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JUDGING BY APPEARANCES: PROFESSIONAL ETHICS, EXPRESSIVE GOVERNMENT, AND THE MORAL SIGNIFICANCE OF HOW THINGS SEEM

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INTRODUCTION

I've heard it said that the key to acting is honesty. When you can seem honest, you've got it made. Today's pundits might say the same thing about politics.¹ This quip and the cynicism that underlies it tap something of our ambivalence about "appearance of impropriety" standards for public officials and professionals. On the one hand, in order to maintain a high standard for official conduct, we prohibit not only corrupt actions, but also actions that resemble corrupt actions so that by building a prophylactic wall around the prohibited conduct we ensure that official conduct is especially pure. In addition, appearance standards are defended on the grounds that they are important to maintaining public trust in elected officials, judges, and professionals. Since ordinary people can only assess actions on the basis of information that is generally available, the public official or professional must take care to ensure that his public actions appear proper. But these protections may backfire. Rather than providing a firewall against corruption and self-dealing, the appearance standard may encourage public officials and professionals to avoid merely the appearance of wrongdoing. Moreover, by widening the range of improper actions—by including those that appear improper—there may be more ethics-related inquiries and prosecutions, which, ironically, may itself erode public confidence in institutions by making it seem that there is far more corruption than was ever thought.²

Whether or not appearance of impropriety standards achieve their desired ends is an important empirical question. However, it is

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1. Analogously, the critic of appearance of impropriety standards might claim that while these standards promise a special sensitivity to ethical violations—政治icians will avoid even the appearance of impropriety—such standards actually downgrade ethics in politics, encouraging members of Congress to avoid merely the appearance of impropriety.

not the question I address in this Article. Instead, this Article addresses the issue of whether there are reasons of a different type that support prohibitions on the appearance of wrongdoing—reasons that do not depend upon controversial empirical claims. But first, why address this question here? Why are the reasons supporting appearance of impropriety standards relevant to the question of the moral and legal significance of the expressive dimension of governmental action?

While there are important differences between (a) appearing to do wrong, and (b) expressing a constitutionally problematic meaning, which I will elaborate below, there are important similarities as well. First, in each the focus of attention is on the external or public manifestation of something nonpublic (something inaccessible or internal). Second, in claiming that both matter morally, one asserts that actors bear moral responsibility for how their intentions are instantiated in action. And third, both recognize the relevance of the action's audience in determining its permissibility.

There are differences as well. Prohibitions on appearing to do wrong presuppose a distinction between the appearance and the reality. Appearing to do wrong is to appear to do some independently defined wrong action. The philosopher Julia Driver uses the helpful term "mimetic" wrong. The mimetic wrong is wrong, if it is, in virtue of its resemblance to a nonmimetic wrong. The nonmimetic wrong is wrong, if it is, "for reasons other than resemblance to something immoral." In the case of the expressive dimension of state action, by contrast, appearance and reality coalesce. For the Equal Protection expressivist, like myself, racial segregation is wrong and violates that Clause, even when it does no tangible harm, because it expresses denigration. How the action appears (denigrating) and how it is (denigrating) are the same.

Moreover, appearance of wrongdoing prohibitions address instances where the observer mistakes the true nature of the action. The mimetic wrong is wrong, if it is, in virtue of someone mistaking it for the nonmimetic wrong. The relevant features of the situation include the observer's inability to know what is really going on and the substantial likelihood of misjudgment or confusion. In the context of expressive governmental action, by contrast, we need not presuppose this confusion.

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4. Id.
5. Id.
Given both the similarities and the differences just mentioned between the appearance of impropriety and the expressive component of state action, is there a reason to use a discussion of one (appearance of impropriety) to enlighten the other (the expressive dimension of state action)? I think so. First, the question whether the appearance of wrongdoing ought to matter and the question whether the expressive dimension of state action ought to matter are importantly similar in their focus on the actor’s responsibility for the external manifestation of his actions.

Second, the fact that the appearance of impropriety rests on the observer’s mistake, while no mistake is presumed in the context of expressive action, strengthens the case for the usefulness of the inquiry envisioned here. If there are good moral reasons for the actor to be responsible for how his actions are likely to be perceived when the perception is grounded on mistake, it would seem that there would be even better reasons for the actor to be responsible for what his actions express when the observer mistakes nothing.

Third, appearance of impropriety standards are most commonly applied to public officials. While they are controversial, they are also extremely common. Since our inquiry at this Symposium focuses on the moral and legal significance of the expressive dimension of governmental action, an analysis of the moral grounding of appearance of impropriety standards may prove fertile ground.

I. Are There Nonconsequentialist Reasons to Avoid the Appearance of Wrongdoing?

In order to isolate this question, we need to make three assumptions. First, in order to ensure that the action is wrong because of its appearance, we must consider cases where the action resembles a nonmimetic wrong but is not itself wrong for nonmimetic reasons. There must be an appearance of wrongdoing but no underlying, independently defined, wrongdoing. Second, onlookers must be likely to be confused about whether the actor commits a nonmimetic wrong. This second requirement really just restates that the action must appear (or be likely to appear) wrong. Third, there must be no harm caused. In practice, we may have to suspend our disbelief in some cases in assuming that the appearance of wrongdoing has not in fact caused harm. The aim here is to see if there are reasons to prohibit the appearance of wrongdoing that do not depend on contingent claims about the likely effect of such an appearance. In doing so, we must try to assume that the kinds of effects we might fear have, for whatever reasons, just not come to pass.
In order to explore this question, this Article will consider three hypothetical scenarios. As these examples are presented in order to test our intuitions, only the most basic facts about the situations will be described. I will assume in each of the cases that the three criteria described above obtain. If there still seems to be something wrong in each case, this intuition will suggest that the appearance of wrongdoing may matter for reasons not causally related to harmful consequences. In addition, by looking at three different cases, we may find that we have different reactions to different cases, suggesting clues as to the reasons appearing to do wrong matters morally.

A. The Teacher and the Student

Consider a high school teacher of a student who needs extra help. With apologies for using stereotypical gender roles, suppose the teacher to be male and the student female. While the teacher usually provides extra help for needy students in the classroom after the school day, this student is unable to stay late because she must babysit for a younger sibling at home (both her parents work and depend on her for after-school child care for the younger child). As the teacher has no other students who need help at the moment, he can help her at her home without compromising his duties to his other students. However, he is concerned that in going to her house after school, which he is likely to be seen doing, he creates the appearance of wrongdoing. If he tutors her at home—appearing to do wrong—does he also do wrong, and for what reason?

In order for the three criteria I outlined above to obtain, we must assume the following. First, the teacher does not engage in an inappropriate relationship with the student. In other words, he commits no nonmimetic wrong. Second, perhaps because the community is somewhat small and the teacher is likely to be observed, or for whatever reason makes the hypothetical convincing, the other students are likely to find out that the teacher is visiting the student at her home after school and are likely to suspect that he is having an illicit relationship with her. Moreover, for his actions to create an appearance of wrongdoing, we must suppose, not unreasonably, that it

6. I make use of stereotypes in this case for a reason. In order to create an appearance of wrongdoing, it must be the case that reasonable observers are likely to believe that the actor commits a nonmimetic wrong. The reasonableness of this conclusion depends on the likelihood of the action being indicative of the underlying wrongdoing. If the stereotype is accurate, even if unfortunate, the conclusion is more likely to be reasonable. For a discussion of the importance of the reasonableness requirement, see infra p. 659.
JUDGING BY APPEARANCES would be wrong for a high school teacher in fact to have a sexual relationship with his student.

Lastly, we must assume that no harm is caused by this mistaken appearance. To make sure we are setting aside the relevant harms, we must try to imagine the reasons why one might think it is wrong for a high school teacher to appear to have a sexual relationship with his student. For example, the other students may lose respect for him, making him less effective in the classroom. Alternatively, the ability of other students to trust adults may be harmed as a result. Clearly, I cannot list all the possible consequences of his action, either for the students themselves, for their parents, or for the student he tutors. But with a stretch of the imagination, we try to assume that none of these harmful consequences come to pass. The students do mistakenly believe that the teacher is having the illicit relationship, but they simply do not care. It doesn’t affect their ability to learn or their ability to trust. The question we are trying to isolate is whether there are different kinds of reasons—ones that do not depend on possibly controversial assumptions about the likely consequences of the misperception—that count against acting in a way that appears wrong.

