

# ON THE EXPRESSIVE FUNCTION OF LAW

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*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 a reality, by turning a decision into an action. It seems to me that this is what life is all about.*

—Sandra Cason.<sup>1</sup>

*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.<sup>2</sup>

## INTRODUCTION

Actions are expressive; they carry meanings.<sup>3</sup> This is true for nearly everything we do, from the most mundane to the most significant. For example, a lawyer who wears a loud tie to court will be signalling something distinctive about his self-conception and his attitude toward others; so too with a law professor who teaches in blue jeans; so too with a student who comes to class in a business suit. What can be said for nonverbal acts applies to purely verbal statements as well. A bank president who uses the terms “Miss” and “Mrs.,” or who refers to African Americans as “Negroes,” will be showing a wide range of things about his attitudes on matters of

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<sup>1</sup> JAMES MILLER, “DEMOCRACY IS IN THE STREETS”: FROM PORT HURON TO THE SIEGE OF CHICAGO 52 (1987).

<sup>2</sup> HERBERT A. SIMON, MODELS OF MY LIFE 281 (1991).

<sup>3</sup> In law, Lawrence Lessig offers the best discussion of this idea in *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995). I owe a general debt to Lessig’s important paper and especially to his discussion of the collective action problem posed by efforts at changing social meanings. *See id.* at 993-1007.

gender and race. So too with a Southern politician who uses the terms “Ms.” and “African American.”

In these and other cases, what the agent 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 agent’s control. Indeed, some agents may not even be aware of the relevant meanings. Consider a foreigner whose very foreignness is often signalled by obliviousness to the social meanings of his actions. What he says may be very different from what he means.

The social meanings of actions are very much a function of existing social norms. When a social norm tells people not to smoke in public places, the social meaning of smoking is obtuseness, discourtesy, or worse. When a social norm requires people to dress casually for dinner, formal attire “means” something bad, like a desire to seem superior or a manifestation of an odd social rigidity. And when social norms change, social meaning changes too. Thus the social meanings of lighting up a cigarette, or engaging in an act of sexual harassment, or using a condom, or refusing to eat meat, are very different in 1996 from what they were in 1966, because of dramatic shifts in underlying norms.

What can be said for actions can also be said for law. Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law. Much of the debate over school segregation, for example, was also a debate about the meaning of laws calling for segregation. *Plessy v. Ferguson*<sup>4</sup> asserted that such laws did not “mean” black inferiority;<sup>5</sup> *Brown v. Board of Education*<sup>6</sup> tried to respond to this assertion with empirical work suggesting the contrary.<sup>7</sup> Or, consider debates over capital punishment. Many people who oppose capital punishment would be unlikely to shift their position even if evidence were to show that capital punishment does have a deterrent effect. They are concerned about the expressive content of capital punishment, not about its ineffectiveness as a deterrent (or about other nonexpressive grounds for

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<sup>4</sup> 163 U.S. 537 (1896).

<sup>5</sup> See *id.* at 544 (noting that segregation laws “do not necessarily imply the inferiority of either race to the other”).

<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> See *id.* at 494 n.11 (relying on social science evidence that showed that segregation generated a feeling of inferiority among African-Americans).

punishment).<sup>8</sup> And many people who endorse capital punishment would not be much moved by evidence that capital punishment does not deter people from committing crimes. Their primary concern is the symbolic or expressive content of the law, not aggregate murder rates.<sup>9</sup>

Very recently, the enormously lengthy and heated debate over flag burning has been permeated by expressive concerns. If we ask whether the debate is about how best to deter flag burning, we will find the debate unintelligible. Few people have burned the American flag in recent years, and it is reasonable to suppose that a constitutional amendment making it possible to criminalize flag burning would have among its principal consequences a dramatic increase in annual acts of flag burning. In fact, adopting a constitutional amendment may be the best possible way to promote the incidence of flag burning. In these circumstances it seems clear that those who support the amendment are motivated not so much by consequences as by expressive concerns.<sup>10</sup> They appear to want to make a statement about the venality of the act of flag burning, perhaps in order to affect social norms, perhaps because they think that making the statement is intrinsically good.

Much of the contemporary debate over the regulation of hate speech is similar. It is above all about the social meaning of such regulations. Do such regulations "mean" that victims of hate speech require special paternalistic protections, are weak and thin-skinned, and unable to take care of themselves? Or do they "mean" that bigotry is utterly unacceptable in a liberal society? Debates of this kind could not plausibly be focused on consequences, for the stakes are relatively low and thus cannot justify the amount of time and energy devoted to the issue. In this way, debates over flag burning

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<sup>8</sup> I do not attempt here to sort out the relation between expressive and other grounds for criminal punishment.

<sup>9</sup> See Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 L. & SOC'Y REV. 21, 40 (1982) (finding that "[p]olitical and social beliefs . . . exercise[d] a strong influence upon support for capital punishment, while the influence of crime-related concerns was small"); Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, J. SOC. ISSUES, Summer 1994, at 19, 27 (finding that, while belief in the death penalty as an effective deterrent hovered around 60% from 1972 to 1991, support for the death penalty during that period rose from 58% to 75%).

<sup>10</sup> The same thing might be said about any law that drives conduct underground. Even if the aggregate incidence of harmful conduct is not decreased, some people support relevant laws on expressive grounds. Consider prohibitions on the use of drugs or on certain sexual activity such as homosexuality, adultery, and fornication.

and debates over hate speech have a great deal in common; they are expressive in character.

Consider, too, the subject of risk regulation. In environmental protection, public debate is often focused on the perceived social meaning of law. Thus the Endangered Species Act has a special salience as a symbol of a certain conception of the relationship between human beings and their environment, and emissions trading systems are frequently challenged because they are said to “make a statement” that reflects an inappropriate valuation of the environment.<sup>11</sup> In the same way, mandatory recycling (as opposed to curbside charges, which seem far better from an economic standpoint<sup>12</sup>) may well receive public support on expressive grounds. In the legal profession, the same may also be true of mandatory pro bono work (as opposed to compulsory donations from lawyers who refuse to do such work).<sup>13</sup>

In this Article I explore the expressive function of law—the function of law in “making statements” as opposed to controlling behavior directly.<sup>14</sup> I do so by focusing on the particular issue of

<sup>11</sup> See STEVEN KELMAN, WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT 2 (1981) (“[T]he question of whether or not to use economic incentives in environmental policy is not simply a technical question, but is also an ideological, philosophical question . . . and many noneconomist participants in the environmental debate tend to react to the issue in ideological terms.”). I do not mean to endorse the view that emissions trading systems reflect an inappropriate valuation of the environment.

<sup>12</sup> See Peter S. Menell, *Beyond the Throwaway Society: An Incentive Approach to Regulating Municipal Solid Waste*, 17 ECOLOGY L.Q. 655, 696 (1990) (comparing various solid waste regulatory policies and finding that on a purely economic basis perfect curbside charge policy and perfect deposit-refund policy always achieve the first-best allocation of resources).

