem – social features-- can be used as explanations. But these don’t explain why somebody would vote²⁴ or donate anonymously to charity.²⁵ And it’s a safe bet that several years after the fact, when the employers hopes and expects that having named the employee as employee of the month

²³ This is also discussed in Akerlof & Kranton, *supra* note 2.

²⁴ Eric Posner argues in *LAW AND SOCIAL NORMS*, *supra* note __, that people vote to signal to others that they are cooperators. I critiqued this view in *Law and Economics in the Personal Sphere*, __*LAW & SOCIAL INQUIRY* (2004); one main thrust of my critique is that it assumes that others know whether somebody votes.

²⁵ While most donations to charity are not anonymous, a small percentage, representing a fairly large amount in absolute dollars, is. [cite]

is still serving to induce the employee to be productive, loyal and diligent, an employee remembers being ‘employee of the month’ for a particular month much more than her co-workers do. Nor need the benefits or costs of identity relate directly to action motivated by identity considerations. What of a secular Jew-by-birth who feels anxiety at attending a participatory Christian ceremony with frequent references to the Christian God and other trappings of Christianity?

As noted above, identity is sought purposively, albeit not necessarily consciously so.²⁶ This is not to say, however, that identity is necessarily an end in itself. Indeed, one might seek an identity as a member of a particular group for classically instrumental ends. One fascinating paper, by Howard Bodenhorn and Christopher S. Ruebeck, discusses the choice some people who could pass for either mulatto or black made.²⁷ Presumably, the choice was affected by the higher wages apparently available to mulattos, although the wage consideration was not dispositive – some people chose a mulatto identity while others chose a black identity.

There are other classically instrumental reasons why one might seek a particular identity. The identity could yield power or status; an example might be a choice to belong to a socially prominent religious denomination. But there are other less classically instrumental, and in some cases non-instrumental, reasons to choose a particular

²⁶ I intend an analogy to the classic rationality account of how people choose and reason. Cite. [cite to the methodology text re: the leaf that abides by the law of gravity]

²⁷ Bodenhorn & Ruebeck, *supra* note 2. The authors note that “[a]dopting a mulatto identity generates pecuniary gains, but imposes psychic costs.”

identity.²⁸ Having a particular identity could be (like) a consumption good – a source of pleasure and self-satisfaction.²⁹ Finally, choosing an identity obviates many other choices, saving considerable information and transaction costs. Making one such decision - say, to take Michael Jordan or Madonna as a role model- can provide an easy decision rule for many otherwise singular and time-consuming choices.³⁰ Even non-celebrity identities have this feature.³¹

Indeed, a particular identity choice can yield an interesting set of costs and benefits, both instrumental and non-instrumental.³² Bodenhorn & Ruebeck also find the choice to depend on the sizes of the communities at issue – again, the greater the size of a group, the more there might be a benefit to being a member of the group. They explain a finding that beyond a certain point, an increase in the number of mulatto households was

²⁸ Akerlof & Kranton, *supra* note 1, note that “identity can explain behavior that appears detrimental. People behave in ways that would be considered maladaptive or even self-destructive by those with other identities. The reason for this behavior may be to bolster a sense of self or to salve a diminished self-image.”

²⁹ These same types of distinctions are drawn in the vocabulary of self-signaling by Benabou & Tirole, *supra* note 2, at 6-7.

³⁰ Of course, not everything a role model does is salient for this purpose. My philosophy professor at the University of Chicago, Ted Cohen, made the point memorably: “You don’t really think, do you?., that whether somebody prefers HoJo Orange Soda or HoJo Cola is relevant to whether or not he’s an ideal judge [of art, in the Humean sense]?”

³¹ In joint work with Erin O’Hara on trust, we argue that one reason to trust is to reduce uncertainty and give themselves guides to action. I have to decide whether to lend somebody my car or not; I make a binary decision because it’s not possible to act on a probability assessment of, say, 67%. Claire Hill & Erin O’Hara, *Optimal Trust* (working paper on file with authors) Similarly, people typically understand and know themselves and choose actions (or construct narratives of their choice processes) with reference to identities (“I’m a nerd” or “I’m the sort of person who’s always at the soup kitchen serving food on holidays”). *See also* Loury, *supra* note 2.

³² The distinction between instrumental and non-instrumental is ultimately largely unintelligible. One wants money for the things money can buy; one wants a promotion for status. But why does one want the things money can buy? Why does one want status? Perhaps to feel pleasure? But why would one want that? Still, for purposes of this essay I will speak as though the distinction were intelligible since I seek to evoke principally a common-sense non-rigorous distinction between, for instance, wanting to get a raise to get money vs. wanting to feel that I’m a worthwhile person living a worthwhile life.

associated with a decrease in wealth as follows: “we interpret this result to mean that a light-skinned African American was more likely to identify as mulatto the larger the size of the local mulatto community, but the driving force behind this decision was apparently not an enhanced ability to increase one’s wealth. There were likely nonpecuniary benefits.”³³

Almost any type of identity is a plausible subject for analysis. In their piece on *Economics of Identity in Organizations*³⁴, Akerlof and Kranton consider a person’s identity as a member of an organization (a soldier, an employee who identifies with her employer or some subgroup of her employer); in their piece on *Economics of Identity in Schooling*,³⁵ identities such as ‘jock’ and ‘nerd’ are considered.³⁶ The common thread is that efforts, whether or not purposive or conscious, are spent pursuing, retaining or bolstering an identity: -- identity responds to incentives, and the inquiry is as to what those incentives are, the results thereof, and what those incentives should be. The employer wants the employee to work more productively: should she give the employee a raise or start an ‘employee of the month’ program? The school (and society) wants the student to work more productively: should the school encourage one ideal identity (high academic achiever) in a school or several (high academic achiever; good all-around

³³ Bodenhorn & Ruebeck, *supra* note 2, at [31]. While their categories of nonpecuniary benefits and pecuniary benefits don’t completely overlap with my categories of non-instrumental and instrumental benefits, there is significant overlap: pecuniary benefits are paradigmatically instrumental, whereas psychic benefits are paradigmatically noninstrumental.

