

CHAPTER 10

LAW, MORAL ATTITUDES, AND
BEHAVIORAL CHANGE

KENWORTHY BILZ AND JANICE NADLER

1 INTRODUCTION

CLASSICALLY, the ambition of legal regulation is to change behaviors. Laws might aim to increase or decrease various activities, such as owning a gun, or taking a work leave to care for a sick family member, or polluting, or hiring a minority job candidate. They might aim to get people or institutions to substitute one activity for another, such as buying diet soda instead of sugared, or using chewing tobacco instead of smoking, or using solar energy instead of conventional sources. Legal regulation can accomplish its goals directly, through fear of sanctions or desire for rewards. But it can also do so indirectly, by changing *attitudes* about the regulated behaviors. Ironically, this indirect path can be the most efficient one, particularly if the regulation changes attitudes about the underlying *morality* of the behaviors. This is because if laws change moral attitudes, we reduce—maybe drastically—the need for the state to act on or even monitor regulated players.

What does regulation designed to affect moral attitudes look like? It can be obvious, such as an information campaign. But less obvious (and even unintentional) approaches are more common, and probably more effective. Legal regulation might seek to link a behavior that the public already thinks is bad or objectionable to a behavior it currently finds inoffensive. For instance, regulators might wish to reduce abortions generally by stigmatizing a rarely performed, but particularly distasteful, version of it (“partial birth” abortions), with the idea that highlighting—and outlawing—a repugnant version of the procedure will ineluctably associate it with the more common, and more innocuous one. Or legal regulation might recharacterize behavior generally thought of as harmless, or as harmful only to the one who engages in it, into behavior with costs. The regulation of cigarettes is a good example of this phenomenon (Lessig 1995). Or, regulation might tax or subsidize with the hope not only of immediately changing the frequency of behavior, but also

either normalizing or demonizing it. Cigarettes (and “sin taxes” generally) are examples of law imposing a tax on behavior to both discourage and discredit it. On the other hand, law can both encourage and signal approval. For example, to encourage breastfeeding, the law could mandate accommodations that normalize the behavior as natural, and not a shameful activity to be hidden away. In line with this, in the United States, Section 207 of the Patient Protection and Affordable Care Act (29 U.S.C.A. § 207 (West 2011)) requires employers to permit employees who are nursing mothers to take breaks to express breast milk, in a place other than a bathroom.

Any one of these methods could either succeed or fail. They can also have unintended and even perverse effects, including backlashes. The aim of this chapter is to sketch out a framework for understanding the conditions under which regulation succeeds or fails to change underlying attitudes. To begin this chapter, consider two brief case studies in the United States, each well funded and ambitious examples of attempts to change moral attitudes. One was successful (sexual harassment) and another was not (gun control).

1.1 Sexual Harassment

In 2012, a unanimous Iowa Supreme Court affirmed the dismissal of a gender discrimination case (*Nelson v. James H. Knight DDS, P.C.* 2012). The complaint was brought by a dental hygienist, who argued that she was fired because her boss found her attractive, and his wife was jealous. Here, the employee was not claiming that she was being coerced into a sexual relationship she did not want, nor that she was being offered a quid pro quo for providing her boss sexual favors, nor that the workplace or her treatment there constituted an environment hostile to women generally. Any one of these assertions would have constituted a face-credible claim for sexual harassment,¹ and she would not likely have lost on summary judgment.

Her claim was different: she argued that *but for* her being female, she would not have been fired—because if she were not female, her boss would not have found her sexually desirable and his wife would not have been jealous of her. Unfortunately for the plaintiff, the law of sexual harassment is quite settled here—it is not enough for a plaintiff to prove that but for her gender she would not have been fired. She must prove that her gender itself *motivated* the firing—and sexual jealousy by the spouse of the employer is a legally permissible motive distinct from the employee’s gender.²

The legal resolution of this case was quite predictable. What was *not* predictable was the public reaction. The decision attracted national attention, and almost

¹ The federal law governing discrimination in the workplace is Title VII of the Civil Rights Act of 1964. The Iowa equivalent, under which the dental hygienist filed her own case, is the Iowa Civil Rights Act, Iowa Code 216.6(1)(a). Iowa courts turn to federal law when interpreting their own discrimination cases, *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 7 (Iowa 2009).

² See, for example, *Tenge v. Phillips Modern Ag Co.*, 446 F.3d 903 (8th Cir. 2006); *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902 (11th Cir. 1990).

uniformly, the decision was lambasted and ridiculed (Newcomb 2012; Politi 2012). Many news outlets noted within the first sentence or two that the Iowa court was “all male,” and that the court had used the term “irresistible” to describe the plaintiff (Foley 2012; Associated Press 2012). Countless bloggers and commentators derided the decision, in often colorful terms; editorialists have even called for reform to close this “loophole” in the law of employment discrimination (Cassens Weiss 2013; Fiedler 2013).

This overwhelming reaction is a strong sign of the success of antidiscrimination law in shaping the moral attitudes of the general public about sexual harassment. Though “Title VII and the Iowa Civil Rights Act are not general fairness laws, and an employer does not violate them by treating an employee unfairly so long as the employer does not engage in discrimination based upon the employee’s protected status” (Nelson at p. 9), citizens’ expectations about how they are entitled to be treated at work have clearly changed over the last three decades, ever since courts began recognizing sexual harassment as discrimination. Arguably, Title VII played a *causal* role in this process (Sunstein 1996). It is hard to imagine op-eds like the following being published by the right-leaning *Chicago Tribune* in the seventies, the eighties, or possibly even the nineties:

If Knight wasn’t guilty of illegal discrimination, he was certainly guilty of being a creep and a boor—not to mention a tightwad, having rewarded Nelson’s years of stellar work with a single month’s severance pay. About the best that can be hoped is that the publicity surrounding the poor treatment Nelson received will attract the interest of dentists at another practice who would place a high value on her excellent skills and performance—and pay no attention to her looks. And Knight? Maybe he needs to find a new place to apply his Novocain. (“You’re Irresistible. You’re Fired.” 2012)

A woman working outside the home in the sixties would have had to expect the possibility of “flirtation” (or predation) as a condition of employment, plus strongly gendered expectations about appearance and the propriety of romantic relationships in the office (Farley 1980). But today, the norms of professionalism have moved towards not just equality, but altogether away from such sexualization in the workplace. Simply put, when evaluated in terms of shifting public attitudes, sexual harassment law is an almost unvarnished success. This does not mean sexual harassment has been eliminated, of course—but it has certainly been marginalized. Behavior and attitudes that would have not only acceptable, but normal, just a couple of decades ago, are now anathema.