<sup>13</sup> See Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 947-51 (1991) (arguing that mandatory pro bono requirements will not affect lawyers’ conception of their professional duty if they are allowed to hire others to do the work on their behalf).

<sup>14</sup> For valuable discussions of the expressive function of legal and economic norms, see ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 33-37 (1993) (discussing expressive norms); ROBERT NOZICK, THE NATURE OF RATIONALITY 26-35 (1993) [hereinafter NOZICK, RATIONALITY] (discussing “symbolic utility,” the utility that is imputed to an action or outcome in accordance with its symbolic meaning); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 370-88 (1981) [hereinafter NOZICK, EXPLANATIONS] (discussing the symbolic message of retributive punishment); Jean Hampton, *An Expressive Theory of Retribution*, in RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed. 1992) (developing an expressive theory of retribution to explain and justify retributive practice); see also Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. (forthcoming Spring 1996) (manuscript at 3) (“Punishment is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation.”); Richard H. Pildes & Cass R. Sunstein, *Reinventing the*

how legal "statements" might be designed to change social norms.<sup>15</sup> I catalogue a range of possible (and in my view legitimate) efforts to alter norms through legal expressions about appropriate evaluative attitudes. I also argue 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 noble. Empirical questions loom throughout, and I do offer several empirical claims; but my goal is normative as well as descriptive or positive.<sup>16</sup>

This Article is divided into seven parts. Part I offers some definitional notes. Part II discusses the use of legal "statements" as a means of correcting social norms that all or most people disapprove. Part III deals with risk-taking behavior. Part IV explores the use of law to fortify norms involving the appropriate use of money. Part V discusses issues of equality. Part VI qualifies the basic argument. It discusses the relationship between the expressive function of law and the issue of consequences; it also explores constraints on the use of law to express judgments about appropriate values.

## I. 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, the impropriety of monetary exchanges may be designed to affect social norms and in that way ultimately to affect both judgments and behavior. On this view, an expressive approach to law depends on an assessment of social consequences; certain expressions are

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*Regulatory State*, 62 U. CHI. L. REV. 1, 66-71 (1995) (arguing that the expressive dimensions of policy choices are appropriate concerns for policymakers); Pildes, *supra* note 13, at 939-40 (arguing that cultural consequences are a significant but frequently ignored dimension of public policy).

<sup>15</sup> This may be an example of the tendency in law schools to overemphasize the function of law in producing and changing social norms. For an important corrective, see ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). As Ellickson acknowledges, however, law provides fundamental entitlements within which norm creation and management can occur at the private level. There are important overlaps between private norm entrepreneurs and legal efforts at norm management through the expressive function of law. See *infra* notes 35-36 and accompanying text.

<sup>16</sup> I take up some descriptive and positive issues in Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. (forthcoming May 1996).

favored because they will (ultimately) have good consequences. Here there is a prediction about the facts: an appropriately framed law may influence social norms and push them in the right direction. For example, if the law mandates recycling, perhaps it will affect social norms about the environment in a way that is different from (and better than) the way curbside charges might affect norms. Or if the law wrongly treats something—let us suppose reproductive capacities—as a commodity, social norms may be affected in a troublesome way.

Sometimes the claim that the law affects norms is plausible. Prevailing norms, like preferences and beliefs, are not a presocial given but a product of a complex set of social forces,<sup>17</sup> possibly including law.<sup>18</sup> Laws designed to produce changes in norms will be my focus here. But sometimes people support a law, not because of its effects on norms, but because they believe that it is intrinsically valuable for the relevant “statement” to be made.<sup>19</sup> And sometimes law will have little or no effect on social norms. Society is filled with legal provisions allowing market exchanges of goods and services—like pets and babysitting, for example—that are not seen as mere commodities but are valued for reasons other than their use. The question, therefore, remains whether the statement will have the claimed effect on social norms. It is fully plausible to say that, although a law that permits prostitution reflects an inappropriate valuation of sexuality, any adverse effect of the law on social norms is so small as to be an implausible basis for objection.

Thus a second understanding of the expressive function of law does not concern itself with effects on norms.<sup>20</sup> Instead, its grounding is connected with the individual interest in integrity. Following a brief but suggestive discussion by Bernard Williams,<sup>21</sup> we might say that personal behavior is not concerned solely with producing states of affairs and that, if it were, we would have a hard time making sense of important aspects of our lives. There are also

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<sup>17</sup> See *id.* (manuscript pt. III.B).

<sup>18</sup> I focus here on law motivated by norm change.

<sup>19</sup> See *supra* note 9 and accompanying text.

<sup>20</sup> For a discussion of the role of symbols in politics, see ELLICKSON, *supra* note 15, at 116-18.

<sup>21</sup> See Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 108-09 (J.J.C. Smart & Bernard Williams eds., 1973) (noting that people often refuse to do a disagreeable act even though their refusal will result in worse consequences).

issues involving personal integrity, commitment, the narrative continuity of a life, and the individual and social meaning of personal conduct. The expressive dimension of action can be an important reason for action.<sup>22</sup> Williams offers cases that might be understood in these terms. Someone might refuse to kill an innocent person at the request of a terrorist, even if the consequence of the refusal is that many more people will be killed. Or a pacifist might refuse to take a job in a munitions factory, even if the refusal will have no salutary effects.

Our responses to these cases are not adequately captured in terms that ignore expressive considerations.<sup>23</sup> It is possible that the refusal to kill an innocent person is consequentially justified on balance, for people who refuse to commit bad acts may cultivate attitudes that lead to value-maximizing behavior.<sup>24</sup> But this is a complex matter. My point is only that human behavior is sometimes a function of expressive considerations.<sup>25</sup> Indeed, it should be possible to model behavior by identifying the role of such considerations.<sup>26</sup> We might agree on this point even if we also believe that consequences count (mediated as they are by expressive norms) and that people should not be fanatical.<sup>27</sup>

There is a rough analog at the social and legal level. 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

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<sup>22</sup> See NOZICK, *RATIONALITY*, *supra* note 14, at 26-35 (discussing symbolic utility).

<sup>23</sup> I should note, however, that it is not clear that Williams is interested in the expressive meaning of action; he may instead be concerned with the agent's capacity to make sense of his or her life. There are interesting questions about the extent to which the agent may be both "saying" things and "hearing" those things via conduct.

<sup>24</sup> See ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* 10-30 (1988).

<sup>25</sup> And vice versa. See Lessig, *supra* note 3, at 1012 ("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 . . . requires a change in behavior sufficient to internalize a set of understandings that construct this new meaning, or, in the case of [a] defensive construction, a change in behavior to resecure a social meaning that would otherwise dissolve.").

<sup>26</sup> See GARY S. BECKER, *ACCOUNTING FOR TASTE* (forthcoming 1996); TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* 1-21 (1995) (discussing "preference falsification," the act of misrepresenting one's genuine wants under perceived social pressures).

