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Social Norms and Social Roles

Cass R. Sunstein

SOCIAL NORMS AND SOCIAL ROLES

*Cass R. Sunstein**

* Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. This is a written version of the Coase Lecture, delivered at the University of Chicago on November 28, 1995. I am grateful to Bruce Ackerman, Richard Craswell, Gertrud Fremling, Elizabeth Garrett, Daniel Kahan, William Landes, Larry Lessig, John Lott, Martha Nussbaum, Susan Moller Okin, Eric Posner, Richard Posner, Joseph Raz, David Strauss, and Richard Thaler for valuable discussions and comments. I am also grateful to participants in very helpful workshops at the University of Chicago and at New York University.

This article is dedicated to the memory of Jean Hampton, an extraordinary friend, colleague, and philosopher who was also one of the nicest people in the world. Jean warmly encouraged my efforts to grapple with these problems and in particular with the expressive function of law, a topic that she did much to illuminate. Her premature death is an unfathomable loss for many people; her brilliant and humane work will provide enduring illumination for lawyers as well as political theorists and philosophers.

I. Tales of Rationality and Choice

A. *Ultimatums and Fairness*[1]

Economists have invented a game: the ultimatum game. The people who run the game give some money, on a provisional basis, to the first of two players. The first player is told to offer some part of the money to the second player. If the second player accepts that amount, he can keep what is offered, and the first player gets to keep the rest. But if the second player rejects the offer, neither player gets anything. Both players are informed that these are the rules. No bargaining is allowed. Using standard assumptions about rationality, self-interest, and choice, economists predict that the first player should offer a penny and the second player should accept.

This is not what happens. Offers usually average between 30% and 40% of the total. Offers of less than 20% are often rejected. Often there

1. See Alvin E. Roth, Bargaining Experiments, *in* The Handbook of Experimental Economics 253, 270–74, 282–88, 298–302 (John H. Kagel & Alvin E. Roth eds., 1995) (exploring concept of fairness in ultimatum games); Colin Camerer & Richard H. Thaler, Ultimatums, Dictators and Manners, J. Econ. Persp., Spring 1995, at 209, 216–18 (discussing impact of fairness on ultimatum games).

is a 50-50 division. These results cut across the level of the stakes and across diverse cultures.[2]

B. *Littering*

Why do people litter? Why don't they throw things out instead? Social psychologist Robert Cialdini tried to find out.[3] He placed flyers under the windshield wipers of cars and waited to see what drivers would do with them. Cialdini made arrangements so that before reaching their cars, some people would see someone (a Cialdini associate) walk past them, pick up from the street a bag from a fast-food restaurant, and throw it in the trash can. Of the group who both saw the responsible behavior and noticed the flyers, almost none threw them on the street. In the control experiment, with no one showing responsible behavior, over 1/3 of the drivers threw the flyers on the street.[4]

C. *Smoking, Rationality, and Race*

About 400,000 Americans die each year from smoking-related causes.[5] Government has tried to reduce smoking through educational campaigns designed to inform people of the risks. Indeed the government has now initiated a large-scale program to reduce smoking, especially among teenagers.[6] Despite this fact, about one million Americans begin smoking each year, many of them teenagers,[7] and people worry that educational campaigns will succeed, if at all, only with well-educated people.

But consider this. Nationally, 22.9% of white teenagers smoked in 1993, a number that basically has been unchanged in the last decade. But in the same year, only about 4.4% of African-American teenagers smoked, a number that is four times smaller than the number a decade before.[8] What accounts for this difference? Part of the explanation ap-

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2. See Camerer & Thaler, supra note 1, at 210–11. In December 1995, the ultimatum game was played in a law school classroom (consisting of about 70 students) in an experiment run by Richard Thaler and me. The results—consistent with the usual ones—will be discussed in Christine M. Jolls & Richard H. Thaler, Behavioral Law and Economics (1996) (unpublished manuscript).

3. See Robert B. Cialdini et al., 24 Advances Experimental Soc. Psychol. 201 (1991).

4. See id. at 221–23.

5. See J. Michael McGinnis & William H. Foege, Actual Causes of Death in the United States, JAMA, Nov. 10, 1993, at 2207, 2208.

6. See Excerpts From Clinton News Conference on His Tobacco Order, N.Y. Times, Aug. 11, 1995, at A18.

7. See Michelle Ingrassia & Karen Springen, Waiting to Exhale, Newsweek, May 1, 1995, at 76, 76.

8. See id. It is notable that the reduction in smoking among African-American teenagers was 50% between 1984 and 1992, whereas the reduction among African-American adults was 25%, a difference that suggests a substantial effect from social norms among teenagers. See U.S. Department of Commerce, Statistical Abstract of the United States 1995, at 144 (1995).

pears to lie in differing understandings of what is fashionable. And part of that difference may lie in a private antismoking campaign in the African-American community, symbolized most dramatically by posters in Harlem subways showing a skeleton resembling the Marlboro man and lighting a cigarette for a black child. The caption reads: "They used to make us pick it. Now they want us to smoke it."[9]

D. *Recycling in the Hamptons*

In East Hampton, New York—part of the famous and wealthy "Hamptons"—what used to be called the East Hampton Dump is now the East Hampton Recycling and Disposal Center. At the East Hampton Recycling and Disposal Center, there are separate bins for green glass, clear glass, newspapers, tin cans, paper other than newspaper, and more.

Almost every day in August (the most popular period in the Hamptons), residents can be found patiently separating their garbage for placement in the relevant bins. Sometimes this takes a long time. The people at the Center tend to own expensive cars—Mercedes Benzes, BMWs—that are parked near the bins. As they separate their garbage, they look happy.

E. *John Jones*

John Jones lives in California. Here is a description of some aspects of his behavior.

1. He buys smoke alarms and installs them in three rooms in his house.

2. He loves chocolate and ice cream, and eats a lot of both. He also eats a fair amount of frozen foods; he makes sure that they are "lean" whenever he has a choice. According to his doctor, he is slightly over his ideal weight.

3. On warm days, he likes to ride his bicycle to and from work, and he enjoys riding his bicycle on busy city streets, even though he has heard about a number of collisions there.

4. He is happily married. He tries to share the work around the house, but he doesn't much like domestic labor. He does less than his share. He acknowledges that this is both true and unfair, and he supports many policies that are conventionally described as "feminist."

5. He buckles his seat belt whenever he is in a car. His own car is a Volvo, and he bought it partly because it is said to be an especially safe car.

6. He is not worried about the risk of an earthquake in California. On some days, he says that he doesn't think that an earthquake is very likely; on other days, he claims to be "fatalistic about earthquakes."

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9. Ingrassia & Springen, supra note 7, at 76.

7. He does not recycle. He considers recycling a personal "irritation." He is mildly embarrassed about this, but he has not changed his behavior.

8. He considers himself an environmentalist; his votes reflect his enthusiasm for environmentalism. He supports aggressive regulation designed to encourage conservation and to protect people from risks to their life and health. In fact he is in favor of mandatory recycling, notwithstanding his own failure to recycle.

9. In his own mind, his resources fall in various mental "compartments." Some money is reserved for retirement. Some money is saved for charitable donations. Some money is kept for vacation. Some money is for monthly bills. His forms of mental accounting are very diverse. He is fully aware of this.

Is Jones inconsistent or irrational? Is Jones risk-averse or risk-inclined? What is Jones's dollar valuation of a human life, or of his own life?

F. *The Point of this Article*

My goal in this article is to challenge some widely held understandings of rationality, choice, and freedom, and to use that challenge to develop some conclusions about human behavior and the appropriate uses and domain of law. I particularly seek to understand and defend the place of law in "norm management."

I urge that behavior is pervasively a function of norms; that norms account for many apparent oddities or anomalies[10] in human behavior; that changes in norms might be the best way to improve social well-being; and that government deserves to have, and in any case inevitably does have, a large role in norm management.[11] As I will suggest, norm management is an important strategy for accomplishing the objectives of law, whatever those objectives may be. One of my goals is to show how this is so.

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10. I understand anomalies by reference to economic understandings of rationality, see infra Parts IV.B–C.

11. Objections to norm management from the standpoint of liberty would overlap a great deal with objections to the use of "external preferences" as a basis for law. See Ronald Dworkin, Taking Rights Seriously 240–55 (1977). I believe that there is no general objection to the use of external preferences—the use of people's beliefs about what other people's beliefs should be—and also that there is no objection to government's effort to change norms. When government attempts to inculcate an anti-littering norm, or to inculcate a norm in favor of paying taxes, its behavior is not objectionable merely because norms are being managed. Any objection, to be persuasive, depends on an argument that government is invading *rights*. A robust set of rights should be in place to limit norm management, see infra Part VII; but so long as it is, there should be no objection to norm management itself. Cf. Joseph Raz, Liberalism, Scepticism, and Democracy, *in* Ethics in the Public Domain: Essays in the Morality of Law and Politics 82, 94–98 (1994) (arguing that "external preferences" should not be automatically excluded from the political domain).

Part of my motivation is therefore practical. Consider the following table:[12]

Deaths from Preventable Risks in the United States

Risk	Percent of Total Deaths	(Range)	Total Deaths/yr
Tobacco	19	14-19	400,000
Diet/activity	14	14-27	300,000
Alcohol	5	3-10	100,000
Microbial	4	—	90,000
Toxic agents	3	3-6	60,000
Firearms	2	—	35,000
Sexual behavior	1	—	30,000
Motor vehicles	1	—	25,000
Illicit drugs	<1	—	20,000

Existing social norms encourage much risk-taking behavior; and almost all of these risks of death could be much reduced with different norms. Consider smoking, diet/activity, alcohol, firearms, sexual behavior, motor vehicles, and illicit drugs as causes of death. In all these cases, new norms could save lives.[13] A regulatory policy that targets social norms may well be the cheapest and most effective strategy available to a government seeking to discourage risky behavior. It may complement or work more efficiently than existing regulatory approaches.

Social norms are also part and parcel of systems of race and sex equality. If norms changed, existing inequalities would be greatly reduced.[14] It is thus transparently important to see whether shifts in social norms, brought about through law, might operate to save lives and otherwise improve human well-being.[15]

But part of my motivation is theoretical. It involves a conceptual puzzle. In the last decade there has been an intense debate about whether and to what extent law should try to change people's "preferences."[16] But the term "preferences" is highly ambiguous, and it is not clear what

12. Adapted from McGinnis & Foege, supra note 5, at 2208.

13. See Marilyn Chase, Besides Saving Lives, Wearing Helmet When Cycling Is Cool, Wall St. J., Sept. 18, 1995, at B1 (noting dramatically shifting social norms with respect to bicycle helmets); see also Richard E. Nisbett & Dov Cohen, Culture of Honor: The Psychology of Violence in the South (1996) (discussing role of social norms in producing violence as a result of judgments about "honor").

14. See United Nations Development Programme, Human Development Report 1995, at 11–28, 99–124 (1995); Susan M. Okin, A Clash of Basic Rights? Women's Human Rights, Identity Formation and Cultural Difference (1995) (unpublished manuscript).

15. I give this idea more content below, see infra Parts V.A, VI.C. For the moment I use it as a placeholder for the reader's preferred account.

16. See, e.g., Richard A. Epstein, Simple Rules for a Complex World 308–12 (1995); Robin West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 Harv. L. Rev. 385 (1985); Richard

the participants in this debate are actually disputing when they say that "preferences" should or should not be respected by law. I attempt to clarify possible meanings of the term. I also suggest that when the idea of a "preference" is unpacked, it becomes plain that the term is often too abstract and coarse-grained to be a reliable foundation for either normative or positive work. We will thus find reason to doubt the elaborate edifice of social science based on the notion of "preference." The ultimate task is to separate positive, descriptive, and normative inquiries more sharply and, in the process, to try to untangle different motivational states and their influences on choices.

More particularly, I aim to make a set of conceptual or descriptive points:

1. Existing social conditions are often more fragile than might be supposed, because they depend on social norms to which—and this is the key point—people may not have much allegiance. What I will call *norm entrepreneurs*—people interested in changing social norms—can exploit this fact. If successful, they produce what I will call *norm bandwagons* and *norm cascades*.[17] Norm bandwagons occur when small shifts lead to large ones, as people join the "bandwagon"; norm cascades occur when there are rapid shifts in norms. Successful law and policy try to take advantage of learning about norms and norm change.

2. Sometimes people do not behave as economists predict. Many important and well-known anomalies in human behavior are best explained by reference to social norms and to the fact that people feel shame when they violate those norms.[18] Thus when people deviate from economic predictions—when they appear not to maximize their "expected utility"—it is often because of norms.

3. There is no simple contrast between "rationality" or "rational self-interest" and social norms.[19] Individual rationality is a function of social norms. The costs and benefits of action, from the standpoint of individual agents, include the consequences of acting inconsistently with social norms. Many efforts to drive a wedge between rationality and social norms rest on obscure "state of nature" thinking, that is, on efforts to discern what people would like or prefer if social norms did not exist. Those efforts are doomed to failure.[20]

A. Posner, The Ethical Significance of Free Choice: A Reply to Professor West, 99 Harv. L. Rev. 1431 (1986).

17. A valuable discussion, one that has much influenced the presentation here, is Timur Kuran, Private Truths, Public Lies 71–73 (1995). Kuran is, however, principally interested in the concealment or falsification of preferences; I am interested in norms that alter behavior as well as talk and hence in a somewhat more general phenomenon.

18. See infra Part IV.B.

19. See infra Part IV.C.

20. A qualification is necessary if the definition of rationality is normative and defended as such. In that case it would be possible to say that a certain norm is irrational because (for example) it makes lives worse.

4. For many purposes, it would be best to dispense with the idea of "preferences,"[21] despite the pervasiveness of that idea in positive social science and in arguments about the appropriate domains of law and the state. In normative work, the idea of "preferences" elides morally important distinctions among the motivations and mental states of human agents. In positive work, the idea is too coarse-grained, in the sense that it disregards contextual factors that produce diverse choices in diverse settings. People's choices are a function of norms, which operate as "taxes" or "subsidies"; and the content of norms depends on the context. Instead of speaking of "preferences," we might assess choice in terms of (1) intrinsic value, (2) reputational effects, and (3) effects on self-conception.

I also aim to make two normative claims involving the appropriate domain of law. These claims have a great deal to do with law's expressive function, by which I mean the function of law in expressing social values with the particular goal of shifting social norms.

1. There can be a serious obstacle to freedom in the fact that individual choices are a function of social norms, social meanings, and social roles, which individual agents may deplore, and over which individual agents have little or no control. Norms can tax or subsidize choice. Collective action—in the form of information campaigns, persuasion, economic incentives, or legal coercion—may be necessary to enable people to change norms that they do not like.

2. Some norms are obstacles to human well-being and autonomy. It is appropriate for law to alter norms if they diminish well-being by, for example, encouraging people to shorten their lives by driving very fast, using firearms, or taking dangerous drugs. It is appropriate for law to alter norms if they diminish autonomy by, for example, discouraging people from becoming educated or exposed to diverse conceptions of the good.

G. *An Insufficiently Charted Domain*

Libertarians, some economic analysts of law, and many liberals[22] give inadequate attention to the pervasive functions of social norms, social meanings, and social roles. Often it is said that in a free society, governments should respect both choices and preferences. But the case for re-

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21. See infra Part III. I think that Gary Becker moves in the direction of dispensing with the idea in Gary S. Becker, Accounting For Taste (forthcoming 1996), because he disaggregates the term. I am not sure, however, that Becker would accept my characterization.

22. The liberal tradition is very complex on this count, and I will not try to sort out its various strands here. I believe that all of the arguments made here fit well within central strands of that tradition. For relevant discussion, see Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy 13–41 (1995). On autonomy, see, e.g., Thomas Nagel, The View From Nowhere 113–20 (1986); Joseph Raz, The Morality of Freedom 369–99 (1986).

specting these things depends partly on their consequences and genesis, and as I have indicated, the determinants of choices (indeed the very meaning of the term "preference") remain obscure.[23] We should agree that social norms play a part in determining choices; that people's choices are a function of their particular social role; and that the social or expressive meaning of acts is an ingredient in choice.[24] Of course norms vary a great deal across cultures, and sometimes even within cultures. We should try to see when social norms, social roles, and social meanings are obstacles to human well-being, and whether something might be done to change them, even if people are making "choices," even if there is neither force nor fraud, and whether or not there is "harm to others."

One of my central points here is that individual agents have little control over social norms, social meanings, and social roles, even when they wish these to be very different from what they are.[25] This is not an argument against norms, meanings, and roles. Human beings can live, and human liberty can exist, only within a system of norms, meanings, and roles; but in any particular form, these things can impose severe restrictions on well-being and autonomy.

As I have suggested, agents who seek to make changes in norms face a collective action problem. For example, it is impossible for an individual to alter norms determining whether the act of smoking seems daring, or the act of recycling seems exotic, or the act of opposing sexual harassment seems humorless. This is so even though the relevant norms greatly influence behavior. If, for example, smokers seem like pitiful dupes rather than exciting daredevils, the incidence of smoking will go down. If people who fail to recycle are seen as oddballs, more people will recycle. If the role of secretary is not associated with susceptibility to unwanted sexual attention, there will be less unwanted sexual attention. The point bears very much on current public disputes. If single parenthood is stigmatized, social practices will change accordingly; if homosexual marriages are consistent with social norms, social practices will be much altered. In all of these cases, individual actors need to act together in order to produce the relevant shifts.

More particularly, I hope to draw attention to the fact that people's conception of appropriate action and even of their "interest" is very

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23. Illuminating discussions include Elizabeth Anderson, Value in Ethics and Economics 1–90 (1993); Amartya Sen, Behavior and the Concept of Preference, *in* Choice, Welfare and Measurement 54 (1982); Jean Hampton, The Failure of Expected-Utility Theory as a Theory of Reason, 10 Econ. & Phil. 195 (1994); Amartya Sen, Internal Consistency of Choice, 61 Econometrica 495 (1993) [hereinafter Sen, Internal Consistency].

24. For especially instructive discussion, see Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943 (1995). Though I have referred to this paper at various points, my presentation here owes a general debt to Lessig's argument and in particular to his emphasis on the collective action problem presented by social meanings. See id. at 991–1016.

25. See id. at 1000–07.

much a function of the particular social role in which they find themselves. This is true of (for example) judges, lawyers, doctors, parents, children, waiters, wives, husbands, colleagues, friends, and law school deans. Attention to the place of social role shows that for many purposes, the contrast between "rationality" and social norms[26] is unhelpful. What is rational for an agent is a function of, and mediated by, social roles and associated norms.[27] And when social norms appear not to be present, it is only because they are so taken for granted that they seem invisible.

At the same time, norms and roles—operating as taxes on or subsidies to action—can create a division between the judgments and desires that are displayed publicly and the judgments and desires that would be displayed without current norms and roles.[28] People's private judgments and desires diverge greatly from public appearances. For this reason current social states can be far more fragile than is generally thought—small shocks to publicly endorsed norms and roles decrease the cost of displaying deviant norms and rapidly bring about large-scale changes in publicly displayed judgments and desires. Hence societies experience *norm bandwagons* and *norm cascades*. Norm bandwagons occur when the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms, to a "tipping point" where it is adherence to the old norms that produces social disapproval.[29] Norm cascades occur when societies experience rapid shifts toward new norms.[30] Something of this kind happened with the attack on apartheid in South Africa, the fall of Communism, the election of Ronald Reagan, the use of the term "liberal" as one of opprobrium, the rise of the feminist movement, and the current assault on affirmative action.

