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Lecture

THE THEODORE I. KOSKOFF LECTURE SERIES:
SOCIAL NORMS AND BIG GOVERNMENT

*By Cass R. Sunstein**

I have some stories for you to begin. I spend summers on the east end of Long Island (near the recent fire) because my in-laws are there. There are many interesting things that one could notice in the Hamptons. One thing that is noticeable in the last few years is the change from the East Hampton dump to the East Hampton Recycling Center. When in late August I went there to throw out and separate my garbage, what I saw was extremely fancy cars—BMW's and Mercedes; there was one Rolls Royce—people with informal but extremely expensive clothes patiently separating their garbage, making sure the green glass was different from the white glass and that the newspapers were all sorted, spending a lot of time at the East Hampton Recycling Center. And they looked happy.

The second story comes from my old boss, Thurgood Marshall,

* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago. This is a lightly edited version of a lecture delivered at Quinnipiac College School of Law in October 1995. Some of the issues are discussed in more detail in *Social Norms and Social Rules*, COLUM. L. REV. (forthcoming 1996, May).

who is famous for arguing the *Miranda* case and for being a staunch defender of the outcome in *Miranda*. Once he thought *Miranda* was maybe going to be overruled by the Burger Court, he came to us and said, "You know, it would be bad, but *Miranda* isn't a big deal." He said, "If the police are going to beat people up they are going to beat people up. *Miranda* isn't crucial. I'll tell you how that stops." And he told a story about a chief of police getting together twenty-five of his officers and saying, "If anyone here beats anybody up, they're fired." Then he said with a big guffaw, "That's how you stop police misconduct."

The third story has to do with teenage smoking, something which the President is very interested in reducing. The newspapers have suggested that there has been a large increase in teenage smoking, which isn't quite true. Among whites, teenage smoking now is about the same as it has been for the past fifteen years. Think of what might have happened, what would you expect would have happened in this period among African American teenagers? Well, here is the appropriate data. In 1965, thirty percent of African American teenagers smoked appropriate cigarettes. In 1987, the number had dropped to twenty percent. In 1993, the number was four point four percent. This is recognized by the Center for Disease Control as a terrific public health success story for which the Center of Disease Control has no explanation. I have a hunch about what explains it. And it's connected with a poster that appeared adjacent to a highway—in a billboard in Harlem, New York, a poster that was part of a private educational campaign by the African American community designed to reduce teenage smoking. The poster has a picture of the Marlboro man looking like a skeleton offering a cigarette to an African American child and saying, "First they had us pick it; now they want us to smoke it." Something very important has happened in that community with respect to teenage smoking.

Only one more story, this has to do with economists. Economists are interested in figuring out how much environmental amenities are worth. One way they try to figure that out is they ask people how much they are willing to pay for environmental amenities. You might be asked how much you would be willing to pay to save a pond. Or how much would you be willing to pay to save the spotted owl, or how much would you be willing to pay to reduce a risk from .005% of you getting cancer to .0005% of getting cancer. Economists believe that if you ask someone how much would you be willing to spend for goods you should give the same amount as if you're asked how much would you have to be paid to have a reduction in the equivalent thing. There

is an intuition that these numbers should be the same. It turns out that the economists have this equivalence as an axiom. But the equivalence doesn't hold. When people are asked how much would they be *willing to pay* to allow the extinction of a spotted owl, they will give a number. They're asked how much would they *have to be paid*, they give a higher number. In fact, much of the time they give an answer like, "I don't answer questions like that," or, "There is no number high enough," or, "What sort of a person do you think I am?" This is an anomaly. It's causing some havoc in the economics community.

There's a unifying theme in the stories I've told, and that has to do with the pervasive effect of social norms on behavior. And I'm going to be discussing the relationship between social norms and law in the effort to make a partial defense of my not-currently-trendy thesis, that is a defense of big government.

