

## On the Moral Foundations of Legal Expressivism

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# Commentary

## ON THE MORAL FOUNDATIONS OF LEGAL EXPRESSIVISM

ANDREW KOPPELMAN\*

King Rex III<sup>1</sup> was a racist and an anti-Semite. In his regime, blacks and Jews were second-class citizens. Their official papers had the words "BLACK" or "JEW" stamped in large red letters on the front. If they attempted to engage in any of a wide range of ordinary activities, such as walking in the parks, they (and only they) were fined. They were routinely denounced by official proclamations declaring their inferiority.

Happily, however, their inferior legal status had no tangible bad consequences, because none of the citizens of Rex's kingdom shared his racism and anti-Semitism. In fact, everyone regarded Rex as an obnoxious idiot. When a private fund was formed to compensate blacks and Jews for the fines that Rex levied from them, it was quickly oversubscribed, so that none of those fines were actually borne by their intended victims.<sup>2</sup> (Rex's regime was otherwise benign, so the citizens agreed that it was not worth the trouble to try to overthrow him.) And, of course, the state's denunciations and official stigmatizations of blacks and Jews had no effect whatsoever on the larger culture, which was united in its hope that time and old age would soon remove from the kingdom its last racist and anti-Semite. The white Christian majority was not tempted to embrace Rex's views. Since the blacks and Jews (like everyone else) had nothing but contempt for Rex, their self-esteem was in no way compromised by Rex's ridiculous laws.

Did the blacks and Jews in Rex's regime have anything they could reasonably complain about? Matthew Adler's recent critique of ex-

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1. For the earlier history of the undistinguished line from which Rex was descended, see LON L. FULLER, *THE MORALITY OF LAW* 33-38 (rev. ed. 1969).

2. The fund also compensated the blacks and Jews for their legal expenses, any psychic distress they felt, and any disruption costs if their activities were actually stopped or changed by Rex's laws. Thanks to Matt Adler for pointing out the need for this clarification.

pressive theories of law<sup>3</sup> suggests that they did not. Legal status is not, in itself, harmful, he argues, because it does not harm anyone's well-being.<sup>4</sup> Inferior legal status *may* harm well-being, either by damaging one's self-respect, by lowering one's *social* status, or by diminishing one's access to objective goods; but these causal contingencies may or may not hold in any individual case.<sup>5</sup> Whatever harm occurs will be a causal consequence of the inferior legal status.<sup>6</sup> The inferior legal status is not itself constitutive of the harm.<sup>7</sup>

Adler's challenge to expressivism is marvelously rigorous and clear, bringing a rare philosophical precision to these issues. The conversation it has engendered promises to bring a new clarity to this discourse. Although his work has already elicited considerable disagreement, his foundational challenge has not been adequately answered.<sup>8</sup> In this Commentary, I will explain, in very brief compass, why his attack on expressivism fails.

It may be helpful at the outset to clarify what is at stake in this debate.<sup>9</sup> Adler acknowledges that rules of law sometimes might ap-

3. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

4. See *id.* at 1434-36. Adler argues that "[s]tigma is not even sufficient, let alone necessary, for status harm." *Id.* at 1436. He illustrates this by noting that "the cultural impact of [the government's stigmatizing] messages is contingent on additional factors, such as whether . . . voters are even listening to what the . . . officials are trying to tell them." *Id.* at 1436.

5. See *id.* at 1434 (arguing that "it is only contingently true that a [stigmatizing] statement by the government . . . will cause" harm to the well-being of the targeted group).

6. See *id.* at 1435-36 (arguing that harm comes not from inferior status itself, but from the possible consequences of that status).

7. *Id.* Adler reiterates this point pithily in *Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes*, 148 U. PA. L. REV. 1577, 1590-91 (2000).

8. The most prominent response to Adler is an elaborate restatement of expressivist theory, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000), but as Steven D. Smith observes, their discussion does not include "any argument that actually explains the focus of their approach on *expression* as the criterion of moral value or legal validity." Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506, 567 (2001). Deborah Hellman similarly observes that Anderson and Pildes's article "is largely explanatory rather than justificatory," and offers no "account of *why* the expressive dimension of action ought to matter in its own right." Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653, 674 (2001).