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26. See Jon Elster, The Cement of Society 1–16 (1989) [hereinafter Elster, The Cement of Society]. It might be possible to define rationality in a way that abstracts from social norms, see Jon Elster, Norms of Revenge, 100 Ethics 862, 872–76 (1990) [hereinafter Elster, Norms of Revenge], but it would be hard to make robust predictions on the basis of any such definition. The problem lies in a norm-free specification of the "ends" that rational actors pursue. If we understand rationality in purely instrumental terms, we will be unable to make any predictions at all; if we understand it in purely economic terms, we will find much social irrationality and hence make bad predictions, and in any case the pursuit of wealth will inevitably have some relation to social norms. (Elster sees revenge behavior as inconsistent with rationality, but individuals who seek revenge get hedonic benefit from getting revenge. Hence Elster's conception of rationality is normatively invested in a way that seems plausible but needs defense, and that in any case is designed for normative rather than positive purposes.) See also infra Part IV.C.

27. See Viviana A. Zelizer, Morals and Markets: The Development of Life Insurance in the United States 41–89 (1983) (discussing conflicts between social norms and the purchase of life insurance).

28. See Kuran, supra note 17, at 3–5, 22–44.

29. See id. at 71–73.

30. Cf. Viviana A. Zelizer, Pricing the Priceless Child: The Changing Social Value of Children (1985) (describing changing economic and sentimental valuation of children); Sushil Bikhchandani et al., A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades, 100 J. Pol. Econ. 992 (1992) (explaining how informational cascades can contribute to the rapid spread of new behaviors).

To spell out the most general point emerging from the discussion: The notion of a "preference" can be deeply confusing, and in many of its uses, it impairs both positive and normative analysis of law. In its standard form, a preference is supposed to be something that lies behind choices and that is more abstract and general than choices are.[31] But what lies behind choices is not a thing but an unruly amalgam of things[32]—aspirations, tastes, physical states, responses to existing roles and norms, values, judgments, emotions, drives, beliefs, whims. The interaction of these forces will produce outcomes of a particular sort in accordance with the particular context. Hence we might say that *preferences are constructed, rather than elicited, by social situations*,[33] in the sense that they are very much a function of the setting and the prevailing norms.

This point bears on the role of government, which cannot avoid affecting social norms. A market economy will, for example, have predictable effects on norms,[34] and historically it has been justified on just this ground, as a way of softening social divisions by allowing people to interact with one another on a mutually beneficial basis.[35] A good deal of governmental action is self-consciously designed to change norms, meanings, or roles, and in that way to increase the individual benefits or decrease the individual costs associated with certain acts. Thus government might try to inculcate or to remove *shame*, fear of which can be a powerful deterrent to behavior. The inculcation of shame operates as a kind of tax; the removal of shame might be seen as the elimination of a tax or even as a kind of subsidy.

There is a thin line between education and provision of information on the one hand and attempted norm-change on the other. In fact we will see that in the process of norm management, government has a

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31. This is the idea hehind much of Gary Becker's work. See, e.g., Gary S. Becker, A Treatise on the Family (enl. ed. 1991). For Becker's most recent statement—which is, I helieve, in a somewhat different spirit—see Becker, supra note 21.

32. See Gary S. Becker, Nobel Lecture: The Economic Way of Looking at Behavior, *in* The Essence of Becker 633, 633 (Ramón Febrero & Pedro S. Schwartz eds., 1995) ("An important step in extending the traditional theory of individual rational choice . . . is to incorporate into the theory a much richer class of attitudes, preferences, and calculations.").

33. Cf. Paul Slovic, The Construction of Preference, 50 Am. Psychol. 364 (1995) (arguing that preferences are shaped by situation-specific cognitive processes). I mean to use the idea of construction somewhat more broadly than does Slovic. Note in this connection the striking study by Samuels and Ross, showing that people cooperate when a certain game is denominated "Community" but not when the same game is denominated "Wall Street." See S.M. Samuels & L. Ross, Reputations Versus Labels: The Power of Situational Effects in the Prisoner's Dilemma Game (1993) (unpublished manuscript); see also Lee Ross & Andrew Ward, Naive Realism: Implications for Social Conflicts and Misunderstandings *in* Values and Knowledge (Terrance Brown et al. eds., forthcoming 1996).

34. See generally Albert O. Hirschman, The Passions and The Interests (1977).

35. See id. at 69–93.

number of tools. In a democratic society, it ought to be willing to use them.

This Article comes in seven parts. Part II discusses the basic concepts: social norms, social roles, and social meanings. Part III explores the relationship between preferences and choices; it explains the limited usefulness of the idea of "preferences." Part IV places special emphasis on the role of pride and shame in human behavior. Part V offers some general comments on the role of government in altering norms. Part VI explores more particular bases for governmental or legal action. It shows how government might overcome collective action problems, diminish risk, and enhance autonomy through managing norms. Part VII briefly describes when and why government action may be illegitimate or ill-advised.

II. Definitions and Concepts

In this section I discuss three ideas that will play an important part throughout this Article: social norms, social roles, and social meanings. Social norms are the most central of these, since they provide the foundation for both social roles and social meanings. I also connect these ideas to problems of collective action, movements for legal and social change, and some issues about the goals and functions of law.

A. *Social Norms*

1. *In general.* — The term "social norms" might be understood in many different ways.[36] For present purposes the differences among the possible definitions are not very important, and we can rely on conventional understandings. If a definition is thought necessary, we might, very roughly, understand "norms" to be social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done. Some norms set good manners, for example, about how to hold one's fork; others reflect morally abhorrent views, as in the taboo on interracial relations; others reflect hard-won moral commitments, as in the norm against racial epithets. In fact there are social norms about nearly every aspect of human behavior. There are norms about littering, dating, smoking, singing, when to stand, when to sit, when to show anger, when, how, and with whom to express affection, when to talk, when to listen, when to discuss personal matters, when to use contractions, when (and with respect to what) to purchase insurance.

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36. I am understanding norms in an unusually broad sense. Narrower definitions are possible and many useful distinctions might be drawn. See, e.g., Elster, Norms of Revenge, supra note 26, at 863–66; Philip Pettit, *Virtus Normativa*: Rational Choice Perspectives, 100 Ethics 725, 728–32 (1990); see also H.L.A. Hart, The Concept of Law 82–91 (2d ed. 1994) (discussing rules of obligation, a subclass of norms); David K. Lewis, Convention 99–100 (1969) (dealing with the relation between conventions and norms).

"It isn't done" is a frequent reaction to certain disapproved conduct[37]—even though the relevant "it" is indeed done. The governing attitudes span an exceptionally wide range. They may or may not begin or maintain themselves as a result of reflective judgments about, for example, fairness and utility.[38] They may be based on simple, intuitive judgments about what is healthy behavior; these judgments may eventually turn into moral commitments unmoored from health judgments. Social norms may or may not promote liberty and well-being; they may or may not be easily malleable or go very deep into people's understandings. Sometimes norms are codified in law.[39] This is true, for example, with norms governing littering, respecting private property, and banning discrimination on the basis of race or sex.

Whether or not law is also at work, social norms are enforced through social sanctions that are, to say the least, pervasive. "Political correctness" is no isolated phenomenon. It is ubiquitous.[40] It occurs whenever reputational incentives impose high costs on deviant behavior. The relevant sanctions create a range of unpleasant (but sometimes pleasant) emotional states in people who have violated norms. If someone behaves in a way inconsistent with social norms, public disapproval may produce embarrassment or perhaps shame and a desire to hide. Sometimes the unpleasant feelings brought about by violations of social norms are intense, and the social consequences of these feelings, and (perhaps even more) of anticipating them, can be substantial.[41]

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37. See Elster, The Cement of Society, supra note 26, at 132–33.

38. I do not offer an account here of the emergence of norms. For relevant discussion, see Elster, The Cement of Society, supra note 26; Allan Gibbard, Wise Choices, Apt Feelings: A Theory of Normative Judgment (1990); Cristina Bicchieri, Norms of Cooperation, 100 Ethics 838 (1990). Nor do I discuss the relationship between social norms and moral judgments about, for example, fairness. Social norms are sometimes supported by such judgments, but sometimes not. Social norms are sometimes a product of such judgments, but sometimes not. On the relation between behavior and judgments about fairness—more precisely, in my view, social norms rooted in judgments of fairness—see Daniel Kahneman et al., Fairness and the Assumptions of Economics, *in* Richard H. Thaler, Quasi Rational Economics 220 (1991).

39. For discussions of law, norms, and insurance, see Zelizer, supra note 30, at 113–37; Zelizer, supra note 27, at 27–39.

40. In fact the term itself is an exercise in norm management. It brands people with certain views as weak followers of convention, rather than people who are following moral convictions of their own. If one believes that one's own views are "politically correct," one is likely to feel a bit embarrassed by them; if one thinks that one is avoiding "political correctness," one is likely to be proud of one's independence and fortitude. Consider the suggestion that "[a] lot of young women don't want to be called feminists because, hey, listen to Rush Limbaugh, and you've heard it all. It's equated with being lesbian, fat, ugly." Karen De Witt, Feminists Gather to Affirm Relevancy of Their Movement, N.Y. Times, Feb. 3, 1996, at 9.

41. The persistent urge to conform to social norms has been demonstrated in a good deal of work in social psychology. The classic study is S.E. Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, *in* Groups, Leadership, and Men 177 (Harold Guetzkow ed., 1951).

Much socially desirable behavior is attributable to social norms. For example, lack of education produces a good deal of shame in certain communities; so too with the decision to be promiscuous, or to use alcohol, cigarettes, or unlawful drugs. The result can be salutary incentives. But social norms can produce undesirable incentives as well. Thus, in some communities, norms encourage a lack of education, promiscuity, or abuse of alcohol or unlawful drugs.

2. *Intrinsic value, reputational value, and self-conception.* — From these points we might conclude that choice among options is a function not only of (a) the intrinsic value of the option—a book, a job, a drink—but also of (b) the reputational benefit or cost of the choice and of (c) the effects of the choice on one's self-conception.[42] The intrinsic value refers to whether, apart from reputational effects or effects on the agent's self-conception, the option is fun, illuminating, pleasant, interesting, and so forth. You may watch a television show on public broadcasting not only because it is fun or illuminating, but also because there are reputational advantages from doing so and advantages as well from the standpoint of enhancing your self-conception. Someone may buy a certain book (say, a book about Shakespeare) and not another book (say, a book by Stephen King) largely because she wants to think of herself as the sort of person who reads about Shakespeare. Someone may buy and wear an expensive piece of clothing not only or not mostly because he thinks it looks nice, but also or mostly because he wants other people to see him wearing that piece of clothing. Social norms are a key determinant in reputational benefit or cost. They can much affect (though they need not determine) self-conception as well.

Changes in social norms can influence choices if intrinsic value is held constant, by altering the effects of reputational incentives and consequences for self-conception.[43] If littering produces shame or disapproval, behavior will shift; if race discrimination produces reputational cost rather than benefit, fewer people will discriminate on the basis of race; if parenthood out of wedlock is stigmatized, there should be less parenthood out of wedlock.[44] Indeed, obedience of law is built in large

42. Cf. Kuran, supra note 17, at 24–38, which has much influenced my presentation here. Kuran discusses reputational and intrinsic utility; he also refers to what he calls "expressive utility," by which he means the expressive value of the act. See id. at 30–35. Some people may, for example, want to deviate from existing norms because of the expressive value of deviation. But I think it is better to speak of effects on the agent's self-conception; this is a more general idea that includes, but is not limited to, what Kuran calls expressive value.

43. See id. at 35–38.

44. See Elijah Anderson, Streetwise: Race, Class, and Change in an Urban Community 112–37 (1990) (describing impact of social norms on patterns of childbirth and parenting).

part on the perceived reputational consequences of law violation.[45] Of course those consequences might be favorable rather than unfavorable.

The three-part division is a bit crude, since perceptions of intrinsic value will be often a function of social norms. Those perceptions do not exist in a vacuum. Perceived intrinsic value is emphatically a result of social forces—consider responses to opera, rock music, rap—and reputational pressures can interact in complex ways with beliefs about intrinsic value. People's self-conceptions are very divergent, and each of our self-conceptions has many dimensions; for example, many of us may want not to be conformists, but also want not to diverge too much from what other people do and think. I offer the three-part division as a place to start.

3. *Norms and freedom.* — In a way social norms reduce freedom, understood very broadly as the power to do whatever one would like to do.[46] Certainly norms stop people from doing things that (if the norms were different) they would like to do, and people sometimes would like the norms to change. In particular, norms can drive a wedge between people's public actions or statements and their private judgments or desires.[47] Some people very much want norms to be something other than what they are, and they regret the fact (if they recognize it) that they have no power to change them. Thus a teenager might lament the existence of social norms in favor of (say) carrying a firearm or using drugs; but while the norms are in place, he might well carry a firearm and use drugs, and in a sense feel compelled to do so.

It would, however, be quite ludicrous to deplore social norms, to see them only as constraints on freedom, or to wish for them to disappear. In fact norms make freedom possible. Social life is not feasible—not even imaginable—without them.[48] In the absence of social norms, we would be unable to understand one another.[49] Norms establish conventions about the meanings of actions. Social norms are thus facilitative as well as constraining.[50] If everyone knows the norms concerning a raised voice or wearing bluejeans, then people can raise their voices or wear bluejeans without having to decide what these actions mean.

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45. See Tom R. Tyler, Why People Obey the Law 45 (1990) (showing a significant correlation between fear of peer disapproval and compliance).

46. I do not mean to endorse this odd conception of freedom. Many unobjectionable things—like speed limit laws or high prices—reduce freedom, thus understood. I seek only to draw attention to the fact that norms can constrain behavior and choice even though some or many people would like them to be otherwise.

47. See Kuran, supra note 17, at 3–12.

48. This is a theme of Elster, The Cement of Society, supra note 26.

49. Hence cross-cultural understandings are sometimes made difficult by the fact that social norms are different in different cultures, so that meanings have to be translated, and people may be unaware of that fact. Consider the example of whistling at sporting events: In America, whistling connotes approval; in Europe, it is a form of "booing."

50. Cf. Holmes, supra note 22 (arguing that constitutional constraints improve governance).

There is a further and, for present purposes, an especially important point. Good social norms solve collective action problems by encouraging people to do useful things that they would not do without the relevant norms.[51] Consider voting, littering, behaving courteously, keeping promises, cleaning up after one's dog, writing tenure letters, and doing one's share of administrative work. Without social norms, coercion or economic incentives—perhaps with large financial investments—would be required to solve collective action problems. Norms can be an especially cheap way of ensuring against the unfortunate consequences of prisoner's dilemmas.

On the other hand, social norms may be ineffective. This is so partly because some people *like* to incur the disapproval that follows norm-violation, and hence some people like to "flout convention" by rejecting prevailing norms by, for example, smoking, playing loud music in public, or wearing unusual clothes. Of course people who violate generally held social norms might be behaving consistently with particular norms in a relevant subculture. This is true when people in a certain group wear clothing of a certain kind, or when people who smoke cigarettes receive peer group approval simply by virtue of the fact that they are violating more broadly held norms. (Hence those who reject generally held norms may be the most committed of conformists; they are following the norms of a subcommunity, as when teenagers choose a form of dress that violates generally held norms but imposes a rigid orthodoxy on the subgroup.)

There are many possible reasons for rejecting prevailing norms. Some people depart from the prevailing norm because of their *reflective judgments*. Such people think, on reflection, that the norm is too silly or too unworthy to affect behavior, or that relevant roles diminish autonomy or well-being. Marrying someone of a different race may reflect this judg-

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51. See Edna Ullmann-Margalit, The Emergence of Norms 18–133 (1977). For an important discussion of how norms produce social order, and solve collective action problems, in the absence of legal constraints, see Robert C. Ellickson, Order Without Law (1991). But norm changes need not produce Pareto improvements; there can be losers as well as winners even in the face of a solution to a collective action problem, as when, for example, some members of a small group reject a ban on littering. Moreover, there is a crucial question about which norms are taken as given, and which are put up for grabs, in the sort of analysis that celebrates certain norms as solving collective action problems. See infra Part VI.A. For an illuminating discussion of why norms might be inefficient, see Eric A. Posner, Law, Economics, and Inefficient Norms, 144 U. Pa. L. Rev. (forthcoming 1996).

A growing literature discusses the place of norms in ordering behavior entirely outside of law. See, e.g., Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992); Robert D. Cooter, Structural Adjudication and the New Law Merchant: A Model of Decentralized Law, 14 Int'l Rev. L. & Econ. 215 (1994). This literature raises interesting questions about the extralegal development of norms and the extent to which law should build on those norms.

ment; sharing domestic labor on an equal basis almost certainly does.[52] In other cases, as discussed above, the departure simply *expresses defiance*, and the real desire is to flout convention, whatever the norm is.[53] Many apparently odd practices involving dress and manners are rooted in this phenomenon; some people find defiance an intrinsic good, and what they are defying is more or less incidental.[54] In still other cases, the departure is the expression of an individual *desire or taste*, which the person would pursue whether or not it is inconsistent with social roles and accompanying norms. Consider the view that Coca-Cola actually is better than all other drinks, a view that might be reflected in unconventional drink selections in many imaginable places.

The fact that some people like to reject social norms is highly relevant to law. For example, a serious problem with legal efforts to inculcate social norms is that the source of the effort may be disqualifying. Such efforts may be futile or even counterproductive. If Nancy Reagan tells teenagers to "just say no" to drugs, many teenagers may think that it is very good to say "yes."[55] It is said that propaganda efforts in the former Soviet Union failed simply because the source of the propaganda was not trusted; hence the government's effort to inculcate norms of its choosing fell on deaf ears.[56] These points bear on the regulation of social risks—a principal concern of this article—particularly in the areas of teenage smoking and potentially dangerous sexual activity. Efforts by private or public authorities to stigmatize certain acts may have the opposite effect.

4. *Exit and entry.* — The fact that norms are contested within a heterogeneous society can lead to the creation of many diverse *norm communi-*

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52. See Susan M. Okin, Justice, Gender, and the Family 149–55 (1989) (discussing gender inequality in domestic labor).

53. Consider the scene in The Wild One in which Marlon Brando, teenage rebel, is asked, "Johnny, what are you rebelling against?" and responds, "Whaddaya got?" described by David Hinckley, The "W" Word, Chi. Trib., Sept. 6, 1990, at 17C.

54. See James Miller, "Democracy is in the Streets": From Port Huron to the Siege of Chicago 59 (1987) (reporting revealing statements made by Tom Hayden describing some 1960s civil rights leaders as seeking to make a personal statement rather than to protect civil rights for their own sake).

55. Compare President Clinton's remarks on teenage smoking, which are very much in the spirit of what I am suggesting here:

> [I]t's simply not true that cultural changes and legal bars, together, cannot work to reduce consumption . . . . If you make it clearly illegal, more inaccessible, you reduce the lure of advertising, and then you have an affirmative campaign, a positive campaign, so that you don't say, "Just Say No." You give young people information and you make it the smart, the cool, the hip thing to do to take care of yourself and keep yourself healthy and alive.

Excerpts from Clinton News Conference on His Tobacco Order, supra note 6, at A18.