It is difficult to separate our intuitions to make sure that the moral unease we may feel is not due to the fact that we suspect there will be undetermined long-term consequences for the students.7 However, there seems to be something wrong in appearing to do wrong that is not attributable to the harmful consequences the appearance may produce. Before I elaborate on what makes this wrong, let me make one preliminary point. In saying that there are nonconsequential reasons for which it may be wrong for the teacher to appear to do wrong, I do not claim that these reasons are necessarily determinative. The importance of the extra help to the student may outweigh the other concerns. My aim is simply to determine what kinds of reasons count against appearing to do wrong. Only when all the relevant reasons have been considered can one determine whether the balance of reasons supports avoiding the misleading appearance.

7. Or perhaps the residue of hesitation we feel derives from the sense that in most instances, although perhaps not in this particular one, the illicit relationship will cause harm. If so, then a rule-utilitarianism provides the reason that the teacher ought to avoid appearing to do wrong here. Our inability to adequately judge when we will cause harm by appearing to do wrong may provide a reason to adopt a rule forbidding such conduct. Nonetheless, I think there is still a residue of nonconsequential wrongness left. Clearly, this will be difficult to evaluate because it will be difficult to know whether we truly have wrung all the consequential reasons from our minds when we contemplate this issue.
The task is to try to articulate the basis for the wrongness left over, so to speak, after the consequences of the mimetically wrong action have been imagined away. In my view, the duties of the relationship of the teacher with his student, properly understood, require that he avoid appearing to do wrong. This explanation should not be confused with the claim that the teacher should avoid action that appears illicit because he may harm the relationship he has with his students. It is because the relationship generates duties, not because the quality of the relationship may be harmed, that the teacher should avoid appearing to do wrong. The relationship that the teacher has with the students requires some accommodation by each to the needs and limitations of the other. For example, it surely requires that he modify his teaching style to meet their abilities and learning styles. In addition, because the teacher and his students are engaged in a joint endeavor, each has a duty to consider the perspective of the other.

It is this general principle—that a joint project requires mutual accommodation—that provides a reason for the teacher to avoid action that appears improper. The students can only judge by appearances. If we assume that they draw reasonable conclusions on the basis of what they know and could reasonably find out, then if the teacher refuses to be shackled by the limitations that constrain his students, the teacher destroys something of the community between them. An analogy may be helpful here. Suppose John is in a club with Alice, a disabled person who uses a wheelchair. The relationship between John and Alice (members of the same club) requires that John take the limitations that constrain Alice—she can only attend meetings scheduled in wheelchair-accessible locations—into account. If John does not take into account the limitation that constrains Alice, he violates a duty he owes to Alice, a duty that springs from the relationship itself. This requirement does not demand that all meetings always be scheduled in accessible locations; an important reason for a meeting elsewhere is possible. Rather, the relationship between John and Alice requires that her limitations factor into the reasons he considers when choosing where to meet.

This account of the reason the teacher has to avoid appearing to do wrong is offered as an analysis of the nature of the obligation that the teacher-student relationship entails.8 Because the two are en-

8. In Matthew Adler’s commentary on this Article, he explores arguments against the claim that so-called “special relationships” can generate reasons for action. Matthew D. Adler, Expression and Appearance: A Comment on Hellman, 60 Md. L. Rev. 688 (2001). The problem, according to Adler, is that “the reasons generated by special relationships are affirmative rather than negative—these reasons require action, not merely inaction—and
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gaged in a common project, the constraints that operate on each must be accepted by the other as relevant in determining action. As I conceive it, this duty springs from the nature of the joint endeavor.

A critic might object that the teacher ought not to have his actions dictated by the students' propensity to think the worst of him. Why suppose that he is involved improperly with his student merely because he goes to her house after school; in fact, why not suppose that he goes there for a good reason? This objection allows me to refine the analysis above: it is only the appearance of wrongdoing to the reasonable observer that matters. For example, if there have been a spate of incidents in which teachers have acted improperly with students, or in which other adults responsible for the care of children or adolescents have done so, then the inference that the students draw may well be reasonable. If, however, such events are rare, then the inference that the students draw may be unwarranted.

Appearances matter only when they are reasonable for the same reason that appearances matter in the first place. The obligation to defer to the limitations constraining what the students are able to know—call these epistemic limitations—springs from the teacher's relationship with them. But the relationship requires something of the students as well as from the teacher; the students must not jump to conclusions. The students' reaction must be reasonable in order to require accommodation. It is important to note that were the prohibition on appearance of wrongdoing supported by consequentialist reasons only, there would be no requirement that the perceptions be reasonable. If the appearance of wrongdoing matters only because of the harmful consequences that it causes, then what matters in judging whether a particular action is wrong on mimetic grounds would be the predictability and not the reasonableness of the audience's reaction.9 The reasonableness requirement is tied to the source of the obligation—the duties that the relationship imposes.

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9. Julia Driver, who argues that appearance of wrongdoing prohibitions are supported by consequentialist reasons only, makes precisely this point. Driver, supra note 3, at 342.
Another critic might concede that the duties of the relationship require the teacher to care about avoiding the appearance of wrongdoing, but argue that this duty is minor in comparison with his duty to provide tutoring to the needy student. After all, one might ask, is not teaching the students of paramount importance? Perhaps. This is precisely the question the teacher must answer. The argument I offer provides a reason—one not premised on contingent causal assumptions—for the teacher to avoid the appearance of wrongdoing. In order to assess whether helping the slower student is more important, one needs to have a clear sense of what lies on the other side.

B. The Judge

In *Spires v. Hearst Corp.*, employees of the Los Angeles Herald Examiner (the Paper) brought suit against that newspaper. The court heard and granted plaintiffs' motion for recusal of the judge hearing the case, in which neither trial nor discovery had yet begun, on the ground that his "impartiality 'might reasonably be questioned.'" The Paper had run a complimentary personal profile of the judge. At the time, there was no newsworthy event in which the judge was involved that explained or justified the Paper's decision to profile the judge at all or at that time. As a result, the judge decided that his obligation to avoid the appearance of bias required him to recuse himself from the case.

In order to use this case to explore the question whether there are nonconsequential reasons to avoid the appearance of wrongdoing, we must apply the three criteria specified above. First, we assume that there is no nonmimetic wrong. A judge acts wrongly, in the sense relevant here, when he bases his decision on grounds other than the legal merit of the case. Were the judge to be influenced by the complimentary article in the Paper and thus predisposed to rule in its

11. *Id.* at 307 (quoting 28 U.S.C. 455(a) (1970)).
12. *Id.* at 306-07; see *id.* at 309 app. A (setting forth the text of the complimentary article).
13. See *id.* at 308-09 app. A. The feature was published in April, after the height of ski season. See *id.* at 308 app. A. The article discussed the judge's talents as a snow skier and reported his induction in the U.S. Ski Hall of Fame. See *id.* at 309 app. A.
14. See *id.* at 307. The judge held that he was required to recuse himself, based on 28 U.S.C. § 455(a) and Cannon 3C of the Code of Judicial Conduct. *Id.*
favor, this would constitute a nonmimetic wrong. Here we assume, as the judge assures us, that he is not so biased.¹⁵

Second, we must assume that reasonable onlookers are likely to think the judge is biased. In this case, the actual plaintiffs claim that they are concerned.¹⁶ Whether or not such worry is reasonable is difficult to answer, but here we will assume it to be so. It surely is the case that the plaintiffs and others have no way to ascertain whether or not the article influenced the judge in an impermissible way.

Finally, in order for the case to be relevant to the issue we are exploring here, we must assume that the misperception causes no harm. The harms that are commonly cited as flowing from the appearance of impropriety by judges are the erosion of trust in the judiciary and a concomitant diminution of its power and authority. The Supreme Court of New Hampshire provided a clear statement of this rationale in a recent case: "Without judges who are perceived and trusted by members of the public as impartial, the authority of the rule of law is compromised."¹⁷ In our example, let us assume that the second harm is avoided (that the power and authority of the judiciary is not compromised). However, it will be difficult to assume away the first (that observers’ trust in the judiciary will not be damaged). Our second criterion, that the observers mistakenly suspect that the actor commits wrong, conflicts with an attempt to assume that they continue to trust him to do right.