A defense of big government would have to have a lot of components. And I'm going to trace right now, very quickly, three of the components that I'm not going to spend much time on. One component in the defense of big government would start by reading the *Contract of America* and noting that sharp distinctions are drawn between markets on the one hand and government on the other. My suggestion would be there is no distinction between markets and government. Markets depend for their existence on government. We cannot have markets without government. In fact, we cannot have markets without taxing and spending. Markets depend for their existence on police, property law, contract law, tort law—an extensive state apparatus that can't get in motion without some taxing and some spending. The distinction—which is so dominant in popular debate right now—between markets and government is built on a conceptual error, that is the proposition that we could have markets without government.

That's not a criticism of markets. It's an observation that markets depend on something like or close to big government.

A full defense of big government would add to this point a list of the terrific success stories that we've had as a result of government regulation in the last thirty years. In the environmental area, air is much cleaner than it was twenty-five years ago, where in Chicago you couldn't open the windows without getting noticeable pollution in your face. It used to be the case that a hundred fifty million Americans lived in areas that didn't meet federal air quality standards. Now only fifty million Americans don't live in places that don't meet federal air quality standards. That's not great, but it's a wonderful improvement. The air is much cleaner than it would otherwise have been, and people are

living longer and better as a result. So too, the water is much cleaner. In many ways America is the envy of the industrialized world because it has clean water compared to what it would have had without our regulatory efforts. In the area of voting rights and discrimination too, things are a lot better than they were as a result of governmental initiative.

Thus the picture of massive government failure is way off the mark. There are many failures, but the overall picture is complex, not simple.

The full case for big government would depend as well on the old ideal of equality of opportunity. My suggestion would be that equality of opportunity is not at odds with liberty; it is part and parcel of it. And equality of opportunity cannot exist without a large government trying to provide decent life prospects to people who now do not have decent life prospects. And the *Contract of America* is missing that extremely old American ideal. It used to be that equality of result was opposed to equality of opportunity; but equality of opportunity was in the 1970s an important conservative theme which justified governmental initiatives. It seems to have dropped out.

What I'm going to emphasize, as I've said, is social norms—in particular, the possibly harmful effects of social norms on human liberty and well-being. My suggestion is that governmental action designed to make for good social norms is an important and underexplored avenue for law. This is a realm in which a lot of good things can be done; but it's something on which lawyers and politicians have spent far too little of their time. Four hundred thousand people die each year as a result of smoking; three hundred thousand people die as a result of diet and failure to exercise; a hundred thousand people die from cars and guns; and in all of these cases social norms are an important contributor to the problem. If we could do something about the norms, we could do something enormously important. This issue has gotten a lot of attention in the area of teenage pregnancy, and here a culprit is social norms that it would be very good to change. Think now about the sharply diminishing rate of smoking among young African Americans and think of how that might be a model for strategies that would lengthen and improve lives.

I'm just going to tell you now the claims I'm going to make and then spend the rest of the talk trying to elaborate on them a bit. First: A lot of anomalies in individual behavior—such as the difference between how much people would be willing to pay to preserve a species and how much people would have to be paid to allow a species to go

extinct—are just a product of social norms that affect us every day and make us do things that are surprising or might be surprising. Many puzzles in behavior are less puzzling if we attend to the pervasive role of social norms. Second: Often people live with norms that they simultaneously don't like but can't change on their own. To change a norm with respect to, for example, what a teacher ought to wear to class or to give a lecture is something an individual can't do anything about. My proposition is there are social norms all over the place that we live with, are governed by, but of which we don't approve if we reflect. Collective action is necessary to do something about them.

Third: I suggest that social states are often far more fragile than they seem, and, in fact, change is far more likely than it seems, partly because what people want, and by people I mean to include all of us, is a function of what other people want and of what we perceive other people to want. When we start to perceive other people's perceptions as different from what we thought, things can change very fast. Something like this has happened, I believe, in the United States with respect to affirmative action. Whatever we think of the merits of the attack on affirmative action, there has been real fragility in the proaffirmative action policy. One of the reasons is, there was widespread social discontent about affirmative action that wasn't expressed because people perceived it as illegitimate to criticize affirmative action. Once the criticism started being expressed and legitimated, people's perceptions of what other people thought shifted very fast and there was a social movement.