³⁴ *See supra* note 2.

³⁵ *See* Akerlof & Kranton, *Schooling*, *supra* note 2.

³⁶ As I mention in note __, *supra*, Akerlof & Kranton actually use the term “social category” rather than “identity” but do use the concept of ‘identity payoffs.’ Other authors use different terms; many use the term “identity.”

balanced student)?³⁷ Again, what distinguishes the economic approach is that it thinks in terms of incentives that would make identity choice or preservation optimal (or suboptimal) from an individual and societal point of view. The focus may be on a person's choice of identity, how somebody else can influence the choice, how the possible identities can be manipulated, or identities might dictate which groups are formed. [Add re: relationship between social and personal identities. It may be that social identities are more amenable to economic analyses. Consider Loury (who expressly distinguishes the two and notes that his analysis is about social identity), Chatterjee]

As the foregoing suggests, identity fits startlingly neatly into neoclassical economics: it simply goes into a person's utility function, just as, more typically, money and power do.³⁸ But there are important differences. Typical economic 'carrots and sticks' – money and power (and, increasingly, status), on the one hand, and monetary and non-monetary sanctions - are often incremental, at least in theory. More money is better than less, all else equal. More time in jail is worse than less time in jail, all else equal. More status is better than less status. Of course, it's not as though all increments are equal. Somebody with a lot of money may be indifferent to getting more; somebody may be virtually indifferent between a 50 year jail sentence and a 55 year jail sentence. And a person who's very much admired may not care if she adds one more to the list of

³⁷ See Akerlof & Kranton, *Schooling*, *supra* note 2.

³⁸ And aggregating identity costs and benefits where different identities are at issue should pose no more conceptual challenge than aggregate more traditional costs and benefits. (Job X offers more money, but less power, than job Y)

admirers. Some social sanctions can be all-or-none, such as ostracism. But, again, in theory incremental incentive effects are obtained from increasing the size of the carrot or the stick.

By contrast, identity is sometimes binary. Somebody is either an ‘x’ or they are not. And where there are increments, they may be quite lumpy. Disobeying enough of the wrong kind of law shoots down one’s ability to be considered or, one hopes, to consider oneself law abiding. But which and how many laws? ³⁹ For this reason, the classical economic model of instrumental motivations contemplates that behavior is far more severable and more readily malleable than it is. We can add an instrumental sanction (jail time; fine; shaming in the community) to an activity that changes our decision from ‘do the activity’ to ‘refrain from doing the activity.’ But our decision may be more resistant to change if the activity is part of what makes us have an identity we value having. ⁴⁰ (In some cases, the resistance may ultimately be near-infinite: consider how resistant homosexuality has been to efforts to change it by making it more costly.) A friend says that the reason she can’t quit smoking is that she ‘views herself as a smoker.’ She pays higher and higher prices, and goes through more and more inconvenience – but until the identity aspect is

³⁹ I discuss the alternatives to ‘necessary and sufficient conditions’ for categories in Claire A. Hill, *Beyond Mistakes: The Next Wave of Behavioral Law and Economics*, QUEENS L. J. (2004). Particular identities are categories.

⁴⁰ Norms may also make behavior less amenable to change through law. My point here is that identity may work rather differently and more subtly in affecting the payoff to obeying a law.

addressed (or, perhaps, she gets a really big health scare) more costs and most inconvenience won't make her smoke much less.⁴¹

Identities are appropriately viewed as categories; indeed, Akerlof & Kranton use the term “social categories” rather than identities, reserving the word ‘identity’ largely to characterize the payoffs from meeting the ideal of a social category.⁴² When might a person, or the society, conclude that the person is ‘law-abiding’? As is the case with most categories, there is typically a prototype with many peripheral cases.⁴³ Presumably, somebody who has committed a murder cannot be (thought of or think of herself as) ‘law abiding’ no matter what else she does. (Or maybe she can – what if she was lawfully ordered to murder? Or if the murder was under very extreme and sympathetic circumstances?). Presumably, somebody who drives faster than the speed limit or litters is not thereby denied the label ‘law abiding.’ People who ‘cheat’ on their taxes thereby can’t be considered (by themselves or others) law abiding – or can they? What of people who are ‘aggressive’ in their use of deductions? What of people who obey all ‘major’ criminal laws yet flout many others? And of course, what ‘being law abiding’ means

⁴¹ Of course at a certain point these constraints would have to work – for instance, if a pack of cigarettes cost the same amount as she earned in a week, or if it was illegal to smoke at work, at home, and on the street – but that doesn't argue against my point that for identity reasons, the increased prices and inconvenience aren't working linearly. One might say she's just addicted – but she manages not to smoke for the entire workday.

⁴² Akerlof & Kranton, *supra* note 2.

⁴³ In traditional psychology work on categories, the term ‘prototype’ would probably be used rather than ‘ideal.’ See [Markman, Barsalou, Medin] And there are categories that don't have prototypes or ideal types. I think identities are categories, and some have prototypes, and some do not.

changes based in part on what people do as well as how the law changes.⁴⁴ In the 1960s, arguably more than now, someone who smoked marijuana might have been considered law-abiding by some non-trivial segment of the population, and might have considered himself to be law-abiding as well. Indeed, identity is both social and individual.⁴⁵ One has one's own view of one's own identity; the society views a person as having some set of identities as well.⁴⁶ There is typically considerable, although not complete, overlap between social and personal identity, with each necessarily influencing the other.⁴⁷ A person might think of herself as 'law abiding;' the society defines what laws exist (and, probably, which are critical for a 'law abiding' person to obey). What it 'means to be female' is arrived at, for the society and for each person, in some complex interaction.