But perhaps this tension is not as problematic as it seems. What masquerades as a consequential reason for the appearance standard may really be nonconsequentialist in nature. If we assume that no erosion of the authority of the judiciary will occur, does the judge still have a reason to avoid the appearance of bias; in this case, does he have a reason to recuse himself? The judge has an obligation to the litigants before him to avoid causing them to distrust his good faith. In the words of the familiar maxim, "justice must not only be done but must manifestly be seen to be done," or, as paraphrased by Justice Frankfurter, "justice must satisfy the appearance of justice."¹⁸

Matthew Adler’s commentary on this Article raises a question about why this erosion of trust is important. He draws a distinction between what he calls “objective trust” and what he calls “epistemic

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¹⁵. See id. at 306 ("[T]he Judge herein does not have, nor did he ever have any such alleged personal bias or prejudice in the slightest degree for or against any of the parties . . . .").
¹⁶. See id.
According to his definitions, the judge violates objective trust if his decisions are influenced by the Paper's profile of him. The judge violates epistemic trust, by contrast, if he acts in a way that destroys or damages the "feeling of assurance" that the litigants have that the judge will rule according to the merits of the case. Adler seems to assume that it is epistemic trust that I am fundamentally concerned with and therefore rests his objection on his purported showing that "relationships need not embody the epistemic trust from which such an obligation [to avoid mimetic wrongdoing] would flow." To illustrate his point, Adler uses the example of the relationship between himself and a hypothetical investment advisor, Mike. According to Adler, the duties of the relationship provide Mike with a reason not to make poor investments deliberately (a violation of objective trust), but not to refrain from appearing to make a poor investment deliberately. According to Adler, avoiding mimetic wrongdoing is not required because the relationship does not require that Mike take care to ensure that Matt feels good about his investment advisor (epistemic trust). Adler argues that because all trust-based relationships do not require that epistemic trust is preserved, the obligation to avoid the appearance of wrongdoing cannot derive from the duties of a trust-based relationship itself.

Before exploring the differences between the sort of trust I have in mind and the two types Adler describes, it is important to point out that Adler assumes, wrongly I think, that Mike has no obligation to avoid the appearance of wrongdoing. In fact he chooses this example because he thinks it provides a good example of a trust-based relationship that fails to generate an obligation to avoid improper appearances. But even Adler would probably agree that Mike ought to explain to Matt why he is choosing the investment that looks like it will have a poor return over one that seems better on the surface. If the obligation to explain the investment decision stems from more than prudential reasons (Mike doesn't want to get fired), which I

19. Adler, supra note 8, at 699.
20. See id. (asserting that a party to a special relationship violates objective trust when he is obliged to comply with a set of moral reasons, but acts wrongly on the balance of those reasons).
21. Id.
22. Id. at 700.
23. Id. at 698-99.
24. Id. at 699.
25. Id.
26. Id. at 699-700.
27. Adler argues, "I want (and would want under ideal conditions) that Mike ignore how the investment choices appear to me." Id. at 699.
think most would agree it does, this must be because Mike has some obligation to avoid appearing to do wrong.

Moreover, Adler’s argument assumes that the only relevant sense of trust falls into either of the two categories he describes. For Adler, there is real, objective trust that is honored if Mike invests Matt’s money properly, and there is the feeling of trust (epistemic trust) that is served by maintaining the proper appearance.28 What I have in mind is a different conception of the role trust plays in providing a reason for Mike to avoid appearing to do wrong. I will call this normative trust (so as not to be outdone by Adler’s penchant for nomenclature). The relationship between Mike and Matt (or between the judge and the litigant) provides a reason for Mike (or the judge) not to act in a way that gives Matt (or the litigant) a reason to distrust his good faith.

At the Symposium, David Luban suggested an example that illustrates this conception of trust well. Suppose a father holds his young son over a deep chasm. What makes this action wrong? First, the son is likely to be scared. Thus, the bad consequences of the action (fear and suffering by the child) provide a reason for the father to avoid it. But there is more. Luban suggested that what makes it wrong is that the son must now explicitly trust his father when before he had taken it for granted that his father would look out for his safety. But perhaps a better way of capturing what makes the father’s action wrong is to say that notwithstanding the fact that the son may still trust the father (may still believe there is no way the father would drop him), the father has given the son a reason to distrust him—and this he should not do.

In sum, the obligation of the judge to take care to provide the appearance of justice to the parties whose case he adjudicates grows out of the nature of his relationship with them. The limitations under which they operate, in particular their inability to know the reasons that truly guide his decisionmaking, obligates him to attempt to appear unbiased as well as actually to be unbiased. This is not simply because the power of the judiciary will otherwise be eroded, but also because the judge’s relationship to the particular parties before him requires him to avoid giving them a reason to distrust his good faith.

28. See id. at 699-700.
C. Wearing Fake Fur

Consider wearing a fake fur coat.\textsuperscript{29} For our purposes, we must assume, as in the previous two examples, that the three criteria described earlier are satisfied. First, the action must not be wrong for independent, nonmimetic reasons. In this case, that requires that we assume that the synthetic coat was produced under fair labor conditions, was not stolen, et cetera. Second, onlookers must be likely to confuse the action for a nonmimetic wrong. In order to satisfy this condition, we must make two assumptions. First, that it is independently wrong to wear real animal fur. For wearing fake fur to appear wrong, it must be the case that wearing real fur is wrong. Second, the coat must be a great fake, convincing to those who see it and unadorned with a “Great Fake” button\textsuperscript{30} or anything else that would dispel the confusion. Since appearing to do wrong is wrong only in those instances where the action appears wrong to the reasonable observer, a cheap imitation that most people would be likely to spot would not be wrong for mimetic reasons.

The third criterion requires that no harm is caused by the mimetic wrong. The harms traditionally associated with this classic example include the following: Wearing fake fur may erode the conviction (that it is wrong to kill animals for coats) of others who see the coat and believe it to be real; this in turn may then lead to more killing of animals for fur coats. Alternatively, others who see the coat and believe it to be real may continue to believe it is wrong to kill animals for fur, but in seeing one person do it, may no longer feel that they will be shamed in doing so themselves. This may erode their resistance to doing what they would like to do but know to be wrong. These two arguments clearly rest on empirical claims about people’s psyches—claims that may turn out to be false. For our purposes here, we will assume that they are false. We assume that onlookers do believe that the coat is real animal fur, but that it simply does not cause either of the psychological reactions described above.

Are there other reasons to believe it is wrong to wear a great fake? I am not sure that there are. While observers will be confused, it is not clear that the wearer need care about that fact, so long as the harms listed above do not occur. There does seem to be something hypocritical in the act, however. Perhaps the problem can best be

\textsuperscript{29} Julia Driver examines the fake fur example to illustrate how resemblance can lead people to misconstrue an action’s moral character. Driver, \textit{supra} note 3, at 333-34.

\textsuperscript{30} See \textit{id}. at 343 (using the “Great Fake” button as an example of how to keep one’s appearance from being misunderstood).
captured in the language of virtue: one's integrity and sincerity are compromised in appearing to wear real animal fur if one believes it is wrong to kill animals for fur coats.\footnote{Peter Levine suggested to me this way of conceiving of the wrong involved.} Alternatively, one could capture the wrong by saying that our relationship with our fellow citizens requires that we avoid broadcasting messages that conflict with our values. But perhaps the relationship of fellow citizens does not require this much of us. What is clear is that the less morally significant the relationship involved (here, fellow citizens), the weaker the demand on the actor to confine his behavior to accommodate those with whom the relationship connects him.\footnote{Of course, there may be other consequentialist reasons to avoid wearing fake fur. For example, it may discourage activists from organizing protests against wearing animal fur. The discussion in the text explores only the nonconsequentialist reasons.}

**D. The Importance of the Relationship**

Perhaps one last example, which I will discuss only briefly, will hammer the point home. Imagine a man who does not wear his wedding band because he doesn’t like to wear jewelry. In addition, imagine that in his particular culture, most married men who do not wear wedding rings do so because they want to appear single to people whom they don’t know in order to be free to disregard their commitment to their spouses. The man we envision has no such intention; thus, his action merely appears wrong. Lastly, imagine that no one’s faith in marriage is eroded, et cetera. To keep the example brief, I will leave to the reader the task of filling in the myriad harms that this misunderstanding could cause.

