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An Attitudinal Theory of Expressive Law

Law is often defined by the fact of its sanction. The state does not merely recommend compliance with the rules we call law, but backs those rules with liability or punishment.¹ Law and economics in particular treats state-created sanctions as central to the study of law. Sanctions so dominate economic thinking that most analysis treats as synonymous the questions: “What is the effect of the legal rule?” and “What is the effect of the legal sanctions that enforce the rule?” A strict focus on sanctions, however, obscures how law can otherwise influence behavior. Legal theorists sometimes posit that law affects behavior “expressively” by what it says rather than by what it does.² In recent years, various economic theorists, particularly those concerned with norms, have pursued this line, suggesting that law has an expressive influence on behavior independent of the effect created by its sanctions.³ The new literature attempts to

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¹ See, e.g., JOHN AUSTIN, LECTURES ON JURISPRUDENCE (Richard Campbell ed., 5th ed. 1885).

² Following Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1624-25 (1998), we should sharply distinguish the consequentialist claim to which I refer—that legal expression causes behavioral change—from the non-consequentialist claim that law has a moral value based on what it expresses. Theorists pursuing the latter idea evaluate law according to the moral quality of what it says independent of what the expression causes (or probably even whether it satisfies individual preferences for government expression). Some of these theorists see expressive values as a means of critiquing a utilitarian or economic evaluation of law. For an interesting exchange, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Matthew D. Adler, *Linguistic Meaning, Nonlinguistic “Expression” and the Multiple Variants of Expressivism: A Reply Response to Professors Anderson and Pildes*, 148 U. PA. L. REV. 1577 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

³ See Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L.

remedy the vagueness of the old thesis by explaining exactly how the expressive function operates. In that vein, this Article presents one causal theory for the expressive effect of law, specifically, that law changes behavior by signaling the underlying attitudes of a community or society. Because people are motivated to gain approval and avoid disapproval, the information signaled by legislation and other law affects their behavior.

The attitudinal theory has three components. First, there is a motivational assumption that an individual's behavior depends, in part, on what actions she believes others will approve or disapprove. The motivating power of approval may arise either because the individual values approval for its own sake, or as an instrument for achieving some other end. Second, there is a claim that individuals have imperfect information about what others approve and that their beliefs about such matters are frequently (though not inevitably) mistaken. Given their concern for approval, individuals are therefore sensitive to new sources of information. Third, there is a claim that democratically produced legislative outcomes are positively correlated with popular attitudes and therefore provide a signal of those attitudes. Independent of the sanction, the legislative signal influences behavior by causing people to update their prior beliefs about what others approve and disapprove. The attitudinal theory is certainly not the only way to explain the expressive effect, and there are almost certainly some effects it cannot explain.⁴ But it does pro-

REV. 1649 (forthcoming 2000); Eric A. Posner, *The Evolution of Constitutions* (2000) (unpublished draft, on file with the author); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998). The recent resurgence of interest in this topic is not limited to economic theorists. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Jason Mazzone, *When Courts Speak: Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039 (1999); Richard H. Pildes, *Why Rights are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Janice Nadler, *The Effects of Perceived Injustice on Deference to the Law* (2000) (unpublished draft, on file with the author).

⁴ Indeed, I have written elsewhere of another explanation of the expressive effect, one I term the "focal point" theory. See McAdams, *supra* note 3. And I am pursuing a third explanation in Dhammika Dharmapala and Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law* (2000) (unpublished draft, on file with the author). Probably some combination of explanations will be necessary to account fully for the law's expressive effect.

vide one simple and plausible story that can be empirically tested and measured against competing theories.

The attitudinal theory of expressive law also presents several interesting implications. First, the theory implies that local ordinances will have a greater expressive effect than state or national legislation because most approval and disapproval occur locally, where others observe us. Second, the perception that “special interests” control the legislature will undermine the expressive effect because it depends on the size of the perceived positive correlation between public attitudes and legislation. Third, court decisions may also have an expressive effect because court decisions often reflect public attitudes. The most significant implication, however, is some insight into political conflict over symbols. Economic analysis has trouble explaining why people invest resources into legislative (or other) disputes in which the winner will gain no material wealth. But the conflict becomes less puzzling when one realizes how even purely symbolic government action can, by signaling attitudes, change behavior. If law has an expressive effect on behavior, then expressive law offers interest groups another tool for achieving their ends. We may then analogize to the public choice observation that interest groups struggle to capture the legislature’s power to redistribute material wealth: the attitudinal theory explains symbolic political struggle as the effort of interest groups to capture the state’s *expressive* power.

Part I presents and explains the attitudinal theory of expressive law. Part II extends the model and explores its implications, particularly for explaining symbolic political conflict.⁵

I

AN ATTITUDINAL THEORY OF THE EXPRESSIVE POWER OF LAW

Economics explains an individual’s behavior as the result of his preferences, beliefs, and opportunities. That is, an individual seeks to maximize satisfaction of his preferences, given his beliefs about how he can accomplish these ends, subject to the constraints of his opportunities. In recent years, various rational

⁵ A third subject, discussed below, though only as an aside to the main discussion is how the points discussed bear on theories about the origin of norms and, in particular, the esteem theory I advanced in Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

choice theorists have applied this basic framework to explain social regularities, such as norms, that were at one time thought to be outside the range of economic theory.⁶ In a prior article, I offered an “esteem” theory of social and group norms.⁷ I posited that individuals have a preference for *esteem*; they care what others, even strangers, think of them as an end in itself. Individuals therefore experience disapproval as a cost and approval as a benefit. As a result, the *belief* that others generally disapprove a behavior makes that behavior more costly, at least if there is some risk that others will detect the behavior. Conversely, the *belief* that others generally approve a behavior makes the behavior less costly (or more beneficial). As is standard, I assume that the intensity of this preference varies continuously among individuals.

One implication of the esteem theory is that one can change an individual’s behavior merely by changing her beliefs about what others approve or disapprove. In this Part, I contend that legislation is one way to change such beliefs, that is, that legislation can influence behavior merely by causing individuals to update their beliefs about the approval patterns⁸ in their community or society. But I also demonstrate that this attitudinal theory of expressive law, while implied by the esteem theory,⁹ does *not* depend on it. If people value approval *even for instrumental reasons*, then law affects behavior by changing beliefs about how to gen-

⁶ For cites outside of the legal literature, see *id.* at 339-40 n.2. Within law and economics, most of the work follows the lead of ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991). Some of this scholarship seeks to explain the origin of norms. Robert Cooter, for example, focuses on internalization, a process of preference change by which the individual comes to prefer the behavior the norm requires and feels guilt acting otherwise. See Cooter, *supra* note 3; Robert Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the “Bad Man” of Holmes*, 78 B.U. L. REV. 903 (1998) (explaining differences in behavior by differences in preferences often risks circularity). But Cooter seeks to avoid the problem by using observable opportunities to explain and predict preference change. See Richard H. McAdams, *Modeling Morality: What are the Limits to Self-Directed Preference Change?*, 78 B.U. L. REV. 947, 948-51 (1998) (discussing Cooter’s concept of a “Pareto self-improvement”). Eric Posner, on the other hand, posits only that individuals have continuously varying discount rates—preferences for the future. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000). Posner further shows that individuals may engage in customary behaviors to signal low discount rates (or to avoid signaling high discount rates) and thereby attract (or avoid repelling) partners for cooperative enterprises. *Id.*

⁷ See McAdams, *supra* note 5.

⁸ I use “approval pattern” to refer to both approval and disapproval patterns.

⁹ See McAdams, *supra* note 5, at 400-07.

erate approval. As long as legislation is positively correlated with popular attitudes or opinions, then it will cause individuals to revise their beliefs about the expected approval or disapproval and to act accordingly. For example, when a town council enacts an ordinance requiring citizens to leash their dogs, recycle newspaper, or transport children in safety seats, the ordinance causes people to expect greater disapproval from acting otherwise. In each case, the desire to avoid disapproval provides an additional incentive to obey the law.

Part I separately explores the three components of the attitudinal theory of the expressive power of law. Section A explains why an individual's behavior depends, in part, on what kinds of behavior she believes others approve or disapprove. Section B explains how individuals often (though not inevitably) make mistakes about what others approve. Section C then demonstrates how law supplies some of the desired information. In presenting this argument, I am not claiming that law necessarily supplies the correct information, or that law inevitably supplies information not previously available, or that the effect of law is always significant. Instead, I present the more modest claim that legislation, or at least certain categories of legislation, cause people to update their prior beliefs about what others in their society or community approve. In some instances, the behavioral consequences are significant.

A. The Motivating Power of Approval and Disapproval

There are at least two reasons why approval motivates behavior. An individual may value approval intrinsically because it satisfies a preference for esteem or instrumentally because it helps to achieve other ends.

If an individual has a preference for esteem, her utility directly depends on what she perceives others to think of her. She gains utility when she believes others do not esteem her and loses utility when she believes others disesteem her. Although the individual cares more about the esteem of her social groups and people who know her well, she places some value even on the esteem of strangers. Many social theorists have posited such a preference¹⁰ and it well explains a large body of social science

¹⁰ See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 62 (D. D. Raphael & A. L. Macfie eds., Oxford Univ. Press 1976) (1759) ("To deserve, to acquire, and to enjoy the respect and admiration of mankind, are the great objects of ambition and

research, much of which I have reviewed elsewhere.¹¹ Here, I will mention just one additional example of such evidence, an experiment from the new literature on “behavioral” law and economics.

Behavioral theorists and some critics of economics have focused great attention on “ultimatum” and “dictator” games.¹² In these games, an individual has to decide how to divide a sum of money between herself and another player.¹³ The fact that many individuals share substantial amounts of the money, often half, suggests that individuals are highly motivated by altruism or a commitment to normative principles of fairness.¹⁴

However, a recent experiment reveals that the subjects might

emulation.”); JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 130 (1990) (although it can bring various benefits, “[social] status, or recognition from others, has long been regarded by psychologists as a primary source of satisfaction to the self.”); Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 *ETHICS* 725, 740 (1990) (“[E]ven in the absence of praise or censure the attitude of approval is a good that I can savor and the attitude of disapproval a bad under which I may smart[.]”); ARTHUR O. LOVEJOY, *REFLECTIONS ON HUMAN NATURE* 129-51 (1961) (chapter on “Approbateness as the Universal, Distinctive, and Dominant Passion of Man”; approbateness is “the desire for approval or admiration of oneself, one’s acts, and one’s achievements on the part of one’s fellows, and for the expression by them of this feeling”).

¹¹ The evidence shows that the mere observation of subjects affects their behavior, even in circumstances where the likelihood of future interaction with the observer is remote and the likelihood the observer could affect the subject’s welfare in any future interaction is even more remote. See Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2250 nn.40-41 (1996) (discussing psychological experiments on conformity); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1009-19 (1995) (discussing unexpected cooperation in experimental one-shot prisoner’s dilemmas and real world settings); see also Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352-56 (1997) (discussing psychological evidence for “social influence”).

¹² For reviews, see RICHARD H. THALER, *THE WINNER’S CURSE* 21-35 (1992); Alvin E. Roth, *Bargaining Experiments*, in *THE HANDBOOK OF EXPERIMENTAL ECONOMICS* 253, 282-92, 296-302 (John H. Kagel & Alvin E. Roth eds., 1995); Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 J. ECON. PERSP. 209 (1995).

¹³ In the ultimatum game, Player 1 proposes some division with Player 2 of a sum of money provided by the experimenter. Player 2 then chooses either (1) to accept the proposed division, in which case both players receive what Player 1 proposed, or (2) to reject the proposed division, in which case both players receive nothing. In the dictator game, Player 1 simply chooses a division of the money and the experimenter then allocates the money according to this division.

¹⁴ See, e.g., THALER, *supra* note 12; Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1489-97 (1998) (using these studies to argue that “[a] concern for fairness is part of most agents’ utility function.”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the*

actually have been motivated by their selfish concerns for the esteem of the researchers.¹⁵ In prior experiments, subjects knew they remained anonymous from other subjects. In the more recent experiment, researchers *also* made sure each individual subject's decision was unknown to the researchers. When the experiment was double-blind, the amount people allocated to the other player *fell* significantly.¹⁶ Apparently, the mere knowledge that researchers were watching, combined with beliefs about what behavior they will approve or disapprove, caused material changes in behavior. The results of the double-blind experiment suggest that much, though not all, of the apparently unselfish behavior actually reflects a selfish concern for the esteem of researchers.¹⁷

Rationality Assumption from Law and Economics, 88 CAL. L. REV. 1051 (2000) (using these studies to argue for a "fairness norm").

¹⁵ See Elizabeth Hoffman et al., *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 GAMES AND ECON. BEHAV. 346 (1994).

¹⁶ The percentage of Player 1's allocating nothing to Player 2's rose from 20% in the original experiments to nearly two-thirds in the double-blind experiment. See also Elizabeth Hoffman et al., *Social Distance and Other-Regarding Behavior in Dictator Games*, 86 AM. ECON. REV. 653, 659 (1996) (reporting a variety of experiments manipulating the social distance between Player 1 and Player 2, finding similar results in the double-blind experiment, and concluding that "people act as if they are other regarding because they are better off with the resulting reputation.").

¹⁷ Just as some theorists have used evolutionary game theory to argue that altruism can provide adaptive fitness for an organism, see Helmut Bester and Werner Güth, *Is Altruism Evolutionarily Stable?*, 34 J. ECON. BEHAV. & ORG. 193 (1998); Werner Güth, *An Evolutionary Approach to Explaining Cooperative Behavior by Reciprocal Incentives*, 24 INT'L J. GAME THEORY 323 (1995), others have made the same argument for a preference for esteem. See Chaim Fershtman & Yoram Weiss, *Why Do We Care What Others Think About Us?*, in *ECONOMICS, VALUES, AND ORGANIZATION* 133 (Avner Ben-Ner & Louis Putterman eds., 1998). These theorists imagine that a preference for status (what I call esteem) creates an indirect benefit because two people who care about status may be able to cooperate when two people who do not care about status could not. Specifically, if individuals gain status according to their effort, then these rewards may convert what would otherwise be a prisoner's dilemma game (based on material payoffs) into a game where defection is no longer the dominant strategy. *Id.* at 136-39. Under certain conditions, preferences for status are evolutionarily stable (particularly if people only care about esteem from others motivated by esteem and migration is possible between societies). *Id.* at 142-48.