How was communism maintained for so long? How did it fall so fast and so safely in most Eastern European countries? One of the reasons is that there were social norms in place under communism that suggested we all had to join the Party and celebrate it, even though hardly anyone celebrated it. Once the social norms with respect to approval of communism started to shift there was a bandwagon effect or a cascade, and things changed really rapidly. The same thing happened in South Africa with respect to apartheid.

Fourth: I'm going to suggest that sometimes social norms are an obstacle to human liberty or autonomy and sometimes social norms help maintain something like a caste system on the basis of race and sex. We don't have in the United States a true caste system, but our system has features of racial and gender caste in the sense that there are signals given by one's skin color or one's gender that one can't do much about and that is associated in many places with certain prescribed social roles. To work against them it would be good to do

something about prevailing norms, and to do that it would be good to use law.

Now let me offer three concepts: Social norms, social roles, and social meanings. First, what I've referred to, is social norms. By this I mean to refer to social attitudes of disapproval and approval, embodied in the notion that "it isn't done." With respect to lots of behavior there is a reaction, "it isn't done." Even though it sometimes is done, the term "it isn't done" is a reflection of evaluation and disapproval. Now norms cover a very wide range—what sorts of words one uses, what counts as good manners, how one deals with one's elders or people who are younger, and so forth. Norms are pervasive and invisible only because they're so deeply internalized that they don't come out to the surface much. There are social norms with respect to such things as smoking, discriminating, using condoms, buckling seat belts and recycling. These norms are often fragile. One's choices about what to do, whether to smoke, whether to discriminate, whether to buckle a seat belt, whether to be courteous—these things are a function, for each individual, not just of the value of the relevant thing but also of the reputational value of doing or having that thing, that is, smoking, having a Hispanic in one's restaurant or buckling one's belt. It's also a function of one's self-conception if one does these sorts of things. There are many people, I assert, who don't buckle their seat belt and who do smoke as a result of social norms and the opposite too. Often one will or will not buckle because of the group of people with whom one finds oneself. One will or will not smoke for just that reason; the reputational effect plays a very large role in individual choices.

It's also the case that one's self-conception plays a large role. There is a mystery in the fact that Stephen Hawking's book, "A Brief Moment in Time," was a best seller. This was a book that was bought by people of whom it is said hardly any read the book. Why did people buy it? My speculation is that some of the purchases had to do with the reputational value of having the book and with one's feeling about one's self-conception from owning the book.

Choices are pervasively a product not just of the intrinsic value of the underlying thing but also of reputational effects and effects on one's self-conception. The reputational effects and the effects on one's self-conception are partly a function of social norms. Prevailing norms will have a lot to do with reputation and probably a good deal with self-conception. This is why I think the people recycling in East Hampton were so happy. It's not as if there was intrinsic joy in separating the various things; but they felt good about themselves, they felt

good about being seen doing this sort of thing; and therefore they undertook a choice that would have been completely astonishing ten years before.

I have an economist colleague who has a dog and in Chicago there is a norm, there's a law too, that you clean up after your dog. And he said, "You know, at night I walk my dog, and when he does what he does I clean up even if it's dark." He said, "I don't know why I do that. I hate the act, it subjects me to a certain amount of danger, and yet I do it." He said, "I would have thought it would have been about reputation, but it's dark, no one can see me." I think the reason he does it is that he's internalized the norm so he thinks it's a wrong thing to do to leave that material there for the next morning. And that's why in many areas of the country something is true now that would also have been astonishing years ago, that is, no dog poop on the sidewalks.