[That identities are categories – attributes, motivations, belief-structures grouped together- suggests ways in which identity formation, retention, and change can be better

⁴⁴ Note that there are significant overlaps here with the familiar debate on the legitimacy of law. If law sought to make consensual missionary-position sex between consenting married adults illegal, presumably its claim to legitimacy would be significantly impaired, and 'being law abiding' might not necessarily be seen as virtuous.

⁴⁵ [consider why the social is more studied by economists of identity, and why the individual comes more under the rubric of self-signaling. Loury, Benabou, Prelec]

⁴⁶ In a sense, all identities are social. Even an identity as a 'loner' is social; it is defined and characterized in opposition to groups and social life. But both social and individual aspects are critical. And, interestingly, the economics insight, that pursuit of identity is purposive, has significant explanatory power in many fields. One important field is clinical psychology. In an interview, a psychoanalyst and psychologist in New York told me that many, if not most, of her peers, use a technique whereby they treat all behavior as purposive towards a particular identity and conception of self and then determine what the purpose might be. (E-mail Interview with Dr. Jill Herbert, January 2005)

⁴⁷ Chaterjee & Sarangi's paper, *supra* note 2, is about social identity: "Identity refers to a person's sense of self or being and locates an individual in different social categories. To name a few - gender, caste, ethnicity and religion are common examples of such social constructs to which we belong and our sense of belonging or identification with a particular group affects our behavior. Incorporating social identity allows us to model the interaction between identity and the rational behavior thereby enhancing the scope of our analysis. *Id.* at 2. See also Geoffrey Miller, *The Legal Function of Ritual*, forthcoming, CHI. KENT L. REV symposium issue on Rationality (2005). Miller argues that rituals of entry, reaffirmation and exclusion shape one's identity as being part of the community, thereby serving as social control mechanisms.

understood. Indeed, the existence of a particular identity, how fine or coarsely grained it is, or to what extent something is properly within one identity (category) or another can change over time.^{48]}

What dictates the contents and existence of particular categories has been extensively studied. One fairly uncontroversial finding is that people (or societies) have the categories that serve their purposes.⁴⁹ In a fascinating article, Fryer and Jackson discuss a majority group employer who has three categories, two for majority group members (in the paper, high human capital and low human capital) and one for minority group members.⁵⁰ His categories for majority group members are more finely grained because he encounters more majority group members and needs to distinguish them from one another fairly often; by contrast, he encounters fewer majority group members and has less need to distinguish them from one another. (Having categories is not costless; people necessarily will economize on the number of categories they have.) Thus, when the employer wants to hire somebody, even if there are equal proportions of high and low human capital people in the majority and minority groups, his information costs in finding a majority group member with high human capital is lower. He correctly attributes to the majority high human capital group high human capital and correctly

⁴⁸ The literature on categories is voluminous; I cite some of the leading articles in *Beyond Mistakes*, *supra* note ____.

⁴⁹ Cite to Arthur Markman

⁵⁰ Fryer & Jackson, *supra* note ____.

attributes to the minority group a lower average level of human capital.⁵¹ Both social and personal senses of identity are implicated in this example. The minority group social ‘identity,’ viewed from the perspective of the majority group, is coarsely grained and undifferentiated; the minority group’s perception of itself, as well as the minority individual’s perception of herself, may be influenced by the majority group’s perception.⁵²

Identity is very closely related to norms. In many respects, norms and identity analyses should complement one another – in some instances, they will provide different vocabularies to describe the same phenomena. But there are important differences, as I argue below.

What are norms? There is no agreed-upon definition. But for present purposes, I will describe them as behavioral regularities enforced either externally, by a community, or internally, or both. Critically for my account, norms are almost necessarily a creature of a community, and at least in part, enforced by a community. Indeed, most of the paradigmatic norms analyses start with the role of the community in establishing,

⁵¹ As Fryer & Jackson note, each minority group member may then not invest in obtaining and demonstrating high human capital. The dynamic is self-fulfilling, as less investment leads to lowering the average human capital level of the group, which leads to.....

⁵² While people would tend to categorize more finely within their groups, as psychological research has documented, there is also research tending to show that categorizations are finer for people deemed higher up in hierarchies than for those lower in hierarchies. To the extent a group came to experience itself as being low in the societal hierarchy, identity might be conceptualized in a less finely grained manner. [cite to Fiske; cite to other work re: taking on views that might be self-undermining in particular circumstances] [consider Wolfe’s “Me Decade” re: luxury of introspection]

defining, and enforcing norms. Richard McAdams argues that “the initial force behind norm creation is the desire individuals have for respect or prestige, that is, for the relative esteem of others.”⁵³ Cass Sunstein says that norms can be understood as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.”⁵⁴ And Robert Cooter defines a social norm as “an obligation backed by a social sanction.” He continues: “By ‘obligation’ I mean a statement about what people ought to do, such as pay taxes and clean up after their dogs. By a social sanction, I mean punishment imposed, not by state officials, but by ordinary people, such as shunning a litigious lawyer or refusing to deal with a law firm that organizes hostile takeovers.”⁵⁵

Different scholars have different views as to the importance of internal vs. external sanctions for norms violation, with Cooter according more prominence to internalization⁵⁶ and McAdams according more prominence to denial of esteem, an external sanction. But for norms scholars generally, including Cooter and McAdams,

⁵³ Richard McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338, 342 (1997). Note, though, that while McAdams’s general discussion focuses very much on external enforcement of norms, he does speak at times as though a norm might be enforced solely internally. *Id.* at 348 (“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.” (emphasis added)) But McAdams ultimately sees norms as social: “My thesis is that norms arise because people seek the esteem of others.” *Id.* at 355.