56. Hence a great deal of attention has been paid in recent years to the role of trust in regulatory policy. See Paul Slovic, Perception of Risk: Reflections on the Psychometric Paradigm, *in* Social Theories of Risk 117, 151–52 (Sheldon Krimsky & Dominic Golding eds., 1992); Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 40–43, 107–12 (1995); Chauncey Starr, Risk Management, Assessment, and Acceptability, 5 Risk Analysis 97 (1985).

ties. People who are dissatisfied with prevailing norms can vote with their feet, using the power of "exit" to leave norm communities they dislike and to enter into groups built on more congenial norms. They may even create, or seek to enter, self-consciously deviant subcommunities. Many American high schools reflect this phenomenon, as students find groups that are defined in a relatively crisp way, and as groups intermingle only on occasion. The most conspicuous norm communities are private; but in a system with state and local governments and free mobility, there are public norm communities too, as people sort themselves by choosing localities with congenial norms. The norms of such communities may be reflected in supportive state or local laws in which, for example, homosexual relations are permitted, or traditional morality is enforced. And once sorting has begun, processes of "voice" can increase the intensity and uniformity of governing norms. Homogenous local communities may insist on their own norms. National rights are often a safeguard against the possibly injurious character of this process.

To the extent that people can freely enter and exit norm communities, such communities offer important protection against oppressive norms. On the other hand, it can be very costly to exit from the norm community in which one finds oneself, and the fact that one has been raised in that community may make other options seem unthinkable,[57] even though they might be much better.[58]

5. *Norms and nonfungible cash.* — Because of prevailing social norms within relevant communities, money itself is not fungible.[59] The point deserves separate discussion, for it has particular importance for law and legal policy, and it has not received the attention it deserves.

Consider, for example, the fact that money is often compartmentalized.[60] Some money is specially reserved for the support of children. Some money is for gifts. Some is for one's own special fun. Some money is for summer vacation. Some money is for a rainy day. Thus a study of practices in Orange County, California, says that residents keep

> a variety of domestic "cash stashes"—"generally one in the billfold of each adult, children's allowances and piggy banks, a 'petty cash' fund in a teapot-equivalent, a dish of change for parking meters or laundry"—or "banked stashes of money," including Christmas club savings and accounts designated for spe-

57. See Kuran, supra note 17, at 176–95 (describing "the unthinkable and the unthought").

58. Apparently dissident communities may be based on norms that are highly reactive to and even defined by reference to more generally held norms; it might be better if the community as a whole could do something about those norms. These points bear on the legitimate role of government.

59. See generally Viviana A. Zelizer, The Social Meaning of Money (1994) (proposing differentiated model of money that recognizes certain monies as nonfungible, nonportable, subjective, and heterogeneous).

60. See Richard H. Thaler, Mental Accounting Matters (Dec. 1993) (unpublished manuscript, on file with the Columbia Law Review).

> cial expenditures such as property or other taxes, vacations, or home and car insurance payments.[61]

Social theorists have often feared that the use of money would "flatten" social life, by erasing qualitative distinctions among goods. Ironically, however, social life, pervaded as it is by social norms, has "unflattened" money by insisting on qualitative distinctions.[62] "There is no single, uniform, generalized money, but multiple monies: people earmark different currencies for many or perhaps all types of social interactions . . . . And people will in fact respond with anger, shock, or ridicule to the 'misuse' of monies for the wrong circumstances or social relations . . . ."[63]

The existence of norms involving money suggests that it may not be possible to infer global judgments from particular consumption choices that are dependent on context-specific norms. Of course a wide range of norms ban the use of dollars as a reason for action, and sometimes law fortifies such norms; consider prohibitions on prostitution, vote-trading, and surrogate parenthood.[64] Here, however, I am concerned with norms that "subsidize" or "tax" certain uses of money. The point is important because economists often claim that particular choices demonstrate or reveal general valuations.[65] But this may be a mistake, because particular choices are a function of social norms that may be limited to the particular context. In a different context, the governing norms may be quite different. Thus, for example, the refusal to insure certain goods may be a product of social norms that are limited to the particular context of insurance. If so, it may be wrong to draw from insurance choices general conclusions about (say) the appropriate domain of tort law.[66]

B. *Social Roles*

1. *In general.* — Many norms are intensely *role-specific*, and law is often self-consciously concerned with social roles. Because the subject of roles raises distinctive issues, I now discuss some of the relationships among roles, norms, and law.

Consider the following social roles: doctor, employee, waiter, law school dean, wife, friend, pet-owner, colleague, student. Each of these roles is accompanied by a remarkably complex network of appropriate norms. The network is not easily reduced to rules, but people know,

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61. Zelizer, supra note 59, at 5 (citing Jean Lave, Cognition in Practice 132–33 (1988)).

62. For an impressive argument to this effect, see Thaler, supra note 60.

63. Zelizer, supra note 59, at 18–19.

64. See Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. (forthcoming 1996).

65. See, e.g., W. Kip Viscusi, Fatal Tradeoffs: Public and Private Responsibilities for Risk 34–74 (1992).

66. See Steven P. Croley & Jon D. Hanson, The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law, 108 Harv. L. Rev. 1787, 1851–53 (1995). For a more detailed discussion, see Sunstein, supra note 64.

often very well, what they are.[67] If you are a waiter, and treat your restaurant's patrons the way you treat your friends, you probably will not be a waiter for very long (except perhaps in California). If you are a student, and treat a teacher as if he were your employee at the local factory, you will be perceived as misbehaving very badly. If you treat friends the way doctors treat patients, or lawyers treat clients, you probably won't have many friends. People rapidly internalize social norms about what their roles entail. Violations of role-specific norms can seem jarring and produce prompt social punishment (or reward).

Roles are accompanied by a wide range of included and excluded reasons for action.[68] These may or may not be a product of law; they are certainly a product of social norms. In your capacity as lawyer, you can act only on the basis of certain reasons. For example, you may reveal something told to you in confidence only to prevent a crime; you cannot breach a confidence on the ground that it would be economically profitable to do so. In your capacity as judge, you may look only at a restricted set of considerations, a set far more restricted than those you may examine if you are a legislator. In your capacity as friend, you are not permitted to violate a confidence on the ground that it would be fun to gossip about what you have been told. Confusion of roles—is X speaking as a friend or as a colleague? is the judge a closet legislator? what exactly is my relationship to my employer?—can cause uncertainty, awkwardness, or much worse.

2. *Roles and freedom.* — Are social roles an obstacle to freedom?[69] In a way the answer is yes, since people often would like to do things that their role forbids, and since people often would like to change the nature of their roles. But this would be a far too simple conclusion. Without roles, life would be very hard to negotiate. Like social norms, social roles are facilitating as well as constraining. The existence of a clear role makes communication much easier. By sharply constraining the domain of permissible actions, roles simplify things and, in that sense, increase personal freedom.

Of course some of the norms associated with certain social roles are silly or even oppressive, and some people deplore them for this reason. What can they do? Large-scale changes in social definitions of roles normally require collective action, whether private or public—a point with considerable importance for those interested in the appropriate domain of law. But sometimes individual people act in ways inconsistent with their roles precisely in order to draw attention to their silly or oppressive character. Thus a slave in the pre-civil War South might decide not to act

67. Cf. John R. Searle, The Construction of Social Reality 127–47 (1995) (describing the "background" knowledge which is necessary to constitute a role as I understand it here).

68. Cf. Joseph Raz, Practical Reason and Norms 35–48 (1975) (discussing exclusionary reasons).

69. The same qualification is necessary here as in supra note 46.

deferentially;[70] a student might raise his voice against an abusive teacher; a woman in an unequal society might insist that domestic labor be shared; a homosexual man might "flaunt it"; a teacher in business school might wear bluejeans. In fact attacks on norms associated with particular roles often have a great deal to do with perceptions of injustice.

Many roles are ascriptive and not chosen, even in post-feudal societies. We cannot fully control the roles in which we find ourselves. To be sure, people have power to assume or not to assume some roles. You can decide whether to be a spouse, a parent, a teacher, a dean, and so forth. And within limits, you can decide what it means to be any of these things; people certainly can alter the roles associated with parent, wife, and husband, even if they cannot do a great deal about the meanings associated with their choices. But many roles are assigned rather than voluntarily assumed—child, man, African-American, old person, short person, and more. A role that is assigned might be described as a *status*, a distinctive kind of role that, if surrounded by objectionable norms, raises special problems.[71] And many roles cannot easily be rejected in most societies—driver, employee, student, citizen, family member.

3. *Roles and law.* — Prevailing roles and norms can be fortified by legal requirements; they may even owe their existence to law. There are many specific legal provisions for people occupying different roles—parents, spouses, employers, employees, home-owners, nuclear power plant operators, animal owners, doctors, stock brokers, landlords, automobile sellers, and others. Law can help constitute roles. Much of the law relating to families, employer-employee relations, and professional obligations (lawyers, doctors, architects, and others) has this feature. In fact many roles seem "natural" even though they owe their origin to social and even legal conventions.[72]

Often law tries to redefine roles. In recent years, this has happened with respect to the roles of employee, husband, father, disabled person, and judge. Thus, for example, the law has said that husbands may not rape their wives; that absent fathers owe duties of support to their children; that disabled people have certain rights of access to the workplace. All of these measures can be seen as attempts to create new or better norms to define the relevant roles.

4. *Citizens and consumers.* — Of course each of us occupies many different roles, and there is much to be said about the constraints imposed

70. Cf. infra note 226.

71. See infra Part VI.D. An illuminating discussion in the context of gender is Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in The Law and Feminist Jurisprudence, 105 Yale L.J. 1 (1995).

72. See Lessig, supra note 24, at 949–51 (discussing constructed character of social meanings); cf. Elster, Norms of Revenge, supra note 26, at 871–72 (The urge for vengeance "is not a spontaneous, presocial anger directed at another person (or, for that matter, a material object) that has harmed or hurt us. The passion for revenge is embedded in a way of life that revolves around the notion of honor, and in which 'boiling blood' is a socially recognized category.").

by these diverse roles. But for present purposes, an especially important and pervasive difference involves the relationship between *citizen* and *consumer*.

Return to John Jones in the fifth tale.[73] The example shows that in your capacity as a citizen, you might urge a result—with respect to (say) the duties of polluters or commercial broadcasters—that is quite different from what you seek through your market behavior in your capacity as a consumer.[74] Acting as citizens, many people try to change social practices, and they often try to do this by changing social norms associated with a particular role. Sometimes these efforts are a function of the role of citizen and associated norms. Sometimes these efforts are undertaken via law. In their private capacity—as consumers, employers, or family members—people may do something that they believe, on balance, to be unjust, and as citizens, they may support measures that better reflect their convictions.[75] Sometimes efforts to change norms and roles reflect an understanding that human beings are selfish or have weakness of will and that measures should be taken to ensure behavior that, on reflection, we would like to follow.[76]

In addition, citizens do or say things just because of existing social norms, which impose sanctions on publicly expressed dissident behavior or judgments; in their private capacity, people may be freer to do or say as they (in a sense, and subject to the prevailing norms) wish. In all cases the difference is connected to the fact that a citizen is helping to make a judgment not simply for himself but for a collectivity.[77] In this sense there are important contextual differences between market behavior and voting behavior. The former does not affect the collectivity in the same way, and hence those concerned, for example, with protecting the environment may believe that their own behavior is largely irrelevant, whereas

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73. See supra Part I.E.

74. See Mark Sagoff, The Economy of the Earth 7–28 (1988) (describing the distinction between citizen and consumer).

75. This is the central topic of a poem by Vachel Lindsay, "Why I Voted the Socialist Ticket." Unfortunately, the poem is truly horrible:

> I am unjust, but I can strive for justice.
> My life's unkind, but I can vote for kindness.
> I, the unloving, say life should be lovely.
> I, that am blind, cry out against my blindness.

Vachel Lindsay, Why I Voted the Socialist Ticket, *in* 1 The Poetry of Vachel Lindsay 64 (Dennis Camp ed., 1984). Of course it is possible, too, that in their private behavior people will be unselfish, whereas people might be motivated by greed in their public arena. I am discussing possibilities only, not making general suggestions about the realms in which people are most likely to be motivated by norms of fairness.

76. See Jon Elster, Ulysses and the Sirens 36–111 (1979); Holmes, supra note 22, at 134–77.

77. People appear to behave accordingly even though a single vote probably matters no more than a single market decision.

laws can make a great deal of difference.[78] Largely for this reason, the role of citizen is accompanied by norms that can discourage selfishness and encourage attention to the public good.[79]

In fact many efforts to change law are at least partly an outgrowth of the difference between citizens and consumers.[80] Consider laws outlawing sexual harassment, providing incentives to share domestic labor,[81] or granting workers a right to unionize. It should be clear that in such cases, there is no simple relationship among choices, preferences, norms, and roles. There may be conflict or tension between two or more of these.

C. *Social Meanings*

Social norms help people assign "social meaning" to human behavior. With this term I refer to the expressive dimension of conduct (not excluding speech) in the relevant community.[82] Social meaning is a product of social norms.[83]

The expressive dimension of conduct is, very simply, *the attitudes and commitments that the conduct signals.* A complex body of First Amendment doctrine deals with the problem of "expressive conduct," that is, acts that carry an expressive purpose and effect, such as flag-burning and draft card-burning.[84] But most conduct (including words) has an expressive function—not in the sense that the actor necessarily intends to communicate a message, but in the sense that people will take the conduct to be expressing certain attitudes and commitments.[85] Advertisers are, of course, well aware of this point, and much advertising is an effort to affect the social meaning of a product or of a purchasing decision.[86] Thus ad-

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78. The very idea that I treat the prevention of environmental damage just like buying a private good is itself quite absurd. The amount I am ready to pay for my toothpaste is typically not affected by the amount you pay for yours. But it would be amazing if the payment I am ready to make to save nature is totally independent of what others are ready to pay for it, since it is specifically a social concern. The 'lone ranger' model of environmental evaluation confounds the nature of the problem at hand.

Amartya Sen, Environmental Evaluation and Social Choice: Contingent Valuation and the Market Analogy, 46 Japanese Econ. Rev. 23, 29 (1995).

79. I am describing a possibility, not a certainty. Political behavior is very often selfish.

80. See Sen, supra note 78, at 26–31, 34 (distinguishing consumer willingness to pay from citizen judgments).

81. See Okin, supra note 52, at 149–55.

82. See Lessig, supra note 24, at 949–58.

83. Cf. Thomas C. Schelling, Micromotives and Macrobehavior 213–14 (1978) (explaining how hockey players's reluctance to wear helmets is a product of social norms); Lessig, supra note 24, at 1014–16 (discussing factors that control or manage social meaning).

84. See generally Geoffrey R. Stone et al., Constitutional Law 1101–1403 (2d ed. 1991).

85. See Lessig, supra note 24, at 951–55.

86. Consider an advertisement in the Atlanta airport, "Remember those nerds you hated in high school? Now you can hire them." The advertisement is for an accounting firm. Its goal is to change the social meaning of a hire, so that people will not feel that they

vertisements often focus not on the intrinsic value of the product, but instead on its reputational value and (equally important) its consequences for self-conception—making the purchaser seem smart, sophisticated, and in control of the situation. Political advertisements can have similar functions. They often attempt to alter the social meaning of a vote by making the opponent's supporters seem like whiners or dupes and voters for the advertised candidate seem decent and good.

The meaning of acts is very much a function of context and culture. Consider some examples. If I light up a cigarette, I will, in certain parts of the United States, be signalling something relatively precise and very bad about myself, my self-conception, and my concern for others. In other parts of the United States, the signals are very different. In France, a smoker gives still different signals. If you fail to attend church—or if you do attend church, and tell everyone about it[87]—your act will have particular meanings, and these have everything to do with the community in which you find yourself. If I decide not to get married, or not to have children, my act will convey a restricted range of possible meanings, and I will not have much control over those meanings. (If I were a woman, my decisions to this effect would have a quite different set of meanings. The meaning of a woman's not marrying or having children is quite different from a man's.) If you buy insurance on your children's lives, you will be signalling something about your conception of your child, and in some times and places, the signal is very bad.[88]

Language also has social meanings, extending far beyond the words themselves and reflected in the attitudes and commitments signalled by how people talk. Context determines those meanings. The words, "You look great today," can have many different possible social meanings. Consider their use from a mother to a fifteen-year-old daughter, from a male employer to a female employee, from a doctor to a convalescent patient, from a homosexual male student to a male classmate. If you refer to women as "ladies," you are also making (whatever your intentions) a certain set of statements about yourself and about your views on gender issues. A description of certain Americans as "blacks" will have a different meaning in 1996 (after the rise of the term "African-American") from what it was in (say) 1976.

As with social norms and social roles, the social meanings of acts are something about which individuals can do relatively little (most of the time).[89] If a lawyer drives a Harley-Davidson motorcycle to Wall Street, his own attitude toward his act will have little relation to what other peo-

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are confused and need a superior mind, but instead feel superior in their capacity to hire a servant.

87. See Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion (1993), which can be understood as an attack on, and an effort to alter, the social meaning of being religious in certain parts of the United States.

88. See Zelizer, supra note 30, at 121–24.

89. See Lessig, supra note 24, at 993–1007 (exploring the collective action problem).

ple take his act to mean. If a European visitor to the United States addresses women as "Miss" or "Mrs.," the social meaning of his choice will have little to do with his intentions (unless, perhaps, people know that he is a visitor). If a nonsmoker asks someone not to smoke, the social meaning of the act will be quite different in New York in 1996 from what it was in the same city in 1966, and different as well from what it is in Germany in 1996. This is a pervasive characteristic of social meanings. If you buckle your seat belt in Boston, you will communicate no insult to the driver; but things would have been very different twenty years ago, and within certain subgroups the buckling of a belt still connotes cowardice or accusation.[90] In fact in California, it is a passenger's failure to buckle that is an act of disrespect to the driver, who, under California law, may be held liable if you have not buckled.

To take a science fiction-ish example: If you lived in a society of vegetarians, the act of eating meat—at, let us suppose, specially designated animal flesh restaurants—would be very different from what it is in a society of meat-eaters.[91] And if you lived in a society of vegetarians, you might well choose not to eat meat, because social meaning would impose a decisive cost on meat-eating. The meanings of actions are set by forces that are emphatically human but that are largely outside of the control of the individual agent.

The expressive dimension of action has everything to do with the actor's particular social role—with the way in which acts conform to, or violate, expectations associated with the role. Because of the social meaning of action, a lawyer acting as a lawyer may not make jokes that would be perfectly acceptable with her family or friends. If a law school dean wears shorts to teach contracts, or calls students by their first name, he will be signalling something important and a bit radical, certainly at the University of Chicago Law School; at a small college, the signals would be altogether different. If a President endorses atheism, or if an American judge speaks critically about the drafters of the American Constitution,[92] people will be outraged, very much because of the role in which presidents and judges find themselves. What can be said and done—in terms of social meanings and social norms—is a function of roles.