<sup>27</sup> See *infra* part V.

know whether the law actually helps members of minority groups. A society might endorse or reject capital punishment because it wants to express a certain understanding of the appropriate course of action when one person takes the life of another. The point bears on the cultural role of law, adjudication, and even Supreme Court decisions. The empirical effects of those decisions are highly disputed.<sup>28</sup> If the Supreme Court holds that segregation is unlawful, that certain restrictions on hate speech violate the First Amendment, or that students cannot be asked to pray in school, the real-world consequences may be much smaller than is conventionally thought. But the close attention American society pays to the Court's pronouncements is connected with the expressive or symbolic character of those pronouncements. When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments. This assumption is a matter of importance quite apart from its consequences as conventionally understood. It is customary and helpful to point to the Court's educative effect.<sup>29</sup> But perhaps the expressive effect of the Court's decisions, or their expressive function, better captures what is often at stake.

The expressive grounds for action should be distinguished from action undertaken solely because it is believed to be right. It is possible to participate in an act of political protest because the protest is for a good cause without believing that participation is justified because it is expressive. Throughout this Article I will be dealing with actions, including legal actions, that are expressive in character.

I do not claim that the expressive effects of law, thus understood, 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 Article; my principal aim is to defend laws that attempt to alter norms, rather than laws that merely "speak." It cannot be doubted, however, that the expressive function is a large part of legal debate. Without understanding the expressive function

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<sup>28</sup> See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 28 (1991) (noting that "attempts to ground [the view that courts can effectively bring about social reform] empirically are not entirely satisfying").

<sup>29</sup> See Christopher L. Eisgruber, *Is the Supreme Court an Educational Institution?*, 67 N.Y.U. L. REV. 961, 964 (1992) ("[T]he Supreme Court cannot be fully understood except as an institution with educative responsibilities, responsibilities that depend upon the excellence of its arguments.").



of law, we will have a hard time getting an adequate handle on public views on such issues as civil rights, prostitution, the environment, endangered species, capital punishment, and abortion.

## II. THE EXPRESSIVE FUNCTION AND COLLECTIVE ACTION PROBLEMS

Many social norms solve collective action problems.<sup>30</sup> Some of these problems involve coordination; others involve prisoner's dilemmas. Norms solve such problems by imposing social sanctions on defectors.<sup>31</sup> When defection violates norms, defectors will

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<sup>30</sup> See ELLICKSON, *supra* note 15, at 167 ("[M]embers of tight social groups . . . informally encourage each other to engage in cooperative behavior."); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 22-60 (1977) (arguing that norms are likely to evolve to help people achieve cooperative outcomes in prisoner's dilemma situations).

<sup>31</sup> I am offering the traditional account here, but there are serious difficulties with this account. The most serious problem is that any collective action problem can be characterized as such because of a wide range of norms, and not only because of the particular norm that is said to be producing the problem. The traditional account focuses on one norm, but the problem is the product of a wide range of them.

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

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

On the economic account, we might solve the problem by asking which norms can be changed most cheaply. Just as one person in a legal controversy might be the cheapest cost avoider, so one norm in a collective action problem might be the cheapest target of norm management. It is plausible to think that it is much more efficient to create a norm in favor of clean-up than to create a norm making people approve of clutter and mess. On this view, we would not inquire into the merits or basis of existing norms, but ask more simply which norms can be altered at lowest cost. I speculate that an implicit judgment of this kind lies behind the traditional

probably feel *shame*, an important motivational force. The community may enforce its norms through informal punishment, the most extreme form of which is ostracism. But the most effective use of norms is *ex ante*. 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.<sup>32</sup> For example, professors write tenure letters and engage in a wide range of administrative tasks that they could refuse to do at little cost (putting to one side shame—the emotional price of violating institutional norms). 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.<sup>33</sup> The norm can do what the law would do at possibly much greater cost.<sup>34</sup> The norms associated with “courtesy” are an especially important source of successful group interaction.

Sometimes, however, good norms do not exist, and bad ones exist in their stead—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 the face of such norms, the social meaning of littering may be independence and fearlessness, and the social meaning of cleaning up or failing to litter may be fastidiousness or even cowardice or neurosis. 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

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approach to this problem.

<sup>32</sup> See DAVID W. BROWN, WHEN STRANGERS COOPERATE: USING SOCIAL CONVENTIONS TO GOVERN OURSELVES 23-54 (1995) (describing various “meta-conventions,” precepts of behavior that clarify the basis for our cooperation with strangers and consequently make coordination problems easier to solve).

<sup>33</sup> For a detailed discussion of the hypothesis that close-knit groups generate norms that maximize the objective welfare of group members, see ELLICKSON, *supra* note 15, at 167-83.

<sup>34</sup> For a discussion of the role of norms in environmental protection, see CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 283-85 (1994).

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 Louis Farrakhan, Catharine MacKinnon, William Bennett, Jerry Falwell, Martin Luther King, Jr., Rush Limbaugh. In the environmental setting, public interest groups often carry out this role by pressing private conduct in environmentally desirable directions, sometimes by providing new grounds for both pride (a kind of informal social “subsidy”) and shame (a kind of informal social “tax”).<sup>35</sup>

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,<sup>36</sup> this is a standard idea, especially in the environmental context,<sup>37</sup> but also in the setting of automobile safety, occupational safety and health, and many other problems as well. What is perhaps less standard is to see the law as an effort to produce adequate social norms. The law might either do the work of such norms, or instead be designed to work directly against existing norms and to push them in new directions. The latter idea is grounded on the view that law will have moral weight and thus convince people that existing norms are bad and deserve to be replaced by new ones.

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.<sup>38</sup> 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

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<sup>35</sup> Cf. STEPHAN SCHMIDHEINY, CHANGING COURSE: A GLOBAL BUSINESS PERSPECTIVE ON DEVELOPMENT AND THE ENVIRONMENT 181-330 (1992) (discussing environmentally protective measures voluntarily adopted by business).

<sup>36</sup> See ANTHONY OGUS, REGULATION 5-20 (1995).

<sup>37</sup> See, e.g., R. KERRY TURNER ET AL., ENVIRONMENTAL ECONOMICS: AN ELEMENTARY INTRODUCTION 65-78 (1993) (discussing the characteristics of market economies).

<sup>38</sup> See BECKER, *supra* note 26 (discussing social capital); KURAN, *supra* note 26, at 35 (arguing that “the choice of public preference gives rise to three distinct returns: intrinsic utility, reputational utility, and expressive utility”).

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. It follows that individual rationality and self-interest are a function of social norms and are not sensibly opposed to them.<sup>39</sup>

Reputational utility is of course produced by social norms, and it may shift over time because it is likely to be endogenous to both existing information and to law. If choice that produces collective harm is driven by reputational utility in the direction of behavior that has low (net) intrinsic utility for the agent, government might think it appropriate to shift reputational utility, so that overall utility might thereby be increased. When norms shift, the expressive content of acts shifts 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. Environmental law, for example, imposes legal mandates to control industrial pollution; it adds a large commitment of enforcement resources.