In this example, it seems clear that it is the relationship from which the duty to avoid the appearance of wrongdoing springs. If the man’s wife is unable to know his real intentions, he ought to take the limitation in her ability to know whether an actual wrong occurs as a reason to refrain from appearing to do wrong. He ought not to give her a reason to distrust him. The husband-wife relationship provides a reason for the husband to respect the limitations under which the wife operates. However, if, as one would hope, their relationship is open and trusting enough so that he is confident that his true intentions are transparent to her, then he may freely refuse to wear his ring. As the man has no special relationship with the others who see him without his ring, he has no (or only a very limited) obligation to take their epistemic limitations into account.

I have tried to strip this example to its bare essentials in order to illustrate the difference that relationships make. As with most exam-
ples that one imagines, it can easily be complicated. For example, ought the fact that the husband or wife's family or friends will see the husband without his ring to matter? In other words, does his relationship with them provide him with a reason to avoid appearing to do wrong? What about the fact that if others think the husband is unfaithful, his wife's reputation may suffer? Obviously, the case is more morally complex than I have painted it above. I use it only to illustrate the point that the relationship the man has with his wife (or other family and friends) is the source of the obligation to take the limitations of others into account. Without a relationship, there is no such obligation.

E. Thompson's Argument from Democratic Accountability

Dennis Thompson offers an account of the importance of avoiding the appearance of wrongdoing that comes the closest, among those I have seen, to the argument presented here.\(^{33}\) Thompson focuses specifically on congressional ethics.\(^{34}\) For Thompson, appearing to do wrong is "a distinct wrong, independent of and no less serious than the wrong of which it is an appearance."\(^{35}\) He defends ethics standards that prohibit members of Congress from actions that appear improper. His reasons include the consequentialist reasons described above: (a) to reduce the number of nonmimetic wrongs;\(^{36}\) and (b) to maintain trust in government.\(^{37}\) In addition to these common reasons for supporting appearance standards, Thompson offers a novel addition. In his view, the demands of democratic accountability itself require that representatives refrain from appearing corrupt.\(^{38}\)

Thompson begins his argument by emphasizing, as I do, that appearing to do wrong involves a failure to modify one's behavior to accommodate the fact that others are unable to know whether one's conduct is, or is not, improper. He describes the situation this way:

When a legislator accepts large contributions from interested individuals under certain conditions, whether or not the leg-


\(^{35}\) Thompson, supra note 33, at 124.

\(^{36}\) See id. at 125 (defending appearance standards on the grounds that they "seek[ ] to reduce the occasions on which the connection between gain and service is actually improper").

\(^{37}\) Id.

\(^{38}\) Id. at 125-26.
isolator's judgment is actually influenced, citizens are morally justified in believing the legislator's judgment has been so influenced and in acting on that belief. The legislator is guilty of failing to take into account people's reasonable reactions.\textsuperscript{39}

For Thompson, this failure to accommodate the citizens' epistemic limitations is wrong because it denies to citizens the ability to monitor the conduct of their representatives. Thompson argues that "[b]ecause appearances are usually the only window that citizens have on official conduct, rejecting the appearance standard in general is tantamount to denying democratic accountability."\textsuperscript{40}

Thompson's argument differs from the argument presented in this Article in that Thompson grounds the wrong of appearing to do wrong in the particular requirements of democracy. Because democracy requires accountability and rejecting the appearance standard denies accountability,\textsuperscript{41} Thompson concludes that fidelity to democratic principles requires that legislators avoid appearing to do wrong.\textsuperscript{42} This is a much narrower argument than the one I have presented. It provides a reason for elected officials to avoid the appearance of impropriety, but no one else. Moreover, while it does not depend on controversial empirical claims, and thus fits the criterion with which we began this inquiry, it does depend on a controversial philosophical claim; one that is, I believe, ultimately untenable.

The first premise of Thompson's argument is that democracy requires accountability.\textsuperscript{43} This seems reasonable. For voters to be able to meaningfully exercise their vote, they must know what their representatives are doing. Thompson's second premise may also be correct: appearance standards provide accountability.\textsuperscript{44} However, if appearance standards are not the only means of providing accountability then the conclusion that appearance standards are necessary for democracy does not follow. And appearance standards are not necessary for accountability. Voters might prefer a system in which they assess their representatives on the basis of final results only—for example, the quality of schools, the state of the economy, the crime levels. If so, they may not need to know how their representatives achieved the desired results. Alternatively, voters may opt for a system in which representatives are watched extremely closely. The choice of

\textsuperscript{39} Id. at 125 (emphasis added) (footnote omitted).
\textsuperscript{40} Id. at 126.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 129.
\textsuperscript{43} Id. at 123-24, 126-27.
\textsuperscript{44} Id. at 126.
surveillance as a means to accountability seems to be precisely what the Office of the Independent Counsel delivers with regard to members of the executive branch.45 The point is this: while democracy surely requires accountability, accountability does not require appearance standards. The prohibition against appearing to do wrong is one way to provide democratic accountability—in this Thompson is right—but it is not the only way.

In my view, legislators do have a reason to avoid the appearance of wrongdoing—just not one that grows out of the concept of democratic accountability itself. Rather, the type of relationship that we have chosen with our representatives (but which we need not) includes an obligation to respect normative trust. This relationship (remember, here we are analyzing the duties that particular relationships in fact require) requires that the representative avoid, where possible, providing her constituents with a reason to doubt her. The fact that citizens are often justified in drawing conclusions on the basis of appearances provides a reason for legislators to avoid appearing corrupt.46

This argument is clearly similar to Thompson's. But it is different in two important ways. First, in my view, democracy does not require one form of accountability. However, if we want a particular kind of relationship with our representatives—if we want to be engaged in a joint enterprise with them—we should insist on compliance with appearance standards. Second, commitment to a joint enterprise with the citizens provides a reason for the legislator to avoid appearing to do wrong. But this reason is not always determinative. It can be outweighed by other important considerations. If the very principle of democratic accountability itself demanded compliance with appearance standards, this flexibility to balance competing concerns would seem to be absent.

F. The Appearance of Wrongdoing to the Reasonable Observer

The last objection to the argument presented above that I will consider here is one raised by Matthew Adler in his commentary following this Article. There he raises a question about whether an onlooker could ever form a reasonable but mistaken belief about whether

46. Laws that require representatives to avoid the appearance of impropriety can be seen, in this vein, as the citizenry’s construction of the nature of the relationship it chooses with its representatives.
the actor acts wrongly.\textsuperscript{47} He correctly notes that the obligation to avoid the appearance of wrongdoing that I describe presumes that there are structural barriers impeding the onlooker's ability to know whether the actor acts rightly or wrongly.\textsuperscript{48} In this circumstance, Adler believes that a reasonable belief in the actor's wrongdoing is not possible: "Traditionally, 'knowledge' is defined as justified true belief."\textsuperscript{49} If Pi (the onlooker) cannot know whether Pj (the actor) behaves rightly or wrongly, that must be because Pi cannot form a justified belief that Pj behaves rightly or wrongly.\textsuperscript{50}

This claim by Adler is clearly mistaken—even if we accept Adler's understanding of knowledge—for surely it is possible to have a justified belief that is false. In such an instance, one has a justified belief but does not have knowledge. Therefore, it must be possible to have one but not the other. The philosophical literature dealing with the theory of knowledge is replete with examples that illustrate this point. Jonathan Dancy used the example of tuning in to the end of the Wimbledon men's tennis final on television and seeing John McEnroe score the match point against Jimmy Connors.\textsuperscript{51} The viewer has a justified belief that McEnroe is the new Wimbledon champion.\textsuperscript{52} However, the viewer does not have knowledge, because in this hypothetical the cameras stopped working and the network showed the previous year's final.\textsuperscript{53} Similarly, if I see a known alcoholic going into a bar, I may be justified in believing he is inside drinking booze. However, it may turn out that just that morning he committed himself to reform and is inside trying to convince fellow drinkers to get on the wagon. If someone can have a justified false belief—which surely must be so—then it is clearly possible to have a justified belief and not to have knowledge.