On the other hand, there are contexts in which a person or a small group of people may make inroads on social meanings. In a household, a woman may be able to alter, a little or a lot, the social meaning to her family of her refusal to do dishes or to make dinner, or her decision to go out with colleagues at night. In a company, a single person or a small group may be able to alter the social meaning of discourteous or aggressive behavior formerly taken as natural or as good, or even as definitive of

90. See id. at 952.

91. I am grateful to Thomas Nagel for this example.

92. See Thurgood Marshall, Commentary, Reflections on the Bicentennial of the United States Constitution, 101 Harv. L. Rev. 1 (1987); William B. Reynolds, Another View: Our Magnificent Constitution, 40 Vand. L. Rev. 1343 (1987).

membership in a certain group. With communication over time, significant changes may occur. But the most entrenched social meanings are—by definition—not movable without concerted action on the part of many people. Hence private groups often attempt to bring about changes in meanings and the norms that produce them.[93] Religious organizations, feminist groups, animal rights activists, and groups challenging "political correctness" are prominent recent examples. Often they have been highly successful; sometimes they produce norm cascades.

D. *Social Norms, Social Roles, and Social Meanings*

What is the relationship among social norms, social roles, and social meanings? As I have said, social norms determine the social meaning of action. Social roles are similarly a product of social norms. But social norms can also be an artifact of social meaning. Suppose that the social meaning of condom use is a confession, an accusation,[94] or a statement, "I am not a spontaneous person." If so, there will be a social norm discouraging condom use.[95] There are many public efforts to change this norm.[96] Social norms can also be produced by social roles. A university teacher has a certain role, and the social norms governing acts by such a teacher—use of a first name, informal clothing, references to popular music—are an outgrowth of that role. Of course roles have no content apart from social norms. Suppose that the social meaning of a male teenager's refusal to fight when insulted is, "I am cowardly." The norm in favor of fighting, in such circumstances, is a product of the role. There is now a public effort to change this very norm.[97]

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93. See Zelizer, supra note 27, at 41–89 (describing changing social meaning of life insurance). Life insurance companies engaged in self-conscious efforts at norm management, from the view that life should not be commodified or an object of gamble, to the view that good fathers and husbands, at least, protect their families in this fashion: " 'The necessity that exists for every head of family to make proper provision for the sustenance of those dear to him after his death, is freely acknowledged and there is no contingency whereby a man can stand excused from making such a provision.' " Id. at 56 (quoting Manhattan Life Insurance Co., Life Insurance 19 (1852)).

94. See Jennifer Steinhauer, At a Clinic, Young Men Talk of Sex, N.Y. Times, Sept. 6, 1995, at C7 (describing men's failure to wear condoms as a product of a fear that such use will be taken as evidence of infidelity).

95. See Elliot Aronson, The Social Animal 89–90 (6th ed. 1992); Lessig, supra note 24, at 1019–25.

96. See, e.g., Steinhauer, supra note 94 (describing efforts to encourage condom use).

97. Thus there is an effort to publicize a new symbol: a fist covered by a hand. The meaning of this symbol is: Though I am offended, I will not fight. The publicity campaign is designed to change the meaning of a refusal to fight back.

E. *Divisions in the Self*[98] *and Norm Bandwagons*

I have noted that social norms can make people act and talk publicly in ways that are different from how they actually think, or from how they act and talk privately. It is time to explore this point.

People often act in accordance with norms that they wish were otherwise or even despise. Under the apartheid regime in South Africa, public criticism of apartheid—at least within South Africa—much understated private opposition to apartheid. The same was true for Communist regimes.[99] In a social group that punishes atheists or agnostics, few people may confess their uncertainty about whether God exists; in a group of atheists, few people may talk about their religious faith. Even in democracies, the deterrent effect of social norms on acts and beliefs creates a sharp disjunction between public acts (including speech) and private thought.[100] Hence a state of affairs may persist even though there is widespread opposition to it. And eventually the norms may affect private thought itself.[101] When, for example, social norms discourage pollution, smoking, or acts of sexual harassment, people may come in their private thoughts to see such things as unacceptable. Of course this might not happen. But over the long run, behavior that is inconsistent with existing social norms might not be defended publicly, and for this reason people may come not to accept that behavior even in their most private moments.[102]

Political actors might be able to exploit private dissatisfaction with existing norms in order to bring about large-scale social change. In fact many political participants can be described as *norm entrepreneurs*; consider Martin Luther King, Jr., William Bennett, Louis Farrakhan, Catharine MacKinnon, Ronald Reagan, and Jerry Falwell. As we have seen, individuals who favor changes in norms face a free rider problem; norm entrepreneurs can alert people to the existence of a shared complaint and can suggest a collective solution. Thus political actors, whether public or private, can exploit widespread dissatisfaction with existing norms by (a) signalling their own commitment to change, (b) creating coalitions, (c) making defiance of the norms seem or be less costly, and (d) making compliance with new norms seem or be more beneficial. We might say that the intrinsic value of some option may be held constant, but the reputational and self-conception values may shift dramatically.

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98. Cf. Kuran, supra note 17, at 43–44 (discussing the "divided self").

99. See id. at 118–27.

100. Thus the idea of a "silent majority" is used to allow people to voice their private views by assuring them that there are many more people who share their views than appears; this is an effort to reduce the perceived reputational costs associated with stating seemingly unpopular views.

101. This is because of the desire to reduce cognitive dissonance, see Jon Elster, Sour Grapes 109–40 (1983), or because the privately held thoughts disappear through lack of public use, see Kuran, supra note 17, at 176–95.

102. For an intrigning discussion, see Kuran, supra note 17, at 176–95.

Thus there can be a "tipping point" when norms start to push in new directions.

When the free rider problem begins to be solved, through reducing the cost of acting inconsistently with prevailing norms, private thoughts will be stated publicly, and things can shift very quickly. Something of this sort happened in both South Africa and Eastern Europe, producing more rapid and more peaceful changes than anyone anticipated.[103] Part of the reason is that hostility to the regimes was widespread and intense—but inconsistent with existing social norms and hence much underestimated. When the norms began to collapse, the regimes collapsed too.

The point bears on norm bandwagons. People may support an existing norm publicly not because they are genuinely committed to it, but because they fear social sanctions. As I have said, there is a bandwagon effect when those sanctions diminish or disappear, as many people join the group opposing the existing norm and urging a new one. The result can be astonishingly rapid change.[104] An effect of this kind occurred with two opposing and recent movements—the feminist movement and the recent opposition to "political correctness" in the university.

F. *Beliefs About Facts*

Choices, meanings, roles, and norms are commonly based on beliefs about relevant facts. Someone may believe, for example, that cigarette smoking is not dangerous, and he may smoke partly for that reason. If he really believed that smoking was dangerous, perhaps he would not smoke.[105] Choices are pervasively a function of beliefs. The same is true for social norms. Consider the dramatic recent shifts in social norms governing smoking. Such norms have a great deal to do with prevailing beliefs about whether smoking causes harm to nonsmokers. When the belief shifts, the norm shifts as well.[106]

Norms about behavior are interpenetrated with beliefs about harm and risk. Thus many religiously-grounded norms about personal cleanliness and hygiene owe their origins to beliefs about what is healthy; but the norms often outstrip the beliefs and receive a kind of moral grounding that is not simply reducible to an instrumental judgment about likely risks. When someone violates a norm relating to hygiene, people's reaction is different—more stern and more deeply moralized—than it would be if the reaction were based solely on the incremental increase in risk.

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103. See id. at 261–88 (discussing fall of Communism).

104. See id. at 288 ("A specific law, regulation, policy, norm, or custom can be abruptly abandoned when people who have helped sustain it suddenly discover a common desire for change.").

105. See Slovic, supra note 56, at 139 (discussing teenagers's misperception of risks of smoking).

106. Cf. Mary Douglas & Aaron Wildavsky, Risk and Culture (1982) (exploring perceptions of and reactions to risk).

There are complex interactions between understandings of facts and social roles. Certainly beliefs about facts help generate roles. Thus beliefs about natural differences between men and women, or blacks and whites, affect social understandings about the appropriate roles of men and women or blacks and whites. When people see that apparent differences between social groups are not grounded in fact, the roles associated with group members may shift accordingly. Thus attacks on claimed natural differences have affected perceptions of appropriate roles. But the process of change is often delayed because of the collective action problems faced by people in changing norms that have outstripped the beliefs on which they were originally based.

The converse is also true: Understandings of facts may be a function of roles and accompanying norms. There are complex scientific literatures on the differences between men and women; much of the relevant work, even in its most scientistic forms, rests palpably on conceptions of roles and of surrounding norms.[107] When the social role of a certain group is to be laborers, or wives, it may be hard for most people to believe that all people are (in some relevant sense) equal.

Judgments about fact are similarly entangled with social norms. When most people smoke, it is hard for most people to believe that smoking is dangerous; in particular, smokers may not want to believe that smoking is dangerous. The norm affects the belief, just as the belief affects the norm. In fact norms and judgments about risk are hard to separate. When people are asked to judge risks in terms of their seriousness, they respond not simply in terms of aggregate expected death rates but also with reference to moral judgments, connected with prevailing social norms, about the voluntariness of the risk, its distribution, its dreadedness, its potentially catastrophic character, and so forth.[108] And norms and roles pervasively influence judgments about facts.[109]

III. Choices and Preferences

If we attend to the functions of norms, meanings, and roles, how will we understand the relationship between choices and preferences? How will we understand the notion of "preference" itself? My proposition here is that attention to the functions of norms, meanings, and roles challenges our understanding of notions like "choice" and "preference" in much of modern social science.

An initial and important problem is that the term "preference" is quite ambiguous. Suppose someone takes a job as a welder, recycles newspapers, or buys aspirin rather than chocolate bars. When we say that

107. See Helen E. Longino, Science as Social Knowledge: Values and Objectivity in Scientific Inquiry 103–32 (1990).

108. See Slovic, supra note 56, at 120; Pildes & Sunstein, supra note 56, at 57–58.

109. See Kuran, supra note 17, at 176–95.

someone "prefers" to do as he chose, what exactly do we mean?[110] There are two major possibilities. First, preferences may be choices. Second, preferences may be the mental states that stand behind choices. Attention to the place of norms, meanings, and roles complicates both of these ideas; it suggests that for many purposes, it would be best to dispense with the term "preference" altogether, and to work with more fine-grained ideas. It follows that much of legal and political debate—about whether the state should respect "preferences"—is based on a confusion stemming from inadequate specification of what "preferences" are. The point very much bears on the continuing puzzle of paternalistic government.

A. *Preferences As Choices*

The idea of a "preference" might be understood as simply a choice, as in the idea, influential within economics from the work of Paul Samuelson, of the "revealed preference."[111] On this view, preferences *are* choices. This approach seems promising, because it makes it unnecessary to inquire into the mental states that accompany choices. Perhaps we can work from behavior alone, and make predictions on the basis of behavior alone. Perhaps behavior itself will show valuations that can be used not only for positive but also for normative purposes.[112] And there is no doubt that it is illuminating to catalogue choices.

If, however, this is what we are doing, it is unnecessary and perhaps misleading to use the notion of a "preference," which seems to be intended to explain or to back something called choices. If we are really talking about choices, we can dispense with the idea of preferences entirely. We will have a list of choices and should speak only in terms of that list.

Perhaps this is merely a semantic quibble. Perhaps social theorists can work with the list for positive or normative purposes. But if they are really working just with choices, they will encounter many problems. Choices are inarticulate, and hence imperfect predictors of behavior without an account of what lies behind them.[113] From the bare fact of (particular) choices, it is not always possible to make robust claims about future choices. This is because particular choices depend on the context and on the norms, meanings, and roles prevailing in that context. When

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110. The question is not adequately sorted out in the legal literature on both sides of current debates about government respecting "preferences." Thus—to take a not entirely random example—Cass R. Sunstein, Legal Interference With Private Preferences, 53 U. Chi. L. Rev. 1129 (1986), takes the term "preferences" as if it is clear; the analysis is weakened by the failure to discuss the ambiguities in the term.

111. Paul A. Samuelson, Consumption Theory in Terms of Revealed Preference, 15 Economica 243, 243 (1948). I do not deal here with formal models of the sort described and criticized in Hampton, supra note 23.

112. See, e.g., Viscusi, supra note 65.

113. See Aronson, supra note 95, at 187–89; Sen, Internal Consistency, supra note 23, at 496–98; Amos Tversky & Itamar Simonson, Context-Dependent Preferences, 39 Mgmt. Science 1179, 1187 (1993).

changes occur in the context, new norms may come into play. And because of norms, even the weakest axioms of revealed preference theory can fail.[114] John Jones, in the fifth tale,[115] presents an illustration; his particular choices do not allow observers to offer general predictions. But for the present let us take a simpler example. If Jones prefers X over Y, we might think that the mere introduction of an undesired third alternative, Z, ought not to change this preference. After all, Jones prefers X to Y, and he would have to be an odd person to prefer Y to X simply because of the introduction of Z.

But we can readily imagine cases in which the new alternative Z has precisely this effect. Jones might, for example, always select the second largest piece of cake, or he might want to be a person of relative moderation. If Z is an especially large piece of cake, his preference for X (once the second largest, now the third) over Y (once the largest, now the second), will shift. Empirical work has encountered an effect called "extremeness aversion," in which people make choices that avoid the extremes.[116] Extremeness aversion is at least partly a product of social norms. People are generally taught to avoid extremes, and people who make extreme choices seem like malcontents, oddballs, or (never a word of praise) extremists.[117] There are many examples. A voter might, for example, choose a Republican candidate over a Democratic candidate; but the introduction of some third candidate (say, Ross Perot) may lead him to choose the Democrat, because it makes some new characteristic salient to voters,[118] or because it shifts the outcome produced by the decision, making it moderate when it would otherwise be extreme. Barry Goldwater's famous slogan—"extremism in the defense of liberty is no vice . . . and moderation in the pursuit of justice is no virtue"[119]—was an (unsuccessful) effort to alter the social meaning of a vote for Goldwater.

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114. See Tversky & Simonson, supra note 113, at 1187-88. Perhaps the weakest of these is the idea that if A prefers X to Y, the introduction of a third alternative, Z, ought not to make A prefer Y to X.

115. See supra Part I.E.

116. See Tversky & Simonson, supra note 113, at 1183.

117. Cf. R.W. Apple Jr., Judge is Witness: His Burden of Proof, N.Y. Times, Sept. 24, 1987, at A26 (describing confirmation strategy of avoiding extremist-sounding testimony); In re Bork: Ex-Chief Justice, Law Professor and Carter Aide Present Views, N.Y. Times, Sept. 24, 1987, at A20 (excerpt of Bork hearings addressing question of whether Bork deserved the term "extremist").

118. Cf. Jonathan W. Leland, Generalized Similarity Judgments: An Alternative Explanation for Choice Anomalies, 9 J. Risk & Uncertainty 151, 169 (1994) (presenting model of "generalized similarity judgments" that "predicts violations of tenets of rationality"); Itamar Simonson & Amos Tversky, Choice in Context: Tradeoff Contrast and Extremeness Aversion, 29 J. Marketing Res. 281, 289–92 (1992) (arguing that the importance to consumers of certain product characteristics varies with the numher of product choices); Slovic, supra note 33, at 364 (discussing dimensions of choice).

119. William Safire, What's an Extremist, N.Y. Times, Jan. 14, 1996, § 6 (Magazine), at 14.

In fact extremeness aversion is itself a contextual "taste," one that varies with both setting and governing norms. In a society or subculture in which extremeness is prized, there may be no such aversion (assuming the idea would be intelligible). All of us have seen subcultures in which extremeness is a virtue (and does not quite count as extremeness). In fact many people who are generally averse to extremeness are, in one setting or another, quite willing or even delighted to be extreme; a person who dresses in ordinary ways may be delighted to wear loud ties, or to make odd dessert choices. This is partly because the social meaning of extremeness in that context is different from what it usually is. It may, for example, signal boldness and confidence rather than self-destructiveness and peculiarity.

More broadly, the social meaning of action can encourage people to make a certain choice, by taxing or subsidizing it; the meaning, and hence the choice, very much depends on the context and the norms that accompany it. If you are in a certain social group, you may well choose a drink of brandy or wine over Coca-Cola simply because of local practices. The choice of Coca-Cola may signal excessive informality, an unwillingness to unwind and enjoy oneself, or even disrespect. But in a different group, your choice may be different (and all this regardless of what you would choose if you were in your house alone[120]). You may purchase an American car, or display the flag on July 4, or engage in risky behavior because of existing norms in your community. Perhaps your purchase of a non-American car would signal a lack of patriotism; perhaps your failure to display the flag would be taken as a political protest whether or not you meant it that way. If you run a local television station, your decision whether to allow violent programming is very much a function of prevailing norms, even if such programming would attract a large audience.

Role is, of course, an especially important determinant of choice. A teacher may refuse an alcoholic drink at a party with students, just because he is a teacher; students may choose a certain kind of music just because they are students and their teachers are there. A teacher's willingness to have a drink with students signals a host of characteristics with which the teacher may not want to be associated. A student group's decision to play rap music at a party with teachers may signal disrespect or (what may be the same thing) excessive friendliness. Because of the importance of context and surrounding norms, a choice of one good over another may tell us little about further choices unless we know a lot about the motivations and context of the choice.

These points suggest that to explain or predict behavior, it is important not only to know about choices but also to have some account of what underlies choices, or of what choices are *for*, and in this way to intro-

120. I do not suggest that that choice would be norm-free or that it should be taken as definitive of what preferences "really" are.

duce an account of motivation.[121] Here social norms, meanings, and roles will be crucial. And if this is right, it is impossible to explain behavior by reference to choices, without using the very apparatus that the "revealed preference" idea was intended to eliminate.[122]

Normative arguments on the basis of choices alone[123] will also run into serious trouble. After finding that a person or group makes certain choices, we may think we can infer what or how much that person or group values, and from this make policy recommendations about, for example, workplace safety or environmental protection. But this is hazardous. Choices are a function of norms, which may be limited to certain settings. Choices need not suggest acontextual valuation of social goods, and thus even if we want to respect people's valuations, we will have to look not at, but behind, choices.

B. *Preferences Behind Choices*

Let us turn, then, to another, more promising conception of a "preference." The term is often meant to refer not to choices themselves, but to something that lies behind, and accounts for, choices. Gary Becker's work is in this tradition.[124] The idea has obvious advantages. It seeks to provide the motivational story behind choices, and if the motivational story is uncovered (and sufficiently simple), positive work should be possible. And if we can identify what lies behind choices, perhaps we can get a sense of people's own conception of what promotes their well-being. Knowledge of this conception is surely relevant for purposes of both ethics and politics.[125] Hence an emphasis on social norms should not be seen as an attack on rational choice approaches to social and political problems. From the standpoint of an individual agent, norms provide a part of the background against which costs and benefits are assessed; more specifically, they help identify some of the costs and benefits of action. From the standpoint of the individual agent, this is hardly irrational, and it is hardly inconsistent with self-interest. (Whether certain norms are rational for society as a whole is a different question. Undoubtedly some of them are not.)

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121. See Sen, Internal Consistency, supra note 23, at 496–98.

122. See Samuelson, supra note 111, at 243.

123. See Viscusi, supra note 65.

124. See, e.g., George J. Stigler & Gary S. Becker, De Gustibus Non Est Disputandum, 67 Am. Econ. Rev. 76 (1977).

125. There are, however, problems with so using preferences. First, some preferences are adaptive to an unjust status quo; when an unjust status quo is responsible for preferences, the status quo cannot be justified by reference to the preferences. See Elster, supra note 101, at 133–40. Second, the preference may well take the form it does for highly contextual reasons, and should not be thought to he the agent's preference in some abstract or global way. In another context, the preference may take a different form. See supra Part I.E. Third, the preference may be an artifact of social pressures directed against public statements or acts of a certain kind. See Kuran, supra note 17, at 22–44.