⁵⁴ Sunstein, *supra* note __ at 913.

⁵⁵ Robert Cooter, *Three Effects of Social Norms on Law*, 79 ORE. L. REV. 1,5 (2000). See also Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1877 (2000); ERIC POSNER, *LAW AND SOCIAL NORMS*, HARVARD UNIVERSITY PRESS (2000)

⁵⁶ see also Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1665 (1996) “[A] social norm is ineffective in a community and does not exist unless people internalize it.”

norms are inherently and importantly social;⁵⁷ by contrast, identities can be importantly individual and personal. In this regard, the ultimate identity payoff is almost by definition individual, whereas the payoff to abiding by a norm could be purely social.

Importantly, too, norms often have as their object a particular action – as in the Cooter quote above, ‘do X,’ or ‘don’t do y’⁵⁸ whereas identity may be about an action or a mindset. When I agreed to donate bone marrow, it made me feel that I was ‘the sort of person who would do good things like that.’ When I bought a plane ticket after comparing prices for only 15 minutes, I found myself surprised and somewhat anxiety-ridden that I might no longer be ‘the sort of person who searched high and low for the best possible deal’ (or in Herbert Simon and Barry Schwartz’s terminology,⁵⁹ that I might now be a satisficer rather than a maximizer). A norms construction does not as readily capture these thoughts, actions, or payoffs.

Also, as discussed above, identities affect how individuals (and perhaps societies) process information and update their beliefs.⁶⁰ Norms may have this effect as well – indeed, Cass Sunstein argues that they do⁶¹—but, I would argue, less so. While the point would be difficult to establish empirically, intuition suggests that many common more action-

⁵⁷ *Id.* at 379-81; Cooter, *supra* note __ at __.

⁵⁸ Cooter, *supra* note __ at 1661 (“Norms are practical in the sense that they direct behavior.”)

⁵⁹ cite to Barry Schwartz, Paradox of Choice

⁶⁰ Cite to philosophers, including Quine, and psychologists, including Kunda.”

⁶¹ *See* Sunstein, *supra* note __, at 931: “[N]orms and [social] roles pervasively influence judgments about facts.” Relatedly, Sunstein also says that he hopes “to draw attention to the fact that people’s conception of appropriate action and even of their “interest” is very much a function of the particular social role in which they find themselves.’ *Id.* at 911-12

oriented norms, of the sort mentioned by Cooter above (and which Richard McAdams has labeled “concrete behavioral norms”),⁶² would be less apt to affect information processing than would a broad self-concept such as viewing oneself as female, which presumably incorporates some view of what it means to be female. As the norms at issue get more abstract and less associated with particular behaviors, they more resemble identities and hence seem more likely to affect information processing and belief formation.

A final distinction between norms and identity is the different in the relevant ‘units’ – many norms, especially “concrete behavioral norms” are in theory quite-simple units of behavior. Identities (and “abstract norms” come in larger units. An example makes the point: A particular behavior such as littering might be attacked through attempts at creating a very behaviorally simple anti-littering norm, or more abstract norms (for instance, a cluster of related behaviors that met with social sanctions), or identities⁶³ (encouraging people to think of themselves as being civic minded, and advancing a definition of civic-mindedness that included littering as well as many other things.)⁶⁴

⁶² Richard McAdams distinguishes between more abstract norms, which he says can be internalized, and “concrete behavioral norms implementing the abstract norm, which are not internalized.” McAdams, *supra* note ___, at 38. What he has in mind by the concept “abstract norms” has some overlap with my concept of identity. For instance, “good neighbor” and “good friend” are abstract norms in McAdams’s account and can be seen as identities as well.

⁶³ Cooter notes that when people internalize norms, they think others shouldn’t violate the norms either – thus, external sanctioning goes with internalization. Identity provides a complementary mechanism.

⁶⁴ There is an overlap here with literature on ‘framing.’ The same behavior – not littering- is being framed alternately as ‘something one shouldn’t do’ ‘something of the sort one shouldn’t do’ or ‘something one wouldn’t want to be the sort of person who did.’

3. Contexts in Which the New Economics of Identity Can Inform Legal Scholarship

i. Introduction

How might consideration of identity inform legal scholarship? I consider several contexts.

One is where an identity is in significant part defined by legal regulation or prohibition. Another is where identity considerations particularly influence costs and benefits of particular actions. A third relates to another feature of identity: that while norms can come in individual units, identities do not. A fourth context is where law, norms, and identity considerations compete. A fifth context is where traditional economic incentives and identity considerations may be antithetical to one another.

ii. Identities Defined or Created by Law

Some identities are defined in significant part by legal regulation or prohibition. Identity considerations may affect whether law might want to have more finely or more coarsely grained categories,⁶⁵ categories that are intended to be more lifelong or more transient, or categories with more or less rigid boundaries.

⁶⁵ Regarding coarseness, recall the discussion above of Fryer & Jackson.

Consider the criminal law. Somebody who commits a crime isn't just a 'criminal.' Rather, there are many law-created categories: felon, sex-offender, repeat offender (for purposes of, for instance, three strikes rules). Illegal drugs are on 'schedules' with particular drugs grouped together as more or less serious. Here, it might make sense to be fairly fine grained to limit the classic incremental effect, here as applied to identity rather than external sanctions. People who take marijuana are often horrified at the thought of taking heroin, thinking 'they aren't the sort of person who takes serious drugs.' Coarser categories might assist somebody who started off with identity objections to heroin to meet (rationalize away) those objections.