That's the first concept, the idea of social norms. The second concept involves the notion of social roles—something that also has a great deal to do with law but hasn't been explored much by people thinking about law. Each of us occupies an astonishingly wide range of social roles: child, parent, sibling, student, teacher, voter, consumer, eater in a restaurant. Each of those roles is surrounded by a complex network of social norms, so much so that if one acted in one role the way one acts without thinking in another role it would seem very bizarre. If one treated, for example, one's employer the way one treats a friend, in most American work places that would be perceived as quite strange. If a teacher treated a student the way a teacher treats a doctor, wouldn't you think that teacher is very confused? Or if you treated your lawyer in the same way you treat your waiter, your lawyer would think this is odd. Or if your waiter treated you the way your friends treat you; that would be very unusual, except in California, I guess. In any case, each social role is pervaded by social norms that people know about, adhere to, rarely step out of, even though some of us some of the time wish our social roles were a bit different. And here too changes in social roles are just about impossible at the individual level.

The feminist movement has everything to do with the effort to change social norms associated with the social role of being a woman. When homosexuals "flaunt it," there might be a self-conscious effort to change the social role of being a homosexual, that is to be closeted. The point here is that social roles are pervasive and also we are, with respect to them, acted on as much as we are acting. If we're going to

change them we need some help. We can't do it on our own.

The third and last concept let's call social meaning. And here I'm drawing on some work by anthropologists and also some recent work in law on exactly this idea. By social meaning I mean the attitudes and commitments that are communicated by words or actions. Words or actions communicate something independent of the words that are actually being used. For example, the use of the term "Miss" or "Mrs." now means something very different from what it meant forty years ago. There is something very specific signaled if one of your instructors calls women students Miss or Mrs. The social meaning being communicated might well be independent of the intentions of the speaker. With respect to a wide range of terms, social meanings attach over which the speaker has no control. If a teacher calls a student by a first name or if a student calls a teacher by a first name, something is being signaled that the individual agent doesn't have much control over. If a teacher wears blue jeans to class at many law schools, something very particular is connoted. If someone buckles a seat belt in some parts of the world, or if a woman refuses to cook dinner in many parts of the world, or if a man or woman insists on the use of a condom in many places, there is a particular social meaning to the act which agents don't have control over and might be unfortunate. There was an article in the New York Times a few weeks ago in which some young men were saying they don't use condoms with their girlfriends because their girlfriends would take that as a confession that they're promiscuous. Now that's a problem. They may not need to be blamed for it. But it's true the social meaning of condom use is a confession or, in some circles, an accusation. Social norms, social meanings, and social roles matter. If people see one another cooperating by giving time or money, working pro bono, donating to charity, writing tenure letters, then they tend to cooperate, too. But if they don't see one another cooperating, rates of noncooperation skyrocket. This is true in both experimental and real world settings. Whether people cooperate to solve a shared problem is a function of the perceived behavior of other people. This may not seem a puzzle; but for certain theories of rational behavior it is indeed a puzzle. Cooperation is closely enmeshed with social norms.

Economists have invented a game. It's called the Ultimatum Game. This is a game in which two people are given a bunch of money to play a game. The game has one act in it, that is one person of the two says to the other person, "I will give you X amount of this pot." If the second person says, "I accept," they both get to keep the relevant

amounts. If the other person says, "I don't accept," neither gets to keep a penny. In experimental settings what would you expect would happen? How much would the first person propose and what would the second person accept? The economists predicted the following: The first person acting in a self-interested way will say, "I'll offer you a penny." And the second person will say, "Great." The first person acts in the self-interested way; the second person acts in a self-interested way; both people are better off. But this is not what happens. People almost never offer a penny, and when they do it's not accepted. There's a very high percentage of fifty/fifty, sixty/fifty, seventy/thirty splits. This is because there is a powerful social norm saying that if you accept a penny you're showing your willingness to be subjected to contempt or dishonor. And if you offer that little, then you're showing a willingness to treat someone else in a contemptuous way. And there are extremely powerful social norms against that. People feel ashamed in both contexts.

This example aligns my argument with some of the arguments in modern politics about deploying shame as a policy instrument. Shame is certainly not an intrinsic good, but shame is important and reduces conduct that inflicts harm on other people. This little story tends to show that what seems like anomalies often are a function of deeply internalized social norms, which when they disappear, make people's lives go much less well.