One can also imagine an evolutionary argument for esteem like the one Robert Frank makes for the adaptive fitness of some human emotions. See ROBERT H. FRANK, *PASSIONS WITHIN REASON* (1988). An example is anger: emotion drives one to retaliate even when the costs exceed the benefits, which is immediately undesirable, but usefully deters future attacks. Frank analogizes emotions to physical pangs of hunger or thirst: rationality alone might motivate an individual to retaliate in order to develop a reputation for retaliating, but anger provides a more reliable incentive. Similarly, for animals that survive best in groups, some "push" toward

A second explanation for why approval motivates behavior is that people value approval instrumentally. Consider the following familiar scenario: *B* wants to win some favor from *A*, e.g., to get a job or job reference, to be invited to a party or into a club, or to get some useful gossip about *C*. To get *A*'s favor, *B* seeks to gain *A*'s approval and avoid *A*'s disapproval.¹⁸

The interesting question is what motivates *A* to behave in this manner. The easiest cases to explain are those where *B* seeks a position that involves interacting with *A* in the future, such as joining the same firm or club or going to the same party. Where *B* wants to interact with *A*, *B* will want to convince *A* that the interaction will be beneficial. That can mean a lot of different things.¹⁹ As one example, if *B* smokes and *A* dislikes being exposed to cigarette smoke, then *A* is less likely to do anything that increases the chance of future interaction. What is true of smoking might be true of any behavior or trait that offends *A*'s sense of smell, morality, or aesthetics. That is, it creates a cost for *A* to interact with *B* and therefore lowers her willingness to provide *B* the favor she seeks.²⁰ More generally, it is often the case that one person will disapprove of another whose behaviors, traits, or opinions are very different from her own and that she will dislike associating with people she disapproves.²¹ For instrumental rea-

herding or social clustering is adaptive. In complex social animals, such a preference might not only motivate the individual to live with others of its species but help her to build coalitions and avoid "accidental" conflict, *i.e.*, conflict that occurs because one individual's behavior is mistakenly perceived as challenging another. A preference for esteem might more reliably produce clustering and avoid conflict than rationality alone.

¹⁸ See Pettit, *supra* note 10, at 746 ("That someone comes to think ill of me . . . gives me reason to believe that . . . the person is thereby made more likely, if the costs are right, to speak unfavorably of me to others . . . or to . . . prefer[] another in the exercise of some patronage.").

¹⁹ For example, *B* may want to convince *A* that *B* has a low discount rate because, in many situations requiring cooperation, people with low discount rates are better partners. See generally POSNER, *supra* note 6.

²⁰ Of course, economic pressures sometimes restrain the inclination to grant favors on the basis of one's personal preferences. A classic example is employment. The employer gains by hiring the employee with the highest expected productivity regardless of other matters. But in cases like this, there is often a principal/agent problem. See Joseph E. Stiglitz, *Principal and Agent*, in THE NEW PALGRAVE: ALLOCATION, INFORMATION, AND MARKETS 241 (1989); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134, 138 (1973). The employer's hiring agent *A* always retains some discretion to deviate from the employer's goal of maximizing productivity. *A* uses that discretion, and *B* expects *A* to use that discretion, to hire people *A* "likes."

²¹ See RUSSELL HARDIN, ONE FOR ALL: THE LOGIC OF GROUP CONFLICT 89

sons, then, *B* tries to avoid exhibiting behaviors, traits, or opinions he suspects that *A* disapproves.²²

The instrumental interest in approval provides a different interpretation of the double-blind dictator game: the subjects acted to preserve the approval of the researchers as a means to some other end. I continue to view the study (and others of its kind) as demonstrating a preference for esteem because the instrumental value of the researcher's approval seems to be much smaller than the monetary sacrifice being made.²³ I may be wrong, but it makes no difference to the attitudinal theory of expressive law.²⁴ All that matters for the theory is that approval motivates behavior, either intrinsically or instrumentally. But if approval is valued only instrumentally, then the experiment interestingly demonstrates how utterly pervasive and all-consuming the instrumental concern for approval is. Specifically, it reveals that individuals seek approval even in a one-shot laboratory experiment with only socially distant researchers—total or near strangers—looking on.

The ubiquity of approval-seeking leads to a third interpreta-

(1995) ("If your presence, with your hostilities to our local tastes and ways of doing things, is discomforting to me, I have an interest in excluding you."); *id.* at 90 ("[F]or norms of difference and exclusion, there may be no costs to some sanctioners. They are not sanctioning per se; rather, they are merely acting in the interests of their comfort in familiarity or whatever and excluding those who are unfamiliar.")

²² Harder to explain is the instrumental value of approval in contexts that do not involve *A*'s interaction with *B*. For example, it is commonly thought that Professor *A*'s willingness to give Student *B* a job recommendation depends not merely on *A*'s estimate of *B*'s abilities and traits needed for the job, but also on *A*'s approval or disapproval of *B*'s non-job related behavior, traits, and opinions. But why would *A* behave this way? A full answer would be surprisingly complex. A short answer is that individuals often prefer that success come to like-minded others, either because they see it as confirmation of their views, allowing them to "bask in reflected glory," or they believe that others will see it as such.

²³ For there to be an instrumental value to the researcher's approval, the subject must believe that there is a chance of interacting with the researcher in the future in such a circumstance that the researcher will act more favorably if she approved the subject's experimental behavior. Unless the subject is or plans to be a student of the researcher, which is usually not the case, there is little chance that the subjects will interact again with the researcher. If they do interact again, the experimenter is not likely to recall how one of hundreds of subjects behaved in the experiment. If the researcher somehow does recall and does disapprove, the level of disapproval at issue will not likely affect how the researcher will act toward the subject in other interactions. Thus, it seems far-fetched that the instrumental value of the researcher's approval exceeds the amounts being sacrificed (five dollars) in the experiments.

²⁴ Nor is the instrumental account necessarily inconsistent with the esteem theory of norms I presented in McAdams, *supra* note 5.

tion of such experiments, namely, that even where the cost of preserving approval exceeds the instrumental benefit, individuals are still acting instrumentally but with imperfect rationality. Assume that people are only boundedly rational and save on information and decision costs by following various heuristics or "rules of thumb." Rather than calculating on each occasion the expected benefits of acting to preserve or gain a favorable opinion from others, one might just treat approval as always having some minimum value, even though that means occasionally sacrificing more than the expected approval gain is actually worth.

Consider the following mundane illustration of this rule-of-thumb. Suppose you are deciding whether to "cut" in a line or to follow the custom of entering at the end. Everyone in the line appears to be a stranger. It is quite difficult to identify the instrumental benefit of avoiding these apparent strangers' disapproval by waiting in line. There is some small risk that an individual who strongly disapproves of line-breaking will violently retaliate against you, either out of moralistic anger or from a strategic effort to build a reputation (among others in line who know her) for retaliating against defectors. Moreover, you may encounter one of the apparent strangers in the future, and she may withhold some benefit from you out of moralistic anger or in the belief that line-breaking predicts other forms of defection.²⁵ Both costs are extraordinarily difficult to ascertain. Quite reasonably, you may decide that it does not pay to calculate the costs of line-breaking in each case. Instead you adopt a rule-of-thumb: you estimate an average disapproval cost and, depending on its magnitude, decide either never or always to wait in line (absent dire circumstances). As a result, you appear to value the esteem of strangers non-instrumentally because you wait in line in some instances even though the benefits of breaking exceed the expected costs.²⁶ In choosing this, you are simply following your rule-of-

²⁵ Line-breaking might signal that an individual does not highly value future interactions with others in the community because, for example, she has a high discount rate, see POSNER, *supra* note 6, or plans to leave the community in the near future.

²⁶ Note how this analysis supports the claim of adaptive fitness mentioned in *supra* note 17. If an individual with bounded rationality constantly confronts situations in which approval has instrumental value, then an individual with a weak preference for esteem may make better decisions than one with no preference for esteem. See Hoffman et al., *supra* note 16, at 659; Pettit, *supra* note 10, at 746 (noting instrumental reasons for pursuing esteem and concluding that the "intrinsic concern for what others think [may be] implanted in us for instrumental reasons . . . by evolution or by training.").

thumb and avoiding the costs of calculating the costs and benefits in every case.²⁷

Determining which interpretation is best is not necessary because all three suffice to support the attitudinal theory of expressive law. Whatever the reason, as long as approval motivates behavior, law can change behavior by providing information about approval patterns.

B. Uncertainty About the Approval Pattern: Random Errors and Pluralistic Ignorance

That people seek the approval of others is one way of explaining the regularities of behavior we call norms. A pattern of approval may generate a pattern of behavior. For example, the fact that virtually everyone approves the act of voting in political elections may help to explain voting.²⁸ Similarly, that virtually everyone disapproves the act of breaking in line may help to explain the regularity of standing in line.²⁹ However, nothing guar-

²⁷ A person behaving in this manner may nonetheless change her rule-of-thumb. If circumstances changed sufficiently, the benefits of line-breaking would almost always exceed the costs (as for example, when one observes almost no one waiting in line). The individual would eventually figure this out and go back to calculating in each case or adopting a rule-of-thumb of always cutting in line. Philip Pettit gives this kind of explanation a particular power by suggesting how this might operate at an unconscious, less-than-fully-rational level. Self-interest might only consciously come into play when one's behavior turns out to strongly sacrifice one's self-interest and sounds "alarm bells" that cause the individual to consider her strategy. See Philip Pettit, *The Virtual Reality of Homo Economicus*, 78 *THE MONIST* 308, 324 (1995) ("while virtual self-regard may be of no use in explaining the emergence or continuation of any pattern of behaviour, it can be of great utility in explaining a third explanandum: the resilience of that pattern of behaviour under various shocks and disturbances."). One who ignores approval, pursues approval without regard to cost, or tries to calculate the costs and benefits in each case eventually finds herself noticing and regretting the costliness of her decision. But an individual who initially decided, perhaps with little reflection, to treat esteem as always having some limited value, without calculating the actual benefit, will get along well enough and have no cause to recalculate her strategy.

²⁸ See Richard L. Hasen, *Voting Without Law?*, 144 *U. PA. L. REV.* 2135 (1996).

²⁹ See McAdams, *supra* note 5. This approach allows norms to be explained in terms of the preceding patterns of approval and disapproval. There remains the interesting and difficult question of how to explain the patterns. I have only been able to say a little about this subject. See *id.* at 359-60. This limitation leads some to object that there cannot be an approval pattern unless there is first a norm, so that the norm cannot be derived from the pattern. See Jane Mansbridge, *Starting with Nothing: On the Impossibility of Grounding Norms Solely in Self-Interest*, in *ECONOMICS, VALUES, AND ORGANIZATION* 151 (Avner Ben-Ner & Louis Putterman eds., 1998). However, people can and do disapprove of things that they know are approved of or tolerated by everyone else, so disapproval does not always follow a

antees that a pattern of approval will generate a norm because, among other things,³⁰ nothing guarantees that people will *discover* the pattern of approval. Not only do people make mistakes about such matters, but, as I explain below, the concern for approval itself impedes the effort to discover the grounds on which others grant approval and disapproval. The uncertainty of what others *actually* think creates a demand for information about public attitudes, information that I argue in the next section is supplied by law. In this section, I explain the basis of the uncertainty, that is, why people sometimes fail to discover the actual pattern of approval in their group or society.

Although the point of this section is to show that people make mistakes about approval patterns, we should begin with the more extreme claim that purely rational actors would *never* determine the approval pattern. This objection is implied by Jon Elster's assertion that one cannot derive norms from patterns of approval and disapproval.³¹ In supporting his general thesis that norms

norm. Various forces could cause individuals to disapprove of a behavior before there is any norm against it. New information about second-hand smoke, for example, could cause increasing numbers of people, acting selfishly and alone, to begin disapproving of public smoking. Once they recognize this new approval pattern, the norm emerges.

The objection may then be that no one will disapprove of anything unless there is first a more basic norm defining rights and harms. The norm against public smoking, for example, requires that people share a pre-existing norm defining a harm to others. There are two points here. First, the problem that norms are embedded in other norms infects any theory of norm origin. But the problem does not stop us from deriving *particular* norms from prior approval patterns. It just means that the prior approval pattern came about, in part, because of some norm *other* than the one we are trying to explain. The esteem theory of norms may not therefore be useful for deriving the foundational norms of western culture, but it is useful for discussing more marginal and contested norms, which are the focus of my study precisely because law can manipulate only these norms. Second, despite the "embeddedness" of norms, approval patterns are still of fundamental importance. In a hypothetical "state of nature" in which there were no norms, there could still be approval and disapproval. The selfish desire to avoid pain, for example, could cause individuals to disapprove of those who randomly inflict physical pain. The problem is not that individuals in "normless" state would, lacking a social concept of "harm," fail to disapprove anything. More likely, the problem is that they would disapprove everything that impeded their self-interest. Foundational norms operate to *restrain* disapproval to cases of socially recognized harm. That's why we don't have to teach children to disapprove other children for taking away a play toy. Instead we have to teach them *not* to blame others for exercising their "fair" claims to such toys.

³⁰ The other thing required is that individuals must perceive some risk of detection. If they believe no one can possibly detect their behavior, then they need not worry about whether others approve or disapprove it. See McAdams, *supra* note 5, at 361-62.