Perhaps what Adler means to argue is something slightly different: if an observer knows that he cannot really know for sure whether something is the case, he is not justified in forming a belief about it.\textsuperscript{54}

\textsuperscript{47} Adler, supra note 8, at 702.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 703.
\textsuperscript{51} JONATHAN DANCY, AN INTRODUCTION TO CONTEMPORARY EPISTEMOLOGY 25 (1985).
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Adler puts the point this way:
\textsuperscript{Pi}'s belief that \textsuperscript{Pj} behaves wrongly on the balance of nonmimetic reasons will not constitute real knowledge, even if that belief happens to be correct. Given a traditional definition of knowledge, this inability to know on \textsuperscript{Pi}'s part implies that \textsuperscript{Pi} cannot form a justified belief to the effect that \textsuperscript{Pj} has failed to comply with the balance of nonmimetic reasons \{R\textsubscript{1}... R\textsubscript{n}\}... The only reasonable course for \textsuperscript{Pi}
Since all of my examples presume that the onlooker recognizes that his vantage point is limited, Adler may think that the onlooker cannot form a justified belief about the situation at all. This is a serious objection. In answering it, let me first point out that the claim I make is somewhat more modest than Adler suggests. I assume that the onlooker forms a reasonable belief rather than a justified belief. While it is hard to describe the quantum of evidence that differentiates these two, the first surely requires less than the second.

Second, I think Adler is wrong to claim that where one knows that one's vantage point is limited, one is unable to form justified beliefs. For example, I realize that I cannot see directly into the mind of my husband to see what he is thinking or feeling, and yet I can form a justified belief about his emotional state based on my knowledge of how he generally feels about similar situations. It may be true that I have not used the term "knowledge" as carefully as I should in saying that the onlooker cannot know whether the actor acts rightly or wrongly. Instead, I should say that the situations I explore all involve a barrier to directly observing what is going on. But if my example regarding my beliefs about my husband's state of mind is convincing, then the existence of such a structural barrier does not, by itself, preclude the onlooker from forming justified beliefs. And it surely does not preclude her from forming reasonable beliefs.

But something in Adler's critique still bothers me. While the fact of a structural barrier to direct confirmation of belief is not enough to demand agnosticism, perhaps the situations I describe above do not provide enough evidence of wrongdoing to warrant that belief. That may well be. In the Spires case, the judge may have recused himself too easily, given the limited basis the litigants had for forming a belief as to bias. The interesting cases are those where the observer has good reason to suspect and even to believe that there is wrongdoing.

As luck would have it (in terms of providing an apt example), a case decided between the time of the Symposium and the revising of

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is agnosticism; a belief on P's part that P has engaged in nonmimetic wrongdoing would be unjustified and unreasonable.

Adler, supra note 8, at 702-03.

55. Consider, for example, the scenario described by Marcia Baron where successful female graduate students who receive a great deal of attention from their male professors are rumored to be having an affair with at least one professor. Marcia Baron, The Moral Significance of How Things Seem, 60 Md. L. Rev. 607, 624-26 (2001). Although the rumors are unreasonable, they are perpetuated by male graduate students who want to "explain away" the success of those female students. Id. at 625.

56. See supra notes 10-14 and accompanying text.
this Article provides a far better example of a situation where onlookers formed a reasonable belief of judicial wrongdoing: *Bush v. Gore*.\(^{57}\) In *Bush v. Gore*, the Supreme Court overruled the Florida Supreme Court’s decision to extend the state law deadline for the certification of votes in the 2000 presidential election in Florida,\(^{58}\) thereby effectively ending the counting of votes and thus giving the state and the presidency to George W. Bush of Texas. Without going into the details of the procedural skirmishes that preceded the decision in this case or into the merits of the constitutional claims raised by Bush—all of which are, I trust, familiar to the reader—I want to here examine whether the Justices ought to have considered whether their decision would appear principled in making their ruling.

The case presents a unique situation in which the Supreme Court’s legal ruling would decide the presidential election. Thus, the opportunity for the decision to appear partisan was great. In addition, for many observers, it was well known that the more conservative justices had previously voted in other cases to scale back federal interference with state laws and policies, while the more liberal wing had been more supportive of the late twentieth-century growth of federal power. With this backdrop, a decision by the conservative wing to stop the counting made on anything other than clearly solid legal grounding would reasonably look like it was motivated by politics and not principle. It would, therefore, be in line with suspected biases and against previously articulated judicial principles. Similarly, a decision by the liberals to allow Florida to continue the counting would run similar risks. This fact—that a decision not solidly grounded in constitutional requirements would run the risk of being perceived as unprincipled—initially should have counseled the Court against taking the case.

The harder question is what the Court was to do once it had, mistakenly, agreed to hear the case. In my view, each Justice, in making his or her decision, should have taken into consideration whether that decision would appear principled. In practice, the effect of this prescription would be to give each Justice a reason to vote against perceived interest—for the conservatives to vote to allow the counting to continue and thereby help Gore’s chances, and for the liberals to vote to stop the counting and thereby help Bush. Whether this reason would be decisive for each Justice would depend on the strength of the remaining reasons. In his commentary, Adler raises a question

\(^{57}\) 121 S. Ct. 525 (2000) (per curiam).
\(^{58}\) Id. at 533.
regarding just the prescription I have given here. He argues that for the actor (here the judge) to take into account the fact that his decision may appear wrong requires the judge to thereby do something that is wrong. Adler describes the problem in this way:

In some of the cases just described, the balance of \{R1 \ldots \ Rn\} [the nonmimetic reasons that are relevant to the given decision] will only weigh slightly in favor of [a] first option. If so, the actor may well be obliged to choose the second option, that is, to engage in actual, nonmimetic wrongdoing so as to avoid the appearance of nonmimetic wrongdoing.\[^{59}\]

Although intuitively appealing, Adler's objection is question-begging. It is surely true that if the concern about how the decision will appear is to matter at all—that is, to count as a reason for action or decision—it must be able to make a difference. That being so, the judge will decide differently than he would have on the basis of the nonmimetic reasons. But that doesn't mean that the actor engages in actual wrongdoing. Rather, Adler is equating right action with action prescribed by the balance of nonmimetic reasons. To do so assumes the question this Section is addressing: whether one ought to take appearance concerns into account in some instances. If one ought to, then right action will be that action that is indicated on the balance of all relevant reasons—mimetic and nonmimetic. We cannot assume at the outset that right action is that which is mandated by nonmimetic reasons only.\[^{60}\]

I argued above that each Justice ought to have taken into account the appearance-based concern in coming to a decision on how to rule in Bush v. Gore. Whether that reason should have been decisive for each Justice depends on the strength of the nonmimetic reasons motivating each Justice. Rather than discuss each—which might be tiresome and would surely involve a judgment about the strength of such reasons that goes beyond the scope of this Article—I want to make just one observation about an extra reason that ought to have motivated Justices O'Connor, Kennedy, and Souter. In the 1992 abortion case Planned Parenthood v. Casey,\[^{61}\] in which the plurality voted to reaffirm the right of a woman to abort a non-viable fetus,\[^{62}\] the plurality opinion—jointly authored by those three Justices—was especially noteworthy for the explicit endorsement it gave to the importance of

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\[^{59}\] Adler, supra note 8, at 706.

\[^{60}\] For a more detailed account of this argument, see Deborah Hellman, The Importance of Appearing Principled, 37 Ariz. L. Rev. 1107, 1137-39 (1995).


\[^{62}\] Id. at 870.
appearances. That opinion argued that because of the highly politicized nature of the abortion issue, the Court must make sure to offer reasons for its decision that could be accepted by "the thoughtful part of the Nation," and "not merely as the victories of one doctrinal school over another by dint of numbers." This same concern ought to have motivated all of the Justices in Bush v. Gore, but most especially these three Justices, as they had already publicly expressed a commitment to this value.

In sum, in this case, as in others, onlookers lack the ability to confirm or disconfirm the truth of their suspicions. This barrier, however, does not necessarily preclude the onlooker from forming a reasonable belief about the underlying conduct. Where the onlooker's suspicion of wrongdoing is reasonable, and the actor is in a special relationship with the onlooker, then the actor has an obligation to try to avoid the unfortunate appearance.

