

2023

## Law as Persuasion

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### Recommended Citation

Bert I. Huang, *Law as Persuasion*, THE CAMBRIDGE HANDBOOK OF MARKETING AND THE LAW, JACOB E. GERSEN & JOEL H. STECKEL (EDS.), CAMBRIDGE UNIVERSITY PRESS (2023).

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## Law as Persuasion

*Bert I. Huang*<sup>\*</sup>

When does the law persuade us about what is right or wrong – and when does it not? On topics ranging from racial equality to abortion to same-sex marriage, historians have debated and puzzled over the law’s persuasive force on our collective moral intuitions. Meanwhile, other scholars have sought out individual-level insights into the psychology of law’s persuasion, under the microscope of controlled experiments.

This chapter presents evidence of the law’s influence on our moral intuitions in a survey experiment based on a classic dilemma known as the “trolley problem,” in which someone must make a choice about whether to turn a runaway train, actively harming one person but saving more people by doing so. This sacrificial dilemma is a familiar reference in legal and policy discussions of harm–harm trade-offs, or “tragic choices.”<sup>1</sup> Such a scenario is also well-suited for studying the law’s possible influence, as it is not an easy moral call, and “[e]specially under conditions of uncertainty, people look for information in their environment that provide credible clues for making judgments.”<sup>2</sup> In the trolley problem, such uncertainty occurs not because our moral intuitions are weak or amorphous; rather, it is because forceful intuitions are set in contest: we must save more people, and yet we must not actively cause anyone harm.

In this study, survey subjects are presented with an identical story posing a trolley-like dilemma; the only thing that varies in what they read is information about what

<sup>\*</sup> I wish to thank Andrew Bradt, Jacob Gersen, Michael Gilbert, Maeve Glass, Mark Greenberg, Scott Hemphill, William Hubbard, Jason Scott Johnston, Frances Kamm, Daryl Levinson, Trevor Morrison, Anne Joseph O’Connell, Adam Samaha, Lior Strahilevitz, Kathym Tabb, and workshop participants at Berkeley, Columbia, Harvard, New York University, the Paul & Daisy Soros Conference, the University of Chicago, and the University of Virginia for helpful suggestions and for the chance to present this work at earlier stages. For research support I thank Columbia Law School and the Parker School Global Innovation Award; and for excellent research assistance, I thank Rebecca Amo, Thomas Enering, and Tim Wang.

<sup>1</sup> See e.g. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

<sup>2</sup> Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, 50 *PSYCHOL. OF LEARNING AND MOTIVATION* 101, 108 (2009).

the law says: some are told that the law requires turning the train, others that the law forbids it. Extending prior work using a similar design to present evidence that the law can influence our moral intuitions about such a dilemma,<sup>3</sup> this experiment introduces new variations aimed at drawing out further insights about when and how such persuasion is likely, or not. In particular, these variations differ in the law's morally relevant content (for example, one is a law that does not address the issue of harm) and in how the law is characterized (some conditions name specific crimes, while others describe liability in a more abstract way).

The findings show that telling subjects about the law can influence their moral intuitions about this sacrificial dilemma. Comparing results across the variations, however, suggests inferences that run counter to a simplistic account of how persuasive we might expect a law to be. First, there is evidence of law's influence on moral intuitions even when the law does not expressly address harm, which is the core issue in the dilemma. Second, there is more evidence of influence for the conditions that describe liability in an abstract way than for those that name specific crimes; and, based on the subjects' responses about which laws they deemed "unfair," one might speculate that for some subjects the specific-crime characterization prompted more of an adverse reaction. Future study of such potentially anti-persuasive reactions may draw guidance both from the legal literature on the legitimacy or moral credibility of the law, as well as from an allied framework in the consumer psychology literature, focusing on the concept of reactance.

### 16.1 THE EXPERIMENT

Each survey subject is presented with a vignette that is identical except for a randomized segment describing what the law says. The scenario begins, for all subjects:

Michael is a railroad engineer. One day, while he is working near the train tracks, he notices a freight train approaching. The train seems out of control. Michael can see that the driver is slumped over, unconscious.

There are two workmen on the tracks ahead. The train is now rushing towards them. They don't see the train coming, and Michael can't get their attention. He yells at them, but the construction noise is too loud. He waves his arms, but they are looking the other way.

