
The Unification Challenge

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A COMMENT ON Wayne Norman (2011), “Business Ethics as Self-Regulation: Why Principles That Ground Regulations Should Be Used to Ground Beyond-Compliance Norms as Well,” *J Bus Ethics* 102(1): 43-57, <http://dx.doi.org/10.1007/s10551-011-1193-2>

ABSTRACT

Wayne Norman argues that there should be more similarity or unity between the justifications for markets and the extra-legal norms that apply to market agents. I question two aspects of his claim. First, why does Norman refer to this view as a view about the self-regulation of market agents? Agents could self-regulate with many different norms, not necessarily norms informed by the justifications for markets. Second, asking for more similarity might create problems in terms of the liberty of market agents to pursue other morally relevant objectives. How are we to balance these other relevant objectives and the objectives of markets?

IT SEEMS NECESSARY that agents who are part of a social institution comply with the legal norms of that institution, but what about their beyond-compliance behaviors? Shouldn't those also be informed by the justification for that institution? Although this seems desirable, many business ethicists have proposed views of market agents' moral obligations as if this question were disconnected from wider questions of the justification for markets. In fact, many business ethicists have relatively little to say about the basic justification for economic regulation.

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This is the starting point for Wayne Norman (2011) in “Business Ethics as Self-Regulation: Why Principles that Ground Regulations Should Be Used to Ground Beyond-Compliance Norms as Well.” Norman makes these observations, expresses his concerns, and then invites us to develop a view of market agents’ moral obligations where there would be more similarity between the justifications for markets, market regulations, governance, corporate law and beyond-compliance ethical obligation. (This view has been introduced elsewhere, see Heath, et al 2010.) We should unify these legal and extra-legal norms for market agents, he suggests, by developing a “unified normative theory of business obligations” (Norman 2011: 44).

Norman’s paper is more a “plea for a research agenda” than a fully laid-out view (2011: 43). But even at this early stage, there seems to be rich philosophical milk in there. It is worth extracting some of it.

I would like to make two comments, which can be summarized as follows. First, Norman’s (2011: 44) slogan is “business ethics as self-regulation.” Would it be useful to think of a different one? What does self-regulation have to do with more unity? Second, and more importantly, how unified does a unified normative theory have to be? On one side, will asking for a perfect unity between legal and extra-legal norms lead to a totalitarian conception of the moral obligations of market agents? Market agents won’t have the liberty to do anything other than securing the objectives of the legal norms. On the other side, how can trivializing the proposed agenda be avoided if a less-than-perfect unity is sufficient? Call this the unification challenge.

Let me start by summarizing what I take to be the three main claims in Norman’s paper. When it comes to market agents like corporations:

- 1) The justification for legal norms that apply to these agents should also inform the extra-legal norms.
- 2) These agents should seek compliance with the legal and extra-legal norms by themselves. (They should comply with the actual regulatory framework or regulation, obviously, but according to Norman they should also make sure their own extra-legal behavior is informed by the justification for this regulatory framework.)
- 3) The justification referred to in (1) is market efficiency.

The last claim is not made as directly as the others. But Norman (2011: 51) presents his approach as a “friendly amendment” to Joseph Heath’s (2006, 2007) market-failures approach to business ethics. Simply put, Heath wants market agents to avoid exploiting market failures, such as the externalization of pollution costs. Market failures are problematic because they undermine market efficiency. By exploiting market failures, market agents also undermine market efficiency and this they should not do.

Taken altogether, these three claims suggest that market agents should comply with legal norms designed to make sure market efficiency is not undermined. They should also make sure their own behavior, even when they comply with these norms, doesn’t undermine market efficiency.

My first comment is the least important. But making that comment explicitly might help clarify claims (1) and (2). Isn’t the ‘business ethics as self-regulation’ slogan (which is also a part of the title) of the paper misnamed? After stating his slogan, Norman explains that it should be interpreted as claims (1) and (2) above. I can see how the slogan fits with claim (2), but why (1)? What does similar justifications for legal and extra-legal norms have to do with self-regulation? As outlined above, claim (1) relates to the degree of unity of norms at different levels. It does not necessarily involve self-regulation, a situation in which an agent seeks compliance on its own.

