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Statutes as public affirmations of social values and norms

On the Expressive Function of Law

Cass R. Sunstein

If I had known that not a single lunch counter would open as a result of my action I could not have done differently than I did. If I had known violence would result, I could not have done differently than I did. I am thankful for the sit-ins if for no other reason than that they provided me with an opportunity for making a slogan into reality, by turning a decision into an action. It seems to me that this is what life is all about.

James Miller, *Democracy is in the Streets: From Port Huron to the Siege of Chicago*, (New York: Simon and Schuster, 1987), p.52.

We are all Expressionists part of the time. Sometimes we just want to scream loudly at injustice, or to stand up and be counted. These are noble motives, but any serious revolutionist must often deprive himself of the pleasures of self-expression. He must judge his actions by their ultimate effects on institutions.

Herbert Simon, *Models of My Life*, (New York: Basic Books, 1991), p.281.

Actions are expressive; they carry meanings. This is true for nearly everything we do, from the most mundane to the most significant. Thus, for example, a lawyer who wears a loud tie to court will be signaling something distinctive about his self-conception and his attitude toward others; so too with a law professor who teaches in shorts; so too with a student who comes to class in a business suit. In these and other cases, what the person will be communicating, or be taken to mean, may or may not have a great deal to do with his particular intentions. In this sense, the meanings of actions are not fully within the control of agents. Indeed, some agents may not even be aware of the relevant meanings. Consider a foreigner, whose foreign state is often signaled by obliviousness to the social meanings of his actions. What he says is very different from what he means.

What can be said for actions can also be said for law. Many people support law because of the statement made by law, and disagreements about law are frequently debates over the expressive content of law. Consider debates in Eastern Europe (and elsewhere) over the contents of a constitution. Many people urge certain provisions—involving official language, minority rights, relationship to

the rest of the world, or economic guarantees—not because of the consequences of these provisions but because of the “statement” they make. Or consider debates over capital punishment. Many who oppose capital punishment would be unlikely to shift position even if evidence showed that capital punishment does have a deterrent effect; their complaint is mostly about the expressive content of acts of capital punishment, not about the ineffectiveness of deterrence. So too for many of those who endorse capital punishment. Such people would not be—are not—much moved by evidence that capital punishment does not deter. Their primary concern is the symbolic or expressive content of the law, not aggregate murder rates.

In this article I explore the expressive function of law—the function of law in “making statements” as opposed to the function of law in directly controlling behavior. The expressive function of law is especially important in new democracies where a liberal legal culture is being revived or perhaps created for the first time, and where administrative and budgetary means for enforcing compliance are sometimes scarce. I explore this subject by focusing on the particular issue of how legal “statements” might be designed to change social norms. I also

urge that the expressive function of law makes most sense in connection with efforts to change norms, and that if legal statements produce bad consequences, they should not be enacted even if they seem reasonable or indeed noble.

Definitional notes

At the outset it is important to say that we might understand the expressive function of law in two different ways. First, and most straightforwardly, the law's "statement" about (for example) minority rights or health care rights may be designed to affect social norms and in that way ultimately to affect both judgments and behavior. But sometimes people support a law not because of its effects on norms, but because it is believed intrinsically valuable for the relevant "statement" to be made. (I think this is particularly true in Eastern Europe; and see the opening epigraph from a 1960s protester.)

Thus a society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown. A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups. The point bears on the cultural role of law, adjudication, and even of Constitutional Court decisions. When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments. This is a matter of importance quite apart from consequences, conventionally understood.

I do not claim that the expressive effects of law, thus described, are decisive or that they cannot be countered by a demonstration of more conventional bad consequences. In fact I will argue otherwise and in that way try to vindicate Simon's remark in the epigraph to this essay. But it cannot be doubted that the expressive function is a large part of legal debate. Without understanding the expressive function of law, we will have a hard time in getting an adequate handle on public views with respect to, for example, civil rights, prostitution, the environment, endangered species, capital punishment, and abortion.