Michael happens to be standing near a railroad switch. He can reach it easily, and he knows that pulling the switch will turn the train onto a side track before it hits the two workmen.

However, there is another workman on this side track. He also doesn't see or hear the train coming, and Michael can't get his attention either.

Michael can choose to pull the switch, or he can choose not to do anything.

<sup>3</sup> Bert I. Huang, *Law and Moral Dilemmas*, 130 HARV. L. REV. 659 (2016).

If Michael pulls the switch, he knows that the man on the side track will be seriously injured by the train.

If Michael doesn't do anything, he knows that the two men on the main track will be seriously injured by the train.

A single randomized statement about the law is then appended to the end of the scenario. The law conditions are phrased as follows (without the title shown in brackets below). First, there are three conditions that state legal liability in a more abstract way, as "breaking the law":

**{Don't harm}**

There is a law saying that Michael (who works for the railroad) must not cause harm to anyone on the tracks. This means that if he pulls the switch, he will be held liable for breaking the law. If he doesn't do anything, he won't be held liable.

**{Not authorized}**

There is a law saying that Michael (who works for the railroad) must not change the path of a train without prior authorization. This means that if he pulls the switch, he will be held liable for breaking the law. If he doesn't do anything, he won't be held liable.

**{Duty to act}**

There is a law saying that Michael (who works for the railroad) must try to reduce casualties from accidents. This means that if he does nothing, he will be held liable for breaking the law. If he pulls the switch, he won't be held liable.

There are also two conditions that state legal liability in a specific way, naming the exact crime:

**{Criminal assault}**

There is a law saying that Michael (who works for the railroad) must not cause harm to anyone on the tracks. This means that if he pulls the switch, he will be held liable for criminal assault and battery. If he doesn't do anything, he won't be held liable.

**{Criminal negligence}**

There is a law saying that Michael (who works for the railroad) must try to reduce casualties from accidents. This means that if he does nothing, he will be held liable for criminal negligence. If he pulls the switch, he won't be held liable.

After reading this story, with the law condition appended, each subject is then asked to evaluate the morality of pulling the switch, by answering whether it is "morally prohibited," "morally permissible," or "morally required." These three options follow standard terminology in moral philosophy,<sup>4</sup> and this choice set has been used in prior experimental work.<sup>5</sup>

<sup>4</sup> See e.g. FRANCIS M. KAMM, *THE TROLLEY PROBLEM MYSTERIES* (2015).

<sup>5</sup> Huang, *supra* note 3.

## 16.2 MECHANISMS OF PERSUASION

The {Don't harm}, {Not authorized}, and {Criminal assault} conditions are legal prohibitions against pulling the switch, and the {Duty to act} and {Criminal negligence} conditions are legal requirements to pull the switch. The most natural opposing pairs with parallel phrasing are the {Don't harm} and {Duty to act} conditions, which state liability in more abstract terms; and the {Criminal assault} and {Criminal negligence} conditions, which name specific crimes. Note, however, that I did not include a bureaucratic duty to set against the bureaucratic prohibition, {Not authorized}, because I did not settle on a phrasing that I thought subjects would likely find to be a plausible rule requiring the engineer to turn the train for a technical reason;<sup>6</sup> still, the {Not authorized} condition can be contrasted with the {Duty to act} condition, given their parallel abstract phrasing of liability.

The main prediction for these comparisons between paired opposing legal conditions is that the law will exert an influential pull on moral judgments in the direction aligned with the law's command. This influence could appear in the observations in two ways: First, it could appear as a greater share of subjects saying that pulling the switch is "morally prohibited" in the {Don't harm} and {Not authorized} conditions than in the {Duty to act} condition; and, likewise, more saying so in the {Criminal assault} condition than in the {Criminal negligence} condition. Second, it could appear as a greater share of subjects answering "morally required" in the {Duty to act} condition than in the {Don't harm} and {Not authorized} conditions; and more saying so in the {Criminal negligence} than in the {Criminal assault} condition. There are no obvious expectations about the share answering "morally permissible" because each directional influence can both increase and decrease that share (depending on how many people shift in from "morally required" versus how many shift out to "morally prohibited," or vice versa).