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 announces or signals a change in social norms *unaccompanied by much in the way of enforcement activity*. Consider, for example, laws 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 signalling appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm. With or without enforcement activity, such laws can help reconstruct norms and the social meaning of action. Someone who fails to clean up after his dog may then be showing disrespect or even contempt for others. Many, most, or all people may see things this way, and the

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<sup>39</sup> For a discussion of this point and its implications, see Sunstein, *supra* note 16 (manuscript pt. III.C).

result can be large changes in behavior. Eventually there can be *norm cascades*, as reputational incentives shift behavior in new directions.<sup>40</sup> It should be unsurprising to find that, in many places, people clean up after their dogs even though this is not especially pleasant and even though the laws are rarely enforced.

When legally-induced shifts in norms help solve collective action problems, there should be no objection in principle.<sup>41</sup> Here, then, is the least controversial case for the expressive function of law.

### III. NORMS INVOLVING DANGEROUS BEHAVIOR

Often the expressive function of law is brought to bear on dangerous behavior, including behavior that is dangerous only or principally to one's self. Of course, all behavior creates risks: driving a car, walking on city streets, volunteering for military service. When government tries to change norms that "subsidize" risk-taking behavior, it must do so because of a judgment that overall welfare will thereby be 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.<sup>42</sup> Powerful norms motivate people to use and sell drugs;<sup>43</sup> powerful norms motivate teenagers to engage in sexual activity that may result in pregnancy.<sup>44</sup> Anderson shows that, with respect to drugs, pregnancy, and the use of firearms, behavior appears to be driven in large part by reputational effects. In fact, for much risk-taking behavior, especially among young people, social norms are crucial.<sup>45</sup> Consider, for

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<sup>40</sup> See KURAN, *supra* note 26, at 3.

<sup>41</sup> Note, however, that these are unlikely to be Pareto improvements. There will be losers as well as winners. For a discussion of some further complexities, see *infra* part VI.A.

<sup>42</sup> See ELIJAH ANDERSON, *STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY* 76 (1990) (explaining that the Northon community has become "even more vulnerable to a variety of social ills, from teenage pregnancy to rampant drug use").

<sup>43</sup> See *id.* at 77-111.

<sup>44</sup> See *id.* at 112-34.

<sup>45</sup> This is a principal theme in FRED M. HECHINGER, *FATEFUL CHOICES: HEALTHY*

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 seatbelt, would be a function not primarily of the intrinsic utility of the underlying act but instead largely a function of the reputational effects.

We might take the term "political correctness" to connote a willingness to say or do something not because of its intrinsic value but because of reputational effects. So understood, political correctness is hardly an isolated phenomenon. It occurs whenever people attempt to avoid the reputational costs associated with violating norms in their community. And when norms shift, turning reputational costs into benefits and vice versa, behavior can shift as well. Certainly this is true when acts and statements are a product of pressures that can make people "falsify" their internal judgments and beliefs.<sup>46</sup> With respect to dangerous behavior, it would be desirable if norms that subsidize choice were turned into norms that are neutral with respect to choice or even into norms that operate as implicit taxes.

Norm entrepreneurs in the private sector can play an important role here. Thus, for example, there has been a dramatic decrease in cigarette smoking among young African Americans, a decrease apparently fueled by changes in social norms for which private norm entrepreneurs are partly responsible.<sup>47</sup> In the relevant communities, the social meaning of smoking is not attractiveness and rebelliousness, but dirtiness and willingness to be duped. More broadly, religious leaders often try to change social norms involving risky conduct such as promiscuous behavior.

But here as elsewhere, private efforts may be unsuccessful. In this light, law might attempt to express a judgment about the underlying activity in such a way as to alter social norms. If we see norms as a tax on or subsidy to choice, the law might attempt to change a subsidy into a tax, or vice versa. In fact, this is a central, even if implicit, goal behind much risk regulation policy. Educational campaigns often have the goal of changing the social meaning

YOUTH FOR THE 21ST CENTURY (1992).

<sup>46</sup> See generally KURAN, *supra* note 26, at 3-21 (discussing the significance of preference falsification).

<sup>47</sup> See Sunstein, *supra* note 16 (manuscript pt. I.C) (describing the private antismoking campaign in the African American community).

of risk-taking activity.<sup>48</sup> Going beyond the 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 portray behavior like smoking, using drugs, or engaging in unsafe sex as a sign of individual weakness.

Are such efforts illiberal or unacceptably paternalistic? Under imaginable assumptions, they should not be so regarded. Choices are a function of norms for which individual agents are not responsible and which, on reflection, many or most agents may not endorse. This is conspicuously so in the context of risk-taking activity involving cigarettes, drugs, unsafe sex, and firearms. Much discussion of whether law should respect "preferences" or "choices" is confused by virtue of its silence on the matter of social norms.<sup>49</sup> People may follow such norms despite the fact that they deplore them.

It is important in this regard that social norms are often a function of existing information. If people believe that smoking is dangerous to themselves and to others, it is more likely that social norms will discourage smoking. Certainly there has been a dramatic norm cascade in the last thirty years with respect to smoking, 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 (although norms can shift in both directions; sometimes a perception of dangerousness increases the attractiveness of behavior). One can imagine similar *information-induced norm cascades* with respect to diet, exercise, and unsafe sex. In fact, people often try to bring norms into accord with existing information. When there is conflict between the two, people may experience dissonance.<sup>50</sup> The result of the dissonance may produce new norms or new understandings of existing information.<sup>51</sup>

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<sup>48</sup> See Lessig, *supra* note 3, at 1022 ("[E]ducation does, or can do, much more than convey information. . . . [I]n some cases education can alter social meanings.").

<sup>49</sup> Lessig provides a good corrective. See *id.*

<sup>50</sup> See ELLICKSON, *supra* note 15, at 174-75.

<sup>51</sup> It would be wrong, however, to suggest that norms are closely aligned with existing information. See MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* (1982) (arguing that human information processing is not wholly objective and that, in many cases, people delegate decisionmaking processes to institutions).

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

#### IV. NORMS INVOLVING THE USE OF MONEY

A complex network of social norms governs the acceptable uses of money. This is so in two different respects. First, some social norms impose sanctions on using money as a reason for action. Here people are not supposed to engage in certain acts if their reason for doing so is financial gain. Second, and even more intriguing, some social norms make different kinds of money non-fungible: there the prevailing norms require different kinds of money to be used for different purposes.<sup>52</sup> These sets of norms raise many complexities. They are also entangled with the expressive function of law. Finally, they suggest that it is sometimes inappropriate to infer general valuations from particular choices, because those choices are a function of norms that are limited to the context in which they are made.

