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## The Regulation of Social Meaning

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## INTRODUCTION

In 1985, the Seventh Circuit struck down an Indianapolis ordinance that made illegal pornography that portrayed women in a sexually subordinated way. At the core of the opinion<sup>1</sup> was an idea that has become irresistible in free speech lore, resonating, it is thought, with the very idea of a free society. The ordinance was flawed, Judge Easterbrook wrote, because it violated first amendment neutrality.

Speech treating women in the approved way—in sexual encounters premised on equality—is lawful no matter how sexually explicit. Speech treating women in the disapproved way—as submissive in matters sexual or as enjoying humiliation—is unlawful no matter how significant the liter-

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<sup>1</sup> *American Booksellers Ass'n, Inc. v Hudnut*, 771 F2d 323 (1985).

ary, artistic, or political qualities of the work taken as a whole.<sup>2</sup>

This, the court held, was “thought control”:

It establishes an “approved” view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.<sup>3</sup>

“Thought control,” said Judge Easterbrook, is just what the First Amendment forbids. Echoing Justice Jackson in *West Virginia State Board of Education v Barnette*,<sup>4</sup> Easterbrook wrote:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” . . . Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be.<sup>5</sup>

This Article is not about the First Amendment. Nor is it about the regulation of pornography. It is instead an effort to understand just how an idea so plainly false—both as a description of our constitutional past and as a prescription about the proper role of government—can come to appear as foundational truth. For *Barnette* and its echoes notwithstanding,<sup>6</sup> it has never been the case that “officials,” whether high or petty, have been forbidden from prescribing “what shall be orthodox” in politics, nationalism, and other matters of opinion:<sup>7</sup> Think of the government’s view of unsafe sex, or abortion, or family values.<sup>8</sup> Nor has it been the case that the Constitution has proscribed the forcing

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<sup>2</sup> Id at 325 (citations omitted).

<sup>3</sup> Id at 328.

<sup>4</sup> 319 US 624 (1943).

<sup>5</sup> *Hudnut*, 771 F2d at 327-28, quoting *Barnette*, 319 US at 642.

<sup>6</sup> See for example, John Stuart Mill, *On Liberty*, in *The Utilitarians* 479 (Dolphin ed 1961), cited in Steven Shiffrin, *Government Speech*, 27 UCLA L Rev 565, 566 n 3 (1980).

<sup>7</sup> An exception here may be religion.

<sup>8</sup> Compare *Rust v Sullivan*, 500 US 173, 194 (1991) (“When Congress established a National Endowment for Democracy . . . it was not constitutionally required to fund a program to encourage competing lines of political philosophy . . . .”); *Cruzan v Missouri*, 497 US 261, 281 (1990) (state may prefer life in spite of recognized right to refuse medical treatment).

of "citizens to confess by word . . . their faith" in such ideas: "Are you, or have you ever been, a member of the Communist Party?"<sup>9</sup> Government has always and everywhere advanced the orthodox by rewarding the believers and by segregating or punishing the heretics.<sup>10</sup> The permissible means for advancing such orthodoxy may be limited, and the instances may be few, but the end has always been the place of government.

From where then does this oddity in *Barnette* arise?<sup>11</sup> What is its source? How is it possible, when thinking of doctrine like the First Amendment, to imagine it organized around a notion so plainly inconsistent with so much else that government does? How can we come, as a constitutional culture, to intone, mantralike, in one area of the constitution a principle that we know to be false in just about every other?

Such selectivity in constitutional law may not be uncommon.<sup>12</sup> In this case, I want to argue, it has a particular source. Its source is a kind of blindness—a learned blindness—to an idea, or an understanding, common in much of social theory,<sup>13</sup> yet ignored<sup>14</sup> in much of law. This is the idea of social construction.<sup>15</sup> It makes sense to speak as if government does not "pre-

<sup>9</sup> See, for example, *In re Anastaplo*, 366 US 82, 100 (1961) (Black dissenting) (asked by the Committee on Character and Fitness, "Are you a member of the Communist Party?")

<sup>10</sup> Indeed, in *Barnette* itself, the government clearly succeeded in establishing an orthodoxy. *Barnette* simply permitted dissenters to dissent by not participating in a flag salute; but the dissent was dissent only because it was dissent from an orthodox view, one supported and endorsed by government action. See *Barnette*, 319 US at 641-42. The *Barnette* principle notwithstanding, not even in *Barnette* itself was the government forced to take no part in the construction of the orthodoxy. Id at 640. For a thorough discussion of "neutrality" in the First Amendment context, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 NYU L Rev 675, 702-17 (1992).

<sup>11</sup> This oddity in the *Barnette* principle has been well noted before. See Shiffrin, 27 UCLA L Rev at 567-78 (cited in note 6).

<sup>12</sup> Think, for example, about realism in law. We are happy to think of much of our constitutional jurisprudence as realistic—in Balkin's terms, "as Professors Peller and Singer tell us, we are all legal realists now," J.M. Balkin, *Some Realism about Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L J 375, 385 (footnotes omitted)—but within the first amendment, the dominant mode of legal jurisprudence (as distinct from academic jurisprudence) is formalistic. Id at 385 n 28.

<sup>13</sup> For a succinct summary of this position, see Roberto Mangabeira Unger, *Social Theory: Its Situation and Its Task* 1 (Cambridge, 1987) ("Modern social thought was born proclaiming that society is made and imagined, that it is a human artifact rather than an expression of an underlying natural order.").

<sup>14</sup> For the most part. The exception is the critical in law. See text accompanying notes 335-39.

<sup>15</sup> One might attempt a definition of "social construction," but in what follows, I will let the examples do the work of definition. My defense for such an evasion is that my

scribe" orthodoxy only so long as we ignore the ways in which governments, as well as others, act to construct the social structures, or social norms, or what I will call here, the *social meanings* that surround us. For these social meanings *are* what is orthodox. They constitute what is authority for a particular society, or particular culture. To the extent that they are built, or remade, or managed by government, then to that extent government is "prescribing" the orthodox, and *Barnette*-like ideas will seem incomplete. Likewise, to the extent that we ignore how society is constructed, or ignore the ways in which governments (and others) act to construct what is orthodox—to that extent as well, *Barnette*-like ideas will seem quite natural. The lore of the First Amendment is as it is today, I suggest, in part because this balance is now tilted against an account of this constructivism. My aim in this essay is to resist this tilt.

The point is not that law in general, or First Amendment law in particular, *denies* the constructivism that social theory asserts. For the most part, it simply ignores it. Indeed, the great strength of Easterbrook's opinion is that it is among the very few openly to address this question of construction. For consider again just what it was that the Indianapolis statute aimed to regulate. While its primary drafters—Catharine MacKinnon and Andrea Dworkin—stressed the physical and psychological harms that pornography causes, they also stressed the role that pornography plays in constructing what it means to be a woman. Certainly not exclusively, and possibly not even primarily, but what pornography does, MacKinnon and Dworkin argue, is to construct an image or attitude or reality of the appropriate woman, a reflection of the "inappropriate woman." This image then constitutes and hence constrains the social world in which women live.<sup>16</sup>

Judge Easterbrook fully acknowledged this claim:<sup>17</sup>

Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home,

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purpose here is not to demonstrate how much of some reality is socially constructed or not. For another attempt, see Paul Watzlawick, ed, *The Invented Reality: How Do We Know What We Think We Know?: Contributions to Constructivism* 15 (Norton, 1984).

<sup>16</sup> See *Hudnut*, 771 F2d at 328-29 (discussing MacKinnon and Dworkin's views).

<sup>17</sup> Acknowledged does not mean credit, or find, for Judge Easterbrook was careful to make clear that he was accepting the claim for purposes of argument, not that he was finding the claim true as a matter of fact. Id at 329 n 2.

battery and rape on the streets. In the language of the legislature, “[p]ornography is central in creating and maintaining sex as a basis of discrimination.”<sup>18</sup>

Nonetheless, held the court, there is no social construction exception to the First Amendment. Even if these words construct the reality that they then describe, or perhaps, *because* they construct the reality that they then describe, government has no power to regulate them.

It is this last move, I want to argue, that moves too quickly. It covers too many intermediate steps. For however well we can maintain this *Barnette* ideal while ignoring issues of social construction, the ideal is a confusion if social construction is brought to the fore. If the Indianapolis ordinance is unconstitutional because it is government’s attempt to establish orthodoxy, then, once we understand just how orthodoxy is constructed, much of what government does should be drawn into doubt. Alternatively, once an account of social construction suggests just how this construction is the norm, it no longer seems obvious just why this particular form of construction is flawed. The antiorthodoxy ideal of *Barnette* is stable so long as our understanding of the construction of orthodoxy is truncated; and it is unstable once the account of construction is extended.

If we are to understand the place of orthodoxy in law—First Amendment law in particular, as well as in law more generally—we must first understand something more about how the orthodox gets made—by whom, and with what techniques. To understand this is to understand something more about the techniques of social construction. That is the aim of this Article. My hope is to suggest a way to speak about how law helps construct social reality, by drawing upon particular examples of this construction, and generalizing from these examples to some fundamental techniques. The aim is a heuristic for understanding law’s place in these constructions, so as to limit (or not limit) this unavoidable rule.

I begin quite narrowly, speaking of the construction of what I call social meanings, by entities like the government. Part I begins with a better sense of what I mean by “social meanings”—how they are used, what their components are. Part II then offers a range of examples of efforts to reconstruct particular social meanings.

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<sup>18</sup> Id at 329 (citations omitted) (brackets in original).

Drawing upon these examples, and upon simple tools from economics, in Part III I collect from these examples four techniques of social meaning construction. Three of these are familiar; the fourth will be something new. I offer these as four ways to understand what is really a common practice of social meaning construction. They are a taxonomy with which efforts at social meaning making can be described, and with which various constructions can be understood. In Part IV, I then apply this taxonomy to two areas of recent social meaning regulation—the regulation of dangerous sex, and the regulation of smoking.

Part V, then, returns very briefly to the questions raised at the start. With an account of social construction begun, I then sketch something of the presuppositions of existing First Amendment law that now may be drawn into doubt. Again, I do not resolve those doubts here. My aim is to identify how they may depend upon an understanding of social construction. Whether and how they get resolved I leave to others, at another time.

## I. SOCIAL MEANINGS

Some social meanings are constructed;<sup>19</sup> some are construct-

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<sup>19</sup> It is constructivism that defines modern social theory. See Unger, *Social Theory* at 1 (cited in note 13). Emile Durkheim is one start: "[S]ocial reality is constructed by the operation of the society itself. . . . Social facts are the product of the group life of the total operation of a society." Joseph Bensman and Robert Lilienfeld, *Craft and Consciousness: Occupational Technique and the Development of World Images* 157 (John Wiley & Sons, 1973) (discussing Durkheim's position). In our own time, the notion was advanced most forcefully in sociology by Peter L. Berger and Thomas Luckman's work, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* 19 (Doubleday, 1966), and in law most importantly by Roberto Unger. Unlike some of the earlier theorists, moderns think less about "society itself" constructing itself and more about how the actions of individuals and collectivities work to construct it. Nevertheless, the tradition has maintained its view about social reality's source: "Human reality is not provided at birth by the physical universe, but rather must be fashioned by individuals out of the culture into which they are born." David Kertzner, *Ritual, Politics and Power* 3-4 (Yale, 1988). Bourdieu describes experiments designed to capture this sense of construction in Pierre Bourdieu, *Systems of Education and Systems of Thought*, in Earl Hopper, ed, *Readings in the Theory of Educational Systems* 159, 161 (Hutchinson, 1971).

In claiming that reality is socially constructed, however, we should avoid three common misconceptions. First, to say that a constructed reality is treated as natural does not mean that such reality, or meanings within this reality, is in any important sense stable. While models of society speak as if a particular society were in equilibrium, "real societies can never be in equilibrium." E.R. Leach, *Political Systems of Highland Burma: A Study of Kachin Social Structure* 4 (Beacon, 1967). Real meanings are always contested.

Real societies exist in time and space. The demographic, ecological, economic and external political situation does not build up into a fixed environment, but into a constantly changing environment. Every real society is a process in time.

ed by government. This is the minimum of what I will claim here. But to understand even this minimum, we must spend some time making clear just what this "construction" means, what "social meaning" means, and what social meanings are.

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*Id* at 5.

On the other hand, instability does not mean models or descriptions of meanings are useless. That economies are never in equilibrium, for example, does not mean equilibrium economics is useless. Models of social equilibrium are tools, not for insisting upon a false stability, but for understanding more clearly how stabilities transform.

A second misconception is to imagine that constructivism implies that any construction is always possible. Constructions are both "invention" and "spontaneous generation, planning and growth." Eric Hobsbawm, *Mass-Producing Traditions: Europe, 1870-1914*, in Eric Hobsbawm and Terence Ranger, eds, *The Invention of Tradition* 307 (Cambridge, 1983). But this does not imply that any construction is possible at anytime. See Carol S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, in Dennis Altman, et al, eds, *Homosexuality, Which Homosexuality?* 13, 17 (GMP, 1989) ("Nor is it to say that entire cultures can transform themselves overnight, or that individuals socialized into one cultural tradition can acculturate at whim to another.")

Constructivism may imply that more than one construction may be possible, Pierre Bourdieu, *Social Space and Symbolic Power*, 7 *Sociological Theory* 14, 19 (1989), but it does not imply that every construction is possible. "That people perceive the world through symbolic lenses does not mean that people or cultures are free to create any symbolic system imaginable, or that all such constructs are equally tenable in the material world." Kertzner, *Ritual, Politics and Power* at 4. What is "possible" hangs upon particular histories and material conditions, and the constraints of both are real.

Finally, although different social constructions may be possible, it does not follow that every possible construction is achievable through central or governmental control. Governments may have a power to influence the construction of social reality, but they have no monopoly on this power. See Bourdieu, 7 *Sociological Theory* at 23. Whatever power they do have is in the end quite limited. As Bourdieu describes:

There is no doubt that the law possess a specific efficacy . . . . Nevertheless, this efficacy, defined by its opposition both to pure and simple impotence and to effectiveness based only on naked force, is exercised only to the extent that the law is socially recognized and meets with agreement, even if only tacit and partial . . . .

Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L J* 805, 840 (1987).

The aim of much of what follows is to provide a way to think about this "management" of social reality. A.P. Cohen and J.L. Comaroff, *The Management of Meaning: On the Phenomenology of Political Transactions*, in Bruce Kapferer, ed, *Transaction and Meaning: Directions in the Anthropology of Exchange and Symbolic Behavior* 87, 102 (Institute for the Study of Human Issues, 1976). But just as there are limits on the management of economic reality, there are limits on the regulation of social reality. Timur Kuran, *Cognitive Limitations and Preference Evolution*, 147 *J Institutional & Theoretical Econ* 241, 269 (1991) (discussing cognitive limitations in evolution of collective choices and individual preferences). I would willingly concede that indeed these limits are much greater in social than in economic reality. The only positive claim I need make at this point is that regulation is not wholly ineffective—that there is no rational expectations school (on the micro rather than the macro level) of the economics of social meaning, see Christel Lane, *The Rites of Rulers: Ritual in Industrial Society—The Soviet Case* 253 (Cambridge, 1981) (noting limitations of ritual and similar studies), or at least not yet. And unless it is proved that regulation can have no effect, there is much to gain by understanding such limited tools as there may well be, if only to understand the dangers these tools present.

That is the aim of this Part. I make just three claims: first, that social meanings exist; second, that they are used by individuals, or groups, to advance individual or collective ends; and third, that their force in part hangs upon their resting upon a certain uncontested, or taken-for-granted, background of thought or expectation—alternatively, that though constructed, their force depends upon them not seeming constructed. I end the Part by offering a way to talk about this background of understanding, a heuristic that will make it simpler to model the process of social meaning change.

I don't mean any of this Part to be particularly new, or especially contentious. To some the claims will seem quite obvious. To others they will simply orient what is to follow. But some orientation is necessary. This is a piece that marries two traditions in social thought, one that we might call interpretive (anthropology, sociology) and the other, traditionally, noninterpretive (economics). As at any wedding, some of what follows will seem familiar, but what will be familiar depends upon on which side of the isle you are seated. Readers from both sides have pushed me to add more examples "here" and cut others "there." But the "heres" are often the "theres." Therefore, rather than seek some ideal mix, I have tried to write this Article as (to continue the wedding metaphor) more a buffet than served. Much of the structure of the argument is sketched through examples, and if the point of the examples in one Section is clear to you, further examples in that Section can be skipped. My hope is that the sum of what follows offers something new, and that this is not inconsistent with the observation that parts taken separately may be quite old.

#### A. The Fact of Social Meanings

Any society or social context has what I call here social meanings—the semiotic content attached to various actions, or inactions, or statuses, within a particular context.<sup>20</sup> If an action creates a stigma, that stigma is a social meaning. If a gesture is an insult, that insult is a social meaning. I say "social" not to

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<sup>20</sup> Richard Pildes has a comparable discussion of the "expressive dimension" of action, offered as an extremely strong critique of rational choice theory. See Richard H. Pildes and Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum L Rev 2121, 2143-69, 2197-2205 (1990); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 Mich L Rev 936, 936-66 (1991); Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 Mich L Rev 483, 506-16 (1993).

distinguish social meaning from individual meaning (whatever that would be), or meaning more generally, but rather to emphasize its contingency on a particular society or group or community within which social meanings occur. My concern is not semantics; it is, instead, pragmatics. The aim is not to advance well known debates in the philosophy of language about the nature or function of meaning. It is instead to find a way to speak of the frameworks of understanding within which individuals live; a way to describe what they *take* or *understand* various actions, or inactions, or statuses to be; and a way to understand how the understandings change.<sup>21</sup>

Some examples may help indicate the sense:

*Seatbelts in a Budapest cab.* Because most cabs in Budapest are quite small, most passengers sit in the front seat. Until about two years ago, if you tried to put on a seatbelt in the front seat of a cab, the driver would try to dissuade you. If you nonetheless insisted and buckled your belt, your action would have an important effect: To wear a seatbelt was to insult the driver.<sup>22</sup> That insult is a social meaning.

*Tipping at the turn of the century.* It is well accepted in modern America that one tips certain people when they provide a service—the taxi driver, the waiter or waitress, the bellboy. You don't tip everyone who provides a service: You don't tip police officers (even in Chicago), or doctors, or law professors. Sometimes you tip the person who delivers the mail, or the person who delivers you flowers, but you never tip the person who sells flowers, or runs FedEx, or sells you stamps at the post office.

To us, these distinctions seem completely obvious. But their complexity should suggest something of their contingency. So too their origin. When tipping first appeared at the turn of the century, the practice was vilified as a relic of European inequality.<sup>23</sup> As described by Viviana Zelizer:

Even when not morally corrupting, tips were denounced as socially demeaning. What sort of gift was it, queried some

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<sup>21</sup> Compare Robert Nozick's conception of "symbolic utility," in *The Nature of Rationality* 26-35 (Princeton, 1993).

<sup>22</sup> Or at least some drivers. Certainly some drivers understood the distinction between intended and received meaning and tracked foreigners' intended meaning.

<sup>23</sup> Viviana A. Zelizer, *The Social Meaning of Money* 96 (Basic Books, 1994). See also William R. Scott, *The Itching Palm: A Study of the Habit of Tipping in America* 38 (Pennsylvania, 1916) ("[T]he difference [is] between aristocracy and democracy. . . . Every tip given in the United States is a blow at our experiment in democracy. The custom announces to the world that at heart we are aristocratic.").

critics, if it humiliated the recipient? "We do not believe," declared the editor of Harpers Monthly Magazine in 1913, "that it is possible for a man earning an honest living to take money which he has not earned without the misery which even the mendicant must know from alms."<sup>24</sup>

Insulting to its recipient and corrupting to both giver and recipient, there were, by the early 1900s, "nationwide efforts, some successful, by state legislatures to abolish tipping by turning it into a punishable misdemeanor."<sup>25</sup> But any one individual opposing tipping had little he or she could do to resist it—"the tipping system is so established now [1916] that the individual who opposes it must be prepared to play the role of martyr, whether employee or patron."<sup>26</sup>

In the mix of the debate in the early 1900s, we can say tipping had a social meaning. Its meaning was different from its meaning today. But in either context, the action (tipping) carries a complex, if only relatively clear, message. That message is a social meaning.

*Confederate flags in the South.* For much of the last century, the confederate flag was all but forgotten. The symbol of a defeated South, it fell quickly into history as a nation rebuilt. But early in the 1950s, it was revived as a political symbol by those most firmly resisting civil rights legislation in the South—the Dixiecrats. In Georgia, the state flag was adapted to include the Confederate symbol. In South Carolina, the Confederate flag was raised alongside the state flag.

We need not remark the obvious about the motives or intent of state legislators in making these changes. For our purposes, it is enough to note the effect such displays had on blacks in the South. As James Forman has written:

By flying the Confederate flag above the capital dome, state governments send a message. In part, that message glorifies and memorializes slavery, Jim Crow, and subsequent resistance to change. The message also excludes.<sup>27</sup>

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<sup>24</sup> Zelizer, *The Social Meaning of Money* at 96, quoting Scott Howells, *Matter of Tipping*, Harper's Monthly 127 (July 1913).

<sup>25</sup> See Zelizer, *The Social Meaning of Money* at 94 (cited in note 23).

<sup>26</sup> Scott, *The Itching Palm* at 75 (cited in note 23).

<sup>27</sup> James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 Yale L J 505, 514 (1991).

To black southerners, the actions of the predominately white legislatures had a meaning of exclusion, just as a decision by Germany to celebrate the birthday of Goebbels would have a meaning of exclusion for German Jews. That effect is its social meaning.

*Working women.* In 1950, an article that focused upon women novelists appeared in a French weekly magazine. At the beginning of the article was a picture of some seventy novelists seated together. Under the picture was a caption that identified the women in, what to us, but no doubt not to the French editors in 1950, is an extraordinary way. To each name was attached a parenthetical, matching the number of novels to the number of children each woman had produced. Roland Barthes describes the meaning:

We are introduced, for example, to *Jacqueline Lenoir* (*two daughters, one novel*); *Marina Grey* (*one son, one novel*); *Nicole Dutreil* (*two sons, four novels*), etc. What does it mean? This: to write is a glorious but bold activity. . . . But make no mistake: let no women believe that they can take advantage of this pact without having first submitted to the eternal status of womanhood. Women are on the earth to give children to men.<sup>28</sup>

The picture conveys this meaning; it is a text that Barthes reads. What he reads is its social meaning.

The form of each of these examples is the same. In each there is an action—buckling up, tipping, raising a flag, presenting novelists—that conveys in its particular context an easily recognized meaning. The actions then have *associations* with other actions, or meanings, and these associations are constitutive of what I am calling their semiotic content. Actions do not always convey easily recognized meanings—not all meanings are easily recognized, and not all actions convey meaning (think of a man turning over in his sleep). Nor of course are these meanings fixed, or stable, or uncontested, or uniform across any collection of people. They change, they are contested, and they differ across communities and individuals. But we can speak of social meaning, and meaning management, I suggest, without believing that

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<sup>28</sup> Roland Barthes, *Mythologies* 50 (Hill and Wang, 1972). This is by no means the best of Barthes's readings. See also his discussion of wrestling, *id* at 15, or the advertising of soap powders, *id* at 36, or his discussion of the French and their love for "steak and chips," *id* at 62.

there is a single, agreed-upon point for any social act. Gold has value even though its value across individuals differs dramatically. Actions have meaning, even if their meaning differs across individuals. Even if there is no single meaning, there is a range or distribution of meanings, and the question we ask here is how that range gets made, and, more importantly, changed.

Thus the things that I call social meanings—in this way do they exist, for a wide range of individual and social actions,<sup>29</sup> and because they exist, in this way is their effect in an important sense nonoptional. They empower or constrain individuals, whether or not the individual chooses the power or constraints. They are “forces to be reckoned with,”<sup>30</sup> by the weakest as well as the strong. A story by Orwell captures the point well: Summoned as a soldier in the British Army in India to kill a runaway elephant in a small Indian village, Orwell describes chasing the elephant through the village, and then cornering it:

And suddenly I realized that I should have to shoot the elephant after all. The people expected it of me, and I had got to do it. . . . Here was I, the white man with his gun, standing in front of the unarmed native crowd—seemingly the leading actor of the piece; but in reality I was only an absurd puppet, pushed to and fro by the will of those yellow faces behind [me]. I perceived in this moment that when the white man turns tyrant it is his own freedom that he destroys. He becomes a sort of hollow posing dummy, the conventionalized figure of a sahib. For it is the condition of his rule that he shall spend his life trying to impress the “natives,” and so in every circumstance he has to do what the “natives” expect of him. He wears a mask and his face grows to fit it.<sup>31</sup>

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<sup>29</sup> Marcel Maus's examples are best here. See Marcel Maus, *Techniques of the Body*, 2 Economy & Society 70, 83 (1973) (“Care of the mouth, and spitting technique. Here is a personal observation. A little girl did not know how to spit and this made every cold she had much worse. I made inquiries. In her father's village and in her father's family in particular, I do not know how to spit. I taught her to spit . . . She is the first in her family who knows how to spit.”)

<sup>30</sup> Margaret Gilbert, *On Social Facts* 316 (Princeton, 1992) (discussing role of social conventions).

<sup>31</sup> George Orwell, *Inside the Whale and Other Essays* 95-96 (Penguin, 1971).

## B. The Uses of Social Meanings

If social meanings exist, they are also used. They not only constitute, or guide, or constrain; they are also tools—means to a chosen end, whether an individually or collectively chosen end. They are a resource—a semiotic resource—that society provides to all if it provides to any. They are a way “for hitting each other and coercing one another to conform to something [one has] in mind”,<sup>32</sup> or for inspiring another or inducing another to do, or believe, or want, in a certain way.

The examples are many and obvious.<sup>33</sup> One uses an insult to oppress; one uses a “thank you” to endear. One selects certain words over other acts; in some contexts, one chooses a certain language to signal one meaning rather than another.<sup>34</sup>

Clothing is an obvious example: In any period, styles provide a repertoire of meanings. These meanings present risk. In eighteenth-century Europe, criminal penalties applied to anyone who dressed outside his proper class or status.<sup>35</sup> Today, the risk may

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<sup>32</sup> Mary Douglas, *Implicit Meanings: Essays in Anthropology* 61 (Routledge & Kegan, Paul, 1975).

<sup>33</sup> For an excellent account of their use in governmental regulation, see Richard H. Pildes and Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U Chi L Rev 1, 66-72 (1995). As Pildes and Sunstein point out, this is a perspective also recently adopted by Robert Nozick. Id at 66 n 228, citing Nozick, *The Nature of Rationality* (cited in note 21).

<sup>34</sup> Susan Gal, for example, recounts a Hungarian woman “ridiculed by fellow villagers for using standard rather than local Hungarian forms in speaking to [a] researcher,” a choice that signaled rejection of the local community in favor of the dominant elite. Kathryn A. Woolard, *Language Variation and Cultural Hegemony: Toward an Integration of Sociolinguistic and Social Theory*, 12 Am Ethnologist 738, 744 (1985) (discussing Gal’s research).