Various psychological mechanisms of persuasion may play a role in law's influence on people's moral intuitions about such a dilemma. What follows is a rough-and-ready articulation of possible mechanisms, drawn from the literature on compliance effects as well as on attitude change,<sup>7</sup> and grouped for convenience

<sup>6</sup> One might imagine, for instance, that the central character Michael was already tasked with pulling the switch because the side track is actually the correct path for the train; however, this would sound odd in the context of a train running out of control and might introduce a mystery about why the "correct" track still has a worker obliviously standing on it.

<sup>7</sup> See e.g. Bilz & Nadler, *supra* at note 2; Robert Cooter, *Expressive Law and Economics*, 27 J. OF LEGAL STUD. 585 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

in a way that corresponds to differing modes of persuasion. Before proceeding, it is worth emphasizing upfront that people likely vary in their responsiveness to the various mechanisms;<sup>8</sup> the outcomes in this study can only reveal aggregate net effects.

**1. Informational.** The potential mechanisms in this group should only be active when the content of the law directly concerns the regulation of harm, and is thus relevant to the harm–harm trade-off at the core of the moral dilemma.

\* *Law offers direct moral guidance.*

\* *Law supplies morally relevant reasoning.*

\* *Law serves as social proof or an indicator of societal norms.*

**2. Functional.** A second group are those that operate because the law is the law, and may be active even if the law does not concern the regulation of harm in a way directly relevant to the dilemma.

\* *Law defines social roles, acting as a coordination device.*

\* *Law sets a default about what is normally expected to happen.*

\* *Obedying the law is morally good.*

\* *The suffering of liability is a morally relevant cost.*

**3. Arbitrary.** One further possibility is that the law condition mindlessly breaks the tie, as a coin flip might. Should such an undiscerning mechanism be important, there should be signs of influence in all of the law conditions.

If one assumes that the informational or functional mechanisms differ in strength among the conditions, then comparisons among the conditions' effects may offer suggestive evidence for sorting among the mechanisms. For example, it seems a plausible assumption that the {Not authorized} prohibition is less likely to be viewed by subjects as providing direct moral information about the harm–harm trade-off. Thus, if the primary pathways of law's influence are those in the informational group, then the {Not authorized} condition should show less influence than the {Don't harm} condition, or possibly none at all. But if the {Not authorized} condition does show some influence, this may be a sign that other mechanisms are at work; for example, the functional group of mechanisms may be engaged.

It also seems sensible to expect that both the informational and functional groups of mechanisms would be active in the {Don't harm}, {Duty to act}, {Criminal

<sup>8</sup> Moreover, the subjects who are near one margin (say, those torn between saying “morally prohibited” and “morally permitted”) may respond differently than those at the other (those torn between saying “morally permitted” and “morally required”).

assault}, and {Criminal negligence} conditions, but that some of these mechanisms might be engaged more by the specifically criminalized conditions. If so, it may be possible to sort between the two groups or even among the mechanisms within each group. For instance, the law conditions imposing criminal liability may induce subjects to weigh the moral cost of liability more than the law conditions stating liability abstractly might.<sup>9</sup> Or, it may be plausible to assume that the expressly criminalized liability of the {Criminal assault} or {Criminal negligence} conditions would send a stronger signal of societal norms than the {Don't harm} or {Duty to act} conditions, respectively – but may not offer more morally relevant reasoning, given that the underlying harm principle is the same.

### 16.3 PRIOR IMPRESSIONS

A further condition included in this experiment is the train scenario on its own, without any additional statement about the law. The subjects' moral judgments in this {No statement} condition can be understood as reflecting the background impressions about the law they may already be holding even when not told anything. Note that this condition should *not* be understood as stating that no relevant laws exist, or of stating that there will be no liability. Rather, the differences between the moral judgments in the {No statement} condition and those in the various law conditions should be interpreted as the effect of telling subjects what the law says, relative to leaving them to their own prior impressions about what the law says. There are no useful predictions to be made, for comparisons between this condition and the others, because interpreting these responses depends on what prior impressions subjects may be holding about the law when not told anything more; rather, it is more sensible to view these results as an indicator of where those prior impressions lie.