II. Why Focus on Nonconsequential Reasons?

The debate in the recent issue of the University of Pennsylvania Law Review between Matthew Adler on the one hand and Elizabeth Anderson and Richard Pildes on the other centers, in part, on the issue of whether the expressive content of state action matters because of its effects (Adler's view) or whether it matters irrespective of its effects (Anderson and Pildes's view).

Very briefly, Adler argues that most theorists that call themselves or are labeled by others as expressivist argue that the meaning of governmental action matters because of the effects it has, rather than in

63. See Hellman, supra note 56, at 1116 (noting that Casey represents the clearest example of the notion that public perception of the Court is fundamental to the Court's legitimate authority).

64. Casey, 505 U.S. at 864.

65. It is Justice Breyer who in Bush v. Gore appreciates the importance of appearances— for both prudential and normative reasons. After quoting approvingly from Alexander Bickel, The Least Dangerous Branch (1962), Justice Breyer issues this warning: [A]bove all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. Bush, 121 S. Ct. at 557 (Breyer, J., dissenting).


its own right. To Adler, such theories are thus not genuinely expressive. For example, Adler believes that if you look closely at Equal Protection theories that focus on the stigmatizing character of some state action, they do so because that action will cause psychological injury or harm the social status of those on whom the law operates. If psychological injury or diminution in social status is really the focus, Adler argues, then expressive action matters not because of what it means, but rather because of the causal link between that meaning and bad consequences. In reply, Anderson and Pildes explicitly reject the claim that expression matters because of its effects or consequences. But the Anderson and Pildes account is largely explanatory rather than justificatory. Anderson and Pildes clearly describe expressivist theories of individual and collective action and offer, in the best reconstructive tradition of legal scholarship, an account both of the ways current doctrine already instantiates expressivist conceptions and of the ways that the doctrine could be improved by doing so more consistently and explicitly. What is missing from their piece, however, is an account of why the expressive dimension of action ought to matter in its own right. While they do claim that expressing the right attitudes toward people is important because peo-

68. See Adler, supra note 66, at 1376 (explaining that “[t]he connection between the linguistic meaning of a legal official’s action and what truly matters, morally speaking, about that action, is a purely contingent connection (normally a purely causal connection”). Anderson and Pildes take issue with Adler’s narrow conception of expressivist theories of law such that only linguistically meaningful actions are expressive—a critique I share. See Anderson & Pildes, supra note 67, at 1565-70.

69. Adler, supra note 66, at 1413.

70. Id. at 1434.

71. Id.

72. Anderson & Pildes, supra note 67, at 1531 (“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 concern about its cultural or material consequences.”). The authors also assert that “[t]he meanings of action do matter after all, independent of their causal consequences.” Id. at 1574.

73. They state the aims of their article in its opening paragraph in this way: At the most general level, expressive theories tell actors—whether individuals, associations, or the State—to act in ways that express appropriate attitudes toward various substantive values. . . . Expressivists do not present this view as some radically new theory of morality and law. Instead, we claim that much of our existing practices of moral and legal evaluation are best understood through expressivist perspectives—but that the more perspicaciously we can grasp the expressive structure of action, the more we can improve our evaluative practices. Expressivism is thus an internal account of existing normative practices, but one with sufficient critical capacity to exert leverage over those practices and to indicate where they ought to be reformed.

Id. at 1504.

74. Id. at 1504-05.
people are important, they do not fill in this claim by explaining why caring about people requires, especially, that we express the right attitudes toward them. While this short Article surely cannot take on the ambitious task of providing a general justification of the moral significance of expressive conduct, it will try to take a small step in that direction.

The reasons most commonly offered in defense of appearance of wrongdoing standards emphasize consequences. Supporters argue that appearance standards work prophylactically to reduce the number of nonmimetic wrongs. This can happen in two ways. First, since the actor may himself be confused about what actions are wrong, prohibiting those that appear wrong may protect against misjudgment. Second, doing things that appear wrong may lesson the actor's moral inhibitions against doing the nonmimetic wrong. Thus, appearance standards help to maintain the proper repugnance to wrong action.

The second common reason offered for appearance standards is that they serve to maintain public confidence in whatever institution is at issue. This rationale is offered in support of appearance standards for legislators, judges, teachers, professionals, religious leaders, and others. If a legislator appears to be voting for a bill because a corporate executive whose company stands to benefit from the legislation has lent him a fancy vacation house, this undermines the citizens' confidence in government, whether that was the reason for the legislator's vote or not.

However, the premise that underlies each of these arguments may turn out to be false. Critics of appearance standards allege that the emphasis on avoiding the appearance of impropriety itself confuses actors so that they learn to avoid the appearance of wrongdoing only. It mistakenly teaches that it is appearance and only appearance that matters. Moreover, the plethora of infractions or alleged infractions that the more restrictive standards engender leaves the public with the impression of a thoroughly corrupt bunch of politicians (to use the examples of ethics standards in Congress). Rightly or wrongly, public confidence in government is diminished.

Whether this critique is accurate is an empirical matter. In saying this, I do not mean to diminish its importance. Clearly, we ought to

75. Id. at 1509.
76. Here it is what Adler has helpfully termed "epistemic trust" that is at issue. See Adler, supra note 8, at 699 ("[W]here epistemic trust is at stake in a special relationship, Pi trusts Pj in the sense that Pi feels assured that Pj will behave in a certain way and counts on Pj to preserve this feeling of assurance.").
figure out whether appearance standards reduce or swell the number of nonmimetic wrongs and whether they decrease or augment public confidence in elected officials. For even if there are other reasons to support these prohibitions, those reasons may be outweighed by the detrimental consequences of appearance standards if the consequences are as dire as critics allege.

This Article is therefore devoted to addressing two questions. First, are there nonconsequentialist reasons to avoid the appearance of wrongdoing (discussed in Part I above)? Second, do these reasons help to explain and justify the claim that the expressive character of state action should be constitutionally significant (discussed in Part III below)?

III. IMPLICATIONS FOR THE EXPRESSIVE DIMENSION OF GOVERNMENTAL ACTION

So far we have established that the appearance of wrongdoing provides a reason to avoid action in situations in which the actor stands in an important relationship with those who are likely to mistake her actions. The relationship provides a reason for the actor to modify her behavior to accommodate the epistemic limitations of those to whom she is responsible. This analysis of the rationale for appearance standards may be interesting in its own right, but is it useful in answering the question of whether the expressive dimension of state action ought to have legal significance. Clearly, the government stands in an important relationship with those whom it governs.\textsuperscript{77} Moreover, some constitutional doctrines—Equal Protection, for example—define nonmimetic wrong action as action that is adopted by the government actor for the wrong reasons.\textsuperscript{78} In addition, it will be difficult for people to know whether the state actor has indeed acted properly. Therefore, one might argue by analogy that the state

\textsuperscript{77} I avoid speaking only of the state’s obligations to citizens because constitutional mandates—Equal Protection, for example—often cover the state’s obligation to “people” rather than just to “citizens.” See U.S. Const. amend. XIV (“No state shall... deny to any person within its jurisdiction the equal protection of the laws.”).

\textsuperscript{78} The view that constitutionally impermissible action is action that is adopted for the wrong reasons is only one possible approach to constitutional law. But it is a prevalent one. In the case of Equal Protection, the view that invidious intent is required for a violation of Equal Protection dates back to Washington \textit{v.} Davis’s rejection of disproportionate impact as sufficient for a prima facie case of racial discrimination. 426 U.S. 229, 238-39 (1976). While Equal Protection law is complicated and not entirely internally consistent, most commentators agree that current doctrine continues to require a showing of improper purpose. See, e.g., Laurence H. Tribe, \textit{American Constitutional Law} § 16-20 (2d ed. 1988) (discussing the evolution of the Court’s discriminatory purpose doctrine).
should take care to avoid appearing to act improperly—that is, appearing to adopt policies for the wrong reasons.