<sup>35</sup> Paul Connerton, *How Societies Remember* 10 (Cambridge, 1989). In late sixteenth- and early seventeenth-century England, legal sanctions were brought to bear against men and women who wore the clothing of the opposite sex. R. Mark Benbow and Alasdair D.K. Hawkyard, *Legal Records of Cross-Dressing*, in Michael Shapiro, *Gender in Play on the Shakespearean Stage: Boy Heroines and Female Pages* 225, 226-34 (Michigan, 1994). See also Michael Shapiro, *Gender in Play on the Shakespearean Stage: Boy Heroines and Female Pages* 20 (Michigan, 1994) (concluding that “London courts labeled all female cross-dressers as whores, itself a form of punishment” as a way of curtailing the independence male clothing provided women).

Even as Europe passed out of its class-based structures, clothing still functioned as a collective structure. France, for example, passed through two important stages of dress as it experienced its revolutionary period.

During the first, which dominated the years 1791-4, clothes became uniforms. The culottes of simple cut and the absence of adornments were emblematic of the desire to eliminate social barriers in the striving for equality: by making the body neutral, citizens were to be free to deal with one another without the intrusion of differences in social status. During the second phase . . . liberty of dress came to mean free bodily movement. People now began to dress in such a way as to expose their bodies of one another on the street and to display the motions of the body.

be less dramatic, though still present. Imagine underdressing at your employee's party, or overdressing at your boss's. Clothing is a type of grammar; "to read or wear clothes is in a significant respect similar to reading or composing a literary text."<sup>36</sup>

Meanings are used by collectives as well as by individuals, and most importantly for what follows, they are used by one kind of collective in particular—government. Governments trade on standing social meanings to advance state ends. If the nation suffers under a health craze, the government can use "healthy styles of life" as arguments to fight drug usage. If the nation worships, then the government can use "family values" to exclude homosexuals from social life. If a nation is trying to build national identity, then (tragically) it can use the constructed meaning of race and blood to carve up a nation.<sup>37</sup> This last, most destructive use was especially common as Europe tried to build its nationalities after the fall of religion. "Blood [became] . . . the elixir that would convert local social relationships into national culture."<sup>38</sup> As the fall of Yugoslavia suggests, it is not a tool that has fallen into disuse.

To speak of governments, however, is not to deny that there are many other institutions that affect social meaning as well. Obviously, there is advertising as well as propaganda, and there is the Catholic Church as well as the State of Georgia. I focus here on government, not to deny the constructive effect of these other nongovernmental organizations, but to isolate important features of governmental, as distinct from other collective, meaning management. A fuller account would include these other institutions. But that account, as I suggest below, is simply an application of the account that follows here.

Finally, to speak of governments affecting meaning is not to say that governments have the ability *easily*, or *successfully* to change meaning. Governments, as other institutions, are inept; changes are very often not as intended. Here, perhaps more than in any other area of social policy, unintended consequences are central to any understanding of the process of regulation. But

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Connerton, *How Societies Remember* at 10.

<sup>36</sup> Connerton, *How Societies Remember* at 11-12.

<sup>37</sup> "When drawn from physical nature, [symbols] exemplify what Douglas . . . has called 'natural symbols' . . . [including] race, blood, and kinship. For better or worse, such ideas have served state ideologies well." Michael Herzfeld, *The Social Production of Indifference: Exploring the Symbolic Roots of Western Bureaucracy* 11 (Berg, 1992).

<sup>38</sup> *Id* at 23-24.

that consequences are often unintended does not mean there is no reason to consider consequences.

### C. The Force of Social Meanings

If meanings exist, and if they are used, from where do they draw their force?

I have called meanings associations, one idea that gets tied to another. But the language of associations is a bit too passive for the purposes that I have here. So instead of speaking simply of associations, I will use the heuristic of writing to signal the dynamic I intend. This is a heuristic that tracks the relationship between *texts* and *contexts*; meaning, so understood, is the product of both.

The text could be an act (the raising of one's hand); the context is that which gives this act meaning (a salute). The text, in context, activates the association. But we need to say a bit more about this context to understand just how. For while in one sense context may simply describe all that goes with (con) the text,<sup>39</sup> the way in which I mean to use this notion turns upon a more focused conception.

As a first cut, we can describe context as the collection of understandings or expectations shared by some group at a particular time and place. But to function in the sense that I mean here, these understandings or expectations must be shared in a particular way. They must be *taken for granted* by those within the group at issue,<sup>40</sup> or put another way, they must be relatively uncontested<sup>41</sup> in that context. It is not enough that individuals

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<sup>39</sup> For a discussion of the etymology of "context," see Ronald K.L. Collins and David M. Skover, *Paratexts*, 44 Stan L Rev 509, 513 n 18 (1992). "Con" is the variant of the Latin "Cum" which means *with*. See Charlton T. Lewis, *An Elementary Latin Dictionary: With Brief Helps for Latin Readers* 182 (Clarendon, 1977).

<sup>40</sup> An action is "taken for granted" when it is the ordinary response to accept the action or the meaning it presents. To say a response is the ordinary response is not to say it is the only response. There are dissidents from what is taken for granted. But for something to function as a social meaning in the sense I offer here, it must be so understood. See Anne Norton, *Republic of Signs: Liberal Theory and American Popular Culture* 1 (Chicago, 1993) ("Ideas are most powerful not when they impose practices upon us but when we take them for granted, not when their primacy is aggressively asserted but when they go unquestioned."). See also Lynne Zucker, *The Role of Institutionalization in Cultural Persistence*, in Walter W. Powell and Paul J. DiMaggio, eds, *The New Institutionalism in Organizational Analysis* 83, 86 (Chicago, 1991); Ronald Jepperson, *Institutions, Institutional Effects, and Institutionalism*, in Walter W. Powell and Paul J. DiMaggio, eds, *The New Institutionalism in Organizational Analysis* 143, 147 (Chicago, 1991); Mark Ramseyer, *Learning to Love Japan*, 31 San Diego L Rev 263, 266 (1994).

<sup>41</sup> I discuss this notion in *Understanding Changed Readings: Fidelity and Theory*, 47

understand that a particular idea along with a given action may yield a given meaning. For it to function as a "social meaning," the individuals in this context must also accept it. For an action to convey a social meaning in the sense I want to use the term here, it must do so without appearing contingent or contested; it must do so in a way that feels natural. As Bourdieu describes, it must function with a sort of "social magic."<sup>42</sup>

Examples will make the point more clearly: A man announces that he is a Nazi. His announcement is a text. This text (in post-World War II Western culture) stigmatizes him. A second man confesses that he is a vegetarian. This too is a text. Someone points out that Hitler was a vegetarian and that therefore we should vilify vegetarianism just as we vilify Nazism. Even if everyone hearing this argument believes the facts and understands the links, the argument does not create stigma for vegetarians. The argument is an *argument* for stigmatizing, but an argument does not make stigma. So long as the premises upon which this argument rests remain *contested*, the argument does not function to stigmatize.

A man is accused of sexually harassing his female secretary. The charge is a text; in some parts of America, it creates a stigma. A second man, this time in Russia, commits the same acts. Even if a westerner explains perfectly well the notion of sexual harassment, why it is wrong, etc., the report in Russia will not create the same stigma. In Russia, the report may be an argument for stigma; but again, so long as the premises upon which the argument rests remain contested, the argument does not function to stigmatize.

In both examples, actions yield social meanings because they rely for their source upon expectations or understandings not themselves (then) in question—not, as I will use the term, contested.<sup>43</sup> These understandings or expectations exist invisibly;<sup>44</sup>

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Stan L Rev 395, 410-14 (1995). Compare John R. Searle, *The Construction of Social Reality* 4-7 (Free Press, 1995).

<sup>42</sup> Pierre Bourdieu, *Language and Symbolic Power* 125 (Harvard, 1991):

Acts of social magic as diverse as marriage or circumcision, the attribution of titles or degrees, the conferring of knighthoods, the appointment to offices, posts or honours, the attribution of a quality label or the corroboration by a signature or initials, are all acts which can only succeed if the institution—meaning to institute in an active way someone or something endowed with this or that status or property—is guaranteed by the whole group or by a recognized institution.

<sup>43</sup> One can of course contest the claim that understandings or expectations are ever not in question or not contested. But this is not a useful quibble. I completely agree that

their effect is ordinarily unnoticed. Obviously they are in some sense learned—how, and through what techniques, is the focus of much that follows. But once learned, this learning is forgotten.<sup>45</sup> There is a process of *coming to see* something in a particular way; but that is quite different from the experience of *seeing* something in a particular way. Compare: At one time, white southerners *saw* blacks as “naturally” inferior. As something *seen*, the view was treated as nonpolitical, a fact of nature, true. Eventually, white southerners *came to see* blacks differently. This *coming to see* was inherently a political exercise—a change from one constructed view to another constructed view—as what was natural before is now seen to be contested, and what is now viewed as contested slowly sinks into a background of naturalness. Or think of the officer in *Blade Runner*, whose job it is to capture and kill runaway androids: At first he sees these creatures as machines, and treats them as machines—“raping,” for example, a machine that insults him by rejecting his sexual advances. But slowly he becomes susceptible to their surprises, and eventually, after falling in “love” with the one he had raped, and after listening to the poetry of another whom he had sought to “terminate,” he sees these androids as human. What was uncontested before becomes contested, and, one is lead to think, what is now contested (the equal status of androids) will eventually become uncontested.

When these understandings or expectations become uncontested and invisible, social meanings derived from them appear natural,<sup>46</sup> or necessary.<sup>47</sup> The more they appear natural, or nec-

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always there is a degree of contestation—there is, after all, the Flat Earth Society. There is also a difference, I suggest, between the contestation that the Flat Earth Society brings to discourse about geography and the contestation that the Moral Majority brings to the abortion debate. The right to abortion is contested in a way that the shape of the earth is not, even though both are certainly contested.

<sup>44</sup> Mary Crain, *The Social Construction of National Identity in Highland Ecuador*, 63 Anthropology Q 43, 43 (1990).

<sup>45</sup> Bourdieu, *Language and Symbolic Power* at 12-13 (cited in note 42).

<sup>46</sup> This is no doubt a dangerous word, for it conveys three quite distinct ideas. The first refers to the ontological source of that which is called natural, or of nature. To say something is natural, or of nature, sometimes means that it is something outside of human control: The laws of nature are given to us; we can do little to change them. The second refers to the ease with which an idea or practice or quality can be changed. “Men are by nature greedy” need not refer to something about their genetic makeup, but can simply mean that this quality, greediness, is not something easily changed. The third meaning refers to a behavior that comes most easily. “Telling the truth for him is second nature.” This means neither that truth telling is for him a genetic quality, nor that it would be particularly difficult for him to lie, but that, all things being equal, he ordinarily tells the truth, and deviating from this ordinary behavior would feel odd, or difficult.

essary, or uncontested, or invisible, the more powerful or unavoidable or natural social meanings drawn from them appear to be. The converse is also true: the more contested or contingent, the less powerful meanings appear to be. Social meanings carry with them, or transmit, the force, or contestability, of the presuppositions that constitute them. They come with the pedigree, presumed or argued for, of their foundation.

#### D. The Elements of Construction

Construction is about change. Social meaning construction is about social meaning change. So how is change effected? What is its technique?

If meaning is the product of a text in a particular context, then we can change meaning by changing either text or context. I can say "thank you" when someone opens the door for me, or I can say "go to hell." The difference is in the text, and the difference yields a difference in meaning—indeed, all the difference in the world.

But texts are not always so easily changed. Being black is a text; being black in the antebellum South had a particular meaning. A black person could not simply change that meaning by becoming white;<sup>48</sup> if the meaning was to change, something other than the text had to change. That something else could only be the context, or more precisely, the associations that get made when the particular text is asserted.

Thus, while at times texts can be changed, and changing them will be the easiest way to secure a desired social meaning, at times text cannot be changed, and in those cases, it will be easier, or simpler, or simply just, to allow the text to remain the

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As I use the term, I want to mix something of the last two usages, and stand quite agnostic about the first. I don't care here about the ontological source of that which I call natural; instead, regardless of ontology, I mean to report either what, in a particular context, seems most difficult to imagine otherwise, or in a particular context, what seems to be the ordinary and expected behavior. Both aspects point to the sense in which some idea or practice can become, in a particular context, relatively uncontested—that which goes without saying, or that which need not be proven to be relied upon. It is this part that becomes the natural, even if it is plainly socially constructed, and it is this sense of natural then that I mean to refer to in the discussion that follows.

<sup>47</sup> Thus Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge, 1986).

<sup>48</sup> Or as George Samuel Schuyler's amazing novel suggests, even if it were possible, the meaning would not be the same. See *Black No More: Being an Account of the Strange and Wonderful Workings of Science in the Land of the Free, A.D. 1933-1940* (McGrath, 1931).

same, while changing the context of understandings that give it its meaning.

This process of changing contexts to change social meanings—the process of changing the associations, of switching on certain links while switching off others—is what I mean by social construction. In the terms I have offered so far, social construction proceeds by breaking up the understandings or associations at a particular time or built into a relatively uncontested context, and upon which social texts have meaning. It proceeds by remaking that which is taken for granted, and which gives a particular text an unwanted meaning. It functions by switching on new associations. This breaking up, or remaking, requires effort; it follows from a practice. The question I want to ask here is how it so follows: What are the techniques that constitute this practice of meaning remaking.

## II. CONSTRUCTING SOCIAL MEANINGS

Meanings exist, and are used. Construction is about how they are changed—more particularly, how the contexts within which they exist are changed. My focus is on cases where the contexts *are changed*, not where they simply *change*. My aim is to understand intervention, not evolution.

The distinction is important. While most social meaning may simply change, in the sense that its content transforms or evolves over time, the cases I want to focus on here are those where social meanings are changed by the action of individuals or groups. It is this that I call construction. Other theories of social meaning take a less activist approach. Jack Balkin, for example, offers an extremely rich account of the evolution of social meaning, understood as a process through which the “cultural software” of individuals changes through time.<sup>49</sup> Michel Foucault’s work is another example, though his is an account focused less on meaning, and more on the “meticulous observation of detail”<sup>50</sup> constructing structures of power and discipline in social life.

My account is less general than these. While an account of how social meaning changes may include an account of how it is changed, my focus is just on the latter. It is meant to stand inde-

<sup>49</sup> See J.M. Balkin, *Cultural Software: A Theory of Ideology* (unpublished manuscript on file with U Chi L Rev).

<sup>50</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* 141 (Pantheon, 1977).

pendent of this more general account. Compare: However it is that a boat is carried down a river, there is a question about how the captain steers the boat. It is that question—or more generally, whether and how—that I am interested in here.

Some misconceptions, however, should be removed at the start. To offer a theory about how social meaning is changed is not to say that all social meaning, or social reality, can be changed.<sup>51</sup> What social reality *is* is distinct from how it can be *changed*; and to say that some can be changed is distinct from saying that all can be changed. How much can be changed is itself a contingency—perhaps very little, perhaps lots. However much, what follows is an effort to account for that part that can be changed.

I begin again with examples. The examples divide into two sorts. With one kind (Sections A and B), there is a new social meaning sought, or an old meaning to be changed; with the other (Section C), there is an old social meaning that is being preserved. The first kind I call *offensive construction*; the second, *defensive construction*.

#### A. Constructions: Offensive, Nonpolitical Changes

The first class of reconstructions I discuss is what I will call offensive and nonpolitical. I mean “offensive” as the opposite of “defensive.” I mean “political” in a very narrow, if ordinary, sense: “Political” are those structures directed at establishing or maintaining or transforming a political order, such as the state; nonpolitical are those structures affecting the rest of social life.

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<sup>51</sup> Construction theory raises properly three distinct questions. The first is ontological: Of what is social reality made? How much is constructed and does anything “natural” remain. But to say, as I do, that *some* social reality is constructed is not to take sides in this unhelpful debate. Although “how much is constructed” may be an important question in some contexts, its resolution is not essential here.

The second question is qualitative: For that part constructed, it asks, how easily can the constructed be changed—how “plastic,” in Roberto Unger’s terms, are the social structures that constitute us. See Unger, *Social Theory* (cited in note 13). This question is no doubt important, though less open, I think, to theory than descriptive accounts. We are, no doubt, differentially plastic—parts of who we are, individually and collectively, are more easily changed than others—but there is little we can say theoretically about which parts are more or less plastic.

The third question is simply pragmatic: For that part constructed, what are the mechanics of reconstruction? My focus is this third question. However much social reality is constructed, certainly some is; and however plastic the constructed part is, there is a distinct question about *how* that plastic part gets remade. Merely calling it constructed or deciding that it is plastic does not tell us just how it gets remade. What follows is an attempt at such an account.

Among political reconstructions are aspects of education, the construction of tradition, nationalism, and political ideology.<sup>52</sup> Among nonpolitical reconstructions are changes which, although they have political implications, are narrower than the first class. Thus, while I certainly agree with the kernel of truth in the slogan "it's all politics,"<sup>53</sup> it is another sense of "politics" that I am referring to here.

### 1. Helmets in Russia.

In the West (as in America versus Russia, not California versus New York), there has long been a battle to get motorcyclists to wear helmets. On one side of this battle stand health professionals, pointing to the extraordinary loss of life in accidents where bikers are not wearing helmets. On the other stand bikers, pleading liberty and an odd thrill from "cheating death."<sup>54</sup>

In this battle, both sides have invoked social meanings to support their side of the debate. Law itself has weighed in to help change these meanings.<sup>55</sup> But consider an extremely odd example coming from the former Soviet Union.

Before the 1960s, motorcyclists in Soviet Russia did not wear helmets. In part this was because of a lack of any perceived need to wear helmets; in part it was because the Soviet economy failed to produce any helmets. Helmets were worn in Western Europe, however, and like most Western goods, by the late 1950s, helmets were slowly finding their way into Soviet Russia. Soon, some Russians began to wear motorcycle helmets produced in Western Europe. The primary design of these was French, and they were what we would now think of as half-helmets, primarily white.

When these helmets first began to appear, the Soviet government quickly reacted against them. For despite bearing the medical costs associated with cycling accidents, the Soviets perceived a much greater cost to the Soviet state associated with individu-

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<sup>52</sup> See Section II.B.

<sup>53</sup> See Unger, *Social Theory* at 15 (cited in note 13).

<sup>54</sup> For a recent example of this debate, see Kim Sue Lia Perkins, *Helmet Bill Left Battered at Hearing: State Safety Official Backs Biker Stance*, Ariz Republic A1 (Feb 3, 1993) (describing the controversy over Arizona's potential loss of \$1.5 to \$2 million in federal aid if it fails to pass helmet law).

<sup>55</sup> In states with helmet laws, wearing a helmet has more of an ambiguous meaning: law-abidingness, as well as a concern for safety or lack of machismo. Of course, for some bikers, law-abidingness itself may be a sign of lack of machismo.

als wearing helmets, that is, the invasion of Western style. Because helmets were produced only in the West, wearing them was a political statement antithetical to the message the Soviet government wanted broadcast.

Thus began an extraordinary and self-conscious campaign by the Soviet government to vilify the wearers of motorcycle helmets. Cartoons appeared in the popular (read: government-controlled) press, mocking the "white heads" on cycles. By the early 1960s, people began wearing helmets only at night, to avoid easy detection.

The night-riding behavior suggests the campaign attacking helmet wearing as "imperialism" had some effect. For no laws were passed banning the wearing of helmets. The campaign, to the extent it had some effect on behavior, had its effect through stigma only. And to the extent behavior changed, this indicated that to some degree the Soviet government succeeded in stigmatizing those who wore white helmets.

Soon after this campaign reached its apex, however, the interests of the Soviets changed. The government started producing Soviet helmets. Once Soviet helmets were available, the propaganda campaign began to shift. No longer was it stigmatizing to wear helmets; it was only stigmatizing to import helmets. The social meaning of helmet wearing was again transformed, and again, transformed self-consciously by government propaganda. After Soviet production of helmets began, the social cost of wearing (Soviet-produced) helmets was allowed to fall, and the incidence of wearing helmets rose.

## 2. Civil rights in the American South.

During the legislative hearings on the Civil Rights Act of 1964, supporters of the bill called before the committee white, southern employers and business owners whose discrimination against blacks was the prime target of the legislation. Some of these employers and businessmen supported the bill, and some of them supported the bill for reasons quite relevant to our analysis of social meaning construction.<sup>56</sup>

For obvious reasons, it would have been better for southern employers and businesses had there been no discrimination

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<sup>56</sup> For a rich and comparable analysis, see Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv L Rev 1003, 1065-85 (1995).

against blacks. Employers would have benefited, since the labor pool would have increased and wages decreased. Businesses would have improved, since the demand for services would have increased—so long, that is, as whites did not shift their custom.

It was this last possibility, however, that set the stage for business support for the Civil Rights Act. For what business leaders feared was the retaliation of whites against their voluntary efforts to integrate. This retaliation had both a behavior and a meaning. The behavior was simply the shift of business to another local business.<sup>57</sup> The meaning was a form of stigma, this time stigma suffered by whites. In a context where voluntary integration was permitted, for a white to serve or hire blacks was for the white to mark him or herself as having either a special greed for money or a special affection for blacks. As one restaurant owner said, "If I'm the only one, how can I face my fellow citizens *with pride?*"<sup>58</sup>

How would the Civil Rights Act change this? In a context where there is no legal proscription against discrimination, the act of hiring or serving a black had a relatively unambiguous meaning—either a special favor for blacks or greed for money. But if that context were changed such that discrimination against blacks was illegal, then at the least, the decision to hire a black would have an ambiguous meaning. The businessman could be hiring or serving a black because of his concern for the status of blacks, or he could be hiring or serving blacks because of his concern to obey the law. By creating this important ambiguity, the law would function to reduce the symbolic costs of hiring blacks.<sup>59</sup> And by reducing the symbolic costs, it would increase, on the margin, black service and employment.<sup>60</sup>

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<sup>57</sup> See the testimony of Burke Marshall in A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, Hearings on S 1732 before the Committee on Commerce, 88th Cong, 1st Sess 216 (1963) (stating that an overwhelming number of southern businessmen favor desegregation, but face serious collective action problems). See also Leslie A. Carothers, *The Public Accommodations Law of 1964: Arguments, Issues and Attitudes in a Legal Debate* 20-21 (Smith College, 1968) (same).

<sup>58</sup> *Civil Rights: Hoss Unhorsed*, Time 51 (Aug 14, 1964) (emphasis added). See also *The Supreme Court: Beyond a Doubt*, Time 13, 14 (Dec 25, 1964).

<sup>59</sup> Gerald Rosenberg makes the same point in *The Hollow Hope: Can Courts Bring About Social Change?* 102 (Chicago, 1991).

<sup>60</sup> Richard Epstein points to this example as one of the effects of the antidiscrimination laws. See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 127 (Harvard, 1992). But he goes on to say that the legislation was not needed to solve a collective action problem. *Id* at 128. This is a point that will have much salience below. Suffice it here that while there was not a collective action problem related to violence, if hiring blacks, or serving blacks was a social meaning, then

This example is important because it demonstrates how a government can change social meaning without having *control* over social meaning. Had the federal government had control over social meaning in the way Orwell speaks of such control, it would simply have decreed that blacks be considered equal to whites. Such a decree would have had—as some argue *Brown v Board of Education*<sup>61</sup> did have—little effect.<sup>62</sup> But such powerlessness notwithstanding, the government does have the power to change the marginal social costs of various social actions by rendering certain meanings ambiguous.

### 3. Helmets in hockey.

A third example follows directly from the first two: For obvious reasons, wearing a helmet in hockey is a cost-minimizing strategy, at least when the only costs reckoned are physical or health costs.<sup>63</sup> For much of the history of professional hockey, however, most hockey players did not wear helmets. There are two salient reasons for their refusal. One reason is that the helmets have a small effect on the player's ability to see; the other is that the helmets were not consistent with the macho self-image of hockey players. A player who wears a helmet then suffers two kinds of costs: First, an efficiency cost relative to other players, since his vision is slightly impaired; and second, a stigmatic cost relative to other players, since their and others' vision of his "machoness" is impaired.

The first of these two costs can be partially eliminated, though to do so raises a collective action problem. Since the harm caused by the impaired vision is partially simply relative, then that portion of the harm would be eliminated if all wore helmets.<sup>64</sup> The second harm—the stigmatic harm—also presents something of a collective action problem, though I want to defer for the moment a discussion of the structure of this collective action problem.<sup>65</sup>

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there was a collective action problem in transforming it.

<sup>61</sup> 347 US 483 (1954).

<sup>62</sup> Rosenberg, *The Hollow Hope* at 70.

<sup>63</sup> For some quibbles, compare Thomas C. Schelling, *Micromotives and Macrobbehavior* 213-14 (W.W. Norton, 1978), with Richard H. McAdams, *Relative Preferences*, 102 Yale L J 1, 21-22 n 81 (1992).

<sup>64</sup> Impaired vision will increase the incidence of accidents, which cannot be reduced by having all wear helmets, but presumably that increase is outweighed by the decrease in severity of accidents.

<sup>65</sup> See Section III.A.

What is interesting for our purposes is the nature of the solution adopted by the National Hockey League. Just as in the case of the Civil Rights Act, the League made it a rule that players wear helmets.<sup>66</sup> The effect of this rule is much like the effect of the Civil Rights rule mentioned above. After this rule, the stigma costs of wearing a helmet are less than before the rule, since after the rule, the social meaning of wearing the helmet is—at a minimum—ambiguous between a failure in machoness and a need to conform to the rules of the game. As one sports commentator put it, referring to the debate over face guards, “Yet others note a certain unmanly stigma in the use of a face guard. I’m glad I have an excuse to wear one,” says Montreal center/wing Ryan Walter.<sup>67</sup> The rule contributes to the undermining of the past macho-focused practice.<sup>68</sup>

#### 4. Dueling in the American South.

For much of the history of the American South, state governments struggled against a well-entrenched practice of dueling. Odd as it may seem, this practice of dueling—the ritual of retiring to a field and firing pistols at one another to satisfy a social insult—was the domain of southern gentlemen only.<sup>69</sup> Not just anyone could successfully challenge another for a duel; only someone with a sufficiently high social standing.<sup>70</sup> Lines, of course, were not sharp, and some on the margins of high society used dueling as a way to secure their place in high society (Aaron Burr, it is said, challenged Hamilton in part to elevate his social

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<sup>66</sup> The rule—Rule 23(b) of the League Rules—came into effect in 1979 for players who signed contracts after June 1979. Players signing before this were allowed to play without helmets as long as they signed waivers. See *N.H.L. Rules New Players Now Must Wear Helmets*, NY Times C14 (Aug 7, 1979).

<sup>67</sup> Craig Neff and Robert Sullivan, *A Prescription for Safety*, Sports Illustrated 7 (Jan 13, 1986).

<sup>68</sup> Unfortunately, the rule may also increase the violence of the game. Some players have complained that the rule makes players less concerned about “checking” others, since the damage caused is decreased. See Kevin Allen, *Players Take Hats Off to Helmetless*, USA Today 7 (Nov 13, 1991); Skip Myslenski, *Hats Off to “The Hatless 5”—But Watch Those Sticks*, Chi Trib C1 (Oct 15, 1991). Compare Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J Pol Econ 677 (1975) (better safety devices lead people to drive more intensely and take more risks).