1.2 Gun Control

Not so, attitudes about guns. The history of gun control in the United States is long and fascinating, if frequently depressing. From the Civil War until the 1970s, gun control activism often was motivated by a desire to limit access to guns by African

Americans (Winkler 2011). Over this period, attitudes about guns have remained remarkably stable. A 1972 empirical review of various public opinions polls from the 1930s until the article's publication revealed that a relatively consistent three-quarters of Americans have supported limited forms of gun control, such as registration (Erskine 1972).³ More recent reviews have shown the same: around three-quarters support regulations like regulation and background checks (Smith 2007; Stinchcombe 1980). Opposition to making laws covering the sale of firearms more strict has been stable as well (Gallup 2012).

This is striking, given the pattern of gun laws tightening and then loosening over the past century in the United States (Kopel 2012). In other words, activists on both sides of the gun control debate have invested decades of time, and millions of dollars, investing in lobbying efforts to change Americans' relationship to guns. They have something to show for their efforts, in that gun *laws* have changed quite a bit, in both directions, over the last one hundred years. Empirical evidence suggests that lobbying activities do directly influence whether particular gun laws get passed (Langbein and Lotwis 1990; Langbein 1993), but there is little evidence that gun *attitudes* have changed in response to interest groups' efforts. One targeted study examined attitudes about a particular proposed reform in Virginia, and found that public attitudes in the period before the legislative vote were the same as those measured by a different pollster six months after the legislative vote was done (Kauder 1993). Though there are spikes in support for gun control policies in the wake of highly publicized shootings, attitudes quickly revert (Newport 2012). Given the prominence of the gun debate, and the stakes each side asserts, this equilibration is astonishing.

Simply put, we argue in this chapter that laws themselves sometimes seem to affect moral attitudes in the intended ways, and sometimes not. Can we make any generalizations—or better yet, predictions—about when it will do which? We think so. We argue that the success of legal regulation in changing moral attitudes will depend on a number of variables. The ones we focus on in this chapter are (1) whether the regulation aims to change attitudes which are important to individuals' cultural *identities*; (2) whether there is underlying *dissensus* about the behavior or attitude; and (3) whether the law is attempting to change the underlying *meaning* of behaviors rather than trying to change the behaviors itself.

We begin by briefly reviewing the literature on the influence of law and legal institutions as a whole on moral attitudes and behaviors. We examine the idea that the legal system can promote compliance with law and cooperation with legal actors and institutions when it is perceived as legitimate and furthering the aims of justice. We then turn to the ability of specific laws and legal regulations to influence moral attitudes and behaviors. We examine the influence of law through various mechanisms, including physical architecture, social meaning, attitude change, and consensus. Throughout

³ The percentages fluctuated from a brief high of 84% in one poll in 1969 to an equally brief low of 66% in 1971 (Erskine 1972)..

the discussion of these mechanisms, we focus on factors that lead to success, failure, or even perverse effects.

2 GENERAL LEGITIMACY AND CREDIBILITY OF THE LEGAL SYSTEM

Undoubtedly, laws are sometimes effective because they are backed by the threat of punitive enforcement. This threat prompts individuals to make judgments about risk and reward before deciding whether to engage in a prohibited activity. Accordingly, standard economic analysis relies on the assumption that if the expected cost of behavior—comprised of the severity and probability of punishment—exceeds its expected benefit, then the actor will refrain from that behavior (Becker 1968). Indeed, standard economic analysis assumes that questions about the effect of law on human behavior both begin and end with the assumption that behavior responds to rewards and punishments. At the same time and in parallel, law forthrightly attempts to shape citizens' moral beliefs. When the law forbids murder, this is because murder is evil, and the language of the law sometimes makes explicit the moral implications of the prohibited act. Thus, the criminal law traditionally grades an unintentional killing committed with a “depraved heart” or an “abandoned and malignant heart” as murder, but other unintentional killings as merely manslaughter. Conversely, Good Samaritan laws—although uncommon in the United States—are designed to shape beliefs about the moral duty to rescue. In this section, we examine the claim that law can succeed in changing moral attitudes through its general reputation for doing justice. We very briefly explore two literatures that consider ways in which law's general reputation works to guide moral attitudes, and ultimately, behaviors governed by those attitudes. Specifically, we first examine the argument that people defer to law because its content is deemed generally consonant with popular morality. We then examine the argument that legal agents promote cooperation by enacting principles of procedural justice.

2.1 Legal Content as a Reliable Source of Morality

To the extent that the legal system is perceived as promoting justice, people will be more likely to comply with law in an overarching sense (Robinson and Darley 1996; Robinson and Darley 2007; Nadler 2005). Compliance with law can mean doing what is required by law such as paying taxes or picking up dog waste, or it can mean refraining from prohibited acts like discriminatory employment decisions or vigilante violence against wrongdoers. In general, when the law imposes obligations and punishment in concordance with general intuitions about justice, then people are more likely to view the legal system as a legitimate and reliable source of morality. Individual cases decided

consistently with lay intuitions of justice reinforce the notion that the law is a source of moral guidance. Discrete laws that reflect the community's sense of justice will enhance the ability of the law to gain compliance in people's everyday lives, in areas unrelated to the law in question (Mullen and Nadler 2008).

The perceived legitimacy of the law can be undercut, and compliance undermined, when the law fails to comport with citizens' intuitions of justice. The mass incarceration of young African American males within communities, for example, is perceived by many as evidence of the law imposing punishment in an unjust fashion (Alexander 2012). One possible consequence is that community members who perceive the law as unjust are less likely to comply with the law themselves (Mullen and Nadler 2008; Nadler 2005). Disaffected citizens might also resort to vigilantism, thereby opting out of a legal system they perceive as deviating from the consensus of the community. When there is community consensus about what justice requires of law, then it is fairly straightforward, at least in theory, to implement this consensus and enact justice. When the legal system comports with justice, it gains legitimacy and compliance because citizens look to law as a source of moral guidance.