The Constitution's expressive function

Some people support constitutional provisions because of the direct effects of those provisions. But many people are concerned with the expressive function of a constitution—with the constitution's role in describing a nation's goals and aspirations. Such people may be thinking that a constitution which includes, for example, rights to medical care and social security will affect that society's norms, by providing a background for public officials and citizens alike. This has been of some importance for the German Constitution, and it has played a role in debates in Eastern Europe as well. And many people are concerned with the "statement" made by constitutional provisions quite apart from effects on social norms. They may think that a role of the Constitution is to reflect certain commitments, and that this is important independently of consequences.

This view raises many questions. Purely expressive constitutions may be meaningless; they may breed cynicism and resentment, or hamper progress toward a constitution with real-world meaning. But those interested in the making of constitutions, and in interpretation of constitutions, will be missing something if they overlook the expressive function of constitutional law.

The expressive function and collective action problems

Many social norms solve collective action problems. Norms solve such problems by imposing social sanctions on people who defect from ordinary practice. When defection violates norms, defectors will probably feel shame, an important motivational force. The community may enforce its norms through informal punishment, the most extreme of which is ostracism. But the most effective use of norms is before the fact. The expectation of shame—a kind of social "tax," sometimes a very high one—is usually enough to produce compliance.

Thus, for example, if there is a norm in favor of cooperation, people may be able to interact with one another in a way that prevents their actions from being self-defeating. In any social setting, norms of cooperation play a large role in deterring,

for example, bribery or corruption or payment of taxes. Or suppose that a community is pervaded by a strong norm against littering. If the norm is truly pervasive, an important problem of environmental degradation can be solved without any need for legal intervention. The norm can do what the law would do at possibly significant cost.

Sometimes, however, good norms do not exist, and bad ones exist instead—where we understand “good” or “bad” by reference to the functions of norms in solving collective action problems. Imagine, for example, that there is no norm in favor of refusing to litter, or that there is even a norm in favor of littering. In such a situation a society would, under imaginable assumptions, do well to reconsider and reconstruct its norms.

It may be able to do so through voluntary efforts. Indeed, norm entrepreneurs in the private sphere attempt to change norms by identifying their bad consequences and trying to shift the bases of shame and pride. Many norm entrepreneurs are alert to the existence of collective action problems. We can find such entrepreneurs in different sectors of social life—consider the Pope, Boris Yeltsin, and Ronald Reagan. But sometimes these private efforts fail. When this is so, the law might be enlisted as a corrective. In fact the least controversial use of the expressive function of law operates in this way. Here the goal is to reconstruct existing norms, and to change the social meaning of action, through a legal expression, or statement, about appropriate behavior. Insofar as regulatory law is concerned with collective action problems, this is a standard idea, especially in the environmental context, but also in the setting of automobile safety, occupational safety and health, and many other problems as well.

More particularly, government might think that choice is, roughly speaking, a function of the intrinsic utility of choice, the reputational utility of choice, and the effects of choice on a person’s self-conception. If someone cleans up after his dog, or fails to do so, his decision may reflect not only the act’s intrinsic value, but also anticipated reputational effects as well as effects on the agent’s self-esteem. We can thus extend the game-theoretic

insight that a person’s behavior often depends on expectations about behavior by other people. Behavior and choice are a product not only of other people’s behavior, but also of the perceived judgments of other people, and those judgments have a great deal to do with—indeed they constitute—social norms. People act in accordance with their perceptions of what other people think. Sometimes they act strategically in order to avoid other people’s opprobrium.

Reputational utility is of course produced by social norms, and it may shift over time, since it is likely to be a product of both existing information and of law. If choice that produces collective harm is driven by reputational utility in the direction of behavior whose (net) intrinsic utility for the agent is low, government might think it appropriate to shift reputational utility, with the thought that overall utility might thereby be increased. When norms shift, the expressive content of acts shift as well, thus producing changes in reputational effects.