<sup>69</sup> Jack K. Williams, *Dueling in the Old South: Vignettes of Social History* 26-27 (Texas A&M, 1980) (describing the social stratification of dueling).

<sup>70</sup> Id at 27 (“No gentleman ever accepted a challenge from one not considered his social equal.”).

position<sup>71</sup>). But social climbers notwithstanding, the class for whom dueling was a practice was relatively small.

The details of this scheme need not concern us here. For our purposes, it is enough to note some of the more obvious oddities of this social ritual. Consider first its disproportionality. A gentleman could be challenged for the slightest insult—merely for being personally cold, for example, in a social setting—yet the challenge could lead to death.<sup>72</sup> More interesting still is its essential randomness: for the duel can result in the death of either the injurer or the injured, with no mechanism to assure that the punishment tracks the guilty.<sup>73</sup> The duel was like a lawsuit where the judge, after establishing that indeed there was a wrong, flips a coin to decide who, between the plaintiff and the defendant, should be executed for the wrong. No doubt then, the duel often misfired, either because the challenge itself was wrongful and the challenged suffered death,<sup>74</sup> or because the challenge itself was correct but the challenger suffered death (not to mention the harm of the death even if the “correct” person died). Charles Dickinson, for example, died at the hands of Andrew Jackson after Jackson had “made uncomplimentary remarks about” Dickinson’s wife.<sup>75</sup>

Many have attempted to explain the rationality of this practice. The question of rationality has two perspectives. From one perspective, the question is whether, given structures as they were, it was rational for any individual to participate in a duel. The other is whether it is rational for a society to have the social structure of dueling. Consider each in turn.

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<sup>71</sup> See id at 16 (“[A] number of public figures gained prominence and were pushed ahead in their careers because of prowess in dueling.”).

<sup>72</sup> Id at 13.

<sup>73</sup> See Warren F. Schwartz, Keith Baxter, and David Ryan, *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J Legal Stud 321, 335 (1984) (“[D]ueling seems to have represented a system employing a very high penalty, a very low probability of imposition, and an extremely high error rate.”).

<sup>74</sup> Id at 325.

<sup>75</sup> Williams’s account is too wonderful to omit:

At the single word “Fire!” Dickinson aimed and shot. His ball hit Jackson in the chest but Old Hickory did not fall. Instead, he raised his left arm and pressed it against his wound, then raised his right arm slowly, aimed, and squeezed the trigger. The hammer stopped at half-cock. Jackson, bleeding badly, drew it back and fired again. Dickinson was killed. Jackson recovered to become judge, general, and president—and to fight more duels.

We have seen enough to see how it could be rational for an individual to participate in a duel, if existing structures of social meaning are taken as fixed.<sup>76</sup> To refuse a challenge wrongfully opened one up to severe social sanction, and the burden of this sanction could easily outweigh the expected cost of participating in the duel. Moreover, by rightfully and properly executing a duel, though risking death, one could establish oneself as a gentleman, a person to be trusted and engaged, and thus awarded significant social advantages. Social meanings could well be such that there would be a net benefit from engaging in a duel if rightfully challenged. If so, we could say, from the individual's perspective, dueling was rational.

The harder question is whether the practice was rational from the social perspective. To us, certain features are clearly ridiculous: the practice is random, it strikes down some of the community's most valuable citizens, and its sanction is not proportional to its harm. On the other hand, no doubt it was a polite society,<sup>77</sup> whose honor (supported by the system of dueling) helped it avoid the cost of cheating.<sup>78</sup> How—from where—one weighs these benefits and costs is an unanswerable question. But for our purposes, this ultimate judgment is not important. It is enough to note that southern states were quick to ban dueling, and to ask whether, and how, this ban was effective.

We should note up front what is a commonplace in the history of American dueling: Regardless of their form, attempts to regulate dueling were largely ineffective.<sup>79</sup> But even though generally a failure, there are differences in the effectiveness of the different kinds of regulation.<sup>80</sup> For our purposes, we can isolate

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<sup>76</sup> See Schwartz, Baxter, and Ryan, 13 J Legal Stud at 341 (cited in note 73).

<sup>77</sup> With an extremely elaborate practice of politeness. Williams, *Dueling in the Old South* at 30 (cited in note 69).

<sup>78</sup> Schwartz, Baxter, and Ryan, 13 J Legal Stud at 333 (cited in note 73).

<sup>79</sup> See id at 327. In part they were ineffective because not enforced. Williams, *Dueling in the Old South* at 66 (cited in note 69). In part they were not enforced because of an odd conflict in the structure of interests regulating the regulation of dueling. On the one hand were the proponents of dueling's ban, the most vocal of which were newspaper editors, who were also those most likely to be challenged to a duel. Id at 60. It was their business to insult, but they were not immune from social sanction. Thus they, along with the general population, were strongly behind antidualing law enactment. Schwartz, Baxter, and Ryan, 13 J Legal Stud at 328 (cited in note 73). On the other hand, enforcement was within the domain of the elite. It was less public and less under popular control. See Williams, *Dueling in the Old South* at 68 (cited in note 69) (describing judicial hesitation in enforcing antidualing laws). Thus enforcement practices could in effect preserve what was proscribed by the democracy more generally.

<sup>80</sup> See Schwartz, Baxter, and Ryan, 13 J Legal Stud at 326-27 (cited in note 73).

two distinct forms. One form aimed to eliminate dueling simply by banning it from social life; the other aimed to eliminate it simply by changing its social meaning.<sup>81</sup> Consider the very different ways these two regulations would work.

As suggested above, what held dueling together was solidarity among an elite class. Simply banning dueling would not necessarily challenge that solidarity. Indeed, if the elite viewed the ban as imposed by the nonelite, ignoring the ban would itself be a demonstration of solidarity.<sup>82</sup> We can see this by imagining a somewhat stylized exchange between two potential combatants:

- Challenged: "I decline your challenge on the grounds that dueling is illegal."
- Challenger: "But these are laws passed by commoners; they do not represent the will of gentlemen."
- Challenged: "Yes, but if we engage in dueling we are likely to be jailed or hanged, if one of us is killed."
- Challenger: "So you are as I thought—a coward."

Proscription here fails in part because it directly challenges the norms of loyalty built within the social structure, and these norms can be quite strong.<sup>83</sup> Within the elite's rhetorical structure, a law banning dueling was not a sufficient reason to refuse to duel.<sup>84</sup>

But a second type of sanction, while in some sense less severe, might actually have been more effective.<sup>85</sup> Under this sanction, an individual participating in a duel was barred from public office after the duel.<sup>86</sup> Holding public office, however, or more importantly, serving the public, was itself a duty of the elite. Thus, exclusion created a conflict in the duties faced by the elite, and hence an elite-based reason for refusing the challenge of a duel. Imagine again a dialogue declining the duel:

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<sup>81</sup> A third form of private social regulation was the creation of antidueling societies. See Williams, *Dueling in the Old South* at 64 (cited in note 69).

<sup>82</sup> Indeed, remaining outside the ordinary system was a form of virtue. Jackson's mother is said to have told Jackson, "Never tell a lie, nor take what is not your own, nor sue anybody for slander or assault and battery. Always settle them cases yourself!" Id at 5 (emphasis omitted).

<sup>83</sup> This is not to say it had no effect. Williams writes that "anti-dueling laws gave moral courage to some" to decline a duel. Id at 70-71.

<sup>84</sup> Compare id at 60 (discussing public opposition to dueling).

<sup>85</sup> See Schwartz, Baxter, and Ryan, 13 J Legal Stud at 328 (cited in note 73).

<sup>86</sup> Williams, *Dueling in the Old South* at 67-68 (cited in note 69).

- Challenged: "I decline your challenge on the grounds that it will bar me from serving in public office in the future."
- Challenger: "But you are obligated as a gentleman to accept my challenge."
- Challenged: "I am also obligated as a gentleman to serve my state, and I consider that duty superior to my duty to give you satisfaction. I agree it would be better if I were free to satisfy both duties, and I would willingly accept your challenge if it did not disable me from serving my state. I have no control over that, however. I must, therefore, respectfully decline."

What is different about the second proscription is that it functions within the elite's rhetorical structure, to undermine the very basis for dueling itself. A gentleman could appeal to a gentleman's duty in escaping the duel, rather than appealing to self-interest or the rules of commoners. The state's action here served to ambigu ate a gentleman's duty, and thereby facilitated the transformation of the social meaning of dueling itself. Against the background that the state has reconstructed, to choose to duel would be to choose to serve private interests over collective duty.

Even this sanction was ineffective for much of the history of the old South, however, usually because legislatures passing this disability would grandfather all duels up to the time of the legislation and would repass the grandfather legislation every few years. Thus the disability actually affected few, as the grandfathering reaffirmed the social status of the practice. Nonetheless, my point here is not so much about whether the laws were in fact effective, but rather the different ways that they could have been effective. It is enough to note that their effectiveness turned in part upon how well they connected with an existing structure of social meaning.

## B. Constructions: Offensive, Self-Consciously Political Changes

The examples I have just given are examples of reconstructions that are relatively narrow within a particular culture. They are in one sense harmless, since they are not political in the sense of being about the creation or maintenance of political structures, and since our anxieties about the idea of social con-

struction are greatest when connecting to matters of politics. Of course this is not to say that these changes have been "nonpolitical"—none could say that the civil rights acts did not involve politics. But what I mean by political here is simply that the structures transformed have not been tied directly to what we traditionally consider political interests.

The examples that follow should provoke more of these anxieties. For each ties directly to the interests of the state, and hence each will appear more political than the last. Each is an example of the state using its power to define and limit itself. No state that deserves the name has ever refrained from this type of social construction, although I again defer a discussion of its force and limits. In each of the following examples, a common pattern of construction will be revealed—one more clumsy and less effective perhaps than the examples just given, but nonetheless, a pattern that has in each case an important effect.

### 1. Education.

"Education is not the teaching of the three R's. Education is the teaching of the overall citizenship to learn to live together with fellow citizens, and above all to learn to obey the law."<sup>87</sup> In the introduction to his argument in *Cooper v Aaron*, Thurgood Marshall echoed an important theme in the history of state education. Of course education conveys information; but more importantly, it also makes certain kinds of people. This is precisely the reason that many are so keen to control the content of what goes on in "our" public schools.<sup>88</sup> It is the premise behind the (misunderstood) belief that if only kids could pray in school, drugs would go away.

How does this construction of citizens work? It is Bourdieu who has provided "one of the few coherent accounts of the central role that schools have in both changing and in reproducing social and cultural [structures and] inequalities from one generation to the next."<sup>89</sup> "If it be accepted," Bourdieu writes, "that culture . . . is a common code enabling all those possessing that code to attach the same meaning to the same words, the same types of

<sup>87</sup> See Brief for Respondents at 6, *Cooper v Aaron*, 358 US 1 (1958).

<sup>88</sup> Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U Chi L Rev 131 (1995). See also Amy Gutmann, *Democratic Education* 3 (Princeton, 1987).

<sup>89</sup> Richard Harker, *Bourdieu—Education and Reproduction*, in Richard Harker, Cheleen Mahar, and Chris Wilkes, eds, *An Introduction to the Work of Pierre Bourdieu: The Practice of Theory* 86 (St. Martin's, 1990).

behavior and the same works," then "it is clear that the school . . . is the fundamental factor in the cultural consensus in as far as it represents the sharing of a common sense which is the prerequisite for communications."<sup>90</sup>

To an American ear, this may exaggerate the extent to which education constructs culture. In a world where children are dazed in front of a television set three times the time they are in school, the role of school in constructing citizens may seem quite small. But Bourdieu writes of France, where education is far more centralized and nationally regulated. And his exaggerations notwithstanding, three aspects of the process that he describes are shared by the French and American systems.

First, the process of education is in many ways a process "of inculcation which must last long enough to produce a durable training."<sup>91</sup> The training must make aspects of the culture part of the *habitus*,<sup>92</sup> or ordinary routine, of the individual. This long inculcation has as its aim the construction of an ordinary response for the properly educated child—one that provides a minimum within a particular culture for existence within that culture. Certain ways of behaving must become automatic—or what we revealingly call "second nature."<sup>93</sup>

Second, this process of acculturation follows from an authority that is necessarily coercive.<sup>94</sup> Even if one believed that there was nothing coercive in learning that two twos are four, education is not all so transparent, and certainly not the part that Marshall called "citizenship." Pedagogic action always inculcates "meanings not deducible from a universal principle . . . : authority plays a part in all pedagogy, even when the most universal meanings . . . are to be inculcated."<sup>95</sup> The education proceeds from one with authority to one who can be disciplined for resisting or challenging that authority.

But third and most important, this coercion is only effective to the extent that it is understood or seen as something other than coercion. If the discipline or coercion is revealed or under-

<sup>90</sup> Pierre Bourdieu, *Systems of Education and Systems of Thought* at 162 (cited in note 19).

<sup>91</sup> Pierre Bourdieu and Jean-Claude Passeron, *Reproduction in Education, Society and Culture* 31 (Sage, 1977).

<sup>92</sup> Bourdieu, *Language and Symbolic Power* at 12-13 (cited in note 42).

<sup>93</sup> See id at 172-73; Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* 466 (Harvard, 1984).

<sup>94</sup> Bourdieu and Passeron, *Reproduction in Education, Society and Culture* at 11 (cited in note 91).

<sup>95</sup> Id at 10.

stood as "mere" coercion, then its pedagogic effect ceases. In America, Bourdieu writes, it is not possible to adopt the forms of inculcation practiced in France. A wide use of corporal punishment or disgrace as a means to coerce students into learning would appear to Americans as "coercion" rather than education. Instead, he writes, American teachers "overwhelm . . . pupils with affection . . . by the use of diminutives and affectionate qualifiers, [and] by insistent appeal to an affective understanding."<sup>96</sup> Accepting Bourdieu's characterization of American education, this "affection" functions no less coercively for Americans than disgrace functions for the French. For it uses that "subtle instrument of repression, the withdrawal of affection,"<sup>97</sup> which operates in context as effectively as disgrace. It, like disgrace, is a tool to ensure conformity, and a practice of naturalized conformity is the essence of a successful education.

Education thus proceeds (1) through a practice, (2) directed by an authority, (3) that coerces—without appearing to coerce—acceptance of the substance of what is taught. These elements are the components of a machine that constructs a certain world for the children it touches and constructs citizens out of these children. In this way it is a model of social meaning construction, one that hides its arbitrariness by "misrecognizing" the arbitrary as a part of nature.<sup>98</sup>

Plainly in part this construction is "political."<sup>99</sup> Children are trained in one hour that two twos are four and, in the next hour, that America or the Soviet Union has promoted democracy throughout its history. They begin their day pledging allegiance to the flag, and move without interruption into classes about natural science and then about society. The messages are mixed, and none distinguishes the ontological root of the "truth" that a student must inculcate. A child can no less plead "but this, sir, is just a social construction" than she can declare "I believe two twos are five." While we reward individuality, we sanction disagreement. While we may encourage separate thinking, we do so only after we have rewarded and encouraged an essential confor-

<sup>96</sup> Id at 17.

<sup>97</sup> Id.

<sup>98</sup> See id at 31.

<sup>99</sup> See Gutmann, *Democratic Education* at 96-97 (cited in note 88) (discussing what a politically correct—but not "PC"—democratic education would look like). See also Bruce Ackerman, *Social Justice in the Liberal State* 139-67 (Yale, 1980); Relinde de Greef, *Socialization and Children's Literature: The Netherlands, 1918-1940* ch 2 (1993) (London School of Economics doctoral dissertation on file with U Chi L Rev).

mity. Before a child is permitted the freedom to criticize democracy, she must inculcate the picture that no democracy could be better than America's.

I do not mean to exaggerate the significance of this education in the overall construction of America's youth. Indeed, perhaps most of what inculcates children comes from aspects of popular culture within the control of CBS or ABC rather than local school boards. But this is just a quibble about the significance of education, not a disagreement about its nature. Education is that institution most clearly revealed to be dedicated to the construction of certain types of people, through subtle and important coercion, dependent upon the invisibility of this very same coercion.

## 2. Language.

A second example of a political construction is one that may seem alien in an American setting, although it was a fundamentally important construction of our political past. This is the regulation of language by a political elite.

The regulation of language has been political because it promotes nationalism. More than "a way of communicating propositions about the world,"<sup>100</sup> language is "a constitutive social activity,"<sup>101</sup> one that has the power "to organize action" and to be an "effective tool of [nationalist] unification."<sup>102</sup> Throughout much of modern history, it has functioned "as the cement of nationalism."<sup>103</sup> Nations have used national languages to construct separations between citizens, and hence identity among common speakers.

Here again, France provides a good example. Prior to the French Revolution, linguistic unification was part of the construction of a monarchical state.<sup>104</sup> But such unification could not occur simply by decree. Instead, a regimented educational system that enforced the dominant language was necessary, as well as a unified labor market that could ensure that language would penetrate ordinary life.<sup>105</sup> In both contexts the experience is coercive, in just the sense that education in general is coercive: indi-

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<sup>100</sup> Donald Lawrence Brenneis and Fred R. Myers, *Dangerous Words: Language and Politics in the Pacific* 6 (New York, 1984).

<sup>101</sup> Id.

<sup>102</sup> Herzfeld, *The Social Production of Indifference* at 100 (cited in note 37).

<sup>103</sup> Id at 98.

<sup>104</sup> See Bourdieu, *Language and Symbolic Power* at 5-6 (cited in note 42).

<sup>105</sup> Id at 6.

viduals may voluntarily conform to the social expectation, but they do so in a context where the sanction for failing to conform is a form of social death.

Few who have lived the struggle over French in Quebec or Spanish in south Los Angeles would argue that this coercion is minor. Nor would they describe these struggles as unself-conscious. That is, people are *aware* of the importance of language. France again provides an example: The Academy has long had the jurisdiction to define proper French, and it continues today self-consciously to protect French from non-French invasions. The government has used its power to punish those who violate this language code, even though its power here is quite limited.<sup>106</sup> Nonetheless, what France does is not different in kind from what happens in every nation. The difference is the degree of centralization and self-consciousness. America has its own academy of proper English, but that academy is relatively decentralized in comparison with the French. Again, it enforces its codes in the schools, which can, because decentralized, be different in different places.

What marks language, then, as a social construction is its conformance with the three elements of education that I outlined above. Like education, language is learned through a process of inculcation. Like education, it proceeds from an authority, whether centralized—in the way that “French” is centralized—or decentralized—in the control of local authorities. Finally, like education, it is a process that is inherently coercive. One is punished, either directly or indirectly, for incorrect speech, whether the speech is ungrammatical (in the context of third-grade English) or too grammatical (in the context of a workers’ pub), and that punishment is successful as coercion only when it is, in Bourdieu’s sense, “misrecognized” as such. Where the coercion to a particular language is recognized as coercion—where the political nature of such inculcation, always present, is understood to be present—then the process comes apart. Language succeeds as construction only when it is genuinely background, and this it can be only when genuinely uncontested. Once background and uncontested, language is construction.

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<sup>106</sup> See *Ministry Puts Ban on English Imports*, 46 *Intl Mgmt* 15 (Apr 1991) (describing France’s effort to ensure “linguistic purity”).

### 3. Tradition.

The construction of a language can proceed only against a background tradition or history. Tradition or history is “an act of writing and reading”;<sup>107</sup> it presents itself through stories or histories taught by those charged with carrying the tradition forward. It is not surprising, then, that “it is the discourse of ‘history’ that is the most powerful and most fought over.”<sup>108</sup> Because what we identify as tradition “is always already a selective tradition[—]a present view of a past that best serves the purpose of . . . justifying the status quo”<sup>109</sup>—the construction of a tradition itself is within the domain of constructed social reality.

Following Eric Hobsbawm, we can describe this constructed tradition as an “invented tradition.” An invented tradition is “a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past.”<sup>110</sup> Like every effective construction discussed so far, its success depends in part upon its hiding its constructed nature, and this hiding is achieved by maintaining an image of apparent continuity.

The construction of tradition proceeds in two very different ways, one that we could call positive, and the other, negative. The positive is “essentially a process of formalization and ritualization, characterized by reference to the past, if only by imposing repetition.”<sup>111</sup> It proceeds not so much by silencing other interpretations—though there are important examples of this silencing<sup>112</sup>—but by emphasizing selected interpretations. It emphasizes these selective interpretations by repeating them at ritualistic times or in ordinary life. This method is the method by which American tradition has been built—through a story told so often that it cannot be questioned as truth.

The negative construction of tradition is an institutionalized practice of forgetting. The extreme of this practice is described by Milan Kundera:

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<sup>107</sup> Andrew Lass, *Romantic Documents and Political Monuments: The Meaning-Fulfillment of History in 19th-Century Czech Nationalism*, 15 Am Ethnologist 456, 458 (1988).

<sup>108</sup> Id.

<sup>109</sup> Id at 457 (emphasis omitted).

<sup>110</sup> Eric Hobsbawm and Terence Ranger, eds, *The Invention of Tradition* 1 (Cambridge, 1983).

<sup>111</sup> Id at 4.

<sup>112</sup> See the example of Czech history discussed in Lass, 15 Am Ethnologist at 460 (cited in note 107).

The first step in liquidating a people, said Hubl, is to erase its memory. Destroy its books, its culture, its history. Then have someone write new books, manufacture a new culture, invent a new history. Before long the nation will begin to forget that it is and what it was. The world around it will forget even faster.<sup>113</sup>

This seems extreme only because such a practice is no longer likely at the level Kundera describes. But this does not mean the practice is no longer possible. Indeed, the negative reconstruction of tradition is all the more dangerous when silent or subtle. Kundera comes from a tradition that has twice suffered “a large power [depriving] a small country of its national consciousness [through the] methods of organized forgetting.”<sup>114</sup> And even without being so extreme, the practice can be quite significant. The potential for the “airbrushed tradition” turns in part on the extent to which “alternative [historical] interpretations . . . are made possible, through the recovery of what had been discarded.”<sup>115</sup> To the extent that there is any “institutionalization of collective memory” there is an “institutionalization of forgetting,”<sup>116</sup> for the institution that decides what to remember also decides what to forget.

The pattern of these constructions is familiar. Whether negative or positive, the invented tradition begins with a certain kind of learning through inculcation. The learning proceeds from an authority—a government, or a university, or a church—that purports to report the facts of the past, learned as uncontested.<sup>117</sup> It succeeds to the extent that this pattern of learning and inculcation succeeds at freezing certain ideas about traditions into a taken-for-granted pattern of thought or action.

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<sup>113</sup> Philip Schlesinger, *Media, State and Nation: Political Violence and Collective Identities* 137 (Sage, 1991), quoting Milan Kundera, *The Book of Laughter and Forgetting* (Harper, 1983).

<sup>114</sup> Connerton, *How Societies Remember* at 14 (cited in note 35). Czech nationalists also did some reconstruction themselves, through the construction (this time literally) of what have been called the RKZ documents, which purported (they were forgeries) to show that the Czechs had an “epic tradition” comparable “with the German, Russian and Balkan epic cycles.” Lass, 15 Am Ethnologist at 460 (cited in note 107). Vergil’s *Aeneid* is another useful example—a self-conscious attempt to write a national epic, modeled on the *Iliad* and *Odyssey*. I am grateful to Alan Meese for this example.

<sup>115</sup> Lass, 15 Am Ethnologist at 457 (cited in note 107).

<sup>116</sup> Id.

<sup>117</sup> Alexander Blankenagel, *Tradition und Verfassung* (Nomos, 1987)

#### 4. Nationalism.

One particular type of tradition that it is the pathology<sup>118</sup> of our time to embrace is nationalism.<sup>119</sup> Through the use of "state institutions, such as the schools, political parties, the bureaucracy, and the communications industry," states have attempted to "forge a collective will and establish popular identification with the imagined political community of the nation."<sup>120</sup> The goal is "to incorporate diverse peoples and heritages into a totalizing national project."<sup>121</sup> And unsurprisingly, it is a process that follows a now familiar pattern.

What is most striking about this nationalism and, for our purposes, most revealing, is that this process of constructing a national political identity is a "specifically modern phenomenon of cultural integration."<sup>122</sup> It is an "ism" that was born at the death of dominant religious modes of thought,<sup>123</sup> most clearly beginning in "the popular national movements proliferating in Europe since the 1820s."<sup>124</sup> The Swiss for example think of themselves as a "nation" over seven hundred years old, yet it was only in 1891 that the nation "decided on" 1291 as the date of the "founding" of Switzerland.<sup>125</sup> Not surprisingly, this process presents "nationality" as natural. As Ernst Gellner, with unmasked frustration, puts it:

Nations as natural, God-given ways of classifying men, as an inherent though long delayed political destiny, are a myth; nationalism, which sometimes takes pre-existing cultures and turns them into nations, sometimes invents them, and often obliterates pre-existing cultures: that is a reality, for better or worse. Those who are its historic agents know not what they do, but that is another matter.<sup>126</sup>

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<sup>118</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* 14-15 (Verso, 1983) (discussing uses of language to promote nationalistic goals).

<sup>119</sup> See generally Liah Greenfeld, *Nationalism: Five Roads to Modernity* 1-26 (Harvard, 1992) (discussing the formation of nationalism).

<sup>120</sup> Crain, 63 Anthropology Q at 43 (cited in note 44).

<sup>121</sup> Id.

<sup>122</sup> Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 Praxis Intl 1, 3 (1992).

<sup>123</sup> See Anderson, *Imagined Communities* at 19 (cited in note 118) (discussing the connection between notions of state sovereignty and the "divine").

<sup>124</sup> Id at 86.

<sup>125</sup> Id at 135.

<sup>126</sup> Schlesinger, *Media, State and Nation* at 168 (cited in note 113), quoting Ernest Gellner, *Nations and Nationalism* 48-49 (Oxford, 1983) (emphasis omitted).

Because, like tradition, nationalism must select among the texts of the past in its construction of a present "nation," nationalism is "to a certain extent a construct" and is thus rendered "susceptible to manipulative misuse by political elites."<sup>127</sup> It is "a form of collective consciousness which both presupposes a reflective appropriation of cultural traditions that have been filtered through historiography and which spreads only via the channels of modern mass communications."<sup>128</sup>

The tools of this construction should now be familiar. To succeed, nationalism must find some way to "identify civil institutions with a pure form of some putative national culture,"<sup>129</sup> and some way to inculcate this conception into a preexisting culture or society. This only becomes possible once the state has "direct and increasingly intrusive and regular relations with the subjects or citizens" and as the older forms of interaction tend to weaken.<sup>130</sup> But beyond the ritual of "bureaucratic actions," there are other everyday rituals.<sup>131</sup>

"Once in being, a nation-state has to establish a pervasive reinforcement of its culturally constructed logic in every aspect of daily life."<sup>132</sup> This is the *practice* we have seen in the construction of education, language, and tradition discussed above. Furthermore, achieving a national culture or character requires a common "appeal to the conventions of collective self-representation,"<sup>133</sup> made easier when this appeal can be tied to "reality and nature, [to] visual and other material images."<sup>134</sup> This nationalism is its *authority*. The history of cleansing, xenophobia, and annihilation is its *coercion*.

One example is the story of the Indians of Ecuador. In the early part of the history of Ecuador, "a relatively unified national self was constructed in opposition to an inferior indigenous other."<sup>135</sup> The national self was constructed as either white or mestizo, and Ecuadorian history was "largely the history of great men, particular notables, gentlemen, priests and military leaders,

<sup>127</sup> Habermas, 12 *Praxis Intl* at 3.