A more difficult situation arises when there is no clear consensus about what justice requires, or worse, when there is clear dissensus. For example, no matter what the position the law takes regarding abortion, a large contingent of citizens will believe the law to be wrong and even immoral. Some individuals have a strong moral investment in either permitting or prohibiting abortion, and for them abortion laws that permit immoral outcomes can prompt strident protests and even vigilante action. For example, in the United States, extremists who believe that the government abortion laws sanction the murder of babies have bombed abortion clinics and murdered physicians (Darley, Tyler, and Bilz 2003). Other examples of dissensus abound. People's intuitions differ, often along predictable cultural lines, about the morality of severe punishment for abused women who kill their sleeping husbands, a man who kills another man because he solicited sex, the possession of recreational drugs, among many other examples (Braman, Kahan, and Hoffman 2010).

2.2 Legitimate Legal Actors and Institutions Providing Motivation for Cooperation

Perceptions of the legal system are shaped by people's everyday experiences with law through interactions with institutions such as the police, traffic court, family court, and government agencies. Even people with no direct personal experience with the legal system nonetheless can readily observe the pervasive operation of legal institutions and authorities. The ways in which people experience the operation of law in their everyday lives gives rise to perceptions about the legitimacy of the law and its actors and institutions. To the extent that people perceive legal authorities to be legitimate, they will view those authorities as properly empowered to make decisions about how the law should be implemented (Tyler and Huo 2002; Tyler 2006a). They will not readily

question when they see a police officer making a traffic stop or when they read about a judge who approves a large employment discrimination award. But to the extent that the opposite is true—that is, when people believe legal authorities lack legitimacy—they will view authorities as exercising power improperly (Tyler 2009).

Empirically, perceptions of legitimacy turn on the quality of treatment people receive from and observe on the part of legal actors and institutions (Tyler and Fagan 2008). Examples of poor quality of treatment by legal actors and institutions include judges who convey a lack of concern toward citizens who appear in their courtroom as litigants or jurors; police officers who convey an attitude of disrespect toward people they stop or question; police department policies and practices that signal surveillance, suspicion, and mistrust, leading people to feel that their communities are being harassed rather than served. These types of perceptions determine the extent to which people see the actions of judges and police as moral and legitimate (Tyler and Wakslak 2004; Tyler 2006b). Legal authorities and institutions that are perceived as legitimate are likely to prompt community members to perceive cooperation and compliance as moral imperatives. Conversely, legal authorities and institutions lacking legitimacy are less likely to prompt people to feel morally obligated to cooperate, and thus less likely to take voluntary actions like calling 911 to report suspicious activity; coming to the police station to identify a criminal; coming to court to testify; accepting the decision of a family court regarding custody; showing up for jury duty and doing a conscientious job when serving; paying fines for traffic tickets; paying income taxes and declaring all income. In sum, a legal system that lacks legitimacy produces community members less likely to feel morally obligated to defer to legal decisions and to cooperate with legal actors and institutions (Tyler 2006b; Tyler and Huo 2002).

3 MECHANISMS OF INFLUENCE

In this section, we review how specific attempts to regulate can succeed or fail to bring about change in people's moral attitude about the behavior in question. Previous scholarship on expressive law has emphasized that law can express values, which in turn can influence behavior (see, e.g., Cooter 1998; McAdams 2000a; Sunstein 1996). Some of the prior research on expressive law explores various mechanisms by which law influences behavior expressively, such as by leveraging people's motivation to maintain the esteem of others (McAdams 1997), or by providing a focal point in situations where coordination is required (McAdams 2000b). We begin by reviewing how law can use physical architecture to change behavior and possibly moral attitudes, by making the targeted behavior either more convenient (e.g., recycling) or less convenient (e.g., smoking). We then consider how legislation or regulation can change the social meaning of a behavior, rendering what was formerly considered to be moral or amoral to be now morally problematic (e.g., discrimination), or vice versa (homosexuality). Next, we briefly review some classic literature in the social psychology of attitude change to highlight

factors that make it less likely that law will successfully influence moral attitudes. We also consider the effects of perceived democratic consensus of law on moral attitudes.

3.1 Architectural Nudges

Bernstein uses the term “melioristic law reform” to refer to citizen-driven efforts to change tort law and criminal law in an effort to improve individual behavior (Bernstein 1996). Individuals sometimes change their behavior readily if gently nudged in a particular direction (Kahan 2000; Sunstein 1996). The most promising domains for changing behavior are those in which people can be subtly prompted to take the path of least resistance. If law makes a desirable behavior—such as recycling—more convenient, people can be persuaded to do more of it. If law makes an undesirable behavior—such as smoking—less convenient, people can be persuaded to do less of it. Initially, the changes are solely behavioral, and up to this point, conventional law and economics can explain changes in people’s willingness to engage in the regulated behavior. But along the way, attitudes about the morality of the behavior can get altered as well. The propensity of behavior to influence attitudes has been long known in social psychology—this is the mechanism underlying classic demonstrations of cognitive dissonance. For example, people asked to choose between two closely ranked products later increase their liking of the chosen item and decrease their liking of the forgone item (Brehm 1956). For attitude change to follow, however, it is important that the individual perceive the behavior as a product of her own choice (Cooper and Fazio 1984). This is another departure from the lessons of conventional law and economics—if the regulatory “nudge” is so forceful that any behavioral changes are seen as obviously caused by legal incentives rather than by free will, attitude change is unlikely to occur (Kuran 1995). Similarly, although in some circumstances attitude change can be assisted by public information campaigns, they are an unlikely source of moral attitude change, as we discuss later.