### 16.4 SURVEY POPULATION

The survey subjects are adults in the United States recruited by the survey firm SurveyMonkey, which approximated age and gender distributions based on the census. They were paid neither a piece rate nor a time-based wage; however, they were rewarded with either a small donation to a charity or an entry in a sweepstake for a small prize. The following subjects were excluded: anyone who did not complete the survey or who said that they could not take it seriously; anyone who had taken another survey recently about a similar trolley-problem dilemma; anyone

<sup>9</sup> Results from a prior experiment suggested the possibility that the law's influence on moral judgment may be more pronounced when the law condition says that liability will follow than when it says that the law will not be enforced. Huang, *supra* note 3, at 694–95.

TABLE 16.1. *Saving two by sacrificing one*

	Morally prohibited	Morally permissible	Morally required	N
<i>Breaking the law</i>				
Don't harm	18.8%	56.8%	24.4%	176
Not authorized	17.5%	55.2%	27.3%	194
Duty to act	4.1%	51.8%	44.1%	195
<i>Specific crime</i>				
Criminal assault	12.9%	63.2%	23.9%	209
Criminal negligence	5.8%	62.8%	31.4%	191
<i>Prior impressions</i>				
No statement	12.9%	59.1%	28.1%	171

who failed a comprehension question; and anyone who had attended law school or and taken courses in moral philosophy.

## 16.5 RESULTS

The outcomes are seen in Table 16.1. Two basic sets of comparisons are analyzed here. The first considers whether varying the content of the law makes a difference in people's moral judgments – this is the primary indicator of law's influence. The second considers the subjects' preexisting background impressions about the law, by seeing which conditions' statements about the law seem to shift subjects' moral judgments relative to leaving them with their prior impressions.

**1. Comparing across laws.** The observed differences across law conditions can be interpreted as evidence that informing people about different legal commands results in different distributions of moral intuitions – in other words, it matters what the law says. The reported differences are statistically significant at the conventional level unless otherwise noted.

To begin with pairwise contrasts among opposing laws, first we may consider the three law conditions that phrase liability in a more abstract way (as “breaking the law”). Between the {Don't harm} and {Duty to act} conditions, the share of subjects saying that pulling the switch is “morally prohibited” falls from 19 percent to 4 percent;<sup>10</sup> and “morally required” rises from 24 percent to 44 percent.<sup>11</sup> Between the {Not authorized} and {Duty to act} conditions, the share saying “morally

<sup>10</sup>  $\chi^2(1, N = 371) = 20.19, p < 0.001$ .

<sup>11</sup>  $\chi^2(1, N = 371) = 15.782, p < 0.001$ .



prohibited” falls from 18 percent to 4 percent;<sup>12</sup> and “morally required” rises from 27 percent to 44 percent.<sup>13</sup> Turning to the conditions in which specific crimes are named: between the {Criminal assault} and {Criminal negligence} conditions, the share saying “morally prohibited” falls from 13 percent to 6 percent.<sup>14</sup> Yet, although the share saying “morally required” seems to rise from 24 percent to 31 percent, we cannot say so with conventional statistical confidence;<sup>15</sup> this result will be discussed in more detail later in this chapter.

**2. Comparing with prior impressions.** Comparing the law conditions with the {No statement} condition tests for differences between subjects’ moral judgments when they are told about a specific legal command, relative to their moral judgments as possibly informed by any original impressions they may have about the law. Again, note that the {No statement} condition should not be seen as representing the subjects’ “pure” moral sense, as if absent any influence from preexisting impressions about the law – to the contrary, this measure reflects those prior impressions, whether consciously or unconsciously held.<sup>16</sup>

Not surprisingly, it appears that the subjects’ moral judgments as informed by their original impressions about the law lie somewhere in between their judgments as influenced by the legal extremes presented in the experimental conditions. The 13 percent share saying “morally prohibited” in the {No statement} condition does not differ in a statistically significant way from any of the law conditions against pulling the switch; but there are significant drops to the 4 percent in the {Duty to act} condition,<sup>17</sup> and to the 6 percent in the {Criminal negligence} condition,<sup>18</sup> the conditions requiring pulling the switch. Similarly, the 28 percent share saying “morally required” shows a statistically significant difference only with the {Duty to act} condition, rising to 44 percent.<sup>19</sup> Given these measurements, one might speculate that the subjects’ prior impressions about the law on average lie somewhat closer to expecting that the law prohibits pulling the switch. But other speculative interpretations are also possible; for instance, the duty-imposing law conditions may tend to exert more influence for the subjects who find them informative.