<sup>128</sup> Id.

<sup>129</sup> Herzfeld, *The Social Production of Indifference* at 48 (cited in note 37).

<sup>130</sup> Hobsbawm and Ranger, eds, *The Invention of Tradition* at 265 (cited in note 110).

<sup>131</sup> See Herzfeld, *The Social Production of Indifference* at 37 (cited in note 37).

<sup>132</sup> Id at 65.

<sup>133</sup> Id at 72.

<sup>134</sup> Id at 75.

<sup>135</sup> Crain, 63 *Anthropology Q* at 46 (cited in note 44).

while Indians were assigned either a secondary or invisible role.”<sup>136</sup>

But since the 1980s, Ecuador has attempted a reconstruction of its national self. “The period since 1979 has been accompanied by a burgeoning discovery and revalorization of indigenous popular culture.”<sup>137</sup>

While earlier policy with respect to the Indian was based either on exclusion or on partially successful attempts to integrate the Indian within the national community, the recent period of Ecuadorian history has been characterized by a repatriation of certain aspects of Indian experience and tradition, now redefined as “national.”<sup>138</sup>

Before, “Indian” was something the national identity defined itself against; now, “Indian” is something the national identity incorporates.

The techniques of this reintegration are familiar. It is practiced through national holidays and state-sponsored festivals. These practices connect with a now authoritative picture of Indian culture and life. The approved view is financed; the old view silenced. And if successful, the result of this process will be the reconstruction of Ecuador with a conception of the state not as “the land of oligarchial privilege” but as a “pluri-ethnic” field.<sup>139</sup>

The success of these efforts is no doubt mixed, as the “state’s increased role in organizing cultural productions”<sup>140</sup> generates mixed responses. No doubt, the precise construction hoped for by the state is not the construction that will ultimately succeed. But as I have emphasized throughout, success is not a measure of influence, and there can be little doubt that this attempt has had influence.<sup>141</sup>

##### 5. Political.

My final example of a self-conscious effort to reconstruct social meaning is drawn from perhaps its most obvious home, the

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<sup>136</sup> Id.

<sup>137</sup> Id at 50.

<sup>138</sup> Id at 47.

<sup>139</sup> Id at 50.

<sup>140</sup> Id at 56.

<sup>141</sup> By far the best examples of this constructive nationalistic effort can be found in the context of colonialism. For an exceptional account of the colonialization process in South Africa, see generally Jean Comaroff and John Comaroff, 1 *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* 2-3 (Chicago, 1991).

former Soviet Union and its efforts to build itself into the nation that its ideology professed. If "every society is in part spontaneously generated . . . and in part consciously shaped and directed by its political elites,"<sup>142</sup> then the Soviet Union was at the extreme of "consciously shaped and directed" cultures. Much of this construction was a failure; but much was not, and, for comparative purposes, some of the failures are quite revealing.

In her work examining the Soviet cultural history, Christel Lane sketches some of the mechanisms that the Soviets used to "change the consciousness of the ruled to bring perceptions of social reality into line" with the official ideology.<sup>143</sup> This cultural management "utilize[d] a large variety of means to achieve the desired changes in the consciousness of individual members of society, . . . [even] by changing actual social relations."<sup>144</sup> For Lane, however, a key mechanism of change was the Soviets' use of political ritual, where ritual is "a stylized, receptive social activity which, through the use of symbolism, expresses and defines social relations. Ritual activity occurs in a social context where there is ambiguity or conflict about social relations, and it is performed to resolve or disguise them."<sup>145</sup>

It is this system of Soviet rituals that I want to focus on here. As Lane suggests, these rituals served as an "instrument of cultural management enabling political elites . . . to gain acceptance for a general system of norms . . . congruent with their interpretation of Marxism-Leninism."<sup>146</sup> These rituals "embodie[d] the norms and values of Soviet Marxism-Leninism,"<sup>147</sup> an ideology which was "clearly no longer a revolutionary ideology mobilizing people for fundamental social change," but instead had become "a very conservative set of rationalizations which support[ed] and legitimate[ed] the existing order."<sup>148</sup>

The need for this "cultural management" was apparent to the Soviets from the beginning of the revolution.<sup>149</sup> "Lenin was particularly aware that the socio-political changes wrought by the October revolution had to be followed by a less violent transfor-

<sup>142</sup> Lane, *The Rites of Rulers* at 1 (cited in note 19).

<sup>143</sup> Id at 27.

<sup>144</sup> Id at 1.

<sup>145</sup> Id at 11.

<sup>146</sup> Id at 25.

<sup>147</sup> Id at 24.

<sup>148</sup> Id.

<sup>149</sup> See id at 28.

mation of attitudes if the Revolution was to succeed."<sup>150</sup> But both the ends and the means of this cultural management have changed over time. Patriotism is one example. Immediately after the revolution, patriotism was a suspect ideal because the revolution was supposed to be merely one stage in an international transformation. But "[w]hen the Revolution failed to extend beyond the borders of the Soviet Union . . . Stalin saw himself compelled to build 'socialism in one country,' [and] patriotism began again to serve a useful political purpose."<sup>151</sup> Likewise with Christmas:

When the Bolsheviks came to power in keeping with their atheistic policy, they immediately suppressed celebration of New Year's/Christmas. But the Soviet leaders soon recognized their error. Their suppression of ritual did nothing to solidify the new regime; it only created popular resentment. To remedy the situation, Soviet authorities changed their policy and called on the state itself to sponsor the ritual. They thought to remove as much of the specifically Christian content as they could, while leaving the pagan content largely untouched. . . . The traditional figures of Grandfather Frost and the Snow Maiden were reintroduced, and collectives sponsored public celebrations complete with tree lighting. Indeed, Lenin himself took part in a number of these rites.<sup>152</sup>

What is most striking about this regulation was its self-consciousness. The Soviets understood that social reconstruction was needed, and they established an office of "ritual specialists" (their own version of Madison Avenue) to do it.<sup>153</sup> Ritual specialists were almost all "local organizers and administrators of the Party, the Komsomol, the trade unions and the local soviet . . . , who receive[d] backing from the highest Party circles."<sup>154</sup> As Lane describes, the process that they underwent to produce the ritual "reminds one of both the scripting and producing of a play and of the introduction of a new piece of political legislation."<sup>155</sup> Spe-

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<sup>150</sup> Id at 2-3.

<sup>151</sup> Id at 140. Also, during World War II, patriotism was brought back by Stalin. See John Keegan, *The Second World War* 190 (Penguin, 1990).

<sup>152</sup> Kertzner, *Ritual, Politics and Power* at 46 (cited in note 19).

<sup>153</sup> Lane, *The Rites of Rulers* at 26 (cited in note 19) (discussing Soviet need for "ritual experts").

<sup>154</sup> Id.

<sup>155</sup> Id at 50.

cialists would meet to hammer out a script, specifying the details of music and poetry, and their product would be submitted to a reviewing organization for approval.<sup>156</sup> "As is the case with a new play, several rehearsals [were] made. The rite [was] performed in one particular collective and [was] judged both by those who 'produced' it and by those who performed it."<sup>157</sup> The ritual was then "popularized by an extensive 'advertising' campaign."<sup>158</sup>

We are likely to think that ritual "will not develop unless it evolves completely spontaneously as a popular creation."<sup>159</sup> But we tend to forget, Lane effectively argues, "that a large and well-established part of the ritual of our Western civilization, namely Christian religious ritual, originated as the result of a similarly controlled and consciously organized effort on the part of the ecclesiastical elite."<sup>160</sup> What made it succeed was not its spontaneity, but the extent to which it could "convert individual emotion into collectively oriented moral sentiment."<sup>161</sup> Ritual specialists would select events in a citizen's life that, "because they represent important turning points . . . generate emotions which can be directed in a politically acceptable direction."<sup>162</sup> As one Soviet account states it:

Rituals are conducted at important turning points of a man's life. Owing to the psychic mood he is particularly receptive to external influences. These opportunities to exert effective influence we must utilize in the interests of communist education.<sup>163</sup>

For the same reason, specialists focused rituals on those who, "because of age or social position, have been unable *fully* to develop their critical facilities: children, youths, manual workers and collective farmers. Very notable is the absence of regularly recurring ritual specifically for members of the intelligentsia or the Communist Party."<sup>164</sup>

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<sup>156</sup> See id (discussing the process of ritual creation).

<sup>157</sup> Id.

<sup>158</sup> Id.

<sup>159</sup> Id at 57.

<sup>160</sup> Id.

<sup>161</sup> Id at 32.

<sup>162</sup> Id at 25.

<sup>163</sup> Id, quoting 7 *Kommunist Estonii* 32 (1968).

<sup>164</sup> Lane, *The Rites of Rulers* at 26 (cited in note 19).

Of course, this social meaning management was not entirely successful. But as I have suggested in the other examples above, lack of complete success does not mean that the efforts had no effect. As Lane presents it, "the data . . . show conclusively that despite their numerous shortcomings the new socialist rituals have made a significant impact on the soviet population."<sup>165</sup> People within Soviet society, and Soviet society itself, were reconstructed by this mechanism of ritual.

To say that this management had an effect, and even that it had in some ways its intended effect, does not mean that it must also follow that social reality is infinitely plastic, however. It is not to say that cultural managers could construct any culture they wish<sup>166</sup> or that "given the right social context, *any* social activity can be turned into a ritual at the whim of ritual specialists."<sup>167</sup> Rituals, and the reality they construct, depend upon the values of the parties to that ritual. They constrain the range of possible rituals, and possible social constructions. Again, that the government can make inflation rise does not mean it can achieve full employment and no inflation.

Soviet rituals succeeded, to the extent that they did succeed, by enacting a practice that was both supported and created by a dominant ideology, in a context where that ideology could have its most coercive effect without being recognized as coercive. It succeeded when it could operate undetected on those emotionally or intellectually vulnerable, and it succeeded through its regularized and forceful practice.

### C. Constructions: Defensive Construction

The examples given so far have been offensive uses of social meaning construction, where the aim was to *change* some social meaning, either from what was thought to be an inferior meaning to a superior meaning, or from no meaning in particular to a particular meaning.

But if absent any intervention the meaning would have evolved to what it did, then it is fair to say that the meaning was not "changed" by the intervention. Change in this context, therefore, means differences that are *caused* in some sense by the intervention. Meanings that one believes would have emerged

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<sup>165</sup> Id at 251.

<sup>166</sup> See note 19.

<sup>167</sup> Lane, *The Rites of Rulers* at 14 (cited in note 19).

absent the intervention I do not include. Although this understanding of change may be somewhat murky and counterfactual, the distinction is an important one and will often be clear enough.

This way of speaking of change suggests a second kind of social meaning change that we could call defensive construction. If "change" refers to meanings that would not have been but for an intervention, then some "changes" are cases where a meaning that otherwise would have decayed or evolved is preserved by an intervention aimed at conserving the old social meaning. This is a "change" in social meaning in the sense that the intervention affects the resulting social meaning, but it is different from the kind of change in social meaning discussed in the examples above because rather than aiming for a new meaning, the change here aims at preserving an old meaning.

Examples of defensive construction are many. The clearest of these examples are cases where individuals within some social group want to preserve a certain status associated with membership in that group. Consider three relatively obvious examples, each closer to home than the examples of change described above.

### 1. Gays in the military.

There is a picture of the "military man"—a stereotype, no doubt, but extant nonetheless—as the holder of "unambiguously male" virtues (not unambiguous virtues, but unambiguously *male* virtues)—strong, disciplined, emotionless, and (crucially) heterosexual. For those who hold this picture, membership in the military offers a certain status. For them, to associate with the military is to gain the value, however defined, of these qualities, much like one acquires a certain status from membership in a particular fraternity—the jock, or quasi-jock, for example who seeks the value of association with the jock fraternity. For those who join the military in part to gain their perceived value of this association, there is a strong interest in preserving the image that the military presents. For them, part of the value in belonging to this military depends upon the preservation of this image.

Homosexuality is perceived to be inconsistent with this image. Again, the point is about perception. No doubt the perception is the result of a particularly skewed stereotype that homosexuals are effeminate, or weak, or irresolute,<sup>168</sup> but for social

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<sup>168</sup> Compare Silvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988

meaning, the truth or falsity of the stereotype does not matter. To the extent that this stereotype exists, those in the military who gain by the nonhomosexual image of the military have an interest in avoiding open acceptance of homosexuals into the military.<sup>169</sup>

This does not mean, however, that the military has an interest in excluding homosexuals completely. For of course, gays have long served extremely well in the military. Instead, what is ideal from the military's perspective is to have homosexuals serve in the military—and thereby gain the value of their service—while also having them serve *invisibly* in the military—and thereby not lose the dominant image of the military man as the holder of these "unambiguously male" virtues. From the military's perspective, it is best if it can gain the value of homosexual service without suffering the cost of the loss in "status" that many in the military seek.<sup>170</sup> Thus, the logic in a "don't ask, don't tell" policy.

If the formal exclusion of gays in the military were lifted, however, this image of the military man would change. Although again driven by a misleading stereotype of homosexuality, the social meaning of being a homosexual is simply not the same as the social meaning of the "unambiguous male." Because of this difference, opening the ranks of the military to homosexuals would *ambiguate* the social meaning of membership in the military, as well as ambiguate the meaning of being gay for those who hold this stereotypical view. If openly open to all males, the military could not preserve the image of being constituted exclusively by the unambiguous male.

No doubt many would say of this change, all for the better. But my point is that those who would welcome the change are not likely to be those in the military itself. For many in the military may have joined the military precisely because of the social meaning that this exclusion preserves. For them, allowing openly homosexual servicemen would be to lose a dimension of value that they have purposely sought. Hence the need for these sorts to insist upon the exclusion or at least the image of an exclusion.

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Wis L Rev 187.

<sup>169</sup> Paul Kahn makes a related point in *Love Field: Patriotism vs. Eros; Military Gay Ban*, New Republic 19 (Mar 8, 1993) (discussing the perceived threat that love between members of the armed forces poses).

<sup>170</sup> For a detailed analysis of this very point, see David Cole and William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv CR-CL L Rev 319, 332 (1994).

For these sorts, to give up the exclusion would be to give up some of what they perceive to be the value of associating with the military. For them, exclusion is a way to *defend* the social meaning of being a military man.

## 2. Motherhood and abortion.

In the eyes of many, the strongest justification for the right to abortion is equality—that the right is essential to the full and equal participation of women in the professional world.<sup>171</sup> Viewed in this way, the right to abortion associates with the notion that it is appropriate for women to occupy professional roles.

Because of this association between abortion rights and women's professional roles, however, women who have invested themselves in roles that associate female virtue with domestic life generally, and motherhood in particular, may oppose the abortion right.<sup>172</sup> As the "professional" model for women becomes secure, it challenges the appropriateness of those who have selected a more traditional life.<sup>173</sup> Their choice—to stay at home and raise children—becomes something to be justified, rather than the natural role of a woman. And to the extent it becomes something to be justified, it imposes a burden on those who are within this more traditional role. When the "natural" thing for a woman to do was stay at home, the social meaning costs of adopting this domestic life were small. But when neither "nature" nor law compels a life at home, and when the life at home is challenged as grounded in inequality, or sexism, or weakness, the choice to stay at home becomes a choice. And when a choice, it is a choice that invites social stigma. Even worse for these women would be the world where the norm shifted from an ambiguous meaning associated with staying at home, to a meaning that was unambiguously negative. To avoid both, therefore, some may oppose the abortion right to assure it does not deny them a certain peace with their own lives.

Of course the choice to be a stay-at-home mother does not necessarily have this stigma of inequality. Were the choice per-

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<sup>171</sup> See the discussion in Cass R. Sunstein, *The Partial Constitution* 272-85 (Harvard 1993).

<sup>172</sup> The discussion in this section draws upon Kristin Luker, *Abortion and the Politics of Motherhood* (California, 1984).

<sup>173</sup> I mean this point only as a description. There is no necessity that this be the reading, here, as elsewhere.

fectly free (whatever that would mean), then there would in principle be no difference between the choice to be a stay-at-home mother, or lawyer, or construction worker. Motherhood takes on this ambiguous meaning only because, until recently, this "choice" did not exist for most women or existed only at a very high price. Some therefore want to avoid the ambiguity by reducing the extent to which women have this choice at all by, for example, opposing the abortion right.

When one opposes the abortion right because it affects the social meaning and value of a certain form of life, then one is engaging in what I have called a defensive construction: one acts to preserve an existing social meaning by fighting changes that may undermine that meaning. Here, the meaning is the natural virtue or value of motherhood, challenged by a universal abortion right.

### 3. Antimiscegenation laws.<sup>174</sup>

As many have noted, much of the impetus for the Jim Crow laws in the Reconstruction South was the desire of whites to preserve the social status of "whiteness."<sup>175</sup> Under the social system of the antebellum South, such laws were not needed. The system of slavery did enough to construct the social difference between the races.

Once slavery was formally ended, however, those who wanted to preserve the status of whites against the advancing status of blacks had to turn to other techniques. The Ku Klux Klan was one such technique, designed to terrorize blacks against taking actions that would advance them socially. A second technique was Jim Crow, which also used force—here the force of the state—to keep blacks in an inferior social position relative to whites.

A third technique was the technique of antimiscegenation laws. Although formally equal—they denied whites the opportunity to marry blacks just as they denied blacks the opportunity to marry whites—the laws were unequal in effect. They were designed to entrench social differences by maintaining the "purity" of the white race. Such segregation made it easier to maintain racial loyalties. If the races intermarried, it would be more diffi-

<sup>174</sup> For a related look at the subject, see Andrew Koppelman's Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 Yale L J 145 (1988).

<sup>175</sup> See id at 181 (discussing the social status implications of miscegenation and sodomy laws).

cult to insist upon the superiority of the "white" race, most obviously because it would become more and more difficult to separate out a white from a black race.<sup>176</sup>

Not that intermarriage would erase racial hatred totally. The war in the former Yugoslavia is a nice testament to the nonplasticity of ethnic hatred. Nor would it be impossible to develop a code for separating white from black. Homer Plessy, for example, pleaded with the court that he was in fact white, since seven-eighths white, but the court in recognition of the evolving systems of segregation considered seven-eighths not white enough.<sup>177</sup> Nonetheless, increased intermarriage would tend to lessen the will to segregate, by lessening the "natural" distinction between white and black.

Antimiscegenation laws, then, can be seen as a tool for preserving a certain social meaning associated with being white. They preserve this meaning by protecting and perpetuating the perceived "purity" of the white race. And by maintaining that purity, the laws helped whites preserve a social meaning difference from blacks.

All three examples of defensive construction function in the same way. A social meaning is challenged by an emerging practice, and to preserve the old meaning, the emerging practice is prohibited or opposed. This resistance is a kind of social meaning construction because it aims to resist what would otherwise be an evolving social meaning. It "changes" the social meaning because but for its intervention, the meaning would become something else. Thus, "military men" resist the ambiguation of that term to preserve the value of the old meaning; stay-at-home mothers resist abortion rights to preserve the nature in their status as mothers; whites resist intermarriage to preserve the loyalty and sensibility of "whiteness." In each case, the semiotic content of a certain status is defended against changes that would change that semiotic content. This defense is as much construction as the offensive measures previously discussed.

### III. MODELS OF CONSTRUCTION

The discussion so far has proceeded in three steps. First, I sketched a range of what I termed social meanings, at least some the products of a world of social structures that are contingently

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<sup>176</sup> Dorothy Roberts, *The Genetic Tie*, 62 U Chi L Rev 209, 223-30 (1995).

<sup>177</sup> See *Plessy v Ferguson*, 163 US 537, 538 (1896).

and humanly constructed. Second, I described how these social meanings can be used by social agents to advance individual or collective ends: how they become, that is, tools in social regulation. Finally, I offered examples of these meanings changing, both offensively and defensively, on an individual, social, and political level.

The next step is to find a way to model these changes in social meaning. To do this, we need a way to connect these collective meanings to the actions of individuals. To understand how they get made, and changed, we must understand how they get made and changed in the heads of individuals.

The tools for this understanding are many. Anthropology and sociology most obviously describe this process of change.<sup>178</sup> But what is missing from their accounts is an easy way to link the process of this change to the actions of individuals. My commitment throughout is to a methodological individualism; the question is what tools are necessary to satisfy this commitment. Pierre Bourdieu, too, is a methodological individualist. His is an extraordinarily rich account of the structures of incentives confronting any individual when negotiating, and transforming, what Bourdieu calls the "linguistic market."<sup>179</sup> But explicating Bourdieu is beyond the scope of this essay.<sup>180</sup> What we need instead is a much simpler set of tools to capture something of the link between individual action and social meaning.

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<sup>178</sup> Within this literature, the best account I have come across describing the ambiguity and multiplicity in this meaning construction is the work of Jean and John Comaroff. See Jean Comaroff, *Body of Power, Spirit of Resistance: The Culture and History of a South African People* (Chicago, 1985); Comaroff and Comaroff, *Of Revelation and Revolution* (cited in note 141). For other useful accounts, see Connerton, *How Societies Remember* at 93 (cited in note 35) (describing the constructive force of habit); Steven Lukes, *Political Ritual and Social Integration*, 9 *Sociology* 289 (1975) (describing the construction through ritual); Kertzner, *Ritual, Politics and Power* (cited in note 19) (same). What is best about this literature is the multiplicity of meaning that it emphasizes, and the ways in which even dominated meanings continue to effect social meaning construction. See, for example, James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale, 1990).

<sup>179</sup> Bourdieu, *Language and Symbolic Power* at 66 (cited in note 42).

<sup>180</sup> Or so the editors tell me. What even the briefest review of Bourdieu's work will reveal, however, is that his is the richest source for understanding and describing these processes of change and reconstruction. In a fuller theoretical account, moreover, Bourdieu's use of economics as a metaphor for social meaning management would provide an obvious link to the simple economic model that follows. Nonetheless, it is clear (or has been made clear) that this is a link that must be worked out elsewhere. The interested reader could begin the review with Bourdieu, *Language and Symbolic Power* (cited in note 42).

Economics will provide this relatively simple set of tools. For economics has a simple way to describe the nature of social meaning, and social meaning change, and thus a simple way to model how it is that such meanings can change.

Social meaning changes when context is changed. But context is not changed by decree. Since contexts are constituted by the taken-for-granted understandings and expectations of groups of *individuals*, somehow, through habit or ritual, these individuals must be made to replace these old understandings and expectations with new ones, and these new ones must become taken for granted. But more importantly, since contexts are constituted by the taken-for-granted understandings and expectations of a *group* of individuals, these new understandings and expectations must be taken for granted by a *group* at the same time.

Thus does social meaning construction present a problem of collective action.<sup>181</sup> Social meanings are constituted by contexts of understanding; they are reconstructed when contexts of understanding change; but contexts change when collections of individuals change, and hence the problem of social meaning making is how to get these groups to change.

In what follows, then, I will argue that we should understand social meaning, and its transformation, as a kind of collective or social good; that as with all collective goods, there is a problem in assuring the good's supply. This problem is loosely referred to as a prisoner's dilemma problem, but better, as a collective action problem. It follows from this that in any case where some individual or part of the collective wants to transform a social meaning, that individual or part faces a collective action problem, since it must succeed in inducing a collective response from a sufficiently large portion of the total society to assure the social meaning change. Against this background, many of the mechanisms that exist for preserving and changing social meanings—the mechanisms of social construction—will be understood as devices for resolving these collective action problems.

#### A. The Problems of Collective Action

The following tale is told of a small village in middle Europe sometime during the Middle Ages: This village had an annual festival, at which wine and food was to be consumed. So as to

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<sup>181</sup> Though not a *simple* collective action problem. As I discuss below, some of these collective actions raise exceptionally difficult questions of responsibility.

collect enough wine for the festival, a large covered vat was placed in the center of the village, and each member of the village was to pour a pitcher of white wine into the vat. These villagers were not wealthy, and wine was not cheap. And as each villager thought the matter through, each realized the following dilemma: While everyone will no doubt pour something into the vat, it is not clear whether they will pour wine or water. It is not clear, because each observes, "either everyone else in the village will pour pure wine into the vat, or not. Some might pour water instead of wine." Each villager reasoned:

If everyone else does pour wine into the vat, then I could pour water into the vat without anyone noticing, and without diluting the festival wine significantly. If everyone else is not pouring wine in the vat, then my single pitcher is not going to save the watered down festival wine. Therefore, regardless of what everyone else is doing, it makes no sense for me to pour wine.

Thus, few villagers poured wine into the vat, with the result that the festival drink was mainly water.

The story is a version of the classic collective action problem. And while one could quibble with details in the story, its lesson is too simple for any quibble. The purity of the wine in the vat is a collective good; as described, the collection system for that wine cannot assure that purity; it cannot assure the purity since there is nothing to match individual consumption with individual contribution to the supply of what is consumed. Thus the good (pure wine) presents a relatively difficult problem of assuring its own supply.<sup>182</sup>

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<sup>182</sup> It is common to associate this "problem of supply" with certain kinds of goods. Public goods, for example, are the most common examples of goods that do not "naturally" assure their own supply. Because a public good is "nonrival and indivisible" it is quite difficult to assure that individuals adequately contribute. For a discussion of private goods, see Tom Tietenberg, *Environmental and Natural Resources Economics* 45 (Harper Collins, 3d ed 1992). A lighthouse presents the classic example. Since one person's consumption does not reduce the amount that another could consume—hence it is nonrivalrous—and the lighthouse cannot divide its good and send it to subscribers only—hence indivisible—any individual can truly reason, "I hurt no one by consuming the benefit of this lighthouse without contributing to its supply. Like Locke's state of nature, I can consume what I will, while leaving 'as much and as good' for everyone else to consume." See John Locke, *The Second Treatise of Government* 33 (Liberal Arts, 1952) (Thomas P. Peardon, ed). But see R.H. Coase, *The Lighthouse in Economics*, 17 J L & Econ 357 (1974).

But it is an interesting mistake to think that this problem of supply is a problem limited to certain kinds of goods—as if there is an ordering, with public goods the most difficult to supply, private goods the most simple, and club goods somewhere in between.

Consider three possible solutions to the village's problem of supply.

*Solution 1: Inspection.* Imagine an inspector tested each villager's contribution before it was poured into the vat. Everyone would know then that only wine was being poured into the vat, and the wine at the festival would be pure. Individuals would still have an incentive to pour water—since water is still cheaper—but the inspector would stop any individual from acting on that incentive. The inspector would assure the provision of a public good.

*Solution 2: Shock.* Imagine a device, inserted into the stomach of every villager, that generated a shock of pain whenever the villager did what a villager was not supposed to do. Now when the villager contemplated pouring water instead of wine, she would account not only for the monetary savings from substituting water for wine, but also for the pain that she would suffer for pouring water rather than wine. At some point—some amount of pain—it would no longer be in the individual's interest to substitute water for wine. Pouring water would now have a cost that exceeded the cost of the wine, and the individually rational act would be to pour wine.