As an example of the use of architectural means to prompt behavioral and attitudinal changes, consider the case of smoking in the United States. In 1964 the US surgeon general’s report established the scientific basis supporting the claim that smoking carries grave health risks for smokers. The following year, Congress mandated health warnings on cigarette packages and in 1969 imposed limits on tobacco advertising (Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–40; Federal Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331–40). It is unclear whether this type of government regulation of information—health warnings and advertising limits—caused any discernible change in smoking behavior. But a turning point came when the prospect emerged that nonsmokers were being harmed by secondhand smoke. At that point, smoking became more than just a question of an individual smoker’s liberty interest in engaging in an activity that causes harm to the self—now harm to others was an issue (Jacobson, Wasserman, and Anderson 1997). Because nonsmokers were being subjected to harms to their health that they did not always consent to, the issue took on

a more salient moral dimension, and legal restrictions on smoking behavior became a real possibility. By the early 1970s, laws imposing bans on smoking in certain public places began to slowly proliferate. In 1986, the US surgeon general released a report that found that secondhand smoke causes cancer, and later reports found that secondhand smoke causes lung and heart disease (“The Health Consequences of Involuntary Smoking” 1986). In children, secondhand smoke is associated with asthma, ear infections, and respiratory infections (“The Respiratory Health Effects of Passive Smoking” 1992). Conventional economics would predict that the largest effects on smoking behavior would stem from effects on the smoker herself. Instead, as elaborated below, the largest effects emerged from realizations about its effects on *others*.

Following the release of these reports, local smoking bans proliferated in some parts of the United States followed by statewide bans in some states (Jacobson, Wasserman, and Anderson 1997). California enacted strong statewide smoking regulations in 1994 that banned smoking in offices, and later restaurants (Cal. Lab. Code § 6404.5 (Act of July 21, 1994, § 1, 1994 Cal. Stat. 310)). In New York, local bans were followed by a strict statewide regulation in 2003 that prohibited smoking in all restaurants (N.Y. Pub. Health Law 1399-n to -x). In many localities, smoking is now prohibited even in prototypical places for smoking like bars and casinos (see e.g., Colo. Rev. Stat. § 25-14-204 (casinos); Smoke Free Illinois Act, 410 ILCS 82 (bars, restaurants, and casinos); N.Y. Pub. Health Law 1399-o (bars and restaurants); Cal. Lab. Code § 6404.5(f)(1)(a) (bars and restaurants)). Arguably, the political will that made these state and local regulations possible was a result of several things; here, we focus on two. The first is the notion that smoking harms others besides the smoker, so that the smoker is imposing a real cost on others against their will, and therefore others have the right to object. The second is the increase in state and local taxes on cigarette purchases, which helped boost the fortitude of those who wanted to quit smoking. As to the first factor, by prohibiting smoking from most public places, legal regulation shapes behavior directly, by leveraging inertia. That is, when smoking is made difficult, it forces the smoker to wait to smoke, to get up and move to a different location, possibly into bad weather; as a result, smokers are likely to smoke less often. Further, those smokers already considering quitting—perhaps because of fear of dreaded disease—are further encouraged to do so. As to the second factor, increased cigarette prices obviously increase the will of smokers to quit. But interestingly, the justification for the taxes also played on the third-party effects of smoking—they were promoted as at least partially offsetting the public costs of chronic illnesses caused by smoking (Santora 2008).

In addition to making use of architecture to discourage harmful behavior, law can also encourage prosocial behavior. Consider recycling. As late as the early 1990s, many communities in the United States, Canada, and Europe did not have mandatory recycling and curbside pickup programs. Municipal regulation that mandated curbside recycling pickup increased dramatically in this period, and the availability in the United States of curbside pickup of recycled materials was partly responsible for an enormous increase in the amount of solid waste that was recycled (Kinnaman 2006). Local regulation making recycling easier and more convenient (by, for instance,

picking it up at curbside along with the regular trash) encourages the target behavior, even on a conventional law and economics analysis. But the removal of small barriers can have disproportionately large effects. For example, separating items probably does not take more than a total of a minute or two of time per day. But eliminating this barrier increases recycling dramatically (Carlson 2001). It is interesting to note that unlike in the example of smoking regulations, the regulations that provide the infrastructure for recycling do not involve prohibiting or requiring anything on the part of citizens. Yet even in the absence of mandatory recycling, making it easier makes it more prevalent. Once recycling becomes a behavioral regularity, positive attitudes toward recycling follow, especially if the individual perceives her own commitment to recycling as voluntary. When an individual perceives herself as the kind of person who recycles, that self-concept leads to valuing the idea of recycling (Werner et al. 1995; Cialdini 2009).

Law reduced smoking by erecting barriers and increased recycling by removing barriers. Again, one way law encourages prosocial behavior is through positive incentives. For example, in Italy, national law provides that any employee who donates blood is permitted to take one entire day off work with pay, per year (D.L. 21 Ottobre 2005, n. 219, in G.U. October 27, 2005, n. 251(It)). This law induces employees to make an average of one extra blood donation per year—a seemingly straightforward response to incentives, and an example of how law can accomplish its goals directly through fear of sanctions or desire for rewards. But possibly, providing a day off of work for blood donation also changes moral attitudes about blood donation. Specifically, when workers begin donating blood in exchange for the day off, the behavior becomes regularized, and people continue to donate at the same frequency even when they stop being employed. And indeed, the facts bear this out: unemployed donors who later become employees make about one extra donation per year, while there is almost no reduction in donation frequency by donors who cease to be employees—and who thereby cease to receive the day-off benefit. Thus, people generally do not stop providing their extra donation when they no longer receive the benefit the law provides. The donation behavior incentivized by law appears to be transformed into a habit, and possibly even internalized as morally good (Lacetera and Macis 2012; Werner et al. 1995).

3.2 Social Meaning Changes

The social meaning of any given behavior depends on the existing social norms governing that behavior (Sunstein 1996). Architectural changes that make a behavior less prevalent can also contribute to changes in the social meaning of that behavior. Consider again the example of smoking. Aside from physical and temporal inconvenience, legal regulation limiting smoking also imposes a social cost on smokers. Being cast out of offices, restaurants, and even bars sends a message of banishment and ostracism to the smoker, which for some might be internalized as shame. In order to engage in the behavior that the law regulates, smokers are increasingly confined to their homes