I am also concerned about the use of words like "choices" or "preferences" to foreclose discussion of what government ought to be doing. Often it is said that people choose some acts, and it is asked, what business is it of Big Brother to alter the choice? At least as a general rule, what business is it of government to interfere with their preferences? And in very tempting arguments, the words "their choices" or "their preferences" opt as conversation stoppers. I hope what I've said already suggests that this argument goes by much too fast, if our preferences and choices are artifacts of norms and roles and meanings that we haven't voluntarily assumed and that we may not like but we can't change on our own. If the meaning of our choice not to go in a car which we know is going to go extremely fast is cowardice, then we might go in that car or even drive in that way. That's enmeshed with social norms over which people have very little control. And to attribute that to them—to say that that's their choice or their preference—is too quick. In the New York Times article I mentioned about condom use, young men were saying they didn't use condoms because they did not want their girlfriends to think they were sleeping around.

They weren't happy with that situation. They weren't sleeping around. They wanted the social meaning of condom use to be different from what it was. To say we should respect their choice would be a much too simple answer.

Incidentally, I'm told by my sister-in-law who works on AIDS education in Bali, that there's been a remarkable change in Bali in the last seven years, so that young Balinese men consider their condom use a very macho thing. Now, she's not sure how this social norm has gotten in place, but she says it's wonderful. If in Bali there is going to be some protection, so to speak, against what's happened in many countries like Bali, this is a way.

Now let's turn to government. How might government do something about problematic norms or meanings and roles? Let's have an ascending order of intrusiveness. The most lenient thing government can do is just provide information. Changing social norms with respect to smoking has a great deal to do with additional information. When we undertake behavior that is dangerous and perceived as such, there are often strong social norms against it. It's very interesting to see in religious communities the extent to which there are norms about diet and behavior that are permeated with beliefs about safety; but the moral issues associated with the diet have outrun the safety belief so that it's believed it is morally wrong to perform some acts. The moral judgment has become more deeply ingrained than the health judgment. In any case, with respect to a great number of things, simple provision of information does the trick.

Government might try to go beyond information and try to persuade. This is what's happened in the area of smoking and drug use and safe sex. The efforts of persuasion may be futile, but it's a possible approach.

There might also be an effort to change social norms with a tax. Consider a tax on cigarettes or alcohol or other dangerous behavior. And that might change the relevant norm.

Or the government might try, most simply, coercion by banning conduct.

Now what I'm going to do is to go through several categories of cases in which governmental action designed to change norms and roles and meanings might well be justified. To make the justification full in any individual case, one would have to say more than I'm going to say. I'm just going to go through a set of cases.

The simplest is the set of cases I have described. That is, cases involving norms that people want to change but can't change on their

own. They require governmental or collective help of some kind. Now, there is a very intriguing class of laws which exist which are almost never enforced, but which accomplish an enormous amount of good—that have a kind of symbolic function just by virtue of the fact that they are there. These include laws forbidding littering, laws requiring seat belts to be buckled, laws encouraging or requiring recycling, and laws requiring people to clean up after their pets. These are laws that have contributed an enormous amount to environmental improvement. And the way they do that is signaling something that has a powerful effect on people's norms. And in these cases government can relatively cheaply use the law to attempt what the majority wants, that is norm change.

The second kind of case has to do with the difference between the social role of consumer and the social role of citizen. Both of us occupy these two roles. We buy things and watch things and we vote and we make public policy recommendations. Here is the key proposition. In our capacity as consumers we may live within norms which we simultaneously, in our capacity as citizens, deplore. The Civil Rights Act of 1964 is under some attack now in some prominent circles. An interesting fact is that that act was supported by restaurants that were discriminators. Restaurants that acknowledged their own discriminatory behavior favored the law. How could that be? What they said was, "If we open our doors to African Americans, what will happen is that we'll be in social trouble because the norm is we're not supposed to do that. But we just want to make profits. If you give us this law, we can make more profits and we won't confront the old norm." These are cases in which people, in their capacity as citizens, urge results that differ from their own private consumption behavior. Many Americans favor more educational programming for children on television, or more public affairs programming on television for themselves. Would they watch it? Would they ask their children to watch it? Maybe not. Is it illegitimate for people in their capacity as citizens to urge and get results that diverge from what happens from consumption choices? I don't think so. And words like "choices" tend to cloud the issue.