##### A. Norms Against the Use of Money

Let us begin with norms punishing the use of money as a reason for action. A recent essay by Joel Waldfogel, *The Deadweight Loss of Christmas*,<sup>53</sup> will help to introduce the point. The essay finds no less than four million dollars in annual deadweight losses from the fact that people give in-kind presents rather than mere cash on Christmas Day. Waldfogel's analysis is simple. For those who give presents, the cost of Christmas is higher than it would be if they gave cash instead. The cost of gift-giving includes not just the expenditure of money, but also the resources expended on gift-selection. And for those who receive presents, the benefit is typically lower than it would be if they received cash. The recipient would be better off if he received cash, which he could use as he wished—just as food stamps are worth less than their dollar value because, unlike cash, they can only be spent on food. The

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<sup>52</sup> See VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 96 (1994) (discussing the ways in which tipping creates "distance and inequality between donor and recipient").

<sup>53</sup> Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328 (1993).



four million dollar “waste” is a result of these sorts of considerations.

What does Waldfogel neglect? The answer has a great deal to do with prevailing social norms.<sup>54</sup> In many contexts, social norms severely discourage the giving of cash rather than, say, a tie, a book, or a sweater. Under existing norms, a cash present—from a husband to a wife, for example—may reflect contempt or indifference. This is precisely because cash is fungible. A tie or a book—whether or not it is a wonderful tie or a wonderful book—fits well with norms that call for a degree of individualized attention on the part of the donor. Part of what Waldfogel neglects is the cluster of Christmas-related norms and the social meaning of diverse forms of gift-giving.<sup>55</sup>

What can be said for Christmas can be said for many areas of social life where money is deemed an inappropriate basis for action. 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 neighborliness that is, under existing norms, judged improper. This is so even if the offeree might clearly prefer to receive, say, twenty-five dollars over 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, disappointments, tasks, or favors. In fact, the universe of cases in which norms disallow monetary exchange is very large, and unremarked upon only because it is so taken for granted. It would be quite strange to give an adult a certain sum of money after hearing that his parent had died, or to ask a colleague to clean up your office for, say, two hundred and fifty dollars. This is so even though favors are of course common, and even though there can be “in kind” implicit transactions between friends, neighbors, and even spouses.

There is often a connection between norms that block exchanges and ideas about equal citizenship. The exchange can be barred by

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<sup>54</sup> A separate issue has to do with cash management as a strategy of self-control. Someone might prefer a tie to its cash equivalent because the cash would end up in the bank, given the agent's self-control strategies. See Richard Thaler, *Mental Accounting Matters* (1995) (manuscript at 1-6) (unpublished manuscript, on file with the University of Chicago Business School).

<sup>55</sup> There is a background issue about why we have some norms and not others. I do not have an answer to this question. Some norms may, however, be helpful strategies of self-control. See *id.*

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.<sup>56</sup> The prohibition on vote-trading is one example. So too with certain complex social bans on the use of wealth to buy services or goods from other people.<sup>57</sup> Some part of the intricate web of norms covering the exchange of money among both friends and strangers is 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”<sup>58</sup> are part and parcel of social norms banning the use of money. The claim is that people ought not to trade sexuality or reproductive capacities on markets because market exchange of these “things” is inconsistent with social norms identifying their appropriate valuation.<sup>59</sup> The claim is not that markets value sexuality “too much” or “too little;” rather, it is that markets value these activities in the wrong way. Judge Posner’s well-known writings on the “baby market” do not quite address this particular objection.<sup>60</sup> Under existing practice, social norms of course affect the adoption of children and impose severe sanctions on any effort (literally) to sell children even to willing and loving parents. The fact that the adoption market is accompanied by safeguards making any “sale” at most implicit is an important way of reaffirming existing norms.

<sup>56</sup> For a discussion of this idea see MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

<sup>57</sup> I do not mean to approve of the ban on these exchanges, a matter that turns, as I discuss below, on a complex range of considerations.

<sup>58</sup> See Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1871 (1987).

<sup>59</sup> We should be wary, however, of a rapid movement away from judgments about appropriate modes of valuation to a particular position about law. See *infra* notes 65-66 (discussing the relationship between tort law and the reluctance of individuals to insure against physical and emotional losses). This is a basis, I think, for questioning some of the applications of the general claims in ANDERSON, *supra* note 14.

<sup>60</sup> See generally RICHARD A. POSNER, *SEX AND REASON* 409-17 (1992); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) (describing how a free market in babies would operate and explaining why the market should be allowed to function in this area); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (proposing a practical method for creating a market for adoption).

### B. *Law and Money*

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 illegal. There is of course a sharp social debate about surrogate motherhood, and those who seek legal proscriptions are thinking in expressive terms.<sup>61</sup> One of their goals may be to fortify existing social norms that insulate reproduction from the sphere of exchange.<sup>62</sup> Or their argument may be less instrumental: They may seek to make a “statement” about reproduction without also seeking to affect social norms.

### C. *Positive and Normative Statements: Hazardous General Inferences from Particular Norm-Dependent Choices*

The existence of norms involving cash exchange bear on the possibility of inferring global judgments from particular consumption choices that are dependent on context-specific norms. Here I am concerned not with norms banning the use of dollars as a reason for action, but instead with norms that subsidize or tax certain consumption decisions. The point is important because economists often explore particular choices as a means of understanding general valuations.<sup>63</sup> But often this is a mistake, because particular choices are a function of social norms that are limited to the particular context. In a different context, the governing norms may be quite different.

Suppose, for example, that someone buys Volvos or some safety device for her home. Can we infer from such purchases something about that person’s valuation of life and health? If the particular

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<sup>61</sup> See ANDERSON, *supra* note 14, at 168-86.

<sup>62</sup> See, e.g., *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *Doe v. Kelly*, 307 N.W.2d 438 (Mich. 1981), *cert. denied*, 459 U.S. 1183 (1983). I do not mean to endorse legal prohibitions of this sort. See *infra* part VI.A.

<sup>63</sup> See, e.g., W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* 17 (1992) (“Addressing value-of-life issues by focusing on our attitudes toward lotteries involving small risks of death provides a methodology for formulating these issues in a sound economic manner.”).

purchase is dependent on context-specific norms, the answer is probably no. Social norms in a relevant community may “subsidize” the purchase of Volvos or of a certain safety device. The decision to purchase may stem from reputational effects or from the effects of the purchase on the agent’s self-conception. In another context, with different norms, reputational effects may be quite different and, hence, choices will be different as well. Perhaps norms subsidize the purchase of Volvos but also subsidize a willingness to travel to especially dangerous areas. Because social norms affect choice and diverge according to context, the value a person places on his safety cannot be described in the abstract.<sup>64</sup> Risk-reducing choices have a great deal to do with norms connected to the setting in which choices are made.

Some analysts suggest that people’s decisions not to insure certain goods—freedom from pain and suffering, the well-being of one’s children—have important implications for tort law.<sup>65</sup> Perhaps the absence of insurance suggests a judgment that injuries of that kind do not deserve compensation (by people’s own lights). But if the refusal to insure such goods is a product of social norms that are limited to the context of insurance, it may be wrong to draw a general conclusion about the appropriate domain of tort law.<sup>66</sup>

We may conclude with the suggestion that an important feature of social norms is their enormous dependence on context. A complex network of norms govern the purchase of insurance; these norms make it difficult to infer, from failures of purchase, global judgments about valuation. The point makes it hazardous to draw general inferences from particular choices.<sup>67</sup>

<sup>64</sup> Cf. G. TOLLEY ET AL., *VALUING HEALTH FOR POLICY* (1994) (finding large disparities in people’s willingness to pay to reduce different risks).