Repeat offender/three strikes and sex offender categories are rigid and permanent.⁶⁶ In a recent case, a residential subdivision and a homebuyer in the subdivision had a dispute. The subdivision claimed that the sex offender's presence became known and sales therefore declined, and that the sex offender sought a large sum of money to move away. It seems not unlikely that the sex offender had to announce himself as such to quite a few people in his attempt to get the money; the cost of such an announcement presumably declines once enough people know and, critically, once he comes to be used to himself being labeled as such.⁶⁷

⁶⁶ Interestingly, Germany apparently has quite finely grained categories in the criminal law context. Cite [Jacqueline Ross]

⁶⁷ cite. I recall in London in 1978 advertisements for somebody who didn't bathe, wore dirty smelly clothes, and carried around a fish in his pocket. He was hiring himself out as 'the stinker' to go to offices where his presence would be particularly embarrassing.

By contrast, consider bankruptcy. Bankruptcy isn't just a set of rules – it's also a 'status' (or identity). The rhetoric of bankruptcy law has been to emphasize that the identity is only transient – one can 'make a fresh start.' [add re: old vs. new rules]. The fresh start rhetoric has accorded well with the American mythology of invention and reinvention, in which a person can 'be anything she wants' – can 'come up from nowhere' – can 'start again' – can 'move to a new place and start a new life.' (And consider in this regard the public interest campaigns telling girls that notwithstanding having had sex, they could present themselves as, and think of themselves as, virgins.)

But there is a tension as well, brought about by long-standing habit, a need to classify and a general 'future is like the past' view. Crime shows on television routinely have the detectives self-righteously and harshly questioning people who they have deemed suspects in significant part based on their past conduct – the presumption is 'once a crook, always a crook.' We thus have two competing credos – identity is infinitely malleable, and identity is immutable. And certainly, the recent debates on privacy law implicate this tension. The more that can be found out about people, the less they can potentially reinvent themselves. Other societies are in principle less committed to reinvention. Are there ways to encourage the right kinds of reinvention? Might an identity framework assist in reframing the debate – perhaps, just as Akerlof and Kranton argue in the context of schools offering a choice of identities rather than just one, here, the choice could be less stark and more intermediate grounds could be offered?

Finally, consider professions subject to regulation: lawyer, hairdresser, plumber, etc. Law specifies who can engage in the profession and on what terms. The existence and rituals of entry into a legally defined profession presumably affect the identity of those in that profession and those outside it. Consider the relationship between people in a legally defined profession and those assisting them (paralegals and secretaries to lawyers; nurses to doctors). More senior lawyers may experience an identity cost if they have to do a task they think is beneath their ‘status’ even if nobody sees them doing it. (More junior lawyers know they’ll be fired if they don’t get the coffee, fix the Xerox machine, etc and hence have to bear these costs.) Interestingly, some low-cost airline carriers have done well by persuading all their employees that it’s not beneath them to do any task that needs doing: a recent story about Southwest Airlines described about a pilot carrying some passenger luggage.⁶⁸ And the point extends beyond hierarchical relationships. How did the distinction in the UK between barristers and solicitors affect how the two types of lawyers conceived of themselves? ⁶⁹

iii. Identity Costs and Benefits

Identity analysis may also be useful where identity costs and benefits are of particular relevance. One example is where identity’s more binary nature is relevant. As I

⁶⁸ cite. To the extent the job descriptions are a matter of union contract rather than legal definition they still qualify as creations of law.

⁶⁹ Here, there is a considerable overlap with ‘social meaning.’ [Consider systematically: more or less finely specified professions; saying ‘behavior X doesn’t count as forming your identity;’ effect of regulation being an ‘official’ one]

discussed above, traditional economic incentives often work at the margins: more jail time and a higher fine is said to discourage behavior more than less jail time and a lower fine. Reputations, similarly, can be ‘better’ or ‘worse.’ But identity is paradigmatically more binary: for many identities, one either has the identity or one does not. Somebody who thinks of himself as a fisherman may not be willing to take even quite-large quantities of money in order to abandon his occupation.⁷⁰ This poses a problem in a community in which fishing is no longer socially advisable for environmental or other reasons. Might a whole community be more willing to abandon the profession together if the identity is largely a social one? (Or might they be less willing on grounds that the social identity itself had a value?) Or might this suggest the desirability of early education regarding declining industries or how one oughtn’t to become too attached to one’s profession? It’s not clear how the identity considerations should best inform policy, but it is clear that they must: the fishermen’s reaction reflects in significant part the costs to them of losing their identity as fishermen.

Another example involves regret. George Loewenstein and Jennifer S. Lerner discuss studies suggesting that people care about “what the [ir] chosen outcome implies for their own self-evaluation as a competent, intelligent person.” They report on a study in which “recruits were willing to settle for less money” in order to avoid getting feedback that might lead to feeling regret.⁷¹ While to some extent, regret itself is doing much of the

⁷⁰ Thanks to Shi-Ling Hsu for this example.

⁷¹ George Loewenstein & Jennifer Lerner, *The Role of Affect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCES, R. J. DAVIDSON, K. R. SCHERER & H. H. GOLDSMITH (2003, OXFORD UNIV. PRESS).

work in this account, the cost to one's self-image on account of the regret factors in as well, and may suggest broader use of the types of solutions Richard Thaler has been proposing in the context of pension plans and savings schemes⁷² – solutions where there is a default choice which has less potential to trigger regret.