*Solution 3: Guilt.* Rather than an external device planted in the villagers' bodies, imagine that we could use a natural device to deter the villagers. Imagine, that is, that the villagers could be made to *feel* guilty about pouring water instead of wine.<sup>183</sup> Imagine that people understood the action to be "cheating" or

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See, for example, James M. Buchanan, *An Economic Theory of Clubs*, 32 *Economica* 1, 13-14 (1965). It is a mistake because, as Ronald Coase pointed out long ago, *every* good presents a problem of supply, whether private or public. The problem exists whenever one cannot assure that those who consume the good will pay for its supply, and for any good, there is *always* a context within which it is not possible to assure that those who consume are so contributing. The problem of supply exists no less when laws against theft are not enforced than when lighthouses are built.

Economists focus on pure public goods when thinking about the collective action problem, but this is because they take for granted a certain regime of property and contract rights. But contract and property systems are no less solutions to this problem of supply of private goods than a tax on passing ships would be a solution to the problem of supply of public goods. Every good presents a problem of supply; what distinguishes each is simply the ease with which this problem can be solved.

Rather than engaging in a categorical debate over kinds of goods, we should focus on the general question of what steps are needed to solve particular problems of supply, and compare the relative costs of each solution.

<sup>183</sup> Frank extends this to the case where an individual not only feels a certain way about defecting from social behavior, but reveals that feeling through some subtle physical signal, for example, a blush. See Robert H. Frank, *Passions Within Reason: The Strategic Role of the Emotions* 64 (Norton, 1988).

"disloyal" or "selfish" or "dishonest", and that when they did something that was "cheating" or "disloyal" or "selfish" or "dishonest" they actually felt badly. Imagine they felt as badly as they would if the device I mentioned above were placed in their stomach and set off. If the village could succeed in constructing such meanings, then the village could succeed in securing a supply of wine rather than water, by changing, in just the way the pain device above changed, the individual incentives of members of the village.<sup>184</sup> Given the feeling of pain associated with being a "cheater" or the like, it would no longer be rational for the individual to refuse to pour wine into the village vat.<sup>185</sup>

All three solutions present a common pattern.<sup>186</sup> There is a social end, and deviation from supporting that end is individually sanctioned. No doubt the sanctions are different, some more expensive than others, but so long as the sanction to an individual is greater than the benefit from defecting from a particular social end, we can expect individuals to support the social end. And finally, if the social benefit is greater than the cost of the sanction, then there is reason for society to erect such a sanction.

All three solutions can be called, following Mancur Olson, selective incentives. A selective incentive is any incentive "that applies selectively to the individuals depending on whether they do or do not contribute to the provision of the collective good."<sup>187</sup> In each case, the selective incentive functions to raise the cost of noncompliance sufficiently so as to make it rational to contribute to the good's supply, whether the selective incentive is the sanction of detection (the inspector above) or a certain kind of penalty (pain or guilt) for failing to contribute to the good's supply.<sup>188</sup> So again, if the cost of wine in our village is \$3 a pitcher, and the villager would be willing to pay \$5 to avoid the pain of guilt, or \$6 to avoid the pain of the internal shock, then it would be ratio-

<sup>184</sup> See id at 53 ("[One's] aversion to feelings of guilt effectively alters the payoffs she faces").

<sup>185</sup> As I suggest below, my purpose in sketching this case is not to suggest "morality" reduces to such an account. My aim here is not to develop a general account of morality. A similar point about moral sentiments is made by Adam Smith, and Robert Frank draws upon this to suggest that these moral sentiments—"anger, contempt, disgust, . . . guilt"—"help people solve the commitment problem." Id.

<sup>186</sup> The pattern is also quite simplified from traditional social psychology. For a much richer division of influences, see Elliot Aronson, *The Social Animal* 34 (California, 1995) (describing three kinds of responses to social influence: compliance, identification, and internalization). Guilt in my scheme most closely approximates internalization in his.

<sup>187</sup> Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* 21 (Yale, 1982).

<sup>188</sup> With a private good, the selective incentive is denial of the good if not paid for.

nal for her to pour wine rather than water—both the physical pain and the guilt function as selective incentives to assure her cooperation.

This long digression should suggest three related points. First, “guilt” in the example above is a social meaning. It also ties, in an important way, to the incentive of an individual. In this way, social meanings can and often do function as selective incentives. An individual’s action has a meaning, for example, “cheating,” and in a well-functioning community, cheating induces a certain kind of pain in individuals that often (but not always) suffices to remove the incentive to cheat. Should—not necessarily would, and certainly not in all cases. But that such an effect is even possible is only because (1) social meanings construct a certain semiotic content to an individual act that make it possible for them to be “cheating” or “disloyal” and because (2) individuals internalize these norms and feel this semiotic content. It is because being a cheater, or being disloyal, can actually matter subjectively to the choices that an individual makes that social meanings become relevant—and at times central—to the regulation of *individual* behavior.<sup>189</sup>

Thus, the first conclusion drawn is that social meanings can function as selective incentives to induce action according to a social norm, or to achieve a collective good. The second conclusion is that these meanings, themselves designed to *solve* collective action problems, do themselves *present* collective action problems in their own construction. The selective incentives that morality constructs solve collective action problems, but they get constructed themselves only by solving collective action problems. And when constructed, they get changed only by solving collective action problems.<sup>190</sup>

A third conclusion is even more important for the problem of how social meanings change: *The very same influences that induce an action according to a social norm also induce resistance to efforts to change a social norm.* The selective incentives that go with the preservation of social meanings simultaneously inhibit the social meanings’ transformation. Thus an individual not only

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<sup>189</sup> My perspective here is focused on why devices like social meanings can serve social ends and suffice to induce individuals to act in accordance with those ends. For an exceptionally rich account of why individuals might find that some social norms—honesty, or generosity, or altruism, for example—may be constitutive of rationality, see Frank, *Passions Within Reason* at 68-69 (cited in note 183).

<sup>190</sup> Changed not *only* by solving collective action problems. Other influences can create these changes.

has no selective incentive to change a social meaning, but she also suffers a selective cost if she does act to change it.

Take an obvious and trivial example—seatbelts in taxis in Budapest, as described above.<sup>191</sup> As stipulated, putting on a seatbelt in a taxi in Budapest had a certain meaning—an insult to the driver. To insult someone is, for the properly (or sadly, depending upon your perspective) socialized sort, costly. One feels something of the pain one imposes on the other. One feels this pain even if one believes the norm stupid. That is, even if I believed the norm stupid, and believed it would be better for both me and the driver if the norm were different, and even if I wanted to change the norm, by donning my belt and explaining my reasons, I would feel (socialized coward that I am) the insult that I had delivered to the driver. I would feel it, and hence it would be a cost. My decision to undertake the reform, then, would be rational only if the expected benefit from the change would outweigh the pain I feel at insulting the driver. But what would the benefit to me be? In this case, I get little from changing the norm, but suffer a lot.

Social meanings act to induce actions in accordance with social norms, and *thereby* impose costs on efforts to transform social norms. They present, then, a particularly harsh collective action problem, for not only is there little incentive for an individual to contribute to a new collective good, but there is a punishment—the cost of deviance—for any individual who wishes to contribute to a new collective good; that is, to a new social meaning. Deviance is an extremely significant individual cost for reasons analogous to Robert Frank's account of the self interest in being moral.<sup>192</sup> Slight but repeated deviations from some social norms may wholly undermine an individual's credibility. Deviance from social norms, when aggregated, signals a more fundamental individual disorder.<sup>193</sup>

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<sup>191</sup> See text accompanying note 22.

<sup>192</sup> See, for example, Frank, *Passions Within Reason* at 68 (cited in note 183) (discussing how a self-interested person might prefer to act morally).

<sup>193</sup> It is this point about the social costs of deviance that I believe theorists such as Mark Ramseyer give us too little account of. See, for example, J. Mark Ramseyer and Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J Legal Stud 263, 287 (1989). By focusing on the marginal person, the person on the margin of society who feels least the pressure of its social norms, Ramseyer argues that "the presence of these outsiders . . . can corrode the entire normative order." Id. But there is a big step taken here. If one is an outsider, and one's actions are deviations from the norms, then one's credibility is undermined as a social actor. This cost of deviance thus both inhibits deviation and undermines the significance of any particular deviation. I

In this way do social meanings bring along with themselves the very mechanisms necessary to preserve their dominance. These mechanisms are themselves social meanings. Or again, social meanings use social meanings to solve collective action problems. And since social meanings are collective goods, to resist the mechanisms that force conformance requires the solution to a collective action problem. Thus the trap that individuals face when wanting to transform particular social meanings: To act against social meanings not only provides little individual reward, but it also brings with it individual sanction, and at some extreme, a form of rhetorical self-immolation.

From this perspective, then, we see that defensive construction may often be easier than offensive construction. In defending a social meaning, structures of social stigma are already built in, while in attacking a social meaning, one must both overcome the existing structures of social stigma and implement new structures in line with one's desired meaning. This is not to say that defensive construction will always succeed, or that offensive will always fail, but that defensive construction does not face as severe a collective action problem as does offensive construction.

I do not mean to overstate the case. Sometimes social meanings collapse on their own; sometimes they are transformed by other social action; sometimes they are so weak that a single action by a single person is enough to topple them; sometimes the efforts that topple them are small and repeated, or small and well placed—the technique, say, of jujitsu. But regardless of how much effort is needed to change, what is important is locating where the change must occur—in individuals, acting on the basis of social meanings.

One final and important caveat: I also do not mean to suggest that the account I have offered is an understanding or proof of morality. Morality is more than a response to incentives. My argument here is not about the nature or function or emergence of morality; it is about the use of devices to align the different structures of incentives that may induce people to act. Morality is an incentive to act in a particular way, but it does not follow that “all there is to morality” is a structure of self-interested incen-

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agree that there is value to seeing whether we can understand social behavior without accounting for such norms—this, it seems to me, is the great value of Ramseyer’s work. But we have seen enough to know that such an account is in important contexts incomplete. See, for example, Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard, 1991).

tives as justification. My purpose is not to reduce morality to this structure, but instead to identify how some can be brought to act according to social norms through an internalization of these norms.

### 1. Whether to change social meanings.

My aim in this Section so far has been to emphasize the collective action in social meanings. Auguste Comte makes a similar point about language. As he put it,

Language forms a kind of wealth, which all can make use of at once without causing any diminution of the store, and which thus admits a complete community of enjoyment; for all, freely participating in the general treasure, unconsciously aid in its preservation.<sup>194</sup>

Constructed social reality is, I have suggested, also such wealth. In Bourdieu's language, it is one aspect of inherited social capital. But most importantly, construction, like language, is "a collective enterprise."<sup>195</sup> Social meanings are "collective identities" and collective identities are "an emergent feature of collective action."<sup>196</sup> An individual may use or participate in this constructed reality, but as with language itself, she may also have "virtually no control over [this reality]. Speaking individuals cannot determine the signs they use. These signs are fixed by the society within very strict limits."<sup>197</sup> To change these social meanings therefore requires a collective effort, which in turn requires the construction of an array of selective incentives, sufficient to overcome the selective incentives that act to support the status quo structure of social meaning.<sup>198</sup>

Individuals, then, cannot be expected to act against social meanings, even if the social meanings are, from some perspective, stupid. The reason follows from what has been said so far:

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<sup>194</sup> See Bourdieu, *Language and Symbolic Power* at 43 (cited in note 42), quoting Auguste Comte, 2 *System of Positive Polity* 213 (Longmans, Green, 1875).

<sup>195</sup> Bourdieu, 7 *Sociological Theory* at 19 (cited in note 19).

<sup>196</sup> Schlesinger, *Media, State and Nation* at 181 (cited in note 113).

<sup>197</sup> Jeffrey C. Alexander, *Analytic Debates: Understanding the Relative Autonomy of Culture*, in Jeffrey C. Alexander and Steven Seidman, eds, *Culture and Society: Contemporary Debates* 1, 8 (Cambridge, 1990).

<sup>198</sup> This is not to say that the collective entity being changed is something other than dispositions or attitudes in individuals. Again, for my purposes, ontology is not as important; it is only important to insist that nothing commits me to some sort of collective entity as the basis of a social meaning.

Social meanings are part of the benefits and costs associated with any individual action. They are, since collectively constituted, fixed, for a particular action at a particular time. Thus, given a particular constellation of meaning, an action can be, for an individual, rational, even if it appears, for a collective, irrational.

Consider a simplified example to help make this point more plain, one practice of Hindu widowhood.<sup>199</sup> According to Hindu tradition, when a woman is widowed, she "begins to wear coarse white saris, ceases to eat nonvegetarian food, and generally leads a frugal and secluded life."<sup>200</sup> This, for the widow, is an extraordinarily difficult existence, and one might well ask why women continue it. Some continue it because they believe it will lead to compensation in the next life.<sup>201</sup> But, as Kaushik Basu and others describe, "most widows comply because of social sanctions and fear of ostracism."<sup>202</sup> To defect from the tradition would be costly, and if it is rational to conform, the defection must be more costly than compliance itself. Thus could this social action be rational in purely individualistic terms.<sup>203</sup>

But even if the action, given the norm, was rational, one might wonder whether the norm itself was rational. One might think, that is, that the norm should not demand such sacrifice from widowed women.<sup>204</sup>

How could we know whether a social norm is collectively irrational? How could we say that despite it being rational for an individual to conform, it is irrational for a collective to induce such conformance?

Whether a society should work to change a particular social meaning requires a normative judgment. I do not intend to provide that normative judgment here, but we can describe norms

<sup>199</sup> Actually, widowhood is treated very differently in the different castes. See Marty Chen, *A Matter of Survival: Women's Right to Work in Rural India and Bangladesh* (Harvard, forthcoming 1995) (discussing the different treatments of widowhood in Hindu culture).

<sup>200</sup> Kaushik Basu, Eric Jones, and Ekkehart Schlicht, *The Growth and Decay of Custom: The Role of the New Institutional Economics in Economic History*, 24 Explorations in Econ Hist 1, 10 (1987).

<sup>201</sup> Id.

<sup>202</sup> Id.

<sup>203</sup> Compare George A. Akerlof, *An Economic Theorist's Book of Tales: Essays That Entertain the Consequences of Assumptions in Economic Theory* 34-44 (Cambridge, 1984) (exploring economic incentives resulting from caste systems).

<sup>204</sup> I don't want to argue whether it is or isn't inferior. I have my prejudices that it is inferior, but I leave it to others who know the culture better. See Basu, Jones, and Schlicht, 24 Explorations in Econ Hist at 18 (cited in note 200) (noting Hindu widowhood as an example of customs that linger even if they would not be chosen now).

for testing whether a social norm should be changed. The norms divide into two kinds, efficiency norms and distributional norms. In the balance of this Section, I describe these norms, and then turn, in Section 2 below, to how such changes may be effected.

*Efficiency Norms.* Efficiency norms—norms that test a social change by the standards of efficiency—could be of two sorts. We could imagine first a requirement that social meaning be regulated if and only if such regulation would result in a pareto superior social state. Here's one example. I sketched what was the social meaning of wearing a seatbelt in a Budapest taxi, and argued that it would be better if that social meaning would change. It would be "better" in the sense of pareto superior so long as at least one person were better off, and none worse off. Does this condition hold in this case? There are two groups, drivers and passengers. Certainly we could say that passengers would be better off—removing the stigma of wearing a seatbelt would allow them the choice of wearing it or not, which would increase their well-being.

Whether drivers would be better off requires a bit more careful analysis. Before the social meaning changes, drivers are no doubt not better off, since they are insulted by their passengers' wearing seatbelts. But after the social meaning changes, they are, by definition, no longer insulted. Thus, after the change, seatbelt wearing makes them no worse off, and indeed, if there is a well-functioning insurance market, they should be better off. Thus from the perspective after the social meaning has changed, changing the social meaning of seatbelt wearing is a pareto superior change.

A less demanding efficiency norm for changing social meanings would be Kaldor-Hicks efficiency. Here what is required is not that all be either indifferent or better off, but that those who are better off are better off by enough to compensate those who are worse off for the harm the change causes them. Here again, Budapest may help. Even if one were not fully convinced that the remnants of machismo could be eliminated by changing the social meaning to allow seatbelt wearing, such that drivers were in some sense still worse off, one could well believe that the benefit to the passengers clearly outweighed the drivers' loss. Perhaps drivers would lament the passage of those glorious days when they could speed through tiny eighteenth-century alleys, with them and their passengers sitting on the edge of death. Nevertheless, it is not a wholly unreasonable judgment that that loss is small against the gain wearing seatbelts would produce.

Whether pareto or Kaldor-Hicks, however, the structure of both norms is the same. In both cases, the claim is that total wealth (however measured) is increased by the change in social meaning.

But note an important and latent incoherence in the very notion of applying these norms to changes in social meaning. For when we begin to tinker with social norms or social meanings, we also begin to undermine the perspective from which one can really choose whether he or she is "better off" in the changed world over the unchanged world. For if a large part of who someone is is the sum of these constructions of social meanings—the set of practices or understandings that guide and constitute her—then this act of changing social meanings is an act of changing the individual herself. And if an act of changing an individual, what is the coherence in the claim that "the individual" is better off with the change than without it.

An extreme example would make the point. Imagine a simple pill existed for erasing racism in a racist's character. Could we convince a racist to take the pill? Certainly, we could argue, that after taking the pill, the racist will be happy that he took the pill; we might even say that the racist would be happier overall after taking the pill than before. But even if both conditions were true, it is not incoherent to imagine the racist saying that *he* just doesn't want to become a nonracist. That *he*, for example, would not be himself if he were forced to become a racist.

The example reveals something of what is presupposed by ordinary discussions of efficiency norms, or for that matter, of the distributional norms discussed just below. If it is unproblematic to assume that it is the same person choosing one world over the other, then notions like pareto efficiency, or Kaldor-Hicks efficiency, are untroubling. But if we imagine that the change contemplated actually changes the individual who would be making the choice, then there is an important incoherence in saying that the individual would choose such a world, or would be better off in such a world. For again, who is this individual who would so choose?

Resolving these questions is fundamental, but beyond the scope of this Article. In my view, they will have no simple resolution. For purposes of this Article, I will assume that the identity of individuals does not change as these constructions proceed, and hence, that it is coherent to speak of it being "efficient" to change certain meanings. This assumption is particularly strong

when I describe changing social meaning as simply the solution of a collective action problem.

*Distribution Norms.* A second norm for testing changes in social meaning tests not the efficiency of a particular change, but its distributional effect. We change a social norm, that is, because of whom the change benefits, and at whose expense. Here Bourdieu's notion of social capital is most useful.

By capital, we ordinarily mean assets which have a certain power within an economic system. Money, in this sense, is capital. The economist usually means something slightly different. For the economist, capital is an asset that produces something of value.<sup>205</sup> Bourdieu's use of "social capital" is consistent with both senses of the term. For him, social capital is a habit, or facility, or status, that yields a certain value to the holder. Being white in the antebellum South was a kind of social capital; having the ability to speak grammatically is a kind of social capital; having graduated from a prestigious university is a kind of social capital. In each case, social capital refers to something an individual has that gives the individual a certain value (whether positive or negative: having an English accent is social capital; its value can be positive or negative) in a particular social context.

Imagine a society—this should not be difficult—where social capital is unevenly distributed according to gender, and women have less than men. Not that every woman has less social capital than every man, but that the distributions are such that the mean social capital is lower for women than for men. Some of this difference may be due to differences in, say, education, or tied, for example, to physical characteristics of the gender. But some no doubt are differences due merely to social meanings associated with being a woman. As I have described it, such would mean that the social meaning of being a woman in this society is more costly than the social meaning of being a man, since again, capital makes existence easier, and capital is allocated in my hypothetical society on the basis of gender.

Against this background, a society could well decide it wanted to reallocate this social capital. Some of this reallocation may occur through ordinary means—by increasing the educational opportunities to women, for example. But some may come through changing the social meaning associated with being a woman—changing, for example, meanings tied to traditional

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<sup>205</sup> Harold S. Sloan and Arnold J. Zurcher, *Dictionary of Economics* 60 (Barnes & Noble, 5th ed 1970).

gender roles, or inequality.<sup>206</sup> Putting to one side the question of just how, we can see the justification for such change does not lie in efficiency: it would take a stretch to argue that men in this society are actually better off without their dominance than with it, although I do not want to argue that such a stretch could not be made. But assuming the stretch could not be made, it would remain for these reformers to argue for the change on equality, rather than efficiency, grounds. Social meaning must change, the argument would go, to effect a reallocation of social capital, so that women are not handicapped in social life by these structures socially constructed. Social capital is such a structure, and anything the state can do to restructure it advances this social goal of equality.

Efficiency norms, then, are distinct from distributional norms, though of course they overlap. Some changes may be justified on both efficiency and distributional grounds, but this is not necessarily so. Some changes will satisfy one norm, and not the other; and the choice of which to advance in any particular context will again require a political judgment.

So much about whether a social meaning should be changed. Think again about why they won't change on their own: While most economists operate with an assumption that preferences and institutions (read: norms) are fixed,<sup>207</sup> a developing literature known as "new institutional economics" addresses directly

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<sup>206</sup> This is, in my view, the best reading of John Rawls's point about the "morally arbitrary" nature of personal assets. See John Rawls, *A Theory of Justice* 310 (Harvard, 1971). This reading was suggested to me by Alex Whiting.

<sup>207</sup> Not because economists are so silly as to actually believe that they are fixed, but because most of the techniques of economics, like any system of knowledge, function only when certain structures are taken for granted. Usually this discussion is in the context of the evolution of custom, but a custom is no less valuable for our purposes than a direct discussion of social meaning: Custom is just a particular form of social meaning, less symbolic in general, but generated and transformed by the same mechanisms that affect social meaning. Economists aim to understand both custom's origin and its persistence, and it is in tracking this understanding of a custom's persistence that the most useful parallels to the regulation of social meaning can be drawn.

There is nothing about positing a change in preferences, however, that is inconsistent with even Gary Becker's conceptions of the stability of preferences. As he has explained, what his account presumes is the stability of "metapreferences," not particular preferences.

The message . . . is not that preferences at time t for different people depend on the same way on their consumption at t. Rather it is that common rules determine the way different variables and experiences enter the meta preferences that motivate most people at most times.

Gary S. Becker, *Habits, Addictions, and Traditions* 23 (Center for the Study of the Economy and the State, 1991) (working paper series no 71).

how these norms develop.<sup>208</sup> In the terminology of the discourse, new institutional economics “endogenizes” institutions within its economic models—that is, as the neoclassical economist attempts to explain price, or quantity demanded, the new institutional economist attempts to explain norms, or institutions, and their evolution.<sup>209</sup> For even if an institution arises in response to demands of efficiency, it does not follow that the institution survives if and only if it continues to advance efficiency. “[A]t a particular time in a particular economy, there may exist lots of institutions which serve no social purpose and which, though once valuable to society, may now be actually harmful.”<sup>210</sup>

It is easy to see why unequal norms—norms that violate principles of equality—might survive. But why would inefficient institutions, as norms, survive?<sup>211</sup> In the neoclassical model of efficiency yielding from perfect competition, inefficiencies die away because individuals can select away from them. But competition crucially hangs upon choice, and individuals do not choose the institutions under which the rest of their choices are made. As Basu puts it, “[i]ndividuals choose in the marketplace, in shops, in labor markets. They do not choose between institutions, customs and social norms. These evolve in response to a multitude of individual decisions spread over different domains and large stretches of time.”<sup>212</sup>

Thus, in many cases, since there is no clear individual mechanism to erode them, if institutions that have become inefficient are to die, often they must be changed. But again the norm or institution itself is a collective good—everyone can rely on it if anyone can—and as with any collective good, it will rarely be in the interest of any individual to act to change an inefficient institution. Often, moreover, there will be no collective entity that can

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<sup>208</sup> See Basu, Jones, and Schlicht, 24 *Explorations in Econ Hist* at 9 (cited in note 200). For the same point as applied to individual preferences, see Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 Duke L J 1, 5.

<sup>209</sup> See Basu, Jones, and Schlicht, 24 *Explorations in Econ Hist* at 2 (cited in note 200) (describing approach of “new institutional economics”).

<sup>210</sup> *Id* at 11.

<sup>211</sup> This question is related to the question why castes would survive. For an extraordinary account, see Akerlof, *An Economic Theorist’s Book of Tales* at 36-37 (cited in note 203).

<sup>212</sup> Basu, Jones, and Schlicht, 24 *Explorations in Econ Hist* at 9 (cited in note 200). Another aspect of their survival may be a phenomenon of “path dependence.” See Bernard S. Black and John C. Coffee, Jr., *Hail Britannia?: Institutional Investor Behavior under Limited Regulation*, 92 Mich L Rev 1997, 2000, 2082-84 (1994).

act to change it for the collective as a whole. Thus the inefficient institution is stuck, till shaken free from this equilibrium.

We can illustrate this point again with the example of Hindu widowhood. A Hindu woman does not enter the world, passing through John Rawls's veil of ignorance,<sup>213</sup> and select the world she will be born into. Instead, she is born into a world already rich with institutions and norms that constitute and constrain her character. In this world, she suffers the norm regarding Hindu widows—she experiences the social coercion that induces her to behave as a “proper Hindu woman” would.<sup>214</sup>

Imagine we believe this norm no longer efficient. For this norm to change, however, the individuals living under it must solve a collective action problem. Individuals may be able to resist the norm, or protest the norm, or defy the norm, but for the norm to change the collective must act together to effect reform. Without this coordinated action, “everyone may be worse off under [the system, yet] rational individuals may comply with its norms because they do not want to risk ostracism. In other words, once institutions are established, they may persist even though they are collectively suboptimal.”<sup>215</sup>

What we have said about institutions, customs, and social norms applies just as well to the general class of these particulars—social meaning. Social meaning is sustained by norms and custom; it can function as an institution; and it disciplines those within society to obey its demands. Social meanings can also become inefficient, but few mechanisms exist for transforming them. Often they can be changed only by some intervention that acts to shock the stable system of norms out of tilt.<sup>216</sup>

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<sup>213</sup> Rawls, *A Theory of Justice* at 12 (cited in note 206) (defining the concept of “veil of ignorance”).

<sup>214</sup> The pressure is rarely just social. See Chen, *A Matter of Survival* (cited in note 199).

<sup>215</sup> Paul J. DiMaggio and Walter W. Powell, *Introduction*, in Walter W. Powell and Paul J. DiMaggio, eds, *The New Institutionalism in Organizational Analysis* 1, 4 (Chicago, 1994). See also Basu, Jones, and Schlicht, 24 Explorations in Econ Hist at 10 (cited in note 200). Even if everyone were not worse off, under some conceptions of efficiency, for example, a Kaldor-Hicks conception, the change could still be rational. See text accompanying notes 204-05.

Note again, however, that there is a strong assumption in the notion that changing these norms could make everyone better off. For to make that assumption true in its simplest form, one has to imagine that changing the norms does not actually change the individuals acting under the norm. But in extreme cases, this is a hard assumption to make. And if one thinks that the change does actually change the individuals in the society, then it is unclear what it means to say “everyone is better off.”

<sup>216</sup> Again, how to evaluate these notions of change is not easy. Traditional neoclassical economics as well may be unable to digest such an approach without trouble, however. If

## 2. Tools for changing social meanings.

Social meaning changes; sometimes it is possible to effect or avoid such changes; efficiency and distribution norms would be appealed to to justify these changes. But we have yet to speak generally about the techniques for achieving or avoiding such change, not about how these techniques are solutions to collective action problems.