The most conventional example involves legal mandates that take the place of good norms, by requiring certain forms of behavior through statutory requirements accompanied by significant enforcement activity. But there is a subtler and more interesting class of cases, of special importance for understanding the expressive function of law. These cases arise when the relevant law is a signal or statement unaccompanied by much in the way of enforcement activity. There is a large set of instances in which laws that (1) aspire to announce or signal a change in social norms are nonetheless (2) unaccompanied by much in the way of enforcement activity. Consider, for example, laws in America that forbid littering and laws that require people to clean up after their dogs. In many localities such laws are rarely enforced through the criminal law. But they have an important effect in signaling appropriate behavior and in inculcating the expectation of social opprobrium and hence shame in those who deviate from the norm.

When legally-induced shifts in norms help solve collective action problems, there should be no objection in principle. Here, then, is the least controversial case for the expressive function of law.

Norms involving dangerous behavior

Often the expressive function of law is brought to bear on dangerous behavior. Of course all behavior creates risks: driving a car, walking on city streets, volunteering for military service. When government is trying to change norms that "subsidize" risk-taking behavior, it must do so because of a judgment that well-being will be thereby promoted. This judgment might be rooted in an understanding that the intrinsic utility of the act is relatively low and that reputational incentives are the real source of the behavior. We are dealing, then, with classes of cases in which the danger accompanying choice means that intrinsic utility is not high but risk-taking behavior persists because of social norms.

There are numerous examples. Elijah Anderson's vivid sociological analysis of life in an African-American ghetto shows that social norms create a variety of risks. (See Elijah Anderson, *Streetwise* (1993)). There are powerful norms in favor of using and selling drugs; there are powerful norms too (for boys) in favor of getting a teenage girl pregnant and (for girls) in favor of getting pregnant. Anderson shows that with respect to drugs, pregnancy, and use of firearms, behavior appears to be driven in large part by reputational effects. In fact for much risk-taking behavior, especially by young people, social norms are crucial. The point certainly bears on analogous problems in Eastern Europe. Consider, for example, the existence of powerful norms governing cigarette smoking, alcohol use, the consumption of unlawful drugs, diet and exercise and carrying and using firearms. We might readily imagine, for example, that a decision to smoke a cigarette, or not to buckle a seat belt, would be a function not primarily of the intrinsic utility of the underlying act, but instead of the reputational effects.

Norm entrepreneurs in the private sector can play an important role here. Religious leaders often try to change social norms involving, for example, promiscuous behavior, which can of course create risks of various sorts. But there as elsewhere, private efforts may be unsuccessful. In this light, law might attempt to express a judgment about the underlying activity, and do so in such a way as to alter social

norms. If we see norms as a tax or a subsidy to choice, the law might attempt to change a subsidy into a tax, or vice-versa. In fact this is a central if implicit goal behind much risk regulation policy. Educational campaigns often have the goal of changing the social meaning of risk-taking activity. Going beyond provision of information, coercion might be defended as a way of increasing social sanctions on certain behavior. Through time, place, and manner restrictions or flat bans, for example, the law might attempt to make it seem weak to smoke, or to use drugs, or to engage in unsafe sex.

It is important in this regard that social norms are often a function of existing information. If people believe that smoking is dangerous to self and others, it is likely (though not certain) that social norms will discourage smoking. Certainly there has been, with respect to smoking, a dramatic norm cascade in America in the last 30 years, a cascade fueled in large part by judgments about adverse health effects. Shifts in norms governing behavior may well be produced by new information about risk (though the norms can shift in both directions; sometimes a perception of dangerousness increases the attraction of behavior). One can imagine similar information-induced norm cascades with respect to, for example, crime, diet, exercise, and unsafe sex.

Because information is the least intrusive regulatory strategy, it should be the preferred option. Whether more aggressive strategies make sense depends on the details.

