Expressivist Jurisprudence and the Depletion of Meaning

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Recommended Citation
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EXPRESSIVIST JURISPRUDENCE AND THE
DEPLETION OF MEANING

STEVEN D. SMITH*

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  Young University; J.D., Yale University. Matt Adler, Larry Alexander, Curt Bradley,
  Deborah Hellman, Andy Koppelman, Bob Nagel, Bob Rodes, and participants in a work-
  shop at the University of Minnesota all gave helpful comments in advance of the Sympo-
  sium. I also benefited from the exchange at the Symposium, and especially from Ed
  Baker's thoughtful commentary. Unfortunately, that benefit is inadequately reflected in
  the present Article; comments at that late stage, I've found, often provide material more
  suitable for ongoing reflection than for immediate incorporation.
The notion of an "expressivist jurisprudence"—or of an "expressive theory of law"—is initially puzzling in the same way that calls for a "vocal theory of opera" or a "visual account of painting" would be puzzling. It seems plain enough that law "expresses," or that it conveys "meanings"; that is just the way law quite obviously works. Law is not like a bully or a bulldozer that can just do things sullenly and through brute force; at its core, law is constituted by words, sentences, arguments, imperatives—by things that mean. If law did not convey meanings it would be impotent; or rather, it would not be law. Consequently, the term "expressive theory of law" seems to involve a sort of redundancy: every theory of law, it seems, will necessarily be an "expressive" theory of law (or, perhaps, a theory of "expressive" law). If anything, one might think legal scholars need to be reminded from time to time that law involves anything other than expression and "meaning."  

Nonetheless, over the last decade or so, scholars like Richard Pildes, Elizabeth Anderson, Charles Lawrence, Cass Sunstein, Law-

1. In a memorable essay, Robert Cover stressed that "[l]egal interpretation takes place in a field of pain and death," and that this violent dimension of law is one that "the growing literature that argues for the centrality of interpretive practices in law blithely ignores." ROBERT COVER, Violence and the Word, reprinted in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203, 203-04 (Martha Minow et al. eds., 1992) (footnote omitted).
rence Lessig, Deborah Hellman, Jack Balkin, and others have generated a body of scholarship self-consciously calling special attention to law’s expressive dimension, or “social meaning.” This body of scholarship can be seen as developing roughly in two overlapping stages. In stage one, beginning in the mid-1980s, scholars like William Marshall and Charles Lawrence and jurists like Justice O’Connor offered local expressivist proposals in an effort to deal with particular problems in Establishment Clause and Equal Protection law. Although this sort of localized expressivism continues (in Deborah Hellman’s recent article advocating an expressivist approach to Equal Protection, for example), it also matured in the 1990s into a second stage in which a few scholars—most notably Anderson and Pildes—began to articulate somewhat loftier aspirations for expressivism. These scholars began to treat expressivism more systematically and as a sort of general theory or jurisprudential position.

My assignment is to comment on and perhaps to criticize this expressivist turn. In order to fulfill this assignment, I need to try to say what expressivism is, or what its point is; and this means trying to tell how the expressivist position is more than truistic. Much of this Article, especially Parts I and II, is accordingly devoted to an effort to extract what I believe are the important insights and claims from what might seem to be a mass of platitudes, and to offer an interpretation of the essential meaning and significance of the expressivist turn in


5. See Anderson & Pildes, supra note 2.

6. As it turned out, figuring out what expressivism is about proved to be much more difficult than I had anticipated when accepting this assignment. The interpretation I propose here is quite different than the one I contemplated five drafts ago; and if it turns out that I have largely misperceived what expressivism is about, I have some consolation in knowing that I will not be the first one in this position. Compare Matthew Adler, Expressive Theories of Law: A Skeptical Overview, 148 U. PA. L. REV. 1363 (2000) (developing a lengthy and analytically fastidious account and critique of expressive theories of law), with Anderson & Pildes, supra note 2, at 1564-65 (declaring that “[t]o a large extent, the target Adler attacks is not one we wish to defend” and that “[o]nce the concept of expression is understood as expressivists understand it, many of Adler’s criticisms . . . clearly miss the point.”).
legal scholarship. For now I can say, probably somewhat cryptically, that it seems to me that expressivism is best understood as an attempt to overcome, at least for law, what is sometimes called "the disenchantment of the world," or what we might think of as the problem of "the depletion of meaning." The attempt is one that we might—and that I do—sympathize with. But I will argue in Part III that this attempt is ultimately unsuccessful, mainly because expressivist scholars lack the metaphysical resources to pull it off.

I am not sure whether my interpretation will be wholly congenial to expressivist scholars themselves, and I assume that my criticisms will not be. So I hasten to acknowledge that, for several reasons, what I have to say about expressivism is necessarily tentative. In the first place, what I've been calling the expressivist turn is a fairly new development—probably the most systematic articulation occurs in an article by Anderson and Pildes that appeared earlier this year—and it is not exactly a tightly-knit movement. Expressivist scholars differ significantly in their purposes and claims. Indeed, they exhibit differing degrees of interest in or commitment to expressivism, ranging from scholars like Pildes, who are fully immersed, to those like Sunstein, who have barely a toe in the water. In addition, I should acknowledge that the expressivist turn is not something that I had understood myself to be either a proponent or an opponent of or that I had followed closely, though I have by now read a number of these writings in preparation for this conference.

Finally, I should acknowledge forthrightly that my interpretation of expressivist jurisprudence may go somewhat beyond what expressivists have explicitly communicated, or perhaps beyond what they have consciously intended. If so, it seems to me that expressivist scholars have no cause in principle to complain; their own theories and practices authorize as much. On their own premises, I suppose they do have standing to debate whether my interpretations are "objectively" justified, or whether my reading of their work is one that a "reasonable observer" would make; and if there is any value in this Article, it may lie in the clarification that such a debate might provide.

8. I did write an article years ago criticizing the "endorsement" approach to the Establishment Clause. Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test, 86 Mich. L. Rev. 266 (1987). To that extent, I suppose I was an opponent of one practical application of expressivism.
9. For example, in their "General Restatement," Anderson and Pildes's interpretation of expressivist jurisprudence arguably goes beyond what other expressivists have consciously intended. Such seems to be the nature of both expressivism and Restatements.

In this Part, I want to notice several claims that expressivist scholarship commonly makes. Most of these claims are descriptive; that is, they are claims about whether, how, and, in a sense, where law means. One of the claims is more normative in character; it is a claim about what gives a law its validity or normative status. I will suggest that none of these claims quite captures the real contribution or “message” of the new expressivism. But taken cumulatively, these claims help point us to what this body of scholarship is about.

A. Descriptive Claims About Legal Meaning

Expressivist scholarship makes recurring claims about the nature of meaning in law. But at least on first hearing, most of these claims seem almost platitudinous. Though they are important in understanding expressivism, they do not represent its distinctive message.

1. The Claim That Law Has an “Expressive Dimension,” or That Law “Sends Messages.”—Probably the most central claim made by expressivists, as the term itself suggests, is that law has an expressive dimension—it conveys meanings, sends messages. This claim is surely correct, and lawyers know it: the different aspects of expressing and discerning meaning—writing, revising, reading, interpreting—are what lawyers, judges, and legal scholars spend their professional lives doing. But as noted earlier, the claim that law expresses meanings is also so obvious, and so universally recognized, that in itself it can hardly amount to any distinctive jurisprudential perspective or contribution. The contention that law works by expressing meanings seems as uncontroversial as the contention that music works through sounds, or that stories involve characters.

Still, we should not cast this claim aside too quickly. In the first place, even if not distinctive, the claim is a founding premise for expressivist jurisprudence. In addition, when prominent and undoubtedly capable scholars feel moved to emphasize the seemingly obvious, there is probably a reason. Trying to ascertain that reason may help us to understand their purpose and the situation that generates their effort, even if the claim itself seems trivially true.

2. The Claim That Law’s Meaning Is Determined Not Solely by What the Authors or Legislators Intended but also by What Readers of (or Those Subject to) the Law Perceive.—Expressivist scholars tend to associate the meanings of laws less with what lawmakers intend and more with what we might call “perceivers’ meaning”—that is, with the perceptions or
understandings of readers, or "the public," or those subject to the
law. This emphasis is discernible both in more localized versions of
expressivism and in its more general formulations. Thus, the Estab-
ishment Clause "endorsement test," which is probably the leading in-
stance in which an expressivist perspective has actually been absorbed
into official doctrine, emphasizes the meanings that people will per-
ceive or associate with laws or government actions. Even if legisla-
tors did not intend to endorse religion, a law might be invalid under
that test if it creates a perception that government has endorsed reli-
gion. Similarly, in Charles Lawrence's proposal for construing the
Equal Protection Clause, it is the perceptions, or "cultural meaning,"
of laws—not the conscious intentions of legislators—that are finally
dispositive. More generally, expressivist scholarship tends to empha-
size "social meaning" or "public meaning" over legislative intentions
or "speakers' meaning."

This claim about how law means—or perhaps about where the
locus of meaning lies—is obviously more specific than the general
claim that law expresses meanings. Still, I think this claim does not
capture the distinctive contribution of recent expressivist scholarship
for a couple of reasons.

First, the idea that the meaning of a statement, or of a legal text,
is determined not just by the speaker's or legislator's intention but
also by the perceptions or understandings of readers or subjects is by
now thoroughly commonplace. The hard thing in contemporary le-
gal culture is to find someone who does not embrace this view in some
form or other—and indeed, who does not treat it as almost axiomatic.
In constitutional law, for example, "nonoriginalists" have long argued
that constitutional meaning is not definitively determined by "fram-

10. See, e.g., Hellman, supra note 2, at 13-14 (rejecting the "invidious intent" approach
to analyzing Equal Protection violations and instead arguing in favor of a test that relies on
the meaning of the law in society).
11. The test was initially set forth in Justice O'Connor's Lynch v. Donnelly concurrence.
12. See id. at 692 ("What is crucial is that a government practice not have the effect of
communicating a message of government endorsement or disapproval of religion.").
13. See Lawrence, supra note 2, at 355 (noting that under the "cultural meaning" test,
"the harm of stigma occurs irrespective of the presence of conscious motive").
14. See, e.g., John T. Parry, The Virtue of Necessity: Reshaping Culpability and the Rule of
Law, 36 Hous. L. Rev. 397, 427 (1999) (asserting that "the social meaning of a law can be
quite different from or at least richer than what the legislature intended"). In expressivist
scholarship, the term "social meaning" is used not only with reference to law, or to specific
laws, but also with regard to the whole gamut of cultural practices and institutions. For
example, Jack Balkin's article, The Constitution of Status, supra note 2, is filled with discus-
sion of the "social meaning" of homosexuality and heterosexuality; Balkin also refers to the
"social meaning" of such things as race, ethnicity, and gender.
ers’ intentions.” But even self-styled “originalists,” like Justice Scalia, tend these days to emphasize “objective” or “textual” meaning. The meaning of a constitutional provision is provided, for them, not by what “the framers intended,” but rather by what readers, or “the public,” would have understood. Even those who employ an “intentionalist” usage as a matter of habit may explain when pressed that they really mean to refer to readers’ or public meaning. So the dispute between these “originalists” and those who favor “nonoriginalist” (or present-oriented, or “dynamic”) approaches to interpretation is not for the most part over “speakers’ meanings” versus “perceivers’ meanings,” but rather over which class of perceivers, or which “public,” gets to control meaning—the public at the time a law was enacted, or the public now?

Indeed, even scholars who defend an intentionalist or authorial version of textual meaning—Paul Campos, for example—do not deny the fact of readers’ understandings or public perceptions of the meaning of texts. Nor do they deny that this fact could, for some purposes, be more relevant than the separate fact of “authors’ intentions.”

15. Evolutive theories of constitutional interpretation, as opposed to originalist theories, hold that “the Constitution is not a static document and needs to be read dynamically, as an ongoing evaluation of popular policies” and that such interpretation should be consistent with “large-scale changes in public values, precedent, and normative metrics external to the Constitution.” DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 86 (2d ed. 1998).

16. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997) (“The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law . . . .”).

17. For an approving discussion of this shift from an “intentionalist” to a “textualist” originalism, see Randy E. Barnett, An Originalism for Nonoriginalists, 45 LOY. L. REV. 611 (1999).

18. Judge Bork, for example, has given credence to the notion that the Constitution should be interpreted in light of public meaning:

Though I have written of the understanding of the ratifiers of the Constitution, since they enacted it and made it law, that is actually a shorthand formulation. We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law . . . .

19. Campos contends that “reading” or “interpreting” requires only the determination of an author’s semantic intentions. See, e.g., Paul F. Campos, That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text, 77 MINN. L. REV. 1065, 1092 (1993) [hereinafter
once again, in emphasizing what we might call "perceivers' meaning" over authors' intentions, expressivist jurisprudence merely points out what most everyone already understands.

A second reason why a claim locating meaning with perceivers over speakers or authors fails to capture the central contribution of expressivism is that, at least in some of their more recent and reflective work, expressivist scholars actually seem less committed to "perceivers' meaning" than many other scholars and jurists are. Recent expressivist work reflects a skepticism, or at least a nervousness, about the idea of "social meaning," as well as a more deliberate turn to something else—to an "objective meaning," or to a "public meaning" that they evidently suppose to be different than "social meaning" understood sociologically. Just what this new sort of meaning consists of remains obscure, and we will return to the subject later. For now, though, we can notice that in turning away from actual "social meaning"—from what real people in society in fact perceive or understand—expressivist scholars follow the lead set by Justice O'Connor in her "endorsement" opinions. Having begun by suggesting that constitutionality should hinge on whether a challenged law or practice was either intended or perceived as endorsing religion, O'Connor

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20. See, e.g., Hellman, supra note 2, at 3 n.10. Hellman noted:

At the suggestion of Richard Pildes, I have largely abandoned use of the term "social meaning" in favor of the "expressive dimension" or "expressive character" of a law or policy. While I continue to understand all three terms as synonyms, Pildes has pointed out that "social meaning" is understood by some readers as calling attention to the effects of laws rather than to their expressive character.

Id.

21. See Lynch v. Donnelly, 465 U.S. 668, 690 (O'Connor, J., concurring) ("The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed.")
quickly clarified that her test would not make dispositive the perceptions of actual people, but rather of an idealized "objective" or "reasonable observer." Hence, in *Lynch v. Donnelly*, the case in which the "endorsement test" originated, there was considerable evidence (and the lower court explicitly found) that at least some residents of Pawtucket, Rhode Island, in fact perceived an endorsement of Christianity in the city's Christmas display. Justice O'Connor did not dispute the finding or the fact, but she declared this fact legally beside the point: an objective observer, it seemed, would not perceive a message of endorsement—even if the actual residents of Pawtucket did.

A different and perhaps more surprising manifestation of the expressivists' lack of attachment to "perceivers' meaning" occurs in the recent "General Restatement" by Anderson and Pildes. There the authors defend the possibility of an actual (not merely fictional) "legislative intention" against the familiar criticism that no such intention is even possible. Whether their defense is successful is a question I will defer to a later point. I do not mean to suggest that Anderson and Pildes are advocating an "authors' intentions" view of legal meaning. Still, in defending the possibility of such a meaning against what is probably the leading objection to it, Anderson and Pildes show, I think, that their overall objective is not simply to enter the well-worn debate between authors' and perceivers' meanings on the perceivers' side. Something more interesting seems to be going on.

22. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.").


26. *See Anderson & Pildes, supra* note 2, at 1520-27 (supporting the notion that collective meaning can be attributed to a governmental institution); *id.* at 1526-27 ("[J]ust as we can attribute purposes, beliefs, attitudes, and other states of mind to various plural subjects under certain conditions, we can do the same for political bodies."). We will later consider that objection and the expressivist response at greater length.

27. At the Symposium, Anderson and Pildes were much faulted for featuring this limited defense of an "intentionalist" conception of meaning. Critics seemed to regard this part of their "Restatement" as a tactical blunder. Maybe so, but the fact that two legal scholars who have developed an expressivist position more carefully and over a longer period of time than probably anyone else undertake this defense should give us pause. Their undertaking seems a clue as to what they are trying (or at least groping) to achieve.
3. **The Claim That Meanings Are Determined in Accordance with "Conventions."** —In connection with the argument that legal meaning is not determined solely by authors' or legislators' intentions, expressivist scholarship sometimes notes that meaning is determined in accordance with linguistic and legal conventions that are independent of the intentions of any particular author or legislator. Once again, this is a perfectly familiar point, and one that, of necessity, lawyers and legal scholars are acutely aware of. It is hardly an exaggeration to say that the principal purpose of law school is to train students in the conventions of legal language and usage: the student's "But I meant . . ." is routinely met with, "But that's not what you said," or "That isn't what this term means." Thus, legal writing instructors drill students in the particular conventions of legal usage so that they can use these conventions in writing memoranda and briefs. And professors school students in the conventions by which rules and doctrines receive their meanings. Lawyers themselves constantly turn to forms, precedents, and legal dictionaries as they employ prevailing conventions in an effort to express their intended meanings. Just what kind of meanings we can squeeze out of conventions (and just what that status of those meanings is) turn out to be difficult questions to which we will need to return. For now, we need only observe that the claim that meanings are conveyed through the use of conventions is so commonplace that, once again, it can hardly be the key to understanding what expressivist jurisprudence is all about.

4. **The Claim That Legal Meaning Is Not Exhausted by "Communicative" Meanings.** —In their recent "General Restatement," Anderson and Pildes underscore what was somewhat less explicit in earlier writings: the meanings of legal texts include, but are not limited to, those meanings that are "communicative" in character. "Communicative meanings," it seems, are those that a law's authors actually intend to convey. But an act or a law "expresses" meanings, Anderson and Pildes contend, beyond those that it intentionally "communicates."

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28. See, e.g., Anderson & Pildes, supra note 2, at 1528 ("The communication of attitudes creates social relationships by establishing shared understandings of the attitudes that will govern the interaction of the parties. . . . Shared understandings of the attitudes governing social or political interactions introduce conventional elements to these interactions.").

29. Cf. Adler, supra note 6, at 1395 ("The conventionalist view [of meaning] is a standard view within the philosophy of language.").

30. See Anderson & Pildes, supra note 2, at 1508 ("To communicate a mental state requires that one express it with the intent that others recognize that state by recognizing that very communicative intention.").

31. See id.
They give an example on an individual level: "The shoplifter may express her intention to get away with stealing a purse in her furtive glances. But she hardly intends to communicate this intention." In the same way, laws may "express" meanings that the lawmakers did not intend to communicate.

With this claim about noncommunicative meanings, have we at last come upon an element that is distinctive to expressivist jurisprudence? One that is not susceptible to the response, "Tell us something we don't all know already"? It seems to me that what we might call the factual component in the expressivist claim—the factual assertion, that is, that people perceive "messages" in laws that legislators do not intend to communicate or that people take laws as evidence of intentions or "mental states" that do not figure in any legislative "communication"—is again perfectly plain and uncontroversial. Does anyone doubt this? What seems more distinctive, and perhaps troublesome, about the expressivist claim is its insistence that these noncommunicative effects are part of a law's "meaning," or that they are part of what the law "expresses."