or designated smoking zones, and smoking is increasingly perceived as an act of social deviance, at least within some social circles or in some times and places. When the issue was one of the individual smoker's decision to harm herself, legal regulation was politically difficult because of the strong libertarian undercurrent that often characterizes policy debates in the United States about hazardous activities. On this view, smoking is a decision about personal preference, like eating chocolate or wearing shorts. Rozin and Singh (1999) argue that over the course of the latter half of the twentieth century, smoking evolved from being viewed as solely a matter of personal preference without implications for moral worth, to being an object of disgust, which empowered nonsmokers to condemn the activity. In societies like the United States which are marked by cultural individualism, an activity like smoking is not psychologically endowed with moral status unless it can be demonstrated that it causes harm to others (Schweder et al. 1997). In this way, the findings that secondhand smoke harms others, especially children, set the stage for bringing the issue of smoking into the domain of the moral, making it politically easier to regulate through law (Rozin 1999). As Dan Kahan has argued, information about the hazards of smoking was accepted and believed only after a cultural shift in the social meaning of smoking as morally noxious because of the dangers to nonsmokers (Kahan 2007). Tellingly, now even other nicotine delivery systems that do not impose harms on others are being regulated because of their association with the "tainted" activity of smoking. That is, legal regulation of one activity can not only change the meaning of that activity, but can spread to others, too. For instance, California has proposed a ban on using increasingly popular "e-cigarettes" in public places, which produce only water vapor (and possibly trace amounts of nicotine) instead of smoke (Cal. Sen. Bill 648, Feb. 22, 2013). At least one municipality has forbidden its employees from using smokeless tobacco while at work. The town manager told the city council, "The concern is a number of employees are chewing tobacco in the presence of a vehicle and others, and they find it very disturbing and they would like to ban the use of chewing tobacco. People are just offended by tobacco products. They think it's a filthy, vile habit and they resent other employees doing it" (Graff 2013).

Bringing an activity out of the domain of the nonmoral and into the domain of the moral can increase prosocial behavior, just as it can decrease the incidence of harmful behavior. Consider again the example of recycling. If people perceive that their neighbors are recycling, it is more likely that they will recycle too. Just as smokers might be motivated to quit if they feel banished and shunned by regulations on smoking, householders might be motivated to recycle if doing so makes them feel included and virtuous within their neighborhood. In an early study of residents of a city that had just began a curbside recycling program, 95% of those who recycled reported that their friends and neighbors did also; but only 67% of nonrecyclers reported that their friends and neighbors recycled (Oskamp et al. 1991). This finding is consistent with results of public goods games in which a norm of cooperation is triggered by cooperation by others (Carlson 2001). This suggests that physical and cognitive inertia is not the only barrier to increasing the rate of prosocial behaviors like recycling. Making it easier to do so is important, to be sure. But in addition to convenience, another important

determinant of prosocial behavior is the subjective meaning of that behavior. If an individual perceives that others are recycling, then they might perceive recycling as an act of cooperation that is expected by other members of the community. Conversely, if an individual perceives that others are not recycling, then he might perceive recycling as an act of substantial sacrifice (Davidai, Gilovich, and Ross 2012; Cialdini 2009; Kahan 2003).

Using less energy is another prosocial behavior that can be encouraged by appeals to social comparison. Home energy use can be reduced by sending customers “home energy reports” comparing their energy use to that of their neighbors (Ayres, Raseman, and Shih 2012). It is not yet clear exactly how receiving peer comparisons serves to reduce energy consumption. One possibility is that people whose consumption exceeds those of their neighbors feel guilt about contributing to the problem of climate change. If this is true, then it is possible that information campaigns such as the energy reports used in this study can work to change attitudes about the morality of energy conservation. Legal regulation might play a role in this type of moral attitude change by mandating information campaigns of this sort.

Finally, legal regulation that alters the social meaning of a behavior can result in a change in the way the people engaging in the behavior are morally evaluated. In the workplace, women with children are, on average, offered lower starting salaries and are less likely to be hired and promoted because they are perceived as less competent and less committed to their jobs compared to childless women. In 1993, the US Congress enacted the Family and Medical Leave Act (FMLA) (29 U.S.C. §§2601–2654), which provides unpaid job-protected time off for family caretaking as a gender-neutral entitlement. Experimental evidence suggests that making the FMLA salient influences normative judgments of women who take caretaking leave, by changing the meaning of taking time away from work to fulfill caretaking responsibilities. It is possible that law is perceived as representing a broad social consensus about the meaning of caretaking leave, and in turn reduces stereotyped inferences people make when they observe a worker who takes family leave (Albiston and Correll 2011).

Legal regulation can therefore transform the social meaning of behavior, changing people’s perceptions regarding the moral acceptability or desirability of the behavior. But sometimes, social meaning change is difficult to manage through regulation when regulation is perceived as attacking the fundamental identity and status of a discrete cultural group. Consider the example of gun regulation in the United States. Like the regulation of smoking, the regulation of guns is designed to reduce the risk of harm. In the case of smoking, harm reduction strategies were mildly controversial to the extent that they were considered inconvenient and expensive by smokers. Contrast this with attempts to regulate gun ownership. As cultural symbols, guns differ from cigarettes because guns signify membership in an important affinity group. According to the cultural cognition thesis, people who are relatively hierarchical and individualistic in cultural orientation tend to oppose gun regulations because they believe law-abiding citizens would be vulnerable to predation as a result of regulation (Kahan et al. 2007). Guns are associated with hierarchical social roles like father, hunter, and protector.

Guns are also associated with individualistic cultural symbols, such as self-reliance, courage, honor, and prowess (Kahan et al. 2007). As a result, hierarchical individualists tend to be skeptical of risk perceptions that would justify such regulations. People who identify with guns include hunters and other outdoor sports enthusiasts who view gun education as an integral part of rural living (Barringer 2013). This helps to explain why the identity of members of this group is undermined and their status is threatened by gun regulation. Gun regulation is perceived by many as a threat to their way of life and an implicit statement that they do not matter. At the same time, there is no discrete cultural group whose identity hinges on members defining themselves by the absence of guns. Thus, unlike the regulation of smoking, the regulation of guns is unlikely to have straightforward influences in shaping behavior and moral attitudes.

3.3 Using Law to Directly Influence Moral Attitudes

The literature in social psychology on attitude change generally is far too immense to summarize here (Bohner and Dickel 2011). Instead we focus on those ways that *legal regulation* in particular may change attitudes. That is, we are holding constant the general source of possible attitude change as being “some legal entity”—be it legislation, an agency action, a court decision, or a plebiscite. These different sources, of course, will themselves have different success rates in different settings—but all, at least, could be categorized in some sense as an “official” legal regulator. So, why might official attempts at attitude change either succeed or fail?