Norms involving the use of money

A complex network of social norms governs the acceptable uses of money. Thus, for example, if someone asks an adult neighbor to shovel his walk or to mow his lawn in return for money, the request will often be regarded as an insult, because it is based on an inappropriate valuation of the neighbor. The request embodies a conception of what the relationship is, or of what neighborliness is for, that is, under existing norms, judged improper. This is so even if the offeree might clearly prefer to have (say) \$25 than to not mowing a lawn for (say) an hour. Quite generally it is inappropriate to offer money to one's friends in return for hurt feelings, disappoint-

ments, tasks, or favors. In fact the universe of cases in which norms disallow monetary exchange is very large, and unremarked only because it is so taken for granted. It would be quite strange to give someone a certain sum of money after hearing that his parent had died, or to ask a colleague to clean up your office for, say \$250.

There is often a connection between norms that block financial exchanges and ideas about equal citizenship. The exchange can be barred by social norms because of a perception that while there may be disparities in social wealth, the spheres in which people are very unequal ought not to invade realms of social life in which equality is a social norm or goal. The prohibition on vote-trading is an example. So too with certain complex social bans on the use of wealth to buy services or goods from other people. Some part of the intricate web of norms covering the exchange of money among both friends and strangers are connected with the principle of civic equality. Monetary exchange would reflect forms of inequality that are not legitimate in certain spheres.

Familiar objections to “commodification” are part and parcel of social norms banning the use of money. The claim is that people ought not to trade (for example) sexuality or reproductive capacities on markets because market exchange of these “things” is inconsistent with social norms identifying their appropriate valuation. The claim is not that markets value sexuality “too much” or “too little”; it is that markets value these activities in the wrong way.

The point very much bears on law. In many ways, law tries to fortify norms, regulating the use of money and to prevent new social practices from eroding those norms. This is an important domain for the expressive use of law. It is connected with the effort to create separate social spheres—some in which money is appropriately a basis for action, some in which money cannot be used.

The law bans a wide range of uses of money. Votes cannot be traded for cash; the same is true of body parts. Prostitution is outlawed. There is of course a sharp social debate about surrogate motherhood, and those who seek legal proscriptions are

thinking in expressive terms. One of their goals may be to fortify existing social norms that insulate reproduction from the sphere of exchange. Or their argument may be less instrumental: They may seek to make a “statement” about reproduction without also seeking to affect social norms.

Equality, social norms, and social change

Norms involving discrimination are an important part of social inequality. Social norms may require women to engage in most of the domestic labor; in some places, in Eastern Europe and elsewhere, women who refuse to do so incur social sanctions and may even feel ashamed. The social meaning of a woman’s refusal may be a refusal to engage in her appropriate role. Hence it may signal a range of undesirable traits. In the areas of both race and gender, prevailing norms help constitute inequality. And here as elsewhere, collective action is necessary to reconstitute existing norms.

Private norm entrepreneurs may be able to accomplish a great deal. With respect to the division of domestic labor between men and women, private efforts at norm management have played an important role. Individual acts that are expressive in character—a refusal to make dinner, for example—are an important part of modern feminism. But the expressive function of law is often especially important here, and it can move to the fore in public debates. If a discriminatory act is consistent with prevailing norms, there will be more in the way of discriminatory behavior. If discriminators are ashamed of themselves, there is likely to be less discrimination. The social meaning of an act of sexual harassment will have a great deal to do with the amount of sexual harassment. A large point of law may be to shift social norms and social meaning.

Qualifications

In this section I qualify my argument. The first set of qualifications stems from a hard question: How might participants in law compare the statement made by law with the (direct) consequences produced by law? What if the statement seems right but the consequences are unfortunate? The second qualification emerges from the need to impose con-

straints on the expressive function of law. Both of these issues are extremely large and complex. I restrict myself to a few brief observations.

Consequences

I have suggested that some expressivists are concerned with changing norms, whereas others are concerned with the “statement” law makes entirely apart from consequences. As the epigraph from Herbert Simon suggests, expressivists can be both fanatical and ineffectual—a most unfortunate combination. For those who endorse the expressive function of law, the most important test cases arise when (a) people support laws because of the statement made by such laws but (b) the effects of such laws seem bad or ambiguous, even by reference to the values held by their supporters. How should such cases be understood? My basic proposition is that at least for purposes of law, any support for “statements” should be rooted not simply in the intrinsic value of the statement, but also in plausible judgments about effects on social norms and hence “on balance” in judgments about consequences.