<sup>12</sup>  $\chi^2(1, N = 389) = 18.194, p < 0.001$ .

<sup>13</sup>  $\chi^2(1, N = 389) = 11.928, p < 0.001$ .

<sup>14</sup>  $\chi^2(1, N = 400) = 5.95, p = 0.015$ .

<sup>15</sup> This difference is not statistically significant, under the conventional  $p = 0.05$  cutoff.  $\chi^2(1, N = 400) = 2.808, p = 0.094$ .

<sup>16</sup> Note, however, that even if a subject would express a different moral judgment in the {No statement} condition than in a specific law condition, this does not necessarily mean that the subject’s prior impression about the law differs from the specific legal command; another possibility is that the strength of the law’s influence is altered by drawing conscious attention to it.

<sup>17</sup>  $\chi^2(1, N = 366) = 9.297, p = 0.002$ .

<sup>18</sup>  $\chi^2(1, N = 362) = 5.499, p = 0.019$ .

<sup>19</sup>  $\chi^2(1, N = 366) = 10.091, p = 0.001$ .

## 16.6 PERSUASION – AND REACTANCE?

Overall, the contrasts between opposing law conditions offer evidence that telling people different things about the law can influence their intuitions about this moral dilemma. Two findings are worth exploring in more depth, as one offers suggestive evidence about the possible mechanisms of persuasion at work, and the other may generate hypotheses for future study relating to the possibility of psychological reactance.

First, the {Not authorized} condition shows as much evidence of influence as {Don't harm}, even though the former's rationale is not expressly related to the core issue in the dilemma, the harm–harm trade-off. Second, the contrasts between the conditions naming specific crimes, {Criminal assault} and {Criminal negligence}, offer less evidence of law's influence on moral intuitions than do the contrasts involving the {Don't harm}, the {Not authorized}, and the {Duty to act} conditions, all of which phrase legal liability in a more abstract way (as “breaking the law”).

**1. Mechanisms?** The {Not authorized} condition does not purport to offer any moral guidance or reasoning about the harm–harm trade-off, much less supply any signal about relevant societal norms. And yet its impact seems similar to that of {Don't harm}, in that their contrasts with the opposing {Duty to act} condition are similar.<sup>20</sup> One might thus speculate that one or more persuasive mechanisms in the functional group are active.<sup>21</sup> For instance, some subjects may defer to such a law as defining the actor's role within the system, or as a coordination device that helps to ensure overall safety; such deference might seem especially sensible in the unfamiliar context of a railroad engineer's decision. Or some subjects may count the threat of sanctions or other collateral consequences as a proper part of the actor's own moral calculus (maybe thinking of the harm to his family should he lose his job). Or some subjects may feel it is moral to obey the law, even when the law is based on a procedural technicality.<sup>22</sup>

<sup>20</sup> But there is statistical uncertainty around each point estimate, of course, and there is not enough statistical power given this sample size to say that these estimates are “close” in a statistically meaningful way (such as showing a narrow confidence interval around zero for their difference).

<sup>21</sup> Note that although the {Not authorized} versus {Duty to act} contrast does provide evidence of the law's influence, allocating each condition's contribution to the gap would require a measure of the subjects' “natural” moral judgments in the absence of any preexisting influence from prior impressions about the law; no such measure is presented here. (Again, the {No statement} condition does not provide such a measure; to the contrary, it captures those prior impressions.) Thus it is possible that only the {Duty to act} condition is responsible for the gap; the discussion above relies on the pure assumption that the {Not authorized} and {Don't harm} conditions also contribute.

<sup>22</sup> For some subjects, this condition may engage the moral value of respect for authority or hierarchy. See Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 *SCIENCE* 998 (2007).

An alternative interpretation, however, is that some subjects may see the {Not authorized} condition as morally informative about harm (though it does not expressly address harm) on the assumption that the rule is rooted in a concern that unauthorized changes to the path of a train can create dangerous risks. I did not take this possibility into account when choosing the phrasing for this condition, which is an oversight worth addressing in future extensions.