In many parts of the world, and in some parts of America, to be well educated is inconsistent with social norms. Probably most of the people in this room have encountered some places where if you say you're in law school, people don't say, "Great." They might say a wide range of things. But one thing some people might say is, "Who do you think you are," something like that. Now, there are many places in the world and some places in America where norms in a relevant commu-

nity operate powerfully against people's efforts to educate or better themselves by going to school or taking school seriously. Many of the hardest problems that people face is running up against social norms that make their efforts to better themselves by their own lights seem a source of shame. It's parallel to the condom story and the seat belt story; but maybe more poignant because it involves people's basic life prospects. There are things that government can do and that can be done collectively to make it so that education isn't stigmatizing but the opposite. There are places in the world where women who try to become literate are ostracized. And by acting on social norms the law might well be able to do something about it.

I have referred to the issue of caste. And by the issue of caste I mean just the fact that even in a free society like ours there are statuses that people have. For example, the experiences of African Americans vis-a-vis the police are systematically different from the experiences of white people vis-a-vis the police. That's one sense in which we have something like a caste system in the United States. There are similar things with respect to sex roles where there are many places where if a woman says, "I'm not making dinner tonight. I'm going out to a meeting," the signal that's given is fundamentally different from the similar signal for a man.

Now, the antidiscrimination laws are, in some circles, under attack as liberty denying. But we might think that the liberty issue is much more complicated than that, in the face of social norms that are connected with caste-like features of existing social practices. And if what the law can do is alter the norm, liberty might be promoted rather than undermined. There are many norms that undermine human well-being; for example, norms that make it seem very good for a teenage boy to have gotten a woman pregnant; norms that make it seem very good for a teenage girl to have a child, notwithstanding her inability to take care of it; norms that make being on welfare seem highly desirable and being in work at a low-paying job seem a social stigma. There are norms that encourage hazardous behavior that is undermining of human well-being. There are things that law might be able to do about this. It might be counterproductive; it might be futile; but this is an unexplored area where law could do a lot of good.

My last point has to do with what we might call the expressive function of law. With respect to our own behavior, often what we do is connected with the message the action expresses as much as with the consequences. There are famous philosophical puzzles about whether you would shoot an innocent person when a terrorist threatens other-

wise to shoot a hundred people. Would you shoot the terrorist? Would you shoot the person the terrorist tells you to shoot if the terrorist would otherwise shoot a hundred people? Most react to that by saying, "I don't know. I don't know if I could. I don't know if I would." Most people hesitate. It's partly because of the expressive function of action and what one is expressing about oneself by shooting an innocent person. Law too often has an expressive function in the sense that it signals national or social commitments, partly in order to make for change with respect to (say) endangered species, recycling, smoking, sex equality. The expressive function of law doesn't have directly to do with consequences but instead with the norms that are being signalled and promoted.

At this stage it's probably worth mentioning that the term "political correctness" is very interesting along this dimension because the term "political correctness," as it's deployed, operates to make people seem pitiful and weak if they believe, for example, that sexual harassment is a bad thing. And it's a brilliant term because of its shifting effect on social norms. It makes it so that what was otherwise forward-looking and bold seems shameful and stepping with the crowd.

It is time to conclude. It is often said that the government should respect people's preferences and choices. I've suggested that that's too simple, because preferences and choices are often an artifact of roles, norms and meanings. All of these things, that is, roles, norms and meanings, can be obstacles to human liberty or autonomy or well-being. Of course governmental efforts to change them might be futile or it might be counterproductive. But, it might not. It would be a shame if the antigovernment rhetoric of the last decade foreclosed efforts to seek change by repeating a mantra about the need to respect choice.