I think that positive and normative work can and should operate in this way. But the idea introduces difficulties of its own—indeed, the difficulties that the "revealed preference" notion was intended to overcome. These difficulties make the idea of "preference," as the agent behind choice, too crude. Recall John Jones, the protagonist of the fifth tale.[126] Can we provide an account of Jones's motivation or "preferences"? No simple answer would make sense. Several possibilities do present themselves. From the fact that Jones pays a certain premium for automobile safety, we might judge that he is risk-averse—someone who prefers to avoid danger—and we might even attempt to generate numbers capturing his own conception of the value of his life.[127] But when it comes to bicycle-riding, Jones is somewhat reckless. And in his capacity as voter, Jones's valuations appear still more complex. To get a full account of his motivation, we need to know many details—something like a personality profile.

This point raises some larger issues. If we think of a preference as something that lies behind choice, what is it exactly? Plainly it is a disposition or a mental state of some kind.[128] And plainly people do have dispositions of various sorts. But internal mental states can be extraordinarily complex. People's decisions are based on a complex of whims, responses to norms, second-order preferences, aspirations, judgments, emotions, drives of various kinds, conceptions of role, and more, with all these producing particular results depending on the context. What lies behind a choice in one setting may be quite different from what lies behind a choice in a different time and place.

In this light, it can be hard to make predictions about individuals or groups without knowing a great deal. Of course the value of positive work lies in what the evidence shows. If predictions can be made with simple accounts of preference, so much the better. Of course there are regularities in people's behavior, and these regularities can be connected to people's dispositions. But general dispositions of various kinds—to avoid extremes, to comply with (or violate) norms, to fit with expectations associated with role, to drink beer rather than wine—manifest themselves in particular choices only in accordance with context. No simple thing called a "preference" accounts for choice. Preferences are not the building-blocks for a theory of decision; if positive work is to be done very well, whatever we call a "preference" needs to be unpacked further.

Of course an excessively detailed account of the ingredients of "preference" may make predictions impossible. A standard that relies on too many factors will not be a basis for social science. We might, then, begin by distinguishing among intrinsic value, reputational effects, and effects on self-conception, and by seeing whether changes in, for example,

126. See supra Part I.E.

127. This is the basic project in Viscusi, supra note 65, at 34–74.

128. Of course mental states have relations to physical entities. For a controversial account, see Paul M. Churchland, The Engine of Reason, The Seat of the Soul (1995).

reputational effects induce changes in choice.[129] This might well be a productive direction in which social science will eventually move.

Shifting from positive to normative, we can see that the complexity of mental states also makes it hard for governments to know how to respond to people's choices. Take an important and contested issue in development policy. To what extent should a national government or international institutions take people's "preferences" as given? Perhaps more important: What does this idea even mean? For example, a poor woman in India may in some sense not wish to be literate, especially if she faces severe sanctions from trying to do so.[130] Because of those sanctions, she may "prefer" not to go to school, or fail to "choose" to go to school, and she may resist certain efforts to teach her to read. We might call these her "conventional" preferences, and they are certainly real.

But in what sense is it helpful to say, in such a case, that she "prefers" the status quo? She may also have certain aspirations—to have self-respect, to be capable of doing a range of things, not to be wholly dependent on others. We may call these her "fundamental" preferences (in the sense that she probably will consider them deeper than her particular choices), and they are real too. In these circumstances, her decision not to learn to read is a function of social norms directly connected with her role, and with the social meaning of her education for people in her group. Norms and roles impose costs on choice, and as the situation has been described, those costs are decisive for her. But on reflection she may wish both roles and meanings to be different. Her general aspirations may conflict with her more particular choices.

She may well see all of this already, or at least under appropriate conditions. If she does, and if she is taught to read and delighted by that fact, should we say that her preference has been changed? The answer depends on how her preference is specified. In some ways the process of learning is consistent with her deeper or more fundamental "preferences." (Of course there are complex issues of interpretation in the description of some preferences as fundamental and others as conventional. Any such description will have large evaluative dimensions.)

The example is merely illustrative. The same questions might be asked about smoking, drug use, single parenthood, risky sexual activity, recycling, and much more. Collective efforts to discourage damaging or risky behavior, or to encourage norms that promote well-being or solve collective action problems, might well be consistent with people's underlying aspirations and judgments.

It may be tempting to think that in cases of this kind, there is a conflict between preferences and metapreferences, or between preferences

129. See Kuran, supra note 17, at 24–38.

130. See the accounts in Amartya Sen, Inequality Reexamined 117–28 (1994); Amartya Sen, Commodities and Capabilities 73–83 (1985) [hereinafter Sen, Commodities and Capabilities]; Martha Nussbaum, Aristotelian Social Democracy, *in* Liberalism and the Good 203, 216 (R. Bruce Douglass et al. eds., 1990).

and preferences about preferences.[131] This is indeed an important phenomenon, one that also complicates certain antipaternalistic arguments. But it is different from what I am now describing. People have preferences about their preferences, but they also have preferences at different levels of precision and generality.[132] Sometimes people are indeed forced to do things that (it makes sense to say) they do not wish to do. But it is far from simple to identify a "preference" as something that stands behind choices and explains them.

This is not to say that the idea is entirely unhelpful. For some purposes it may aid analysis. We may be able to posit that a legislator "prefers" to be reelected and we may use that preference for positive purposes. Social scientists may be able to posit that most people prefer to obey social norms most of the time, and make predictions accordingly. Of course some people regularly like some foods better than others merely on grounds of taste, and they choose accordingly. But these are the simplest cases, and even here there are complexities. And in other cases, things are far more difficult.

C. *Against the Idea of Preferences*

From all this we might conclude that for many purposes, the whole idea of a "preference" is confused and misleading because it is ambiguous between choices and underlying psychological forces, and because the mental operations that produce choices are a function of a great many factors, prominently including social norms and social roles. For many purposes, it might well be best to dispense altogether with the idea of preference and to work instead with choices on the one hand and with complex and somewhat unruly mental states on the other—or to relate choices to more concrete sources of subjective value (intrinsic value, reputational effects, and effects on self-conception) or to a wide set of influences (norms, roles, price changes, increases in leisure time). I believe that this point gives us reason to doubt the elaborate edifice of social

131. See Gary S. Becker, Habits, Addictions, and Traditions, *in* The Essence of Becker, supra note 32, at 218, 232 (referring to metapreferences); cf. Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, *in* The Importance of What We Care About 11, 11–25 (1988) (distinguishing between first order and second order desires).

132. Human motivation includes many ingredients: bodily appetites, emotions, reasoned judgments, and more. Social norms do not play the same role in all of these. Hunger and thirst certainly are affected by social norms; one's attitude toward these things is hardly unmediated by learning. But hunger and thirst are connected with physical states, and in extreme forms they are likely to be unpleasant no matter what the prevailing norms may be—even if the unpleasantness can be counteracted by attitudes of certain sorts. The case of racial attitudes should be analyzed quite differently. The emotions present a special case: Early childhood experiences affect fear and jealousy in a way that they may not some other attitudes. A serious problem with the idea of "preference" is that it runs all these together. As we will see, the conflation makes it harder to understand how governmental practices might shape attitudes in different contexts.

science based on notions of "preference" or "metapreference"[133] (though much of the edifice can remain if reconstructed on different foundations).[134] The eventual task is to separate positive, descriptive, and normative inquiries more sharply, and in the process to try to untangle relevant mental states and their influences on choices.[135]

IV. Choices, Norms, Roles, and Meanings

In this section I discuss in more detail how social norms, roles, and meanings affect choice. I also deal with the place of shame and pride in explaining certain anomalies in human behavior. In the process I offer some notations on how this point bears on law and legal policy, especially by showing how law can affect choice by affecting the sources of shame and pride and associated norms.

A. *In General*

What is the relationship between choices and social norms, between choices and social roles, and between choices and social meanings?

1. *Choices and norms.* — Choices are, of course, affected by social norms. As I have said, we can understand a norm—with respect to choices—as a subsidy or a tax. If you would otherwise like to dress colorfully, and if the relevant norm fortifies that choice, the norm is a subsidy; but norms governing dress can operate as a tax too, as they do in many professional (and nonprofessional) settings.

The mere fact that a norm is as it is need not be decisive with respect to choices. Any particular social norm is only a relevant factor. The extent of its effect will depend on five factors: (1) the intensity of the norm (exactly how much opprobrium attaches to a violation?); (2) the nature of the norm (what kind of attitude is signalled by a violation? what kind of

133. This is the approach defended by Gary Becker. See Becker, supra note 131. In Becker's view, preferences change, but metapreferences stay constant. There are many puzzles here. Metapreferences may change too. Someone may want to be the sort of person who has many friends and goes to many parties (whether or not one is that sort of person); but this metapreference may shift. Someone may want to be the sort of person who likes classical music (even if one prefers rock and roll); but this may shift. It may be possible to posit a human motivation of some sort—to have a good life, or to have a lot of money—and see how far we can get with the assumption. Perhaps some of the motivations that it is helpful to posit can be described as metapreferences. But certainly one's preferences about one's preferences shift over time, and it may even be possible to model those shifts. Note that metapreferences, like preferences, are a product of social norms.

Becker has, however, recently recast his approach to place emphasis on "social capital" rather than metapreferences, and this recasting fits well with much of what I am suggesting here. See Becker, supra note 21.

134. Cf. Gary S. Becker, Irrational Behavior and Economic Theory, *in* The Essence of Becker, supra note 32, at 18 (discussing dispensability of the economic assumption of rational behavior by individuals).

135. Becker, supra note 32, and Kuran, supra note 17, at 326–48, make some movement in that direction.

attitude is provoked by violators?); (3) the agent's attitude toward the norm and the opprobrium occasioned by its violation (does the agent like to be seen as a defiant person? how does the agent react to social opprobrium?); (4) the possibility of social approval or forgiveness among relevant subgroups (will the agent's peer group support the norm-defying act?); and (5) the nature and weight of the other ingredients in choice, including competing norms, intrinsic value, and effects on self-conception (what must a norm-complier sacrifice?).

Some people like to make choices that violate social norms, or do not much mind doing so. Some people are willing to ask whether some, many, or all norms really make sense. Some people are willing to choose in such a way so as to violate norms if the "price" of compliance is high, as it is, perhaps, for some people who are asked to refrain from smoking, or for others who are asked to clean up after their dogs. If norm violators are viewed in relevant places as somewhat courageous—or as freedom fighters engaged in a form of civil disobedience—norm violation will not be terribly uncommon. This is true for smokers in some places, and also for people engaged in homosexual relations. With respect to both, whether to be "in the closet" is partly a function of social norms.

2. *Choices and roles.* — Choices are pervasively a function of social role. A teacher might dress a certain way, take a certain salary, or refuse to talk about the current President in class, because of what is (understood to be) entailed by the social role of teacher. A teacher might do some of this even though she would greatly wish that the social role of "teacher" had different implications. A patient might act a certain way toward her doctor just because of the nature of norms associated with the doctor-patient relationship, even if the patient would like that relationship to be different.

In some cultures, a social role entails a great deal of gift-giving to hierarchical superiors.[136] Social inferiors who do not give gifts are signalling something bad or dangerous about themselves, to the effect that they are disrespectful, rebellious, or angry at their superiors. The "choice" to offer gifts is a function of role. This is pervasively true of human choices, and if it is not visible, it is only because the particular role is so deeply internalized. The practice of giving gifts to hierarchical superiors may seem exotic to most Westerners; but it has parallels in a wide range of social gestures signalling an understanding of social hierarchies and roles.

3. *Choices and meanings.* — Like a social norm, the social meaning of an act can operate as a subsidy to choices or as a tax on them. Suppose that the social meaning of listening carefully to others, and not talking a great deal of the time, is to reveal yourself as a good person who cares

136. Consider, for example, contemporary China.

about others and about what other people have to say. If so, the act[137] of listening carefully to others is "subsidized" by its social meaning, in the sense that the benefits of listening carefully are increased, by the social meaning, over what they would otherwise be. If, by contrast, the relevant social norm is that talking a lot, interrupting, and claiming the spotlight reveals strength of character, confidence, and an understanding of one's general importance—whereas listening reveals weakness, low status, and confusion—the social meaning of listening carefully is a "tax" on the choice of doing so.[138] Thus courtesy can be made more or less costly by social meaning. There are many examples in social life, with the amount of the subsidy or the tax varying with context.

4. *Preferences.* — What is the relationship between social norms, social meanings, and social roles on the one hand, and "preferences" on the other? If preferences are what lie behind choices, then norms, meanings, and roles are part of the complex and unruly set of factors that help produce choices. People usually do not want to feel shame, and for this reason they may act consistently with a social norm, even if they believe the norm is wrong and wish the norm were otherwise. Some people may not want to face the hostility of others and may obey the norm for that reason. Some people may do things to counter the social norm, perhaps to show a reflective judgment that the norm is wrong, perhaps for the sake of defiance. We might say, then, that any preference for an action is partly a function of social norms and the agent's attitude toward those norms.

B. Willingness To Pay vs. Willingness To Accept: The Place of Shame

Once we incorporate social norms into our account of choice, we can explain some anomalies in common theories of rationality. As the five tales at the beginning of the Article show,[139] seemingly anomalous behavior can result from anticipated shame or pride. My goal here is to explain how social norms help account for anomalies in ways that bear on positive social science in general. Many such anomalies qualify as such at least partly because of social norms. In particular, behavior is a product of shame and pride, or anticipated shame and pride, and changes in behavior often reflect anticipations of shame and pride (as seen in all five tales in Part I).

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137. Not the preference, which is a confusing concept in this setting, for reasons discussed above.

138. See generally Diego Gambetta, "Claro!": How to Get Deliberative Democracy Wrong (1995) (unpublished manuscript, on file with the Columbia Law Review). Gambetta describes the culture of "claro" in Italy and South American countries, in accordance with which any statement of any kind is greeted with the word "claro!"—signalling, "of course; I knew that"—and in which any statement of ignorance is treated as an admission of weakness. See id. at 1, 6–13. In such a culture, the social meaning of surprise and learning is different from what it is elsewhere.

139. See supra Parts I.A–E.

Recent empirical work suggests that many claims in economics[140] rest on an intriguingly false assumption, one that indicates that it sometimes may be impossible for government to take preferences "as they are."[141] The basic finding is this: The initial grant of an entitlement of some good X to some person A can make A value X far more than he would if X had been initially allocated to B. (It also makes B value it less than he otherwise would.) The initial allocation—the legal rule saying who owns what before people begin to contract with one another—serves to create, to legitimate, and to reinforce social understandings about presumptive rights of ownership. The effect of the initial allocation of a commodity or an entitlement is commonly described as the "endowment effect."[142]

This point has received considerable empirical confirmation, often in the context of environmental amenities. One study found that people would demand about five times as much to allow destruction of trees in a park as they would pay to prevent the destruction of those same trees.[143] When hunters were questioned about the potential loss of their hunting licenses, they said that they would be willing to pay an average of $247 to prevent the loss—but would demand no less than $1044 to accept it.[144] In another study, participants required payments to accept degradation of visibility ranging from five to more than sixteen times higher than their valuations based on how much they were willing to pay to prevent the same degradation.[145] A related experiment tried to ascertain the "existence value" of a tree-like houseplant. The subjects were told that any trees not sold or kept would be killed at the end of the experiment. The mean willingness to pay (WTP) to avoid the "kill" option was $7.81. The mean willingness to accept (WTA) payment to allow a tree to be killed was $18.43.[146]

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140. Including the Coase theorem.

141. See Richard H. Thaler, Toward a Positive Theory of Consumer Choice, *in* Quasi Rational Economics, supra note 38, at 3, 7–10. A good overview is Elizabeth Hoffman & Matthew L. Spitzer, Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications, 71 Wash. U. L.Q. 59 (1993). See also W.R. Dubourg et al., Imprecise Preferences and the WTP-WTA Disparity, 9 J. Risk & Uncertainty 115, 116 (1994) (arguing that imprecision of people's preferences is a factor explaining WTP-WTA disparities).

142. It was first so-called in Richard Thaler, Toward a Positive Theory of Consumer Choice, 1 J. Econ. Behav. & Org. 39 (1980). This essay, along with others of similar interest, can be found in Quasi Rational Economics, supra note 38.

143. See David S. Brookshire & Don L. Coursey, Measuring the Value of a Public Good: An Empirical Comparison of Elicitation Procedures, 77 Am. Econ. Rev. 554, 562–63 (1987).

144. See Judd Hammack & Gardner M. Brown, Jr., Waterfowl and Wetlands: Towards Bioeconomic Analysis 26–27 (1974).

145. See Robert D. Rowe et al., An Experiment on the Economic Value of Visibility, 7 J. Envtl. Econ. & Mgmt. 1, 10 (1980).

146. See Rebecca R. Boyce et al., An Experimental Examination of Intrinsic Values as a Source of the WTA-WTP Disparity, 82 Am. Econ. Rev. 1366, 1370 (1992).

In general, the range of the disparity appears to vary from slight disparities to a ratio of more than four to one, with WTA usually doubling WTP. Environmental goods tend to reflect a disparity of factors from two to over ten.[147] In some environmental experiments involving trees, the WTA/WTP ratio is extraordinarily high, averaging around 75/1.[148]

What explains this phenomenon? There are many possibilities, and none is likely to be exhaustive.[149] My suggestion is that some of the difference between WTP and WTA has a great deal to do with social norms and social meanings. If someone says that she is willing to accept $X to allow the extinction of a species, the meaning of her action is altogether different from what it is if she says that she is willing to pay $X (and no more) to prevent the extinction. Under prevailing social norms, one ought not to accept even a great deal of money to allow destruction of an environmental amenity—partly because the good at issue is collectively owned, partly because its loss may be irreversible, and partly because it is not thought to be commensurable with its cash equivalent (in the sense that it is not valued in the same way or along a single metric).

In these circumstances, people who announce their willingness to accept cash for the loss of a pond or a species feel *shame.* They believe that they are assuming responsibility for the destruction of something intrinsically valuable, not replaceable, and owned by many people. Because of the risk of shame, people will demand a great deal, and they may even refuse any amount that is offered.[150] By contrast, those who refuse to pay an enormous or infinite amount to *save* an environmental amenity do not feel the same degree of shame (if they feel shame at all).[151] They are confronted with a different set of social norms.

Take an analogy. If someone is asked how much she would be willing to accept to allow her dog's life to be shortened by six months—or how much she would be willing to accept to allow her dog to suffer severe

147. See id. at 1366.

148. See Brookshire & Coursey, supra note 143, at 561–62.

149. See Cass R. Sunstein, Endogenous Preferences, Environmental Law, 22 J. Legal Stud. 217, 227–30, 242–53 (1993).

150. Thus in surveys nearly 50% of people sometimes refuse to name any amount. See Rowe et al., supra note 145, at 9.

151. There is a hackground issue here about the relation between shame and guilt. Sometimes shame is described as a result of violations of a widely shared standard of proper behavior; by contrast, guilt is described as a transgression of other people's rights. See John Rawls, A Theory of Justice 483–84 (1971). Sometimes guilt is described as a feeling of wrongdoing experienced by individuals consulting their own conscience in an individualistic culture, whereas shame reflects violation of a community's widely shared norms. See Stuart Schneiderman, Saving Face: America and the Politics of Shame 5–6 (1995). On this view, America is sometimes described as a "guilt culture" and Japan as a "shame culture." See id. at 5. But these descriptions are controversial.