Drawing on the examples that began this Article, I now want to identify four methods of self-conscious transformations or preservations of social meaning and suggest how each act as solutions to a collective action problem. While three of these techniques will be quite familiar, the fourth may be something of a surprise.

All four are in some sense concerned with the same problem. All four, that is, are about how links in associations are made and broken, such that texts have or no longer have associated meanings. But we can divide this common problem into techniques of two kinds. One kind changes meaning directly, by interfering with existing meanings (these I call semiotic techniques); the other changes meanings indirectly by inducing certain behavior that, over time, will affect these meanings (these I call behavioral techniques).

In describing these techniques, I will rely on a (perhaps chilling) image of a meaning manager, or meaning architect, who has identified a social meaning that is to be transformed, and must find the techniques to achieve this transformation. Again, while chilling when imagined of government, as will be obvious, changes of just this sort are imagined and engaged by nongovernmental actors all the time.

The changes that these techniques will remark are, in most cases, marginal. They are not the stuff of revolution; they are incrementalism, and reform. This does not mean that there is not revolution, or that social meanings cannot be revolutionized. I do not mean that all there is is incrementalism and reform, because again, I do not mean this to be a complete catalog of techniques for social reform.

Finally, the reason the meaning manager selects these changes is left unspecified. I am not arguing these changes are

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we understand the change I have been speaking of as a change in individual preferences, then this draws into doubt the ordinary norms for evaluating "efficiency." These norms typically presume stability of preferences in order to establish a baseline from which to compare changes. See Dau-Schmidt, 1990 Duke L J at 16 (cited in note 208).

selected because they make society better off. This is not meant as a functionalist account. All I am aiming for here is an account of the techniques used in such changes.

a) *Semiotic techniques.* Two techniques for changing social meaning rely directly upon the semiotic content of the meaning being changed. Both, that is, use social meaning to change social meaning, one by focusing and the other by blurring a particular social meaning.

The first and most obvious example is the technique of *tying*. In these cases, the social meaning architect attempts to transform the social meaning of one act<sup>217</sup> by tying it to, or associating it with, another social meaning that conforms to the meaning that the architect wishes the managed act to have.<sup>218</sup> The tied text thereby gains some of the associated meaning of the tied-to text.

The technique is extremely common.<sup>219</sup> Think of how endorsements in advertising work: Michael Jordon endorses Nike shoes. Some of his social capital is transferred to the product endorsed, and the meaning of wearing Nike shoes changes.<sup>220</sup> Gap tells us about the world of famous and diverse people who wore khakis. Some of their social capital is transferred to this kind of trousers, and the meaning of wearing khakis changes. In each case, the tying builds a link between the text and an association existing in the social context.

The link can transfer negative as well as positive value. A candidate for Congress ties her opponent to the President, hoping that negative views about the President will transfer to the opponent. The link can also be used either to change (offensive construction) or preserve (defensive construction) social meaning: In an effort to preserve smoking as an accepted social practice, for example, tobacco manufacturers appeal to the liberty of the Declaration of Independence.

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<sup>217</sup> Throughout this Part, I speak of the social meaning of an act. But as should by now be clear, acts are not the only things with social meanings. Just as easily, inaction, status, or persons, for example, can be the source of a social meaning.

<sup>218</sup> See William A. Gamson, *Political Discourse and Collective Action*, 1 Intl Soc Movement Res 219, 225-28 (1988).

<sup>219</sup> Marketers call this brand-name leveraging. See generally David A. Aaker, *Managing Brand Equity: Capitalizing on the Value of a Brand Name* (Free Press, 1991).

<sup>220</sup> Note, the person transferring this capital in a sense is issuing a bond to the product; if the tie is a bad one, then it can come back to haunt the person transferring the capital.

Similar transfers were in the examples I sketched above, particularly the Soviet motorcycle helmets example.<sup>221</sup> There the government attempted to brand wearing helmets as “imperialist,” hoping to trade on some of the accumulated social capital behind the notion of imperialism to induce individuals to stop using helmets. The South’s regulation of dueling too.<sup>222</sup> By making dueling illegal, the government’s effect (if there was one) was not the direct deterrence caused by fear of prosecution—the likelihood of detection or prosecution was quite small. The effect, if any, of the regulation came from tying the act to the governmental stigma of “illegality.”<sup>223</sup>

Whether negative or positive, tying functions by focusing a meaning—by making an association that clarifies the meaning along some dimension, sometimes by implicitly breaking another link that before existed.

A second technique is more intriguing. Indeed, it is this example that I believe the surprise. For our focus in law is often on how law functions to clarify. Here it functions not by clarifying, but by blurring. This is the technique of *ambiguation*.<sup>224</sup> With this technique, the architect tries to give the particular act, the meaning of which is to be regulated, a second meaning as well, one that acts to undermine the negative effects of the first. In this sense, while tying is about establishing that X is like Y, ambiguation is about establishing that X is like Y or Z. It simply adds a link without denying an existing link, and thereby blurs just what it is that X is.

Once this pattern is seen, the examples are many. The Nazis required Jews to wear yellow stars. Wearing a star had then a particular meaning, in part constructed by *disambiguating* who were Jews and who were not, thereby facilitating the expression of racial hatred. Danes who opposed the racism of the Nazis then began to wear stars themselves.<sup>225</sup> Their action then *ambiguated* the meaning of wearing a star. Now wearing a star

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<sup>221</sup> See Section II.A.1.

<sup>222</sup> See Section II.A.4.

<sup>223</sup> As I discussed, the cost to a gentleman of this stigma may have been slight, so as a technique, this was weak.

<sup>224</sup> One might view ambiguation as a nested opposition with the idea of tying: ambiguation functions by blurring the link with some attributes, and emphasizing the link with others. See J.M. Balkin, *Nested Oppositions*, 99 Yale L J 1669 (1990), reviewing John M. Ellis, *Against Deconstruction* (Princeton, 1989).

<sup>225</sup> Or so it is said. See Jørgen H. Barfod, Norman L. Kleebatt, and Vivian B. Mann, eds, *Kings and Citizens: The History of the Jews in Denmark 1622-1983* (Jewish Museum, 1983).

meant either that the person was a Jew or that the person was a Dane supporting the Jews. Their action also *tied* the Danes to the Jews: now Danes were seen as supportive of the Jews.

Nkosi Sikelel was the song of the black protest in South Africa. In 1963, the South African Parliament declared it the official anthem of Transkei, the earliest ethnic “nation” created under the South African homelands policy.<sup>226</sup> The aim<sup>227</sup> of the South African government was to give the singing of the song in Transkei a dual meaning, thereby weakening its association with the protest movement. Ambiguation was used to undermine the power of the song’s social meaning.

At one time, vendors did not systematically check whether a credit card was stolen. One reason for this was the cost; one part of this cost the actual transaction cost in looking up the card, either in a booklet, or on a machine; the other part the insult cost, delivered to the cardholder whose card gets checked. One simple way to minimize the latter of these two costs is to make a rule about when cards will be checked—all purchases over \$500, for example. Such a rule, while increasing the costs of verification because increasing the number of verifications, will also reduce an insult cost in any particular verification. Again, the rule ambiguates the meaning of any particular verification. (The same point: think of metal detectors at airports.)

Ambiguation is common in the examples I sketched at the start as well. The dueling example is the clearest. When the government makes dueling a disqualification for office, it transforms the meaning of the act of dueling—from an act that is solely a measure of a man’s honor, to an act that both is the measure of a man’s honor and also inhibits the gentleman’s ability to serve civil society. The act thereby becomes both honor-enhancing and honor-defeating. And this change in the social meaning of the act no doubt will affect its incidence. Since the benefit of the act has been reduced, so too will its demand be reduced.

Two other examples of ambiguation from my initial list are essentially the same, and I can present them quickly. These are the examples of the Civil Rights Act,<sup>228</sup> and helmets in hockey.<sup>229</sup> In each case, the meaning architect attempted to change the social meaning of a particular act—the act of accommodating

<sup>226</sup> Comaroff and Comaroff, 1 *Of Revelation and Revolution* at 3 (cited in note 141).

<sup>227</sup> Though unsuccessful, as I discuss below. See text accompanying note 230.

<sup>228</sup> See Part II.A.2.

<sup>229</sup> See Part II.A.3.

blacks or the act of wearing helmets—by giving it a second meaning—the meaning of simply obeying the law or following the rules—thereby making ambiguous the real reason that the same actors were doing the particular act. By ambiguating the meaning of the action, one undermines any stigma attached to the action, making it easier for the action to be taken.

The pattern should now be plain. Sometimes semiotic techniques function by disambiguating a particular action or status—naming it, if you will. (This is tying.) Sometimes they function by giving the action a second meaning. (This is ambiguation.) Neither, of course, is always successful. Ambiguation was not successful in the South African example.<sup>230</sup> Nor would tying always be successful.<sup>231</sup> There are limits to the power of any architect to transform meaning through either semiotic technique.

But my aim here is not to map a guide for successful meaning management; it is instead to map the possible moves of meaning management. Both techniques, in some cases, give the meaning architect the ability to shift social meaning by changing the marginal social cost of the same social act. Where the cost is changed by narrowing the range of meanings possible, that is achieved through tying; where the cost is changed by multiplying the range of meanings possible, that is achieved through ambiguation.

b) *Behavioral techniques.* Meaning construction is more than speaking differently. For it to function, it must succeed in recreating understandings and expectations. To create these understandings and expectations—in the sense that they are learned and then taken for granted—requires a change in behavior sufficient to internalize a set of understandings that construct this new meaning, or, in the case of defensive construction, a change in behavior to resecure a social meaning that would otherwise dissolve.

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<sup>230</sup> See Comaroff and Comaroff, 1 *Of Revelation and Revolution* at 3 (cited in note 141).

<sup>231</sup> Imagine a high school principal who wants to dissuade students from smoking in the bathrooms. Say smoking is considered “cool” by high school students. The principal wants to tie that meaning to a negative social meaning, so she reveals to the students that the smartest student in the class is not a smoker, so neither should they be. But of course this move in this context would be a complete failure. To be different from the smartest student is more, not less, “cool.” To undermine the meaning of “cool” the principal would have to tie smoking behavior to images that are not cool, but, in context, that could well be impossible.

We can isolate two such behavioral techniques—techniques for changing meaning by changing behavior—in the above examples. The first is a regulation designed to *inhibit* a certain behavior that would otherwise aid in the construction or reinforcement of a disfavored social meaning. Segregation, for example, is both an instance of racial harm and a behavior that reinforces the social meaning of inequality. Prohibiting segregation is a way of undermining practices that reinforce social meanings of stigma and inequality.

Another example makes the point more directly. Under the Fair Housing Act, it is illegal for a real estate broker to indicate, whether asked or not, what the racial makeup of a community is when a buyer is purchasing residential property.<sup>232</sup> Nor can a broker indicate the racial patterns of purchasing and selling in a neighborhood.<sup>233</sup> Both of these restrictions attempt to reduce the number of economic decisions made on the basis of race. One effect of reducing the incidence of such actions may be to undermine the racist social meanings built into contemporary American society; or so the framers of Title II thought.

The best examples of inhibition, however, are in the context of defensive construction.<sup>234</sup> Think again about antimiscegenation laws. These laws inhibit an action—interracial association—that over time would erode the social meaning of white superiority. Or consider antisodomy laws. Once sodomy became identified with homosexual sex, the function of these laws was to reduce the incidence of homosexual sex, thereby preserving a dominant morality against homosexuality. *Bowers v Hardwick*<sup>235</sup> is as explicit as any opinion could be on this: The State of Georgia was constitutionally permitted to use antisodomy statutes to “preserve” the moral views of Georgia (read: *orthodoxy*) that homosexuality was wrong.

Inhibition, then, is one behavioral technique for changing social meanings. The second technique is to *induce* actions that tend either to undermine or to construct a particular social meaning.<sup>236</sup> This technique I will call *ritual*. Here, the more bla-

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<sup>232</sup> 42 USC § 3604(c) (1988).

<sup>233</sup> 42 USC § 3604(e) (1988).

<sup>234</sup> See Part II.C.

<sup>235</sup> 478 US 186, 196 (1986).

<sup>236</sup> What it means to “induce” an action in context is of course ambiguous. The rituals of the Shabot are rituals, but they are in some sense inactions, not actions. The notion, however, is that it is a practice distinct from what otherwise would have happened, and this acts to support the meaning being sought.

tantly constructive actions discussed in the political construction examples above are illustrative. Political ritual is the easiest case, and *Barnette* serves as a helpful guide through this example.

In West Virginia, children were required to stand and salute the flag in school. *Barnette* protects the right of some students not to participate in this ritual.<sup>237</sup> Because forced participation in ritual could be inconsistent with fundamental religious views, the Court excepted dissenters from the schools' regulation.<sup>238</sup>

But as many have noted,<sup>239</sup> this does not mean that West Virginia is not free to establish political orthodoxy. Indeed, that is precisely what the morning ritual did. Through a practice of reverence to the flag, many<sup>240</sup> of these students will likely become inculcated with patriotism as a fundamental political value. (Or at least we could expect as much in 1940.) It is likely that this ritualistic practice simply constructs an orthodox view, a view that makes it more difficult for Jehovah's Witnesses, among others, to exist in this culture, and a view that expresses a very particular political judgment.<sup>241</sup>

Of course it could construct different views as well—indeed, perhaps the orthodox view the First Amendment is said to require. It could construct the view that tolerance of dissenting views is permitted, so long as the dissent does not interfere with the dominant view. The dissenters may sit silently, but in this permission is encoded much about what dissent in America can mean. This code is no less a construction than forcing a salute. It is a meaning, induced through public forms of action.

### 3. The collective action problem revisited.

Two techniques of semiotics—tying and ambiguation—and two techniques of behavior—inhibition and ritual—serve to alter or preserve social meanings. Together these four describe com-

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<sup>237</sup> 319 US at 642.

<sup>238</sup> See the discussion in note 10.

<sup>239</sup> See, for example, Shiffrin, 27 UCLA L Rev at 567 (cited in note 6).

<sup>240</sup> Many, not all—again, particularly in high schools, it may be enough for the state to endorse something for the students to adopt the opposite view, but perfection is not the test for possibility.

<sup>241</sup> And indeed, one could say, the opinion in *Barnette* itself was an act that was constructing a certain social meaning—this time the social meaning of the First Amendment. Through its proclamation, Jackson established a conception of neutrality in America, a conception itself no less an orthodoxy simply by virtue of being a commitment to antiorthodoxy.

mon and sometimes successful methods for a government or other social meaning architect to alter the balance of semiotic costs confronting someone engaging in, or not engaging in, a particular behavior. They can, that is, alter the costs of that behavior. By altering such costs, they are able to alter behavior through changing social meaning. So much is true without believing that all or any of these four techniques together could control or manage all social meaning.

Of these four, certainly ambiguation is the most interesting. For while we ordinarily think of law as functioning to clarify obligations and norms, here it functions by obscuring what was clear.

How do these techniques relate to the collective action problems that began this Section? All four techniques are solutions to this collective action problem,<sup>242</sup> for each is transformative of the selective incentives facing an individual, at least so far as the link, or break of a link, identified in each succeeds in a sufficiently large proportion of the collective. When the meaning architect acts to tie a particular action to another, and thereby trade on the meaning associated with the other, she is doing something that individuals acting alone cannot so easily do. If successful, then the tie increases or decreases the value of the new social meaning. So too with ambiguation: If the architect has it within her power to add a meaning to a particular action—say by making it “unlawful”—then this added meaning thereby changes the selective incentives associated with the targeted action. Now its meaning is different than it was before, and now that it is different, on the margin, behaviors will be different as well.

Behavioral techniques function in the same way. By inhibiting or inducing actions, the techniques change what constructs a particular meaning; as those components change, so too the implicit costs of behavior under that meaning change. As those costs change, behaviors change. To the extent that the government then subsidizes or penalizes a certain structure of social meaning, that meaning can be transformed.

Each of the four techniques functions to solve the collective action problem by transforming the incentives individuals face, through changing the benefits and costs associated with these different actions. Tying raises (or lowers) the value of the new

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<sup>242</sup> Again, there is a collective action problem whether one thinks the change pareto efficient, or Kaldor-Hicks efficient. In the most general sense, the problem is how to induce people to behave according to the efficient norm, however one decides it is efficient.

meaning; ambiguation confuses its cost; inhibition increases the cost of the old, rejected meaning; rituals serve to coordinate individuals in support of a new meaning.

### B. Liberal Constraint on Social Meaning Making

So far I have described techniques for social meaning change, each variously successful in differing contexts. Before considering particular applications of these techniques, I want to add one final caveat to this discussion of social meaning management, one that is in particular crucial to understanding social meaning construction within liberal political traditions.

Relatively well established (if only relatively recently) within our political and social tradition is a strongly negative social meaning associated with the efforts of anyone to change social meaning. (Here by "change" I mean change relative to a status quo. There is little problem with acting to preserve status quo meanings.) So firm is this "antibrainwashing" ideal that to defeat an attempt to change social meaning in many contexts, one need only identify it as an attempt at social meaning management. This is the core of the passion against "political correctness." Those who oppose political correctness are not people who oppose rules against offensiveness generally. What drives the passion of the anti-PCers is the idea that what is "offensive" is being defined or determined by some particular group, and defined differently from what we happen now to find offensive.<sup>243</sup> What drives the passion, that is, is the idea that the social meaning of offensiveness is being managed. So too with government "propaganda": whenever we can see that the message being delivered is a message from the government, we are extremely suspicious of its content, and watchful about its effect. Speech by politicians is clearly less effective than speech by nonpoliticians in persuading or convincing someone of some truth.<sup>244</sup>

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<sup>243</sup> See Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too* 3-7 (Oxford, 1994) (describing the "fairness" claims of those included in the debate).

<sup>244</sup> Compare the same point made by Sabina Lovibond:

The young child is "continually tampered with" . . . by watching television, and later by reading newspapers and magazines . . . But as long as these moral and political steering agencies are not explicitly acknowledged as such . . . they are not even logically possible candidates for *conscious* adoption as paradigms of sound judgment about moral and political reality.

Sabina Lovibond, *Realism and Imagination in Ethics* 93 (Minnesota, 1983), quoting F.H. Bradley, *Ethical Studies* (Oxford, 1297).

Call this the Orwell effect: when people see that the government or some relatively powerful group is attempting to manipulate social meaning, they react strongly to resist any such manipulation. What the Orwell effect means is that efforts by the government to regulate social meaning that are seen as efforts by the government to *change* social meaning will be less effective than efforts that are not so viewed. This does not mean that such efforts will be wholly unsuccessful—the government propagandizes about smoking or drug use or family planning, and no doubt on the margin these efforts have some effect. But what the Orwell effect does mean is that there is a strong incentive for the government to deliver its message of change while hiding the messenger.<sup>245</sup>

An excellent example is provided by the regulations giving rise to the case of *Rust v Sullivan*.<sup>246</sup> There the government required (partially) governmentally funded doctors to say certain things about what methods of family planning were best, and to refrain from giving women any information about abortion as a method of family planning.<sup>247</sup> The clear purpose of these regulations was to steer women away from abortion. But the power of this message was amplified dramatically by its being delivered, without disclaimer, by a doctor. Out of the mouth of a doctor, the antiabortion message had a much more powerful effect than an antiabortion message out of the mouth of Congressman Henry Hyde. (If, that is, doctors are seen as something other than the government.) In part because it was hidden that it was the government that was speaking, the government's message had a much more powerful effect, if only by deceiving poor women about the source of the message. And precisely because these women were least likely to have access to other sources of information, they were prime targets for this indirect propaganda.

What the Orwell effect will mean is that government will have an incentive to minimize the extent to which its messages seeking change seem to be messages from it, by tying its mes-

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<sup>245</sup> Interestingly, moreover, it does not seem that the Orwell effect applies to corporate speech, or at least not in the same way. For it seems impossible to imagine a television advertisement by the State of Alaska congratulating itself on its contributions to the environment, but we see nothing odd in United Technologies or Exxon running the same ad. Corporate speakers are allowed to say, "we are great"; government is not. Or at least, such a message by government would be far less effective than the same message by the corporation.

<sup>246</sup> 500 US 173 (1991).

<sup>247</sup> Id at 187. In fact, if asked about abortion, these doctors were required to say that "we" do not consider it an appropriate method of family planning.

sages to independent authorities (for example, doctors) or authority (science).

As will be clearer when I discuss First Amendment doctrine below, the Orwell effect is oddly one sided. Although people resist the efforts of the government to "brainwash" us into thinking something new, few seem to worry about efforts of the government to support or confirm the existing or dominant orthodoxy. It is "brainwashing" to change the status quo; it is the ordinary stuff of government to preserve it. It would have been "brainwashing" for the Soviets to have turned us into Communists; but it is perfectly fine stuff for the American government to drum into our heads the sanctity of the market, or of democracy.

Why these differences exist, if they exist, I cannot explain. My point in raising them here, however, is simply to remark this difference in the social meaning of change and preservation, particularly as it applies to the government. No doubt the difference in meaning is tied to the very strong antitotalitarian history of the United States during this century at least. Indeed, we have forgotten some of the power of this tradition, reflected in the extremely skeptical view Americans took to advertising (seen as propaganda) when it first began to appear in the American culture. As Allan Winkler describes:

As Americans became increasingly aware of propaganda, many began to feel uneasy about its implications. They viewed it with a morbid fascination, studied and wrote about it, and began to fear its possible consequences. Propaganda to some seemed to have an unlimited force—the power to capture men's hearts and bypass their rational process.<sup>248</sup>

Time and television have allayed the same fears about the effect of organized speech, at least when corporately organized. Perhaps because we do not believe that corporations can have complete control, the partial effects of their attempts to affect social meaning seem less significant as well. Whatever the reason, some difference in the appropriate speech of corporations and government exists. This difference in appropriateness has an effect on the methods employed by government and corporations to achieve their social meaning objectives. It does not mean, however, that government will give up such efforts, nor that government should give them up. It is neither the case that govern-

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<sup>248</sup> Allan M. Winkler, *The Politics of Propaganda: The Office of War Information 1942-1945* 4 (Yale, 1978).

ment should have no role in the construction of social meaning, nor that it should have an unlimited role. The question is when such a role should be constrained, a question I return to in the final Part. First, however, I consider some applications of these ideas.

#### IV. APPLICATIONS

It is my claim that an account of social meaning regulation will, at times, be necessary to understand social behavior, and will be useful in designing regulations of that behavior. In this Part, I sketch briefly two examples that further make this point. In each, my claim is simply that an account that ignores this social meaning dimension to the behavior regulated will mislead.

##### A. The Regulation of Dangerous Sex

One response to "the AIDS crisis" has been the government's effort to regulate dangerous sex. So described, of course, this is not a new enterprise for government. All that is "new" is the type of danger being regulated. When preserving property structures by preserving marriage was important, "dangerous sex" was sex outside of marriage. When saving souls from damnation was important, "dangerous sex" was any sex without the structures of religion. In this somewhat less theistic time, "dangerous sex" is life-threatening sex, and the policy response to its emergence has been the search for ways to minimize such unsafe sex.<sup>249</sup>

I want to focus here on one account of such policies—the recent economic analysis of the AIDS crisis by Tomas Philipson and Richard Posner. Philipson and Posner's account is a continuation of a controversial application of law and economics to sexual behavior, first examined in Posner's book *Sex and Reason*.<sup>250</sup> The application is controversial because it extends economics to a paradigm of nonmarket behavior—sexuality.

My interest in the controversy, however, has less to do with a concern about extending economics outside traditional market domains.<sup>251</sup> I have no criticism in general of using economics as a tool for understanding nonmarket behavior, even sex behav-

<sup>249</sup> Michel Foucault, *Sexual Discourse and Power*, in Jeffrey C. Alexander and Steven Seidman, eds, *Culture and Society: Contemporary Debates* 199, 200-01 (Cambridge, 1990).

<sup>250</sup> Richard A. Posner, *Sex and Reason* (Harvard, 1992).

<sup>251</sup> For an extremely powerful consideration of the book's use of economics, See David Charny, *Economics of Death*, 107 Harv L Rev 2056 (1994).

ior.<sup>252</sup> Properly qualified, the rhetoric of economics is extremely useful in understanding fields not traditionally within the domain of economics—the work of France's Bourdieu and our own Gary Becker being obvious examples.

Instead, my interest is in the completeness of this economic account—in particular, the extent to which it incorporates an account of social meaning in its account of sex behavior. For what is striking about Philipson and Posner's work is their committed refusal to consider how social meaning may matter. With just a bit of unfairness, one could say, in the tradition of Marx, that Philipson and Posner are materialists, who proceed as if meaning can be ignored either because epiphenomenal upon something more fundamental, or because not subject to the same tools of economic study, or because not significant enough in the policy account they present to be reckoned. In what follows, I argue that none of these three excuses suffices to excuse this fundamental omission. Maybe economics cannot embrace this thicker account. But if it cannot, then its use in understanding this dimension of human behavior is essentially compromised.

Philipson and Posner's general approach is easily stated: economics is a tool for understanding how individuals respond to changing incentives; AIDS is a disease "spread primarily through voluntary intimate contacts,"<sup>253</sup> and these contacts are influenced by changing incentives. Therefore, economics can help explain the spread and control of AIDS, at least better than models less focused on behavioral responses to changing incentives.

So much is not controversial. The controversy comes when specifying the scope of "incentives" for which Philipson and Posner account. For they begin with traditional assumptions of economics—that preferences are "fixed"—and they analyze behavior assuming that these preferences remain fixed. From the analysis so far, however, we can see how the view could be broader. Rather than taking preferences, institutions, and norms as fixed, we could include in the analysis the social meanings that construct these assumedly fixed things, and ask how easily these social meanings could be changed. Managing social meaning could change individual preferences,<sup>254</sup> and by changing prefer-

<sup>252</sup> There are criticisms enough—perhaps even too many—of the materialist aspect of Posner's work. See, for example, Frank, *Passions Within Reason* at 163 (cited in note 183).

<sup>253</sup> See Tomas J. Philipson and Richard A. Posner, *Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective* vii (Harvard, 1993).

<sup>254</sup> There is an important link to the discussion of the collective action problem above. For again, this raises the ambiguity in the collective action. If it is changing the pref-

ences, it could be one dimension in the practice of changing incentives to change behavior.<sup>255</sup>

In many cases, ignoring the possibility of changing social meaning will matter little. But focus for a moment on a case where it matters a lot—Philipson and Posner's discussion of the need for government support of education about AIDS. Economists are traditionally skeptical about the need for government to subsidize education.<sup>256</sup> Education, it is said, is a commodity just like any other; as with all commodities, individuals will purchase more of that commodity so long as the marginal return from the last dollar spent is greater than one dollar. Because there are no collective action problems or failures of information involved, there is little reason to expect a market failure in the education market. Therefore, the economist concludes, an adequate—in the sense of maximizing total social welfare—amount of education will be provided without government intervention.