9. On first reading this exchange, I did not think I had ever taken a side on the question that Adler addresses, even though I am one of Adler's named targets. See Adler, *supra* note 3, at 1371, 1433. The reason, I think, is that my book, *Antidiscrimination Law and Social Equality*, examines theories of Equal Protection that stress the cultural meaning of government decisions as either evidence of impermissible motive or as likely to promote social inequality, but does not consider (what no then-extant theory focused on) the intrin-

appropriately turn on expressive considerations.<sup>10</sup> He repeatedly stresses the contingency of the connection between what an action expresses and its effect on social practices.<sup>11</sup> But he does not deny that contingent connections can be stable enough over time to be a sound basis for legal (even constitutional) doctrine. One might conceivably have a just society without the Fourteenth Amendment (because the society had no history of racial subordination) or the Establishment Clause (because it had no history of religious conflict). But that does not change the fact that in America, the problems to which these provisions respond have persisted for centuries. And in both cases, the connection between expression and status is a strong one. Moreover, Adler also concedes that the institutional limitations of the judiciary might provide a good reason for selecting rules of law that focus on expression, which may be a good proxy for the pernicious causal sequences that the law seeks to disrupt.<sup>12</sup>

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sic constitutional significance of that meaning. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* (1996). This gap in the literature has been filled by Deborah Hellman's excellent article, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000), though Hellman pays less attention to foundational concerns than I do here.

10. See Adler, *supra* note 3, at 1401-03, 1437; Adler, *supra* note 4, at 1593-94.

11. E.g., Adler, *supra* note 3, at 1468.

12. *Id.* at 1437; Adler, *supra* note 4, at 1593-94. Although Adler offers an "overview" and Anderson and Pildes a "restatement," neither describes all the ways in which the expressive meaning of a law can be morally and legally relevant. I cannot do that here, but a brief taxonomy may help to locate both my disagreement with Adler and my unhappiness with the way that Anderson and Pildes have answered him. A law's expressive meaning may be significant for the following three reasons:

I. *What it reveals about the process by which it came into being.* ("Meaning" here is used in the Gricean sense of nonlinguistic meaning.) See Adler, *supra* note 3, at 1384-85 (discussing H. P. Grice's definition of nonlinguistic meaning). This is what Anderson and Pildes have in mind when they offer the cases of the shoplifter whose furtive glances betray her intentions, see Anderson & Pildes, *supra* note 8, at 1508, or the white emergency rescue workers who "prefer[ ] to resuscitate white victims at mixed-race disaster scenes," *id.* at 1528. There are areas of constitutional law in which an impermissible intent can invalidate a law, most notably in the case of a racially discriminatory intent. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). For the leading defense of this approach, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 136-45 (1980) (discussing why a discriminatory intent standard is desirable); see also KOPPELMAN, *supra* note 9, at 13-56 (surveying process-based theories of Equal Protection).

Adler is not interested in this consideration, but it is what Anderson and Pildes appear to be primarily concerned with, though they weaken the constitutional requirements unnecessarily by relying on Margaret Gilbert's theory of collective agents. See Anderson & Pildes, *supra* note 8, at 1515 (citing, with approval, Gilbert's argument that groups which "(1) can properly refer to themselves as 'we,' and (2) make normative claims upon one another in virtue of their belonging to the 'we'" can be "meaningfully ascribe[d] purposes, beliefs, and other mental states" (quoting MARGARET GILBERT, *ON SOCIAL FACTS* 204 (1989))). If a law would not have passed but for the legislators' racism, it should not matter whether (as Gilbert's theory requires) the legislators were jointly committed to a racist result; the law is still invalid even if each was expressing his own racism in an uncoor-