**2. Reactance?** There is more evidence that the law conditions stating liability in abstract terms (“breaking the law”) influence the subjects’ moral judgments, than there is for the law conditions naming specific crimes (“criminal assault and battery” and “criminal negligence”).<sup>23</sup> If one had expected that the vividness of a specific criminalized description of liability should activate certain mechanisms of persuasion more than would the more abstract phrasing, or if one had expected that the criminalized labeling would be perceived as stronger social proof of societal norms, then this leaves something to be explained.<sup>24</sup> One possibility is simply that such expectations were incorrect – that naming specific crimes does not necessarily communicate more vividly (for example, some subjects may be unfamiliar with the terms “criminal assault and battery” or “criminal negligence,” or the technicality of such phrasing may dampen its impact), and that such descriptions do not necessarily enhance a perception of social proof of societal norms.

Another possibility is that one (or both) of the specific-crime conditions exerts less net influence on moral judgments than does its abstractly phrased counterpart, due to a countervailing reaction to the criminalized phrasing among some subjects. A rough diagnostic is available in a follow-up question asked after the subject has already answered the central moral judgment question. It asked subjects how they felt about the law information they were given, including allowing them to choose the options “the law was fair in this situation” or “the law was unfair in this situation.” These answer options were included to detect whether some subjects might feel that criminalization was illegitimate, when applied to the actions of someone confronted – through no fault of their own – with such a tragic choice to make.

<sup>23</sup> More precisely put, we can infer with greater confidence that there are differences on both the “morally prohibited” and “morally required” margins, in the comparisons among the {Don’t harm}, {Not authorized}, and {Duty to act} conditions. In the comparison between the specific-crime conditions, the difference on the “morally required” margin falls short of the conventional  $p = 0.05$  level, as noted above.

<sup>24</sup> Moreover, the conditions with the phrasing “breaking the law” do not specify whether the liability is civil or criminal, leaving it to the subjects’ imagination. In early-stage presentations, I had used the shorthand “civil” as a characterization for the {Don’t harm} and {Duty to act} conditions. But I stand corrected, with thanks to those workshop participants who persuaded me that such a shorthand might both obscure the possibility of understanding the phrase “breaking the law” as indicating possible criminal liability, and also distract from what is interesting about that phrasing – that it describes liability in an abstract way.

Overall, more subjects say that the laws prohibiting turning are “unfair”: 63 percent for {Criminal assault}, 53 percent for {Don’t harm}, and 48 percent for {Not authorized}. Fewer say that the laws requiring turning are unfair: 25 percent for {Criminal negligence} and 25 percent for {Duty to act}. Likewise, fewer said that the laws prohibiting turning are “fair”: 6 percent for {Criminal assault}, 9 percent for {Don’t harm}, and 12 percent for {Not authorized}. And more said that the laws requiring turning are fair: 25 percent for {Criminal negligence} and 33 percent for {Duty to act}.<sup>25</sup>

The high proportion of subjects (63 percent) in the {Criminal assault} condition saying that the law is unfair is notable, even relative to the other two prohibition conditions. Among those subjects, 90 percent also say that turning the train is “morally permissible” or “morally required” (contrary to the law’s command). It seems sensible to speculate that the harshness of imposing liability for criminal assault and battery may have dampened the responsiveness of the subjects’ moral intuitions to this law condition.<sup>26</sup> Could the {Criminal assault} condition have lost some net influence because it seems especially disproportionate or even illegitimate, prompting a countervailing impulse for some subjects? Did more subjects discount the moral information, or the social proof, to be gained from such a law in such a situation?<sup>27</sup> These possibilities correspond to what the legal psychology literature has theorized as a loss of moral credibility when a law becomes uninformative about what is morally right,<sup>28</sup> which in the extreme may even lead to the possibility of a perverse behavioral response – “flouting the law” – as observed in prior experimental work.<sup>29</sup>

Such adverse reactions have also been examined closely in the literature of consumer psychology and marketing,<sup>30</sup> including health

<sup>25</sup> Both the variation among law conditions in these evaluations and the apparent differences among the pairwise comparisons in evincing law’s influence tend to reduce the plausibility of the “arbitrary” mechanism (likened to a mindless coin-flip, above). Both sorts of nonuniformity suggest that subjects view the conditions with discernment and differentiation.

<sup>26</sup> This is not to suggest that any criminalized phrasing might do so; here, both the fairness and unfairness responses for the {Criminal negligence} condition seem close to those for its abstractly phrased counterpart, the {Duty to act} condition.