3.3.1 *Effects of the Source*

Although all legal regulators might be seen in some sense as representatives of “the state,” these representatives are not monolithic. Each has a domain in which action will be seen as appropriate, by subject matter, by hierarchy (local, regional, national, international), or by mode of action. Briefly, the same attempt at attitude change will be perceived as more or less legitimate, depending on which legal entity issues the regulation. An entity that attempts to act outside its sphere of legitimate influence will be perceived as a bully, or, just as devastatingly, laughable. Consider the example of numerous municipalities declaring themselves as “Nuclear Free Zones in the 1980’s” (Maclay 1988). These laws were mostly symbolic. Indeed, the cities where it might have had real bite because of the presence of institutions doing nuclear research, like Cambridge, Massachusetts, and Palo Alto, California, the regulations failed to pass, and those in which it did pass routinely ignored the ordinances or granted waivers so that the local economies could continue their work uninterrupted (Emmanuel 2012). By now, the number of US. municipalities with such bans exceeds one hundred. We know of no study that has attempted to assess the effect of such declarations on public attitudes towards nuclear proliferation, but we are confident that any such study would find nothing. Editorials and commentary on the ordinances are just as likely to reveal ridicule or embarrassment as support, with the following sentiment being

representative: “[I]f anybody—and I mean ANYBODY—tries to bring a nuclear warhead into [Iowa City’s] limits, they will be facing (I am not making this up) a \$500 fine! With a deterrent like that, you understand how Iowa City has distinguished itself from other small towns in Iowa and managed to stand firm against the onslaught of nuclear weapons” (Brawner 2010).

A municipality might try to change attitudes toward local issues such as, say, recycling or cleaning up after pets or shoveling snow from sidewalks, but if it tries to affect attitudes toward international issues such as nuclear disarmament, its attempts are likely to fail. When an institution steps outside of its expected domain to regulate, the public is likely to regard its actions with skepticism. And attempts to regulate that are seen as institutionally misplaced can backfire. Consider again the 2011 Patient Protection and Affordable Care Act, which the US Justice Department (successfully) attempted to make more constitutionally acceptable by characterizing as a “tax” rather than as mandating the purchase of health insurance. While recasting the regulation as a tax allowed it to win its battle in the Supreme Court (*Nat’l Fed’n of Indep. Bus. v. Sebelius* 2013), its strategy might have diminished the federal government’s ability to win the larger cultural war over US citizens’ attitudes about the moral obligation to acquire health insurance.

Even when acting within the scope and boundaries of its appropriate domain, regulation may fail if the legal entity is perceived as not credible (Sternthal, Phillips, and Dholakia 1978). One way to lack credibility is to be untrustworthy, and classic experimental work in social psychology has shown that untrustworthy sources have little ability to persuade about factual issues and predictions (Hovland and Weiss 1951). Similarly, a source that is perceived as lacking in knowledge will not be persuasive on factual questions (Kuklinski and Hurley 1994). Still another form of noncredibility has to do with illegitimacy—and this is particularly relevant for failures to persuade on *moral* as opposed to factual issues. Edwin Hollander (1958) argued that leaders build up “idiosyncrasy credits” by conforming their decisions to the expectations of their followers, which they can then “spend” to behave in ways that run counter to expectations. This insight is easily transferred to legal entities rather than to leaders—a legal entity that has built up goodwill may be able to change public attitudes, but one that has been bucking public opinion for years will be relatively helpless to change public attitudes with yet another maverick legal act (Gibson, Caldeira, and Spence 2003). In the wake of more than a decade of decision after unpopular decision establishing rights for criminal defendants in the 1960s, for instance, the Supreme Court arguably simply had no more reputational capital left to spend in changing public attitudes toward school busing (*Swann v. Charlotte-Mecklenburg Board of Education* (1971)). The Court’s popularly excoriated decision led to massive resistance by whites, and even to violence in Boston (Tager 2001).

One researcher found that while attitudes toward busing did change in Charlotte, they did not do so as a direct result of the persuasive effects of the Court’s decision. Instead, attitude change came from their compliance with the Court’s order. That is, after sending their children to integrated schools and finding that the education system

did not collapse as they had expected, cognitive dissonance forces caused them to soften their attitudes toward busing (Maniloff 1979). Timur Kuran (1995) argued that, if the goal is attitude change, the *reason* citizens comply with a legal mandate is less important than *that* they comply and that citizens see others complying. Eventually, citizens assume others are complying not because they must, but because they want to—and this perception contributes to a shift in social norms.

This is also consistent with more modern findings that sources that espouse views that are contrary to the source's usual positions, or which are counter to the source's own or their group's interest, are more influential than those who act in line with expectations. Consider, for example, Republican governor George Ryan's decision to place a moratorium on capital punishment in Illinois. The fact that a Republican governor was an unlikely source of deep skepticism about the death penalty undoubtedly moved the death penalty abolitionist's position forward more than would the same move would have if made by a Democratic governor (Gross and Ellsworth 2001; Visser and Mirabile 2004). Failures caused by source characteristics are more likely to result in simple failures than in backlashes or perverse effects. They will simply be seen as hamhanded, self-interested, incompetent, or silly—and rejected outright by their intended audience.

3.3.2 *Effects of the Attitude Object*

If characteristics of the *source* of the regulation can cause it to fail, then so can characteristics of the targeted attitude itself. The most important of these, at least in the United States, is the ease with which we can describe the targeted object of regulation as causing *harm* to third parties. For instance, if we wish to change attitudes about a particular behavior, it helps to characterize the behavior as causing damage not just to those (informed, consenting adults) who choose to engage in it, but to innocent bystanders as well. As discussed earlier, the legal movement against smoking gained traction once the medical risks of “secondhand smoke” were introduced as part of the policy debate. Of course, it is almost trivially simple to describe *any* behavior as having at least some third-party harms (Bilz and Darley 2004). As a natural corollary, then, to the extent opponents can describe those third-party harms as a front, and persuasively argue that the target of attitude change causes mere moral harm (or, perhaps, mere psychic harm), the attempt at legal regulation is likely to fail. In a political society informed by Enlightenment liberalism's emphasis on the Harm Principle, as it is in the United States, citizens often resent attempts by government to impose any kind of official orthodoxy—even when, interestingly, they individually endorse the belief.⁴ The strands of individualism in the United States run deep, and an attempt to change moral attitudes *as moral attitudes* is likely to fail (Katyal 2006).