There is also an underlying question about the extent to which people actually believe that the norm is right. Of course people may comply with norms (because of the reputational cost of violating them) that they reject in principle; their compliance may be more likely if they approve of the norm for articulable or firmly held reasons.

pain for (say) one week—she might well say: "No amount is sufficient." The question is very different if a veterinarian is asking someone whether unusual and expensive medical procedures should be used to prolong a dog's life or to reduce its pain. Here the answer need not be: "No amount is too high."

Some intriguing work suggests that the disparity between WTA and WTP is connected with the assignment of moral responsibility for the destruction of environmental assets, which are perceived as intrinsic goods. The WTA measure assigns responsibility to the individual. The WTP measure does so more ambiguously.[152] These findings are consistent with the norm-based explanation I am offering here. People want to avoid or minimize the feeling that they have been morally culpable for producing the loss of an environmental amenity.[153] Feelings of moral culpability are tightly connected with prevailing social norms.

C. *Anomalies, Shame, Altruism, and Free-Riding*

The general point—that choices are a function of norms and the sentiments they produce—relates to the first, second, and fourth tales in Part I;[154] we are now in a position to explain these apparent anomalies as well. When two people are to divide an amount given to them under the stated conditions, the offeror in the ultimatum game feels shame given prevailing norms[155]—that he is demonstrating that he is a greedy and even horrible person—if he offers a penny or a dollar from a sum of (say) $200. If a sum is given to two people under the conditions of the game, good people share; they do not try to keep almost all of the money for themselves. For his part, the offeree feels mistreated—treated in a contemptuous way—if a small or token amount is suggested.[156] The social meaning of the statement, "How about five cents for you?" is contempt; the social meaning of responding, "Great!" is a willingness to be dishonored.[157]

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152. This is an apparently pervasive social judgment about responsibility, but it must of course be defended; it is not self-evident. Consider the distinction between acts and omissions, of which this is an example; the line between the two has a great deal to do with ascriptions of moral responsibility. I am trying to describe the norm, not to defend it.

153. See Boyce et al., supra note 146, at 1371.

154. See supra Parts I.A–B, D.

155. He may well feel guilt as well; he may accept the prevailing norm in principle.

156. See Roth, supra note 1, at 270–74, 298–302.

157. Cf. Richard H. Thaler, The Psychology of Choice and the Assumptions of Economics, *in* Quasi Rational Economics, supra note 38, at 137 (describing fallibility of rational choice theory); Daniel Kahneman et al., Fairness as a Constraint on Profit Seeking: Entitlements in the Market, *in* Quasi Rational Economics, supra note 38, at 199 (discussing role of fairness in commercial settings). Of course feelings of dishonor may be based on bad norms, and it may be appropriate for people to try to change them. Cf. Elster, The Cement of Society, supra note 26, at 116–21 (discussing feuding); supra note 97 (describing current efforts to stop people from fighting when insulted).

So, too, even affluent people may recycle if prevailing norms make it shameful to refuse to do so, or if prevailing norms make it seem wonderful to engage in menial labor. Those who separate their garbage may enjoy the reputational benefits of doing so. Or they may enjoy the effects on their self-conception of contributing to what is perceived as a social good. Hence it should come as no surprise that people in East Hampton are willing to recycle, and even to separate, their garbage in a public space.[158]

Experimental work shows that people contribute to a shared good, and refuse to free ride, far more often than economists predict.[159] It also shows that agents are willing to cooperate, and hence to solve collective action problems without coercion, if most people are seen as cooperators; in such circumstances the social meaning of noncooperation is greed or selfishness. When a number of people free ride, and are seen to free ride, cooperation breaks down; in such circumstances the social meaning of cooperation is a willingness to be a "dupe" or a "sucker." The desire to contribute to a collective good is palpably a function of social norms. If social norms do not lead most people to contribute, contributions decrease steadily and dramatically.[160] The second tale[161]—involving littering and cooperation—should therefore be taken as a metaphor for many social outcomes.

My suggestion, then, is that apparent puzzles of rationality are often a product of social norms and moral judgments that are intertwined with those norms. When people appear to behave irrationally, in the sense that they violate predictions based on economic assumptions, it is often because social norms are at work. In such circumstances, nothing need be irrational in the normative sense about the underlying behavior; such people are not confused or inconsistent; they see existing norms (and associated meanings) as imposing costs on choice. Of course a full explanation of these matters would have to include an account of norms as well—why are they as they are?—and there is a risk that a reference to social norms will become a conclusory response to any apparently anomalous results. But once we identify prevailing norms, we may be able to make robust predictions about behavior and also to test those predictions

158. See supra Part I.D.

159. See Charles A. Holt, Industrial Organization: A Survey of Laboratory Research, *in* The Handbook of Experimental Economics, supra note 1, at 349, 409–11; John O. Ledyard, Public Goods: A Survey of Experimental Research, *in* The Handbook of Experimental Economics, supra note 1, at 111, 141–69; John M. Orbell et al., Explaining Discussion-Induced Cooperation, 54 J. Personality & Soc. Psychol. 811, 811 (1988). Note also that cooperation increases when people can talk with one another; discussion significantly raises contribution rates, perhaps because it increases empathy and the shame associated with noncooperation. See id. at 811–12, 818. Of course discussion may increase cooperation because it can introduce more assurance of compliance; but the greater assurance itself comes from norms.

160. See Kuran, supra note 17, at 48–49.

161. See supra Part I.B.

by asking, for example, whether the anomalous behavior continues when it is not observed publicly. We also may know something about the prospects for social change through law. If we know how laws affect behavior, we can more accurately generate laws that target norms. And if law generates a change in norms, behavior may change too. (Consider the second, third and fourth tales.[162])

These points suggest a more complex and adventurous one: For many purposes, it is not sensible to oppose "rationality" and social norms. Of course we could define "rationality" in many ways, and economists have offered restricted definitions that are useful for many purposes.[163] Such definitions, whether or not abstracted from norms, may be valuable for positive purposes. The test of a positive theory lies in its usefulness in making predictions. My central point here is that norms will create many of the costs and benefits that enter into an agent's decision. It follows that from the standpoint of the individual agent, rational decision is very much a function of social norms. Norms help show what it makes sense to do; norms even help identify costs and benefits as such.

It might seem natural to suppose that it is in people's interest not to pick up their garbage (see the second tale[164]) and that social norms against littering add a new or artificial factor to the individual calculus. But if we make this supposition, we are saying something about the individual's calculus without the anti-littering norm. What is the basis for any particular conception of how the calculus will come out? No such conception will be free of an array of ends, seen as such partly because of social influences, including social norms. Why, for example, is picking up garbage a cost rather than a benefit? Why, for that matter, is voting, cooperating, seeking revenge, putting one's fork on the right-hand side of the plate, covering up one's nose as one sneezes, or for that matter violating rather than complying with norms, best treated as a cost rather than a benefit?

An implicit (but undefended and obscure) state of nature theory seems to lie at the heart of many distinctions between social norms and rationality, or between social norms and rational self-interest. That is, the distinction seems to make sense only on the basis of some supposition about what people would do in some natural state lacking social norms. But we are not likely to be able to make much progress in that way. As I have suggested, a positive theory of human rationality will likely do best if

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162. See supra Parts I.B–D.

163. See, e.g., Douglas G. Baird et al., Game Theory and the Law 6–46 (1994); Graham Loomes & Robert Sugden, Regret Theory: An Alternative Theory of Rational Choice Under Uncertainty, 92 Econ. J. 805 (1982); Amos Tversky & Daniel Kahneman, Advances in Prospect Theory: Cumulative Representation of Uncertainty, 5 J. Risk & Uncertainty 297 (1992).

164. See supra Part I.B.

it sees norms as taxes on or subsidies to choice, and hence as part of the array of considerations that people face in making decisions.[165]

V. Government Action: On Autonomy and Tools

Sometimes it seems desirable for individuals or societies to change choices. Government might attempt to change, or help people to change, choices by changing social norms, social meanings, and social roles. In fact changes in norms may be the cheapest and most effective way to make things better, whatever are our criteria for assessing that matter. The relation between behavior and norms has yet to receive sustained attention; when we attend to that relation, we see that government has a policy instrument of great potential value. In this section I deal with some general points. I turn to more specific grounds, and more specific objections, in Parts VI and VII.

To be sure, private power to create norm communities may make government action less necessary or less desirable. Often the best step is to allow those communities to be formed and to see how they work out. But sometimes it is too costly for individuals to create or join those communities, and sometimes the generally held norm is too damaging to human well-being. These issues cannot be solved in the abstract; the judgment depends on the details. But it is clear that norms can create problems of various sorts and that collective action may be required in some cases.

A. *Norms and Paternalism*

Common objections to "paternalism" or "meddling" are not easy to sustain in such contexts. Recall that people usually do not choose norms, meanings, and roles; all of these are (within limits) imposed. As I have said, it would be ludicrous to deplore norms, meanings, and roles. They make life possible and they much facilitate social engagement. They provide the context within which free interaction is possible. Nonetheless, some of them operate as severe limits on autonomy or well-being, and certainly they should not be treated as fixed or given regardless of their content or consequences.

Private groups can test or even change norms. Indeed, the testing of current norms, meanings, and roles is a crucial function of groups that are intermediate between citizens and the state. Religious groups are in this sense norm entrepreneurs; the same is true for environmental and civil rights organizations. But sometimes private groups are unable to produce desirable change on their own. This is a point missed by the idea that the sole basis for government action is to avoid force, fraud, and

165. See Kuran, supra note 17; Becker, supra note 32.

"harm to others."[166] Obstacles to autonomy and to good lives can also come from bad roles, norms, and meanings.

Changes in norms and meanings can promote human well-being. Often all or most people would, on reflection, like to see a change in a particular norm;[167] and yet they cannot bring about the change on their own, because in his individual capacity, each person has limited power to alter meanings, norms, or roles. The case of mandatory helmets for hockey players is a familiar example. Hockey players may prefer not to wear helmets if the meaning of helmet-wearing is cowardice; but their preferred solution, available only through a league mandate, is a system in which all are required to wear helmets, and hence players wear helmets without signalling cowardice.[168] Of course shifts in norms, meanings, and roles are pervasive. Consider, for example, changing norms with respect to smoking, littering, drug use, polluting, racial discrimination, sexual relations outside of marriage, the roles of women and men, and interracial relationships.

In fact it is often hard to know what people would "like" or prefer, because their judgments and desires are entangled with norms, meanings, and roles, and because once one or more of these is changed, they may be better off, either objectively or subjectively. If government changes the social meaning of smoking (see the third tale[169]), has it acted illegitimately? What if most people, or most smokers, would, on reflection, want smoking to have a different meaning? Or suppose that government tries to change an aspect of a certain social role, like that of unwed fathers, high school teachers, homosexuals, or workers. Surely the consequences of the change matter; surely it matters if the change is supported by (most or all) unwed fathers, high school teachers, homosexuals, or workers, and if members of each group face a collective action problem. The justification for government action is firm if all or almost all people support it as a means of solving a collective action problem.

B. *Tools*

Suppose that government wants to change norms, meanings, or roles. It has many different tools for doing so; some of these are mildly intrusive while others may foreclose choice. Government may restrict itself to *education*, understood as simple statements of fact designed to en-

166. See Epstein, supra note 16, at 37–49; Richard A. Posner, Sex and Reason 2–4 (1992). I think that both Epstein and Posner give inadequate attention to the liberty-limiting effects of norms, roles, and meanings. The classic source of the "harm to others" idea, Mill, offers subtle arguments on the point. See John S. Mill, The Subjection of Women (1869); John S. Mill, On Liberty (1859) (developing a complex discussion of pressures to conform).

167. Their desire to this effect is likely to be a product of norms that are being held constant. See infra Part VI.A.2.

168. See Schelling, supra note 83, at 213–14; Lessig, supra note 24, at 967–68.

169. See supra Part I.C.

sure accurate beliefs. We have seen that norms, meanings, and roles can be a function of beliefs and that beliefs are mutable.[170] Perhaps prevailing beliefs are false and warrant correction. People may think that AIDS is a disease limited to homosexuals, that smoking does not hurt nonsmokers, or that there is no relation between cholesterol and heart disease or between diet and cancer. Changing norms with respect to smoking are almost certainly a result—at least in part—of information from the government about health risks.[171]

Of course government may try to ensure accurate beliefs in order to persuade people to do something new or different. It may seek to increase or decrease shame; or it may not be thinking much about norms. But so long as government restricts itself to the provision of accurate information, there should be no objection to governmental efforts to correct false beliefs, even if the correction affects norms, meanings, and roles. In fact the change along this dimension may be the most important consequence of education, which may, for example, remove certain kinds of shame on the part of people who want to buckle their seat belts or abstain from premarital sex.

Government may also attempt to engage in *persuasion*, understood as a self-conscious effort to alter attitudes and choices rather than simply to offer information.[172] Consider the third tale;[173] assume that some such advertisement had been issued by state officials. Perhaps it would have been effective (though its social meaning would have been altogether different if issued by officials rather than by members of the private African-American community). The "just say no" policy for drugs falls in the category of attempted persuasion; so, too, with efforts to control AIDS by strongly encouraging the use of condoms or abstinence from sex. Here government does not restrict itself to provision of information, but instead uses rhetoric and vivid images to change norms, meanings, or roles, and in this way attempts to persuade people to choose a certain course.[174]

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170. Beliefs, however, are not easily mutable because of cognitive dissonance. See George A. Akerlof & William T. Dickens, The Economic Consequences of Cognitive Dissonance, *in* George A. Akerlof, An Economic Theorist's Book of Tales 123 (1984); Aronson, supra note 95, at 171–239.

171. See W. Kip Viscusi, Smoking: Making the Risky Decision 47–60 (1992) (relating smoking trends and public information).

172. Cf. id. at 144–46 (criticizing persuasion as "propaganda" in the context of smoking, and arguing for information instead). Viscusi treats norms and meaning as exogenous givens and as some ineradicable part of the guiding normative criterion, "choice." If these are not fixed and not chosen, the attack on persuasion is much weaker because the background contains limits on liberty that government and citizens may seek to overcome. See, e.g., Excerpts from Clinton News Conference on His Tobacco Order, supra note 6, at A18.

173. See supra Part I.C.

174. This kind of approach is much more effective than the mere provision of facts. See Aronson, supra note 95, at 89–90. Part of the reason is status quo bias. See William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 J. Risk & Uncertainty 7, 8 (1988) (describing how people sometimes retain their particular choices

If government is interested in persuasion, it will understand that "reference states" matter a great deal, and it will use this understanding to lead people in the right direction. People are generally loss averse, in the sense that they are made more unhappy by a loss of a certain amount than they are made happy by an equivalent gain.[175] Hence reactions to information turn a good deal on how the information is framed. A claim that breast cancer examinations will increase the number of lives saved (over what it would otherwise be) is far less effective than a claim that the failure to examine one's breast will decrease the number of lives saved (over what it would otherwise be).[176] Similarly, energy conservation programs are far more effective if they point to the dollars lost through failure to conserve than if they point to the dollars saved through conservation.[177] The difference has a great deal to do with social norms and social meanings and in particular with shame. If government is interested in changing behavior, it will take advantage of the phenomenon of loss aversion.

Some people think that although the provision of information can be justified, government should rarely or never attempt to persuade.[178] But if norms, roles, and meanings are beyond individual control, and sometimes bad, this thought is hard to sustain, at least if government is subject to democratic controls.

Consider in this connection the problem of smoking and the lessons of the third tale.[179] Among African-Americans between 18 and 24, the smoking rate has fallen from 37.1% in 1965, to 31.8% in 1979, to 20.4% in 1987, to 10.3% in 1992.[180] Among whites in the same age group, the rate fell from 38.4% in 1965 to 27.8% in 1987—but it has remained more or less constant since that time.[181] The change among African-American teenagers is universally described as a " 'public health success story,' " but one that government officials cannot explain.[182] Though no one has a full account of this phenomenon, changing social norms appear to be

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instead of changing to a preferred alternative); see also Dubourg et al., supra note 141, at 128 (discussing overwhelming importance of the "reference state" in determining reactions to changes in risks).

175. See Daniel Kahneman et al., Experimental Tests of the Endowment Effect and the Coase Theorem, *in* Quasi Rational Economics, supra note 38, at 167, 182–86.

176. See Beth E. Meyerowitz & Shelly Chaiken, The Effect of Message Framing on Breast Self-Examination Attitudes, Intentions, and Behavior, 52 J. Personality & Soc. Psychol. 500, 506–09 (1987).

177. See Marti H. Gonzales et al., Using Social Cognition and Persuasion to Promote Energy Conservation: A Quasi-Experiment, 18 J. Applied Soc. Psychol. 1049, 1062 (1988).

178. See Viscusi, supra note 65, at 149–59.

179. See supra Part I.C.

180. See U.S. Department of Commerce, supra note 8, at 144.

181. See id.

182. Donald Bradley, Few Black Teens Smoke, But Why?, Kan. City Star, Aug. 12, 1995, at A1 (quoting Michael Eriksen, Director of the Office on Smoking and Health at the Centers for Disease Control and Prevention).

playing a substantial role.[183] Smoking does not have the same cachet in the African-American community that it has among whites. If government could bring about a general change in social norms—through, for example, attempts at persuasion—it is hardly clear that there would be a good objection to its behavior. Consider related findings about the close relation between norms and alcohol abuse.[184]

Government also might use economic instruments to *tax* or *subsidize* choices. Of course education is assisted publicly, as are day care, museums, and public broadcasting (at least as of this writing). Alcoholic drinks, tobacco products, generation of waste, and some polluting activities are met with taxes (although some of these are subsidized too). We can understand some economic incentives as efforts in part to counteract social meanings, social norms, or social roles with financial benefits or penalties designed to produce a good "equilibrium." A social meaning that is perceived to be bad might be "matched" with a financial disincentive. Some such incentives may amount to efforts to change social norms or social meanings. If a good becomes more expensive, the social meaning of choosing it may change. Cigarette smoking, for example, may become less popular if most people cannot afford to smoke. Of course it is hard to predict the effects of changes in price on norms.

Government also might impose *time, place, and manner restrictions.* It might ban smoking in public places. It might say that television shows containing violence may be shown only in certain time slots. It might require government itself to choose low-polluting motor vehicles. It might ban affirmative action in the public sector but allow it in the private sector. Strategies of this kind might affect the social meaning of the

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183. See id. at A19. It might be speculated that there has been a shift from cigarettes to some other harmful substance, such as illicit drugs. But it is notable that African-Americans have lower lifetime rates of reported use of illicit drugs (especially cocaine) than whites. The 1990 National Household Survey on Drug Abuse finds that 40 to 50 percent fewer African-Americans than whites under age 35 report any lifetime use of cocaine. (About 20% more African-Americans than whites over age 35 report lifetime cocaine experience.) For use in the last year, African-Americans between 12 and 17 report the lowest rates of use of cocaine—1.7% compared to 2.3% for whites. African-Americans in the 12 to 17 age group consistently posted lower prevalence rates than whites for lifetime, past year, and past month use. (Surveys in 1985, 1988 and 1990.) All of these data suggest that young African-Americans use illicit drugs at a lower rate than do young white people. These data do not address directly the substitution of cocaine for cigarettes. But it appears that while African-Americans between 12 and 17 use cocaine at lower rates than whites (according to 1985, 1988, and 1990 surveys), rates for both groups have decreased from 1985 to 1990. The white rate has decreased from 4.2% to 2.3% and the African-American rate has gone from 2.4% to 1.7%. Thus it seems that the public health success story regarding African-American teenagers and cigarette smoking also extends to cocaine use. And there may be another public health success story to be told with respect to cocaine use among white teenagers. All data is from Denise B. Kandel, The Social Demography of Drug Use, 69 Milbank Q. 365, 395–99 (1991). I am grateful to Tracy Meares for help on this point.