Take the issue of minimum-wage legislation. A possible justification for such legislation is expressive in nature. Some people might think that government ought to make a statement to the effect that human labor is worth, at a minimum, \$X per hour; perhaps any amount less than \$X seems an assault on human dignity. But suppose too that the consequence of the minimum wage is to increase unemployment among the most vulnerable members of society. It is not easy to know how to weigh the “statement” against the bad consequences. Part of the attraction of the expressive view is that inquiries into consequences often seem difficult and complex, and perhaps not subject to resolution at all. But if an increase in the minimum wage would really drive vulnerable people out of the workplace in significant numbers, it is hard to see why people should support it.

We can thus see that expressive approaches to law verge on fanaticism where effects on norms are unlikely and where the consequences of the “statement” are not good. In this sense, there is ample reason to endorse Herbert Simon’s remarks at the

beginning of this essay. Without desirable effects on social norms, there is not much point in endorsing expressively motivated law. Blanket statements are risky here. But the best use of legal “statements” is in signaling social judgments in order to change norms, not to make statements for their own sake. Thus I suggest that constitution-making should be designed to “make statements” only if it seems plausible to think that those statements will have good effects or at least not have bad effects.

Constraints, liberal and otherwise

What barriers should there be to governmental efforts at managing social norms? The simplest answer is: The same barriers as there are to any other kind of governmental action. There is nothing distinctive to norm management that requires a special set of constraints.

Thus, for example, government should not be permitted to invade rights, whatever may be our understanding of rights. The rights constraints that apply to government action generally are applicable here as well. If government tried to change social norms so as to ensure that everyone is a Christian, it would violate the right to religious liberty; if government tried to change social norms so as to ensure that women occupy domestic roles and men do not, it would violate the equal protection clause.

Quite apart from the question of rights, there is always a risk that efforts at norm management will be futile or counterproductive. We can imagine, for example, that when government attempts to move social norms in a particular direction, it may fail miserably. For this reason it may be best for government to attempt to enlist intermediate organizations, so as to ensure that people with authority in relevant communities are participating in the process.

Some people would go further than this. On one view, any effort at norm management is illegitimate; this is a project that is off limits to government. But it is hard to see how this argument might be made persuasive. Effects on social norms are not easily avoided; any system of government is likely to affect norms, including creation of the basic systems of contract, tort, and property. Moreover,

intentional norm management is a conventional and time-honored part of government. Of course we could imagine abuses, even unspeakable ones. But the proper response is to insist on a wide range of rights-based constraints on the management of social norms through law.

Conclusion

There can be no doubt that law, like action in general, has an expressive function. Some people do what they do mostly because of the statement the act makes; the same is true for those who seek changes in law. Many debates over the appropriate content of law are really debates over the statement that law makes, independent of its (direct) consequences. I have suggested that the expressive function of law has a great deal to do with the effects of law on prevailing social norms. Often law's "statement" is designed to move norms in fresh directions.

All this leaves open a number of questions. Among the most pressing are empirical ones. To what extent have shifts in norms been a function

of law? How can law, including constitutional law, be made effective in shifting norms? What variables account for effective norm-change? There are also important theoretical issues about constraints on norm management through law. It is particularly important to decide how to handle situations in which laws motivated by expressive goals have mixed or bad consequences. I have suggested that legal "statements" producing bad consequences should not be endorsed. But my simplest suggestion here is that we begin to make sense of law's expressive function if we attend to the role of law in the management of social norms. No system of law can entirely avoid that role; even markets themselves—very much a creation of law—are exercises in norm management, since they attempt to create initiative and enterprise, and to diminish feelings of entitlement and dependency. In these circumstances it is best for government to proceed pragmatically and contextually, seeing which norms are obstacles to well-being, and using law when law is effective in providing correctives.