This insistence upon a very encompassing use of the notions of "meaning" and "expression" seems to be largely peculiar to expressivist scholars. The somewhat peculiar usage helps account for the misunderstanding reflected in the recent exchange in which Matthew Adler carefully and comprehensively criticized expressive theories of law, only to be told that he had missed the whole point by equating "expression" with "communication." To be sure, nothing prevents expressivists from using terms like "expression" or "meaning" in the way they want to. But a critic might complain that expressivist scholars are merely promoting confusion by confounding different things, or by taking advantage of the contingency that in our language, "to mean" happens to have a communicative or intentional sense ("I think he means that ironically" or "S-O-S means 'help'") and also a more evidentiary sense ("When he says 'I'll give you a call' he means 'I'm not interested in talking with you'"). What is the point, a critic might wonder, of conflating these distinct senses of "meaning"? And what can be the result, other than (strategic?) confusion?

32. Id. (emphasis added).
33. Id. at 1565-70. Anderson and Pildes also assert that "this confusion is also central" to my own "critique of the 'no endorsement' test" and that it "takes the force out of much of [my] critique." Id. at 1565 n.185 (citing Smith, supra note 8, at 286-91). Because my article is not the focus of their "General Restatement," Anderson and Pildes do not elaborate on this assertion, and I confess that I do not understand it.
34. In practice, no doubt, these distinctions run into all of the subtleties of language and human interactions. For example, the second of my assertions ("When he says 'I'll
To be sure, it is hard to know at this point just how much weight expressivists want to put on law’s “noncommunicative meanings”—and for what purposes. Most obviously, they want noncommunicative meanings to be a basis for invalidating laws under, for example, the Establishment or Equal Protection Clauses. As noted, a law might be held to violate the Establishment Clause if it “expresses” a preference for a religion, even though the legislators never intended to “communicate” any such preference. It is less clear whether expressivists would also say that the noncommunicative meanings of a law should be enforceable. Should people be held criminally responsible or civilly liable, for instance, for violating a statute’s “noncommunicative meanings”? The suggestion provokes concern, because “noncommunicative meaning” seems to be a more capacious and far more amorphous category than “communicative” or “intended” meaning. Conversely, if noncommunicative meanings count only for the purpose of invalidation, then it seems we are committed to saying that a law has one kind of meaning for one legal function and a significantly different kind of meaning for a different legal function. Such a divergence would underscore the concern about the potential for confusion that attends noncommunicative meaning.

Nonetheless, I suspect that there is an understandable and even attractive (if somewhat misdirected) purpose behind the expressivist impulse to recognize something more than the communicative function of a law and to treat that “something more” as the law’s “meaning”—not just its “effects” or “consequences” in an evidentiary sense. But that purpose requires a bit more background before it can be presented.

5. The Claim That Law Influences “Social Meanings,” or That It Has Cultural Impact.—A good deal of expressivist scholarship emphasizes that law works not only, or perhaps not even primarily, through direct coercion; rather, law affects and alters “social norms,” which in turn influence the way people behave. To put the point differently,
law has a cultural impact that is distinguishable from (and possibly more powerful than) its more direct coercive effects.

Once again, this claim seems to be quite obviously right, and the point is widely recognized both by scholars and citizens generally. Scholars talk about law’s “teaching” or “educative” or “symbolic” functions; and in my experience students and non-lawyers seem even more inclined to invoke these functions in explaining, criticizing, or justifying law. Perhaps that is because many legal scholars, aspiring to reshape law in a scientific, or “analytical positivist,” or “rationalist” direction, have learned to disregard its more indirect cultural effects that are less easily cognizable and measurable. This tendency by some scholars perhaps explains how expressivist scholars can announce, sometimes with an air of discovery, what many lawyers and most non-lawyers would probably take for granted—that law’s “cultural impact” is important and arguably as powerful as its more positivistic and coercive effects. Expressivist scholars rightly correct this tendency, I believe, and they have also made valuable contributions to understanding how law affects social norms.35

Still, there is nothing especially novel about the claim that law teaches as well as coerces, or that law has important cultural consequences. The first insight is common enough. To mention just one instance, Lee Bollinger wrote a well-known book defending the protection of free speech rights of Nazis based largely on the teaching function of First Amendment law.36 More generally, the interaction of law and culture has been the main subject matter for a whole school of legal thought—often called “Law and Society”—that has flourished since the 1960s.37 Expressivist scholars are perfectly free to contribute to this school, of course, and some of their contributions are impressive. But if there is anything distinctive about expressivist jurisprudence—and I believe there is—then it would seem to lie elsewhere.

35. For example, Lawrence Lessig’s analysis provides numerous interesting insights about how law can influence social norms, sometimes in counterintuitive ways. See Lessig, supra note 2 passim.
37. For an illustrative sample of materials, see THE LAW & SOCIETY READER (Richard L. Abel ed., 1995). One section of these materials is classified under the heading of “Norm Creation.” Id. at 211-51. This seems to be exactly the topic with which this “norm”-oriented aspect of expressivism is concerned.
B. The Normative Claim About Legal Meaning

In addition to the descriptive claims about the nature of meaning in law, expressivist scholars often add a normative claim; they assert that the normative status, or the validity, of a law should depend on the meanings it expresses. Once again, this position is evident in both local and more general statements of expressivism. In her "endorsement" opinions, Justice O'Connor argued that the constitutionality of a law under the Establishment Clause should depend not so much on the material effects of the law, but on what "message" the law sends: a law that avoids sending a forbidden message of "endorsement" would be permissible although "it in fact causes, even as a primary effect, advancement or inhibition of religion."³⁸ In an article supporting this approach, William Marshall was even more explicit in advocating "a jurisprudence that is primarily 'symbolic' and not 'substantive,'" and hence that would be "concerned less with the substantive goal of limiting certain types of government involvements and supports of religion than with eliminating the perception of improper government action."³⁹ Marshall illustrated the point: "[A]ssume a state provides direct financial payment to a minister. The establishment harm is not in the payment. It is in what the payment symbolizes."⁴⁰

More recently, in their "General Restatement," Anderson and Pildes advocate a normative expressive theory that evaluates actions "in terms of how well they express certain intentions, attitudes, or other mental states."⁴¹ In this view, an action (or a law) might arise from the purest of intentions, and it might produce highly desirable consequences; but the action or law is still to be disapproved (and, in the case of the law, invalidated) if it expresses, even inadvertently, an improper message or meaning.⁴²

I have suggested that the descriptive claims commonly advanced in expressivist scholarship seem commonplace, almost platitudinous. The normative claim encounters the opposite problem: it seems counterintuitive. After all, a familiar and intuitively accessible posi-

⁴⁰. Id. at 513.
⁴¹. Anderson & Pildes, supra note 2, at 1508 (emphasis added).
⁴². See id. at 1531 (explaining that expressive theories hold that a law that "expresses impermissible violations" is wrong regardless of "further concerns about its cultural or material consequences"). But cf. id. at 1514 ("Expressive theories . . . do not deny that the consequences matter. Rather, they tell us why the consequences matter, and which consequences matter.").
tion holds that a meritorious act (or a just and good law) is one that produces, on balance, good consequences. A competing, but also familiar and intuitively accessible, position maintains that a meritorious act (or law) is one that is performed (or enacted) with good motives, or for good purposes. But it is hard to understand, on first reflection anyway, why our judgment of an act or law should turn on what the law expresses, or on what "message" it sends.

Such a view, one might say, favors appearance over reality. True, the advertisements proclaim that "Image is everything," but are we really supposed to believe them? The expressivist theory almost seems calculated to commend hypocrisy or posturing. The "hypocritical" act (or law) that works wickedness while seeming good is commended; the act (or law) that looks bad while in fact achieving good is condemned. This seems to be the implication of the expressivists' normative claims. But what is there to recommend such a perspective?4

The implausibility of the expressivists' normative claim is less conspicuous than it might be, I suspect, because that claim can easily be mistaken for more mild and intuitively credible claims that some expressivists also make, but that do not convey the bolder normative contention that is more distinctive to expressivism. For example, the expressivists' more ambitious normative claim might easily be diluted into the milder observation that a law's perceived meanings or "messages" may be evidence that helps us to ascertain the actual or intended purposes of an act or a law. If expressivists were merely saying that perceptions should be considered in ascertaining legislative purpose, the claim would be easily acceptable. If we are trying to figure out legislative purpose, of course we should consider perceptions of that purpose. How could we do anything else? And this does seem to be essentially what some expressivist scholarship is arguing for. Thus, Charles Lawrence argues for an Equal Protection doctrine focusing on the "cultural meaning" of a challenged law, it seems, because he believes that "cultural meaning" is a key to understanding actual (albeit unconscious) legislative motivation.44 But the more ambitious ex-

43. To recur to the "endorsement test" example: If we believe the Constitution prohibits government from favoring or advancing religion, then it seems to follow that public measures that in fact favor religion ought to be unconstitutional—even if they manage to avoid sending a "message" favoring religion. Conversely, if actually favoring or advancing religion is not a constitutional violation, then why does government violate the Constitution by appearing to do something—that is, favor religion—that the Constitution permits?

44. See Lawrence, supra note 2, at 355-56 ("I propose a test that would look to the 'cultural meaning' of an allegedly racially discriminatory act as the best available analogue for and evidence of the collective unconscious that we cannot observe directly."). Whether Lawrence is right in supposing this connection is debatable, of course.
pressions of an expressivist jurisprudence do not limit themselves to this evidentiary use of perceived or social meanings. They insist, rather, that a law's "meaning" exists independent of the actual intentions or purposes of lawmakers. It is this meaning, not the actual intended purposes, that should determine the law's validity.45

By the same token, it is easy enough to agree that "messages" have effects on the world; they are among the relevant consequences of an act or law.46 So one can easily imagine a consequentialist position that would include "messages" and their effects among the consequences to be considered; indeed, a consequentialism that ignored these "expressive" aspects of law would be naïve and irresponsible. If expressivists were merely saying that "messages" or "social meanings" should be included in the consequentialist calculus, then it would be easy to understand and accept their point47—though, of course, the practical implications of this point (for judicial review, for instance) would still be very much open to debate.48 And indeed, some expressivist scholarship does seem to be making essentially this claim. Thus, in their expressivist moments, Cass Sunstein and Lawrence Lessig seem to be

45. See, e.g., Hellman, supra note 2, at 39 ("If objective meaning is determinative, evidence of subjective intent matters only so long as that evidence contributes to the public meaning of the action."). Hellman adds: "Either subjective intent is what really matters, and then objective intent must be seen as simply one kind of evidence of it; or subjective intent is irrelevant, and objective intent matters independently and for its own sake." Id. at 57. Hellman opts for the latter alternative. See id.

46. See Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. REV. 1, 68 (1995) (arguing that a legal norm that sends inappropriate messages "may influence social norms and experiences, and push them in the wrong direction").

47. Cf. Adler, supra note 6, at 1377 ("No one disputes that if government utters a sentence with one meaning rather than another, that utterance might affect overall well-being or the distribution of resources. Expressivists are surely making a more robust and interesting claim than that.").

48. For example, it need not follow from the fact that "messages matter" that courts should use the power of judicial review to act as a sort of censor on public expression, in the way that the expressivist scholars considered in this Article tend to prescribe, or that government should assume the role of "meaning manager," as Lessig advocates. Lessig, supra note 2, at 1008. Recognizing the significance of the expressive dimension of law has led some scholars—Robert Nagel and Robert Cover, for instance—to quite contrary positions that seek to subvert the prevailing preference within the legal academy for judicial and "statist" approaches. In his well-known essay Nomos and Narrative, for example, Cover emphasized the expressive, meaning-creating function of law to decry the "dangerous tendencies of a statist paideia," Robert Cover, Nomos and Narrative, reprinted in Narrative, Violence, and the Law, supra note 1, at 95, 164, and he declared himself to be among a minority "unwilling to conceive of law in such a state-bound framework." Id. at 154; see also Robert F. Nagel, Rationalism in Constitutional Law, 4 CONST. COMM. 9 (1987) (criticizing judicial intrusions that overlook and disrupt the social meaning dimension of law). By contrast, most contemporary expressivist scholars seem entirely comfortable with the statist that Cover and Nagel have criticized: if "social meanings" matter, then the state, and especially the courts should regulate them.
merely calling for a more sophisticated consequentialism that takes into account law's influence over social meanings and norms.\footnote{49. See Lessig, supra note 2. Sunstein captures this strand of expressivist scholarship, I believe, in his assertions that "good expressivists are also consequentialists" and that "an expressive theory of some sort helps people to identify consequences as such." Sunstein, supra note 2, at 2047.} By contrast, the more self-conscious and deliberately "expressivist" scholarship affirmatively resists absorption into a more encompassing consequentialism. What a law "expresses" is contrasted with (not subsumed in) its "effects."\footnote{50. See, e.g., Anderson & Pildes, supra note 2, at 1581 ("If expressive theories are right, state action should be wrong—and unconstitutional, if constitutional law tracks expressive concerns—when it expresses impermissible valuations, without regard to further concerns about its cultural or material consequences."); id. at 1574 ("The meanings of action do matter after all, independent of their causal consequences."); Hellman, supra note 2, at 14 ("This claim explicitly denies that the wrong is rooted in consequentialist concerns. By its nature, an expressive harm is always 'in the air.").} And it is expression, not effects, that is the decisive factor (or at least a decisive factor) in determining the law's validity.\footnote{51. Though it is not always clear whether expressivists intend their meaning-based tests of legal validity to be "instead of" or "in addition to" other possible tests based on actual purposes or consequences, there seems to be no reason why they need to regard their meaning-based tests as exclusive.}

To be sure, the expressivist position is not altogether clear on this point, because even the most committed expressivist scholars sometimes defend their claim that expression or meaning (not consequences) should be decisive by pointing to what looks suspiciously like consequentialist concerns. They often argue, for example, that expression and meaning are important because they help to constitute social relationships.\footnote{52. See, e.g., Anderson & Pildes, supra note 2, at 1571 (asserting that "successful communicative acts establish shared or collective understandings between speaker and audience" and that "[s]uch understandings are constitutive of social relationships"); see also Deborah Hellman, Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem, 60 Md. L. Rev. 653, 665-66 (2001).} This claim seems entirely plausible, and plainly consequentialist in character. So it might be that even the purest expressivists are best interpreted as a particular kind of consequentialist who believe—for reasons that remain obscure—that what we might call "social relationship consequences" have a normative importance that other "material consequences" do not.

But if we interpret these scholars as consequentialists in this way, we do so over their own ardent protest. So, on balance, it seems most plausible and charitable to suppose that these expressivist scholars mean what they repeatedly say—that "meanings" should be decisive for a law's normative status and constitutional validity. Once again,
though, this more ambitious normative claim seems counterintuitive. Suppose a law sends an undesirable message, perhaps inadvertently, but the law was adopted for legitimate purposes, and it has good consequences overall (even considering the bad effects of its message). Why should the law be condemned and invalidated, thus leading, by hypothesis, to a net loss of good consequences?53

Still, the fact that careful, competent scholars have advocated this position should make us cautious about dismissing it too quickly. And indeed, I hope to show that there is a potentially attractive ethical insight embodied in the expressivist insistence on making law's normative status attach to its expressive dimension.

C. Beyond the Discrete Claims?

The discussion thus far has indicated that expressivist scholarship commonly makes both descriptive and normative claims; but on initial inspection, none of the claims seems to make a distinctive or potentially attractive jurisprudential contribution. The descriptive claims suffer from being too true—or, rather, too obvious. They simply assert what most everyone already understands. If there is anything distinctive about the descriptive claims, it lies in the expressivist tendency to use the notions of "expression" and "meaning" more broadly than most other people do. This broader usage, a critic might claim, reflects no new insight and seems mostly calculated to confuse by conflating different senses of "express" or "meaning." By contrast, the normative claim, which makes the normative status or validity of a law hinge on the message it sends, is distinctive; but the claim achieves distinctiveness by sacrificing plausibility.

Expressivist jurisprudence thus brings to mind the comment Samuel Johnson is said to have made to a would-be author: "Your manuscript is both good and original; but the part that is good is not original, and the part that is original is not good."54 This dismissive conclusion, however, reflects an approach that tries to consider expressivist jurisprudence claim-by-claim. Perhaps that is the wrong approach. Indeed, the claim-by-claim approach manifests precisely the sort of thinking—thinking that tries to understand a subject by breaking it down into the clear, discrete units—that is characteristic of an

53. This sort of reflection has led even some scholars sympathetic to an expressivist perspective, such as Sunstein, to distance themselves from its purer version. See Sunstein, supra note 2, at 2046-48. Sunstein comments that purer versions of expressivism "verge on fanaticism." Id. at 2047.

“analytical positivism” that expressivists seem constitutionally disposed to resist.

So perhaps we should try a different approach, one more in tune with the tenor of expressivism. Rather than treating the position as a series of detached and almost atemporal claims, perhaps we should try to consider it as a whole and in its historical and cultural context to see what it is reacting against and what it is trying to accomplish. The next Part undertakes such a reexamination.

II. LAW AND THE PROBLEM OF MEANING

In this Part, I want to step back from a direct and out-of-context inspection of discrete expressivist claims to reflect on the expressivist turn in a more holistic way and against the backdrop of the cultural situation from which it arises. In seeking to appreciate expressivist jurisprudence more holistically and in its wider historical context, the discussion in this Part will, of necessity, have to paint with a very broad brush. This broad-brush approach may disturb readers committed to the sort of legal scholarship that consists of more contained assertions secured by safe footnotes; I confess that the approach worries me as well. The test, though, will be whether this approach sheds light on what animates expressivist jurisprudence (and perhaps whether, by doing that, it illuminates our current situation more generally).

So in this more generous and holistic spirit, let us begin with this observation: if we try to consider the claims discussed in Part I, not individually, but rather, cumulatively, it is apparent that running through all the expressivist claims—both the claims that seem truistic and the claims that seem extravagant or implausible—is an emphasis on “meaning.” Expressivists seem obsessed with law’s “meaning”—with affirming and reaffirming the fact of meaning, with extending the scope of meaning, with exalting the normative implications of meaning. What accounts for this fixation on “meaning”? The question points

55. I should also say at the outset that there is much in our historical situation that is very likely relevant to expressivism, but which I will not be discussing. It is often said, for example, that our world is one in which the distinction between reality and “virtual reality”—between how things are and how things appear—seems not nearly as clear as it might have once been. In this respect, Nintendo 64 and post-modern theory converge. Our intellectual world has also been powerfully influenced by what is sometimes called “semiotics”: signs and symbols and texts or text constructs now show up almost everywhere. Though I think these cultural features are surely connected to the emergence of expressivism, the connections cannot be pursued here. To put the point differently, I will be more interested in developing “pre-modern” connections than “post-modern” ones (though in my experience there is often a surprising degree of parallel between these perspectives).
us, I hope, to a different way of appreciating what the recent expressivism is about.