184. See William J. Sonenstuhl, Working Sober: The Transformation of an Occupational Drinking Culture (forthcoming 1996).

relevant activity very generally. But they do not foreclose choice entirely; they channel it instead. Of course in cases of this sort, government is directly affecting behavior. What I am suggesting is that it may be seeking as well to affect social norms and social meanings by affecting the wellsprings of shame and pride. The social meaning of smoking is, for example, affected by virtue of the existence of time, place, and manner restrictions, even in places lacking those restrictions.

The most intrusive kind of government action is of course *straightforward coercion.* Thus government might prohibit the use of certain drugs; require everyone to recycle or buckle their seat belts; or make education mandatory for people under a certain age.

C. *Levels and Institutions*

A polity concerned to change norms could proceed through different levels and with different institutional arrangements. Should it encourage private behavior through creative public-private partnerships? Should it, for example, fund private groups that are engaged in discouraging teenage pregnancy, drug use, and promiscuity? There is also a question about whether national action or local action is better. Norm management could occur in towns; it could happen at the state level; it could be a self-conscious effort of the national government.

The question about appropriate levels of government is hard to answer in the abstract. Much depends on the details. But two notations may be appropriate. First, public-private partnerships are often the most fruitful of all possible approaches. Purely governmental efforts at norm management may fail for lack of trust; imagine, for example, if the national government had engaged in the anti-smoking campaign that was apparently so successful among African-American teenagers. Often a government concerned with bad norms does best by working with charitable and religious organizations which can have a high level of competence, experience, and trust.

Second, it is probably best to have a presumption in favor of the lowest possible level of government.[185] The lowest level is closest to the people, and in that sense most responsive to it, and most likely to be trusted by it. The risk of futility or positive harm is accordingly diminished. Of course there are familiar counterarguments, and sometimes national efforts at norm management are well-justified. But a nation that is concerned about existing norms should exploit the possibilities that exist in a system committed to federalism.

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185. See Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987) (reviewing Raoul Berger, Federalism: The Founders' Design (1987)); Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism after Garcia, 1985 Sup. Ct. Rev. 341, 400, 402–03, 407–08; Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956).

VI. GOVERNMENT ACTION: FIVE GROUNDS

In this section I discuss several grounds for governmental efforts to change norms, meanings, and roles. The unifying theme is *the expressive function of law*—a term that I use to identify the function of law in expressing social values and in encouraging social norms to move in particular directions.[186]

My discussion will not by any means exhaust law's expressive uses,[187] and I do not discuss any of these grounds in much detail. I offer instead a brief sketch of some possibilities. An account of legitimate grounds for changes in norms will overlap a great deal with—and may even be reducible to—an account of the legitimate bases for governmental action. My purpose here is hardly to offer such an account, but instead to see how some fairly standard ideas might be brought to bear on the particular subjects under discussion. In none of these cases do I urge that social norms should be free from scrutiny on the merits by individual citizens. Government ought not to inculcate norms that cannot be supported and evaluated publicly, and on the basis of reasons. Like rules, norms will typically have a degree of crudeness and rigidity, and it is entirely appropriate for citizens to conclude that there are contexts in which even good norms make no sense if they are mandated.[188]

Nor do I urge that the mere fact that behavior is a function of norms provides some warrant for governmental action. To defend governmental action, some claim has to be offered about how such action will make things better. A reference to norms helps undermine the view that government should restrict itself to the satisfaction of "preferences." We have seen that this term is highly ambiguous and that norms can often undermine human well-being. But to defend a change, the idea of well-being has to be specified, and it has to be shown that the change would improve matters under the relevant criteria.

To introduce the analysis, we might make a few initial distinctions.

1. In some cases, all or almost all people will support an effort to change a norm, a meaning, or a role. In the case of hockey helmets, for

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186. For more discussion, see Sunstein, supra note 64.

187. In particular there is an intriguing set of laws desigued to fortify norms regulating the use of money as a reason for action. See id.

188. There is a currently prominent and controversial example: governmental efforts to stigmatize unwed parenthood. At first glance, it seems legitimate for public and private institutions to try to inculcate norms that make people feel ashamed if they produce children who will have horrible life prospects. For this reason, efforts to inculcate norms against unwed parenthood—in cases in which the children who result will have miserable lives—are fully supportable. But there are several questions that might be raised about this conclusion: (a) In some cases, unwed parents will not have done anything wrong, and hence they are entitled not to feel ashamed; (b) The fact that the children will have miserable lives may be a result of a background of social injustice; (c) Shame is heavy medicine, and some people might think that government should feel free to inculcate norms but not the particular norm of shame in this setting. These are merely questions about the project of shame inculcation in this context; they do not purport to be answers.

example, there may be near-unanimous agreement that things would be better if the meaning of helmet-wearing were not cowardice. In the case of cleaning up after one's dog, almost everyone may agree that things would be better if there was a norm in favor of cleaning up. Of course any such agreement may depend on norms that should themselves be brought into question.[189] We might say that the agreement can be "impeached" by showing that people do not, on reflection, endorse the norms that produce agreement, or that there are problems with those norms.

2. In some cases, all or almost all people will agree that behavior is a function not of intrinsic value, and not of effects on people's (well-considered) judgments about their self-conception, but instead a function of the reputational consequences of choice; and they will agree too that it would be better if the reputational consequences were different. All or almost all people might agree, for example, that use of drugs in a certain community stems from the reputational benefits of using drugs and the reputational costs of refusing to do so. They also might agree that things would be better if using drugs produced reputational harm rather than benefit; they might act accordingly via law (with education, attempted persuasion, economic incentives, or coercion). In this kind of case, there is also a possibility of "impeachment" of the agreement along lines suggested above.

3. In some cases, existing norms may be part and parcel of a caste system. They may turn a morally irrelevant characteristic—race and gender are the most obvious examples—into a signalling device with respect to social role and associated norms. If a caste system is unjust, it is appropriate to alter norms, roles, and meanings that perpetuate it.

4. In some cases, existing norms undermine people's well-being or autonomy, by discouraging them from being exposed to diverse conceptions of the good and from giving critical scrutiny to their own conceptions, in such a way as to make it impossible for them to be, in any sense, masters of the narratives of their own lives.[190]

These are brief notations on some highly controversial subjects. Needless to say, I cannot attempt here to defend an account of the appropriate role of the state; my purpose is more modestly to connect the project of norm management with some familiar ideas about what the state legitimately does. Notably, there are cases in which it is unnecessary to choose among two or more of the general grounds for government action; people with varying theoretical commitments might believe that a particular action makes sense. Hence political participants might achieve

189. See infra Part VI.A.

190. On this conception of autonomy, see Raz, supra note 22, at 400–29. This idea is very controversial as a foundational norm. See, e.g., John Rawls, Political Liberalism 134–35 (1994). But political liberals might well favor an effort to ensure against norms that prevent people from being or acquiring the capacities to be free and equal citizens. See id. at 174–76.

an *incompletely theorized agreement* on a particular outcome—an agreement on what steps make best sense, unaccompanied by a shared understanding of why, exactly, they make the best sense.[191] Those interested in possible changes in norms would do well to take advantage of such agreements.

A. *Some Unusual Collective Action Problems*

1. *Standard accounts.* — In a now-standard account, offered by many economists, lawyers, and political scientists,[192] social practices would be inefficient were it not for certain social norms; such norms solve collective action problems. They do the work of law.[193] They may provide conventions on which everyone voluntarily settles; table manners are examples. Or they may solve prisoner's dilemmas through social sanctions imposed on deviants; this is true of the idea that people should clean up after their dogs. And the absence of such norms makes some existing practices highly inefficient.

Let us begin here with the simple and conventional case of littering, captured in the second tale.[194] Under ordinary assumptions, each person may well litter—if the costs of throwing things in the garbage are wholly internalized, whereas the benefits of doing so are spread across a wide range of people. In the standard account, "rational" individuals, acting in their "self-interest," will produce a great deal of litter, perhaps so much that legal regulation ultimately is required. This idea helps explain legal responses to environmental degradation, as in the cases of mandatory recycling, taxes on or fees for polluting activity, and command and control regulation.

2. *Puzzles.* — It is illuminating to see things this way, but many questions might be raised by the standard account. The relevant changes do not bring about Pareto improvements, which occur only when everyone gains or at least some gain and no one loses. But in the cases at hand, some people are losers; in fact many people may be losers. With a mandatory seat belt law, for example, there will be people who dislike wearing seat belts and resent the coercion, no matter the number of people who wear them. Their objection has nothing to do with the social meaning of wearing belts; it involves the intrinsic inconvenience of doing so.

We should, in this light, distinguish the very simplest cases—in which all or nearly all people favor a change in norms—from cases in which

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191. See Cass R. Sunstein, Incompletely Theorized Agreements, 108 Harv. L. Rev. 1733, 1735–36 (1995); Cass R. Sunstein, Legal Reasoning and Political Conflict ch. 2 (1996) [hereinafter Sunstein, Legal Reasoning].

192. See, e.g., Ellickson, supra note 51, at 123–36; Ullmann-Margalit, supra note 51, at 18–133.

193. See Ellickson, supra note 51, at 123; Elster, The Cement of Society, supra note 26, at 125–40; Ullmann-Margalit, supra note 51, at 89–93.

194. See supra Part I.B.

there are bare majorities in favor of such a change. If everyone would favor a situation in which people pick up after their dogs, but this result cannot be brought about without government action, the case is easy: Government action should be initiated. But if 65% of people would favor the change, and 35% like the status quo, we have a harder case. Perhaps the change would be favored under the Kaldor-Hicks criterion; but that criterion is highly controversial.[195] To decide whether government action is appropriate, it is thus necessary to take a stand on a large question in political theory; the fact that norm-change is involved means that the setting is unusual, but the basic analysis is not.[196]

Even more fundamentally, the words "rational" and "self-interest" obscure a great deal, since they take so much for granted. At first glance it appears that there is no sharp dichotomy between rationality and social norms or between self-interest and social norms; taking the words in their ordinary sense, what is rational and what is in an agent's self-interest are functions of social norms.[197] Return to our second story[198] and suppose that there is a social norm that everyone should pick up litter.[199] If the norm is in place, people who act in their rational self-interest will not litter. In the second tale, were the non-litterers or members of the control group acting in their rational self-interest? What is rational, and what promotes self-interest, depends on many exogenous factors, including existing norms.[200]

There is a further point,[201] and it raises serious difficulties for the traditional account of the relationship between norms and collective ac-

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195. See Richard A. Posner, The Economics of Justice 91–92 (1981); cf. Ronald Dworkin, Is Wealth a Value?, *in* A Matter of Principle 237 (1985) (criticizing using "social wealth" maximization as a basis for social action).

196. To know whether government action is appropriate, we also need to ask whether government is pursuing legitimate ends and also whether the action is likely to be effective. See infra Part VII.

197. See the qualification in supra pp. 946–47. Of course nothing I have said is inconsistent with the view that we should adopt a tractable definition of rationality for positive purposes and see how that definition helps in predicting behavior. What might be adapted to this kind of approach is an understanding that the incentives created by norms will play a role in an individual's judgment about what is the rational thing to do.

198. See supra Part I.B.

199. Cf. Carol M. Rose, Introduction: Approaching Property, *in* Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership 1, 2–3 (1994) (discussing role of norms in providing environmental protection).

200. For an interesting qualification, see Holmes, supra note 22, at 42–68. Self-interest might be self-consciously defined in narrowly economic terms, in which case it is not formal but, on the contrary, has a point—the defeat of sometimes corrosive social norms such as honor, which can in some circumstances cause people to fight. Hence Holmes argues that the early liberal enthusiasm for self-interest was designed not to disparage altruism but instead to call attention to the fact that if people are pursuing economic goals in a self-interested way, they may not do the sorts of mischief associated with fanatics and dogmatists of various stripes. See id. at 53–62.

201. I am grateful to Ronald Dworkin for raising this problem.

tion problems.[202] The difficulty is that any collective action problem can be characterized as such only because of a wide range of norms, and not only because of the particular norm that is said to be producing the problem. The traditional account focuses on one norm, but the problem is a product of a wide range of them.

Suppose, for example, that there is no norm against littering; that people think that there is too much litter; and that they would like to create a new, anti-littering norm. Would it be right to say that this is a case involving a collective action problem that would be served best with the aid of a new social norm, that is, a norm against littering? The statement would not be false, but it would be misleading and incomplete. What gives rise to the collective action problem is an array of individual judgments and desires that are themselves (in all likelihood) a function of social norms. There are, for example, norms against clutter, norms involving certain conceptions of aesthetics, norms about public spaces. If people "want" a new norm—the norm against littering—their desire probably stems from many other norms, such as norms favoring clean rather than dirty parks, norms in favor of shared rather than maldistributed burdens, norms in favor of solutions through norms rather than coercion or fines.

When a situation is supposed to create a prisoner's dilemma that would be satisfied by some norm Z, the situation presupposes a range of norms A through Y which are being held constant and not being put in contention. Then the question becomes: Why is it that norm Z (say, the norm with respect to littering) is put into question, rather than some other norm (say, the norm favoring clean parks)? Why should a norm be established in favor of cleaning up after one's dog, instead of changing the norm producing unwillingness to be exposed to the relevant mess? This question has yet to be addressed in existing work on collective action and social norms. And the question has a powerful Coasian dimension.[203] The traditional account takes a set of norms as given, without seeing that they themselves might be altered, rather than altering the particular norm that has been put into question.[204]

Several answers might be offered. On the Coasian view, we might ask which norms can be changed most cheaply. Just as one person in a legal controversy might be the cheapest cost avoider, so one norm in a collective action problem might be the cheapest target of norm management.

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202. See Ellickson, supra note 51, at 149.

203. See R.H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1, 42–43 (1960).

204. Hence the traditional view is, roughly speaking, Pigouvian. In describing pollution as a problem of externalities, Pigou did not see that the pollution problem is a function not just of the polluter's most recent act, but also of something that is being taken for granted, that is the numerous acts and omissions of both polluters and pollutees. See id. at 34. In seeing a certain norm Z as creating or solving collective action problems, the traditional view does not see that norms A through Y are also important sources of the problems. Perhaps norm A, B or C might be altered more cheaply than norm Z could be.

It is plausible, for example, to think that it is much more efficient to create a norm in favor of cleaning up than to create a norm making people approve of clutter and mess. On this view, we would not inquire into the merits or basis of existing norms, but ask more simply which norms can be altered at the lowest cost. I speculate that an implicit judgment of this kind lies behind the traditional approach to this problem.

Alternatively, and departing from economic criteria, we might put at issue those norms that are not part of the relevant agents's own deepest convictions and self-understandings. Typically the norms thought to solve collective action problems seem to be a form of "tinkering," encouraging conduct that preserves what people believe most deeply, have thought through, or most take for granted. Finally, we might not look to agents's convictions but venture instead an objective account of human needs and human interests. On this view, we should create a norm against littering, rather than a norm in favor of clutter and mess, because lives are objectively better with the first norm than with the second. On such an approach, a collective action problem exists because if reasonable agents could agree on the norm in question, things would be better rather than worse. It is not clear, however, that this way of seeing things can coexist with ordinary understandings of collective action problems, which are rooted in subjective desires. A possible conclusion of what I have said thus far is that in the context of norms, the ordinary understandings face a serious conceptual problem.

3. *Legal responses.* — A well-functioning society needs many norms that make it rational for people, acting in their self-interest, to avoid collective action problems. When such problems exist, it is because of the social norms that make rational self-interest take a certain form—in favor, for example, of refusing to clean up or otherwise failing to contribute to shared projects.[205] If we draw back from the puzzles just discussed, we can make a simple point for simple cases: A large task for society and for law is to try to inculcate the relevant norms. Effective responses promote efficiency[206] and simultaneously enhance a form of freedom by producing outcomes that citizens reflectively judge best but cannot obtain on their own.

Much legal regulation has this goal. Such regulation might even consist of direct coercion, designed to generate good norms or to pick up the slack in their absence. There are laws designed to ensure that everyone picks up after their dog; that people do not litter; that people do not smoke in certain places. These laws are rarely if ever enforced through criminal prosecutions. But they have an effect in shaping social norms and social meanings. They do this in large part because there is a general

205. Of course it may be possible to create property rights as a way of diminishing or eliminating the collective action problem. See Terry L. Anderson & Donald R. Leal, Free Market Environmentalism 3 (1991).

206. The complications from the immediately preceding discussion should be kept in mind.

norm in favor of obeying the law. The relevant laws help to inculcate both shame and pride; they help define the appropriate sources of these things. (Of course people have to be brought up to have a sense of shame, and to have a certain understanding of what sorts of things call for shame, notably including certain paradigm cases from which analogies appear.[207]) They readjust the personal calculation, making what is rational, and what is in one's self-interest, different from what they were before.

The key point is that such a change may be supported by the reflective judgments of all or most people. When it is, there should be no objection in principle.[208] The point very much bears on the phenomenon of norm bandwagons. People may actually reject existing norms but fail to state their opposition publicly, and once public opposition becomes less costly, new norms may rapidly come into place.

B. *Citizens and Consumers*

John Jones, the protagonist of the fifth tale,[209] is in one way quite usual: There is an evident and pervasive difference between people's choices as consumers and their choices as citizens. This is because people are choosing quite different things.[210] In their private capacity, people may watch silly situation comedies; but they may also support, as citizens, the use of government resources to assist public broadcasting. Some people seek stringent laws protecting the environment or endangered species even though they do not use the public parks or derive material benefits from protection of endangered species—and even though in their private behavior, they are unwilling to do much to protect environmental amenities. The mere existence of certain environmental goods seems to be highly valued by political participants, even if they are not willing to back up the valuation with dollars in private markets. Of course many people give to organizations that support environmental protection. But what people favor as political participants can be different from what they favor as consumers. It is in part for this reason that democratic outcomes are distinct from those that emerge from markets.[211]

In fact a good deal of empirical work shows that people's judgments about politics are not a product of their self-interest, narrowly under-

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207. See Churchland, supra note 128, at 272–78 (describing role of paradigm cases in mental functioning); Charles E. Larmore, Patterns of Moral Complexity 1–5 (1987) (discussing moral examples). Creativity in politics and law usually consists of assimilating new cases to the paradigm ones. See Sunstein, Legal Reasoning, supra note 191, at ch. 3.

208. Some cases can be imagined in which the response would be invasive of rights and therefore, by hypothesis, unacceptable. See infra Part VII.