So too with education about AIDS. There is a market for information about AIDS—people have an incentive to learn about AIDS just as they have an incentive to learn about what shots they need before going to a foreign country.<sup>257</sup> Given this incentive, people will spend resources to discover facts about AIDS, so long as the returns from that spending exceed the cost. Therefore, except for a narrow range of cases, Philipson and Posner argue, there is little purpose to government support of AIDS education.<sup>258</sup>

Note the implicit premise about what function education serves: education is simply a tool for conveying information; it transmits facts the way a telephone transmits conversation. But there are at least two different functions that education could serve—compare the “educator” who directs his first-grade class to stand and pledge allegiance to the flag, with the “educator” who teaches that two twos are four. If “education” functioned solely as

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erences, how do we know it is efficient? See Part III.A.

<sup>255</sup> See Dau-Schmidt, 1990 Duke L J at 14-22 (cited in note 208) (examining preference-shaping role of criminal law). On a more related point, see Amartya Sen, *Behavior and the Concept of Preference*, 40 *Economica* 241, 252-53 (1973) (warning against inferring personal preferences solely from individual behavior).

<sup>256</sup> For an overview of such skepticism, see Larry L. Leslie and Paul T. Brinkman, *The Economic Value of Higher Education* 28 (Macmillan, 1988).

<sup>257</sup> However, the incentives to learn about AIDS may be a bit complex. If there is an incentive for self-deception, for example, this could complicate the information account.

<sup>258</sup> See Philipson and Posner, *Private Choices and Public Health* at 174 (cited in note 253) (concluding that findings “do not support the hypothesis that public expenditures on AIDS education increase knowledge about AIDS”).

a transmitter of facts, one might well question the function government has in supporting it given market alternatives to its supply.

But education does, or can do, much more than convey information. As we have seen, in some cases education can alter social meanings. Social meanings are collective goods, and collective action is needed (sometimes, at least) to change collective goods. If there are existing social meanings that inhibit public policy against AIDS—for example, the social meaning of wearing a condom—then one way of advancing social policy may be to reconstruct these social meanings. And as already discussed, if social meanings are collective goods, then there is an economic reason to support AIDS education—for as neoclassical economics well understands, unregulated markets will not supply a socially optimal amount of a public good.

What might these changes in social meaning look like? Consider first the social meaning of condom usage. There are at least two possible social meanings tied to the use of a condom in heterosexual sex.<sup>259</sup> Imagine first a world where using a condom is the exception, such that asking another to use it, or proposing its use voluntarily, both (1) signals to the other the belief that there is a special reason to use a condom, and (2) interrupts a ritualized sex dance, which does not ordinarily include putting on a condom.<sup>260</sup> In this world, the use of a condom imposes on the proposer at least two different, but significant, social meaning costs: first, the costs of what the signal could be signaling, and second, the costs of interrupting the sex dance (which, if interrupted, may induce other harms—anger, violence, or simply the stopping of the dance). In such a world, the incentives to use a condom—the avoidance of AIDS and pregnancy—are balanced against the full range of costs, some of which are ordinary economic costs—the cost of a condom and the decline in pleasure when using a condom—and some of which are social meaning costs.

Now imagine a second world, where people ordinarily or always use condoms—or more importantly, where “ordinary people” ordinarily use condoms, and where an ordinary part of sex is the

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<sup>259</sup> I focus here on heterosexual sex because, to the extent there is inequality between sex partners, the effect I am remarking here will be exaggerated.

<sup>260</sup> See Aronson, *The Social Animal* at 240 (cited in note 186) (discussing low condom usage by sexually active college-age adults). As a response to this, some manufacturers have developed a female condom, that is inserted long before intercourse. See Elizabeth Kaye, *Reality Dawns*, NY Times § 2 at 8 (May 9, 1993).

use of such a condom. In this world, "ordinary" or "normal" sex includes this step in the ritual of the sex dance—putting on a condom has become just one move in the sex dance itself, just as showering in the morning is one step in the ritual of morning in America but not in England. It seems plain that in this second world, the social costs to the use of a condom are less. Indeed, in this second world, to refuse the use of a condom is to signal abnormal behavior, and hence is to invite its own costs.

Between these two imagined worlds, all other costs being equal, we could predict that condom usage will be greater in the second world than in the first because the costs of using a condom in the first one are greater than the costs of using a condom in the second.<sup>261</sup> The incentives are different. Furthermore, the difference in these costs is a difference caused by a socially constructed reality, for certainly what is "ordinary" sexual behavior, or at least what are the ritualized steps in the "normal" sex dance are constructions of cultures, and not science.

The question for the policymaker, then, is what can be done in the first world to construct the social meanings that exist in the second world.<sup>262</sup> We've seen enough to gather some clues as to technique. The most common technique has been the technique of tying: Popular figures—Magic Johnson, for example—advocating the use of condoms.<sup>263</sup> A more successful technique has been tying the message to peer groups. Studies of the effect of education programs in schools, run in part by other students discussing the use of condoms, show that a sufficiently long-term program of education does have a statistically significant effect on long-term condom usage.<sup>264</sup> These studies also

<sup>261</sup> Philipson and Posner discuss the "costs" of condom usage. Philipson and Posner, *Private Choices and Public Health* at 32 (cited in note 253). On the social meaning costs of condom use, see Colin McMahon and Carol Jouzaitis, *Taboos Leave Many Teens Unprotected*, Chi Trib § 1 at 1 (May 24, 1994).

<sup>262</sup> Aronson discusses the same idea in *The Social Animal* at 91 (cited in note 186). Compare Murray Edelman, *Political Language: Words that Succeed and Policies that Fail* 9 (Academic, 1977) (discussing in general this problem of social meaning in policy determinations).

<sup>263</sup> The technique of tying AIDS to images of death have been less successful. As Aronson discusses, tying the image of AIDS to death actually reduces usage of condoms. Since "when contemplating having sex, [people] do not want to be thinking about death or disease," and therefore people simply deny the possible consequences from unsafe sex. See Aronson, *The Social Animal* at 90-91 (cited in note 186).

<sup>264</sup> See id at 240 (discussing success with "saying is believing" sex education program for students). See also Barbara A. Misztal and David Moss, eds, *Action on AIDS: National Politics in Comparative Perspective* 15 (Greenwood, 1990); Michael Quam and Nancy Ford, *AIDS Policies and Practices in the United States*, in Barbara A. Misztal and David Moss, eds, *Action on Aids: National Policies in Comparative Review* 25, 39 (Greenwood, 1990)

suggest that the change in behavior that is observed is not due solely to the transmission of new information. In fact, the information about AIDS was known before the change in behavior occurred. Even if education is not fully effective, the relevant question is whether it is an effective use of resources, which means whether it is effective given the amount spent. As many have noted, among policy options, AIDS education is relatively cheap.

To be fair, Philipson and Posner do in fact raise the possibility that a change in "attitudes" may be an effective policy tool.<sup>265</sup> But they discuss this possibility on just a single page of their text. And rather than reviewing what is a large literature in sociology and anthropology discussing the effects of AIDS education on behavior,<sup>266</sup> Philipson and Posner raise and dismiss—with one cite to a Wall Street Journal article discussing condom sales—the possibility that attitudes are an important part of the policy debate.<sup>267</sup>

If one ignores the social meaning dimension of education, then one could easily conclude that subsidies for education are unjustified. For again, by ignoring the social meaning effect of education, one ignores the collective action problem that social meaning presents. If one includes the social meaning account, then there is in theory at least an economic reason for government support of education, even if there remains an empirical question about the relative success of this reconstructive effort.

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(outlining several AIDS education plans). For a discussion of the success of the education programs in Switzerland, see D. Hausser, F. Dubois-Arber, and E. Zimmermann, *Assessing AIDS Prevention in Switzerland*, in F. Paccaud, J.P. Vader, and F. Gutzwiler, eds., *Assessing AIDS Prevention* 116 (Birkhäuser, 1992).

<sup>265</sup> See Philipson and Posner, *Private Choices and Public Health* at 169 (cited in note 253). For an account of attitude or "preference shaping" in economics, see Dau-Schmidt, 1990 Duke L J 1 (cited in note 208). The idea of course is not limited to economics. See Dorothy Ross, *The Origins of American Social Science* (Cambridge, 1991). There is a long-standing debate in social psychology about the relationship between attitudes and behavior. See Aronson, *Social Animal* at 159 (cited in note 186) (concluding that on the margin, changes in attitudes can affect behavior).

<sup>266</sup> See, for example, Hausser, Dubois-Arber, and Zimmermann, *Assessing AIDS Prevention in Switzerland* at 116 (cited in note 264); Misztal and Moss, eds., *Action on AIDS* at 15, 39, 89, 192, 202 (cited in note 264); Heather J. Walter and Roger D. Vaughan, *AIDS Risk Reduction Among A Multiethnic Sample of Urban High School Students*, 270 JAMA 725 (1993); Leon McKusick, et al, *Longitudinal Predictors of Reductions in Unprotected Anal Intercourse among Gay Men in San Francisco: The AIDS Behavioral Research Project*, 80 Am J Pub Health 978 (1990); Dooley Worth, *Sexual Decision-Making and AIDS: Why Condom Protection among Vulnerable Women is Likely to Fail*, 20 Stud Fam Planning 297 (Nov/Dec 1989).

<sup>267</sup> Charny makes the same observation about Philipson and Posner in 107 Harv L Rev at 2075 n 55, 2076 (cited in note 251).

The narrower focus of Philipson and Posner is blind to this empirical question, and hence misleading about what policy should be recommended. Here at least, Occam's razor draws more blood than insight.<sup>268</sup>

### B. The Regulation of Smoking

Consider now the example of smoking regulation, which offers the broadest range of social meaning regulation of any example surveyed so far, with the best examples coming from the earliest efforts to regulate smoking. Antismoking regulation originated "in the last twenty years of the nineteenth century."<sup>269</sup> In 1890, "26 states had passed legislation prohibiting the sale of cigarettes to minors," and by 1909, "17 states had prohibited the sale of cigarettes altogether."<sup>270</sup> But the passion for regulation died just about as quickly as it arose. "By the early 1920s, all state legislation barring the sale of cigarettes to adults had been repealed."<sup>271</sup>

What explains the rapid transformation in the regulation of smoking? First, note what it was not: the early regulation of cigarettes had no real connection to health concerns. "There was no consensus, among either medical researchers or the lay public, that the physiochemical consequences of cigarette smoking were very harmful to the health of the smoker or to the nonsmoker."<sup>272</sup>

Instead, what drove the antismoking campaign of the late nineteenth century was the "scandal" that women began to smoke.<sup>273</sup> Not a pollution of health, but rather a pollution of social order motivated this first regulation. "During the 19th century in America, smoking was a major symbol and sign of the adult male in American life. The segregation of the genders and all

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<sup>268</sup> For a much more general account of the change in the "symbolic and social reconceptualizations" of AIDS that would be necessary to change social and professional behavior, see Paula A. Treichler, *AIDS, Homophobia, and Biomedical Discourse: An Epidemic of Signification*, in Douglas Crimp, ed., *AIDS: Cultural Analysis, Cultural Activism* 68, 69 (MIT, 1991).

<sup>269</sup> Joseph R. Gusfield, *The Social Symbolism of Smoking and Health*, in Robert L. Rabin and Stephen D. Sugarman, *Smoking Policy: Law, Politics, and Culture* 49, 50 (Oxford, 1993).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 53.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 51.

that it implied was dramatically portrayed in the exclusivity of smoking as a masculine form of pleasure.”<sup>274</sup>

In part, we might say that the change in smoking behavior was induced by a change in smoking technology. Smoking among men was primarily cigars and pipes. But when cigarettes appeared in the late nineteenth century, the sex-segregated patterns of smoking blurred. New technology—both the cigarette and the safety match—made it easier for women to smoke. “Cigarettes could be easily hidden in purses,” and were “easier to light, and milder than [their] competitors.”<sup>275</sup> As a result, cigarettes “became more accessible to two groups for whom smoking had been under a restrictive taboo: women and young people, especially boys.”<sup>276</sup>

The response to this increase in smoking among women and children—whose social status was, after all, beneath that of men—was rapid and predictable. Editorials tied female smoking with “continental habits” and ambiguated the action by identifying female smoking as against “good manners.”<sup>277</sup> The sentiments of the time are well captured in a speech of a New York assemblyman, introducing a bill to prohibit the sale of cigarettes:

Do you know that any number of our High School girls, as well as boys, smoke cigarettes, and do you know that many foolish women are beginning to believe that it is real smart to learn to smoke? . . . Women in society have taken to smoking cigarettes and persons who are on the ragged edge of society think they have as much right.<sup>278</sup>

During the growth of this anticigarette legislation, the dominant consumers of cigarettes were women and boys. It was therefore easy for legislation to target cigarettes without inhibiting the smoking habits of men. But World War I changed all this. The very same qualities that made cigarettes attractive to women—smallness, ease of carrying—made cigarettes the choice among soldiers. Cigarette consumption among men grew dramatically during the war, as men gave up the prestige of the cigar for the convenience of the cigarette.<sup>279</sup>

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<sup>274</sup> Id.

<sup>275</sup> Id.

<sup>276</sup> Id.

<sup>277</sup> Id.

<sup>278</sup> Id., quoting *Says Schoolgirls Smoke*, NY Times 20 (Feb 12, 1905).

<sup>279</sup> Gusfield, *The Social Symbolism of Smoking and Health* at 53 (cited in note 269).

The end of the First World War brought a second change that would further the popularity of cigarettes. Soon after the War, demands for equal rights for women—and acceptance of equality for women—grew. Cigarettes soon became one symbol of that campaign: already tied to women, cigarettes became a “symbol of the demand for equality of the sexes.”<sup>280</sup> Thus, as female smoking moved from being a sign of social deviance to a symbol of equality, the demand for cigarette regulation quickly fell to the wayside.

The cycle of this early cigarette regulation, therefore, tracked not some question of health, but solely an issue of social meaning. Men used the law to help support social inequality, but as equality norms began to dominate, the laws enforcing social inequality fell away. The rise and fall of cigarette regulation at the turn of the century depended primarily upon the rise and fall of the social desire to support a socially dominant male. Regulation arose originally to defend the social status of the male, and it fell as soon as the social support for sex-based inequality eroded away.

The second wave of antismoking regulation was not so directly tied to moralistic or gendered social meaning. Instead it grew from the social meaning of science.<sup>281</sup> In 1964, when the Surgeon General released a report that announced that smoking was dangerous to health, smoking regulation in America was virtually nonexistent. “In the forty years before the publication of [the report], not only was there no serious thought given to banning cigarette smoking, but there was virtually no regulation at all of tobacco sale or use.”<sup>282</sup> Consumption increased. This was to change after 1964. “[U]ntil 1964, while some intuitive feeling that smoking was harmful existed among a number of Americans, there was no widely accepted authority that settled the factual question of the healthfulness of smoking.”<sup>283</sup> The 1964 report

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<sup>280</sup> *Id.*

<sup>281</sup> The link here to the work of Michel Foucault is strong. Here, the institution of science is able to define individuals as “unreasonable” because of its ability to define certain practices as unhealthy. This form of knowledge thus disciplines individuals into certain kinds of behavior. After this knowledge is represented as knowledge, individuals must choose whether to become “unreasonable” by ignoring it, or conform. Compare Michel Foucault, *Discipline and Punish* 26-27 (1977); Michel Foucault, 1 *The History of Sexuality: An Introduction* 92-93 (1990).

<sup>282</sup> Robert L. Rabin and Stephen D. Sugarman, *Overview*, in Robert L. Rabin and Stephen D. Sugarman, eds, *Smoking Policy: Law, Politics, and Culture* 5 (Oxford, 1993).

<sup>283</sup> Gusfield, *The Social Symbolism of Smoking and Health* at 53 (cited in note 269).

became this widely accepted authority, in time settling the factual question regarding smoking.

This report and subsequent similar studies were "enormously important in stimulating the cultural redefinition of smoking."<sup>284</sup> But it is important to locate the source of this significant effect. The second wave of smoking regulation got its social "authority in the research of medical science."<sup>285</sup> This authority itself is a form of social meaning. It flows not directly from "facts" of individual experience, but from an institution of science that can certify the "real" "character of smoking and health."<sup>286</sup> The 1964 report was as successful as it was in convincing individuals about the dangers of smoking because it could connect with an institution that had gained a relatively secure authority, believed to be independent of political influence and dependent upon truth.

The effect of the 1964 report was to convey information, which, in the model of Philipson and Posner, should have led to a fall in smoking solely because individuals recalculated the net utility from smoking, based on this new information. And according to their model, the resulting consumption of cigarettes, with all facts known, would be wealth maximizing. While smoking increases the risk of cancer and other diseases, if the benefit to the smoker is greater than the expected cost of injury, then, injury notwithstanding, smoking would be rational for some individuals. It would follow, according to this model, that there is no justification for public education once the facts about smoking are known.

But smoking is an addiction. As Gary Becker and others have discussed, if a commodity is addictive, then an individual, knowing all the relevant facts, may actually consume more of a commodity than is utility maximizing.<sup>287</sup> Simply stated, because cigarettes are addictive, individuals may consume more than they actually want.<sup>288</sup> Thus there may be reasons to take steps to reduce consumption below the level demanded when all facts are

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<sup>284</sup> Robert A. Kagan and Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in Robert L. Rabin and Stephen D. Sugarman, eds., *Smoking Policy: Law, Politics, and Culture* 69, 82 (Oxford, 1993).

<sup>285</sup> Gusfield, *The Social Symbolism of Smoking and Health* at 54 (cited in note 269).

<sup>286</sup> *Id* at 57.

<sup>287</sup> See Becker, *Habits, Addictions, and Traditions* at 5 (cited in note 207).

<sup>288</sup> I realize the gaggle of puzzles here, and I acknowledge the range of theoretical solutions to this notion of an individual wanting something other than he or she wants. Puzzles notwithstanding, there is an intuition here that I believe we all share, and it is upon this that I am relying.

known—and therefore a public justification for efforts to reduce cigarette smoking below the “invisible hand of demand.”

This perspective explains some of the justification for the third wave of antismoking regulation. “[I]n the three decades since the report a distinct moral tone has been added” to the rhetoric of the antismoking campaign.<sup>289</sup> There are two dimensions to this new moralism: one painting the smoker as a pariah, and the second painting the smoker as weak, reckless, or without self-control.

Consider the second dimension first. One clear message from recent medical science is that many aspects of illness can be construed as resulting from lifestyle choices—as the direct consequence of chosen behavior. “How we eat, drive automobiles, accept stress, drink alcohol, exercise, conduct sexual relations, lead sedentary lives, use drugs, and smoke tobacco are widely understood today as important to the health of the individual.”<sup>290</sup>

Tied to this view of health as a function of choice, the antismoking campaign could link itself to the emerging health and fitness campaigns. As health became a defining feature of social life, smoking stood at odds “with the images of today’s leaders, heroes, and idols. . . . Smokers [in the public’s eye] are increasingly marginalized and considered reckless.”<sup>291</sup>

The first dimension of the change—viewing smokers as pariah—became strongest after the 1986 Surgeon General’s report about the effects of second-hand smoke. Once the public accepted the notion that smoking was harmful not just to the smoker, but also to third parties, it became impossible for smokers “to take refuge in a libertarian ethic, claiming that cigarette smoking affected only themselves.”<sup>292</sup> The views about second-hand smoke “turned the distaste of smoke into a positive source of exclusion. The smoker [became] on the defensive as the act of smoking [was] increasingly banished from many social circles and the smoker so frequently admonished not to smoke.”<sup>293</sup> Together, these two changes have resulted in a “dramatic change in the social acceptability of tobacco smoking. Smokers feel condemned, isolated, disenfranchised, alienated.”<sup>294</sup>

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<sup>289</sup> Gusfield, *The Social Symbolism of Smoking and Health* at 60 (cited in note 269).

<sup>290</sup> Id at 49.

<sup>291</sup> Rabin and Sugarman, *Overview* at 18 (cited in note 282).

<sup>292</sup> Kagan and Skolnick, *Banning Smoking* at 83 (cited in note 284).

<sup>293</sup> Gusfield, *The Social Symbolism of Smoking and Health* at 65 (cited in note 269).

<sup>294</sup> Kagan and Skolnick, *Banning Smoking* at 79 (cited in note 284). See also Thomas C. Schelling, *Addictive Drugs: The Cigarette Experience*, 255 *Science* 430 (Jan 24, 1992);

By now it should be clear that a significant portion of current American attitudes about smoking derives not from science alone, but from social meanings that have become attached to the actions of smoking. The clearest proof of the role of these social meanings is the comparison of smoking behavior across cultures. Europeans know the facts about smoking as well as Americans, yet as anyone forced to suffer the Frankfurt Airport knows, smoking behavior is radically different. This difference cannot be due to a lack of knowledge. It must be due instead to a difference in culture—which is shorthand for a difference in the collection of incentives presented by different social meanings regulating smoking behavior.<sup>295</sup>

Was the government responsible at all for these changes in the social meaning of smoking? The answer to this is an extremely qualified, yes. There is little doubt that government had a role in transforming the meaning of smoking. But there is also little doubt that it could assume that role only because of a range of factors that made the American culture open to the transformations that government sought. Government could effect this change in social meaning only because society was in part open to accepting this change. This means that the government's role in the change of social meaning was limited in a number of important ways. The first limitation was timing: What is most striking about smoking regulation today is the extremely high degree of compliance. But “[n]ot many years ago, the imposition of restrictions on smoking probably would have resulted in widespread evasion and enforcement efforts would have encountered considerable defiance.”<sup>296</sup> “Like surfers, legislators . . . who wish to change everyday social norms must wait for signs of a rising wave of cultural support, catching it at just the right time.”<sup>297</sup>

A second limitation is the extent of the punishment for deviance from the emerging social norm. What is required for the inducements not to backfire is that punishments be proportional and that there be alternatives or accommodations for smokers. This reduces the cost of the emerging norm, and hence makes it

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Thomas C. Schelling, *Economics and Cigarettes*, 15 Preventative Med 549 (1986).

<sup>295</sup> The same point is made by Douglas and Wildavsky about pollution: “ideas about pollution are not sufficiently explained by the physical danger.” See Kagan and Skolnick, *Banning Smoking* at 81 (cited in note 284), quoting Mary Douglas and Aaron Wildavsky, *Risk and Culture: An Essay on the Selection of Technical and Environmental Dangers* 38 (California, 1982).

<sup>296</sup> Kagan and Skolnick, *Banning Smoking* at 78-79 (cited in note 284).

<sup>297</sup> Id at 85.

easier for the nonsmoker to feel justified in enforcing the non-smoking norm. To make the transition smoothly, both the enforcers and the deviants must be able to treat each other less as "criminals," and more "as errant family members."<sup>298</sup>

These are the limits, but what are its techniques? We can fit these examples into the catalog of tools sketched above:

*Tying.* As I have just reviewed, a significant part of the social meaning costs of smoking is that smoking has been successfully tied to unhealthy behavior, and unhealthy behavior has been successfully tied to human choice. To smoke, under this reading, is to reveal a certain personal weakness, and in the culture of fitness, individuals do not want to be weak. Just as cigarette consumption benefited in the 1920s from its tie with the movement for equality among women, it has been harmed in the 1980s because of its tie with unhealthy (read: weak) behavior.

Examples from other nations are useful here as well. While the dominant form of cigarette regulation among nations is the requirement of labels indicating the danger of cigarettes to health, some nations impose regulation to prevent cigarette smoking from being tied, through advertising, to socially approved forms of behavior. Argentina, for example, forbids cigarette advertisements that picture young or socially attractive individuals smoking.<sup>299</sup> Similarly, Cyprus forbids the depiction of smoking as a stylish or successful form of behavior.<sup>300</sup> Both regulations, however successful, are motivated by the idea that tying in advertisement has an effect on smoking behavior.<sup>301</sup>

*Ambiguation.* The second semiotic technique of social meaning reconstruction is ambiguation. Consider the ambiguating effect of signs against smoking. There are no smoking police.<sup>302</sup> What a smoking sign does, beyond clearly marking out boundaries for those who want to know where they can freely smoke, is give the nonsmoker a tool that before she would not have. Without this sign, in requesting a smoker not to smoke, the nonsmoker would be asserting her preference for a smoke-free environ-

<sup>298</sup> Id at 77.

<sup>299</sup> See World Health Organization, *Legislative Responses to Tobacco Use* 1 (Martinus Nijhoff, 1991).

<sup>300</sup> Id at 84.

<sup>301</sup> For an argument that advertising does not have this effect, see Michael Schudson, *Symbols and Smokers: Advertising, Health Messages, and Public Policy*, in Robert L. Rabin and Stephen D. Sugarman, eds, *Smoking Policy: Law, Politics, and Culture* 208, 209-11 (Oxford, 1993).

<sup>302</sup> See Robert Cooter, *Market Affirmative Action* 31 San Diego L Rev 133, 167 (1994).

ment over the smoker's preference for the right to smoke. The conflict would be a conflict among the preferences of two otherwise equal citizens. But after the sign, the nonsmoker's request is ambiguous between advancing her preferences over the smoker's, and insisting that the smoker simply obey the rules. The ambiguation gains power, then, from what Joseph Raz would call "practical authority," the instinctive desire of individuals to follow social rules,<sup>303</sup> or as described above, the desire of individuals to conform. Having the rule means that its enforcement flows not necessarily from the preference of the enforcer, but also possibly from an independent desire to conform to rules.

A second example of ambiguation comes from Singapore, where warnings on cigarette packages must include not just the information about how cigarettes are harmful to health, but also a warning that "Smoking harms those around us."<sup>304</sup> Thus, smoking is publicly tied to the notion of harming others, where before it seemed only to harm the smoker. Once again, the tie ambiguates the action, changing it from being purely personal to one being socially harmful, again increasing the social meaning cost of the action.

*Inhibition.* The technique of inhibition works by stopping a certain behavior so as to weaken support for the social meaning associated with it. With smoking, the examples are obvious. First, many nations prohibit smoking among the young, thereby avoiding the initiation of this addiction when people are particularly vulnerable.<sup>305</sup> Similarly, many nations prohibit promotional gifts of cigarettes, which again would induce behavior inconsistent with the social meaning being sought.<sup>306</sup> In both cases, the behavior of smoking is attacked not broadly by prohibiting all smoking, but narrowly by targeting specific groups, with the aim to weaken social support for the behavior itself.

*Ritual.* The hardest type of social meaning regulation to find is ritual, perhaps because there is in fact no such example. Indeed, as the description of ritual above suggested, we may be in an age when the technique of ritual is extremely rare, existing only when there is a long-standing tradition that supports the ritualistic practice. We have a ritual of singing the national an-

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<sup>303</sup> See the discussion of Raz's notion of practical authority in Kagan and Skolnick, *Banning Smoking* at 86-87 (cited in note 284).

<sup>304</sup> See World Health Organization, *Legislative Responses* at 185 (cited in note 299).

<sup>305</sup> See, for example, El Salvador and Malta, in *id* at 89, 126-27.

<sup>306</sup> See, for example, Belgium, France, and Ireland, in *id* at 57, 93, 115.

them at baseball games, but it would be extremely difficult to begin a ritual of singing before the start of work each morning, as in Japan.