Still, there are contexts in which Adler's claims matter, because there are some situations in the world that approximate the predicament of Rex's citizens. A prominent example is that of gays, who are stigmatized by unenforced sodomy laws.<sup>13</sup> They are arguably stigmatized once more when the law responds to the demand for same-sex marriage by creating a second-class "civil union" status, as it has in Vermont, with all the tangible benefits of marriage, but with the honorific title of "marriage" withheld.<sup>14</sup> Do gays have anything to complain about in Vermont?<sup>15</sup> The answer turns on whether Adler is

minated (or even unconscious) way. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989). Anderson and Pildes's reliance on Gilbert also produces intractable difficulties when it is combined with the idea that the norm of equal concern and respect can be breached by failures and omissions, as when persons negligently toss beer bottles on my lawn, *see* Anderson & Pildes, *supra* note 8, at 1527, or when teenagers blare their car horns late at night, oblivious to the fact that others are trying to sleep, *see id.* at 1512-13. In neither case can it make any sense to say that the actors have collectively committed themselves to their thoughtlessness. For a discussion of the difficulties of relying on Gilbert in this context (which in no way impugns Gilbert herself, who was addressing different questions), see Simon Blackburn, *Group Minds and Expressive Harm*, 60 MD. L. REV. 467, 472-76 (2001).

II. *The objective significance of the law itself, read in light of the social practices, conventions, and contexts in which it occurs.* Here what matters is not intentions, but the law's "public meaning," which is "a product of interpreting the norm in the full context in which it is adopted and implemented." Anderson & Pildes, *supra* note 8, at 1524, 1525. An example would be sad music, which does not necessarily indicate that the musicians or composer are sad, and need not make the audience sad. *Id.* at 1508. It is with respect to the significance of public meaning, per se, that I am joining issue with Adler here. Anderson and Pildes do not engage this issue directly, because when they examine public meaning, they appear to be primarily concerned with what public meanings reveal about the actor's state of mind, including, perhaps, the actor's failures and omissions. *See, e.g., id.* at 1524-25.

III. *The material and cultural consequences of the law.* Adler freely concedes that expressive conduct may have (good or bad) consequences, but insists that consequences do not automatically follow from expression. Adler, *supra* note 3, at 1434-36. I have no disagreement with him here. *See* KOPPELMAN, *supra* note 9, at 57-114 (discussing result-based Equal Protection theories). Consequences matter. The question is whether they are all that matters.

13. *See* RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 60 (1988) ("[U]nenforced sodomy laws are the chief systematic way that society as a whole tells gays that they are scum.").

14. *See* 2000 Vt. Acts & Resolves 91 (to be codified in scattered sections of VT. STAT. ANN. tits. 4, 8, 14, 15, 18, 32, 33), available at <http://www.leg.state.vt.us/docs/2000/acts/ACT091.htm>.

15. To help readers who are having difficulty understanding what the complaint might be, I offer the following hypothetical: For centuries, American law prohibited interracial marriages. At one time or another, forty-one American colonies and states prohibited them. Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 49 (1996). By the time the Supreme Court invalidated these laws in 1967, they were still on the books in sixteen states. *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967). Suppose that, before the Court's decision, Virginia had created a status for interracial couples called "civil unions," with all the legal rights of marriage, but

correct. Are expressive wrongs bad in themselves, or are they bad only because of their contingent connection to tangible injuries?

The core of Adler's article offers a general argument why expressive theories cannot be persuasive. His method is ingenious and elegant: to "construct a progressively refined and sophisticated picture of the moral criteria governing (or plausibly governing) legal decisions, starting from the simple core of preference-utilitarianism and then adding new moral considerations or refining existing ones."<sup>16</sup> He moves from the various forms of utilitarianism, through various forms of non-utilitarian consequentialism, deontology, and specifically political theories.<sup>17</sup> At no point does the developing theory become expressive. At no point does morality dictate that expressive harm can count, *per se*, as an injury. And from this, he concludes that the legal status of inferior cannot be, in itself, harmful for anyone.<sup>18</sup>

The persuasiveness of the argument depends on the thoroughness of its canvassing of possible moral considerations. And here is where it fails. A major strand of Western moral and political thought, led by Rousseau and Hegel, is entirely ignored by Adler's survey. That tradition emphasizes two moral factors that Adler neglects.