<sup>65</sup> See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *YALE L.J.* 1521, 1546 (1987) (“Individuals . . . do not voluntarily insure for non-pecuniary losses”); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *YALE L.J.* 353, 367 (1988) (“[G]iven current evidence, the aspect of strict liability that prohibits firms from shifting the risk of incurring nonpecuniary harm to consumers cannot be justified by reference to the goal of compensating consumers for harm.”).

<sup>66</sup> See Stephen P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 *HARV. L. REV.* 1787, 1914 (1995) (challenging the view that tort law is in need of fundamental reform because it mandates a type of insurance that the sovereign consumer does not demand).

<sup>67</sup> See Sunstein, *supra* note 16 (manuscript pt. III.A) (discussing some difficulties with the term “preferences” in light of the role of social norms).

#### D. *Non-fungible Money and Social Norms*

Money is generally treated as the paradigm of a fungible good; one dollar is as good as any other dollar, and no different from it. But social norms mean that money itself may not be fungible.<sup>68</sup> The uses of money and the place of different "kinds" of money are pervasively affected by social norms. People put money in different mental compartments and act accordingly. Some money is specially reserved for the support of children. Some money is for gifts. Some is for one's own special fun. Some money is to be given to charities. Some money is for summer vacation. Some money is for a rainy day. Some money is for celebrations. If you receive a fee for a lecture, or a small amount from the lottery, you may use it for a special, outlandishly expensive dinner, whereas "other" money could not in good conscience be used for that purpose.

Social norms create qualitative differences among human goods,<sup>69</sup> and these qualitative differences are matched by ingenious mental operations involving qualitative differences among different "kinds" of money. Thus a study of practices in Orange County, California reports that residents keep "a variety of domestic 'cash stashes'—generally one in the billfold of each adult, children's allowances and piggy banks, a petty cash fund in a teapot-equivalent, a dish of change for parking meters or laundry—or 'banked stashes of money,' including Christmas club savings and accounts designated for special expenditures like property or other taxes, vacations, or home and car insurance payments."<sup>70</sup>

In short, there are complex procedures of "mental accounting," in which money that falls in certain compartments is assessed only in terms of its particular intended uses, and not compared with money that has been placed in different mental compartments.<sup>71</sup> We cannot understand the uses of money itself without understanding the role of social norms. Social theorists have often feared that the use of money would "flatten" social life, above all by erasing qualitative distinctions. But it would be more accurate to report that social life, pervaded as it is by social

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<sup>68</sup> See ZELIZER, *supra* note 52, at 18 ("Despite its transferability, people make every effort to embed money in particular times, places, and social relations.").

<sup>69</sup> See ANDERSON, *supra* note 14, at 3-8.

<sup>70</sup> *Id.* at 5 (quoting JEAN LAVE, UNDERSTANDING PRACTICE 132-33 (1988)).

<sup>71</sup> See Thaler, *supra* note 54 (manuscript at 1-10).

norms, has “unflattened” money, by insisting on and enforcing qualitative distinctions.<sup>72</sup> “There is no single, uniform, generalized money, but multiple monies: people earmark different currencies for many or perhaps all types of social interactions. . . . And people will in fact respond with anger, shock, or ridicule to the ‘misuse’ of monies for the wrong circumstances or social relations . . . .”<sup>73</sup> Thus laws barring the use of money in certain contexts are complemented by norms barring the use of certain money, such as retirement money, for certain purposes, such as gambling or vacation.

### E. *Non-fungible Money and Law*

Often decisions about money can be made through private mechanisms that do not require special legal help. These mechanisms may be as simple as a mental notation. They may be more complex, taking the form of different bank accounts understood to be used for different purposes. Social norms in families and small communities often fortify these efforts,<sup>74</sup> with certain forms of money being seen as “for a rainy day” or as basically untouchable.

Law can also play a role. Some measures that might be seen as puzzling, or as objectionably paternalistic, make more sense if they are understood as precommitment strategies reflecting diverse “kinds” of money or as efforts to facilitate people’s efforts to place their money in different categories. As a facilitative strategy, consider the Individual Retirement Account (IRA). IRAs are created by a complex set of legal provisions. One of their virtues is that they allow people more easily to separate their money into different “kinds.” The social security system is mandatory, not optional, but it becomes more intelligible if we understand that people often like to have help in putting their money into different accounts with different uses. This is hardly a full defense of the social security system in its current form, but it might help in understanding any legal effort to allow or require money to be separated into different compartments.

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<sup>72</sup> See *id.*

<sup>73</sup> ZELIZER, *supra* note 52, at 18-19.

<sup>74</sup> See generally Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

## V. EQUALITY, SOCIAL NORMS, AND SOCIAL CHANGE

Norms of partiality<sup>75</sup> are an important part of social inequality. Social norms may require women to perform the most domestic labor; in many places, 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 gender role.<sup>76</sup> 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.

Of course 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 in that particular environment. A large point of law may be to shift social norms and social meaning. Consider in this connection the fact that many restaurant owners and inn-keepers actually supported the Civil Rights Act of 1964, which would have prevented them from discriminating.<sup>77</sup> Why would people want the state to act against them? The answer lies in the fact that the law helped shift social norms and the social meaning of nondiscrimination. Whereas nondiscrimination would formerly signal a willingness to act on a race-neutral basis—and hence would trigger social norms that call for discrimination against blacks—it would henceforth signal a willing-

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<sup>75</sup> See ULLMANN-MARGALIT, *supra* note 30, at 134-97 (discussing norms involving partiality and inequality).

<sup>76</sup> See generally SUSAN M. OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989) (discussing the importance of equitably distributing labor within the family and rejecting arguments that the gender-structured family is directed by nature or that its noble virtues preclude equitable redistribution of labor).

<sup>77</sup> See Lessig, *supra* note 3, at 965-67.

ness to obey the law, and hence fail to trigger adverse social norms.<sup>78</sup>

In Part IV, I dealt with cases in which social norms discourage cash payments in interpersonal relationships. But social norms help constitute a wide range of qualitatively different kinds of valuation,<sup>79</sup> and these diverse valuations much affect behavior and the social meaning of behavior. These norms are omnipresent and are usually taken for granted. Imagine, for example, that John treats a beautiful diamond in the same way that most people treat friends, or that Jane values a plant in the same way that most people value their children, or that Sandy values her car like most people value art or literature. Antidiscrimination law is often designed to change norms so as to ensure that people are treated with a kind of dignity and respect that discriminatory behavior seems to deny.