Doug Kysar's recent work on preferences⁷³ for processes is also relevant here. Kysar argues that people have preferences sometimes for the processes by which goods are made rather than just the inherent attributes of the goods; he therefore critiques various legal rules and regimes that can limit access to information on process. In other work, Kysar describes consumption decisions as 'messy communicative acts that ...[involve] elements of self-identity and social expression.' Identity offers one unifying account of preferences for processes and many seeming preferences for inherent attributes. A manufacturer depicts a product as something stylish people consume, or as something that will yield a stylish appearance – I view myself as stylish, or want to do so, and hence decide to buy the product – buying the product is part of how I come to be, and see

In his recent book *The Paradox of Choice*, Barry Schwartz also argues vigorously for the downside of regret Barry Schwartz, *The Paradox of Choice* (cite). Schwartz and I are writing a piece, tentatively entitled *More is Less*, on how choices and negotiations are actually more Heisenbergian than is generally appreciated for many reasons, including that they potentially inspire regret.

⁷² Cites, including work with Kahneman

⁷³ Here, I agree with Sunstein that the concept of preference is problematic. See Sunstein, *supra* note ___. Gary Becker argued that people's actual preferences tended to be second order rather than for particular items: ("The preferences that are assumed to be stable do not refer to market goods and services, like oranges, automobiles or medical care, but to underlying objects of choice that are produced by each household using market goods and services, their own time, and other inputs. These underlying preferences are defined over fundamental aspects of life, such as health, prestige, sensual pleasure." Gary Becker, *The Economic Approach to Human Behavior* (Univ. of Chicago Press, 1976). In the spirit of Becker's characterization, one could characterize quite similarly the preference to be, to be thought of, and to think of oneself in a particular way. See also Douglas Whitman, *Metapreferences*, *supra* note__.

myself as, stylish. A manufacturer touts the process by which her sneakers are made- by people over 18 paid a living wage- and I buy them, thinking that I am the sort of person who would rather pay more for sneakers than be party to labor practices I disapprove of.⁷⁴

iv. Identities as Categories

A third relates to another feature of identity: that while norms can come in individual units, identities do not. That this is so affects how policy-makers might best go about influencing behavior. In some cases, it may be best to influence behavior by attaching additional legal sanctions, or attempting to create a norm with respect to particular conduct; in other cases, a more identity-related approach may be desirable. Compare, for instance, addressing drunk driving via a fine or via a campaign touting ‘what good friends do (and don’t do).’ Here, there are particularly strong overlaps with social norms and social meaning, but identity considerations may suggest why we might prefer one approach of changing behavior to another.⁷⁵ Indeed, as I suggested above, a particular behavior such as littering might be attacked through attempts at creating a very

⁷⁴ [Might it be particularly important to regulate the truth of process-based claims? It’s been argued that such claims may be especially hard to verify (how do I know how much Nike is paying its workers in Thailand?). But identity may offer another reason: the identity benefit may be more readily and formulaically available.]

⁷⁵ A somewhat related line of argument is made in the context of trust by Nava Ashraf, Iris Bohnet & Nikita Piankov, in *Is Trust a Bad Investment* [available on website], in which the authors argue as follows. “If policy makers wish to raise the level of trust, they need to know the determinants of trust. If trust is mainly a function of expected trustworthiness, they should focus on the level of trustworthiness and on beliefs about that level. In contrast, if trust is mainly motivated by warm-glow kindness, they should focus on fostering of intrinsic rewards. Recent evidence suggests that institutions such as contractual arrangements and market organization affect the intrinsic benefits people derive from cooperation and trustworthiness.” *Id.* at 6

behaviorally simple anti-littering norm, or more abstract norms (for instance, a cluster of related behaviors that met with social sanctions), or identities⁷⁶ (encouraging people to think of themselves as being civic minded, and advancing a definition of civic-mindedness that included littering as well as many other things.)⁷⁷

iv. Law, Norms and Identity

A fourth context is where law, norms, and identity considerations compete. It's well understood that some groups' norms (and identity) reward challenges to law – consider, at the extreme, gang initiation. But clashes involving identities not traditionally characterized as such are less noticed, and are of considerable interest. My principal example is an identity I label “push the envelope.” This identity accords with a popular conception of tax lawyers: people who take pride in their ability to craft strategies that are ‘close to the line’ of some prohibition, go over the line with a minimal risk of detection, or honor the fact of the prohibition while violating its spirit.

In the recent corporate scandals, we know that the corporate executives who committed various frauds weren't (sufficiently) constrained by any internal prohibition against the conduct. Thus, the approach has been not only to increase traditional legal sanctions but

⁷⁶ Some norms theorists note that when people internalize norms, they think others shouldn't violate the norms either – thus, external sanctioning goes with internalization. [cites] Identity provides a complementary mechanism.

⁷⁷ There is an overlap here with literature on ‘framing.’ The same behavior – not littering- is being framed alternately as ‘something one shouldn't do’ ‘something of the sort one shouldn't do’ or ‘something one wouldn't want to be the sort of person who did.’

also to try to instill the view that the conduct is ‘wrong’ as a matter of community norms. But some of the executives didn’t merely not think of what they did as ‘wrong’ - -they seem to have thought of it as identity bolstering. Consider the pleasure some Enron employees apparently got from raising “Grandma Millie’s” gas prices by manipulating the California energy market. One article notes that: “[t]he taped conversations [among Enron traders] have added a graphic new dimension to public understanding of the company's record of greed, callousness and complicity in the western power crisis of 2000 and 2001. Traders gloat on one tape about jacking up the electricity bill of "Grandma Millie." On another, they scheme to shut down a Nevada power plant in the midst of rolling blackouts in California.”⁷⁸ An instrumental (and perhaps identity-fueled) reason to obey the law may be competing with an identity fueled reason to ‘push the envelope.’⁷⁹ Solving the problem may require more than just an increase in legal sanctions and a change in norms. It may require some way to make the identity less desirable or reshape it in profound ways. A first cut thought is that the more rules there are, and the more detailed they are, and the more enforcement there is, the more craft there may be in envelope-pushing. Might more standards-based rules help? Tax law itself, which keeps enacting more rules and more standards (such as prohibitions on transactions that are legal in steps but in the aggregate achieve a prohibited objective) clearly doesn’t have the answer. But what’s the alternative? The hope would be that there