To say that market agents should seek compliance on their own suggests that they should comply even if these norms are not enforced, that they should comply even if they don’t face any consequences for non-compliance, that they should be proactive in their attempts to comply with the norms, that they should make sure others are complying, and so on.

There is a relation between the slogan and claim (1). The term ‘regulation’ refers to the regulatory framework in place, or the legal norms. Saying that agents have to ‘self-regulate’ suggests that agents have to make sure their extra-legal behavior is informed by the relevant regulation. Since the regulation is understood as the legal norms, the legal norms inform agents’ beyond-compliance behavior. This

suggests that a similar justification informs legal and extra-legal norms. But this is one of multiple possibilities.

Imagine that I think legal norms should be designed so as not to undermine efficiency, on one hand. Imagine also I am also a stakeholder theorist. (For a canonical exposition of the view, see Freeman et al 2010.) That is, imagine I think business managers have a personal responsibility to increase value for their businesses' stakeholders. In this hypothetical case, I would agree with Norman's point (2) but not (1). I would agree that managers ought to self-regulate, but I wouldn't think the same justification should apply to legal and extra-legal norms. Yet I could still use Norman's slogan.

My second, more substantial, comment relates to what I refer to as the unification challenge. Establishing the desirable degree of unity between legal and extra-legal norms for market agents is a difficult question. It might be easier to show why it is so difficult by drawing a parallel with a similar, even if broader, question in political philosophy.

Over the last forty years or so, there has been (and continues to be) a debate on the scope of John Rawls' theory of justice. Rawls (1999: §2; 1977) argued that justice should be limited to the basic structure of society. By that, he was referring to the most basic social institutions – like the legal or educational system – with the potential to have long-lasting effects on socio-economic inequalities. Some replied that having just institutions, and people complying with these just institutions, was not sufficient. A just society also requires that people's extra-legal behaviors be informed by the same principles of justice. For instance, Gerald Cohen (2008: ch. 3) argued that a just society also requires an ethos of justice. People should have a motivation to secure justice in their day-to-day lives. If most people are committed to equality, for instance, they should be willing to earn the same income, even if they do different work.

Rawls argued for limiting the scope of justice for at least two reasons, but I am only going to deal with the second reason.² In Rawls'

² The first reason is related to the difference principle, Rawls' second principle of justice. According to this principle, a just society can allow socio-economic inequalities as long as they are to the benefit of the least advantaged (Rawls 1999: §46). Allowing these inequalities might incentivize the talented individuals to work more (if they can thereby earn a higher income for instance), which could result in a bigger redistributable surplus.

view, a conception of justice not limited to the basic structure of society would not qualify as a political conception of justice.³ Only that particular conception would have the potential to generate an overlapping consensus. That is, a consensus leaving a sufficient space for choice in order to include all “the opposing philosophical and religious doctrines likely to persist and to gain adherents in a more or less just constitutional democratic society” (Rawls 1985: 225). In a pluralistic society, the possibility of reaching an overlapping consensus is a necessary condition for accommodating the opposing philosophical and religious doctrines of such a society’s citizens. If these citizens can’t reach that consensus, they won’t agree on a conception of justice. If they don’t agree on a conception of justice, it will be impossible to ensure the stability of justice and, more importantly, to avoid coercing people into complying with social institutions they don’t consider legitimate. Therefore, a conception of justice not limited to the basic structure of society will not be stable and will lead to forms of coercion (see Rawls 2005, especially Lecture IV).⁴

In Cohen’s (2008: 116) view, principles of justice should also apply to “people’s legally unconstrained choices” and justice should be part of the social ethos. He puts forward two reasons for this. First, it is impossible to design enough legal rules to cover all possible situations where people’s behavior would have an impact on the capacity of society to secure justice. Second, such extensive legal rules would impose unacceptable constraints; “it would severely compromise liberty if people were required forever to consult such rules” (2008: 123). Justice should not inform all of people’s choices, however. Cohen specifies that people should also be entitled to a legitimate personal prerogative. They should be granted “the right to be something other than an engine for” securing justice, in order to be able to engage in other personal activities (2008: 10). But the liberty of choice granted by the personal prerogative is much smaller than the liberty of choice granted by Rawls’ conception of justice.