The point is not limited to race and sex equality. Consider, as an especially interesting example, the movement for animal rights. Some people think that animals should be treated with dignity and respect, and not as if they existed solely for human consumption and use.<sup>80</sup> This view is very much about social norms; it need not entail the further claim that animal life is infinitely valuable. It is best taken as a recommendation for a shift in norms governing the treatment of animals, accompanied by a judgment that the new norms will have consequences for what human beings do. The recommendation may be based on the view that, if we see animals (and nature in general) in this way, we will solve collective action problems faced by human beings in preserving animal life important for human lives; it may be based on a noninstrumental effort to extend ideals of basic dignity to all living things. Of course judgments of this kind must be defended.

## VI. QUALIFICATIONS

The discussion thus far has certainly not been exhaustive. There are many areas in which law is used in an expressive way, largely in order to manage social norms. The criminal law is a prime arena for the expressive function of law; and as we have seen, the debate

<sup>78</sup> *See id.*

<sup>79</sup> *See* ANDERSON, *supra* note 14, at 5-20.

<sup>80</sup> *See* PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 1-26 (1976).



over flag burning has everything to do with the statement that law makes. I hope I have said enough thus far to show the wide range of possible "expressions" via law and to see how the law might plausibly be used to manage social norms.

In this Section I qualify the basic 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 set of qualifications emerges from the need to impose constraints on the expressive function of law. Both of these issues are extremely large and complex. I restrict myself to a few brief observations.

### A. Consequences

I have suggested that some expressivists are concerned with norm management, whereas others are concerned with the "statement" law makes entirely apart from its consequences. As the epigraph from Herbert Simon suggests, expressivists can seem both fanatical and ineffectual—a most unfortunate combination. For those who endorse the expressive function of law, the most important testing 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 its effect on social norms and hence in "on balance" judgments about its consequences.<sup>81</sup> Here we can bridge the gap between consequentialists and expressivists by showing that good expressivists are consequentialists too.

Consider, for example, the debate over emissions trading in environmental law. Some of the most pervasive objections to emissions trading are expressive in nature.<sup>82</sup> Critics claim that

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<sup>81</sup> This is a difference between law and the case of the individual agent, where Williams's view seems more convincing. See Williams, *supra* note 21, at 85-88 (explaining that the relation of an individual agent's action to the good state of affairs that accompanies the action "may not be that of cause to effect—the good state of affairs may be constituted, or partly constituted, by the agent's doing that act").

<sup>82</sup> See KELMAN, *supra* note 11, at 27-28 (arguing that a society "fails to make a statement stigmatizing polluting behavior" when it relies upon economic incentives

emissions trading has damaging effects on social norms by making environmental amenities seem like any other commodity: a good that has its price, to be set through market mechanisms. Thus they suggest that emissions trading systems may have damaging effects on social norms by making people see the environment as something without special claims to public protection. To some extent the suggestion might be taken as an empirical prediction and evaluated as such. Will emissions trading systems have substantial effects on social norms associated with the environment?

On that issue, we may be able to make some progress. We have an empirical question subject, in principle, to empirical resolution. If emissions trading programs could be shown to have bad effects on social norms, they might be rejected notwithstanding their other virtues; perhaps the overall effects on such programs would be bad. (Compare this to the question whether to require recycling; mandatory recycling might well have better effects on norms than curbside charges.) But in the area of emissions trading programs, a high degree of skepticism is appropriate with respect to the expressivist's concern. Public attitudes toward the environment do not depend much on whether government has a command-and-control system or instead relies on economic incentives.

Of course, some people appear to think that consequences are barely relevant, and that it is intrinsically problematic to "say," through law, that environmental amenities are ordinary goods with appropriate prices. Is this a good objection to emissions trading programs if (as we might suppose) such programs can save billions of dollars in return for the same degree of environmental protection?<sup>83</sup> I do not believe that the objection has much force if, in fact, costs are lower, jobs are saved, the air is cleaner, norms are held constant, and fewer people are poor. On what basis should the "statement" made by law be taken to be cause for concern?

Or 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 like an assault on human

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to carry out environmental policies).

<sup>83</sup> See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171 (1988) (arguing that the environmental regulation debate is flawed because it fails to focus on the comparative consequences of alternate solutions).

dignity. But suppose too that the consequence of the minimum wage is to increase unemployment among the most vulnerable members of society.<sup>84</sup> 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 bad. In this sense, there is ample reason to endorse Herbert Simon's remarks at the beginning of this Article.

The debate over flag burning is an especially revealing case in point. It seems reasonable to suppose that the principal effect of a constitutional amendment allowing flag burning to be criminalized would be to increase the number of acts of flag burning. Even if this is so, many people would support the amendment because of its expressive value. Perhaps their view makes sense if the amendment would have significant effects on social norms and if those effects would be good. But if these are not simultaneously likely—and they do not seem to be—it is far from clear that it makes sense to devote a substantial amount of public and private resources to promoting an amendment dealing with flag burning.

Thus far, I have tried to resolve a possible debate between expressivists and consequentialists by suggesting that, without desirable effects on social norms, there is not much point in endorsing expressively motivated law. At most, we might say that good statements are worth supporting when judgments about consequences are unclear. But we may be able to make more progress by rethinking the relationship between expressivists and consequentialists. I have suggested that good expressivists are also consequentialists, but we may speculate too that all good consequentialists are ultimately expressivists, at least in the general sense that an expressive theory of some sort helps people to identify consequences as such. This will not entirely bridge what I have been

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<sup>84</sup> This is of course a disputed question. Compare DAVID CARD & ALAN B. KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE* (1995) (analyzing studies showing that minimum wage increases have no effect on employment) with FINIS WELCH, *MINIMUM WAGES: ISSUES AND EVIDENCE* (1978) (claiming that minimum wage increases produce greater unemployment).

treating as a gap between the two camps; but it may make it necessary to recharacterize the opposition.

We might be tempted to suppose that people can avoid expressive concerns entirely and that it is possible to assess law solely on the basis of consequences—that an open-ended, “all things considered” inquiry into consequences is a feasible way of evaluating legal rules.<sup>85</sup> But this is not actually possible. The effects of any legal rule can be described in an infinite number of ways. Any particular characterization or accounting of consequences will rest not on some depiction of the brute facts; instead it will be mediated by a set of (often tacit) norms determining how to describe or conceive of consequences. It is possible to see a large part of the expressive function of law in the identification of what consequences count and how they should be described. Something of this sort is inevitable. Because any conception of consequences is interpretive and thus evaluative in character, simple or unmediated consequentialism is not a feasible project for law (or for anything else).

More precisely, any description of the effects of some legal rule is a product of expressive norms that give consequences identifiable social meanings—including norms that deny legal significance to certain consequences. When it seems as if we can talk about consequences alone, it is only because the mediating expressive norms are so widely shared that they present no controversy.

To say this does not make expressive approaches to law less than distinctive. Many people focus on the “statement” made by law, and vote accordingly, without inquiring into the (expressively mediated) consequences of the law. We have seen that this is true of capital punishment, flag burning, and more. Many people are especially interested in the effects of law on social norms. Probably the best conception of expressivism, for law, is very much focused on consequences—not simply consequences for norms—and self-conscious about the expressive norms that make consequences count, and make different consequences count in different ways.