<sup>27</sup> Although the discussion suggests the possibility of sorting among the mechanisms within the informational group based on the assumption that naming specific crimes may convey societal norms more convincingly, it is ambiguous what lesson is learned from the fact that the criminal-phrasing comparison shows less evidence of law’s influence. It could be, for example, that social proof of societal norms is not an important mechanism relative to the others; or it could be that societal norms are quite important but some subjects simply discount the informative value of the {Criminal assault} condition, given what they perceive to be its implausibility.

<sup>28</sup> See e.g. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications from Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

<sup>29</sup> See Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005).

<sup>30</sup> See e.g. Cavan J. Fitzsimons & Donald R. Lehmann, *Reactance to Recommendations: When Unsolicited Advice Yields Contrary Responses*, 23 MARKETING SCI. 82 (2004); Mark

communications.<sup>31</sup> In this literature, these effects are commonly described as instances of “psychological reactance theory.”<sup>32</sup> Although the exact scope of reactance as a concept depends on whom one asks, it generally is said to mean “a motivational state that is hypothesized to occur when a freedom is eliminated or threatened with elimination.”<sup>33</sup> Such a threatened freedom is “defined broadly to include actions as well as emotions and attitudes . . . in other words, freedom to do, freedom to feel, or freedom to hold a particular evaluation, or not”; and thus reactance is the theory “most frequently called upon to give account” of both “boomerangs and failure to persuade.”<sup>34</sup> Among the proposed effects of reactance are “an increase in the attractiveness of the constrained behavior and a decrease in the evaluation of the source of the restriction,” as reactance is “a motivational state directed toward reattaining the restricted freedom.”<sup>35</sup> This literature on marketing and consumer psychology, not surprisingly, has devoted much attention to the possibility that overt persuasion attempts may generate reactance.

Several key features of stimuli that are thought to generate reactance map readily onto legal commands. As relevant here, the mapping seems to make the {Criminal assault} condition a likely candidate for reactance theory: Such a law is likely to be seen initially as a “credible source,” such that “increased threat arises because the decision maker is likely to increase the attention to and weight on recommendations provided by the credible source.”<sup>36</sup> Moreover, it is likely to be seen as a “persuasion attempt” from a credible source, in that criminal law tends to convey a moral message.<sup>37</sup>

Wendlandt & Ulf Schrader, *Consumer Reactance against Loyalty Programs*, 24 J. OF CONSUMER MARKETING 293 (2007); Peter Wright, *Factors Affecting Cognitive Resistance to Advertising*, 2 J. OF CONSUMER RES. 53 (1975).

<sup>31</sup> See e.g. Marissa G. Hall, Paschal Sheeran, Seth M. Noar, Kurt M. Ribisl, Marcella H. Boynton & Noel T. Brewer, *A Brief Measure of Reactance to Health Warnings*, 40 J. BEHAV. MED. 529 (2017); Joseph Grandpre, Eusebio M. Alvaro, Michael Burgoon, Claude H. Miller & John R. Hall, *Adolescent Reactance and Anti-Smoking Campaigns: A Theoretical Approach*, 15 HEALTH COMM. 349 (2003); Steven R. Graybar, David O. Antonuccio, Lynn R. Boutilier & Duane L. Varble, *Psychological Reactance as a Factor Affecting Patient Compliance to Physician Advice*, 18 COGNITIVE BEHAV. THERAPY 43 (1989).

<sup>32</sup> See e.g. SHARON S. BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* (1981); Mona A. Clee & Robert A. Wicklund, *Consumer Behavior and Psychological Reactance*, 6 J. OF CONSUMER RESEARCH 389 (1980); James P. Dillard & Lijiang Shen, *On the Nature of Reactance and Its Role in Persuasive Health Communications*, 72 COMM. MONOGRAPHS 144 (2005); Zakary L. Tormala & Richard E. Petty, *Source Credibility and Attitude Certainty: A Metacognitive Analysis of Resistance to Persuasion*, 14 J. OF CONSUMER PSYCHOL. 427 (2004).

<sup>33</sup> BREHM & BREHM, *supra* note 32, at 98.