Nonetheless, not to be deterred by truth, let me suggest one example of ritualistic behavior that may support an antismoking norm. Consider the period during which smoking was not permitted on any flight—not the general ban on smoking on domestic flights, but the ten minutes during takeoff and landing during which smoking was not permitted on any flight in America, beginning in 1979.<sup>307</sup>

From the standpoint of the passenger, it was not clear just why smoking was banned for these first few minutes of every flight. The simplest explanation is ventilation, which, until the aircraft takes off, is not fully functioning.<sup>308</sup> But no one explained the reason for the ban when invoking the ban, and because linked to the general presentation of safety concerns—how to exit the plane, where the life-jacket is stored, etc.—it takes on a very different meaning. Rather than air quality, it is as if the danger of smoking is actually far more threatening—as if because takeoff and landing are the two times when the risk of a crash is greatest, lighted objects are best avoided during a crash.

Whether or not there is a marginal increase in safety, it should be clear that the effect of this ritualistic period of nonsmoking was actually much broader than any marginal safety provided on the 185 commercial planes that crashed during these 8 years without bursting into flames.<sup>309</sup> For consider the broader meaning of the practice. For twenty minutes on every commercial flight in America from 1979 to 1987—a total of one billion minutes<sup>310</sup>—passengers were required to engage in a ritual—nonsmoking—that signaled the public harm that this otherwise private activity could represent. What the ritual signaled was that this at-one-time-considered private activity (smoking) really had an extremely important life-threatening public dimension. The image was this: that those few people sitting in the last

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<sup>307</sup> See *Action on Smoking and Health v Civil Aeronautics Board*, 699 F2d 1209, 1211 n 5 (DC Cir 1983).

<sup>308</sup> See *id.*

<sup>309</sup> Figures derived from Mark S. Hoffman, ed, *The World Almanac and Book of Facts: 1992* 699 (Pharos, 1991) (Graph: U.S. Airline Safety). See also US Department of Transportation, *FAA Statistical Handbook of Aviation* 154 table 9.5 (1988).

<sup>310</sup> There were about 50.2 million departures between 1979-87. US Department of Transportation, *FAA Statistical Handbook* at 154 table 9.5 (cited in note 309). At 20 minutes per flight, that makes a total of 1.004 billion minutes.

few rows of the airplane actually held in their hands the fuse to a devastating bomb that could, if lit, annihilate all on the aircraft. In those twenty minutes of flight, their power, and hence the danger of their habit, was ritualized for the 3.1 billion who flew during those 8 years.<sup>311</sup>

What this ritual did, I suggest, is support the growing notion that there was a public safety dimension to the individual practice of smoking. Support, not entail: for even if I am correct about the association with cigarettes, it does not follow the same association carries over to radios, or walkmans, both banned during the same period. But however tenuous or marginal its effect, this was an effect brought about by a ritual—hence completing the catalog of techniques used to change the social meaning of smoking.

What the catalog of regulations here reveals, I suggest, is the broad extent to which the social meaning costs of smoking can be changed to change smoking behavior, just as the economic costs (understood more narrowly) can be changed to change smoking behavior as well. As with economic regulation, social meaning regulation no doubt has its limits. But as with economic regulation, it also has its effects.

#### V. PUZZLES

After a scad of examples, I have identified in the above four techniques of social meaning regulation, and I have then applied these techniques to two problems in social regulation, the regulation of dangerous sex and smoking. My argument has been that an attention to social meaning is essential to the understanding, and regulation, of these two domains of social life, and essential elsewhere as well. Regulating social meaning is at the core of regulating these social problems.

Why isn't it troubling that in these areas, as well as in the others that I have sketched above, government might work to alter social meanings? If the orthodox and the heretical are constituted by social meanings, then regulating social meanings is the regulation of what is orthodox, and what is heretical. So why

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<sup>311</sup> Figure derived from Hana Umlauf Lane, ed, *The World Almanac and Book of Facts: 1981* 214 (Newspaper Enterprise, 1980); Hana Umlauf Lane, ed, *The World Almanac and Book of Facts: 1984* 153 (Newspaper Enterprise, 1983); Hana Umlauf Lane, ed, *The World Almanac and Book of Facts: 1986* 156 (Newspaper Enterprise, 1985); Mark S. Hoffman, ed, *The World Almanac and Book of Facts: 1989* 199 (Newspaper Enterprise, 1988).

isn't it troubling that in these "matters of opinion" government might act to "prescribe" the orthodox? Why doesn't the same passion that animates Jackson's fixed star<sup>312</sup> seem at all in place when thinking about these other domains of orthodoxy?

There is an odd, and less and less peaceful, coexistence, I suggest, between domains within which the regulation of social meaning seems perfectly fine, and domains within which its regulation seems to insult fundamental values—in particular, the First Amendment. It seems to insult fundamental values in a very small set of cases, First Amendment cases, where the government acts to prescribe social meaning by proscribing certain speech. The model is censorship. It seems perfectly fine in just about every other case. But why should censorship be the only antiorthodoxy concern? Why is it different in kind from all the other ways that the state may act to affect the orthodox?

The answer, I suggest, is a pattern familiar in constitutional law: Doctrine is developed to attack a particular threat to some constitutional value; the doctrine succeeds against that threat; but once that threat is past, the constitutional value becomes identified with the doctrine designed to protect it, and the value gets confused with the particular threat that the doctrine attacked.<sup>313</sup>

So has it been with First Amendment law too: For much of this century, the amendment was useless in repelling efforts by government to silence opposition, first in the World Wars, and later in the McCarthy period.<sup>314</sup> The modern view is a response to these censorships. Born in a series of dissents from the Court's refusal to protect the right of dissent, the modern view was finally established in 1969, when, in *Brandenburg v Ohio*,<sup>315</sup> the Court embraced the Holmes-Brandeis vision of the First Amend-

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<sup>312</sup> See text accompanying notes 4-5.

<sup>313</sup> A related point is made with respect to equal protection law by Reva Siegel. Compare Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan L Rev 261 (1992).

<sup>314</sup> The sins of the First World War were the Espionage Act of 1917, Act of June 15, 1917, ch 30, title I, §3, 40 Stat 219, and the Sedition Act of 1918, 40 Stat 553. During the War, there were some two thousand prosecutions under these acts. Geoffrey Stone, et al, *Constitutional Law* 1026 (Little, Brown, 2d ed 1991). After World War I, the terror shifted to the "Red Scare," with some two-thirds of states enacting laws prohibiting the advocacy of criminal anarchy, and laws prohibiting the display of a red flag with a seditious intent. Zechariah Chafee, Jr., *Free Speech in the United States* 141-68 (Harvard, 1941). In the 1950s, the battle shifted to the federal level, with laws directed against Communism directly. The Smith Act here was the primary weapon. See, for example, *Dennis v United States*, 341 US 494 (1951).

<sup>315</sup> 395 US 444 (1969).

ment: "that speech cannot be banned simply because it may be politically dangerous or politically convincing . . ."<sup>316</sup> This was the great triumph in free speech history, when "liberal ideas and values eventually convince and win over the opponents of enlightenment and fairness."<sup>317</sup>

Since 1969, this triumph has eclipsed any other possible feature of Jackson's "fixed star." For it is as if this particular threat of government orthodoxy (censorship) is the only threat of government orthodoxy; that the rest in Jackson's rhetoric is just that. So focused have we been on the triumph in *Brandenburg* that we have lost sight of any broader value that the First Amendment might serve.

What the first four Parts to this Article should suggest, however, is that there may be reason to wonder about this limited view. In the face of the many techniques of social meaning regulation, one might ask why censorship has become the First Amendment's dominant concern. For these techniques should suggest at least that censorship is just one part of any power over orthodoxy.

The point is not that there is no sense to Jackson's "fixed star." Indeed, I think the principle (in some formulation) is fundamental to our constitutional tradition. The point is instead to find a way to translate Jackson's principle into a world within which a broader understanding of social meaning regulation is acknowledged. The principle cannot mean that government cannot modify what is orthodox; the principle must instead guide the places where the regulation of the orthodox is proper.

As I warned at the start, I do not intend here to make that translation. But there is value, I suggest, in ending this discussion first, by pointing to some of the presuppositions of the existing regime that may need rethinking, and second, by suggesting something about what has made this rethinking necessary.

#### A. The Marketplace Muddle

It is said that the First Amendment establishes a "free trade in ideas";<sup>318</sup> that it is from this "marketplace of ideas"<sup>319</sup> that truth will win out; and that because of this competition, the best

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<sup>316</sup> Balkin, 1990 Duke L J at 393 (cited in note 12).

<sup>317</sup> Id.

<sup>318</sup> *Abrams v United States*, 250 US 616, 630 (1919) (Holmes dissenting).

<sup>319</sup> This phrase, and its differing implications, is first raised by Justice Brennan, in *Lamont v Postmaster General*, 381 US 301, 308 (1965) (Brennan concurring).

remedy for false speech is not prohibition, but rather more speech.<sup>320</sup>

There are a number of ideas built into these slogans, each quite interesting from the perspective of social meaning. First, what is the picture of truth upon which each of these slogans hangs? True, no matter how often I say “ $2 + 2 = 5$ ,” two twos will be four. For such false claims, a perfectly adequate remedy is more speech, since those who track truth will be more successful than those who track falsity, and such success beats all.

But what about the following sort of “truth”: “Women are inferior to men.” This too is a falsity. But is it really the case that, like “ $2 + 2 = 5$ ,” no matter how many times this message is uttered, in whatever form, it will still be a falsity? Isn’t it possible that such speech will have an effect on the reality that it describes, such that, even if first false, someday it may become true?

Where the market model makes most sense is where statements about X will not affect the truth of X. But even if this is so in many cases, what we have seen about social construction suggests that it is not so for all cases. That is, even if one thought that there were a reality (call it “nature”<sup>321</sup>) that is in some sense independent of what we say about it, there is also a reality, a social reality, that is in an important sense constituted by what we say about it. “Nature” may be resilient to the falsities of man, but it is the falsities of man that make up society.

How could this difference matter from a First Amendment perspective? The answer is not at all clear. In the first place, if the marketplace metaphor were fully embraced, then we might worry here (as antitrust law does in the real marketplace) about differences in market power. If truth is to the speech marketplace as price is to the real marketplace, then we might worry when institutions, whether government or private, exercise significant market power. For it is then that one would trust less the result of the market process, and then that one might wonder more about a possible corrective. This might, for example, suggest a greater anxiety about governmental speech.<sup>322</sup>

<sup>320</sup> See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 Duke L J 1, 4-5.

<sup>321</sup> Again, a misleading term. The distinction I point to is best captured by John Searle in *The Construction of Social Reality* at 31-57 (cited in note 41). Here I mean just those aspects of social reality least open to construction—as in the laws of nature, or the facts of science. That is not to say that these are not open to construction, only that their constructions appear less plastic.

<sup>322</sup> Some of the best work on government speech is in Mark G. Yudof, *When Govern-*

The concern might be different, however, depending upon the kind of speech considered. Again, if there is a category called "nature" that is resilient to the falsities of man, that simply means that any errors produced in the speech market with respect to these will be corrected by an unyielding reality. Truth will win out because there will be a greater return from truth than falsity, or so the thought might go.

But as to other categories of speech, those unrelated to "nature," falsity may undermine the very possibility of self-correction. If the falsities go to the very status of participants in the market of speech itself, then their standing to challenge these falsities may be undermined by the falsity itself. Think again about the falsity about the equal status of women, and compare it to the argument about equal representation raised in *Baker v Carr*.<sup>323</sup> While in general a political system might be self-correcting because views not adequately respected will exert their force through the political system, some flaws in the system (for example, unequal representation) may undermine the very possibility of this self-correction.

It is from this perspective, then, that much of the conflict over hate speech and pornography has a special salience. For seen like this, the claim of those who would support speech regulation is fundamentally about equal citizenship rather than the special truth of their claims. On analogy again with the market: the regulations they seek are not so much the fixing of certain prices, but the avoiding of a debasement of currency.

The point is not only that more speech might not actually lead to finding the truth.<sup>324</sup> It is both that the speech itself may constitute the truth, and that the speech itself may undermine the status of those who would assert a counter truth. Both complications make more complex this model of the market. And as

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ment Speaks: Politics, Law, and Government Expression in America (California, 1983). Yudof's account, however, does not attempt to distinguish these two kinds of government speech—what we could call speaking, and constructing. Again, there is a difference between the government as one voice in a debate, and the government indirectly structuring the debate so as to color its outcome. This is not to say that there is a simple way to draw this distinction, nor that I think I have a clearer account, but that his conclusions are contingent upon there being no distinction here to draw. See also Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 Harv L Rev 535 (1980).

<sup>323</sup> 369 US 186 (1962).

<sup>324</sup> See, for example, Ingber, 1984 Duke L J at 16-31 (cited in note 320); Edward Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L Rev 964, 974-78 (1978).

with any effort at making more complex the market, both may suggest an increased scope for market-perfecting regulation.

### B. Regulating Context versus Regulating Text

The complexity in the marketplace metaphor suggests a second blindness in the scope of the First Amendment's focus. As I have suggested, the core of First Amendment jurisprudence is the limitation on the government's attempt to proscribe certain speech. Simplified mercilessly, what the First Amendment does is to limit the cases under which the government may say what may not be said, or what must be said. That was the core of the holding in *Hudnut*—that because the “fixed star” of the First Amendment proscribed government's prescribing what shall be orthodox, Indianapolis could not prohibit pornographic speech.

But the proscription of speech is just one of many means to the establishment of orthodoxy—indeed, perhaps the least effective way. What the techniques of social meaning regulation reveal is that there are many ways for government to establish what is orthodox and what is heretical, speech proscription being just one. Yet for these other techniques, the First Amendment has nothing to say.

The point is well known, though I suggest the heuristic of social meaning construction may help make it more plain. One example should suffice. New York law prohibits “loitering . . . for the purpose of begging.”<sup>325</sup> In 1992, the statute (as applied to the public streets) was struck down by Judge Sweet as a violation of the First Amendment.<sup>326</sup> The opinion was upheld by the Second Circuit one year later.<sup>327</sup> Said the court, “begging constitutes communicative activity,” and since conducted “in a traditional public forum,” it was entitled to First Amendment protection unless the regulation was “necessary to serve a compelling state interest,” “narrowly tailored to achieve that” interest, or “[c]ould be characterized as a regulation of time, place and manner” in a content-neutral manner.<sup>328</sup> Finding that the statute did not meet these conditions, the court struck it down.

Compare New York's first attempt to regulate panhandling with a second. Having lost the battle against begging in public

<sup>325</sup> NY Penal Law § 240.35(1) (McKinney 1989).

<sup>326</sup> *Loper v New York City Police Department*, 802 F Supp 1029 (S D NY 1992), aff'd, 999 F2d 699 (2d Cir 1993).

<sup>327</sup> See *Loper v New York City Police Department*, 999 F2d 699 (2d Cir 1993).

<sup>328</sup> *Id* at 704.

streets,<sup>329</sup> New York tried something new. What was needed, the city may have thought, was a way to get people to stop giving to panhandlers, reducing the return from panhandling so as to reduce the supply of panhandlers. This need suggested a second regulation, one which targeted subway passengers.

For a panhandler to succeed, he or she must incite in passengers either compassion or guilt. Focus here on the second. Guilt is an essentially social meaning—for one to feel guilt, one must feel a responsibility or obligation to do something in the face of the begging. The panhandler trades upon a feeling or social meaning in the passengers that they *should* do something to help.

It was this social meaning that the New York Transit Authority sought to attack. Through a series of public announcements and a poster campaign, the Authority told the public that it was wrong to give to panhandlers—that panhandlers were people who needed help, but that by giving to panhandlers, one made it less likely they would get help. To help the panhandlers, the Authority said, one must not give to them.

The potential effect of this kind of regulation was, as one writer put it, “devastating.”<sup>330</sup> Before the Transit Authority started this poster campaign, the refusal of a passenger to give any money to a panhandler had a relatively unambiguous meaning—identifying the passenger as coldhearted, or cheap, or uncaring. Thus, the refusal to give was costly for the passenger.<sup>331</sup> But the Authority’s poster campaign ambiguated this meaning. Now, the refusal could either be because the passenger is coldhearted, etc., or because the passenger is concerned to do what is best for the panhandler. What is best for the panhandler is for the passenger to say no to the panhandler. Thus the posters succeeded in making it less costly for the passenger not to give to the panhandler by ambiguating the social meaning of a refusal to give.

The pattern by now should be familiar. But note the relationship between this regulation and the first regulation I mentioned above. The regulation prohibiting begging and the social meaning

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<sup>329</sup> Loper addressed panhandlers in the street. Two years earlier, the Second Circuit had upheld a limitation on panhandling in the subway. See *Young v New York City Transit Authority*, 903 F2d 146 (2d Cir 1990).

<sup>330</sup> See Nicholas Dawidoff, *To Give or Not to Give*, NY Times Mag 36, 36 (Apr 24, 1994).

<sup>331</sup> Particular targets, Dawidoff reports, were men obviously trying to impress “their dates.” Id.

regulation I just described both have an identical objective—to eliminate begging; both seek to achieve that objective by altering what is orthodox. Indeed, between the two it is the second regulation that attempts to regulate what is orthodox more directly. Yet although the second regulation operates on what is orthodox directly, only the first is within the scope of First Amendment law. While the regulation prohibiting begging is cognizable as a First Amendment question, the regulation changing the social meaning of begging is nowhere within its scope. Here the government is perfectly free to alter the social meaning of this act of refusing to give—perfectly free to say what is orthodox—and nothing in the First Amendment provides a basis to review this regulation.

The point can be made more starkly. What is orthodox is a function of social meanings. Social meaning is a function of a text, and a context of understandings and expectations against which that text has meaning. To control social meanings, therefore, one can control either the texts that get made, or the context against which these texts have meaning. The First Amendment is concerned primarily with government regulation of texts—it limits the government's ability to limit what can be said.<sup>332</sup> It is apparently not concerned with government regulation of contexts—it has nothing to say when government, through the tools of social meaning regulation, transforms the social meaning of some act.

But in light of our sketch of the regulation of social meaning, this division may seem quite odd. For there is no reason in principle to believe that the orthodox is more easily regulated by regulating texts than regulating contexts. Indeed, today, the opposite may well be true. Today, between the regulations of text (of what can be said) and the regulations of context, regulations of text may well have become far less effective, if effective at all.<sup>333</sup> If the government's attempt to proscribe speech is public enough to be within the cognizance of the courts at all, then it is most likely to be a self-defeating regulation: In the modern political context, speech prohibition will never actually succeed in silencing the ideas prohibited (think, for example, of the effect of

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<sup>332</sup> Of course, the extent and insistence of this restriction is of recent origin. See Note, *The Actionable Words Statute in Virginia*, 27 Va L Rev 405 (1941).

<sup>333</sup> Compare the success of totalitarianism (primarily a text-based method of social meaning regulation) to the success of advertising (primarily a context-based method of social meaning regulation, using all the techniques I have identified above).

the fax machine or the Internet on attempts to silence dissidents' views) and will most likely excite a sympathetic response from well-established antipathy toward censorship—the implication of the Orwell effect.

But regulations of context need not be so benign. For not only is this technique of regulating social meaning more likely to be successful, it is likely to be successful in part because it is not seen as an attempt to regulate social meaning. It can escape the safety valve of the Orwell effect. Propaganda, to the modern mind, is unsuccessful because it comes clearly labeled—"This is propaganda." But the best techniques of social meaning transformation come without a label—they have their effect because their objective is obscured.<sup>334</sup>

The oddity of current First Amendment law, then, is that it is obsessed with just the kind of orthodoxy regulation that may be least likely to be successful (the regulation of text), and blind to the kind of orthodoxy regulation that is most likely to be successful (the regulation of context). If the fixed star in our constitutional constellation is this antiorthodoxy principle, then oddly, something in First Amendment law has skewed its focus.

### C. Rendered Ambiguity

How do we account for these two sorts of puzzles? First note their cause. In each case, what raises the oddity noted is the consideration of a perspective ordinarily ignored within First Amendment jurisprudence—the perspective of social construction. In each case, what creates the ambiguity is the perspective that law not only (a) regulates life within certain structures of understanding, but also (b) regulates these structures of understanding themselves. The traditional focus of First Amendment law is (a), practicing a learned blindness to the perspective of (b); the perspective of social meaning regulation is (b), and from this perspective, the rhetoric of Jackson is uncertain. The problem for First Amendment law is how to carry the principles that animate law in (a) over to the world of action in (b).

It should be clear that there is no simple translation. If the *Barnette* principle describes well regulations of the sort of (a), the examples that we have sketched should suggest why it cannot carry directly into the context of (b). But it should not follow from

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<sup>334</sup> *Rust v Sullivan*, 500 US 173 (1991), again, is the best example here. See text accompanying notes 246-48.

this that no limit on the kinds of regulation in (b) can be found. What is needed is an account of the antiorthodoxy principle that does not have to ignore (b) in order to regulate (a).

The need is growing. For it is less and less possible to practice the learned blindness that free speech law manifests about these issues of construction. As more and more of the critical in law takes on this more general account—whether critical race theory,<sup>335</sup> critical legal studies,<sup>336</sup> feminism,<sup>337</sup> or gay<sup>338</sup> or queer<sup>339</sup> law—law at its core, and First Amendment law in particular, must address these same issues. A resolution will not be found so long as First Amendment law is blind to the insight that is at the core of this critical view. A parallel could be drawn to *Erie*,<sup>340</sup> and to law's need to account for the emergence of a more realistic, positivistic account of law's source. Echoing Brandeis, echoing Holmes, we could say, social reality “in the sense in which [we] speak of it today does not exist without some definite [constructive force] behind it.”<sup>341</sup> To understand, and account for, the increasing challenges in free speech law, the First Amendment too must acknowledge and accommodate this sense.

This is not the place to resolve these questions about First Amendment law. My promise instead was simply to identify the source of these questions, and to suggest that a different sort of solution is inevitable. However easy it was to ignore the constructive power of government in the past,<sup>342</sup> the kinds of questions that First Amendment law faces now are questions that trade fundamentally upon this constructive fact. Questions about the regulation of pornography and hate speech, or the regulation of

<sup>335</sup> See Derrick A. Bell, Jr., *And We Are Not Saved: The Elusive Quest for Racial Justice* (Basic Books, 1987); Alan D. Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 Harv CR-CL L Rev 295 (1988).

<sup>336</sup> The work of Roberto Unger is of particular importance. See Roberto Mangabeira Unger, *Politics: A Work in Constructive Social Theory* (Cambridge, 1987).

<sup>337</sup> Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard, 1987); Catharine A. MacKinnon, *Only Words* (Harvard, 1993).

<sup>338</sup> William N. Eskridge, Jr., *Gay Legal Narratives*, 46 Stan L Rev 607 (1994).

<sup>339</sup> Janet E. Halley, *The Construction of Heterosexuality*, in Michael Warner, ed, *Fear of a Queer Planet* 82, 82 (Minnesota, 1993).

<sup>340</sup> *Erie Railroad Co. v Tompkins*, 304 US 64 (1938).

<sup>341</sup> See id at 79, quoting *Black and White Taxicab and Transfer Co. v Brown and Yellow Taxicab and Transfer Co.*, 276 US 518, 533 (1927) (Holmes dissenting) (speaking of how the common law should be understood).

<sup>342</sup> Which is not to say that it was ever easy. There has long been a tradition, in conservative thought in particular, to push the constructive power of the government toward constructive (or moralistic) ends. What was easy was to ignore the free speech dimension to these efforts, and it is that, I suggest, which is no longer so easy.

homosexuality, are all questions now because we cannot help but see the constructive dimension in all that government does. This constructive dimension will not go away, and the confrontations that it creates ensure that it will be something we cannot long ignore. The task must be to find a way to account for this now visible constructivity, rather than ignore it.

### CONCLUSION

The social world is constituted by social meanings; these social meanings impose costs on, and supply benefits to, individuals and groups; individuals and groups use them to advance individual or collective ends; and their range makes them essential tools in any individual's or collective's life.

At least some of these social meanings are in some sense constructed. But importantly, if they are constructed, they are socially constructed. For as I have argued, constructing social meanings is a collective activity, and as with any collective activity with any public good, inducing individuals to act to support or reconstruct a particular social meaning involves changing incentives, to induce them to change their behavior. As with any collective good, providing social meanings or reconstructions of social meanings means solving collective action problems.

In this Article I have sketched a range of examples of construction, and a few models for understanding how these constructions proceed. In particular, I have sketched four techniques common to social meaning constructions and reconstructions, and I have suggested how each can be viewed as a solution to the collective action problem faced in reconstructing social meanings. These techniques illustrate how reconstruction is possible without conceding that total regulation is feasible. Instead they suggest simple tools for shifting the semiotic costs of various social acts, thereby reconstructing ordinary social behaviors.

I have used these tools to examine two applications of social meaning construction, and to suggest the value of this social meaning account. The first application was the regulation of dangerous sex; the second, the regulation of smoking. The regulation of both proceeds through the regulation of social meaning; thus, any account of the regulation of either must include an account of social meaning making.

This discussion of social meaning construction leaves us with a question, with—as of yet—no satisfying answer. If it suggests the need for a fuller account in understanding the effects of legal policy, it should also help us see what may be an odd inversion in

current First Amendment law: Most cynically, it reveals that First Amendment law can pretend to be so strong precisely because it proscribes what is most weak. Least cynically, it may help us see that First Amendment law needs to incorporate social reality "in the sense in which we speak of it today," and that changes in doctrine will follow this broader account. Either way, it is this dimension of construction that reveals the present instability in First Amendment intuitions, and if so, then it is this dimension of construction that must be explored if this instability is to be resolved.



# Mandatory Disclosure as a Solution to Agency Problems

Paul G. Mahoney†

## INTRODUCTION

Most sellers of goods or services are not legally compelled to provide particular information about their products to potential buyers; they must merely avoid making false claims. One important exception relates to securities. Firms that issue securities in the public markets must provide affirmative disclosures about the securities and the issuer. This is true not only in the United States, but in most developed countries. What accounts for the distinction between securities and other products?

Surprisingly few attempts have been made to justify the distinction on efficiency grounds. The initial approach of academic economists to the United States securities laws was to marshal empirical evidence that investors were, or were not, better off after the enactment of these laws.<sup>1</sup> In response to the empirical debate, a small but influential theoretical literature has developed on the efficiency of mandatory disclosure.<sup>2</sup> That literature identifies the goal of mandatory disclosure as helping market participants to determine prices for securities that accurately

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<sup>1</sup> See George J. Stigler, *Public Regulation of the Securities Markets*, 37 J Bus 117 (1964) (arguing that returns to investors in new issues were unaffected by securities laws); Irwin Friend and Edward S. Herman, *The S.E.C. Through a Glass Darkly*, 37 J Bus 382 (1964) (challenging Stigler's analysis and countering that the variance of returns was lower post-1933); George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 Am Econ Rev 132 (Pt 1 1973) (evidence suggests that mandatory periodic disclosure does not benefit investors); Irwin Friend and Randolph Westerfield, *Required Disclosure and the Stock Market: Comment*, 65 Am Econ Rev 467 (Pt 1 1973) (challenging Benston's analysis).

<sup>2</sup> The principal works are John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 Va L Rev 717 (1984); Frank H. Easterbrook and Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va L Rev 669 (1984); and Gregg A. Jarrell, *The Economic Effects of Federal Regulation of the Market for New Security Issues*, 24 J L & Econ 613 (1981).