³¹ See JON ELSTER, *THE CEMENT OF SOCIETY* 98 (1989).

are not “outcome-oriented,” Elster claims that no one would rationally incur the costs to enforce norms.³² Even the most minimal enforcement—expression of disapproval—is “always costly” because “[o]ne may alienate or provoke the target individual, at some cost or risk to oneself.”³³ In other words, if approval matters, one who expressly disapproves another always risks *counter-disapproval* by his target. This appears to create a circularity problem as no one would want to express disapproval, and therefore no one would learn of any social pattern of disapproval. As a result, Elster contends that one cannot explain norms as arising from rational individuals seeking to avoid the sanction of disapproval.³⁴

However, upon closer inspection, there is no circularity. I first respond to Elster by showing that individuals will often learn of approval and disapproval patterns despite the problem of counter-disapproval. I then use Elster’s insight to explain how frequently individuals misjudge what others think about common behaviors.

1. *How Selfish and Rational Individuals Detect Approval Patterns*

Elster is right that expressing disapproval risks counter-disapproval and that the costs of expression *may* deter communication and produce a state of collective ignorance about what people actually think.³⁵ But his objection further asserts that collective

³² *Id.*

³³ *Id.* at 133.

³⁴ [W]hen one moves upwards in the chain of actions, beginning with the original violation, the cost of receiving disapproval falls rapidly to zero. People do not frown upon others when they fail to sanction people who fail to sanction people who fail to sanction people who fail to sanction a norm violation. Consequently, some sanctions must be performed for motives other than the fear of being sanctioned. I argued in the preceding paragraphs that sometimes there is an unmoved mover at the very beginning of the chain. Here I have argued that every chain must have one.

Id.

³⁵ Note that it will *not* suffice to answer Elster by saying that people will express disapproval indirectly or subtly. Admittedly, one may attempt to express disapproval without risking retaliation by making cryptic remarks or furtive gestures (e.g., by rolling one’s eyes). But in every case, either the disapproval is not conveyed, in which case the target is not sanctioned and no norm arises, or the disapproval is conveyed, in which case the target is sanctioned but may counter by disapproving the sanctioner. Similarly, it will *not* work to say that disapprovers might only express *approval* of behavior they esteemed and not disapproval. (I mistakenly suggested otherwise in McAdams, *supra* note 5, at 363). It is true that those receiving

ignorance of esteem judgments is not just a possible equilibrium but, given rational action, the *only* possible equilibrium. So stated, the proposition seems doubtful.

First, note how unstable such an equilibrium is. Suppose that, although it is not generally known, a large majority of society disapproves behavior *X*. Against the counter-disapproval an individual may suffer from expressing disapproval of one who engages in *X*, one must weigh the possible third-party *approval* from expressing the view that most others share. Indeed, one may gain particular approval from being the first to express a judgment shared by many who had previously been afraid to express themselves. For example, those who voice the first criticism of what had previously been a universally applauded work of art, piece of scholarship, or trend in fashion, risk rejection but later gain special recognition as “opinion leaders” when others turn out to agree. Thus, when an individual believes that most others will approve her expression of disapproval, she is likely to take the risk of being first. If she is proved right, then others will discover the true approval pattern. Ignorance remains an equilibrium only if an insufficient number of individuals begin to suspect the actual approval pattern.

There are at least two ways that rational individuals will, correctly or incorrectly, begin to form beliefs about approval patterns before anyone expresses their evaluative judgments. The first is *introspection*. An individual will examine his own esteem-judgments and ask whether his basis for those judgments is likely to be shared by others. He may reason that the factors causing him to disapprove the behavior will affect most others in a similar way.³⁶

Second, an individual may *observe and interpret* the behavior

approval will not retaliate. But if people never express disapproval, the failure to express approval would be understood as disapproval, so that everyone would express approval of everything to avoid risking counter-disapproval. The strategy of selectively expressing approval is just another attempt at subtlety: those actually disapproved of either do not infer that any distinction is being made, in which case they never perceive a loss of esteem, or they do recognize the distinction, in which case they may retaliate against those who damn them by refusing to express approval.

³⁶ For example, an individual may expect that others will disapprove behavior against their interests, just as she disapproves behavior against her interests. See Pettit, *supra* note 10, at 740. If *A* disapproves neighbors who play loud music in the middle of the night because it disrupts her sleep, then she may assume that her neighbors will disapprove of her if she plays loud music in the middle of the night. The same is true of behavior she approves. If *A* esteems those who pick up litter in

of others as evidence of their esteem judgments. To see how this works, imagine yourself as an individual who wishes to avoid the sting of counter-disapproval. When you are uncertain of the pattern, not only do you refuse to express disapproval of anyone's conduct, but you even go so far as to never express approval of anyone's conduct, lest the absence of expressed approval be read as disapproval. But this is still not far enough because we routinely reveal our esteem judgments in our *behavior*. When we invite someone to a party, hire a person for a job, or give money to an agent for a charity, our action reveals evaluative judgments that imply less approval if not outright disapproval of those not selected. For example, if *A* observes that none of her colleagues volunteer to work or socialize with *B*, who happens to be the only office worker who wears fur or dates across racial lines, then *A* may infer that her colleagues disapprove of those behaviors.

Perhaps Elster would respond that selfish and rational individuals would seek to avoid counter-disapproval by behaving in a way that conceals their esteem judgments. But this would overlook a crucial distinction between avoiding the expression of disapproval and avoiding actions that reveal disapproval. *Avoiding these actions is costly*. People prefer to interact more with those they esteem. Even absent material consequences, people often prefer to trade with or employ those they think well of, prefer to socialize with people they esteem, and, most obviously, prefer to date or marry those they hold in high regard. The effort to conceal the basis on which one grants or withholds esteem, by treating individuals identically, without regard to one's evaluation of their behavior, would be painful. There is no reason to think that the risk of counter-disapproval will *always* exceed these concealment costs.³⁷ Thus, even without their expression, individuals

the neighborhood because it serves her interest in clean surroundings, she may expect her neighbors to esteem her for the same behavior.

³⁷ Because a person may suffer costs from interacting with someone she finds offensive, a norm can also arise even if people value approval only instrumentally. The normal assumption is that a selfish and rational person would not bother to incur the "costs" of sanctioning another for violating a norm. See McAdams, *supra* note 5, at 362-63. But if *A* finds *B*'s presence offensive, then *A* will incur a benefit, not a cost, by avoiding *B*. If *B* desires to interact with *A*, then she will regard this avoidance behavior as a sanction. As a result, *B* may abstain from the behavior or seek to conceal the traits that *A* finds offensive. A norm could emerge if enough people follow this strategy. Even with this different starting point, most of what I say in McAdams, *supra* note 5, about "esteem" norms would apply to norms derived from an instrumental concern for approval. See also Robert Sugden, *Normative Ex-*

will sometimes reveal esteem judgments in their behavior, and will do so despite the risk of counter-disapproval. Consequently, esteem-seeking individuals may discover a pattern of disapproval without any overt expressions of disapproval.³⁸

As soon as individuals begin to form beliefs about approval patterns via introspection or behavioral inferences, their new beliefs can change their behavior. Once individuals believe that a consequence of their behavior is net approval (disapproval), they will perceive an additional benefit (cost) to that behavior. Even without expressed disapproval, the pattern of approval may generate a behavioral regularity. Somewhere along the way, however, an individual is likely to think it worthwhile to express disapproval. The same reasoning process that leads her to change her behavior will lead her to believe that third-parties will approve her expression of disapproval, all the more so if she has observed other people adjusting their behavior to what she believes is the approval pattern. As explained above, this belief makes it likely that someone will express the common sense of disapproval. Hence, collective ignorance is not a necessary equilibrium. When individuals in society generally approve or disapprove a behavior, rational individuals can discover the pattern and even choose to express themselves consistent with it. The recognized approval pattern can then produce a norm.³⁹

2. *How Rational Individuals Make Mistakes About Approval Patterns*

Nothing guarantees that individuals will correctly judge an ap-

pectations: The Simultaneous Evolution of Institutions and Norms, in *ECONOMICS, VALUES, AND ORGANIZATION* 73 (Avner Ben-Ner & Louis Putterman eds., 1998).

³⁸ We should therefore reject another claim Elster makes, that rational individuals will never discover the approval pattern because the expression of disapproval “requires energy and attention that might be used for other purposes.” ELSTER, *supra* note 31, at 133. This cost is real. But for the reasons just stated, people can discern disapproval even if no one expresses it, using either introspection or the observation of behavior. Individuals who care about approval will be motivated to expend the “energy and attention” needed to learn the criteria others use for granting or withholding approval, so there is no necessity that others expend energy and attention *expressing* those criteria.

³⁹ Note I did not say a norm would emerge. That depends on how significant is the expected approval or disapproval compared to the cost of conforming to the approval pattern (engaging in the approved behavior or refraining from the disapproved behavior). See McAdams, *supra* note 5. But if my argument is sufficient to demonstrate that individuals can expect approval or disapproval prior to any expression of approval or disapproval, then the circularity objection necessarily fails.

approval pattern. To the contrary, some level of mistake is expected. For instance, suppose we ask a roomful of people to write down the percentage of people in the United States who disapprove of handgun ownership. We would expect a range of answers, most of which would over- or underestimate the correct level. We would get a similar range of mostly inaccurate answers if we asked people to name the percentage of people in their local community who disapproved of public smoking or unleashed dogs or who approved of prayer in public schools or the medicinal use of marijuana. These mistakes are not a sign that people do not care about approval any more than mistakes about the price of milk indicate that people do not care about milk prices. The problem is that information is costly. An individual typically infers the approval patterns of a community or nation from the actions and statements of people she knows, a far from random sample of individuals.⁴⁰ While media coverage of public opinion polls corrects some of these mistakes, it is not likely to eliminate them.⁴¹

The resulting errors might be random. That is, the range of answers may be normally distributed around a mean that equals the “true” value of the approval pattern. The general explanation for such an outcome is that for every person who gathers

⁴⁰ The problem is compounded when we try to account for intensity of preferences. An individual cares whether those who disapprove of a certain behavior will strenuously or tepidly object to the behavior. Given that intensity of disapproval (or approval) can vary infinitely, determining the average degree of disapproval in a group of individuals requires even more information.

⁴¹ If a poll indicates that 58% of parents “agree” that “responsible parenting requires the use of child safety seats for all young children on every automobile trip,” then conceivably everyone might read the poll and hold the identical belief about the approval pattern. But there are many reasons that polls won’t prevent all mistakes about approval patterns. First, there isn’t always a timely and scientifically valid poll for every relevant issue in every relevant population. This is especially true because the individual might care about the approval pattern in her own community, and the poll surveyed people in some larger area, like the entire state. Second, when the poll exists, the public does not always read about or remember it. Third, sometimes there are conflicting polls, so that the individual must either average the two or apply some methodological criteria for deciding which is the superior poll. The public may also be skeptical of polls, perhaps aware that the outcome is sensitive to the exact wording of the question. Related to methodology, individuals are not always honest in stating their opinions to pollsters, for reasons I discuss *infra* notes 42-49 and accompanying text, so reliance on a scientifically valid poll may not prevent mistakes. Finally, all of these concerns are magnified when the issue is not a simple dichotomy—that one is “for” or “against”—but one in which the attitudes of approval or disapproval are spread out over a continuum. The natural result is that people make mistakes.

information from people who are unusually disapproving of the behavior, there is another person who gathers information from people who are usually approving (or at least tolerant) of the behavior. Mistakes of one sort are balanced by mistakes of another sort. But even on this fairly optimistic account, it is still the case that most people over- or underestimate the current level of approval or disapproval for the given behavior.

There are several reasons why the error may be skewed in one direction rather than random. One reason might be that the underlying approval pattern changes faster than the beliefs about the approval pattern. If the approval pattern had been stable for a time, individuals might be slow to recognize a change. At each moment, everyone gives excessive weight to the approval pattern in the last time period. The group thus tends to underestimate a rising level of (dis)approval and to overestimate a falling level of (dis)approval. The lag in beliefs, however, would normally be temporary. Absent some other factor, we would expect beliefs to eventually catch up with actual approval patterns, with the mean belief equaling the actual pattern.

However, another factor could more permanently skew the beliefs about what is approved and disapproved. Here we return to Elster's objection: even if collective ignorance is not the only possible equilibrium, it is a possible outcome. One individual may be afraid of speaking out against what she perceives to be the consensus. If enough individuals are unwilling to challenge what appears to be the prevailing view, no one learns that it really *is not* the prevailing view.

There is an interesting confluence of writing on this "Emperor's New Clothes" phenomenon.⁴² The economist Timur Kuran refers to "the act of misrepresenting one's genuine wants under perceived social pressures" as "preference falsification."⁴³ Similarly, social psychologists use the term "pluralistic ignorance" to refer to the outcome "in which virtually every member of a group or society privately rejects a belief, opinion, or practice, yet believes that virtually every other member privately ac-

⁴² Much of the law and norms literature comments on it. See, e.g., Lessig, *supra* note 3, at 997-99 (1995); McAdams, *supra* note 11, 144 U. PA. L. REV. at 2259; Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1716-18 (1996).

⁴³ TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 3 (1995).

cepts it.”⁴⁴ Because everyone pretends to support the existing norm, everyone thinks that they will be disapproved for acting or speaking contrary to the norm, even though private support is largely absent.

The psychology literature documents several cases where preference falsification or pluralistic ignorance created an equilibrium in which people misperceived the common view. Perhaps the first finding comes from Schanck, who in 1932 reported on the attitudes about theatre-going and card playing that he surveyed in a small community dominated by the Methodist church.⁴⁵ A large majority of community residents reported private attitudes that were more tolerant of these activities than the norm they believed their community endorsed. Another example concerns the Jim Crow South, where private white support for state-mandated segregation eroded well before there was any willingness to question segregation publicly.⁴⁶ Contemporary examples of pluralistic ignorance include the belief among college students that their classmates approve of drinking more than they actually do⁴⁷ and the belief among southern males that others approve of violent responses to insults (or disapprove of

⁴⁴ “The term pluralistic ignorance is something of a misnomer, for in these cases, group members are not, in fact, ignorant of one another’s private sentiments; rather, they think they know, but are mistaken.” Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and the Perpetuation of Social Norms by Unwitting Actors*, 28 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 161, 161 (1996); see also Dale T. Miller & Deborah A. Prentice, *Collective Errors and Errors About the Collective*, 20 *J. PERSONALITY & SOC. PSYCHOL. BULL.* 541 (1994).