³ More precisely, this condition is the first of three conditions. A political conception of justice must not be presented as falling from a more comprehensive moral doctrine (second condition) and must be expressed with ideas seen as implicit in a democratic society (third condition) (see Rawls 2005: 11–13).

⁴ Rawls then argued that reasonable democratic citizens could agree on a political conception of justice. But this is contentious and it has been debated. See, for instance, Michael Barnhart (2004: 257).

Norman might be advocating a unified normative theory in business ethics for different reasons than Cohen has for advocating an ethos of justice. But their claims are similar in one respect: they want more unity between legal and extra-legal norms. The former is calling for more unity between legal and extra-legal norms in market institutions. The latter is calling for more unity between the norms of the basic structures of society and all legally unconstrained behaviors.

If Norman and Cohen's claims are similar to some extent, is there a similar risk that a unified normative theory will create the problem Rawls wanted to avoid by limiting the scope of justice to the basic structure of society? I think it could.

If one seeks a perfect similarity between the justification for markets and the justification for the extra-legal behavior of market agents, what liberty of choice will it leave to these agents? What if a corporation wants to give money to a charity, for instance? If extra-legal behaviors have to be informed by the justification for markets, and if this justification is efficiency, then this corporation should spend that money in another way (by investing in research, making expansion or other non-efficiency-undermining expenditures). This is what I mean when I say there is a risk of creating a totalitarian conception of the moral obligations of market agents. These agents will be forced to comply with the justification for markets, without the possibility of pursuing other objectives not dictated by this justification.

The other (more plausible) interpretation is that Norman is not arguing for a perfect unity. There doesn't need to be a perfect similarity between legal and extra-legal norms, just more similarity than there is now. If Cohen's argument is correct and if it applies to market institutions more specifically, this suggests that simply asking market agents to comply with the regulation would undermine the function of these institutions. It is not possible to design and impose all the necessary legal norms covering all the possible situations in which market agents' behaviors could have an impact on market efficiency. For instance, many forms of pollution fall into a legal gray area because they involve new processes, technologies, compounds, etc. On the other hand, a space for choice has to be left to market agents in order for them to pursue other morally relevant objectives that might undermine market efficiency in some cases.

If a less-than-perfect unity is sufficient, the next step will be to specify which extra-legal norms should be informed by the justification for markets and which shouldn't. Here we can expect many difficult cases to turn up. Think of the hypothetical example provided above, of the stakeholder theorist who also favors market efficiency. These two standards can easily lead to contradictory prescriptions as to how a manager should behave. Which one should have priority over the other? Increased corporate efficiency or returned value to stakeholders? And this seems to reflect a real ambiguity in Norman's paper. At one point, Norman (2011: 44, emphasis in the original) writes that extra-legal norms informed by the justification for legal norms should be seen as "a potential alternative *or supplement* to other frameworks like 'stakeholder theory,' 'corporate citizenship,' or 'corporate social responsibility.'" So, which one should it be: an alternative or a supplement? A non-trivial unified normative theory will have to say something on this question.

In conclusion, I am sympathetic to Norman's argument. I believe the unifying agenda is worth pursuing and I have argued for a unified normative theory elsewhere (Martin 2012: 12). My comments here should not be read as criticisms. They are interrogations as to where we should go next. Forty years of debates in political philosophy suggest a long-lasting debate also awaits business ethicists.

Received 2 Feb 2013 / Posted 25 Feb 2013

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