A. The “Interest-Seeking” and “Meaning-Oriented” Views of the Person

A helpful starting point, I think, is Lon Fuller's observation that a particular understanding of law will contain, at least implicitly, a corresponding “view of man” (to use Fuller's own phrase).\(^{56}\) A virtue of his own rule-oriented conception of law,\(^{57}\) he claimed, was that it “involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.”\(^{58}\) This view of human nature (or at least human potential), he thought, contrasted starkly with the view implicit in prevailing instrumentalist jurisprudences, which operate on the tacit assumption that persons are subjects to be conditioned, or are “the helpless victims of outside forces.”\(^{59}\) And Fuller attributed this gloomier view, which he regarded as “an affront to man’s dignity as a responsible agent,”\(^{60}\) to “certain doctrinaire schools of thought in the social sciences.”\(^{61}\)

This behavioral view was not only dispiriting; Fuller suggested (though he was not prescient enough to use our terms) that the instrumentalist view was unfaithful to the way law really works, precisely because it overlooked what we at this Symposium might call law’s “expressive dimension.” More specifically, in good Holmesian fashion, the instrumentalist view treats a “tax” and a “fine” as equivalent because their material consequences are the same: a person who engages in certain defined conduct has to pay a prescribed amount of money.\(^{62}\) But this assertion of equivalence obliterates a vital distinction, Fuller argued—one that we might say is expressed in the differ-

57. Fuller defined law as “the enterprise of subjecting human conduct to the governance of rules.” Id. at 96 (internal quotation marks omitted).
58. Id. at 162.
59. Id. at 167; see also id. at 163 (“Today a whole complex of attitudes, practices, and theories seems to drive us toward a view which denies that man is, or can meaningfully strive to become, a responsible, self-determining center of action.”).
60. Id. at 162.
61. Id. at 163. Fuller specifically mentioned B. F. Skinner and behavioral psychology, id. at 163-64, which “represent[s] an overreaching of ‘science.’” Id. at 164.
62. O. W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 461-62 (1897). More generally, it seems fair to say that Holmes's famous “bad man” device for understanding what law “really” is, id. at 459-61, is calculated precisely to cleanse law of its “expressive dimensions” or “social meanings.”
ing "social meanings" of a fine and a tax—that human beings readily understand.63

Fuller's contrast centered on the issue of free will versus determinism;64 I want to redirect his point slightly by focusing instead on human motivation, or on the question of (to borrow a title from Tolstoy) "What Men Live By."65 The prevailing instrumentalist view implicitly depicts humans as creatures with needs and wants—or "interests"—who live to satisfy those interests (including an interest in "survival," which is a prerequisite to satisfying other interests) as fully as possible. This "materialist" understanding of human beings is firmly entrenched, as Fuller suggested, in a good deal of modern science and social science.66 A similar assumption is apparent in, say, sociobiology or evolutionary psychology,67 and in much economic thought, whether of a Marxist or market variety, that aspires to be "scientific."68

Not surprisingly, given law's longstanding ambition to be a "science," a good deal of modern legal thought has embraced the "interest-seeking" assumption about human behavior. The assumption is readily apparent in instrumentalist legal approaches from Holmes to some of the legal realists to the devotees of law and economics to the sundry proponents of one or another form of "policy science." As Robert Summers has shown, a "pragmatic instrumentalism" dominated much of American legal thought throughout the twentieth century,69 and the effort to make law more responsive to the social sciences continued in full force at century's end.70 Often implicit in this general approach is an assumption that human beings are self-seeking agents out to satisfy their wants and needs—their "interests."

But it is not just the law and economics scholars who understand human nature and behavior largely in terms of the pursuit of "interests." A similar assumption is evident in the writings of more "liberal"

63. FULLER, supra note 56, at 166-67.
64. Id. at 167.
66. See FULLER, supra note 56, at 163.
68. Cf. Lessig, supra note 2, at 1020 ("With just a bit of unfairness, one could say, in the tradition of Marx, that Philipson and Posner are materialists . . . .").
70. See Steven D. Smith, Believing Like a Lawyer, 40 B.C. L. REV. 1041, 1083-84 (1999).
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theorists like John Rawls, and even (albeit in quite a different way) of natural law theorists like John Finnis. Nor is this understanding of law and of human beings and human behavior limited to legal theory; it is conspicuous in legal decisions and doctrines as well—in the strongly instrumentalist character of so much modern constitutional doctrine, for example.

The "interest-seeking" depiction of human beings no doubt contains a good deal of truth, but it also downplays, or perhaps distorts, the truth contained in a different view that depicts human beings as belief- and meaning-oriented. We are engaged, to borrow from Viktor Frankl's title, in a "search for meaning." In the course of that search, we form beliefs about our world and our lives and their overall meanings; and then we seek to live in accordance with these beliefs.

This alternative conception of human beings has potential relevance not only to our understanding of how individuals behave; it also provides a potential perspective for understanding law and political community. We might understand a political community, that is, not as a conglomeration of individuals banded together (perhaps under the form of some actual or mythical "social contract") for the mutual pursuit of self-interest, but rather as an association "dedicated to [a] proposition," as Lincoln put it, or to a shared set of beliefs or meanings. The American republic, in this view, might be best understood not as a commercial cooperative set up to achieve material prosperity, but rather, in Chesterton's phrase, as a "nation with the soul of a church." Robert Bellah has perhaps done as much as any modern scholar to recover this conception of the American political commu-

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71. The device of the original position operates on the assumption that individuals are rationally pursuing their own interests and that, deprived of information about their exact situation in life, they will choose a society organized to promote the interests they may turn out to have. See John Rawls, A Theory of Justice 17-22 (1971). "[E]ach desires to protect his interests, his capacity to advance his conception of the good . . . ." Id. at 14.

72. Though it could not be called "consequentialist" in the usual sense, Finnis's approach to natural law depicts human beings as using practical reason to pursue a finite set of "basic goods." See John Finnis, Natural Law and Natural Rights 81-133 (1980).

73. For a discussion of the pervasively instrumentalist character of modern constitutional doctrines, see Nagel, supra note 48, at 9-12.


75. For example, Robert Cover's essay Nomos and Narrative stressed the meaning-oriented qualities of human beings and the function of law in creating or upholding a nomos, or normative order. Cover, supra note 48 passim.


nity—a conception, I would add, that is not captured in a "republi-
canism" that emphasizes the importance of community without
making a commitment to larger beliefs or meanings on the basis of
community.

So there is an alternative to the prevailing materialist conception
of human beings, and of their law and their communities—an alterna-
tive that emphasizes our "meaning-oriented" qualities over our "inter-
est-seeking" propensities. And it is hardly surprising that some
people, and in particular some legal scholars, would gravitate to the
alternative conception over the last decade or so. That period is
sometimes perceived as one in which unprecedented personal free-
dom and material prosperity coincided with a sense of the absence of
meaning. In this vein, Cornel West discerns in contemporary Ameri-
can life "a pervasive spiritual impoverishment" and "[t]he collapse of
meaning in life,"79 Zbigniew Brzezinski describes "a society guided
largely by cornucopian aspirations devoid of deeper human values."80
These conditions naturally lead to pleas for a "politics of meaning";81
they also lead Americans to attach increasing importance to religion
as a factor in their personal lives.82 An expressivist jurisprudence,
manifesting a fascination with "meaning" in law, is perhaps a natural
result and expression of this situation: if we need a politics of mean-
ing, why not a jurisprudence of meaning?

If the instrumentalist perspective, with its interest-seeking view of
human beings, has predominated in modern legal thought, however,
that dominance reflects more than perversity, or thoughtlessness, or
even a misguided ambition of law professors to wrap themselves in the
mantle of "science." The instrumentalist view is the result of a long
and profound development in the prevailing conceptions of the
world; and we need to consider that development in order to under-
stand the expressivist impulse and to assess its merits and its prospects.


80. Zbigniew Brzezinski, Out of Control: Global Turmoil on the Eve of the Twenty-First Century 115 (1993); see also Roger Lundin, Interpreting Orphans: Hermeneutics in the Cartesian Tradition, in The Promise of Hermeneutics 1, 2 (1999) (observing "the spiritual poverty of our age").


82. See George Gallup, Jr. & D. Michael Lindsay, Surveying the Religious Landscape: Trends in U.S Beliefs 9-11 (1999) (providing statistics to demonstrate that, in 1998, a majority of Americans considered religion "very important" to their lives).
B. The Pre-Modern Framework and the Possibilities of Meaning

In a common understanding, belief in an inherently meaningful universe is what distinguishes the pre-modern milieu from “modernity.” In this Part, I will very briefly try to describe this pre-modern view and to mention some of its key implications for law.

1. The Normative Order.—In the “pre-modern” world (meaning, roughly, in the classical and later Christian West), the universe was thought to be constituted as a normative order. In his book, Passage to Modernity, Louis Dupré explains that in classical thought, the universe was viewed as a “kosmos,” or as an “ontotheological synthesis,” in which nature itself was thought to have “theological and anthropic as well as physical meanings.” In this view, Dupré explains:

Nature teleologically directs organic processes to their destined perfection. It establishes the norms that things developing in time must follow if they are to attain their projected end. The more comprehensive term kosmos constitutes the ordered totality of being that coordinates those processes as well as the laws that rule them. Kosmos includes, next to the physis of organic being, the ethos of personal conduct and social structures, the nomos of normative custom and law, and the logos, the rational foundation that normatively rules all aspects of the cosmic development.

Dupré traces this “ontotheological synthesis” back to its Greek origins. What he calls kosmos later came into tension with Christian thought—in particular with the nominalism of thinkers like William Ockham—and Dupré argues that its eventual dissolution can be traced in large part to these Christian influences. Nonetheless, drawing upon both scholastic philosophy and a “sacramental attitude toward nature,” medieval thought for a time achieved an effective integration with the classical view.

84. Id. at 18.
85. Id.
86. Id. at 17.
87. See id. at 17-18.
88. See id. at 39 (“With Ockham . . . , the entire ontotheological synthesis began to disintegrate.”).
89. See id. passim.
90. Id. at 35.
91. See id. at 33-36.
In a more cross-cultural study, Seyyed Hossein Nasr suggests that most human beings throughout history have understood the universe in terms of religious perspectives, which, though "of very distinct structures and belonging to different climes and times," have nonetheless concurred in accepting the existence of an overarching normative order. The various understandings have converged in maintaining that "the order of nature is related to an order 'beyond' itself" and also that "the order of nature has a purpose, a meaning, and this meaning has spiritual and moral significance for human beings." This understanding has been so common, Nasr argues, that it has constituted a sort of "cosmologia perennis."

2. The Possibilities of Meaning.—Within this "cosmologia perennis," Nasr explains, everyday events and objects have meanings beyond themselves. "Traditional metaphysics sees the universe not as a multitude of facts or opaque objects each possessing a completely independent reality of its own, but as myriads of symbols reflecting higher realities." In more figurative terms, the world is "a veil that at once hides and reveals the realities beyond." Consequently, "[p]henomena . . . become transparent to realities that transcend them and that they reflect on their own existential level." This view naturally generates "[t]he language of symbolism."

In his classic study The Autumn of the Middle Ages, Johan Huizinga argued that this symbolic mode of understanding the world "was very nearly the life's breath of medieval thought" with its "habit of seeing all things in their meaningful interrelationships and their relationship to the eternal." The world was "a great symbolic nexus—a
cathedral of ideas." A cross, a rose, a lamb, even a walnut, were not merely discrete objects or figures, but rather links to a larger reality:

Nothing is too low to signify the highest of things . . . . The walnut signifies Christ; the seed kernel is the divine nature, the outer shell His human nature, and the woody membrane in between is the cross. All things offer support and stability to the mind as it climbs to the eternal; all things lift each other to the heights.

Huizinga stressed that this symbolic understanding of the world presupposed a form of metaphysical realism that posits an order of reality beyond or behind the visible phenomena: it was their connections to this order that permitted mundane objects and events to have meanings beyond their literal or obvious ones. "Symbolism loses any semblance of arbitrariness and immaturity," Huizinga explained, "as soon as we realize that it is inseparably linked to that worldview that was known as realism during medieval times and that we, somewhat less fittingly, call Platonic idealism."

Huizinga did not romanticize the symbolic understandings of late medieval thought; on the contrary, he saw the symbolic practices of the period as decadent—in the process of "hopeless degeneration"—and as an obstacle to scientific thinking. But he also acknowledged the power of a symbolic orientation to the world to confer meaning on life and its components. "The value for life of a symbolic interpretation of all of existence was incalculable," Huizinga observed. "Symbolism created an image of the world more strictly

101. Id. at 235-36.
102. See id. at 234, 236, 239.
103. Id. at 239.
104. Id. at 236. Huizinga added that what supported the symbolic understanding was less high-level philosophy or theology than everyday assumptions:

[W]hat matters is . . . the ideas that completely dominate the life of fantasy and thought as it is expressed in art, ethics, and daily life. They are all extremely realistic, not because high theology had been educated in a long tradition of neo-Platonism, but because realism, independent of philosophy, is the primitive mode of thought.

Id. at 257.
105. Id. at 242.
106. See id. ("Finding symbols and allegories had become mere play, a superficial fantasizing on a simple association of ideas."); id. at 240 (noting that symbolism "had a tendency to become purely mechanical" and that it "attaches itself to the intellectual function like a parasitic plant and degenerates into pure habit and a disease of thought"). As symbolism degenerated, "the meaningful had became meaningless." Id. at 247.
107. Id. at 238.
unified by stronger connections than causal-scientific thought is capable of.\textsuperscript{108}

In a similar vein, Charles Taylor describes the pre-modern worldview as one in which "the order of things embodies an ontic logos,"\textsuperscript{109} or in which "people accepted without resistance their insertion in a universe of meaningful order."\textsuperscript{110} Within this worldview, visible things and events were connected with a deeper order of reality. This assumption supported what Taylor calls the "doctrine of correspondences"—the idea that there are "publicly understood subjects of divine and secular history, events, and personages that had \textit{heightened meaning}, as it were, \textit{built in to them}."\textsuperscript{111} Taylor discusses how poets and painters could draw on this "doctrine of correspondences" to convey (or, as they thought, tap into) meanings in a way that is no longer possible.\textsuperscript{112}

In the pre-modern worldview, in short, the belief that the universe is composed as a normative order of reality conferred on events and objects in the visible world the capacity to contain rich and, we might say, "objective" meanings that were not simply projected onto them by human perceivers and users. The world itself, as Huizinga’s depiction shows, could seem to be almost overflowing with "meanings." What I have earlier referred to as the "meaning-oriented view" of human beings thus seems very much at home in this kind of world; the pre-modern world seems almost made to order for that kind of person.

\textsuperscript{108} Id. Huizinga also observed:

Symbolic thought causes the continuous transfusion of the feeling for God's majesty and for eternity into everything that can be perceived and thought. It never allows the fire of the mystic life to be extinguished. It permeates the idea of anything with heightened aesthetic and ethical value. Just try to imagine the enjoyment of seeing every jewel sparkle with the splendor of its symbolic value, of the moment when the identity of roses with virginity is more than just poetic Sunday dress, the time when identification points to the essence of both. It is a true polyphony of thought. In a completely thought-out symbolism, each element reverberates in a harmonious musical chord of symbols. Symbolic thinking yields to that intoxication of thought, leads to that pre-intellectual obscuring of the definition of things, that muting of rational thought, which lifts the intensity of the feeling for life to its very peak.

\textit{Id.} at 239.


\textsuperscript{110} Id. at 192.

\textsuperscript{111} CHARLES TAYLOR, THE ETHICS OF AUTHENTICITY 83 (1991) (emphasis added).

\textsuperscript{112} \textit{See id.} at 82-88.
3. **The Convergence of Meaning and Value.**—In the pre-modern understanding, "meaning" and moral or normative value are closely linked.\(^{113}\) The "meaning" of an object or an action comes in part from its relation to the larger normative order. That relation also gives an object or action its moral value. The encompassing normative order provides a framework, we might say, within which individual things and events obtain both their meanings and their moral qualities.\(^{114}\) Hence, meaning and value are not neatly severable.

For example, if the universe is a normative order, then to live or act morally would be to live and act in congruity with that order; and to live or act immorally would be to act in a way that is incongruous, or "against nature." Moral evaluations, consequently, would reflect judgments about such congruities or incongruities. To interpret an action's meaning and to evaluate that action would simply be different ways of understanding the action's relation to the larger normative framework.

This notion is a difficult one—and one that I do not pretend to understand adequately—but an illustration may be suggestive. Suppose we pick out a line in a poem and then ask two questions. First, what does the line *mean*? Second, is it a *good* line? Both questions require us to consider the relation between the line and the poem as a whole. The meaning of the line surely derives from the poem. And its relation to the poem also determines whether it is a good line. Meaning and value are not exactly identical—we will still sometimes say, "This is what the line seems to mean, but it just doesn't work in this poem"—but they are closely linked. The goodness or badness of the line is not incidental to or "in addition to" its meaning, but rather is inseparable from that meaning; and both meaning and poetic value are determined by the line's relation to the poem as a whole. If the universe itself is viewed as an overarching poem, or drama,\(^{115}\) or *kosmos*, then the meaning and value of objects and actions will likewise tend to converge.

4. **Law in the Normative Order.**—Thus far I have said nothing about "law" in the pre-modern worldview, but these more general ob-

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113. Cf. Huizinga, supra note 99, at 240 ("The ethical value of symbolic thought is inseparable from its formative value.").

114. Taylor explains that "[a]s long as the order of things embodies an ontic logos, then ideas and valuations are also seen as located in the world, and not just in subjects." Taylor, supra note 109, at 186. Consequently, "correct human knowledge and valuation comes from our connecting ourselves rightly to the significance things already have ontically." Id.

115. Cf. Dupré, supra note 83, at 145 ("In a medieval cosmic play the human person clearly had the lead, but an all-knowing, unchanging God directed the play.").
servations already suggest an understanding of law that diverges significantly from currently prevailing views. Quoting Richard Hooker's statement that law sits "'in the bosom of God, her voice the harmony of the world,'" Robert Gordon observes that up until about the time of Holmes, lawyers "had, as they saw it, a direct line to God's mind through their knowledge of the principles of legal science." Our reflections on the pre-modern worldview may shed some light on this seemingly extravagant notion.

In this conception, law would operate within—and indeed would gain its status and meaning as law by reference to—the larger normative order or kosmos. To be sure, law might in part be a product of human lawmakers, but it would also be in some sense a manifestation or expression of the normative order of the universe. Thus, in Aquinas's intellectual system, human or positive law emanates at one level from a ruler or legislator. More essentially, though, positive law derives from the "eternal law," which is essentially the divinely-ordained order governing the universe, and it gains its status as law by virtue of participating in that order. "Consequently, every human law has just so much of the nature of law as it is derived from the law of nature," Aquinas explained. And he added that "if, in any point [the human law] deflects from the law of nature, it is no longer a law but a perversion of law."