### B. *Constraints, Liberal and Otherwise*

What barriers should there be to governmental efforts at managing social norms? The simplest answer is that the same barriers as there are to any other kind of governmental action

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<sup>85</sup> This is an aspiration of cost-benefit analysis.

should apply. There is nothing distinctive about norm management that requires a special set of constraints.<sup>86</sup>

Thus, for example, government should not be permitted to invade rights, whatever our understanding of rights may be. 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. At least these conclusions make sense if government action is coercive.<sup>87</sup>

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. Nancy Reagan's "Just Say No" policy with respect to drugs may well be an example. It is necessary to ensure that those who engage in norm management are trusted by the people whose norms are at issue. 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.<sup>88</sup>

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<sup>86</sup> Indeed government engages in norm management on a regular basis, whether or not it does so intentionally. See Lessig, *supra* note 3, at 945-46.

<sup>87</sup> At present there appear to be few constitutional constraints on propaganda campaigns. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* 52-55 (1978).

<sup>88</sup> Relevant here is the suggestion that government may not attempt to vindicate "external preferences," that is, preferences about what other people should prefer. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 234-38 (1977). I believe that the supposed prohibition is rooted in confusions; it does not sort out the idea of "preference," and it obtains its force from hypothetical cases involving rights violations having nothing to do with external preferences. See JOSEPH RAZ, *ETHICS*

There is a final point. The social meaning of law will constrain the legitimate or permissible content of law. The meaning, set as it is by social norms, may make government efforts unsuccessful. As Daniel Kahan has shown, for example, debates over criminal sanctions are strongly affected by this problem.<sup>89</sup> So-called intermediate sanctions for criminal violations are often unpopular because they are taken to “mean” something other than public opprobrium. When a violator is told to engage in community service, he appears to have “gotten off,” even if the service is, to him, worse than a short period in jail. Hence the social meaning of the law makes the law unacceptable to the community at large. If intermediate sanctions are to be feasible, the norms that accompany them must shift as well.

The point is a general one. The meaning of legal statements is a function of social norms, not of the speaker’s intentions. The government may take a range of steps to discourage teenagers from smoking; but if those steps make smoking seem like a delicious forbidden fruit, they may be counterproductive. Measures designed to discourage unwed parenthood may actually encourage unwed parenthood. This is simply a special case of the general phenomenon of unintended consequences.<sup>90</sup> Of course unintended effects, either realized because of existing norms or in the form of unanticipated changes in existing norms, may be good as well as bad.

### C. Norm Management and Communication

For law to perform its expressive function well, it is important that law communicate well.<sup>91</sup> Unfortunately, “law” is not an agent and it cannot speak. Statute books are rarely read and are barely intelligible when they are read. The same is even more emphatically true for the *Federal Register*. Supreme Court decisions are at best filtered through newspapers and magazines. Thus, the use of law for norm management receives articulation through the anticipation

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IN THE PUBLIC DOMAIN 94-98 (1994); Sunstein, *supra* note 16 (manuscript pt. IV.A.4).

<sup>89</sup> See Kahan, *supra* note 14 (manuscript at 17) (“[T]he failure of alternative sanctions to displace imprisonment stems from their social meaning.”).

<sup>90</sup> For a discussion of the unintended cultural consequences of legal rules, see Pildes, *supra* note 13, at 937 (discussing the need to influence specific public programs by “attend[ing] to profound disaffections with the modern regulatory state” and by recognizing that “public values are constituted not only at the grandest levels of policy formation, but also in the myriad microscopic day-to-day experiences of policy”).

<sup>91</sup> I am grateful to Robert Ellickson for raising this point.

and enforcement of sanctions and through clarifying and supporting statements by politicians.

This fact can create a range of problems for effective law enforcement. The statement made by law may be different from the statement heard by the audience, because the sanctions are inadequately understood and because the supporting statements can be unintelligible or misleading. If the law's expressive function is to be performed well, it is important to develop ways to reduce these problems. A good beginning would be the wealth of work about effective and ineffective risk communication.<sup>92</sup>

### 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.

Least controversially, law may attempt to generate norms that will solve collective action problems. The central point here is that from the standpoint of individual agents, norms are given rather than chosen, and agents would sometimes like norms to be other than what they are. Often shifts in norms are a low-cost method of achieving widely or universally held social goals—as the intrinsic utility of choice stays constant while the reputational consequences of choice begin to shift. Far more controversial is the use of law to fortify social norms involving the permissible use of money. A liberal society ensures a measure of sphere differentiation, in which the realm of markets and market thinking is not coextensive with the realms of politics and family life. Hence social norms regulating the use of money are an important part of a well-functioning liberal society. Sometimes law is used to fortify those norms or to prevent them from becoming atrophied. Bans on the sale of sexual and reproductive capacities are an important illustration.

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<sup>92</sup> See, e.g., Morgan et al., *Communicating Risks to the Public*, 26 ENVTL. SCI. TECH. 2048 (1992).

For purposes of legal policy, some of the most interesting cases of norm management through law involve the control of risky behavior and the promotion of social equality. Risky behavior is often a product of social norms that people would very much like, on reflection, to change. And with respect to risk, American society has witnessed dramatic changes in prevailing norms in the last decades. Cigarette smoking is the most striking example, but similar shifts can be seen in the areas of alcohol use, drug use, seatbelt use, carrying guns, and diet and exercise. If government sees prevailing norms as a tax on or a subsidy to choice, it might seek to change norms as a way of changing choices. Certainly the point helps account for antidiscrimination policy, where a goal is to alter norms associated with both taste-based discrimination and rational stereotyping.

Are efforts at norm management unacceptably paternalistic or illiberal? In many cases they are not. As I have emphasized, norms are generally given rather than chosen. Sometimes people would like norms to be changed; often they do not have a considered view about which norms are best, but, if they reflected a bit, they would wish norms to be something other than what they are. When this is so, it is entirely legitimate to use law to alter norms that encourage people to shorten their own lives, at least when they do so in order to avoid reputational cost and without much in the way of increased intrinsic utility. Certainly efforts at norm management are more legitimate if they have a democratic pedigree. More generally, attention to the effects of social norms helps show that “choices” should not be taken as sacrosanct.<sup>93</sup>

All this leaves open a number of questions. Among the most pressing are empirical ones. Why do norm cascades occur? To what extent have shifts in norms been a function of law? How can 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. It is particularly important to decide how to handle situations in which laws motivated by expressive goals have mixed or bad consequences. I have argued that legal “statements” producing bad consequences should not be endorsed. But my simplest suggestion here is that we begin to make

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<sup>93</sup> See Lessig, *supra* note 3, at 951 (arguing that “social meanings exist” and that “their force in part hangs upon their resting upon a certain uncontested, or taken-for-granted, background of thought or expectation”); Sunstein, *supra* note 16 (manuscript pt. III.A) (discussing relationships between choices and norms).



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—which are very much a creation of law—are exercises in norm management. 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.