⁴⁵ Richard Louis Schanck, *A Study of A Community and Its Groups and Institutions Conceived of as Behaviors of Individuals*, 43 *PSYCHOL. MONOGRAPHS* 42-45, 56-58 (1932).

⁴⁶ See James M. Fields & Howard Schuman, *Public Beliefs and the Beliefs of the Public*, 40 *PUB. OPINION Q.* 427 (1976); Hubert J. O’Gorman & Stephen L. Garry, *Pluralistic Ignorance—A Replication and Extension*, 40 *PUB. OPINION Q.* 449 (1976); Hubert J. O’Gorman, *Pluralistic Ignorance and White Estimates of White Support for Racial Segregation*, 39 *PUB. OPINION Q.* 313 (1975); see also KURAN, *supra* note 43, at 316-17.

⁴⁷ Psychologists find that pluralistic ignorance causes higher levels of alcohol consumption on college campuses than would otherwise occur. Individuals believe that their less approving view of alcohol is deviant and therefore conceal it, reinforcing the general perception that drinking is highly approved. See Prentice & Miller, *supra* note 44, at 165-88; Deborah A. Prentice & Dale T. Miller, *Pluralistic Ignorance and Alcohol Use on Campus: Some Consequences of Misperceiving the Social Norm*, 64 *J. PERSONALITY & SOC. PSYCHOL.* 243, 245 (1993) (finding that students “were much less comfortable with the alcohol drinking habits of [fellow] Princeton undergraduates than they believed the average student to be”).

non-violent responses) more than they actually do.⁴⁸ Similarly, Kuran uses the idea of preference falsification to explain strong *public* support for communist regimes in eastern Europe and the former Soviet Union, that existed in the absence of parallel private support.⁴⁹

To summarize, an individual cares what others approve and disapprove, yet lacks perfect information about this fact. A particular problem is that others may seek to conceal their evaluative judgments. As a result, we can say there is a “demand” for information about what others approve and disapprove. The next section contends that, intentionally or not, government actions often “supply” the desired information.⁵⁰

C. *The Expressive Power of Law: Legislation Signals Popular Preferences and Beliefs*

The utilitarian analysis of law is dominated by a focus on legal sanctions. The above analysis, however, begins to reveal how law might have a significant expressive effect, an effect dependent not on the legal sanction but on what the law says. Law signals the existence of information held by the law-maker. In particular, democratically enacted legislation provides information about what elected representatives believe their constituents approve and disapprove. Because legislators have a professional interest in correctly judging approval patterns, their enactments

⁴⁸ Joseph A. Vandello and Dov Cohen, *Pluralistic Ignorance and the Perpetuation of Norms about Male Aggression* (unpublished manuscript, 1999); Dov Cohen & Joseph A. Vandello, *Honor and “Faking” Honorability*, in *THE BIOLOGY OF BELIEF* (R. Nesse, ed., forthcoming). The same might have been true of the practice of dueling, in the South and elsewhere. The willingness to challenge others escalated so that, in the latter stages of the institution, when trivial slights produced a duel, most parties may have preferred to abandon the practice but no party would suffer the indignity of saying so publicly. See Hardin, *supra* note 21, at 93, 101-02; Lessig, *supra* note 3, at 970.

⁴⁹ See KURAN, *supra* note 43, at 118-27. Kuran’s other main examples are the persistence of India’s caste system, *id.* at 128-36, and what he describes as “the unwanted spread of affirmative action.” *Id.* at 137-54. In each case, he says that social pressures operated to constrain criticism of a practice that lacked private support.

⁵⁰ Various private institutions in civil society provide the same sort of information about social attitudes. A social club, firm, or university might signal the attitudes of, respectively, its members, employees, or alumni, by the regulations it adopts or other actions it takes. The legislature seems to have a comparative advantage over private entities in publicizing attitudinal information concerning an entire community or society, but I make no strong claim that government is *necessary* in this respect. I am content to show that one effect of law is to provide such information and therefore to influence behavior apart from sanctions.

reveal their private information about such patterns. The law, not the sanction, then influences behavior by causing people to update their prior beliefs about what others approve and disapprove.

The claim assumes that legislators signal their beliefs about social approval patterns when they vote for or against legislation. This will be true *if* democratic elections effectively threaten incumbent legislators who act contrary to majority preferences. If legislators fear that frustrating popular sentiment will cost them their jobs, then legislators have a strong incentive to invest in gathering information about popular preferences. Note here the role of the secret ballot: by removing social pressures from the voter, the voter has no reason not to express her true preference. Elected politicians then have a great incentive to find out what people actually approve or disapprove, rather than what they pretend to approve and disapprove. Politicians who correctly detect a state of “pluralistic ignorance” gain an electoral advantage over those who do not. If voters turn out of office those who ignore or misjudge popular preferences, then individuals with a comparative advantage at gathering and interpreting such information will dominate legislative bodies. In sum, if legislators cater to popular opinion, then legislative outcomes provide signals of what those legislators believe about public preferences.⁵¹

We should examine the claim I am making in light of public choice theory to determine whether that body of scholarship rules out an expressive theory of law based on the informational content of legislation. After concluding that the attitudinal theory is consistent with public choice literature, I provide a more precise description of the manner in which legislation signals public attitudes.

⁵¹ As I have emphasized, legislators will typically be better than private citizens at correctly ascertaining public opinion. But legislation can serve as a signal of public opinion even if legislators have no such comparative advantage. Even if the average private citizen is equally likely to be right about public opinion as the average legislator, the aggregation of hundreds of legislative votes will be informative because a majority of legislators is more likely to be right than any one citizen. This point follows from the Condorcet Jury theorem. See Dharmapala & McAdams, *supra* note 4. Of course, if private citizens were as knowledgeable as legislators about public opinion, then an equal aggregation of their opinions would be equally as informative. But the expressive effect on behavior depends also on how publicized the aggregation is, and legislation is typically more publicized than private aggregations. See *supra* note 41.

1. *Public Choice Theory and the Relationship Between Legislation and Public Opinion*

It would be naive to deny that elected representatives sometimes feel immune from popular pressure. Legislators know that many citizens do not vote and those that do have imperfect information about how their representative has voted on or otherwise influenced legislation.⁵² Even if the citizen knows what her representative did, she also has imperfect information about whether the result was desirable. Perhaps the legislator had investigated the matter, possessed superior information, and acted paternalistically in the voter's interest.⁵³ Finally, when the citizen enters the voting booth with the thought of ousting her representative in retaliation for some legislative act, she will have only a limited range of electoral options. Even if the voter disapproves of many of the incumbent's votes, she may still think herself better off with the incumbent than the challenger.⁵⁴ For these reasons, Timur Kuran believes that democratic processes often fail to reveal or displace pluralistic ignorance.⁵⁵

Not only do these limitations weaken the connection between majority preferences and legislative outcomes, but there are strong non-majoritarian influences over legislation. Here enters public choice theory and the problem of "rent-seeking." Rent-seeking occurs when a well-organized but narrow interest group exploits these limitations to secure a legislative transfer of material wealth from a larger and poorly organized majority. Public choice scholarship documents this old story and explains how it occurs. The obvious point is that lobbying groups influence legislators with campaign contributions and other favors. Less obvi-

⁵² Given a complex committee structure, bi-cameralism, the influence of political parties, and other features of legislative assemblies, a minority can defeat legislation and it is difficult for a voter to assess her representative's responsibility for a legislative outcome. Moreover, it is difficult to assess the responsibility the legislature bears for certain policy outcomes, given that the legislature shares power with other branches of government and that some problems have no governmental solutions.

⁵³ The idea that legislators act for their view of the public interest, or other reasons besides the satisfaction of public opinion, suggests another signaling theory of expressive law: that legislation signals information about the costs and benefits of the behavior being regulated. Dhammika Dharmapala and I pursue this idea in Dharmapala & McAdams, *supra* note 4.

⁵⁴ Election candidates typically differ from each other in very complex ways. Thus, a legislator can vote against popular preferences on some issues but still expect to win if his overall package of representation is better than the package of representation his electoral opponent will offer.

⁵⁵ See KURAN, *supra* note 43, at 91-93.

ous before public choice theory was the relevance of a collective action problem. Namely, it is easier to organize 100 actors to secure legislation giving each a \$10,000 benefit than it is to organize in opposition 100 million taxpayers who will each lose one cent.

Does public choice theory rule out the signaling model presented here? Only if legislators are *so* effectively insulated from diffuse public opinion that they are actually indifferent to it. Some public choice theorists seem to think that this is true that legislators care *only* about organized interest groups who can provide the money and other favors that determine the outcome of elections. If this strong thesis were correct, legislators would not gather information on majority preferences and citizens would not view legislation as a signal of those preferences. There would be no room for the expressive effect I am claiming.

Like others, however, I reject this strong thesis.⁵⁶ I will not here review the extensive public choice literature, but I believe it demonstrates only the weaker (but still extremely important) point that interest groups wield disproportionate power in legislatures and that, despite appearances, many enactments are the product of interest group rent-seeking. At the same time, diffuse public opinion still threatens incumbents and thereby exerts an influence on legislation. If so, then we should expect legislative enactments are, as a whole, *positively* correlated with popular opinion. If legislators bear a cost by acting contrary to public opinion, then rent-seekers will be more successful enacting legislation over popular ambivalence than popular opposition. Stated differently, the cost interest groups bear in securing legislation goes down as the popular opposition goes down.⁵⁷ The result suffices to create a positive correlation between legislation and popular opinion, which in turn is sufficient (I argue below) to create an expressive effect.

I need not, however, defend a claim even this broad as a nar-

⁵⁶ See, e.g., GEOFFREY BRENNAN & LOREN LOMASKY, *DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE* (1993); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 21-33 (1991).

⁵⁷ For example, if the public wants environmental protection and crime control, it is much easier for politicians to redistribute benefits to organized interests through environmental and crime legislation. If the public opposes health insurance regulations or gun control, it is much more difficult for organized interests to entice legislators into enacting such legislation. What gets passed remains correlated to what the diffuse public wants.

rower claim suffices. Suppose, contrary to the point just made, that legislation as a whole is *not* positively correlated with popular opinions. In this scenario, there is still an expressive effect if there are *categories* of legislation that are positively correlated with popular opinion and the public can recognize these categories. There are at least two reasons to believe that such categories of legislation exist.

Initially, note that the interest group account of legislation is most compelling for legislative provisions that escape public scrutiny. When a legislator predicts that the media will not widely report an enactment or a specific provision of an enactment, she has no reason to fear public reaction. Accordingly, in these cases, narrow interest groups might fully control the legislative process. This concession, however, is not much of a limit to an expressive theory of law. Even if interest groups had no power over legislatures, *a law the public generally fails to notice can hardly be expected to have an expressive effect.*

By contrast, consider the category of “publicized legislation,” *i.e.*, pending bills where legislators believe either that the media is widely publicizing the legislative activity or that the media will widely publicize the ultimate legislative outcome. In these cases, legislators do have reason to fear diffuse public opinion. Even if there is no positive correlation between popular opinion and *all* legislation, there will be a positive correlation between popular opinion and publicized legislation. And because the public by definition does not notice unpublicized legislation, it will tend to observe from the legislation it does notice a positive correlation with popular opinion. Such legislation can then produce an expressive effect.⁵⁸

Even this claim can be further refined. Among all publicized legislation, there are some cases in which the public perceives that popular support was essential to the outcome. At the risk of using the term unconventionally, I will call this legislation “populist.” Legislation is populist, in the sense I intend,⁵⁹ if it is enacted without having been championed by an interest group with

⁵⁸ This category is substantial. Politicians attempt to conceal the private interest in some legislative provision by concealing the provision or shrouding it in a plausible claim of public interest. Given the limited attention many voters give to such matters, these tactics sometimes work. But they often do not work because other politicians stand ready to expose them for political advantage. It remains easier for narrow groups to secure legislation that carries less risk of being exposed as such.

⁵⁹ My discussions with Dhammika Darmapala helped me refine this point.

a material stake in the legislative outcome or where there were interest groups on both sides of the legislative battle but the clearly weaker interest group won (either of which would be impossible if the strong public choice thesis were true). In either case, when the public does not perceive that a concentrated interest group produced the legislation, the strong inference is that diffuse public opinion did. Thus, by definition, there is a strong correlation between populist legislation and popular opinion.

Perhaps the best example of populist legislation occurs where the legislature enacts the law over the *one-sided* opposition of organized interest groups. In these one-sided cases, the fact that an interest group unopposed by other interest groups still managed to lose a legislative battle demonstrates that the legislative enactment must be very strongly supported by diffuse public opinion. Anti-public smoking ordinances provide an example. The financially interested lobbying groups were the tobacco industry and possibly restaurant and bar owners. The fact that legislatures (including city councils) acted notwithstanding this organized opposition strongly demonstrates that legislators believed that public opinion supported the bans.

Another example of populist legislation is purely symbolic legislation, where the law does nothing to redistribute material wealth. In these cases, there are no interest groups competing over economic rents, so the outcome will be highly correlated with the number of voters who prefer the "symbol" being enacted.⁶⁰ To state the obvious, absent judicial interference, a city council is more likely to place on public land the symbols of the majority religion than the symbols of some minority religion. Likewise, a state legislature is more likely to enact laws that symbolically oppose abortion if the majority of state voters oppose abortion, or to enact a state holiday in honor of a Confederate general if the majority of voters view Southern history predominantly as a source of pride.