A bit closer to home, Blackstone expressed a strikingly similar understanding, albeit in much abbreviated form. He explained:


117. Id.

118. Aquinas defined law as "a certain ordinance of reason for the common good, made by him who has the care of the community and promulgated." THOMAS AQUINAS, SUMMA THEOLOGICA I-II, q. 90, art. 4 (Fathers of the English Dominican Province trans., 1948) (1485) (emphasis added).

119. See id. at I-II, q. 93, art. 1 (declaring that "the eternal law is nothing else than the type of divine wisdom, as directing all actions and movements"); see also id. at I-II, q. 93, art. 5 ("And thus all actions and movements of the whole of nature are subject to the eternal law.").

120. "Since, then, the eternal law is the plan of government in the Chief Governor," Aquinas explained, "all the plans of government in the inferior governors must be derived from the eternal law." Id. at I-II, q. 93, art. 3.

121. Id. at I-II, q. 95, art. 2. The "natural law" or law of nature is that part of the "eternal law" that is accessible to human reason without the aid of divine revelation. See id. at I-II, q. 91, arts. 2, 4.

122. Id. at I-II, q. 95, art. 2.

123. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38-43 (1765).
This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediatly or immediately, from this original.\footnote{Id. at 41.}

On this understanding, it would be natural to see the meaning of law, or of particular laws, as coming only in part from the human officials responsible for drafting, adopting, and applying them. Insofar as positive law is seen as derived from an overarching law of nature, and indeed as obtaining its status as law from that larger order, it would seem sensible to look to that larger order to ascertain what a law means. In this sense, the specific legislator or judge who announces a particular law or legal precedent would be analogous to the scriptural scribe who writes down and disseminates the revelations of God. The human scribe’s understanding may well be instructive on the meaning of the text, but it is neither conclusive nor exhaustive regarding that meaning. Indeed, it would hardly be surprising if the text had meanings that exceed anything the specific human scribe may have understood.\footnote{I explore this parallel at greater length in Steven D. Smith, Law as a Religious Enterprise: Legal Interpretation and Scriptural Interpretation, in Law and Religion (Andrew Lewis & Richard O’Dair eds., forthcoming 2002).}

In the same way, the normative status of a law—its justness and rightness, and indeed its very validity—would depend upon its congruity with the normative order. And, of course, that is exactly what Aquinas and Blackstone say in the quotations given above.

C. The Modern Declension

Today, it seems obvious, we no longer work within the kind of intellectual framework I have been discussing. Just when and how the change occurred—or whether even now, it is complete and final—are complicated questions that we need not worry about here. But it seems apparent that lawyers and legal scholars today are generally like modern thinkers in declining to suppose that the universe constitutes a kosmos in the classical sense—an “ontotheological synthesis” or normative order in place that supplies the source of meaning and the framework for moral reflection. Vittorio Hösle observes that “[t]he nature depicted in modern metaphysics lacks three qualities that were indissolubly linked with the Greek concept of physis: It is without soul,
without purpose, and without intrinsic value.”

A familiar phrase describes this change as the “disenchantment of the world.”

In the modern view, there is no built-in meaning or purpose to which we can appeal. Far from constituting a normative order, nature in the modern view is, as Leon Kass observes, “mechanistic and materialistic.” It consists of matter moving in time and space, and matter is “thought of . . . as little billiard balls, as waves or particles, as understandable only externally.”

John Searle describes the modern worldview—which, he stresses, is mandatory, “not an option”—as resting on two propositions that are beyond serious doubt: first, that everything that exists is composed of, and is reducible to, atomic particles in motion; and second, that higher life forms are the product of unguided Darwinian evolution.

Not everyone will agree with this austere creed, of course. But I think it is fair to say that at least within academic contexts, the assumptions commended by Searle generally mark the boundaries for discussion. Respectable law review articles today do not contain anything like the sorts of declarations that I have quoted from Aquinas and Blackstone. Indeed, even legal scholars closely associated with natural law and with Catholic positions eschew reliance on religious or “teleological” premises.

So what does this change in frameworks (or, perhaps more accurately, this rejection of any given or intrinsic framework) mean for

127. Less poetically, the change is also often described as the loss of a teleological conception of the world: it is no longer supposed, as it once was, that the universe and its constituents have any built-in purpose or goal. Another way to describe the change is to say that the classical, Aristotelian understanding, in which objects had “formal” and “final causes,” has given way to a modern scientific view that recognizes only “material” and “efficient causes.” And “post-modern” thinkers sometimes talk of the absence of any “meta-narratives.” See, e.g., David Harvey, The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change 44-45 (1989) (noting that “post-modern” thinkers “explicitly attack[ ] any notion that there might be a . . . meta-narrative . . . through which all things can be connected or represented”).
129. Id. at 275.
131. Id. at 88-90. With reference to older, more theistic beliefs, Searle suggests that “in our deepest reflections we cannot take such opinions seriously.” Id. at 90.
132. See, e.g., Finnis, supra note 72, at 33-34 (noting that the basic forms of good and evil are not inferred from a teleological conception of nature); see also Thomas W. Smith, Finnis’ Questions and Answers: An Ethics of Hope or Fear?, 40 Am. J. Juris. 27, 29 (1997) (observing that Finnis’s natural law theory attempts to “appeal to all rational persons independent of their religious beliefs”).
law, and for our moral reflections and commitments generally? In the first place, the possibilities for "meaning" that the older worldview afforded are no longer available. Objects in the world are what they are, no more and no less; they are not signs or clues pointing us to a larger or more ultimate reality. There are no deep, natural reserves of "meaning" for us to draw on. If objects or events have "meanings," rather, those meanings must be supplied by us—by persons. Thus, Taylor describes the demise of the "doctrine of correspondences."\textsuperscript{133}

To be sure, we (or at least poets) might still treat objects or events symbolically. But we understand that symbolic meanings are not inherent in the objects that we treat in this way; they are our contributions, our projections. Thus, Taylor explains that "the decline of the old order with its established background of meanings"\textsuperscript{134} prompted a change from "'a mimetic to a creative conception of poetry.'"\textsuperscript{135} Poetry today "'must . . . formulate its own cosmic syntax.'"\textsuperscript{136} That is because "where formerly poetic language could rely on certain publicly available orders of meaning, it now has to consist in a language of articulated sensibility."\textsuperscript{137}

Similarly, the loss of belief in an inherent normative order means that the valuation of objects or actions can no longer take the cosmos, or "nature," as a ready-made normative framework or standard. "Disengagement from cosmic order," Taylor explains, "meant that the human agent was no longer to be understood as an element in a larger, meaningful order. . . . He is on his own."\textsuperscript{138}

So then, what can provide the standard for valuation? Answers vary widely, of course, but as a rough generalization, we can say that modern approaches orbit around two central ideas. One idea says that an action is good if it produces good consequences. The other

133. Taylor, supra note 111, at 83.
134. Id. at 84.
135. Id. at 85 (quoting Earl Wasserman, The Subtler Language 10 (1968)).
136. Id. (quoting Wasserman, supra note 135, at 11).
137. Id. at 84. A poetic expression of this change, perhaps, is Wordsworth's well-known sonnet, The World Is Too Much With Us, in which he concludes by wishing:

\ldots I'd rather be
A pagan suckled in a creed outworn;
So might I, standing on this pleasant lea,
Have glimpses that would make me less forlorn;
Have sight of Proteus rising from the sea;
Or hear old Triton blow his wreath'ed horn.

William Wordsworth, The World Is Too Much With Us Ins. 9-14, in Poems in Two Volumes (1807). The loss of this more meaning-laden view, Wordsworth suggests, leads to a more materialist and instrumentalist approach to life: "Getting and spending, we lay waste our powers." Id. at ln. 2
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idea suggests that a meritorious action is one performed for a proper purpose, and that purposes are proper if they are in accordance with "reason." The first idea inspires a family of "consequentialist," "utilitarian," or "instrumentalist" normative positions that we might associate with Bentham. The most conspicuous representative of this approach in the modern legal academy is surely Richard Posner. The second idea runs through a family of normative approaches associated with Kant, and prominently (though arguably at several removes) represented in the modern legal academy by Ronald Dworkin.

These sprawling normative families tend to feud—the acrimonious debate between Posner and Dworkin arising out of Posner's Oliver Wendell Holmes Lectures is a recent skirmish—but they have in common their refusal to appeal to any "extrinsic" natural order as a basis for valuation. Even more important for our purposes is the tendency of both approaches to separate questions of "meaning" from questions of "value." What an act (or a law) "means"—if it means anything at all—is one thing. Whether the act (or law) is "good" presents a separate question—a question that turns on something that either precedes the act (the principle that animates it, or what we might loosely call its purpose) or that follows it (its consequences).

More generally, we might describe the overall change in perspectives by saying that in the older, pre-modern view, both meanings and moral or normative values were in a sense "there"; they were "built in" to the universe (even if, as with diamonds and gold, considerable work was needed to find and then refine them). The universe was rich in meaning and in moral content, as if designed to suit the meaning-oriented human being. By contrast, in the modern worldview, neither meanings nor moral values are just "there": if they are to exist at all, then they will have to be constructed—by us, in accordance with our interests and commitments.

139. For present purposes, two core Kantian ideas are relevant. First, the only thing that is truly good is "the good will," IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 61 (4:393) (H. J. Paton trans., 3d ed. 1956) (1785), and "[a] good will is not good because of what it effects or accomplishes—because of its fitness for attaining some proposed end: it is good through its willing alone—that is, good in itself." Id. at 62 (4:394). Second, a good will is one that acts rationaIly—that is, in accordance with maxims or principles that it can will to be universalizable. Id. at 67-70 (4:402-04).

D. From legal realism to "Legal Realism"

Of course, we have also had to reconstruct our understandings of law. Not surprisingly, law comes out looking very different than it did in the pre-modern conception (so that the sort of statement that Robert Gordon quotes from Richard Hooker now sounds quite outlandish). In the first place, law's "meaning" can no longer emanate from the universe—a universe that has no inherent meaning. Rather, if law is to have meaning, then "we"—some of us, anyway—must put it there. So modern thinking about law recurrently features, first, denials that law has any "natural" or inherent status or meanings, and second, arguments over who the "we" is that gets to give law its meaning.

The first feature is apparent in the painstaking efforts of John Austin and his positivist descendants to link law and its content to some specifiable and thoroughly human "sovereign" or sociological process;\textsuperscript{141} it is also evident in the repeated efforts of Holmes—and then the legal realists, and then the Critis—to apply "cynical acid" to the law so as to dissolve away any notion that law has any inherent meaning deriving from "nature" or "morality."\textsuperscript{142} The second feature is evident in the perennial battles over whether the meaning of law comes from authors and legislators, or, conversely, from readers or interpreters or judges (or "society," or "the public").

If the meaning of modern law must be supplied by one or more of these classes of people, law's normative status or validity must also be determined in accordance with one of the normative approaches developed in modern ethical theories. In modern legal doctrines and theories, therefore, the goodness and validity of a law is typically assessed in terms of its consequences (as in instrumentalist approaches) or in terms of the legitimacy and rationality of its purposes (as in more Kantian approaches). Modern constitutional doctrine, for example, is a hybrid of these approaches. It pervasively employs the instrumentalist vocabulary of means-end inquiries and "interest balancing."\textsuperscript{143} It also purports to assess the legitimacy of the "purposes" reflected in laws.\textsuperscript{144}

\textsuperscript{141} See, e.g., John Austin, Lecture VI, in The Province of Jurisprudence Determined 197 (The Legal Classics Library 1984) (1832); H. L. A. Hart, The Concept of Law, at v (2d ed. 1994) (explaining that his version of law is a sort of "descriptive sociology").

\textsuperscript{142} Holmes, supra note 62, at 462. For a brief and approving summary of the "realist" insight that all law is political and not natural, see Louis Michael Seidman & Mark V. Tushnet, Remnants of Belief 26-35 (1996).

\textsuperscript{143} See, e.g., Nagel, supra note 48, at 10.

\textsuperscript{144} For a discussion of these approaches, see Steven D. Smith, The Constitution and the Pride of Reason 84-104 (1998).
The difference between pre-modern law and law reconstructed on modern assumptions is strikingly manifest in the fact that the terms "realism" and "realist" have come to have almost the opposite meaning from those they once had. In the pre-modern view, as noted, law (like the world in general) had a "realist" quality in the sense that behind or beyond its visible manifestations there was believed to be a more solid reality that gave law its identity and status as law. By contrast, when modern legal thinkers claim the title of "realist" they mean just the opposite; they mean to deny that there is anything in nature—any "brooding omnipresence in the sky"—supporting law. "Realist" once meant that something more real stands behind what we see; today it means that what we see is all there is. In this respect, as often noted, "legal realism" is exactly contrary to what may be called "metaphysical realism." And it is only a slight exaggeration to declare that, as the saying goes, "we are all (legal) realists now"—consciously, at least.

In describing the contours of the modern reconstruction of law, I hope that I have said nothing original or even especially interesting. My goal in this Section has been merely to describe the intellectual framework within which we lawyers address matters of law on a daily basis. The framework is largely taken for granted; it "goes without saying."

And yet, we are not entirely comfortable with the modern reconstruction. On the contrary, the last century was the scene of two major movements—the legal realist movement, and the critical legal studies movement—that implied that our reconstructions are less secure than we usually suppose. Though these radical movements were both overcome by, or absorbed into, the general legal culture, their challenges nonetheless suggested the vulnerability of our intellectual structure. More specifically, these challenges were manifestations of what we might describe as a troublesome depletion in our resources of legal "meaning."

146. See Robert Justin Lipkin, Indeterminacy, Justification and Truth in Constitutional Theory, 60 FORDHAM L. REV. 595, 621 n.108 (1992). Lipkin explains:
Philosophical or metaphysical realism is the view that statements in science, ethics, and everyday life are true and reflect an external reality that exists independently of minds or perceivers. This view should be distinguished from "legal realism," which seeks to discover the actual causes of judicial decisions in contradiction to reasons for those decisions.
Id. (citation omitted).
147. The qualification is important. See Smith, supra note 70, at 1130-37 (discussing the works of Joseph Vining and others who suggest that modern law reflects a hidden faith in a more transcendent reality).
E. The Predicament of Modern Law

The principal difficulties in the modern attempt to reconstruct law using purely human materials can be placed under two headings: the frailty of legal meaning, and the problem of normative evaluation. The more specific issues and criticisms will be familiar, but a brief rehearsal seems a necessary prelude to understanding how expressivist jurisprudence tries to address our situation.

1. The Frailty of Legal Meaning.—Everyone understands, as discussed in Part I, that law conveys “meanings”; if it did not do this, it would not function as law. So lawyers and judges work everyday with legal meanings—usually without feeling any need to reflect deeply on just how laws mean, or on “what it means to ‘mean.’” But if we do pause for reflection, the meanings we assign to law, or to specific laws, can have an eery, mirage-like quality; they seem to vanish just as we reach out to grasp them more securely.

One recurring cause of this elusive quality lies in what we can call the “problem of collective intentions.”148 The problem is often noted in connection with the adage that an enactment’s meaning should be determined in accordance with “the intention of the legislature” (or, in the case of a constitutional provision, the “framers’ intent” or the “framers’ understanding”). Legislatures, the familiar objection goes, do not have intentions; only persons have intentions. Of course, if legislatures are not “persons,” legislators are. So perhaps it would make sense to use the term “legislative intention” as a sort of shorthand for an aggregation of the separate intentions of the individual legislators who enacted a measure. But in the first place, we usually will not know what individual legislators intended: most will not have spoken regarding a particular piece of legislation, and the statements of those who did speak are notoriously unreliable (especially when the question involves possible illicit motivation, such as racial animus). Even if we did know the intentions of all individual legislators, moreover, we have no settled method of aggregating these individual intentions into an overall intention of the legislature. A collection of materials on statutory construction reveals an array of aggregative or ascriptive techniques that seem quite chaotic when viewed as a whole, and sometimes almost comical when considered one-by-one.149 Consequently,

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148. It would perhaps be more accurate, but also more awkward, to call this the problem of “collective mental states,” since collective “perceptions” and “understandings” should be included in the scope of the problem.

149. See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 633-879 (2d ed. 1995) (discussing doctrines of statutory interpretation). For a
"legislative intention," as Max Radin declared in what may be the classic statement of the objection, is a "transparent and absurd fiction . . . an illegitimate transference to law of concepts proper enough in literature and theology."150

One familiar response to this objection transfers the meaning-conferring responsibility from the authors, or from the persons who wrote and enacted a law, to the persons who read, apply, and live by the law—to the readers, or the public. I have earlier referred to this strategy as one that emphasizes "perceivers' meanings" over "authors' meanings." In this vein, as noted earlier, constitutional "originalists" may emphasize that they are concerned with the original "public meaning" of a provision, and expressivist scholars may exalt the "social meaning" of law. But this transfer of responsibility fails to solve the "problem of collective intentions" for two reasons. In the first place, the transfer simply relocates the problem to a different, but even more intractable, collective agent. If it makes little sense, that is, to suggest that the intentions of a relatively contained and identifiable body of individual legislators will converge to form some sort of "collective intention," how much sense can it make to suppose that the perceptions or understandings of a vastly larger and more diffuse group ("society" or "the public") will converge to form a collective "social meaning"? In the case of a federal statute, for example, the difficulty of aggregating five hundred or so personal meanings to form an overall meaning will hardly be solved by adding another two hundred million or so personal meanings into the equation.151

particularly comical instance, see Kosak v. United States, 465 U.S. 848, 855-62 (1984), in which a disputed issue regarding the meaning of the Federal Tort Claims Act was settled on the basis of a memorandum written by a Justice Department attorney fifteen years before the law was actually enacted—even though, as Justice Stevens noted in dissent, "[t]here [was] no indication that any Congressman ever heard of the document or knew that it even existed." Id. at 863 (Stevens, J., dissenting).


151. Proponents of this "transfer" move may adopt additional tactics in an effort to make "social meaning" more manageable. They may try to define some smaller and more unified subset of "society" whose understanding or perception will be treated as authoritative. In determining what a controversial law (a voucher bill, say) "means" for Establishment Clause purposes, maybe what should count is not how the law is understood by "society at large"—society at large will probably diverge in its understandings—but rather how the law is perceived by, say, "religious minorities," or by "non-mainstream" religions. Cf. Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113, 1177-79 (1988) (arguing that the endorsement test should be applied based on perceptions of religious "outsiders"). But even this subgroup is likely to be much larger and more diffuse than a legislature is. Moreover, it becomes difficult to explain why one sub-
There is a further difficulty with the attempt to solve the problem of collective authorship by shifting to "perceivers' meaning": perceivers or readers, as Paul Campos has convincingly shown, typically ascribe meaning to texts precisely by trying to discern what the authors of those texts intended to express. So it seems that "perceivers' meaning" is merely a shorthand for "authors' semantic intentions as perceived by a reader (or 'the public')." If so, then the shift to "perceivers' meaning" cannot adequately remedy the sort of deficiencies in an intentionalist approach described by critics like Max Radin (and many others). If legislative intentions do not exist, as Radin and others have argued, then what sense would it make to have the content of law turn on a reader's (or "the public's") perceptions of that non-existent entity? To be sure, people (and judges) might not grasp the fallacy of "legislative intention." Consequently, a statute might continue to have a "public meaning"—just as a public belief in ghosts (and a belief that ghosts are white and clammy) might persist even if the ghosts themselves do not actually exist. But how much confidence could we have in a law whose meaning ultimately depends on the persistence of what seems, upon reflection, an illusion?