209. See supra Part I.E.

210. See Sen, supra note 78, at 26–31, 34.

211. Of course there are other reasons, including the free-rider problem, since citizens may support laws for whose costs other people are responsible.

stood. People without health care are not more likely to support laws creating a right to health care; people recently victimized by crime are not more likely to support aggressive policies against crime. Norms and values are instead the principal determinant of political judgment.[212]

The disjunction between political and consumption choices presents a puzzle. Would it make sense to say that consumer behavior is a better or more realistic reflection of "actual" preferences than is political behavior?[213] In light of the fact that choices depend on context, and do not exist in the abstract, the very notion of a "better reflection" of "actual" preferences is a confusing one; there is no such thing as an "actual" (in the sense of unitary or acontextual) preference in these settings. The difference might be explained by the fact that political behavior reflects judgments made for a collectivity.[214] For this reason it reflects a variety of social norms that are distinctive to the context of politics.

Because of the governing norms, citizens may seek to implement individual and collective aspirations in political behavior but not in private consumption.[215] As citizens, people may seek the aid of the law to bring about a social state that they consider to be higher than what emerges from market ordering. People may, in their capacity as political actors, attempt to promote altruistic or other-regarding goals, which diverge from the self-interested preferences sometimes characteristic of markets. Political decisions might also vindicate metapreferences or second-order preferences. People have wishes about their wishes, and sometimes they try to vindicate those second-order wishes, including considered judgments about what is best, through law. And norms with respect to public discussion may impose "taxes" on public statements of various sorts—perhaps requiring them to be "laundered,"[216] perhaps inducing conformity by punishing certain dissident views that might be reflected in other spheres.

In all of these ways, the norms at work in democratic arenas can produce different choices from those produced by markets. It would be wrong to say that the market choices are more "real" or "true." The question of which choices should govern for purposes of law and policy depends on a range of contextual issues that cannot be resolved by refer-

212. See Dennis Chong, Values, Norms, and Interests in the Explanation of Social Conflict, 144 U. Pa. L. Rev. (forthcoming 1996); David O. Sears & Carolyn L. Funk, Self-Interest in Americans' Political Opinions, *in* Beyond Self-Interest 147, 150–64, 168–70 (Jane J. Mansbridge ed., 1990).

213. As suggested in Viscusi, supra note 65, at 4–5.

214. See Sen, supra note 78, at 29.

215. This is a possibility and only a contingent one. We could imagine a society in which people were self-interested in political behavior but aspirational in markets or at least civil society. What I am discussing here is a function of prevailing norms.

216. See Robert E. Goodin, Laundering Preferences, *in* Foundations of Social Choice Theory 75, 86–91 (Jon Elster & Aanund Hylland eds., 1986). By "laundering" Goodin means a form of cleaning, whereby preferences, expressed in public, are stated in terms that avoid what speakers consider illegitimate or invidious. See id. at 75–76.

ence to notions of "choice" and "preference" alone. Of course some collective judgments might be wrong, productive of inefficiency, invasive of rights, or confused. I take up this point below.

C. *Risk, Autonomy, and Well-Being*

Thus far I have tried to avoid the most controversial questions and to build from common understandings. Let us venture now into more complicated territory, connected with the ideas of well-being and autonomy.

Outside of the domain of autonomy, we might think that there are obstacles to well-being in norms that encourage people to take high risks simply because the failure to do so signals—in light of those norms—cowardice or worse. Suppose that people engage in certain behavior not because of its intrinsic value but because of the reputational cost of failing to do so. We are dealing, then, with classes of cases in which the danger accompanying choice means that intrinsic utility is not high but risk-taking behavior persists because of social norms. Suppose too that people dislike the norms that generate that reputational cost, or that on reflection, people would dislike those norms. If so, norms that encourage people to carry guns, use dangerous drugs, drive well over the speed limit, engage in unsafe sex, and so forth may properly be an object of governmental attack, because of their potentially pernicious effects on people's lives. Information and persuasion are probably the best tools for government to use. But in some cases economic incentives or coercion may be justified.

Of course a liberal society might also want to ensure that all of its citizens are autonomous.[217] For the moment let us understand that notion in a way that leaves open many questions but that will be helpful for our limited purposes here. A citizen can be understood as autonomous insofar as she is able to choose among a set of reasonably good options and to be reflective and deliberative about her choice.[218] A society can be understood as self-governing, and as politically autonomous, to the extent that its citizens face a range of reasonably good options and exercise capacities of reflection and deliberation about their choice.

It should be clear that social norms, meanings, and roles may undermine individual autonomy. Above all this is because norms can compromise autonomy itself, by stigmatizing it. People may believe, on reflection, that the act of being well-educated should not be a source of shame; but in some communities, a good deal of education may be inconsistent with prevailing social norms.[219] Or exposure to diverse options, and re-

217. A form of liberal perfectionism is defended in Raz, supra note 22, at 369–429.

218. Cf. Anderson, supra note 23, at 141–43 (discussing autonomy and market choice).

219. This is very much true with respect to employment for women. See, e.g., Martha Chen, A Matter of Survival: Women's Right to Employment in India and Bangladesh, *in* Women, Culture, and Development: A Study of Human Capabilities 37, 37–50 (Martha C. Nussbaum & Jonathan Glover eds., 1995).

flection about which is best, may seem inconsistent with existing norms. In such cases autonomy cannot easily[220] exist without collective assistance; people are able to produce the norms, meanings, and roles that they reflectively endorse only with governmental involvement. Something must be done collectively if the situation is to be changed.

To promote autonomy, a society might seek to ensure that everyone has a minimal degree of education, a certain level of exposure to diverse conceptions of the good, and what might be considered the material bases of autonomy: food, shelter, and freedom from criminal violence.[221] In modest forms this project is fully compatible with political liberalism; perfectionist liberals might insist on a good deal in this vein in order to allow people to be (more or less) masters of the narratives of their own lives.[222] In either case, social norms can undermine the liberal project, and government might try to alter them in order to promote autonomy. People may have adopted prevailing norms rationally in view of limits in existing opportunities, as when norms discourage schooling for people whose prospects are poor;[223] but such norms are nonetheless an obstacle to autonomy.

A government that seeks to promote autonomy might well work against efforts by subcommunities to require conformity to a single defining creed. In fact conflicts between antidiscrimination principles and religious liberty have everything to do with perceived limits on governmental ability to change norms, meanings, and roles in subgroups that deny autonomy. These conflicts are generally resolved in favor of the latter, especially in the area of sex equality. But if we attend to the autonomy-denying effects of norms and meanings, it might well make sense to resolve the conflicts against subgroups, even religious ones.

D. *Caste*

Social norms, social meanings, and social roles bear very much on problems of discrimination. For someone who is African-American, female, or handicapped, existing meanings are possible obstacles to autonomy or well-being. The social meaning of being female, for example, may bear on a range of choices at home and in the workforce. So, too, for the social meaning of particular choices by women, which may diverge sharply from similar choices from men: not to have children, to

220. Of course some people may be able to defy existing norms against autonomy.

221. See Raz, supra note 22, at 407–08.

222. See id. at 408.

223. Cf. Elster, supra note 101, at 109–40 (describing adaptive preferences); Sen, Commodities and Capabilities, supra note 130, at 81–83 (in India, the "*perception* of relative needs of different members of the family may be closely related to social influences"). Just as preferences can be adaptive to an unjust status quo, so can norms and meanings be a predictable outgrowth of limited autonomy or heteronomy.

work as an airline pilot, to hate cooking, to dress in a certain way.[224] We have seen that a status is a particular kind of role; statuses are imposed rather than chosen. Thus statuses are an occasional target of law. In particular, law might attempt to overcome a collective action problem faced by victims of discrimination in changing prevailing norms, meanings, and roles.

In American law, problems of discrimination typically raise issues of caste. We might say that we have a system with caste-like features when a highly visible and morally irrelevant factor is turned, by social and legal practices, into a systematic source of societal disadvantage.[225] An important and disastrous feature of this situation is the *signalling effect* of the characteristic that is shared by lower caste members. That characteristic promotes a certain social role for caste members, since it is associated with a range of undesirable or otherwise stigmatizing traits. Often an attack on a caste system amounts to an attack on that social role and its associated social norms—especially as a result of behavioral norms shared, or thought to be shared, by members of the lower caste.[226] For lower caste members, the problem is that the shared characteristic carries with it a meaning—stupidity, passivity, venality—that cannot be controlled by individual agents.

Laws forbidding discrimination might well have, as one of their purposes and effects, a change in the signalling effect of the relevant characteristic. They might be designed to encourage people to be self-conscious about registering the preexisting signal.

Suppose, for example, that it was thought important to alter social norms about gender relations. The social role of "being a woman" is associated with a wide range of social norms and social meanings. There are many examples from the present and recent past. Thus it may be that women do the majority of domestic labor. In these circumstances, a man who does most of the domestic labor might seem odd, or in some way woman-ish, and a woman who asks for something like equality in domestic labor might seem odd, selfish, or in some way man-ish.[227] Or a woman in her fifties might be seen as fundamentally different from a man in his fifties, because of social norms associated with gender. Or a single woman might be stigmatized, or inquired about, in ways fundamentally different from what happens to a similarly situated man. Or a woman who

224. For what might be seen as an argument in favor of changing the social meaning of biological characteristics, see Case, supra note 71, at 9–36.

225. See Cass R. Sunstein, The Partial Constitution 338–46 (1993); Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2428–33 (1994).

226. Note in this regard Richard Wright's suggestion that unlike most blacks in the south, he would "act straight and human." See Richard Wright, Black Boy: A Record of Childhood and Youth 162 (1937). Wright says that most blacks, even those who felt great resentment, pretended to accept their inferior position. See id. at 160–62.

227. Cf. Zelizer, supra note 59, at 36–70 (discussing "dole" and "allowance" in context of use of domestic money by women).

complains about apparently mild forms of sexual harassment might seem to be a radical, a troublemaker, or someone without a sense of humor.

For lower caste members, a wide range of "choices" might emerge from the underlying social norms. These choices might reflect adaptation by lower caste members to existing injustice; they might be a product of the social opprobrium attached to violation of social norms by lower caste members.[228] The choices might even be called "preferences";[229] certainly desires can be affected. But many women believe on reflection that the social meaning of being a woman is bad for them and that it should be changed. These women face a collective action problem that may be solved best via law.[230] In any case a caste system tends to deny autonomy to lower caste members. Thus we have a particular reason for legal intervention: to overcome the obstacles to autonomy produced by a system of caste, obstacles that cannot be overcome by individual agents.

This is simply a stylized discussion of the problems faced by people who live within a caste system, and who might seek to enlist the law to make things better.

E. *The Expressive Function of Law*

Many laws have an expressive function. They "make a statement" about how much, and how, a good or bad should be valued. They are an effort to constitute and to affect social meanings, social norms, and social roles. Most simply, they are designed to change existing norms and to influence behavior in that fashion.

Of course human goods are valued in different ways; people have a wide variety of evaluative stances toward relationships and goods.[231] Laws with expressive functions are often designed to promote a certain way of valuing certain goods. Many such laws are intended to say that specified goods *should be valued in a way that deters thinking of them as mere objects for use.* Laws forbidding the purchase and sale of certain goods can be so understood. A ban on the sale of children is designed (among other things) to say that children should be valued in a way that forbids the acceptance of cash as a reason for taking them out of parental care. A ban on vote-selling can be viewed similarly. We might understand such a law as an effort to make a certain statement about the pricelessness—not

228. See Kuran, supra note 17, at 196–204 (discussing preference adaptation of lower caste members in India).

229. See Becker, supra note 31 (adopting an economic approach to family relationships and choices); cf. Amartya K. Sen, Gender and Cooperative Conflicts, *in* Persistent Inequalities 123, 126–28 (Irene Tinker ed., 1990) (describing social factors that lead women to adapt to, and accept, injustice).

230. See Kuran, supra note 17, at 134 ("Because society will generally ostracize anyone who abandons the caste system, the potential member of an anticaste colony is likely to withhold his participation until it appears likely to succeed. With other potential members reasoning likewise, the colony will remain unformed.").

231. See Anderson, supra note 23, at 1–16.

the infinite value—of the right to vote. In the environmental area, debates over market valuation are partly debates over this question.[232] Some people think that market valuation should be viewed with suspicion; it threatens to affect social norms and social meanings in undesirable ways.

Laws with expressive justifications are most plausibly defended on the ground that they will in fact affect social norms and move them in appropriate directions.[233] But at this stage there are empirical questions: Do laws really affect social norms and social meanings? Under what conditions? Much work remains to be done on these important questions.

VII. Blocked Grounds

What I have suggested here should unsettle some common understandings about government "paternalism" and "meddling." If private choices are a function of roles, norms, and meanings over which private people have no sovereignty, many imaginable initiatives are consistent with individual autonomy, rightly conceived. But this conclusion ought not to suggest that government should be licensed to do whatever it wishes. There should be firm limits on government's efforts to engage in norm management.

Of course government action should often be rejected on simple pragmatic grounds—because, for example, it is likely to be futile or counterproductive.[234] The "just say no" campaign with respect to drug use probably falls in this category. Perhaps efforts to stigmatize teenage smoking will backfire and make smoking seem bold or glamorous. Perhaps government has mistakenly concluded that there is a collective action problem calling for governmental response. Perhaps most people are happy that littering is not stigmatized.

It is also true that government interference with norms, roles, or meanings might compound a collective action problem, aid well-organized private groups promoting unjust goals, or aggravate a caste-like situation. Imagine an effort to *promote* the use of cigarettes, alcohol, or drugs, or to *discourage* the buckling of seat belts, or to increase the opprobrium associated with the role of being a homosexual. Nothing I have said sug-

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232. See Steven Kelman, What Price Incentives? 52–83 (1981).

233. See Zelizer, supra note 27, at 16–17 (discussing prohibitions on life insurance). In making these claims, I do not endorse the use of law to "make statements" independently of consequences. Though I cannot defend the point here, official use of law merely to "make statements" risks fanaticism and pointlessness. See Sunstein, supra note 64. Indeed, emphasis on consequences—and on the empirical questions raised by arguments over consequences—has the salutary function of reducing the volume and the heat raised by policy disputes. It does so by shifting debate from basic values to issues that are, at least in principle, subject to empirical testing. I believe that this is an important social function of approaches to law and policy that are based on consequences; it is also part of the appeal of utilitarianism.

234. Cf. Raz, supra note 22, at 428–29 (discussing pragmatic objections to pursuit of perfectionist policies).

gests that government is not properly criticized when it engages in activities of this sort. But any such criticism should be on the merits, not on the ground that government may not interfere with private preferences or choices.

There is a final and especially important point. A liberal society limits the permissible bases for governmental action.[235] Ordinarily people describe these limits as "rights." Rights operate as constraints on norm management as on everything else that government does. A full account of these limits would be far too ambitious for an article of this sort; but a few notes will be helpful.

Some government action designed to change norms, meanings, and roles might be based on religious grounds; these should be banned as reasons for public action. At least in the American constitutional system, for example, it is unacceptable for government to attempt to legislate on the ground that the divinity of Jesus Christ requires a certain state of affairs.

It would be equally unacceptable to base government action on grounds that deny the basic equality of human beings—as in efforts to encourage norms that treat members of racial minorities as second-class citizens. Many efforts to change norms would impair autonomy rather than promote it. If government attempted to promote norms ensuring that women occupy traditional roles, its attempt would be illegitimate—not because it is an attempt at norm management, but because the attempted management invades rights of sex equality.

In any case some human interests are properly denominated rights, and efforts to change norms, meanings, and roles should not be allowed to invade rights.[236] Many imaginable efforts ought to be rejected because of this risk. Consider, for example, a suggestion that the meaning of refusing to allow government officials into your home is now "personal courage and independence"—accompanied by the not implausible thought that things would be better if the meaning were "unpatriotic unwillingness to cooperate with the crime-fighting effort," culminating in a proposal that all people should be required to open their homes to the government. There is a collective action problem here. But if it is believed that people should have a right to keep government officials from their homes, this proposal should be rejected.

Political liberals go further and urge rejection of any ground for action that is based on a "comprehensive view."[237] Of course there are

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235. For discussion, see, e.g., Dworkin, supra note 11, at 266–78; Larmore, supra note 207, at 42–68; Raz, supra note 22, at 400–29.

236. I do not mean to say anything here about the status or basis of rights.

237. See Larmore, supra note 207, at 40–90 (arguing that liberal government must remain neutral by not selecting among divergent "conceptions of the good life"); Rawls, supra note 190, at 58–66, 133–72 (describing political principles on which those with diverse "comprehensive views" can rely).

many complexities in this claim.[238] What is important for present purposes is that on any sound view of liberalism, there is no *general* basis, in principle, for objection to proposals of the sort I have suggested. Political liberals ought to acknowledge, for example, that social roles and social meanings may undermine the equality and liberty of citizens and that changes require collective action. The constraints imposed by political liberalism impose no bans on those changes.

CONCLUSION

Many claims about the appropriate limits of law are insufficiently appreciative of the pervasive effects of social norms, social meanings, and social roles. In fact these effects have yet to receive much attention.[239] But—to say the least—the impact of law on human behavior is an important matter for lawmakers to understand, and that impact has everything to do with social norms. An understanding of norms will therefore help illuminate effective regulatory policy. Many of the most dramatic gains in health and safety policy are a product of changes in norms, meanings, and roles. Many of the most severe problems in current societies are a product of unfortunate norms, meanings, and roles.

Norms relate to some broader issues as well. Often it is said that the common law, and a liberal regime dedicated to freedom, take "preferences" as they are and do not seek to change them. But the term "preferences" is highly ambiguous. If the term is meant to refer to "choices," it should be understood that choices are very much a function of context, including governing norms, meanings, and roles. Certainly the particular choices made by people in markets—in their capacity as consumers or laborers—do not suggest global or acontextual valuations of relevant goods. If the term "preferences" is meant to refer not to choices but to the motivational and mental states behind choices, it is important to recognize that those mental states include assessments of social norms, the expressive meaning of acts, and the expectations associated with a dazzling variety of social roles. Norms and roles affect both public action and public talk, in ways that can much disguise how people think privately. This point has large implications. In many settings, it would be best to dispense with the idea of "preferences," and to shift instead to more concrete ideas, including intrinsic value, reputational effects, and effects on self-conception.

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238. See Rawls, supra note 190, at 133–72.

239. The principal contributions are Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. (forthcoming 1996) (discussing how norms affect the public assessment of criminal punishment); Lessig, supra note 24 (arguing that law should account for, and regulate, social meaning); and from a different direction, Ellickson, supra note 51 (discussing norm of neighborliness in land-use bargaining); see also Kuran, supra note 17 (describing role of "preference falsification" in reflecting and shaping social norms).

We have also seen that norms can be far more fragile than they appear. Hence "norm entrepreneurs" can help solve collective action problems, and hence "norm bandwagons" and cascades are common. Sometimes law interacts with the efforts of norm entrepreneurs, facilitating or blunting their efforts, and sometimes law ratifies or accelerates—or halts—norm bandwagons and cascades.

While social life would be impossible without norms, meanings, and roles, individual people have little control over these things. The result can be severe limits on human well-being and autonomy. Certainly there is a problem with existing norms when all or almost all people would seek a change. There may well be a problem when reputational incentives lead people to do what they would otherwise refuse to do, at least if the relevant norms deny people the preconditions for autonomy or otherwise undermine well-being. In fact lives are shortened and unjustified inequalities are perpetuated by the existence of many current norms.

People need collective help if they want to change norms, meanings, or roles. Collective help may be futile or counterproductive; it may be illegitimately motivated. But these matters require an inquiry into the particular context. The issue should not be foreclosed by resort to confusing claims about the need to respect private choice.