As stated above, the correlation in these cases is between legislative outcomes and *actual* public opinion. The pressure created by diffuse public opinion comes from the action of voters. Given

⁶⁰ The correlation will not be perfect because there may still be differences in how well organized the different ideological interest groups are. But the primary reason some interest groups are well organized is the material reward well-organized groups gain from rent-seeking legislation. When we say there is no prospect for material gain, the organizational differences between interest groups should be smaller.

the secret ballot, no one knows how an individual votes, and there is, therefore, no social pressure to prevent voters from expressing their genuine views. Legislators therefore wish to cater to the genuine views and to avoid acting on behalf of publicly stated but privately rejected views. Moreover, legislators will seek to determine when a state of pluralistic ignorance exists, because those who correctly ascertain the private views will gain an electoral advantage. If legislators are sufficiently informed, they may enact legislation that appears to many to be contrary to the public view, but is actually supported by it.

In sum, there are categories of legislation that are positively correlated with actual public opinion. The narrow claim is that this correlation exists for “populist” legislation enacted without having been championed by an interest group with a material stake in the outcome, which occurs when legislation is purely symbolic or is enacted over the one-sided opposition of interest groups. The broad claim is that this correlation exists whenever the legislation is publicized because in this case incumbents fear offending public opinion.⁶¹

2. *Legislative Signals and the Updating of Private Beliefs about Public Opinion*

Assume, then, that publicized legislation (or a recognizable subcategory thereof) is positively correlated with actual public attitudes. This correlation makes publicized legislative decisions a signal of popular attitudes. Under this assumption, the absence of legislation regulating a given behavior signals that legislators *tend not* to believe there is a strong societal consensus for regulating that behavior. Correspondingly, the enactment of legisla-

⁶¹ Public choice theory also challenges the ability of legislators to aggregate individual preferences. For a general introduction, see FARBER & FRICKEY, *supra* note 56, at 38-42. A famous part of the problem is the voting paradox or legislative cycling, in which no policy position can sustain a legislative majority against all possible alternatives. See Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219 (1994). Arrow's Impossibility Theorem shows that one cannot avoid legislative cycling without giving up some normatively attractive governance criterion. Some view the problem as fundamental, making incoherent the idea of the “public interest” and making chaotic the work of legislatures. See, e.g., WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 137 (1982). Again, I will not argue the issue but only note my agreement with those who say that legislative mechanisms restrain cycling without completely disconnecting legislative outcomes from popular opinion. See, e.g., Stearns, *supra*; FARBER & FRICKEY, *supra* note 56, at 47-62.

tion in some subsequent time period signals that legislators *tend* to believe in the existence of such a consensus. New legislation causes individuals to update their prior beliefs about the approval pattern.⁶²

If legislation is correlated with popular opinion, this effect is fairly intuitive. Before the legislation passes, the correlation implies the absence of popular support. After the passage of legislation, the correlation implies the presence of popular support. I will make the point a little more precise with two informal models, both of which are useful even if they do not describe the conscious thought processes of the individual concerned.

First, suppose we define the relevant belief, b , as what an individual believes is the percentage of the population who disapproves of a given behavior. For concreteness, assume that the behavior is public smoking or the failure to clean up after one's dog. Assume that individuals are aware, prior to the enactment of legislation, that the law permits them to smoke in public and not to clean up after their dogs. The absence of legislative action is one of the factors affecting b . In an extremely simple model, we might imagine that the individual believes that there is a single trigger point, t , at which the legislature acts. (For example, if the legislature acts to prohibit a behavior when 60% of the population disapproves of it, then $t = 0.6$.) For that individual, the absence of legislation signals that public disapproval is less than t , while the enactment of legislation signals that public disapproval is equal to or greater than t . The individual need not believe the legislature is infallible, but she will adjust her own beliefs according to the signal that is sent.

The same is true if we more realistically imagine that the individual believes that legislation is correlated with public opinion, but that there is no precise trigger point at which legislation occurs. Here, we use Bayesian updating of probabilities.⁶³ To do so, let us redefine b as what an individual believes is the *probability* that the community, in the aggregate, strongly disapproves of the behavior. For our purposes, it does not matter exactly how we define when "strong disapproval" exists, but we mean some specific, measurable level of aggregate disapproval.⁶⁴

⁶² Although my focus is the expressive power of law, non-governmental actors can produce the same effect. See *supra* note 50.

⁶³ See PETER M. LEE, BAYESIAN STATISTICS (1989).

⁶⁴ For simplicity, we might just consider the percentage of the population that

Suppose that, prior to legislation, $b = 0.4$, meaning the individual believes it is 40% likely that the public strongly disapproves of the behavior. For this example, assume that a 40% likelihood is not a sufficient probability to cause the individual to forgo the behavior.

We must now define a second belief concerning the correlation between popular opinion and legislation. Let us express this judgment as a function of two conditional probabilities: (i) what the individual believes is the probability that the legislature will enact a law against behavior X, given that the community strongly disapproves of it, and (ii) what the individual believes is the probability that the legislature will enact a law against behavior X, given that the community does *not* strongly disapprove of it. If the individual believes in the requisite correlation between popular attitudes and legislative action, then she necessarily believes that the first conditional probability is higher than the second. Suppose the individual believes the first probability is 0.6 and the second is 0.3.

Now suppose that the individual observes the enactment of legislation prohibiting X. She previously believed that the probability of strong community disapproval was 0.4. But given her observation, she wants to know the probability that the community strongly disapproves the behavior, *given that the legislature has enacted a law against it*. Using Bayes formula, the answer is 57%, which is much higher than her initial belief of 40%.⁶⁵ This difference in beliefs could easily change the individual's behavior. While she was willing to run the prior risk of

disapprove the behavior and understand "strong disapproval" as meaning that a specified percentage—well above half—disapprove. More appropriately, we would take account of the intensity of disapproval and the aggregate disapproval might be expressed by an expected monetary loss. For example, "strong disapproval" might mean that one detected instance of the behavior generates an expected approval loss equal to \$100.

⁶⁵ Event (A) is that the community strongly disapproves behavior X. Event (B) is that the legislature enacts a law against X. We have said that the individual initially believes that the probability of event (A)— $P(A)$ —is equal to 0.4 (which means that $P(\text{NOT } A)$ equals 0.6). We have also said that the individual believes that (i) the probability that the legislature enacts the law given that the community strongly disapproves of the behavior— $P(B|A)$ —is equal to 0.6; and (ii) the probability that the legislature enacts the law given that the community does *not* strongly disapprove of the behavior— $P(B|\text{NOT } A)$ —is equal to 0.3. The question is: what is $P(A|B)$, *i.e.*, the probability that the community strongly disapproves the behavior given that the legislature enacted a law against it? Bayes Theorem says $P(A|B) = P(A)P(B|A) / P(A)P(B|A) + P(\text{NOT } A)P(B|\text{NOT } A)$. Given our initial values, the updated probability is 0.57.

strong disapproval, the higher risk of strong disapproval may prove too much. We can generalize this result. Whenever there is a positive correlation between popular opinion and publicized legislation, the individual will always update her beliefs in the same direction, believing it to be more likely that there is strong disapproval when the legislature has acted to prohibit the behavior than when it has not.⁶⁶ For a law prohibiting behavior, people will tend to believe there is greater disapproval of such behavior than they previously thought. Accordingly, prohibitory legislation tends to suppress behavior expressively by raising the expected disapproval costs.

Like other theories of expressive law, the claim here is speculative. This Article is an exercise in hypothesis building rather than hypothesis testing. But specifying the causal mechanism for expressive law should prove useful for identifying the path for empirical work (and also raises some implications for law that I explore in the next section). I will mention, however, two pieces of indirect evidence that, when viewed together, support the attitudinal theory.

First, a common finding in public opinion surveys is that the race or gender or other factors about the questioner affect the answers given.⁶⁷ This result is consistent with the idea that people value approval. Survey respondents make inferences about

⁶⁶ Using the Bayes Theorem terminology of the prior footnote, the claim is that $P(A|B) > P(A)$ whenever $P(B|A) > P(B|NOT A)$. The former equation represents the fact that the updated belief is a probability greater than the one represented by the prior belief. The latter equation represents the condition under which the former equation holds: what the text calls a positive correlation, meaning that the probability that the legislature will enact a law against X, given that the community strongly disapproves of it, is greater than the probability that the legislature will enact a law against behavior X, given that the community does not strongly disapprove of it. Some simple algebra demonstrates that $P(B|A) > P(B|NOT A)$ implies that $P(A|B) > P(A)$, thus proving the claim:

(1) $P(B A)$	$>$	$P(B NOT A)$
(2) $[1 - P(A)] P(B A)$	$>$	$[1 - P(A)] P(B NOT A)$
(3) $P(B A) - P(A)P(B A)$	$>$	$[1 - P(A)] P(B NOT A)$
(4) $P(B A)$	$>$	$P(A)P(B A) + [(1 - P(A))]P(B NOT A)$
Substituting $P(NOT A)$ for $(1 - P(A))$, we get:		
(5) $P(B A)$	$>$	$P(A)P(B A) + P(NOT A)P(B NOT A)$
(6) $P(A)P(B A)$	$>$	$P(A)[P(A)P(B A) + P(NOT A)P(B NOT A)]$
(7) $\frac{P(A)P(B A)}{P(A)P(B A) + P(NOT A)P(B NOT A)}$	$>$	$P(A)$

Substituting Bayes Theorem from the prior note, we get:

(8) $P(A B)$	$>$	$P(A)$.
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⁶⁷ See, e.g., Darren W. Davis, *The Direction of Race of Interviewer Effects Among African-Americans: Donning the Black Mask*, 41 AM. J. POL. SCI. 309 (1997); Nora Cate Schaeffer, *Evaluating Race-of-Interviewer Effects in a National Survey*, 8 SOC. METHODS & RES. 400 (1980).

what answers the surveyor will approve and are more likely to give those answers. In that light, the following finding by political scientists Paul Sniderman and Thomas Piazza takes on special significance.⁶⁸

Shortly before 1993, Sniderman and Piazza asked a large number of subjects whether they favored minority set-aside programs. However, they first randomly divided the subjects into two groups. One group was initially told that “[t]he Congress of the United States—both the House of Representatives and the Senate—have passed laws to ensure that a certain number of federal contracts go to minority contractors.”⁶⁹ The other half was simply told that “[s]ometimes you hear it said that there should be a law to ensure that a certain number of federal contracts go to minority contractors.”⁷⁰ For all subjects, the survey continued that “[w]e’d like to know what YOU think. Do you think that such a law is a good idea or a bad idea?”⁷¹ The answers the two groups gave were significantly different. Fifty-seven percent of those told that Congress had enacted the law said it was a good idea, while only forty-three percent of the other group indicated approval.⁷²

My interpretation of these results is that the subjects told of Congressional action used it as evidence to infer what answer the average person, *including the interviewer*, might approve or disapprove. The fourteen percent difference in response indicates a substantial effect in what people are willing to say they approve, which reflects that believing the existence of a law creates a significantly different belief about what others will approve.⁷³

Second, experiments demonstrate that the mere publicity of

⁶⁸ PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* (1993).

⁶⁹ *Id.* at 193.

⁷⁰ *Id.*

⁷¹ *Id.* at 131-33, 193 (question 52).

⁷² *Id.* at 133. Because the individuals were selected randomly for each group, there is every reason to think that the differences in their answers are caused by the differences in the statement introducing the question rather than differences in other factors concerning the individuals in each group.

⁷³ The 14% difference is especially significant given that some of the people in the group not told of the law probably already knew it existed. Thus, the results probably understate the effect that would occur if everyone in one group believed there was no law and everyone in the other group knew there was one. The survey also demonstrates a second important point. Public opinion polls about affirmative action attitudes are fairly common. The results of this survey show that, notwithstanding such information, information about legislation can additionally affect one's beliefs about what others approve. See *supra* note 41.

disapproval affects behavior. Social psychologists studying litter, for example, have been able to manipulate the amount of littering solely by publicity campaigns where the only information conveyed is about the social disapproval of littering.⁷⁴ These studies are entirely consistent with the general findings that people obey law, in part, due to their fear of disapproval and that individuals who believe that others will disapprove a particular legal violation are more likely to comply.⁷⁵

Together, the survey and experimental results provide some support for the attitudinal model of expressive law. The survey supports the claim that people infer from legislation a greater level of popular approval or disapproval, while the experiments support the claim that a change in beliefs about public approval will change behavior. The evidence, though not powerful, does suggest that proscriptive legislation signals expected disapproval and thereby generates some compliance independent of its sanction.

3. *Expressive Power, Discontinuities, and Norms*

The model is essentially complete, but I want to explain how the expressive function can generate either large or small changes in behavior. In simple cases, the expressive effect of law produces only a marginal change in beliefs, which in turn produces only a marginal change in behavior—a small boost to legal compliance. The magnitude of the attitudinal signaling effect is equal to the difference in actual legal compliance and the amount that we would predict from deterrence by state-imposed sanctions or other expressive effects. Although small differences in compliance are important, the effect may be fairly small because

⁷⁴ See Robert B. Cialdini et al., *A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior*, 24 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 201 (1991); Harold G. Grasmick et al., *Shame and Embarrassment as Deterrents to Noncompliance with the Law: The Case of an Antilittering Campaign*, 23 *ENV'T & BEHAV.* 233 (1991).

⁷⁵ See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990). Tyler's primary finding is that perceived legitimacy explains self-reported compliance with laws concerning speeding, parking, noise, littering, drunk driving, and shop lifting. See *id.* at 57-64. But even though he found that respondents did not expect peer disapproval for the first four of these offenses, *id.* at 44, peer disapproval still correlated with overall legal compliance at significant levels. See *id.* at 45, 59, 238-39 n.2, 240 n.10; see also *id.* at 63 (stating that peer disapproval "takes [the] place" of legitimacy when the individual does not believe the legal system is legitimate).

the new legislation may not dramatically change most people's prior views about the approval pattern.