⁷⁸Blaine Harden, *Utility Exposes Enron Greed at Its Core: Exclusive Tapes Portray Lust for Profit, Lack of Concern for Consumers*, WASH. POST, March 1, 2005)

⁷⁹ Jeff Gordon makes a more limited point along the same lines: he notes that one cause of Enron may have been accountants having been overly influenced by tax lawyer ‘culture’ (of seeking ways that offer technical compliance while violating the spirit of relevant prohibitions.) See Jeffrey Gordon, [University of Chicago L. Rev. article on Enron]

would be some way to channel the pride at ‘craft.’ Or perhaps, taking an opposite approach, there could be more craft applied to detecting tax-lawyer-type machinations?

In a recent paper comparing U.S. and German business contracting,⁸⁰ my co-author and I discussed another example. In U.S. complex business contracting, parties spend far more time negotiating and agreeing upon specific prohibitions on particular conduct than they do in Germany. A U.S. contract might forbid related party transactions, and then define such transactions quite specifically with reference to size, availability of investment banker opinion, and other matters. A German contract might simply have a blanket prohibition. There is at least anecdotal evidence that the German prohibition works as well as the U.S. prohibition, if not better. One reason might be that the U.S. prohibition reinforces and validates an instrumentally-focused identity in which one defines oneself by one’s cleverness in coming close to, but not going over, the line. This identity would co-exist with the cooperative identity; actual behavior might be an uneasy compromise between the two. The German prohibition might invoke only the cooperative identity.⁸¹

Having identified the problem, what is the solution? The solution should be crafted mindful of the differing penumbras law, norms, and identity can offer. When can law

⁸⁰ Claire Hill & Christopher King, *How Do German Contracts Do As Much With Fewer Words?*, CHI. KENT. L. REV. (2004)

⁸¹ There is probably another factor contributing to the difference. As we argued in the German paper, the reputational community in Germany may be more homogeneous, making it easier to agree upon, detect, and punish deviations from a consensus definition of ‘related party transaction.’ But the identity aspect is, I would argue, a significant part of the picture. A follow up question would be why and how the ‘push the envelope’ identity develops. There seems to be some evidence that it’s more common in individualist rather than collectivist culture. Of course, however, Germany is an individualist culture—certainly, the portion from which the country’s contracting practices stem.

invoke a penumbra, counting on reputation and other social sanction and perhaps, individual sanction, to enforce, and when not? When will law complement norms and identity considerations, and when not?

Insofar as law is being followed only for instrumental reasons, its penumbra should be quite small: people are doing precisely what the law requires, to avoid legal sanction. Norms can potentially have a far broader penumbra. In the business context, norms can extend to conduct that has more of a ‘you know it when you see it’ character, where verification and enforcement would not be possible with only strictly legal proceedings and sanctions. For instance, there can be community consensus as to norms of fair play and fair dealing that would be difficult to detect, prove or punish deviations from. Identity’s penumbra is potentially quite different, and can be complementary or in tension with that of law, in ways further research will be needed to elucidate.

v. Traditional vs. Identity Incentives

Consider the debate about paying for blood or organs to be used for, respectively, transfusions or donation. Standard economic analysis suggests that payment would increase the supply, although the analysis acknowledges that payment might reduce the average *quality* of the supply – people who are selling their blood may be more likely to have lower quality blood than those who donate their blood. But might there be an effect on supply as well, or quality-adjusted supply overall, if blood or organ donation no longer

was viewed as something virtuous people did? Ideally, there would be a way to tap both pecuniary and non-pecuniary motivations. And apparently, occasional payment simply increases the supply without reducing quality. But what if payment became the norm? When I was agreeing to be a bone marrow donor, I did so principally because I enjoyed thinking of myself as, and being thought of by others as, a person who would go through considerable unpleasantness to donate marrow. What if people were typically paid for their bone marrow and for undergoing the procedure? I'm not sure what I would do – the 'set of things I'll do if I'm paid' is quite a different set than 'the set I would do because it's a 'good thing' to do.' Some scholarship argues that traditional incentives may sometimes crowd out intrinsic motivations (such as the motivation 'to do a good thing') sufficiently that the incentives are counterproductive.

The crowding out problem is potentially quite broad. I might see myself as a 'good citizen' and want to be seen as such by others. I therefore have to do enough of what it is that good citizens do. One component of good citizenship may be 'being law abiding.' As some have noted, there may be a paradoxical effect: X doesn't think of herself or want to be thought of as acting to avoid punishment; rather, she wants to be, and be thought of, as a 'good citizen,' and a 'good citizen' is not somebody who obeys the law in order to avoid going to jail. High-powered monitoring, detection and enforcement mechanisms might, as has been observed, dilute the value of either of these identities, at least by diluting the strength of the signal that one has obeyed the law. If detection is very unlikely and one obeys the law, one might think- and others might think- that the decision

to obey the law evidences having the desired identity of being law abiding. If detection is much likelier, obeying the law might just be a signal that one doesn't want to suffer the applicable legal punishments from law-breaking. And the signal wouldn't just be to others – the signal might be to oneself as well.⁸²

Perhaps an identity framework can explain more about when crowding out might be a significant risk and, more broadly, how the society can do the best it can in improving the health and well being of all its citizens. For instance, in the bone marrow (and other comparable bodily intrusions) context, a mix of incentives might be offered (recognition via ceremonies, preferred position on a registry to receive donations, ability to designate a preferred recipient, a special benefit such as a preferred parking pass entitling the holder to park in a handicapped space.) Perhaps the mix would preserve a potential donor's ability to get the identity payoff from donating, while giving others more classically instrumentally motivated a payoff as well.