<sup>34</sup> Brian L. Quick, Lijiang Shen & James P. Dillard, *Reactance Theory and Persuasion*, in THE SAGE HANDBOOK OF PERSUASION: DEVELOPMENTS IN THEORY AND PRACTICE 167, 167 (James P. Dillard & Lijiang Shen eds., 2013).

<sup>35</sup> Fitzsimons & Lehmann, *supra* note 30, at 83.

<sup>36</sup> *Id.* at 84.

<sup>37</sup> See Tormala & Petty, *supra* note 32.

This study was not designed to test for reactance as fully conceptualized in this literature on the psychology of persuasion. Yet the responses about whether the stated law is “unfair” might be interpreted as expressing resistance to the law’s attempt at persuasion – that is, as a possible indicator for reactance. In particular, contesting the law’s command as “unfair” seems a close fit for the psychological strategies of “counterarguing” and “source derogation” that have been considered classic mechanisms of reactance.<sup>38</sup> It is fortuitous that a measure meant to capture what the legal psychology literature might call legitimacy also corresponds to certain dimensions of what the consumer psychology literature might call reactance; this overlap seems worthy of further analysis and potential synthesis.<sup>39</sup>

### 16.7 LIMITATIONS AND EXTENSIONS

Several limitations are worth emphasizing and offer guidance for future work. First, experiments based on vignettes share the common limitation that how subjects react to a story might not reflect their responses to actual events. This study’s findings, for example, may be overstated because the law is told directly to the subject, relative to a natural-setting study in which people might not have heard about the law. Yet these findings might be understated because what it says about the law may readily be dismissed as fictional, relative to a study based on actual laws that are verifiable or common knowledge; or one might even imagine some subjects showing a sort of reactance against a survey that appears to be pressing a certain viewpoint.

Second, this study makes progress, but only in a limited way, toward sorting among the possible mechanisms. It suggests that mechanisms within the functional group are likely to be engaged; by contrast, the arbitrary tiebreaking mechanism does not track the findings. But by no means does this study rule out mechanisms in the informational group. Do some subjects find direct moral guidance in what the law says? Do some see the law as social proof of societal norms? These remain open questions. Moreover, the listed psychological pathways seem likely to be incomplete, likely to vary from person to person, and also likely to interact in complex ways with other influences on our moral intuitions.

Third, this study has not been designed to test reactance theory, but rather identifies it *ex post* as generating hypotheses worthy of investigation in future work. To state what may be obvious, reactance theory has potential explanatory power not only for boomerang effects but also for weakened signs of persuasion.<sup>40</sup> It seems

<sup>38</sup> See e.g. Clee & Wicklund, *supra* note 32; Quick, Shen & Dillard, *supra* note 34; Tormala & Petty, *supra* note 32; Wright, *supra* note 30.

<sup>39</sup> The notion of legitimacy has been considered within the reactance literature. See e.g. Sandra Sittenhaler, Christina Steindl & Eva Jonas, *Legitimate vs. Illegitimate Restrictions – A Motivational and Physiological Approach to Investigating Reactance Processes*, 6 *FRONTIERS IN PSYCHOL.* 1 (2015).

<sup>40</sup> See Quick, Shen & Dillard, *supra* note 34.

appropriate to consider such a possibility especially in studies where outcomes take the form of aggregate net effects among groups of heterogeneous subjects, and there is reason to believe that positive persuasion is occurring for some subset of subjects, as is the case in this study. In such a context, it seems sensible to ask whether an adverse reaction among some other subset of subjects is plausibly at work (even if that subset is not large enough to flip the sign of the net outcomes).

Reactance theory may thus serve as a guide in generating and refining predictions for future work on law's influence on moral judgments. One might, for example, design studies comparing subgroups of subjects who are less or more likely to show an adverse reaction to a given sort of command by the law.<sup>41</sup> Complementarily, the legal literature on legitimacy and moral credibility can offer insights about what sorts of threats to one's freedom of moral evaluation – that is, what sorts of laws – might generate the most reactance.

<sup>41</sup> See e.g. Fitzsimons & Lehmann, *supra* note 30; Yael Zemack-Rugar, Sarah G. Moore & Gavan J. Fitzsimons, *Just Do It! Why Committed Consumers React Negatively to Assertive Ads*, 27 J. OF CONSUMER PSYCHOL. 287 (2017).