However, there are two instances where the expressive effect might create a large-scale change in behavior. I will illustrate both with the much discussed example of smoking laws. First, a law may cause a large-scale change in beliefs if there had been a state of pluralistic ignorance. Where there is a widespread and false belief in a particular approval pattern, anything that signals the real approval pattern reveals a very different set of social costs and benefits than was previously understood. Timur Kuran uses this idea and further elaborations to explain surprising political revolutions, such as the abrupt fall of the communist regimes in eastern Europe and the former Soviet Union.⁷⁶ A critical event in such cases, Kuran argues, is the sudden widespread recognition of pervasive discontent which not only shatters the previous state of pluralistic ignorance, but also causes people to disseminate, for the first time, critical facts and arguments about the regime. If a legislature perceives a state of pluralistic ignorance and legislates in favor of the "silent" majority, it can thereby signal an enormous disparity between the perceived and actual approval pattern. The behavior effect could be quite large.⁷⁷ A possible example may be anti-smoking legislation, because, until many of the ordinances were enacted, neither smokers nor non-smokers were very aware of the rising attitudes against public smoking.⁷⁸

Second, the expressive effect of legislation can produce large

⁷⁶ See KURAN, *supra* note 43, at 261-88.

⁷⁷ The Civil Rights Act of 1964 illustrates a related, but distinct effect. Congress imposed the Act's requirements on southern states even though their federal legislators strenuously opposed its enactment. Nonetheless, the law, possibly due to its sanctions, produced some significant compliance. Once some form of segregation was eliminated, however, it seemed easier for white Southerner's to discuss their actual views about it. Thus it revealed a previously existing but underappreciated level of white opposition to Jim Crow policies. See KURAN, *supra* note 43, at 317; Lessig, *supra* note 3, at 965-67. For data on the pluralistic ignorance among white southerners, see *supra* note 46.

⁷⁸ See Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 69, 71-76 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). Kagan and Skolnick state:

[F]ormal rules serve an important *communication* function, overcoming the familiar problem of pluralistic ignorance and inaction. Even if, in 1983, most nonsmokers (and many smokers) favored restrictions on smoking in the workplace . . . individual nonsmokers may not have realized the *extent* of support for such rules, and hence may not have felt emboldened to complain directly to smokers. The enactment of ordinances and workplace

behavioral changes even though the changes in beliefs are small. Sometimes a social situation has multiple equilibria and a small change causes behavior to “tip” out of one equilibrium and into another. This discontinuity is counterintuitive; one would more readily imagine that a small change in belief produces a small change in behavior, or possibly a brief deviation and return to the original equilibrium. But the reason for the larger change is a “feedback” effect. Feedback occurs when individuals approve or disapprove of behavior in proportion to its frequency.

For example, in many cases, the more rare the disapproved behavior, the more “deviant” it seems and the more intense the resulting disapproval. The feedback then occurs as follows: Step One is an event—legislation—that signals a higher level of disapproval than previously believed. In reaction, Step Two is a marginal decrease in the more greatly disapproved behavior. In reaction, Step Three is that this less frequent behavior now incurs more intense disapproval. Step Three leads back to Step Two, where more intense disapproval results in less of the behavior. Step Two leads to Step Three again, and so on. The effect can continue for some time until the social interaction reaches a new and possibly very different equilibrium.

The expressive effect thus gives law a significant potential for managing norms. One of the necessary conditions for a norm is that people generally realize that others will, at the least, approve or disapprove of them for engaging in certain conduct.⁷⁹ Where the approval pattern is not well known, a legislative proclamation can publicize it and create a norm. Even where the approval pattern is already known and the norm exists, legislation can still strengthen the norm by causing individuals to adjust upward their beliefs about the strength of the consensus underlying the norm.

Going back to the smoking example, suppose the local town council passes an anti-smoking ordinance for restaurants. To isolate the expressive effects, suppose also that no one expects the state to actually enforce the ordinance with fines or otherwise. Therefore, the only reaction is that individuals revise upward their beliefs about the expected disapproval from engaging in

rules told nonsmokers that they had a *right* to breathe air that was free of smoke.

Id. at 86.

⁷⁹ See McAdams, *supra* note 5, at 362-64.

such conduct. By itself, this effect may be small and fail to produce substantial compliance. But the fact that some people comply means that the fewer people who do smoke in restaurants garner a more intense level of disapproval. Non-smokers may express this fact or smokers may simply observe that there are fewer people smoking at any given time and infer the greater level of disapproval. As a result, more smokers give up the activity in restaurants, leading to even more disapproval for those remaining. This produces another round of compliance; the final result may be full compliance. The law then appears to have created an anti-smoking norm. On the attitudinal model, legislation is indeed the catalyst for change but only because it is believed to demonstrate (as it usually does reflect) a consensus against the proscribed behavior.

* * * * *

To summarize the model: people care about attitudes of approval and disapproval, but make mistakes about such matters; legislation is correlated with public attitudes so that the enactment of legislation provides a signal of public attitudes; and those who observe the signal will update their prior beliefs about public attitudes in the direction of expecting more disapproval for behavior the law condemns. Expecting disapproval for the behavior provides an incentive, independent of legal sanctions, to comply with the law. Although the effect will usually be small, a law may upset a state of pluralistic ignorance or create a feedback effect, thereby producing a discontinuously large change in behavior. The particular explanation being offered—the signaling of approval attitudes—is independent of other expressive effects.⁸⁰

⁸⁰ The attitudinal claim is, for example, fully independent of my claim that law can serve as a focal point around which individuals coordinate. See *McAdams, supra* note 3. Focal point theory does not require that individuals involved place any value on approval or disapproval. The attitudinal model also contrasts with this Condorcetian claim that legislation signals, not popular attitudes, but the legislators' private information about the costs and benefits of the behavior being regulated. See *Dharmapala & McAdams, supra* note 4. Finally, the attitudinal model also differs from the claim that individuals comply with law because they have internalized a duty to obey law and feel guilt otherwise. See generally *Cooter, supra* note 3.

II

EXTENSIONS AND IMPLICATIONS OF THE ATTITUDINAL THEORY OF EXPRESSIVE LAW

Legislation influences behavior not only because it imposes sanctions, but also because it signals patterns of public approval. Thus, law matters for what it says in addition to what it does. Economic analysis of law should not, therefore, assume the contrary and analyze *only* the deterrent (or other) effect of sanctions. Along with other causal theories,⁸¹ the attitudinal theory recommends that economists make the consideration of the expressive consequences of law a standard component of their models.

Beyond this simple but important point, the theory has three specific implications that I explore in this Part. First, the attitudinal theory identifies factors that increase the expressive power of legislation. Second, the theory suggests that judicial decisions may also have an expressive effect, though a less reliable one than legislatures. Finally, the theory predicts and explains political conflict over purely symbolic matters.

A. Prescriptions for Maximizing Expressive Power: Locality and Legitimacy

The attitudinal theory implies that two features of legislative bodies will significantly determine the degree to which their law has an expressive effect: their geographic scope and a particular type of legislative “legitimacy.”

With regard to the first feature, local legislative bodies have a comparative advantage over state and national bodies because their actions are a stronger signal of the local attitudes that matter most. An individual cares primarily about local attitudes because judgments of approval and disapproval are mostly local. For example, when an individual dates a member of her own sex or a different race, she worries about disapproval from the people who observe her behavior or may otherwise learn of it. Unless she is famous, very few people outside of her local community will form any judgment about her because very few people know her. For someone in the United States, the enact-

⁸¹ See, e.g., Cooter, *supra* note 3, at 597-607; Dharmapala & McAdams, *supra* note 4; McAdams, *supra* note 3.

ments of Congress are more informative in predicting local attitudes than, say, the enactments of the Canadian parliament, but are probably less informative than enactments of the state legislature, and certainly less informative than the local ordinances of the city council. Other things equal, the attitudinal model predicts a larger expressive effect from local laws than state or federal laws, from local ordinances regulating smoking, recycling, and dogs more than state or federal statutes regulating speeding, motorcycle helmets or drunk driving.

The attitudinal theory also predicts the importance of a particular type of legislative “legitimacy.” Psychologists have measured a connection between an individual’s perception that a government operates “legitimately” and the willingness of that individual to comply with the government’s laws.⁸² Legitimacy is a rich and difficult concept that probably involves many different elements. The attitudinal model identifies only one element but one that can be measured quite precisely: the correlation an individual perceives between popular attitudes and legislative outcomes. The greater the perceived correlation, the stronger the signal sent by legislative action. The stronger the signal, the more people revise their prior beliefs, and the greater the expressive effect is on behavior. Thus, the more that individuals perceive that a particular legislature acts legitimately, in the specific sense of representing majority preferences and opinions, the greater the expressive effect. Conversely, the more that individuals perceive that a particular legislature is captured by “special interests” and well-heeled lobbyists, the weaker the expressive effect. The attitudinal model directly links an issue like campaign finance reform to the expressive power of law.

B. *The Expressive Effect of Judicial Decisions*

When legal scholars talk of the expressive function of law, they often mean the expressive function of *court-made* law.⁸³ The claim is that judicial pronouncements shape how individuals frame social and political issues and otherwise have a powerful symbolic effect on behavior. Because I developed the attitudinal model in the context of legislative action, it seems to give no support to such claims. Indeed, if courts are “counter-majoritarian” institutions, as much legal theory suggests, then judicial decisions

⁸² See, e.g., TYLER, *supra* note 75, at 40-68; Nadler, *supra* note 3.

⁸³ See, e.g., Mazzone, *supra* note 3; Pildes, *supra* note 3; Posner, *supra* note 3.

are not constrained by, and therefore cannot be a signal of, diffuse public attitudes. Under this line of thinking, the attitudinal model predicts that judicial decisions have no expressive effect.

However, this judgment is too quick. Although the expressive effect may be weaker, there are reasons to believe that popular attitudes do constrain courts much of the time and therefore that court decisions might, on average, signal such attitudes. Recall that the attitudinal model predicts an expressive effect as long as the decisions of the state actors are positively correlated with popular approval. Even if the correlation is weaker with courts than with legislatures, a positive correlation probably still exists, as the following two points suggest.

First, the counter-majoritarian claim, even as applied to the Supreme Court, is hotly disputed. Despite the theory that courts *should* protect minority rights,⁸⁴ many constitutional historians⁸⁵ and scholars of public opinion⁸⁶ believe that the Supreme Court more typically caters to majority preferences. Michael Klarman puts it boldly:

The romantic image of the Court as countermajoritarian savior is shattered by historical reality. The Supreme Court sanctioned rather than attacked slavery, legitimized segregation for much of the Jim Crow era, validated the Japanese-American internment during World War II, sanctioned McCarthyism, and approved sex discrimination until after the emergence of the modern women's movement.⁸⁷

⁸⁴ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-77, 135-79 (1980).

⁸⁵ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 224 (1960); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996); see also Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881 (1991).

⁸⁶ See, e.g., BRADLEY C. CANON & CHARLES A. JOHNSON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (2d ed. 1999); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); David G. Barnum & John L. Sullivan, *The Elusive Foundations of Political Freedom in Britain and the United States*, 52 J. POL. 719, 731-32 (1990); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957); Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468 (1997); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993).

⁸⁷ Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 161 (1998).

These scholars claim that many cases celebrated for protecting minorities turn out, on closer inspection, to be far less “heroic.”⁸⁸ Cases where the Supreme Court clearly frustrates public opinion, such as school prayer, flag burning, and criminal procedure, are exceptional. None of this should be surprising given that Supreme Court justices are nominated and confirmed by elected officials and that justices prudently worry about the fragility of their power. As a result, although the Court is counter-majoritarian when *compared to Congress*, that does not mean its decisions are negatively correlated or uncorrelated with public attitudes. The same may be said of lower federal judges and state court judges, especially those who are elected.⁸⁹ Thus, even for constitutional law, judicial decisions may be positively correlated with popular attitudes.

The constitutional debate over the extent to which the Supreme Court is counter-majoritarian tends to obscure a second point: that much of what courts do is not constitutional. Courts

⁸⁸ See *id.*

The *Brown* decision was the product of a broad array of political, social, economic and ideological forces inaugurated or accelerated by World War II; by the time of the Court’s intervention, half the nation no longer supported racial segregation. Similarly, *Roe v. Wade* was decided at the crest of the modern women’s movement and was supported by half the nation’s population from the day it was handed down. Finally, the Court protected gay rights for the first time in *Romer v. Evans* only after a social and political gay rights movement had made substantial inroads against traditional attitudes toward homosexuality.

Id. (footnotes omitted). Klarman substantiates his point about *Brown* in Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) and Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 13-71 (1994). See also Klarman, *supra* note 85, at 7-8, 32-34 (arguing that *Brown* was not counter-majoritarian but followed broader social changes on race relations); *id.* at 9-15, 34-46 (making the same argument regarding sexual equality cases, privacy and sexual autonomy cases, and free speech cases); *id.* at 15-16, 46-62 (discussing how Establishment Clause cases are only weakly counter-majoritarian); *id.* at 62-66 (discussing how the criminal procedure revolution followed changes in societal attitudes about race and poverty, and an ideological revulsion to Nazi law enforcement). Klarman characterizes many of these cases as “the justices’ seizing upon a dominant national consensus and imposing it on resisting local outliers.” *Id.* at 16. In “less frequent[] and far more controversial[]” cases, in which “the Court intervenes on issues where the nation is narrowly divided,” the justices appear to be anticipating (rightly or wrongly) a future trend. *Id.* at 17. He concludes: “To risk putting the point somewhat cynically, the Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.” *Id.* at 17-18.

⁸⁹ See Richard L. Hasen, “*High Court Wrongly Elected*”: A Public Choice Model of Judging and Its Implications for the Voting Rights Act, 75 N.C. L. REV. 1305, 1313 n.28 & 1328 n.91 (1997) (describing state rule for electing or appointing judges).

interpret statutes and exercise common law powers. In both cases, they are subject to being “overruled” by the legislature, which has primacy in non-constitutional fields.