An interesting issue to consider in this rubric is the relationship between identity and income. For some types of jobs, getting more money is valued for its identity effects ('I'm a success since I make so much money') whereas for other types of jobs, getting

⁸² See, e.g., self-signaling literature, and literature on pro-social behavior. [Benabou, Tirole, Prelec, Fehr] Note the tension with a traditional view about the expressive value of law – that one reason why people might obey the law is that the fact that it's the law tells them they ought to do it. Crowding out theory argues that in some contexts, the existence of a law might serve as a disincentive, or might inspire behavior that honored the fact but violated the spirit of the law. Doing X isn't a signal to me or somebody else that I'm good and virtuous if I'll get punished unless I do X – the 'signal' of my virtue is too noisy, and my behavior is as consistent with pure instrumental calculation as virtue.

less money may have identity effects ('I'm willing to sacrifice my material comforts to 'do good.'). Clearly, the optimal mix of traditional and identity-based incentives for a particular job will vary depending on the type of people who might be attracted to that type of job.⁸³

4 Further Thoughts About The Economics of Identity

Identity theory can alter the course of many sterile debates. Consider the inquiry as to why people vote, a matter of interest for economics and law. It's clear that if only instrumental factors are considered, why people vote is a puzzle: the chance that somebody's vote is going to influence the outcome is exceedingly small. Some, most notably Eric Posner, have suggested instrumental explanations that turn on signaling⁸⁴. Person A engages in a costly action, voting, to show that she is willing to invest in her reputation in the community as a cooperator; those for whom the signal is intended are therefore willing to deal with A in a cooperative manner. But such explanations turn on whether the fact that A votes is known to others – which it may or may not be. Many have therefore turned to more expressive explanations. Identity makes for a very convenient handle to fit voting behavior into economic theory: if somebody gets a benefit from thinking of herself as civic minded, she'll have to perform acts in accordance with

⁸³ [cite to research by Robert Frank on how much less money people in nonprofit-type jobs make]

⁸⁴ ERIC POSNER, LAW AND SOCIAL NORMS, *supra* note __.

that identity – what would it mean to be civic minded if one never did anything civic minded? She'll hence get a benefit from voting.⁸⁵

What might follow if the society wants to encourage voting? How might legal sanctions compare to alternative voting-encouragement techniques? Countries that require voting tend to have much higher voting rates than the U.S. – but is requiring voting a real-world possibility in the U.S. – is it politically feasible? Probably not. Perhaps what's needed is identity-entrepreneurs who popularize the virtues of civic mindedness, and the traits constituting civic mindedness. Admittedly, at this point in the analysis, identity has done nothing more than reinforce common sense. But it can potentially save 'more trees' that would otherwise be wasted seeking a more classically instrumentally oriented explanation of voting behavior. Furthermore, there may be interesting things to be said about identity entrepreneurs, who are, in a sense, norms-entrepreneurs writ large.

Consider, too, the frequent complaint that people should 'ignore sunk costs' and that by not doing so, they are making an error. Suppose somebody wants to think of herself as a person who, once she commits herself to a course of action, always follows through – a person who has determination and willpower. If such a person spends \$X on a health club, she may be more likely to use it than if she pays each time she goes. Once she's spent the money, ignoring having done so isn't rational because there's an identity cost in doing so – she can't maintain her identity as somebody who follows through on

⁸⁵ The complementary vocabulary of self-signaling makes the same sorts of points. See Prelec, etc.

commitments.⁸⁶ There may be many people for whom not ignoring sunk costs really is irrational on any metric. A recent article by Gregory Mitchell in the *Georgetown Law Journal*⁸⁷ argues that many people can be educated to ignore sunk costs. But my explanation is not thereby ruled out in some, and perhaps many, instances; in this regard, Mitchell's article also stresses the extent to which different people react differently.⁸⁸

5. Conclusion

[to come]

What legal issues might be elucidated by the new economics of identity? I argued that there are quite a few. If what motivates people is in part their sense of identity, identity considerations will need to be taken into account by policy makers in designing laws and other strategies for promoting societally desirable behavior. A simple stylized model that takes some of these matters into account increasingly seems feasible. The sacrifice in parsimony should yield considerable gains in explanatory and predictive power.

⁸⁶ See Benabou & Tirole, *Willpower and Personal Rules*, *supra* note 1, for a related analysis. (“The key idea is that because people have imperfect knowledge of their willpower, they see their own choices as indicative of “what kind of person” they are, implying that lapses can have a severe adverse impact on future behavior.”) *Id.* at 849-50. “[T]he individual should come to see each decision as a possible precedent for future ones, so that giving in today raises the probability that he will do the same in the future.” *Id.* at 851, discussing work by George Ainslie. See also Bodner & Prelec, *supra* note 1. They develop a concept of self-signaling, “separate from any desire to be regarded well by others.” However, and in contrast to my account, their interest is in “purely diagnostic motivation...caring about what an action might reveal about a trait even when that action has no causal impact on it.” *Id.* at Abstract.

⁸⁷ Gregory Mitchell, ___, *Geo. L. J.* (200[3])

⁸⁸ Mitchell's main complaint is that behavioral 'biases' and 'errors' are no more universal than law and economics' 'perfection' is. He argues for using relevant subgroupings of people, as to which empirical evidence bears out particular claims. (Group X is apt to do badly on such-and-such type of reasoning problem)