The first consideration is the human need for recognition. People want and deserve to be respected. Insult is a wrong even if it is accompanied by no tangible harm, loss of status, or even psychic distress. Justice Thurgood Marshall liked to tell the following story about tourists who mistakenly entered the Justices' private elevator:

Finding a lone black man standing there, [the tourists] said, "First floor please." "Yowsa, yowsa," Marshall responded as he pretended to operate the automated elevator and held the door for the tourists as they left. Marshall regularly recounted the story, noting the tourists' puzzlement and then confusion as they watched him walk off, and later realized who he was.<sup>19</sup>

Marshall does not appear to have experienced any psychic distress at all as a result of this episode. On the contrary, it seems to have given him pleasure, and the pleasure was compounded every time he had the opportunity to repeat the story. But it does not follow that he was not insulted, and therefore wronged, by the tourists' behavior. (If

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not the title. Would the interracial couple have had anything left to complain of? Would they have had standing to challenge the law?

16. Adler, *supra* note 3, at 1462.

17. *See id.* at 1462-93.

18. *See supra* notes 4-4 and accompanying text.

19. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 64 (Avon Books 1981).

insult does not count, then does it follow that the tourists had no good reason to feel embarrassed or apologetic?)

Justice Marshall suffered no tangible harm from the insult. A person might disprefer being treated this way, but, as Adler notes, "then again he might disprefer anything."<sup>20</sup> How can anyone have a standing obligation to respect his (possibly idiosyncratic) preference not to be harmlessly insulted?

Yet it is a stretch to regard this preference as an idiosyncratic one. Adler appears to assume without argument that the desire to have one's value recognized and acknowledged is just one preference among all the others, like chocolate ice cream and cotton underwear.<sup>21</sup> Some of the principal philosophers in the Western canon have thought, on the contrary, that the desire for recognition "is not just another desire that we happen to have; it is the core human desire, central to our sense of well-being, our sense of who and what we are."<sup>22</sup> Rousseau, for example, thought that *amour-propre*, which can be roughly translated as pride or vanity, is *the* fundamentally human passion, that which distinguishes us from the animals.<sup>23</sup> Hegel thought that the desire for recognition was the basic substrate of all human relations.<sup>24</sup> And this view is not peculiar to these long-dead philosophers.<sup>25</sup> Recognition is one of the fundamental themes of

20. Adler, *supra* note 4, at 1590.

21. See *id.* Nietzsche heaped scorn on this kind of utilitarian effort to level all human desires to a single currency. "If we have our own *why* of life, we shall get along with almost any *how*. Man does *not* strive for pleasure; only the Englishman does." Friedrich Nietzsche, *Twilight of the Idols*, in *THE PORTABLE NIETZSCHE* 463, 468 (Walter Kaufmann ed. & trans., 1968). For a more systematic critique of this kind of levelling, see T.M. Scanlon, *Preference and Urgency*, 72 *J. PHIL.* 655 (1975).

22. STEVEN B. SMITH, *HEGEL'S CRITIQUE OF LIBERALISM: RIGHTS IN CONTEXT* 117 (1989).

23. JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, in *THE FIRST AND SECOND DISCOURSES* 77, 222 (Roger D. Masters ed., Roger D. & Judith R. Masters trans., St. Martin's Press 1964) (1755) (describing vanity as "a relative sentiment, artificial and born in society, which inclines each individual to have a greater esteem for himself than for anyone else" and distinguishing this concept from "[l]ove of oneself," which is "a natural sentiment which inclines every animal to watch over its own preservation").

24. I describe the pertinent views of Rousseau and Hegel in greater detail, with numerous citations, in Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 *YALE J.L. & HUMAN.* 399, 408-10, 416-20 (1992) (book review).