Two theories predict that courts would attempt to avoid issuing rules that legislatures feel compelled to supplant. First, if judges are motivated by prestige,⁹⁰ they will presumably seek to avoid the loss of prestige that occurs when legislators enact highly popular legislation that “corrects” a judicial decision. Another theory posits that judges seek to implement their own policy preferences.⁹¹ If so, judges will get more of what they want if they push the policy only slightly beyond what it desires. The claim here is that legislatures can give attention to only a limited number of issues and that they are more likely to allocate that time to overruling judicial decisions the more those decisions deviate from legislative preferences. In other words, a statutory interpretation or common law rule is more likely to survive if it is consistent with or only slightly offends the popular attitudes that influence legislatures. Thus, under either a prestige model or a policy preferences model, non-constitutional decisions are constrained by popular attitudes. More precisely, popular opinion constrains *publicized* cases, but (as with legislation) law’s expressive effect is, in any event, limited to cases that attract public attention.⁹²

⁹⁰ See Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 129 (1983) (positing that “self-interested judges seek prestige”); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (1994) (stating, among other motives, the judicial desire for “reputation within the legal community”); Thomas J. Miceli & Metin M. Cosgel, *Reputation and Judicial Decision-making*, 23 J. ECON. BEHAV. & ORG. 31, 38 (1994) (stating, among other motives, the judicial desire for a reputation among her peers).

⁹¹ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263, 267 (1990); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636 n.10 (1995); Erin O’Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 738 (1993).

⁹² Several studies show that elected judges tend to cater to majority preferences in high profile cases, e.g., the death penalty and abortion. See, e.g., Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1120-21 (1987); Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 497-98 (1995). Rick Hasen claims that most cases have “low-salience” with the public, and that in these matters, elected judges are likely to decide cases like appointed

In sum, electoral pressures often influence the selection of judges who, in turn, have independent reasons to avoid offending popular attitudes, in constitutional as well as non-constitutional law. The point is not that judges seek to satisfy popular attitudes in every opinion—the contrary seem obvious—but that *on average* their opinions may reflect the attitudes of the society from which the judge is drawn, and in which the judicial rules must operate. The likely result is that judicial decisions are positively correlated with popular attitudes. If so, the attitudinal model says that such decisions are also a signal of popular attitudes and, for that reason, that judicial opinions have an expressive effect independent of the sanctions that enforce them. Of course, because judges do starkly deviate from popular attitudes on occasion, one can always seek to undermine the expressive effect of particular judicial opinions by characterizing them, perhaps with good reason, as being “out of touch” with the “mainstream.”⁹³ Thus the expressive effect of judicial opinions is weaker and more contingent than it is with legislatures.

C. Symbolic Conflict: Political Struggles to Capture the State’s Expressive Power

The final implication is symbolic conflict. If the attitudinal model correctly explains how government action affects behavior expressively, even without sanctions, then purely symbolic acts of the government will also have this effect. Because government expression influences behavior, we can more easily understand why ideological interest groups invest so heavily in capturing and exploiting the expressive power of the state. This section first explains this positive claim—that groups seek government symbolism as a means of influencing behavior—and then discusses its normative significance. In situations where interest groups will seek an excessive level of influence over individual behavior, it is desirable to limit government expression, including legal expression. In making this point, I discuss the obvious example of the Establishment Clause, which in part limits the government’s ability to express religious messages.

judges. See Hasen, *supra* note 89, at 1313-26. But as I note in the text, low salience cases would not serve to have an expressive effect anyway.

⁹³ See, e.g., Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989).

1. *The Positive Theory: Government Symbols Affect Behavior*

Political conflict is overtly symbolic when the individuals involved in the conflict recognize that the government action matters to each side primarily because of the values or ideas it expresses. Such conflict is common. For example, when citizens mobilize for or against the display of the confederate flag,⁹⁴ or for placing the Ten Commandments on government property,⁹⁵ their conflict is symbolic in the narrow sense that it relates to an object that is valued or opposed for its character as a symbol.

⁹⁴ The NAACP recently led a tourism boycott of South Carolina because it continued to fly the Confederate Flag over its Statehouse. See Bob Edwards & Adam Hochberg, *Demonstrations Continue in Columbia* (National Public Radio, Morning Edition, Apr. 7, 2000) (reporting that “business leaders say [the boycott] has already cost the state \$10 million”). Flag opponents held two large rallies in 2000. One began with a march from Charleston to Columbia and ended with a rally of 2000 flag-opponents and about 300 counter-demonstrators. *Id.*; Erik Neely & Rachel Graves, *A Journey of 109 Miles: Dueling Flag Rallies Greet March*, THE POST & COURIER (Charleston, S.C.), Apr. 7, 2000, at A1. After considerable legislative turmoil, on July 1, 2000, South Carolina permanently removed the flag from atop its Statehouse dome and placed one permanently on a pole next to the Confederate Soldiers’ Monument on the Statehouse grounds. See Gene Crider, *Just Two Flags Fly Above Statehouse*, THE HERALD (Rock Hill, S.C.), July 2, 2000, at 1A. This sort of symbolic dispute is particularly common in the South, see F.T. McCarthy, . . . *What Your Good Book Said: Southern History: The South’s Old Symbols*, THE ECONOMIST, June 10, 2000, but it is pervasive throughout American and other societies. For an enlightening discussion, see SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES (1998).

⁹⁵ In 1995, Alabama Governor Fob James threatened to use the Alabama National Guard to protect a Ten Commandments plaque posted by a judge in county court. See *Ex parte State ex rel. James v. ACLU*, 711 So. 2d 952, 962 (Ala. 1998) (finding that constitutionality of judge’s plaque was not justiciable); *Alabama Freethought Assoc. v. Moore*, 893 F. Supp. 1522, 1544 (N.D. Ala. 1995) (finding plaintiffs lacked standing to challenge the courtroom plaque). Recently, several state legislatures enacted or began considering legislation authorizing displays of the Ten Commandments in public buildings alongside other “historical documents.” See B.G. Gregg, *Moral Code Gains Backing*, THE DETROIT NEWS, March 31, 2000, at Metro 1 (stating that 12 states have had such bills introduced in their legislature and two states—Indiana and South Dakota—have enacted the provisions into law); Robert Parham, *Ten Commandments and A Number of Views*, THE ORLANDO SENTINEL, Apr. 2, 2000, at G1 (reporting that U.S. House of Representatives voted overwhelmingly for such a bill). The courts are starting to hear the Establishment Clause challenges to this practice. See, e.g., *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000) (granting preliminary injunction against public school displaying Ten Commandments and other documents); *Indiana Civil Liberties Union v. O’Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000) (granting preliminary injunction against construction of monument displaying Ten Commandments on Statehouse grounds). State mottos present similar issues. See, e.g., *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 210 F.3d 703 (6th Cir. 2000) (holding unconstitutional the Ohio state motto “With God All Things Are Possible”), *reh’g en banc granted*, 222 F.3d 268 (6th Cir. 2000).

Although public choice theory recommends that one look carefully for the material interests behind legislative struggles, this kind of controversy is *not* about manufacturers of flags and Ten Commandment plaques attempting to induce the government to buy their products.

In the same way, disputes over legislation prohibiting flag-burning,⁹⁶ repealing an unenforceable ban on miscegenation,⁹⁷ opposing evolutionary theory,⁹⁸ or establishing a religious holiday⁹⁹ are not about government re-allocation of material resources but concern the values and ideas these laws express. Even legislation that appears to regulate conduct can be symbolic in this narrow sense because the citizens who favor or oppose the law recognize that it does little more than express values.¹⁰⁰

Judge Richard Posner's dissent in *Hope Clinic v. Ryan*¹⁰¹ char-

⁹⁶ See *United States v. Eichman*, 496 U.S. 310 (1990) (holding federal Flag Protection Act unconstitutional under the First Amendment); *Texas v. Johnson*, 491 U.S. 397 (1989) (holding that state could not constitutionally punish defendant for burning American flag during protest rally).

⁹⁷ See Phillip W.D. Martin, *Devoutly Dividing: U.S. Opponents of Interracial Marriage Say God Is On Their Side*, THE BOSTON GLOBE, Nov. 7, 1999, at D1 (reporting that Alabama voters expected to consider repealing their unenforceable ban on interracial marriage).

⁹⁸ Some struggles are symbolic in the additional sense that the legislative branch and informed observers probably know for certain that the judicial branch will invalidate the legislation if it passes. See, e.g., Brian Ford, *Creation-Evolution Fuss Won't Go Away*, TULSA WORLD, Apr. 6, 2000 (reporting that Oklahoma House of Representatives passed bill 99-0 that would require that all science textbooks adopted by the state contain "acknowledgement that human life was created by one God of the universe").

⁹⁹ See *Koenick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (upholding constitutionality of state statute creating public school holiday for the Friday before and the Monday following Easter); *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999) (upholding constitutionality of state statute providing that Good Friday is a legal holiday for state employees); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (holding that the closing of county courts and administrative offices on Good Friday did not violate Establishment Clause); see also Laurie Goodstein, *Bush's Jesus Day Is Called Insensitive and a Violation of the First Amendment*, THE NEW YORK TIMES, Aug. 6, 1999, 31, at A20 (describing controversy over Governor George W. Bush's proclamation "declaring June 10 to be Jesus Day, and urging all Texans to 'follow Christ's example'").

¹⁰⁰ For example, Dan Kahan argues that much of criminal punishment is expressive in content because people do not care much about the deterrent consequences even though they pretend to. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 436-45 (1999) (discussing death penalty debate as means of expressing values of competing social groups).

¹⁰¹ 195 F.3d 857, 876, 879-81 (7th Cir. 1999) (Posner, J., dissenting), cert. granted and judgment vacated, 120 S. Ct. 2738 (2000) (in light of *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000), which held similar laws unconstitutional).

acterized two states' partial birth abortion bans in these terms. Finding that there could be no possible policy or moral difference between the permitted and prohibited abortion techniques, Judge Posner concluded that the law's proponents were "concerned with making a statement in an ongoing war for public opinion, though an incidental effect may be to discourage some late-term abortions."¹⁰² In other words, the law was enacted "merely for [its] symbolic or aspirational effect."¹⁰³

Symbolic governmental actions, and the controversy they generate, present something of a puzzle for economic analysis. Even when the symbolic action involves legislation, it imposes no real sanction and allocates no material resources. Why then do people invest so much in a purely symbolic struggle? One can give an explanation based entirely on preferences. That is, some people have a preference for observing the Confederate or United States flag in a position of authority and a preference against its denigration. To satisfy this preference is then no different than satisfying material preferences. One's ends—to observe the veneration or desecration of the symbol—make rational some degree of political involvement to achieve those ends.¹⁰⁴

However, this is not a very satisfying answer for two reasons. First, it places substantial weight on preferences for the actions of others, a form of "third-party" preference that economists usually think is not very intense. Why should people care so much about what others do with their own flags? Second, it does not explain why the *government's* actions are so important. Why are individuals not content with bumper stickers and other private speech? Often it seems to matter more to individuals what the government says than what other private actors say, even if the private actors speak as loud as or louder than the government.

The attitudinal theory offers a different explanation. The theory posits that people value symbolic government action (in part) because it can change behavior. The point is not simply that *A* and *B* struggle over what the government will say symbolically because *A* likes the proposed symbol (gains utility from its display) and *B* dislikes it. In addition, *A* and *B* struggle because they expect that the governmental symbol will change the behav-

¹⁰² *Id.* at 880-81.

¹⁰³ *Id.* at 881.

¹⁰⁴ How the collective action problem is avoided is an interesting question I do not address.

ior of *C*.¹⁰⁵

This is the dynamic Judge Posner refers to when he says the partial birth abortion laws are part of “an ongoing war for public opinion.”¹⁰⁶ He suggests that abortion opponents use the law to publicize the “ugliness” of abortion or a particular method.¹⁰⁷ But that is not all. Given a positive correlation between public attitudes and legislative action on publicized matters of symbolic concern, the legislative condemnation signals disapproval of the prohibited abortion method and, quite probably, abortion generally. When one side wins the legislative battle, it signals that side’s greater strength in numbers of adherents or the intensity of their attitudes, either or both of which create greater social pressures for everyone to conform publicly to that side’s view. *Roe v. Wade* denies to pro-life voters a legislative prohibition on abortion enforced by criminal sanctions.¹⁰⁸ As a substitute, pro-life voters seek to create or strengthen social norms against abortion. One means toward this end is to enact legislation that condemns abortion symbolically, thereby signaling a high level of private disapproval for abortion.

While a group may use symbolic governmental action to demonstrate its actual majority status, the struggle is not limited to signaling *true* approval patterns. Ideological interest groups would prefer to constitute a majority but will settle for creating the appearance of being the majority. Creating pluralistic ignorance will serve the group’s interests nearly as well because, as noted above, this outcome can be stable and can substantially influence behavior. For this reason, opposing groups vying for public influence each will claim to represent the “mainstream.” More generally, the size of an interest group often becomes a hotly contested issue, with a group expending significant effort in claiming to have the largest possible membership.¹⁰⁹

We may then analogize to the public choice observation that interest groups struggle to capture the legislature’s power to re-

¹⁰⁵ Why *A* and *B* care about the behavior of *C* may ultimately come back to a story of the preferences of *A* and *B*. But conflict over government symbols matter more and more obviously to those preferences *if* they affect behavior.

¹⁰⁶ See *Hope Clinic*, 195 F.3d at 880.

¹⁰⁷ *Id.* at 879-80.

¹⁰⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰⁹ A frequent concern of protesters is that the media not underestimate and under-report the number of participants in a march or rally. Similarly, the attempt to estimate the number of gays and lesbians in the population is greatly contested. See RICHARD A. POSNER, *SEX AND REASON* 295 (1992).

distribute material wealth. The attitudinal theory explains symbolic political struggle as the effort of interest groups to capture the state's expressive power. This observation is not intended as a complete explanation of the role of symbols in political life, which are far more complex, but as a useful starting point for economic analysis.

2. *The Normative Implication: Constitutional Limits to Government Symbolism*

Is it a good idea for the government to engage in symbolic action? The answer obviously depends on what one thinks of the particular ends the government seeks to advance. The expressive power is merely one means to influence behavior, and that means can be put in service of good or bad ends. Although the expressive law literature has focused more on the good ends to which this power can be used, there is much to say about the bad ends of symbolic governmental action.