The problem of collective intentions plagues modern efforts to explain how laws can have meanings. Later, we will consider the efforts of expressivists (and others) to address this problem by invoking linguistic conventions and "objective meanings." But before examining those efforts, we should notice that the problem of collective meanings is not the only difficulty that afflicts modern accounts of legal meaning. Almost as serious is the problem of what we can call, a bit awkwardly, "the thinness of legal meaning." In the modern view, that is, the "meanings" ascribed to law seem necessarily to be meanings intended or understood by some class of human beings—of legis-

152. For a full discussion of this point, see articles cited in supra note 19. Campos illustrates the point with an intriguing example. Suppose that while walking in the desert near the border between the United States and Mexico, you come across marks in the sand forming the figures "R E A L," and you wonder what these marks "mean." Your first step will be to guess whether the marks were made by an English-speaking or Spanish-speaking agent. If you think the marks were made by an English speaker, you probably will interpret them to mean something like "real" in the sense of "actual" or "existing." If you suppose instead that the marks were made by someone speaking Spanish, then you will understand them to mean something like the English term "royal." But if you think the marks were made by no one, and were instead simply the fortuitous effect of wind on the desert sand, then you will not suppose that the marks actually "mean" anything at all—they are merely a strange but meaningless accident. In any case, supposing an author is a first and essential step in ascribing meaning to the marks. Campos, Against Constitutional Theory, supra note 19, at 118-19.
lators, or the public, or some other group—and these human beings will be subject to all of the deficiencies of ordinary mortals: thoughtlessness, selfishness, carelessness, lack of vision. In many instances, especially where the Constitution is concerned, they will also have lived in the distant past. But we demand of our law meanings that speak responsibly, wisely, justly—and that speak to us, now. So the meanings that we can plausibly ascribe to actual human beings may seem just too meager—too "thin"—to warrant the authority that law carries in our culture.\(^{153}\)

This problem is particularly salient in constitutional law. If we were to limit the force of, say, the Equal Protection Clause or the Establishment Clause to what was actually in the minds of the politicians who voted for those provisions, a good deal of the constitutional law that is now widely cherished would have to be relinquished. The majesty of our fundamental law would give way to, as Ronald Dworkin says contemptuously, "a document with the texture and tone of an insurance policy or a standard form of commercial lease."\(^{154}\) We expect more of our law than that—more than meanings limited to the actual intentions of busy, distracted, selfish, distinctly finite enactors can provide.

Once again, the transfer of meaning-conferring responsibility to someone other than legislators or "framers" sometimes seems calculated as a response to this problem. And insofar as the difficulty is simply that the enactors of a measure lived a long time ago, transferring responsibility over meaning to a present class—"the public," maybe—might seem to address that aspect of the problem.\(^{155}\) But there seems to be no reason to suppose that a present class—or a class of readers—would be wiser, or philosophically deeper, or possessed of greater vision than the enactors or authors. In many contexts, we might expect the opposite to be true. In the case of the Constitution, for example, one might surmise that although a representative sample of the present "public" might give us a more up-to-date meaning, that sample might not achieve an improvement in terms of wisdom or vision over the delegates to the Philadelphia convention.

\(^{153}\) This problem is a pervasive theme in JOSEPH VINING, FROM NEWTON'S SLEEP (1995).

\(^{154}\) RONALD DWORIN, FREEDOM'S LAW 74 (1996).

\(^{155}\) The transfer of meaning-conferring authority to present interpreters raises other problems that I will not address here. For example, the transfer does not address the challenge made by Campos. The transfer also raises what I have elsewhere described as the problem of "mindlessness." For a discussion of this problem, see Steven D. Smith, LAW WITHOUT MIND, 88 MICH. L. REV. 104 (1989).
To be sure, on readers’ meaning assumptions we might obtain more philosophically rich meanings by assigning meaning-conferring responsibility not to the general public but rather to, say, the Harvard philosophy faculty (although that group would surely also be capable, if they were so disposed, of reading the Constitution to mean a good deal less than ordinary members of the public could). But any such suggestion raises the obvious objection based on lack of authority: why should they get to determine what the Constitution means?  

Modern lawyers and jurists adopt a variety of strategies for overcoming the problem of “thinness” in legal meaning. Fancy theories of “hermeneutics” and movements in law-and-literature are plausibly viewed as reactions to this problem; so is the familiar argumentative device whereby lawyers, judges, or scholars treat a legal text as incorporating by reference some “principle” more sweeping and majestic than anything the enactors of the text can plausibly be thought to have contemplated. I do not pretend to address all of these strategies here. For now, it is enough to notice that the problem is troublesome and that it seems to be one of the concerns that expressivist jurisprudence seeks to address.

2. The Problem of Normative Evaluation.—In the modern reconstruction of law, as we have seen, a law’s normative status is typically addressed from one of the ethical positions—consequentialist or Kantian—that have developed in the effort to give an account of morality and moral evaluation following the loss of belief in a normative order that could provide the framework for such valuations. These approaches to the normative questions presented by law are perfectly familiar, but there is increasing reason to worry about their efficacy. The issues are numerous and complicated, of course; they comprise, in a sense, the whole intricate body of modern ethical theory as well as

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156. I might add that, for me, all of these suggestions have an unreal quality—not merely politically, but conceptually—because I agree with Campos that “interpretation” is never understood by its practitioners as a way of “conferring” meaning on the text; rather, it is understood to be a process of ascertaining meaning that is in some sense already “there” (or that has been put there by an author). So there is no reason to suppose that a competent, philosophically-sophisticated interpreter should understand a text to have any different meaning than a competent but philosophically-innocent interpreter would (though one interpreter might well appreciate implications and difficulties that the other would not, and though the philosophically-sophisticated interpreter presumably would be better able to discern the meanings in a text that is in fact philosophically sophisticated).

157. I have discussed the invocation of “principles” at length elsewhere. See, e.g., Steven D. Smith, Idolatry in Constitutional Interpretation, in AGAINST THE LAW, supra note 19, at 157, 180-86. For now, I will only say that this common practice seems dubious for the same reason that I will argue expressivism is dubious: it seems to presuppose a metaphysically richer universe than the modern worldview allows for.
a good deal of legal theory. But the frustration over both approaches may be readily understandable to those of us who read the recent debate between Judge Posner (an heir of Bentham) and Professor Dworkin (a distant descendant of Kant) and find both these antagonists to be cogent and persuasive when they are criticizing the other.

As that debate illustrates, there are potent philosophical objections to both approaches. A guide to those objections is Alasdair MacIntyre’s influential study *After Virtue*. MacIntyre explains that Kantian and consequentialist and other ethical theories are part of what he calls “the enlightenment project,” and he argues that this project is destined to fail. But the Posner-Dworkin debate also underscored a different, more practical kind of objection. This objection would suggest that whatever their virtues as a way of understanding ethics or morality generally, the standard consequentialist and Kantian approaches are of limited value to law, or at least to adjudication, because courts have no way of ascertaining the factors that would be needed to apply those ethical perspectives.

The objection is perhaps most telling with respect to the consequentialist approach. Any judicial decision may, of course, have an almost infinite series of effects on a host of people, most of whom are not before the court and many of whom may not yet exist. A court will not typically have even a fraction of the information needed to perform a responsible consequentialist calculation and would have very little idea what to do with that information even if it were available. To be sure, legal thinkers since at least Holmes have repeatedly called for the development of a “policy science” to guide a consequentialist legal enterprise, but at the turn of the millennium, little progress toward such a science was apparent. Indeed, Brian Leiter observes that “in retrospect, policy ‘science’ looks rather silly, a ‘science’ in name only.” In constitutional law, Alexander Aleinikoff offered a devastating attack on the notion that courts can resolve constitutional questions by “balancing” interests. Expressivist scholars—Pildes, in particular—reinforce this objection.

159. Id. at 35.
160. Id. at 49-59.
161. For a discussion, see Smith, supra note 70, at 1083-85.
The perceived impracticability of a consequentialist judicial enterprise may incline some to a more purpose-oriented position, at least for judicial use in assessing challenged laws. It may seem, that is, that although courts cannot ascertain and weigh all of the consequences of a law, they can more realistically determine what the purpose of a law was and then approve or condemn the law based on the legitimacy of that purpose. Hence, purpose-oriented approaches have come to dominate modern constitutional law. But (to note just one difficulty among many) the preceding discussion of legislative intention may cast doubt on this view. The "intention of the legislature," as we have seen, may be devilishly difficult to ascertain; it may be nothing more than a fiction, or an illusion.

In sum, both of the standard normative approaches may seem to assign to the courts functions that they cannot perform. And frustration over both of the predominant approaches might well lead us to wish for some alternative. Expressivism, by making its "meaning" dispositive of a law's validity, may seem to offer such an alternative. After all, the "meaning" of a law, in contrast to either its actual purposes or its consequences, may seem to be something within the competence of courts. Isn't that what courts do all the time—determine the "meaning" of laws? So an approach that would tie normative status or validity more closely to "meaning" seems powerfully attractive, for reasons of institutional competence and perhaps on philosophical grounds as well.

F. What Is Expressivist Jurisprudence?—A Second Look

In the introduction to this Part, I suggested that, taken cumulatively, the claims common to expressivist scholarship manifest a sort of obsession with legal meaning. It is now possible, I hope, to understand what lies behind that obsession. "Meaning" is at the core of what law is; if it does not "mean," law does not exist as law. But in the modern reconstruction of law, as we have seen, legal meaning is a frail and elusive thing. Expressivism aims to reinforce that essential dimension of law.

More specifically, recent expressivist scholarship tries to accomplish this goal in three ways. First, it tries to reaffirm and solidify what we might call the standard sources of legal meaning. Expressivism, it seems, is not in the final analysis concerned to favor "perceivers'
meaning” over “authors’ meaning” (or “conventional meaning” over either of these), but rather to shore up all of these standard sources of meaning—including “authors’ meaning.” Second, using the standard sources of meaning as a base or starting point, expressivism attempts to move beyond them to a meaning that is more solid and rich and “objective”—less vulnerable to the problems we have discussed above. Third, expressivism attempts to give law’s “meaning” greater dignity—to make “meaning” more meaningful, so to speak—by making it the basis of law’s normative status.

In all of these ways, the new expressivism can be understood as an effort to regain for law some of the important and attractive qualities it had in the pre-modern milieu. In that context, as we have seen, law (like the world in general) was rich with meaning; and a law’s meaning did not need to be limited to what some discrete class of mortals, such as the enactors, thought it meant. Rather, within the pre-modern worldview, it made sense to say that a law “means” X even though neither the legislators nor the actual public—the “public,” that is, that is composed of real human beings—would have understood the law to have that meaning. In addition, as we have seen, the law’s normative status was closely linked to its “meaning” in the sense that the law gained both its meaning and its status as law from its relation to the larger normative order in which it participated. The recent expressivist turn would confer similar qualities on modern law: a law could have “objective” meanings that were not—and are not—understood either by its enactors or by the actual public; and these meanings would be determinative of the law’s validity.

More generally, expressivism would make law more congenial to the “meaning-oriented” conception of what human beings are, as opposed to the more “interest-seeking” versions characteristic of prevailing instrumentalist views. In these ways, expressivism seeks to satisfy the hunger of many in our culture, noted earlier, for greater meaning in politics and culture.

Thus understood, recent expressivist scholarship is far from platitudinous; it seems, if anything, visionary and potentially inspiring—perhaps even a bit reckless. For people (like myself) who share the expressivists’ dissatisfaction with modern accounts of legal meaning and with contemporary normative positions, there is much in the expressivist turn with which to sympathize, and cause to hope that expressivism might succeed in achieving its objectives. But can it?
III. THE FUTILITY OF MODERN EXPRESSIVISM

I have suggested in the preceding Section that expressivist scholarship seeks to shore up legal meaning in three ways: by reinforcing the standard sources of legal meaning; by moving beyond these standard sources toward a meaning that is more rich, solid, and "objective"; and by making law's meaning determinative of its validity or normative status. I concede that these are admirable objectives. But a closer reflection suggests that expressivist scholarship lacks the resources to achieve its aspirations.

A. The Defense of Collective Intentions

Though expressivist scholars endorse the standard sources of meaning—especially what I have called "perceivers' meaning," but also "conventional meaning"—they usually do little to defend these sources against criticism of the kind discussed earlier. At least in the expressivist scholarship that I have read, there is often an expressed preference for "social," or "cultural," or "public" meanings over meanings controlled by "legislative intention." But little effort is made to explain why a meaning located in a class of people even more diffuse and diverse than a legislature (and vastly more numerous) is a more manageable concept than the concept of an authors' meaning tied to "legislative intention."

A notable exception to this casual attitude occurs in the recent "General Restatement" by Anderson and Pildes. In that article, the authors address head-on the primary problem afflicting all of the standard sources of meaning—the problem of assigning semantic intentions, or, more generally, "states of mind" to a collective agent. In response to that problem, Anderson and Pildes thoughtfully defend the notion that a collective intention or mental state can exist and—crucially—can be more than an illusion, or metaphor, or fiction, as the familiar objection contends.

They begin by noting that in everyday conversation "we speak without puzzlement about social groups or collective actors having beliefs, emotions, attitudes, goals, and even characters." For example, "[p]eople say that the big tobacco companies knew they were lying when they denied that cigarettes are addictive; that Russia is angered at NATO's expansion plans; that rival gangs hate each other; that the Congressional Budget Office is trustworthy and nonpartisan." The

166. Anderson & Pildes, supra note 2.
167. Id. at 1514.
168. Id.
observation is surely correct, and it can easily be extended: people also talk about what "the government was trying to do," or what "the legislature had in mind." So what? Critics of legislative intention have never denied that people commonly talk in these ways; such talk is precisely the target of their criticism, which suggests that this talk is careless, misconceived, or metaphorical.

But Anderson and Pildes go on to defend this common usage, explaining with some rigor the conditions in which it seems sensible and accurate (and not merely a loose, metaphorical "personification") to talk of collective mental states. The formal statement of these conditions is as follows: "A group, \( G \), has mental state \( M \) if and only if the members of \( G \) are jointly committed to expressing \( M \) as a body." Anderson and Pildes illustrate this possibility with examples of people self-consciously, and by mutual understanding, hiking together (as opposed to hiking unilaterally in close proximity to each other), cooking together, and shoveling snow together pursuant to a common agreement. They explain that

[w]hen groups share beliefs, they are often the product of successful conversational exchange. Suppose, while waiting for the bus, two people discuss whether the clouds in the sky threaten rain. One says, "Those clouds look like they are getting dark, so we’ll be getting rain." The other replies, "No, they just look dark because the sun is setting." The first says, "Oh," nodding in agreement. This conversation establishes, through joint acknowledgment of the claim that the clouds do not indicate rain, a belief held by the conversational group.

Having established the possibility of a collective mental state, Anderson and Pildes go on to argue that groups "can also share principles of action, social norms, or conventions." Moreover, these groups might include "legislatures, political associations, or social groups."

This analysis helpfully clarifies the idea of a collective mental state, which might include an intention such as a semantic intention, or an intention to convey a particular meaning. Anderson and Pildes's analysis shows, I think, that legal meaning determined in accordance with either "legislative intention," or perhaps even "social

169. Id. at 1517.
170. Id. at 1515-16.
171. Id. at 1517 (footnote omitted).
172. Id. at 1518.
173. Id. at 1519.
meaning," is in principle possible. The strong objection that would assert that such notions are a priori nonsensical, or that collective intentions or meanings are necessarily an illusion, is thus mistaken.

This is a valuable philosophical insight, I think; but the critic will likely respond that as a practical matter, this insight is largely beside the point. Granted that it is possible in principle for members of a legislature (or even members of "society" or "the public") to reach a deep shared understanding in the way that two neighbors might, still, how likely is it that such a meeting of multiple minds will in fact occur? The more sensible construction of the familiar objection to legislative intent, perhaps, would interpret that objection as claiming not that legislative intention is impossible a priori or in the abstract—in theory, legislators could all agree on a single shared meaning and purpose for a law—but rather that, in reality, the convergence necessary for such an intention rarely, if ever, occurs. If so, then the argument offered by Anderson and Pildes will seem like a defense of anarchism, which asserts, in response to the usual practical objections, that every person in the world just might decide to be peaceable and generally nice. Well, yes, they might—but . . . .

And indeed, although Anderson and Pildes purport to extend their point about collective mental states to legislatures, social groups, and even "the democratic State," a close reading suggests that, in fact, they simply leave the analysis behind when considering these larger groups. Thus, Anderson and Pildes make no effort to show that a legislature or "the democratic State" could in fact satisfy the conditions that they have so carefully specified—the conditions, that is, of their "members [being] jointly committed to expressing [a particular meaning] as a body"—or that these groups could engage in the "successful conversational exchange" attributed to partners in hiking, cooking, and shoveling snow. Instead, they promptly retreat to a different (and all too familiar) position: that we often treat laws as if they reflected some such collective intention. Their rigorous "if and only if" quickly lapses into the licentious "as if."

174. Adler, for example, seems to make the more moderate and sensible objection. See Adler, supra note 6, at 1390-91. And even when objectors like Radin seem to be making the objection in stronger, a priori terms, they might simply be presupposing the practical impossibility of the sort of convergence that Anderson and Pildes hypothesize. "It goes without saying," in other words, "that that kind of 'legislative intention' will rarely, if ever, occur, so references to the 'intention of the legislature' could make sense only on the (a priori nonsensical) supposition of a 'collective mind' or something of that sort."

175. Anderson & Pildes, supra note 2, at 1520.

176. Id. at 1517.

177. Id.
In this vein, Anderson and Pildes observe that "Congress has adopted various mechanisms, institutional structures, and conventions through which it understands itself to be manifesting its purposes." Consequently, members of Congress "are deemed to have accepted these mechanisms or structures by virtue of accepting their seats." But this contention provokes a host of questions. Who is hiding behind the passive voice? Who, that is, is doing the "deeming"? And by what authority? That is, who says (or where is it written) that by accepting a seat in Congress an official necessarily accepts some set of "mechanisms" and "conventions" beyond those explicitly spelled out in formal rules or in the Constitution itself for establishing institutional meanings? (If an elected representative declared her refusal to accept those "meaning-conventions," would she be denied her seat?) And in any case, Anderson and Pildes's assertion seems simply wrong as an empirical proposition: in reality, the "mechanisms" and "conventions" for ascribing meaning to enactments are far from being uniformly understood or accepted. On the contrary, among those who pay attention to such conventions, they are hotly debated. So any "deeming" we do will be a pretty flimsy and artificial affair.