25. For a short review of Rousseau's continuing importance, see Allan Bloom, *Rousseau—The Turning Point*, in *CONFRONTING THE CONSTITUTION* 211 (Allan Bloom ed., 1990). On Hegel's influence, see CHARLES TAYLOR, *HEGEL* 537-71 (1975).

modern political life, pervading questions of multiculturalism, feminism, nationalism, and cultural separatism.<sup>26</sup>

The demand for recognition is not per se a political one. It has no necessary relation to politics. Both Rousseau and Hegel envisioned its emergence in a state of nature.<sup>27</sup> Hegel's famous master-slave dialectic arises out of the clash of two consciousnesses in a wilderness in which there is no law, but only a struggle to the death.<sup>28</sup> And it was not the state that looked at Justice Marshall and saw an elevator operator. (Marshall himself is the only state official in the story.)

Steven D. Smith has asked whether the argument just described "is actually another kind of consequentialist argument. If we all have a psychological need for respect, why isn't causing the state to recognize and satisfy that need an argument about good consequences?"<sup>29</sup> There is a sense in which it is, although it is not reducible to the utilitarianism-plus-deontology that Adler espouses, and so the point could be taken as a minor amendment to Adler's consequentialism. On the other hand, the gap between intrinsic wrong and consequentialist wrong becomes awfully narrow here. If recognition is a good thing in itself, then we do not really care about consequences that happen contingently to follow from it. The sort of scientific analysis of causal regularities that Adler calls for would not be helpful here. Rather, the wrong Justice Marshall suffered was complete in itself before any consequences followed from it. The way to prevent this particular bad consequence from ensuing would not be to figure out what its social causes are, but to monitor expressive behavior to determine whether insult has occurred.

When one turns to political considerations, Smith's objection evaporates. There is nothing consequentialist about the contractarian objection to second-class citizenship. Politics matters, because it can (and, according to both philosophers, does) transform the *desire for* recognition into a *right to* recognition. Both thought that the state was, above all, a response to the struggle for recognition. For both, the point and purpose of government was to set up a framework whereby each person's desire for recognition was satisfied. Rousseau's

26. This is argued with characteristic elegance by Charles Taylor in *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994).

27. See generally ROUSSEAU, *supra* note 23; G. W. F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A. V. Miller trans., 1977) (1807).

28. See HEGEL, *supra* note 27, at 111-19.

29. Personal communication from Steven D. Smith (Oct. 11, 2000).

social contract is designed to prevent the oppression that arises when one person rules over another: "as each gives himself to all, he gives himself to no one; and since there is no associate over whom one does not acquire the same right one grants him over oneself, one gains the equivalent of everything one loses, and more force to preserve what one has."<sup>30</sup> While Rousseau's goal is the negative one of preventing tyranny, for Hegel, juridical recognition is a positive good. For Hegel, the right of recognition "is not simply a contingent feature of the modern state; it is its inner soul and purpose."<sup>31</sup> The state, by according legal equality to persons, "unites men in an inward manner, whereas needs and necessity bring them together only externally."<sup>32</sup> The idea of recognition these thinkers invoke is implicitly at the root of much of contemporary Fourteenth Amendment scholarship, notably Kenneth Karst's celebrated "principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member."<sup>33</sup>

If these theories are accepted, then Rex's laws are unjust for two reasons. First, they are insulting. And second, the insult is made more serious by the fact that it emanates from the state, the entity that exists precisely in order to accord to persons' recognition. Rex's laws contradict a central reason for having a state in the first place.

Now, I have merely described these views. I have not defended them and will not attempt to do so here. Perhaps Rousseau, Hegel, and the legions of thinkers influenced by them are wrong. But Adler has not shown that they are. Until these ideas are refuted, the suspicion will remain that there is something wrong with Rex's regime, and that legal status matters.

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30. JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 53 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press 1978) (1762).

31. SMITH, *supra* note 22, at 123.

32. G. W. F. HEGEL, *PHILOSOPHY OF MIND* § 431Z, at 171 (William Wallace trans., Clarendon Press 1971) (1807).

33. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).