⁴ For instance, when asked the following poll question, “Some people think the government should promote traditional values in our society. Others think the government should not favor any particular view. Which comes closer to your own view?” 50% of Americans agreed with the latter statement, and fewer than half with the former (Opinion Research Corporation 2011).

Another element of the attitude object that can undermine successful attempts to change it is how discrepant the legal regulation is from what citizens currently think it should be. The further apart they are, the more resistant to change people will be (Hovland, Harvey, and Sherif 1957). Although in some sense this is obvious, more than one attempted legal regulation has foundered on the shoals of being “too extreme” for the public to accept. Dan Kahan has written about the difference between what he calls “gentle nudges” versus “hard shoves” in legal regulation, arguing that the latter not only tend to fail, but can actually cause backlashes (Kahan 2000) (or, in the terms of early attitude research in social psychology, “boomerang effects” [Sherif, Sherif, and Nebergall 1982]).

Kahan uses the example of date rape. Date rape became a cause célèbre of feminists in the 1980s, especially on college campuses. Activists wished to change the notion that rapes that occurred between acquaintances, where perhaps the issue was confusion about consent (does “no” really always mean “no”?), were somehow less bad than stranger rapes (Viki, Abrams, and Masser 2004). Their solution was to urge that date rape be treated by the legal system and all its actors (police, prosecutors, judges, and juries as fact-finders) as equally bad, by being punished equally (Clemens 1982; Taslitz 2005). Kahan argued that in so doing, activists were actually doing more harm than good. Because most of the public thought date rape was bad, but not *as bad* as stranger rape, insisting that they be treated identically would result in police who were reluctant to arrest, prosecutors who were reluctant to charge, and judges and juries who were reluctant to convict *at all*. This very reluctance would serve as social evidence that, in fact, date rape was not only not as bad as stranger rape, but perhaps was not a crime at all (Kahan 2000). Though research showing the law (or at least, the *attempts* to change the law) directly caused a backlash is lacking here, plenty have argued that the law is impotent to impose a change in attitudes about date rape through dramatic redefinition of the crime (Schulhofer 2000; Pierce Wells 1996), and the phenomenon of “date rape backlash” itself is accepted enough to have spurred considerable commentary and research (Woods and Bower 2001; Clarke, Moran-Ellis, and Sleney 2002) and even a documentary film (Media Education Foundation and FAIR (Firm) 1994).

A final feature of the attitude object that will affect the ability of a law to change attitudes is the level and quality of citizens’ involvement with the issue. The greater the involvement, the more resistant to change people will be (Sherif and Hovland 1961). Social psychological researchers have focused on a number of different ways one can be “too involved” to allow a legal decision-maker to change your mind about something. The issue being discussed could be particularly vivid or frightening to contemplate a change in attitude about it (Leventhal, Meyer, and Nerenz 1980). Or, the issue could have high levels of importance to citizens. Early on, Hovland and Sherif argued that those with high “ego involvement” in an issue would be resistant to persuasion (Sherif and Hovland 1961; Sherif, Sherif, and Nebergall 1982). Much more recently, Linda Skitka has focused on “moral mandates.” Where people’s attitudes are strong, wrapped up in their personal identity, and related to core moral values, they will be particularly resistant to changing theme (Skitka and Houston 2001; Mullen and Skitka 2006). Since

this chapter is particularly concerned with changing *moral* attitudes, Skitka's lessons are particularly important. Interestingly, high levels of self-interest play less of a role in determining people's attitudes than standard economic analysis would predict, and so presumably whether or not the proposed legal regulation interferes with the direct, material interests of the regulated parties is not a very good predictor of success for attempted attitude change on an issue (Sears and Funk 1991; Miller and Ratner 1998; Sanderson and Darley 2002). Note, however, that when proposed regulations would have measurable, immediate, monetary effects on the regulated parties, people *are* likely to oppose the regulation (Sears and Funk 1991).

3.3.3 *Effects of the Manner of Regulation*

Political scientists would argue that failures to regulate will occur, at a minimum, if advocates are insufficiently organized, interested, and funded to effectively lobby lawmakers or to withstand attacks by other organized interest groups (Olson 1965). In other words, many "attempts" at legislation that would affect moral attitudes simply never get off the ground in the earliest stages, because of a lack of coordination or resources. But even well-funded and organized attempts that succeed in changing the actual law may nevertheless fail to achieve their ultimate ambition of changing attitudes because of features of the legal regulation itself. First, if the public knows you are attempting to change moral attitudes, the regulation is less likely to work (Walster and Festinger 1962; Allyn and Festinger 1961). Effective propaganda is subtle propaganda. Relatedly, if the targets of persuasion are focused on another task, they will be more persuaded by a communication than those who are not distracted (Festinger and Maccoby 1964; Freedman and Sears 1965; Gilbert 1991). Indeed, messages that are too obvious can even induce backlashes. All of this perhaps explains the generally dismal success rates of public information campaigns (Aronson and O'Leary 1983; McGuire 1986).

While simple exhortations to change attitudes are likely to fall on deaf ears, carefully framed persuasion can work, sometimes even when it is clear to a careful observer that attitude change is the goal. For instance, people wish to conform to others they perceive to be in their in-group (Asch 1955). These effects are quite powerful—messages that are framed to appeal to self-interest or moral commitments usually lead to less behavioral (and attitude) change than those that are framed to make the listener believe that others just like them are behaving in the desired way (Cialdini 2007; Nolan et al. 2008; Goldstein, Cialdini, and Griskevicius 2008; Cialdini and Goldstein 2009). For example, rates of tax compliance go up, and deductions go down, when citizens believe *other* citizens are paying their fair share (Kahan 1997; Roth and Witte 1989).