More importantly, even if the "mechanisms" and "conventions" were codified and universally accepted, the resulting "constructive" mutual understandings and intentions (based on what members of Congress would be "deemed to have accepted") would still not be the actual "mental states" or "intentions" that Anderson and Pildes earlier seemed to be arguing for. Rather, they would be precisely the sort of construction that critics like Radin have all along said they are. Thus, after starting out to defend the possibility of collective mental states, such as legislative intentions, against the objection that says these are merely fictional, Anderson and Pildes soon begin cozying up to that very fiction.

But the embrace is a brief one. In fact, Anderson and Pildes soon go on to contend for what they call the "public meaning" of laws and official actions—a meaning not determined either by what the enactors intend or by what the "public" (the public composed of real people, that is) understands. "Public meaning" (whatever it is) in fact

178. Id. at 1523.
179. Id. (emphasis added).
180. See supra note 150 and accompanying text (noting the practical impossibilities involved when attempting to ascribe "legislative intentions"). Anderson and Pildes do not list the specific conventions, seemingly for good reason: any ostensible convention (for example, an ambiguous law means what its sponsor said it means, or what the committee report said it means) would be controversial—not settled or uniformly accepted.
seems closer to the expressivists’ larger purposes, so we will return to consider it shortly. For now, we should note that “public meaning” does not correspond to any actual collective mental state of the kind that Anderson and Pildes so carefully described. Indeed, it seems that “public meaning” need not match up with what anyone intends or understands; it “need not be in the agent’s head, the recipient’s head, or even in the heads of the general public.”

So then where does “public meaning” come from, if not from the authors, the readers, or even “the public”? At this point, Anderson and Pildes turn to conventions as a source of “public meaning”; conventions are central to their claim that acts and laws can have an “objective meaning.” With this claim, I think we come closer to the heart of the expressivist position, so we will need to consider that claim more closely. For now, two points seem pertinent. First, as noted, linguistic and legal conventions for determining meaning are in reality a mixed, messy, often conflicting set of practices. Second, even if the appeal to conventions always yielded univocal answers, those answers would do nothing to deflect the familiar criticism which asserts that “collective intentions” are a fiction rather than any sort of actual “mental state.” With regard to that criticism, Anderson and Pildes seem like scientists who reject the assertion that the mirages of water that one sees in the desert are illusions by pointing out that mirages are generated in accordance with the regular laws of physics and optics. Maybe so, but the observation does precisely nothing to alleviate the distress of the person who is lost in the desert and dying of thirst.

In sum, Anderson and Pildes’s treatment of the problem of collective mental states is marked by a troubling disconnect between the beginning and ending of their discussion. They begin, as noted, by offering a (valuable but limited) account of the possibility of actual collective intentions or mental states. They conclude with a defense of collective meanings that seems wholly incongruent with that account and that, by their own admission, has almost nothing to with anyone’s intentions or mental states.

182. Id. at 1525. It is, instead, “socially constructed”—but not in any straightforward sense, because “public meaning” is “not . . . determined by shared understandings of what the action means.” Id. at 1524. At least, that is what Anderson and Pildes say at one point; several pages later they seem to say the opposite. See id. at 1527 (“The expressive meaning of collective actions is a matter of public and shared meanings.”). The precise claim is thus unclear, to me at least; but as will become apparent, I am skeptical that everything said by Anderson and Pildes about meanings and public meanings is reconcilable.

183. See id. at 1520 (invoking “understandings and practices”); id. at 1528 (invoking “conventions of meaning”).
B. The Quixotic Quest for "Objective" Meanings

The more central claim made by expressivist scholars asserts that laws have "objective" meanings—meanings that may grow out of, but that are nonetheless distinguishable from, more "subjective" factors, such as the conscious intentions of actual human legislators. This search for an "objective" meaning is understandable. It might seem, after all, that the "subjective" quality of more conventional understandings—of "legislative intent," for example, or of "social meaning" understood as a sociological fact—is precisely what makes those meanings frail and insecure as bases for law. An "objective" meaning, it seems, would be more solid and reliable. It would avoid the problem of collective intentions because the meaning would not belong to any actual person's subjective intentions, and it would presumably be less "thin" in its content than the subjective meanings intended or understood by fallible, finite human beings.

The claim that laws have an "objective" meaning lies at the core of expressivist jurisprudence. To be sure, scholars and jurists who are not self-consciously expressivists—"textualists," for example—often make similar-sounding claims about "objective" meanings. But these assertions, though often murky enough, typically seem content to refer to the understandings of a law that exist in fact in the minds of average members of "the public" who are supposed to be real human beings. Expressivists, at least in their more sanguine moments, seem to go beyond this point in order to claim an "objective" meaning that does not even correspond to "social meaning" or "public meaning," empirically understood. It is in these moments, I think, that we can most clearly perceive the affinities between expressivism and the pre-modern understanding of law. In that understanding, as we have seen, events and objects could be said to have meanings independent of those projected onto them by human sub-

184. See, e.g., id. at 1512 (asserting that in an expressive theory, "the standard of adequacy is public, set by objective criteria for determining the meanings of action"); Hellman, supra note 2, at 31 (discussing C. Edwin Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. Pa. L. Rev. 933 (1983), and agreeing with Baker that, in assessing the purpose of a law in an Equal Protection challenge, "we should understand that intent objectively rather than subjectively").

185. See supra notes 16, 18 and accompanying text (discussing the similar views of Antonin Scalia and Robert Bork).

186. See, e.g., supra note 20 (noting Deborah Hellman's abandonment of the term "social meaning"); see also Hellman, supra note 2, at 22 (rejecting as "flawed" an approach that "casts the judge as sociologist" in search of meanings understood by "the majority of people").
jects. Expressivist scholars seem to crave a similar meaning that transcends our mundane subjectivities.

1. How Is “Objective Meaning” Possible?—Here we confront the crucial problem for expressivism. In the pre-modern understanding, as we have seen, events and objects could be said to have “objective” meanings because they were believed to be linked to an order of reality beyond the visible or phenomenal one. This supporting metaphysics, as scholars like Huizinga and Taylor and Nasr have explained, was what made it possible to view mundane objects and events as symbols or manifestations of some larger order, and hence, as having meanings beyond their merely human or “subjective” meanings. Modern expressivists, by contrast, invoke no such supporting metaphysics. “Meaning” thus seems of necessity to be meaning to us, or at least meaning to someone. Meaning, in short, seems inherently “subjective”; any other sort of meaning—any “non-subjective” meaning—is, within the modern worldview, simply unintelligible (like an “itch” that no one feels, or a “desire” that no one is aware of having).

Suppose I say, “Objectively, this sentence means X,” and you ask, “Really? Would anyone understand the sentence in that way?” And suppose I answer, “No, I’m not saying that anyone—any person—would understand the sentence to mean X. It doesn’t mean that to anyone. That’s just what it means, period—objectively.” You would conclude, I suspect, that I am guilty of committing nonsense. Meanings are ultimately, by their nature, subjective; they are meanings to someone. So it might seem that expressivists are claiming something that in the modern intellectual framework amounts to a contradiction in terms.

So how are “objective” meanings to be constructed, or found? Expressivist scholars attempt to ground such meanings in a variety of sources; they invoke “noncommunicative” meanings, “conventional” meanings, and artificial or fictional observers, and sometimes they

\[187. \text{If this conclusion seems too strong, that may be because we can (and often do) describe meanings as “objective” as a way of distinguishing them from something else that is “subjective” in an understood way. In a given context, this usage may work well enough; but it does not lead us to a meaning that is “objective” in any ambitious sense that would avoid the problems of subjectivity. Suppose you and I both understand that you have a highly idiosyncratic theory of interpreting poetry. I might ask you: “What does this poem mean? I’m not interested in your ‘subjective’ interpretation. What does it mean ‘objectively?’” You might understand this question to be asking you to set aside your more idiosyncratic theory for the moment and apply more general or conventional criteria to the interpretation of the poem. But the interpretation that would result from these more conventional criteria would still be essentially “subjective.” It would still be an interpretation of what the poem means to someone.}\]
seem to suggest that actions or statements can just plain "mean" without meaning to anyone. But none of these efforts can supply the kind of "objective" meaning that expressivists seek.

2. "Noncommunicative Meanings."—As discussed in Part I, expressivists claim that a law "expresses" meanings beyond those that it communicates; it "sends messages" that its enactors did not intend to convey. Because these "noncommunicative" meanings are, by definition, not part of any communicative "intention," they may seem less "subjective" than more "communicative" meanings.

I have already noted one objection to this usage: it arguably works to produce confusion by conflating intentional and more evidentiary senses of the term "to mean" that ought to be kept distinct. Without regard to that objection, however, we need only observe, for present purposes, that including "noncommunicative meanings" within the "meaning" of a law does nothing to solve the problems of subjectivity. To be sure, insofar as a meaning is not "communicative," it presumably was not part of the semantic intentions of the authors of a law; so this meaning avoids that specific kind of subjectivity. But insofar as noncommunicative meanings are still "meanings," they must still exist in the understanding of someone—and that someone, whether it be "society," or the "public," or the judge, will still consist of a subject, or of subjects.

Taken at face value, in fact, Anderson and Pildes's description of noncommunicative meanings would make them "subjective" at both ends of the interpretive relation—that is, at both the sending and receiving ends. That is because Anderson and Pildes repeatedly indicate that what is "expressed" (without being "communicated") is a "state of mind" or a "mental state." And a "mental state" is surely a property of a person, or a subject. So a noncommunicative meaning seems subjective both at the point of origin and at the point of perception. And insofar as those subjects are collective agents—the legislature, the "public"—acknowledging noncommunicative meanings does nothing to solve the problem of collective intentions.

Neither are the "noncommunicative" meanings associated with a law wiser or morally or philosophically richer than the meanings actually contemplated or intended by authors. Or at least Anderson and Pildes give no reason to suppose that they would be. Nor, in most settings, is there any apparent reason to think that mental states that an actor inadvertently or unconsciously manifested (or, in Anderson

188. E.g., Anderson & Pildes, supra note 2, at 1508, 1565.
and Pildes's terms, "expressed") would be morally or philosophically richer than those mental states that the actor actually intended to communicate. So "noncommunicative meanings" seem to be a poor remedy for the problem of "thinness" in legal meaning.

In short, though their usage is unconventional and arguably confusing, expressivists are free to classify the noncommunicative aspects of a law as part of the law's "meaning." But it is unclear what they gain by that unconventional usage. Perhaps the added meaning, because it was by definition not actually intended, seems more receptive to the adjective "objective." But there seems to be no reason to suppose that this unconventional formulation does anything to address either the problem of collective intentions or the problem of "thinness."

3. "Conventional Meanings."—Another source of "objectivity" that expressivists (in common with many others) invoke is linguistic "conventions"—conventions that are thought to be impersonal, and hence "objective," and hence capable of yielding "objective meanings." Linguistic conventions are, of course, real enough; without them, it would be almost impossible for speakers to communicate, or for listeners to understand what speakers are trying to say. The importance of such conventions becomes painfully apparent to us whenever we find ourselves in a country or culture where we do not share such conventions—that is, where we don't speak the language. As noted, therefore, legal education is largely devoted to inculcating a knowledge of the relevant conventions.

But does it follow from this that conventions are capable of yielding "objective" meanings that are independent of the more "subjective" meanings associated with "authors' intentions" or "perceivers' meanings"? Expressionists (and others) sometimes seem to regard "conventions" in the way an Austinian positivist regards "law"—that is, as a set of rules, laid down by some supreme sovereign, that the individual subjects or speakers just have to take as given. Just as "the rules" (of law) determine the legal effects of the subjects' actions without regard to the subjects' intentions or desires, "the rules" (of language) imperiously determine the meanings of speakers' statements independent of the speakers' actual semantic intentions. But of course this is not how "the rules" of language arise, or how they function. Linguistic "conventions" are not "objective," meaning-conferring agents that operate outside (and sometimes override) the actual practices of speakers and listeners. Rather, "conventions" are simply the common patterns that speakers and listeners use in communicating. Upon reflection, therefore, it seems that "conventions" cannot
supply any meaning that is not already available from the authors’ or perceivers’ conceptions of meaning.

Consequently, conventions can at most provide an account of (and perhaps the resources for ascertaining) authors’ or perceivers’ meanings; they cannot supply any meaning in addition to those meanings. So we need to be wary, I believe, of the philosophers’ cherished distinction between “speaker’s meaning” and “sentence meaning” (or between “intended” and “linguistic” or “conventional” meanings). Such distinctions may have certain limited uses—for example, to identify particularly idiosyncratic or nonstandard expressions, or the kinds of verbal miscalculations that we acknowledge when we say “I misspoke” or “I didn’t mean what I just said.” But any very strong distinction will render the notion of “sentence meaning” nonsensical.

Gerald Graff explains:

Speech act theorists like John Searle and H.P. Grice distinguish between “sentence meaning” and “utterance meaning” to distinguish between the kind of understanding we can have of a context-free sentence like “keep off the grass” and of the same sentence when actually used by somebody to commit a speech act, say, of warning. One might suppose that the expression “keep off the grass” is sufficiently familiar that we know what it means independent of any situation in which it may be used. In fact, the expression’s familiarity probably depends on our imagining a standard situation with which we associate the words—a sign seen on a well-manicured lawn, say, or the cry of a gardener working on such a lawn while somebody is walking across it. “Keep off the grass” would mean something entirely different if we overheard the expression uttered by a narcotics-counselor, in appropriate circumstances, to a person known to us as a marijuana-user. . . . [I]nterpretation is concerned not with what words or sentences mean “in themselves” but with how speakers actualize the semantic potential of words and utterances in particular speech acts.

Gerald Graff, “Keep off the Grass,” “Drop Dead,” and Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev. 405, 407-08 (1982), reprinted in Interpreting Law and Literature 175, 177 (Sanford Levinson & Steven Mailloux eds., 1988) (footnote omitted).

Even here, I think, we need to be wary. When we say that a particular speaker’s intended meaning departs from “conventional” meaning, we are typically merely employing an unduly crabbed or even obtuse conception of linguistic conventions. For example, it is sometimes said that speakers’ meaning differs from (or is the opposite of) conventional or sentence meaning when a particular speaker has an ironic semantic intention. But, of course, irony itself is typically used and understood by means of conventions (and if it were not, we would almost never have any way of detecting irony). So, for example, there seems to be no warrant for concluding that the expression, “Yeah, right” (meaning something like, “No way” or “Are you crazy?”) is a case in which “speakers’ meaning” differs from “sentence meaning.” That conclusion seems plausible only if we take an extremely narrow or obuse view of our linguistic conventions.

In the same way, the notion of “objective” meaning in, say, contract, may be understood as a way of screening out private, or hidden, or idiosyncratic understandings that a party might try to assert, but the notion hardly implies that there is some meaning “in the words” independent of what actual users of the language would “subjectively” intend or understand by them. See generally Campos, Hermeneutics and Legal Text, supra note 19, at 1088-90.
What sense could it make, after all, to say: “Although neither this particular speaker nor speakers generally would intend this sentence to mean X, and although neither this particular listener nor listeners generally would understand the sentence to mean X, nonetheless, according to ‘the conventions of our language,’ the sentence means X.” If speakers and listeners do not understand a sentence to have a particular meaning, then obviously there are no conventions that give it this meaning. It might be true, of course, that a clumsy or uncomprehending application of some of our linguistic conventions would lead someone to suppose that the sentence means X. For example, if you didn’t understand that a certain inflection (or exaggeration or whatever) conventionally indicates sarcasm, you might think the sarcastic utterance “That’s just great!” indicates praise. But why should clumsy or uncomprehending application be honored with the privilege of establishing “conventional meaning”?

In sum, although conventions are plainly essential to communication, it makes sense to distinguish a sentence’s “conventional meaning” from “speaker’s meaning” (if it makes sense at all) only as a way of identifying and declining to honor particular idiosyncratic or deviant uses of language. But disagreements over the meanings of statutes or constitutional provisions rarely arise out of idiosyncratic or deviant uses of language: in their official texts, legislators are not wont to deploy language in highly idiosyncratic or deviant ways (or if they do, they are likely to employ conventions—explicit definitions, for instance—to help us understand what they are doing). In these contexts, disagreements over meaning typically reflect a situation in which within the conventions of our language a statement might manifest more than one purpose or semantic intention. And in this situation, it is a mistake to suppose that what “conventions” (or “the rules of language”) can give is more than what speakers’ or perceivers’ meanings already offer.

We might put the overall point differently: When we try to figure out what a statement or a text means, we are already, of necessity, making use of linguistic conventions. Similarly, when we observe that meaning is uncertain (or ambiguous, or disappointingly “thin”), we are already reporting on (among other things) the limitations of our linguistic conventions. In that situation, we can hardly turn to conventions to transcend the limitations of those very conventions.

192. The situation may be different for contracts.
4. Artificial and Idealized Meanings.—Alternatively, proponents of "objective" meaning can explain that these meanings are "objective" in the sense that they do not represent the intentions or understandings of any actual human beings, but rather reflect what an imaginary "ideal" observer would understand a law or action to mean. As noted, Justice O'Connor adopts this tactic in her "endorsement" jurisprudence: what is dispositive, she explains, is not the messages that real persons actually perceive, but rather the messages that would be perceived by an "objective" or "reasonable" observer fully versed in free exercise values and familiar with the full background of the particular law in question.

In the same way, Deborah Hellman's expressivist construction of the Equal Protection Clause makes the validity of challenged laws turn on whether they express meanings inconsistent with the norm of "equal concern and respect." But Hellman recognizes that different people and groups will see different meanings in a given law, and rather than assign authoritative status to any particular group's perceptions, Hellman argues for a more "idealized" approach. What matters, she argues, is not how real people currently understand a law, but rather how it would be understood by people at the end of an imaginary Habermasian conversation.

The turn to an imaginary or idealized observer permits expressivists to invoke an "objective" meaning without falling into the error of supposing that an expression can "just mean" without meaning to someone. Unfortunately, meaning that is "objective" in this highly stylized sense secures none of the benefits that "objectivity" is supposed to deliver. Meanings, though we can call them "objective" if we want to, also continue to be "subjective," with all of the difficulties that attend that quality. Indeed, meanings become doubly subjective. In the first place, to say that a law means X is still to say that it means this to

193. Cf. Umberto Eco, Interpretation and Overinterpretation 64 (Stefan Collini ed., 1992) (contrasting the "empirical" authors and readers of texts with the "model" authors and readers, and assigning final authority over meaning to the "model" readers and authors).