In the discussion that follows, my comments are directed specifically at the views of those judges and scholars who hold that constitutional protections are best conceived as prohibitions on acting for the wrong reasons. Using the analogy sketched in this Article, I examine whether that view requires its holder to also accept that the expressive dimension of state action ought to have constitutional significance. While this approach will not address the reservations of all who oppose the expressivist conception of constitutional law, it is relevant to many, and it is aimed specifically at the dominant doctrinal approach to Equal Protection. Therefore, those scholars and judges who believe that invidious intent is the gravamen of the Equal Protection violation ought also to question whether laws with denigrating social meanings are also constitutionally problematic. I limit my discussion in this way because it is here that the analogy I explore has the most to offer. However, at the end of the Article, I argue that there are good reasons not to conceive of constitutional protections in this way and suggest, very briefly, the ways in which the expressive dimension of state action is relevant for other reasons.

A. Mistakes

In pursuing the analogy presented in this Article, it will be helpful to look at how mistakes occur in the context of appearing to do wrong and in the context of laws that express a noxious social meaning. Let’s begin with a case where a public official’s behavior creates an appearance of impropriety. For example, suppose that the judge in the Spires case discussed earlier had not recused himself and had instead gone on to decide the case. If he decides the case for the Paper on its legal merit, his behavior may still create the appearance of impropriety. The observer—here the plaintiffs, perhaps—may reasonably, but mistakenly, believe that the judge’s decision was influenced by the Paper’s complimentary profile of him.

Thus, the appearance may accurately reflect the reality or, as above, it may inaccurately reflect that reality. Where the appearance inaccurately reflects reality, the observer may reasonably, but mistakenly, arrive at a false belief. Sometimes, however, the problem lies not in the appearance, but instead in the observer. For example, if a male tennis coach holds the arm of a female tennis student in order to correct her swing, someone unfamiliar with common methods of tennis instruction may unreasonably think that the coach is taking advantage of his position in order to get physically close to the student. As
these examples make clear, the reasonableness of the observer’s suspicion depends on cultural practice.

In looking at appearance of impropriety issues, we thus find two different ways that action can be misconstrued: reasonably and unreasonably. Both of these errors (if that is the right term) occur in the reading of what the appearance indicates about the underlying action. We can therefore identify three components of the process. There is the reality (whether the judge is in fact biased), there is the appearance (whether he appears biased, given the Paper’s profile of him), and there is the interpretation of that appearance by a particular individual who observes the situation, which can be reasonable or unreasonable. Of course, sometimes the appearance and the reality accord—the judge looks biased and is biased or the judge doesn’t look biased and isn’t biased. Because this Article has focused on cases where there is an appearance of wrongdoing only, we have simply not examined cases where the appearance accurately reflects reality. Clearly, however, this will be common.

We might then say that there are two joints at which something can go wrong. First, the appearance may not accurately reflect the reality (these are the cases we have concentrated on). Second, the interpretation of the appearance may not be reasonable. Again, we concentrated above on cases in which it was reasonable. It was only in those cases where I argued that the actor had an obligation to avoid appearing to do wrong to those with whom the actor stands in a special relationship.

Expressive action is also open to mistake. According to Elizabeth Anderson and Richard Pildes, to express is to manifest a mental state.79 Via a complex account of the way in which it is plausible to ascribe mental states to collective agents, like governments, Anderson and Pildes make clear that expressing is about manifesting actual mental states in action.80 Here, also, there appear to be two joints at which something can go wrong when an agent expresses. First, the expression may be a poor manifestation of the mental state that gives rise to it. For whatever reason, there is a disconnect between the actual mental state and its display. Anderson and Pildes acknowledge this possibility in their discussion of the bumbling lover.81 Perhaps even more on point would be the example of a shy lover who, out of fear, avoids his

79. Anderson & Pildes, supra note 67, at 1506.
80. Id. at 1508, 1514-20.
81. Id. at 1508 (providing as an example of incongruity between a mental state and its manifestations, a “bumbling lover” whose “infatuation may cause him to express his love in awkward ways that repel his beloved”).
beloved altogether. Here his conduct does not express, in the sense of display or manifest, his attitude at all. (It doesn’t communicate it either, but as Anderson and Pildes explain, that is a separate issue.)

The second joint at which something can go wrong is in the interpretation of the expression by its audience. This is a problem of poor reading. Here the mental state is expressed in action, but is not perceived by others (or by some others) correctly. For example, I argue elsewhere that Justice Brown’s understanding of the meaning of the practice of segregated railway cars in 1896 as not denigrating African Americans, upheld in *Plessy v. Ferguson*, was unreasonable. The practice of segregation expresses denigration, but Justice Brown simply does not see it (or so he says).

With that topography in mind, an analogy can be drawn between the relationship between appearance and reality, on the one hand, and expression and mental state, on the other. Just as the litigant can’t know whether the judge in *Spires* will base his decision on legal merit or personal vanity, so too the observer of expressive action can’t know whether the expression adequately expresses the mental state it purports to express—think of the shy lover. The actor must therefore, in certain circumstances, take care to ensure that he expresses himself adequately.

I find the term expression here a bit confusing. Take the example of the shy lover. It is hard to characterize his actions as expressing love at all. He may have love in his heart, but his actions do not express—manifest, display, make public—that love. Rather, it makes more sense to say that his conduct is caused by his love, but does not in fact express it. So then, we see that to express an attitude implicitly requires that it is adequately expressed. The concept of expression

82. *Id.*
83. In the infamous passage, Justice Brown argued:

   We consider the underlying fallacy of the plaintiff’s argument to consist in 
   the assumption that the enforced separation of the two races stamps the colored 
   race with a badge of inferiority. If this be so, it is not by reason of anything found 
   in the act, but solely because the colored race chooses to put that construction 
   upon it.

84. *Id.* at 552.
86. Anderson and Pildes largely agree:

   Expressive theories of action tell us to express certain attitudes adequately. 
   The standard of adequacy is not met simply by intending to express those atti- 
   tudes, or by thinking that one’s actions do express those attitudes. Rather, the 
   standard of adequacy is public, set by objective criteria for determining the mean- 
   ings of action.
embodies the idea of adequacy already. Perhaps it would be more helpful then to refer to the manifestation of the mental state that may express it (if it adequately displays the mental state) or not (if it does not).

The analogy to appearance ethics then suggests that because observers can’t know whether the mental state displayed in action actually is the mental state embodied in the action, the actor should take care to express his mental states adequately. But clearly that is too strong. Surely the shy lover has not acted wrongly (though perhaps unfortunately). Only in some instances will one have an obligation to adequately express one’s mental state. Another example Anderson and Pildes used helps us here. They contrast the case of the person who doesn’t visit his sick mother in the hospital because he doesn’t want to transmit a contagious illness to her with the case of the person who doesn’t visit his mother in the hospital in order to spare himself unpleasantness. This comparison occurs in their article in a discussion of the importance of the connection between the reasons for action and the action itself in an expressive theory of action. For my purposes here, what is important to note is that neither action expresses concern for one’s mother. While the first is caused by concern, it does not express or display concern because the action is not recognizable as concern. Rather, in order to express concern, one would think that the son here must also tell his mother why he is not coming to the hospital.

In fact, most of us probably think that he ought to tell his mother why he is not coming. The reason the son must take care to express himself adequately while the shy lover need not is because the son’s relationship with his mother requires this of him, while the lover owes (as yet) nothing to the object of his desire. My view differs from the Anderson and Pildes account here. In my view, an expressive theory of action, in itself, does not require that one’s action manifest the right attitude. Rather, it is the degree of one’s relationship with others that determines whether one must ensure that one’s actions adequately express one’s moral attitude.

In sum, if constitutionally permissible action is action that is adopted for the right reasons, then the government’s relationship with the governed provides a reason for the state to avoid action whose meaning conflicts with constitutional guarantees. A state actor

Anderson & Pildes, supra note 67, at 1512.
87. Id. at 1511.
88. Id. at 1508-14.
has a reason to avoid action that appears corrupt because his relationship with his constituents provides a reason for him to accommodate his behavior to their inability to know what is really going on. It gives him a reason to avoid giving his constituents a reasonable basis to doubt his good faith. So, too, governmental actors ought to avoid action whose public meaning conflicts with constitutional mandate out of deference to the inability of observers to know whether or not constitutionally permitted reasons motivated the action at issue.

B. Ought Intent to Be the Touchstone?

The focus in some expressive theories of law on the expression of an attitude may well be problematic, however. The recent article by Professors Anderson and Pildes purports to provide a “General Restatement” of expressive theories of law. While their conception is certainly interesting and important, it is not definitive of what any such theory may entail. In my view, their conception of an expressive theory of law continues to overemphasize the importance of the actual mental states of legislative actors in a way that distorts the theory.