Fellow members of a political community can be one such in-group (fellow residents of Chicago, say, or fellow Americans), and to the extent a legal regulation is seen as a reflection of democratic group consensus on an issue, it is likely to be more successful than if it were seen as a top-down imposition by elites or even outsiders (McAdams 1997; McAdams 2000a; Dharmapala and McAdams 2003). This would at least suggest that plebiscites should be more persuasive than legislation, which should be more

persuasive than judicial opinions. Research directly testing the effects of legislation or plebiscites on public opinion is rare (or nonexistent), but several studies have focused on the power of Supreme Court decisions to change attitudes (Bartels and Mutz 2009; Hoekstra 1995; Hoekstra 2000). There, the results have been mixed, and the best summation of the Court's ability to move public opinion is that it is limited, depends heavily on circumstances, and in any event is prone to inducing backlashes (Brickman and Peterson 2006; Franklin and Kosaki 1989; Johnson and Martin 1998; Persily, Citrin, and Egan 2008). Though this research is tantalizing, by referring directly to established institutions (*the Supreme Court*, *the US Congress*) it conflates the source-credibility issues discussed in the previous section⁵ with the procedural/manner effects we refer to here, which have independent effects on the likelihood of failure of an official attempt to change moral attitudes.

4 CONCLUSION

In this chapter, we started from the assumption that political actors primarily wish to change behaviors, and that they often attempt to accomplish that goal—knowingly or not—by trying to change attitudes. Sometimes this works, sometimes it doesn't, and in this chapter we tried to identify when and how.

However, our initial assumption that the goal of regulation is behavioral or attitudinal change may be wrong, at least some of the time. Considerable research in political psychology suggests that at least sometimes, the point of legal regulation may instead be an attempt to co-opt the expressive capital of the law to advance a more symbolic agenda (Lau and Heldman 2009; Kinder 1998; Sears and Funk 1991). As we have written elsewhere, "Law is a form of cultural capital that can be captured by opposed groups [who use it to] stick a flag in the dirt to mark public territory as their own" (Bilz and Nadler 2009, p. 122). Social groups compete to establish laws that they perceive as expressing high social standing for their group; likewise, they oppose laws that symbolize low social standing for their group. Richard McAdams calls this view the "expressive politics theory of law" (McAdams, forthcoming). In this chapter, we have described a handful of regulations that could not credibly be described as anything *other* than flags in the dirt, for instance, the "nuclear-free zones" established by municipalities across the country, or the handful of affirmative "Good Samaritan" laws established in some states, which are virtually never enforced (Rosenbaum 2011, p. 248) and entail tiny penalties even when they are.⁶

⁵ For instance, the Court has historically been held in high regard by the public (Caldeira and Gibson 1992), while the credibility of Congress has historically been lower (Hibbing and Theiss-Morse 1995).

⁶ See Wisconsin Stat. Ann. § 940.34 (class C misdemeanor); Vermont Stat. Ann. tit. 12, § 519 (up to a \$100 fine); Ohio Rev. Code § 2921.22 (fourth-degree misdemeanor); Minnesota Stat. Ann. § 604A.01

Even what might look like instrumentally motivated legal regulations are often, perhaps even usually, either supported or opposed on the grounds of what they *say* rather than because of what they *do*. For instance, residents of a rural town opposed legal limits on using wood for heat to the extent they endorsed masculine pioneering ideals, despite agreeing that old-fashioned wood-burning heaters cause air pollution and health problems (Cupples, Guyatt, and Pearce 2007; Reeve et al. 2013). Support for the regulation of novel “reduced tobacco” products was predicted most strongly by the respondent’s general attitudes about the legitimate role of government society, even when the respondent was a smoker (Kim, Stark, and Borgida 2011). Support for the Vietnam War was better predicted by “feeling thermometers” toward the military and antiwar protesters than it was by having an immediate family member serving there (Lau, Brown, and Sears 1978). The list goes on, and new data points arrive frequently.

This is not to say, of course, that self-interest is never a factor in support for legal regulations. Nor is it even to say that instrumental concerns are always swamped by symbolic ones. Indeed, as research in the area has blossomed, we have learned that the relationship among instrumental concerns, symbolic concerns, and political attitudes is quite nuanced. For example, when the actual consequences of legal regulations are immediate (Hunt et al. 2010) and clear (Sears and Funk 1991), consequences tend to dominate symbolic concerns. There are also individual differences in self-interestedness, and unsurprisingly, the more self-interested a person is in general, the more self-interest will predict her political views (Crano 1997a; Crano 1997b). The *taste* for self-interest might also be growing over time (Ratner and Miller 2001), which would suggest that in the future, the role of symbolic politics might diminish. Moreover, sometimes it’s hard to tell what is self-interest and what is “merely” symbolic: is supporting a policy that favors the group with whom you strongly identify a function of your self-interest, or of group solidarity (Luttmer 2001)?

Indeed, as the *norm* of self-interest grows—or rather, *if* it does—then this, too, should be a factor that predicts the success or failure of legal interventions. We have already noted that in Western societies built on principles of Enlightenment liberalism, people bristle at attempts by the state to impose official moral orthodoxies. Some have argued that self-interest might actually have become not just acceptable but normative. One study found that even altruists were reluctant to explain their own behavior as motivated by wanting to do the right thing, but instead consistently tried to describe it as motivated by instrumentalist concerns (Wuthnow 1991). If self-interest becomes the dominant grounds for why a citizen *says* she is endorsing or opposing a legal regulation, successful attempts to regulate might eventually be more likely to depend on whether they actually *do* improve a citizen’s “bottom line.”

That would be unfortunate. On the surface, in that world it would be easier to win support for a legal regulation if all advocates had to do was make it economically (in the broad sense) worthwhile to citizens. But it might be a lot more *expensive* to do so—not

(petty misdemeanor). The only exception would be Rhode Island, which assigns a fine of \$500–\$1,000 or up to six months in jail. R.I. Stat. §§ 11-1-5.1, 11-56-1.

only in the sense of “buying” support (and constructing a regulation that gives the highest material output to the largest numbers—or the most powerful numbers), but also in the sense of maintaining *compliance*. Internalized support for or opposition to a policy is stickier than support grounded in self-interest—but that stickiness is just as often an advantage as it is a disadvantage. In the grand scheme, morally motivated citizens will behave or believe as they do, *almost* no matter what the law tells or demands of them. This can be frustrating to those who wish to upset entrenched bad norms, but it can be a godsend to a legal regime with limited resources (both economic and political) to police behavior.

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