195. See Hellman, supra note 2, at 13 ("A legal classification violates Equal Protection if the meaning of the law or practice in our society at the time conflicts with the government's obligation to treat us with equal concern.").

196. Id. at 23. At one point, Anderson and Pildes suggest a similar approach:

Although these [public] meanings do not actually have to be recognized by the community, they have to be recognizable by it, if people were to exercise enough interpretive self-scrutiny. This is the sense in which expressive meanings are public constructions.

Anderson & Pildes, supra note 2, at 1525.
someone—even if that "someone" is an imaginary or fictional observer. In addition, this fictional observer is, of necessity, the creation or the projection of some real person, and thus is subject to all of the shortcomings and uncertainties and vicissitudes of that person.

Consequently, invoking a fictional observer as the arbiter of meaning merely turns disputes about "what the law means" into more byzantine disputes about just what sort of character the fictional observer is, or about what this fictional character would perceive. The Supreme Court’s “endorsement” opinions are full of such arcane debates. If these debates sometimes exhibit a surreal quality, that is hardly surprising: the turn to fictional observers represents a deliberate turning away from reality. In the same way, if Professor Hellman’s proposal for applying the Equal Protection Clause were adopted, debates about what a particular law means would inevitably be transformed into more ethereal debates about what people would think the law means after an imaginary Habermasian conversation. We do not, in fact, have the benefit of any such conversation, of course, so a discussion of what we would perceive if we did have that experience will be inherently speculative. But it seems obvious that people who currently believe that a particular law does send an unacceptable or discriminatory message will speculate that in an ideal speech situation everyone would perceive this message (and vice versa). What sense would it make, after all, to say that, based on what I know now, I believe the law means X, but I also believe that if I understood it more fully (in an “ideal speech situation,” for example), I would not think it means X? I can only imagine what my conclusion in an idealized situation would be on the basis of what I know in my actual situation, and if what I know in my actual situation leads me to conclude “not-X,” then I will project “not-X” into the “ideal speech situation.”

197. Consider, for instance, the debate in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995), between Justice O’Connor, who advocated the use of “a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share,” id. at 780 (O’Connor, J., concurring), and who “is similar to the ‘reasonable person’ in tort law,” id. at 779, and Justice Stevens, who argued that Justice O’Connor’s observer “comes off as a well-schooled jurist, a being finer than the tort law model,” who is “singularly out of place in the Establishment Clause context.” Id. at 800 n.5 (Stevens, J., dissenting). Like Justice O’Connor, however, Justice Stevens would not simply honor the actual perceptions of flesh-and-blood citizens, but would instead require that “an apprehension be objectively reasonable.” Id. For example, he opined that “[a] person who views an exotic cow at the zoo as a symbol of the government’s approval of the Hindu religion cannot survive this test.” Id. In another case, Justice Brennan discussed, in apparent seriousness, whether holiday displays, including “a menorah next to a giant firecracker” and “a Latin cross next to an Easter bunny,” would pass the endorsement test. County of Allegheny v. ACLU, 492 U.S. 573, 640 n.* (1989) (Brennan, J., concurring in part and dissenting in part).
In sum, the turn to a fictional observer does not solve—though it may serve to obfuscate—the problems of assigning meaning to laws. In addition, the move creates a difficult normative question: Why should the perceptions of a fictional observer matter? If real people perceive an unacceptable message in a law, why should it matter that a fictional observer ostensibly would not perceive that message (and vice versa)? Who cares, frankly, what we would think about a law in the fantastic scenario in which we all manage to engage in a Habermasian dialogue? Isn’t the important question how the law affects us—how it affects real people—in the world we actually inhabit?

We will consider this normative question more closely in the next Section. For now, these difficulties might cause us to wonder why this resort to fictional observers and artificial questions—to hypothetical scenarios that, from a detached perspective, appear far-fetched and fantastic and, frankly, escapist—seems so powerfully attractive to competent, thoughtful scholars and to jurists like Justice O’Connor. Part of the explanation, I submit, is that the effort to find an “objective” meaning beyond what frail human legislators intend and what merely mortal citizens understand reflects a desire for the sort of richer, more solidly grounded meanings that seemed to be available in the pre-modern intellectual framework.

5. “Objective” Meanings, Period?—At times, expressivist scholars seem to suggest that laws or actions can just have “objective” meanings, period—meanings that need not be meanings of or to anyone. Anderson and Pildes give the example of a musical composition: “Musicians can play music that expresses sadness, without feeling sad themselves. The music they play need not express their (or anyone’s) sadness . . . .”198 In a more recent article, Deborah Hellman criticizes Anderson and Pildes for asserting that “noncommunicative” meaning must express a “mental state”:199 it seems that even entities without the qualities of consciousness or mentality (inanimate objects, perhaps?) can still express meanings.

It is not at all clear that expressivists actually mean to embrace the notion of “objective meaning, period.” Surely the example given by

198. Anderson & Pildes, supra note 2, at 1508 (emphasis added); see also id. at 1525 (asserting that public meaning “need not be in the agent’s head, the recipient’s head, or even in the heads of the general public”).
199. Hellman, supra note 52, at 681-82. Hellman does not, I think, mean to refer to the familiar usages in which “to mean” is understood simply to refer to evidence of anything (“The puddles mean it rained last night”) or to ordinary causation (“The rejection of my article means I won’t get tenure”). In any case, it would seem quite unnatural to describe those senses of “to mean” as the product of “expression.”
Anderson and Pildes does not support the possibility. To be sure, a musician can play sad music without feeling sad. But to call the music “sad” presumably implies (a) that the music will cause at least some listeners to have a feeling of sadness, or (b) that the music expresses a sadness felt by the composer of the music, or (c) that the music at least manages to express an attitude of sadness that an imaginary subject would feel. (“You can tell by the violin music that Bambi is feeling sad.”) Conversely, if the music does not express an attitude of sadness felt by anyone, then what sense does it make to say that the music is “sad”? Anderson and Pildes do seem to say this, but given the extravagance of the claim, it seems more charitable to honor their earlier assertion that “[e]xpression’ refers to the ways that an action or a statement (or any other vehicle of expression) manifests a state of mind”—presumably, of someone’s mind.

If expressivists do intend to assert the possibility of “objective meaning, period,” then it is here that they come closest to claiming the sort of meaning that was available in the pre-modern conception. But in a modern framework, this assertion simply renders the notion of “meaning” unintelligible; and so far as I can see, expressivists do not manage to make that notion intelligible.

In sum, modern efforts to reconstruct law using purely human materials leave a lot to be desired, and expressivist jurisprudence manifests a deep discontent with the thin and elusive meanings that the reconstruction supplies us with. We might say that expressivist jurisprudence reflects an effort to recover, for law, something that would take the place of the “doctrine of correspondences” that Charles Taylor says was once available for poets and others, but which he declares to be irretrievably lost. But if this interpretation helps make expressivist claims understandable, it does not thereby make those claims plausible.

200. My view that this sort of claim is “extravagant” was seemingly not shared by everyone at the Symposium. Why, I was asked in an after-session conversation, can’t there be musical conventions dictating that all music within a defined category is “sad music,” even if a particular composition falling within that category doesn’t express, evoke, or depict sadness by anyone? (“Music in a minor key is hereby declared to be ‘sad music,’ regardless of any actual emotion that it reflects, conveys, or evokes.”) On this assumption, I suppose there would be nothing anomalous about a statement such as, “Joe’s new sonata is a piece of sad music that is thoroughly cheerful from beginning to end.” I hope I have stated this view accurately; but I am not confident that I have, because, to be candid, the suggestion still seems bizarre to me (in much the same way that the suggestion that linguistic conventions determine “objective meanings” independent of what speakers intend or listeners understand seems bizarre).

201. Anderson & Pildes, supra note 2, at 1506 (emphasis added).

202. See Taylor, supra note 111, at 82-88.
C. The Failure of the Expressivists' Normative Claim

In Part I, I suggested that among a variety of seemingly platitudinous claims about legal meaning, expressivist scholars also offer a claim that suffers from the opposite defect of implausibility. The seemingly implausible claim, made by some expressivists but rejected by the less committed ones, asserts that the normative status or validity of a law turns on what it expresses, or on the message it sends. So a law enacted for a worthy purpose that produces good consequences would, nonetheless, be invalid if it sends an improper message. For some expressivists, in particular Anderson and Pildes, this normative claim about law is part of a larger moral theory about action generally. But this claim, I suggested, seems radically counterintuitive. Indeed, it seems to be a theory that would turn the skillful hypocrite (who manages to appear good) into a moral hero, while relegating the misunderstood saint (who acts for the best of motives and with good effects, but nonetheless looks bad) to the status of moral reprobate.

1. The Appeal of the Normative Claim.—By now the expressivists' normative claim ought to seem at least somewhat more attractive. As we have briefly noticed, there may be good philosophical reasons to be dissatisfied with the prevailing consequentialist and Kantian positions; and expressivist scholars manifest such dissatisfaction. Even more clearly, there is reason to doubt that the consequentialist and Kantian approaches, whatever their philosophical merits or shortcomings, offer a viable method for the judicial evaluation of law. That is because their valuations turn on factors—consequences and actual purposes—that are arguably not within the effective cognizance of courts.

This dissatisfaction with the standard normative approaches is manifest in expressivist jurisprudence. Thus, Justice O'Connor's endorsement test reflects a well-warranted frustration with the way the dominant approaches work within Establishment Clause doctrine. That doctrine has long been formulated in terms of a test—the Lemon test—that in a very loose way has both a consequentialist aspect (in its "effects" prong, and perhaps also in its "entanglement" prong) and a more Kantian aspect (in its "purpose" prong). 203 Those elements

203. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In Lemon, the Court articulated a three-pronged test for determining whether a statute violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." Id. (citations and internal quotation marks omitted).
have given rise to endless disagreements about what the actual purposes and effects of various laws and programs were—disagreements that by the mid-1980s had turned Establishment Clause jurisprudence into an open scandal. Justice O'Connor's "endorsement" proposal was an attempt to move away from those intractable factors toward something that seemed more within the competence and cognizance of a court—the "message" sent by the law or program. In a similar but even more conspicuous way, Deborah Hellman's recent Equal Protection proposal repeatedly eschews reliance on either the "purpose" or "effects" of laws in favor of a doctrinal approach focusing on the law's "messages" or "meanings"—things that at least seem more accessible to a court.

For both practical and, perhaps, philosophical reasons, in short, there could be real advantages in reclaiming something like the older view in which "meaning" was more closely tied to morality or normative status. At the same time, serious obstacles confront any such reclamation project. More specifically, in the older view there was (or was believed to be) a normative order in place, and "meaning" was morally relevant because it indicated the relation of an act—or a life, or a law—to that normative order. With the loss of belief in a normative order, "meaning" can no longer serve that function. So how can "meaning" be morally dispositive?

With this question, we return to the initial problem: even if the expressivists' normative claim now seems more attractive than it did, it still seems prima facie implausible. Expressivists would need to supply a powerful argument in order to make that claim credible. Do they?

2. The Missing Argument.—I think the answer is "no," but at this point I also need to make a confession: after reading some of the most careful expressivist scholarship, I still do not know what the argument for the normative claim even is. I can only report that, so far as I can see, expressivist scholarship exhibits a common pattern on this point: the scholars say they are going to offer an argument for the normative claim, but instead they go on to argue (sometimes quite persuasively) for something else, and then they say they have given an argument for the normative claim. Or they tack an expressivist con-

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204. See Hellman, supra note 2 passim.

205. Of course, the preceding Section's critical discussion of "objective meaning" should cast doubt on this assumption. For present purposes, however, I will assume that laws have an ascertainable "objective meaning" in order to focus on the normative question: why should that "meaning" determine the law's validity?
clusion onto an argument that, so far as I can see, provides no support for that conclusion.

Take Deborah Hellman's Equal Protection article.\textsuperscript{206} The article begins with a cogent explanation of the limitations in the major existing schools of thought regarding Equal Protection.\textsuperscript{207} It then offers its expressivist proposal as an alternative.\textsuperscript{208} The bulk of the article is devoted to an exposition of this proposal. The exposition explains that an expressivist construction would focus on a law's "meaning," not primarily its purposes or effects.\textsuperscript{209} It also describes the meanings that would be unacceptable—basically, meanings that fail to treat all citizens with "equal concern and respect."\textsuperscript{210} The exposition also situates the expressivist version of Equal Protection relative to other judicial and scholarly positions,\textsuperscript{211} and it discusses how the proposal might apply to several different kinds of legal problems, including controversies over veterans' preferences,\textsuperscript{212} laws regulating homosexuals (such as the one invalidated in \textit{Romer v. Evans}),\textsuperscript{213} and treatment of noncitizens.\textsuperscript{214} In these respects, the article seems as lucid as such things can fairly be expected to be.

What is missing, so far as I can tell, is a "justification" section. The article does not explain why the Constitution should be construed to require this sort of judicial censorship of the "messages" that laws send. Hellman does not offer any "originalist" argument suggesting that either "the text" or "the framers' intentions" direct us to adopt such a construction. Nor, so far as I can see, is there any argument from moral philosophy to justify the expressivist focus of her proposed construction.\textsuperscript{215} She argues that her proposal is consistent with some

\begin{itemize}
\item \textsuperscript{206} Hellman, \textit{supra} note 2.
\item \textsuperscript{207} See id. at 1-5.
\item \textsuperscript{208} Id. at 13-43.
\item \textsuperscript{209} E.g., id. at 13-14, 21-22, 24.
\item \textsuperscript{210} See id. at 14-18.
\item \textsuperscript{211} Id. at 15.
\item \textsuperscript{212} Id. at 28-37.
\item \textsuperscript{213} Id. at 44-49.
\item \textsuperscript{214} Id. at 49-63; see \textit{Romer v. Evans}, 517 U.S. 620, 635-36 (invalidating a state statute that prohibited cities within that state from passing laws that would protect gays and lesbians from discrimination based on sexual orientation).
\item \textsuperscript{215} Hellman, \textit{supra} note 2, at 63-68.
\item \textsuperscript{216} Hellman does use philosophy—Habermas, for example—to clarify what the proposal entails, and also to explain the egalitarian content of the category of forbidden messages. See, e.g., id. at 25 (explaining that "the expressive dimension of a law or policy is best understood as the meaning that we would arrive at if we were to discuss the interpretive question together under fair conditions" and borrowing this "conception of objectivity" from \textit{JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION} (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990)).
\end{itemize}
of the precedents, but not with others;\textsuperscript{217} so she evidently does not intend a conventional lawyer's justification.\textsuperscript{218} Perhaps the most serious attempt at justification consists of the claim that the expressivist proposal is consistent with \textit{Brown v. Board of Education}\textsuperscript{219} and inconsistent with \textit{Plessy v. Ferguson},\textsuperscript{220} and we know that \textit{Brown} was right and \textit{Plessy} was wrong.\textsuperscript{221} This is something, I suppose, but it seems an awfully thin defense of what would be a major doctrinal innovation.

By contrast, perhaps because they are offering a "General Restatement," Anderson and Pildes are much more conscious of the issue of justification, but I think that a close reading of their discussion once again fails to turn up any argument that actually explains the focus of their approach on \textit{expression} as the criterion of moral value or legal validity. Anderson and Pildes build their argument on a more basic premise that seems attractive and plausible, but the connection between this premise and the expressivist conclusion is hard to discern. The basic premise is that "from a moral point of view, \textit{people} are what is fundamentally valuable."\textsuperscript{222} This claim seems plausible enough. Kantians can accept the claim,\textsuperscript{223} as Anderson and Pildes note;\textsuperscript{224} and in different ways, so would Christians,\textsuperscript{225} and perhaps even consequen-

\begin{itemize}
\item \textsuperscript{217} See \textit{id.} at 44-68 (applying the expressive approach to Equal Protection, with differing results, to cases involving veterans' preferences, discrimination on the basis of sexual orientation, and laws that distinguish between citizens and non-citizens).
\item \textsuperscript{218} Expressivists do often claim, however, that their approach gives a better explanation for important precedents than other theories do—especially for \textit{Shaw v. Reno}, 509 U.S. 630 (1993). See Anderson & Pildes, \textit{supra} note 2, at 1539; see also \textit{id.} at 1531-32 ("Expressive considerations provide both a better rationalization of many existing patterns of constitutional decisionmaking and a better account of the theoretical purposes of the provisions being enforced."). In their "General Restatement," Anderson and Pildes extend this claim to a variety of constitutional areas, including (perhaps surprisingly) the dormant commerce clause and federalism. \textit{Id.} at 1551-64. Though I do not address the explanatory claim in this Article, I will only say that expressivist discussions in this vein often seem illuminating. Moreover, it seems to me that their claim has considerable \textit{prima facie} plausibility, at least in this crude sense. Even when the Justices present constitutional decisions invalidating laws in terms of "balancing" interests or of discovering improper legislative purposes, these explanations are often quite dubious, for reasons discussed above. A straightforward "I didn't like the message," or "I didn't like the look of it," or "It looked kind of fishy," might often be a more cogent and honest explanation.
\item \textsuperscript{219} 347 U.S. 483 (1954).
\item \textsuperscript{220} 163 U.S. 537 (1896).
\item \textsuperscript{221} See \textit{Hellman, supra} note 2, at 8-13.
\item \textsuperscript{222} Anderson & Pildes, \textit{supra} note 2, at 1509 (emphasis added).
\item \textsuperscript{223} \textit{Cf. KANT, supra} note 139, at 96 (4:429) ("The practical imperative will therefore be as follows: \textit{Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.}" (footnotes omitted)).
\item \textsuperscript{224} Anderson & Pildes, \textit{supra} note 2, at 1509 & n.9.
\item \textsuperscript{225} See \textit{Matthew} 22:37-39.
\end{itemize}
From this starting point, Anderson and Pildes go on to infer—plausibly, I think—that "we ought to adopt particular attitudes toward people" and also that having the proper attitudes "can give us reasons for action." They then proceed—and this is the crucial step—to conclude that "the rational (moral) thing to do is to act in ways that express our rational (or morally required) attitudes toward people."

But this conclusion might be understood in two ways. Understood one way, the conclusion seems plausible, but it falls far short of commending a normative expressivist position. Understood another way, the conclusion does commend a normative expressivist position, but that position does not follow from the preceding argument. Indeed, it subtly contradicts that argument.

The first understanding consists of the commonsense thought that if we have the proper attitudes toward people, and if we act on the basis of those attitudes, then we will usually express the proper attitudes in our actions. This thought seems plausible, at least by and large. If I actually love my spouse, then presumably I will act in ways that convey this attitude to her, and to others who may be paying attention. Still, according to the earlier claims and inferences made by Anderson and Pildes, my fundamental moral obligation is to have and to act on the proper attitudes. Expression of those attitudes will be a typical effect of these more primary qualities, perhaps; expression may also be evidence of those qualities (though, as Anderson and Pildes elsewhere explain, it will be unreliable evidence). Ultimately, though, it is having and acting on the proper attitudes that is normatively decisive, not

Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, thou shalt love thy neighbor as thyself. On these two commandments hang all the law and the prophets.