I have argued elsewhere that selfish individuals often seek to impose their third-party preferences on others via a norm.¹¹⁰ If approval matters, a majority of individuals may, by threatening to deny approval, create norms that restrain the freedom of all individuals, even though the minority loses more than the majority gains. A larger group of individuals who oppose inter-racial dating, for example, might succeed in creating a norm that caused others to refrain from the activity, even though the disutility to the few who prefer to date inter-racially exceeds the utility to the many who prefer that others do not. Although I make the point in utilitarian terms, one might use any number of normative theories to evaluate and sometimes condemn a group or societal norm. The relevance to the present discussion is that a group having trouble creating or enforcing such an undesirable norm may seek to do so by exploiting the expressive power of the state. Given this sort of danger, we may hope that the expressive powers of government, like other powers, are subject to constitutional constraints.

An interesting example of such a governmental limitation is the First Amendment's Establishment Clause. One category of Establishment Clause cases consists of symbolic governmental action, such as the display of a creche, cross, or menorah on gov-

¹¹⁰ See McAdams, *supra* note 5, at 412-19 (discussing "nosy" norms).

ernment property.¹¹¹ In such cases, the Supreme Court often uses an “endorsement test,” which, as Justice O’Connor first stated, asks whether the purpose of the government action is to “endorse or disapprove of religion” or whether the effect is to “convey[] a message of endorsement or disapproval.”¹¹² Justice O’Connor justified the test in the following oft-quoted passage: “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”¹¹³ While a message of inequality is often offensive, this passage does not explain exactly what about the message is constitutionally deficient. In this brief space, I do not intend to provide anything like a complete theory of the endorsement test, but only to explain how the attitudinal theory fits into the literature on this subject.

One way to read Justice O’Connor’s justification is that she thinks the problem with endorsement is that it creates, or tends to create, disutility for members of religious minorities.¹¹⁴ That

¹¹¹ See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (holding that Establishment Clause did not require removal of a Ku Klux Klan cross from a plaza next to a state capital); *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding permissible an 18-foot menorah at the entrance to a government building placed next to a city-owned Christmas tree but impermissible a privately-owned nativity scene on the main staircase of a county courthouse); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding constitutionality of a city-sponsored nativity scene).

¹¹² *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring). The Court began to consider endorsement as part of its Establishment Clause test in *School Dist. Of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985). In *Pinette*, five Justices preferred the endorsement test to the “Lemon” standard for a symbolism case (based on *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). More recently, however, the Court seemed to reaffirm *Lemon* and view endorsement as a supplement or adjunct to its concerns. See *Agostini v. Felton*, 521 U.S. 203, 234-35 (1997). For a description of the doctrinal evolution, see Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2124-37 (1996).

¹¹³ *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring); see also *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 23 (1993) (Blackmun, J., dissenting) (“[T]he union of church and state in pursuit of a common enterprise is likely to place the *imprimatur* of governmental approval upon the favored religion, conveying a message of exclusion to all those who do not adhere to its tenets.”).

¹¹⁴ Some may read Justice O’Connor’s justification as condemning the message of endorsement without regard to its consequences. Indeed, a number of theorists posit the importance of “expressive” values in law precisely because they are independent of consequences. See, e.g., Anderson & Pildes, *supra* note 2. But Justice O’Connor’s concerns are probably, like my own, consequential. She certainly emphasizes the consequence of messages in the racial gerrymander case of *Shaw v.*

is, outsiders feel bad about their second-class status. Perhaps this is a sufficient basis for the endorsement test, but it raises some troubling questions. Are religious minorities not already well acquainted with the fact that they are in the political minority? Where the answer is yes, as it usually is, what is the incremental harm of having government add one more symbol of the dominant religion? When a single religion pervades and dominates a community, members of minority religions will likely feel politically subordinate and culturally excluded no matter what the government expresses. In many American towns, for example, a high proportion of residents decorate their homes and workplaces, including public accommodations like restaurants and shopping malls, with symbols of Christianity, particularly during Christmas and Easter. In these communities, it seems naive to think that barring government expressions of Christianity will prevent Christians from feeling like “insiders” and non-Christians from feeling like political and cultural “outsiders.” Though there may be good responses to this criticism, it does show the value of exploring an alternative rationale for the endorsement test, one that looks beyond the *immediate* reaction to the government endorsement.¹¹⁵

A better way to justify the endorsement test, possibly consistent with Justice O’Connor’s language, is to focus on the ultimate behavioral effect such endorsements can create. Christopher Eisgruber takes this approach when he claims that “[t]he Establishment Clause turns out to have a surprising affinity to the Titles of Nobility Clauses,” which prohibits Congress from granting

Reno, 509 U.S. 630, 631, 657 (1993) (noting that racial gerrymander “reinforces” racial perceptions, “may exacerbate” racial voting, and “may balkanize us into competing racial factions”). In any event, the consequential caste-based theory of the Establishment Clause is useful, regardless of Justice O’Connor’s intent, because of the difficulties that plague a non-consequentialist expressive theory of the Clause. See Adler, *supra* note 2, at 1438-48.

¹¹⁵ This is a general point, not limited to the context of religion. For example, some theorists usefully interpret political conflict as an effort by competing groups or classes to establish their superiority to other groups or classes *symbolically*. See JOSEPH R. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (2d ed. 1986); Kahan, *supra* note 100. In these theories, the group members seem to gain some immediate satisfaction from the fact that their group’s symbol, and not the other group’s, is embodied in law. I wish merely to add this additional layer to the analysis: that symbolic or expressive law is also valued because it influences the behaviors of the other group or of third parties.

aristocratic titles to American citizens.¹¹⁶ Eisgruber reads this clause to illustrate the general principle that “[t]he Constitution prohibits government from exercising any form of power likely to create caste-based factions.”¹¹⁷ The problem in government endorsement of religion is not that (or at least not only that) it stigmatizes non-adherents, but rather that the message of insider/outsider difference threatens to “create or reinforce the division of American society along lines defined by religious differences.”¹¹⁸ Given the historic and “severe threat posed by religious factions,” the Establishment Clause forbids government from actions, including symbolic ones, that “reinforce sectarian divisions.”¹¹⁹ In sum, the Clause states an anti-caste principle.¹²⁰

This normative rationale for the Establishment Clause, however, requires a causal theory to explain how endorsement causes factionalization. Perhaps the point seems so obvious as to need no elaboration—government endorsement of religion makes people “identify” more with their religion. But how does endorsement achieve this result? After all, one would not *necessarily* create a caste even if the law explicitly proclaimed one.¹²¹

I believe the attitudinal model usefully provides the causal story. Religious symbolism is a means of influencing religious behavior. A Christian symbol on government property signals that Christians exercise political control over the relevant governmental body. Legislation creating a Christian religious holiday or moment of silence in majority-Christian schools signals that popular attitudes favor Christian religious observances. Most people already know that Christianity is the dominant religion in the United States, but the signal will still affect beliefs and can still affect behavior. Individuals will believe that the approval of Christianity is higher after the signal than before it.

¹¹⁶ Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1304 (1994).

¹¹⁷ *Id.* at 1302.

¹¹⁸ *Id.* at 1305.

¹¹⁹ *Id.* at 1305, 1306.

¹²⁰ The objection raised in the prior paragraph does not apply to this rationale. The objectionable end is not that religious minorities are made to see that they are in the minority, so it does not matter that minority members already know this much without the government symbol. The danger is the tendency of endorsements to reinforce divisions that develop into castes.

¹²¹ Thus, I agree with Eisgruber that the tendency of governmental endorsements to reinforce religious divisions “does not depend upon complex causal chains.” *Id.* at 1305. But I do not think those chains are entirely obvious.

Given the signal, one expects greater approval from practicing Christianity and greater disapproval practicing other religions or none at all.¹²²

There are several behavior consequences to events that raise the social cost of being outside the majority religion, or, what is the same thing, raise the social benefit of practicing the majority religion. First, adherents to other religions feel some pressure to avoid displaying their faith. Because they expect greater disapproval from revealing their beliefs, they make some effort to avoid doing so. Second, non-believers—agnostics and atheists—feel the same pressure to conceal their lack of religious faith. This group includes those who were born into the majority religion, but who no longer practice it. Third, some majority adherents practice their religion in private. Individuals in this group now feel some social pressure to practice their religion in a more overt way to gain approval and avoid disapproval. All of this describes a particular process by which individuals come to identify themselves and others more and more according to their religious differences. The end of this process of behavioral change is a system where religious differences are so important that we would call them a caste.

Stating the causal story exposes a potential weakness in the anti-caste account. It is easy to invoke the ultimate fear—caste—in response to a minor example of government endorsement of religion, but it is unlikely that any *particular* endorsement will produce that result. One of the reasons courts find it difficult to apply an endorsement analysis is this causal indeterminacy: no one can state how much endorsement is necessary to produce a substantially different social environment. No wonder then that some judges apply the same test far more strictly than others.¹²³

Worth noting, then, is the fact that religious symbols, like the expressive effect generally, can create sharply discontinuous ef-

¹²² For example, in the absence of the signal, people may believe that *observant* Christians themselves are only a plurality, not a majority. But the signal provides evidence that observant Christians are more numerous than previously thought.

¹²³ Justice Kennedy has complained that the cases rely on “little more than intuition and a tape measure.” *County of Allegheny v. ACLU*, 492 U.S. 573, 675 (Kennedy, J., concurring in part and dissenting in part). *Compare* *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) (upholding display of city-owned creche in public park because it was part of Syracuse’s overall *downtown* secular holiday display), *with* *Chabad-Lubavitch v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991) (*per curiam*) (holding unconstitutional the public display of a menorah despite being “a few feet” away from secular holiday signs).

fects on behavior. Recall the discussion above about the “feedback effect.” The disapproval of minority religions or of atheism may rise as more appear to practice the majority religion; the fewer who deviate, the more deviant they seem. As a result, one individual’s religious behavior changes the social incentives for others. In a community where Christianity is the dominant religion, if observant Christians begin to practice their faith more openly, moving along the continuum from private to more public observance, the level of disapproval for non-observance rises. The same is true as non-observant Christians or observant non-Christians act to avoid being identified as such. As there appear to be fewer and fewer people who are not enthusiastic public supporters of the majority faith, the perceived disapproval for everyone else rises. As the process continues, social behavior may “tip” out of one equilibrium and into a very different one.¹²⁴ For any particular symbol in any particular community, there is no guarantee that this discontinuous effect will occur, but precisely because it is difficult to predict when it will, one might regard the government’s use of religious symbols as generally dangerous.

In sum, government symbols endorsing or disapproving a religion will lower or raise the social costs from openly practicing that religion.¹²⁵ Signaling an approval pattern via government endorsement therefore affects religious behavior. Because of the dangers of religious factionalization, the Establishment Clause can plausibly be read to prohibit the government from lending to a particular religion (or religion generally) its expressive power to influence behavior. The same point can be made about the anti-caste principle some theorists give for the Fourteenth Amendment—that state segregation (or classification) by race “can have no other result than . . . to keep alive a conflict of races, the continuance of which must do harm to all con-

¹²⁴ Timur Kuran discusses this sort of discontinuous process in his model of “ethnification.” See Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623 (1998).

¹²⁵ Government expression is thus not so different than material subsidies or taxes of religion. The theory here thus contrasts with those who attempt to explain all of the Establishment Clause, even cases involving material subsidies, as deriving from endorsement concerns. See, e.g., Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O’Connor*, 62 NOTRE DAME L. REV. 151 (1987). Instead of saying that the main problem is endorsement and subsidies are a form of endorsement, we could equally say that the main problem is subsidy and endorsement is a form of subsidy.

cerned.”¹²⁶ The attitudinal model helps to explain how legislation mandating segregation (and possibly other law) had that effect: it signaled attitudes approving, and thereby reinforced, social norms of separation and discrimination.¹²⁷

CONCLUSION

The common claim that law works expressively, independent of its sanctions, is too frequently left unexplained. In this Article, I have focused on one possible causal explanation for how law influences behavior by what it says. In a democratic society, legislation and other law can change what people believe about the approval patterns in their community or society; the law operates as a signal of popular opinion. Because people value approval, intrinsically or instrumentally, such beliefs influence behavior. Updating one’s beliefs to account for the law, an individual will infer the prospect of greater disapproval costs from behavior the law condemns, which gives the individual an incentive to obey the law that is independent of the legal sanctions.

Like other accounts of expressive law, the attitudinal theory suggests that economic theorists should stop implicitly assuming that law matters only because legal sanctions affect the costs of behavior. The economic analysis of a legal rule is at least presumptively incomplete when it ignores the possibility that law influences behavior expressively, as by influencing beliefs about approval patterns. In addition to this point, the attitudinal theory of expressive law has a number of interesting implications including: that local law will have a greater expressive effect than state or national law; that the expressive effect depends on the

¹²⁶ *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

¹²⁷ Stating the causal claim explicitly also helps to reveal the limitations of the reasoning. Individuals sometimes assert that an action “sends a message” of division without giving any plausible account of how the action could have an expressive effect. In *J.E.B. v. Alabama*, 511 U.S. 127, 140-42 (1994), for example, the majority states that the use of peremptory challenges on the basis of gender sends a “message” “ratify[ing] and reinforc[ing]” gender stereotypes. But it is not clear whether the public is aware of peremptory challenges, knows when a lawyer exercises the challenge on the basis of gender, or infers from a state lawyer’s gender-based challenges that some stereotype is true. This does not mean *J.E.B.* was wrongly decided, but that the symbolic rationale was weak. Contrast the much stronger publicity for a sexist “message” where the state legislature funds schools that train only one sex for a profession already associated with that sex. See *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating state support of all-male military academy); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (invalidating state support of all-female nursing school).

degree to which the public believes that law is positively correlated with public opinion; that courts can have an expressive effect because court decisions are so correlated; that ideological interest groups will seek to capture the expressive power of law as a means of expanding their influence over the behavior of others; and that some limits on government expression may be desirable to avoid its undesirable exploitation by such groups.