226. Though the issue is complicated, the consequentialist injunction to promote the greatest good for the greatest number arguably assumes the value of persons.

227. Anderson & Pildes, supra note 2, at 1509.

228. Id. Sometimes the expressivist justification seems to start at this point—that is, with the claim that moral quality or normative status depends on reasons for acting, and not with the claim that, morally, it is people that are valuable. See, e.g., Pildes, supra note 2, at 734 (arguing that "constitutionalism primarily entails judicial efforts to define the kinds of reasons that are impermissible justifications for state action in different spheres" (emphasis added)). The "people matter" version appears to be offered as a more complete account. That is, Anderson and Pildes appear to advance the claim that "people are what matter" as a way of explaining why "reasons for acting" are morally determinative (and also as a way of clarifying the content of acceptable "reasons for acting"). I believe that the criticism I will make here is equally germane to the more abbreviated expressivist account that begins with the claim that "reasons for acting" are morally determinative.

229. Anderson & Pildes, supra note 2, at 1510 (emphasis added).
expressing them. In short, the commonsense view observes that if people are morally obligated to have and act on the right attitudes toward others (as they are), we will usually be able to tell whether they are acting morally by asking what attitudes their actions express. This conclusion seems plausible enough, but it does not amount to an expressivist normative position.

Anderson and Pildes clearly mean to assert more than this. They mean to assert that what an act expresses is not merely a typical consequence of its moral quality, nor is it merely evidence of that quality. The expression, in their view, is the criterion that actually determines the act’s moral quality. That stronger claim is precisely what distinguishes their “expressivist” moral position from alternative views. But this stronger conclusion does not follow from their earlier claim that “people matter,” or from their inferences that if people matter, then we ought to have and act on the proper attitudes toward people. Indeed, their conclusion actually departs from those propositions by contradicting the proposition that morality lies in having and acting on the proper attitudes, and instead locating morality in something else—expressing the proper attitudes.

Their own example can serve to provide a concrete illustration of this point. Anderson and Pildes consider two courses of action in a similar situation. In the first instance, they suppose that “I will avoid visiting my mother in the hospital, in order to avoid transmitting my contagious illness to her.” In the second case, they hypothesize that “I will avoid visiting my mother in the hospital, in order to spare myself unpleasantness.” They go on to observe that although these cases “involve the same type of act,” still the “action based on the first reason is permissible, or even required, while following the second is arguably wrong.” This assessment seems sensible, but notice that it turns on the actual reasons for not visiting one’s mother, not on what the failure to visit expresses. As Anderson and Pildes point out, the actions themselves are outwardly the same, and what they express might be the same as well (depending on other, unspecified facts). Indeed, it could even happen that the first person (who is sincerely

230. See id.
231. Adler describes this position by suggesting that an expressivist “claims that linguistic meaning has foundational moral relevance—that the linguistic meaning of an action figures in the best or most perspicuous description of that action.” Adler, supra note 6, at 1375. Excising the term “linguistic,” I think this description is accurate.
232. Anderson & Pildes, supra note 2, at 1511.
233. Id.
234. Id.
235. Id.
concerned about his mother’s welfare) might inadvertently convey the wrong message—life is full of such misunderstandings—while the second person might contrive to make it seem that his failure to visit his mother was based on concern for her welfare. If it were truly what the actions express that determine their moral quality, then in these situations it would follow that the first person (though in fact well motivated, and though sparing his mother from contracting a contagious disease) behaved immorally, and that the second person (though in fact acting selfishly) behaved morally. But this conclusion seems deeply perverse. The fact that Anderson and Pildes reach the opposite conclusion reveals the implausibility of their claim that the normative status of an act—or, by extension, a law—is determined by what the act or law expresses.236

The difference between these understandings of the function of “expression” might have little practical significance if our actions invariably constituted a fully accurate expression of the attitudes that animate them. In fact, though, the reality and the expression often diverge, sometimes quite dramatically. Anderson and Pildes acknowledge—indeed, they insist on—the point:

A speech may express ideas poorly by being confused, disorganized, vague, ambiguous, or inarticulate. Conduct also may express intentions, emotions, and attitudes poorly—for example, by being clumsy, distracted, self-defeating, or ambivalent. A bumbling lover’s infatuation may cause him to express his love in awkward ways that repel his beloved. Such incongruity between the mental state and its manifestations is the stuff of comedy—or, if the failure is serious enough, of tragedy.237

We might add that an “incongruity between the mental state and its manifestation” may occur not only through clumsiness or inadvertence, as Anderson and Pildes rightly observe, but also from calculation—which may be either wicked in its intent (as with the con artist or the seducer) or benevolent (as with the parent who compels a young child to undergo a painful, life-saving surgery even though the child can only perceive this as simple cruelty).

The fact that attitudes and expression often diverge underscores the huge gap that divides the premise with which Anderson and Pildes begin (and the inferences that they plausibly make) from the conclusion that they fallaciously draw. In such cases of misleading expres-

236. See id. at 1508-10.
237. Id. at 1507-08.
sion, our moral assessment of an act will be wholly different depending on whether it is the actual attitudes or the expression that is morally determinative. Anderson and Pildes assert that it is the expression that matters. But they give no argument for that conclusion. Indeed, their actual argument points to the opposite conclusion.

The gap between Anderson and Pildes's initial claim that "from a moral point of view, people are what is fundamentally valuable" and their expressivist conclusion becomes even more glaring when we recall that for expressivists, the “meaning” that is morally determinative is not the meaning of an act or a law to the real, flesh-and-blood human beings that we encounter around us (and that we ourselves are), but rather the “objective” meaning, or perhaps the meaning to an observer who is a deliberately created fiction. If the fictional observer perceives an illicit message in a law, then the law will be invalidated, even though it is beneficial to and appreciated by less-than-ideal, real human beings. Conversely, if the fictional observer sees no offensive message in the law, then an expressivist normative standard will approve it even though it is offensive and harmful to actual human beings. Hence, starting with the proposition that “people are what matter,” the expressivist commitments of Anderson and Pildes lead them to a position in which people—actual people, that is—are precisely what does not matter, or at least what is not in the final analysis determinative of the validity or normative status of an act or a law.

Justice O'Connor's "endorsement test" presents a stark, real world instance of this problem. Justice O'Connor asserts that government should be constitutionally forbidden from endorsing or disapproving of religion, because to do so "sends a message to nonadherents that they are outsiders, not full members of the political community." Whether or not one thinks the Constitution imposes such a prohibition, Justice O'Connor's proposal at least appears to be rooted in an understandable desire to avoid offense or psychological harm to real human beings.

But then the question quickly arises: which human beings? In many controversial cases, in other words, a particular measure may send messages alienating some people but reassuring others; rescinding or repudiating the measure may send the opposite set of messages. And what about people who are arguably "hypersensitive"—who see illicit messages in a host of measures that most citizens see as innocuous and perhaps necessary? Do these more sensitive citi-

238. Id. at 1509.
zens have a veto over public policies? Perhaps anticipating such problems, Justice O’Connor soon explained, as discussed above, that the determinative question is not whether (or how many) actual human beings perceive an offensive meaning or message, but instead whether a fictional “objective” or “reasonable” observer would perceive such a message. In thus shifting to an artificial or fictional perceiver, however, Justice O’Connor transgresses her apparent commitment to preventing people from being made to feel like less than “full members” of the community. Indeed, whenever claims based on reported perceptions of endorsement are rejected by the courts (and they often are), the message to the claimant is not only that “You lose,” but that the reason you lose is that your perceptions are not “reasonable,” or that you are not a “reasonable observer.” Setting out to avoid alienation and offense to real human beings, in short, the “endorsement test” ends up adding insult to injury.

240. See Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring); see supra notes 22-25 and accompanying text (noting the development of Justice O’Connor’s “objective observer”).

241. In his commentary, Professor Baker proposes a different, Rawlsian defense of the expressivists’ normative claim. Baker believes that in the “original position,” situated behind a “veil of ignorance,” we would agree not only on the two principles that Rawls advanced, but also on a third principle that would prohibit government from acting in ways that express disparagement of any person’s equal worth. C. Edwin Baker, Injustice and the Normative Nature of Meaning, 60 Md. L. Rev. 578 (2001). In assessing Baker’s argument, we surely should not limit our reflections to situations in which his “third principle” would be cost-free, operating to prevent gratuitous insults emanating from government. Indeed, it is hardly necessary to resort to an “original position” to conclude that gratuitous insults ought to be disfavored: that suggestion is presumably uncontroversial, and might go on anyone’s “wish list.” In assessing Baker’s argument, however, we must focus mainly on situations in which the principle might actually have costs, and thus might actually be controversial—cases, for example, in which a law has produced (or will produce) desirable “material” consequences, but has also, perhaps inadvertently, “sent a message” that some people believe to be demeaning. Recognizing that a trade-off is involved, would we choose a principle that would deprive us of material benefits, for example, in order to spare us purely expressive injuries?

I’m not sure. But I am confident that asking what we would choose in the fanciful condition of the “original position” behind a “veil of ignorance” does nothing to advance our deliberations. Situating ourselves in a fictional condition simply abstracts out some of the factors (self-interest, religious convictions, and so on) that lead us to disagree in our actual, “real world” condition. But if we all agree that those “filtered out” factors are not properly relevant to the question under discussion, then we don’t need to imagine ourselves into a fictional condition; we can simply try to exclude the inadmissible factors from our present discussion and then see what conclusions seem to be indicated. Conversely, if we do not agree that the “filtered out” factors are irrelevant to the question, then the device of imagining ourselves in an “original position” is simply a way of assuming away what is really at issue.
D. The Subject-Object Shuffle

The preceding discussion suggests a common pattern in expressivist scholarship—what we might call a "subject-object shuffle." Whether we are trying to explain how law means or why law's meaning matters, claims about "subjective" and "objective" meanings generate their own familiar criticisms. Expressivists, it seems to me, commonly sidestep criticisms of various types of "subjective" meanings by shifting over to "objective" meanings, and then avoid criticisms of "objective" meanings by quietly moving back into the "subjective" territory. This oscillation helps expressivists evade criticism—their position becomes a moving target, so to speak—but it also leaves us without any clear and satisfactory conception of what "meaning" means to them, or why "meaning" (whatever that means) matters.

Thus, Anderson and Pildes begin by grounding meaning in what plainly seems a "subjective" source—actual human "mental states." But this subjective conception of meaning quickly provokes the well-known criticisms: How could a legislature (or "the public") have a collective "mental state"? And why should this collective mental state, even if it does exist, be authoritative for us? After a brief effort to answer these questions, Anderson and Pildes soon abandon the meanings that were constituted by actual mental states; they shift first to "constructive" intentions and attitudes, and then they invoke conventions, fictional observers, and idealized reflections (or, in Hellman's case, an imaginary Habermasian conversation) to construct a "public" or "objective" meaning. So in response to the familiar criticisms, expressivists insist—over and over again—that the criticisms are misguided because it is the "public" or "objective" meanings that matter, not the "subjective" meanings that the critics find so elusive.

But that sort of "objective" meaning provokes objections of its own. Is an "objective" meaning even real, or is it merely an illusion? And if it is real, why should we care about these "objective" meanings—which by the expressivists' own admission might be meanings that no actual person in fact discerns or cares about? In response to these challenges, expressivists move back to meanings grounded in the

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243. See id. at 1522-24.
244. Hellman, *supra* note 2, at 23.
subjective "mental states" of real persons. Those meanings seem real enough, and they also matter: as expressivists often point out, for example, they are constitutive of the "social relations" upon which persons depend.

But at this point the equivocation is plain. Those meanings—the ones that people actually value and that help constitute their social relationships—may well be important (and any consequentialist should be pleased to admit as much). But those are not the kind of meanings that expressivists have invoked in order to avoid the first batch of criticisms, nor are they the meanings that expressivists would make controlling with respect to law.

E. The Metaphysics of Expression

So could expressivism be rendered a viable position? Could the expressivist aspiration to find an "objective" meaning that is both intelligible and normatively significant be realized? My own hunch—I can't really say that it is much more than that—is that the expressivist aspiration is doomed to frustration, at least within the impoverished metaphysical framework that characterizes the modern view of the world. I can perhaps best explain this idea by a comparison. So I want to very briefly describe a proposal made almost half-a-century ago by my colleague Robert Rodes. Rodes's proposal, I believe, illustrates quite clearly the kind of jurisprudence to which expressivists seem to aspire, but it also indicates the underlying philosophical commitments that would be needed to make such a jurisprudence intelligible.

Rodes calls his account of law "symbolist" rather than "expressivist," but the similarities are striking. Law, Rodes argues, is "essentially a symbolic statement." "Law symbolizes all a society aspires to." It is "the most solemn expression of a society qua society." Like contemporary expressivists, Rodes contrasts this "symbolic" conception with a more "material" perspective. With regard to the problem of human suffering, Rodes thus contends that "[t]he need for law, then, is a need not for material well-being, but for

246. Thus, immediately after giving a very "objective" account of "expressive meaning," id. at 1525-27, Anderson and Pildes shift back to a much more "subjective" account of "expressive harm." Id. at 1527-31.
247. Id. at 1528-29.
249. Id. at 105.
250. Id. at 117.
251. Id.
symbols of sustenance, symbols of pity. Material reform may be the symbol required, but it is as symbol, not as reform, that it will be judged.”

And much like contemporary expressivist proposals urging that the normative status of laws be determined by their messages rather than by their effects, Rodes argues that “[t]he principle for the evaluation of criminal laws . . . should be a consideration not of whether they effectively inhibit the proscribed conduct, but of whether they effectively express a commitment on the part of society to a principle that opposes such conduct.”

However, Rodes also devotes a substantial portion of his essay to exploring the presuppositions of such a “symbolist” jurisprudence and the conditions in which it might flourish. A necessary premise, he explains, is that “events”—a category broad enough to include laws—“have real meanings.” This premise is perhaps most conspicuous in symbolist poetry, in which it is presupposed that “events . . . have meanings that may be discerned in the events themselves without independent statement by the author.” Once again, the assertion of “real meanings” and of meanings not dependent on the author closely resembles the contemporary expressivists claims about “objective meanings.” Rodes promptly explains, however, that “[t]he ‘meaning’ of an event” consists in a “relation between the event and something else.” So events, such as laws, cannot just in themselves have “real meanings.” For this kind of meaning to be possible there must be “something else”—or some further order of reality with which an event can have a relation. So “real meaning,” Rodes goes on to explain, presupposes some form of metaphysical realism in which there is an order of reality with its own “real structure.”

In the past, this kind of metaphysical realism sometimes predominated, making a symbolic perspective on events seem entirely congenial. Today, by contrast, the prevailing intellectual frame-

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252. Id. at 118.
253. Id. at 113 (emphasis added).
254. Id. at 91.
255. Id. at 89.
256. Id. at 91.
257. Id. at 92-94.
258. Rodes explains:

The medieval scholastic lived in a society rich in symbol. Within it, the Christian revelation with its sacramental and philosophical concomitants was in conflict with various classical and Islamic notions for the hearts and minds of men. . . .

. . . . But the philosophical foundation was badly undercut by the disappearance of the medieval society with its affinity for sacramentality in nature, its symbolic organization.
work reflects "the scientific doctrine of a random universe," and this framework entails that "reality has no real structure, and events do not have real meanings." On these assumptions, a "symbolic jurisprudence" makes little sense. Instead, legal thinking naturally gravitates to an instrumentalist orientation: the task of law is "to establish machinery that would accomplish the desires of as many people as possible," or to promote the "cooperative achievement of the more widespread desires."

Rodes's essay, reflecting his own Christian and natural law orientation, proposes an alternative to the prevailing instrumentalist assumptions. As noted, his "symbolist" proposal seems strikingly like contemporary expressivist jurisprudence in a number of important respects—in the emphasis on law's symbolic or expressive dimension, in its desire to evaluate law by what it symbolizes and not just by its "material" consequences, and in its claims about "real meanings." The crucial difference, it seems, is that Rodes devotes greater attention to the philosophical assumptions that a symbolist or expressivist presupposes, and a greater willingness to affirm those presuppositions. By contrast, contemporary expressivists seem not to question the prevailing worldview in which "reality has no real structure and events have no real meanings" of the kind that would presuppose such an ordered reality. Consequently, their claims about "objective meanings" seem hollow—meanings in the void.

**CONCLUSION**

Modern law exhibits the dissonance that comes from conflicting commitments to both legal realism and "Legal Realism." In its practices (and specifically in its practices of ascribing normatively rich

Id. at 97-98.

259. Id. at 94. In this modern view, "the task of the intellectual is one of constructing an artificial order in the midst of a natural chaos." Id.

260. Id. at 95. For present purposes, I have oversimplified Rodes's analysis. His essay actually considers variations on the modern theme—variations in which it is supposed that reality has a real structure but events have no real meanings, or conversely, that events have real meanings but reality has no real structure—and it discusses the kinds of jurisprudence associated with these variations.

261. Rodes observes:

We live in a time when the conflict between structure and meaning is being more and more sharply posed by the waning of the intellectual position that denies both. The conflict is one that tears a man in two. It will not do to take sides; to be whole men, we must affirm both structure and meaning . . . .

Id. at 104 (emphasis added). Rodes indicates his own commitments: We are creatures teleologically directed toward the expression of love in society through the symbolism of producing in society a perfect concomitance of ministry and need." Id. at 116.
meanings to law), modern law continues to presuppose realism in what Huizinga called the "medieval" sense—metaphysical realism, that is. At the same time, modern law typically professes a "Legal Realism" in the modern sense of the term—which in reality is a form of anti-metaphysical realism more consistent with the dominant view of the world as inherently without meaning. Many of the problems of modern jurisprudence can be traced to this dissonance.\textsuperscript{262}

The dissonance is apparent in the divergent views of human beings that are implicit in different approaches to law. With the loss of belief in an overarching normative order, law seems of necessity to be of, by, and for human beings. But what sort of beings are those? One approach depicts humans mostly as bundles of desires, needs, "interests" that we seek to satisfy. This approach, a critic might say, stresses what we have in common with caterpillars. A different approach underscores what we have in common with angels—a propensity to seek truth and "meaning," and to live in accordance with those supposed realities. Expressivist jurisprudence, I have argued, can best be appreciated as an expression of this latter turn.

Given these alternatives, my own hope would be to travel the path toward which the expressivists seem to be gesturing. So, beyond the criticisms I have made here, I hope I have also managed to convey a larger sympathy with the direction taken by the expressivists. The difficulty is that it is not clear whether the "meaning-oriented" view of humans and their law can flourish in a universe that is believed to be devoid of inherent meaning. If a plausible expressivism is to develop, therefore, I suspect that expressivist scholars will need to take on some metaphysical issues that they have thus far not addressed.

\textsuperscript{262} I have explored this tension at greater length in my article, \textit{Believing Like a Lawyer}, \textit{supra} note 70.