For Anderson and Pildes, expression “refers to the ways that an action or a statement (or any other vehicle of expression) manifests a state of mind.” They go on to define an expressive theory of action as follows:

Expressive theories of action are fundamentally concerned not just with achieving certain ends, nor with prescribing or proscribing certain means (types of action), but with whether the connection between the means and the end is justified. They ask: does performing act A for the sake of goal G express rational or morally right attitudes toward people?

The last sentence of this passage illustrates ambivalence about which of the two components therein mentioned is critical. Is the fact that one performs act A for the sake of goal G what is really important (the subjective motivation of the actor)? Or, instead, is it the expression itself (the objective manifestation of intention) that matters? To express the right attitude, one must both (a) have the right attitude (be doing the act for the right reasons) and (b) display the right attitude. Expression, as they conceive it, is a fusion of actual mental state and apparent mental state, of doing and seeming.

They are clear about the fact that good intentions are not enough. One must express ones attitudes “adequately” where ade-

89. Id. at 1506.
90. Id. at 1510 (emphasis added).
quacy "is not met simply by intending to express those attitudes . . . [but is] set by objective criteria for determining the meanings of action."91 Yet, they are equally clear that pretty behavior is not sufficient either; the goal is not "to maximize the amount of proper expression in the world."92

While expressing the right attitude may be morally relevant in assessing individual action, it is not at all clear that it is equally important for a normative theory of governmental action. I do not mean to address here their use of Margaret Gilbert's conception of a collective mental state,93 nor to critique its applicability to a democratic state.94 Rather, I question why a theory addressing when and on what grounds particular state actions are permissible need be concerned with the group mental state at all. Attitudes are clearly relevant to the moral culpability of actors. Anderson and Pildes's view, which I share, is that for individuals, the objective manifestation of those attitudes is also relevant.95 As they describe, the teenagers who honk loudly for their friend in the residential neighborhood at night express disrespect for the neighbors' interests, and thereby act wrongly.96 But the analogy to the permissibility of governmental actions requires argument. It is not at all clear why group attitudes or intentions ought to matter in judging the permissibility of laws.

A court must assess whether a law establishes religion or a policy denies Equal Protection, for example, not whether the state that enacted the law or policy is morally culpable in doing so. The mental state of the collectivity would be relevant to the second issue, but not plainly to the first. Admittedly, the case law, particularly in the field of Equal Protection, emphasizes the importance of intent in assessing violations of constitutional guarantees.97 Therefore, a theory of Equal Protection that retains the importance of the subjective mental state of the state actor will require less disruption of existing doctrine than one that disregards it. However, the fact that courts do it this way is not a sufficient reason to justify this approach.

91. Id. at 1512.
92. Id.
93. See id. at 1515 (articulating and explaining the criteria for a "plural subject" as including that its members (1) "can properly refer to themselves as 'we,'" and (2) can "make normative claims upon one another in virtue of their belonging to that 'we.'"); id. at 1515 n.20 (noting that the group activity discussion is "drawn heavily" from MARGARET GILBERT, ON SOCIAL FACTS (1989)).
94. See id. at 1520-27 (discussing the democratic state as a collective agent).
95. Id. at 1512.
96. Id. at 1512-13.
97. See supra note 78 (noting the prevalence of the invidious intent requirement in Equal Protection jurisprudence).
If expression requires both that the actor have an attitude and that the actor manifest that attitude, then perhaps the Equal Protection theory to which I subscribe is not, properly speaking, "expressivist." I have argued elsewhere that the social meaning of state action ought to determine whether that action violates Equal Protection. The actual subjective mental state of the state actor ought not to be relevant to determining its constitutionality. I argued that because a plethora of laws must draw distinctions between people in order to achieve their ends, the best way to determine which distinctions are permissible and which impermissible is to focus on the meaning or expressive content of the law. That theory grew out of the realization that wrongful discrimination can be identified neither by looking at the concrete, material effects of laws, nor by focusing on the culpable intent of state actors. What makes one action discriminatory and another not is bound up with the social meaning of the distinctions at issue. Understanding which state actions wrongfully discriminate requires an interpretation of the action in question—an inquiry into whether its meaning is one that conflicts with the principle of equal concern and respect. While I clearly cannot rehearse the entire argument of that article, my point here is this: perhaps some constitutional protections require expressive theories while others do not because of the nature of the particular constitutional protection at issue.

In sum, a constitutional theory that focuses on the reasons for state action will also require that the state attend to the expressive dimension of its actions. This conclusion is the heart of what I have argued in this Article and derives from the analogy I draw to the reasons that support avoiding the appearance of wrongdoing. However, there are reasons to doubt whether this way of conceiving of constitutional protections (as prohibitions on reasons for action) is justified.

98. Hellman, supra note 85, at 13-14. I should note here that Adler seems to somewhat misunderstand what I mean by "social meaning." As I define it, it is the meaning of a law or policy that would be arrived at by the community under specified fair conditions. Id. at 23-24. Adler seems to think that if real people disagree about that meaning, then the law at issue lacks "social meaning." See Adler, supra note 8, at 710-11. First, I would emphasize that the fair conditions I have in mind represent an ideal that is unlikely to be met in real instances. Therefore, the fact of real disagreement does not necessarily indicate that there would be disagreement under ideal conditions. Second, even if there were (which is certainly possible), I would still label such a case an instance of contested social meaning rather than of a lack of social meaning. Only in those cases where the meanings attributed by different individuals or groups are so fragmented—numerous and quite distinct—would I say that a law or practice lacks social meaning.

100. See id.
If not, one may still adopt a modest expressivism—one that grows out of an understanding of the content of particular constitutional guarantees. An endorsement of this view for any particular constitutional clause will, of course, require development of the type I present in my article on Equal Protection.101

IV. THE INDEPENDENCE OF NONMIMETICALLY WRONG ACTION

The analogy I have been exploring in this Article will help to clarify another important confusion about expressive theories of laws. Critics argue that the focus on what a law or policy expresses obscures discussion of the underlying constitutional norm at issue. For example, Steven Smith has objected to the expressivist conception of the Establishment Clause according to which the permissibility of state action is assessed in terms of whether it sends a message to outsiders that they are not full members of the political community.102 According to Smith, the focus on the expressive dimension of the state action tempts judges to avoid the difficult and critical question that ought, in Smith’s view, to precede it.103 Smith objects that “[w]e cannot achieve the appearance of neutrality unless we first know what actual neutrality means. But if we knew what actual neutrality meant, why would we be content with a merely symbolic neutrality?”104

Here, the comparison with the appearance of wrongdoing standard shows that Smith is right in one important respect and wrong in another. The mimetically wrong action is wrong because it resembles the nonmimetically wrong action; if wearing fake fur is wrong, it is because it looks like wearing real fur. In this sense, the mimetically wrong action depends, for its identification, on a prior and independently defined nonmimetically wrong action. All appearances aren’t bad, only those that look like actions that are bad for other, nonmimetic reasons. For example, for the person who does not observe Jewish dietary laws, there is nothing wrong in eating the veggie-burger with cheese in a public place, because there would not have been anything wrong in eating a cheeseburger in the first place.

101. Hellman, supra note 85.
102. Steven D. Smith, Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test, 86 Mich. L. Rev. 266, 271 (1987) (discussing Justice O’Connor’s use of the “no endorsement” test in Lynch v. Donnelly, 465 U.S. 668 (1984)); id. at 276 (“Before its formal acceptance, however, the ‘no endorsement’ test deserves far more careful scrutiny than it has received thus far. Such scrutiny reveals serious problems, both theoretical and practical, with O’Connor’s proposal.”).
103. Id. at 325.
104. Id.
Analogously, those who argue that the public meaning of governmental action matters in assessing its constitutionality are not released from providing an account of what meanings are proscribed. Here Smith is right. We still must do the work to understand whether neutrality in religious matters is the right conception of the Establishment Clause and what that neutrality requires. In the Equal Protection context, I have argued that the Clause prohibits meanings that conflict with the principle of equal concern and respect.\(^\text{105}\) The content of the constitutional clause provides the source; it instructs which meanings are constitutionally problematic.

In fact, this is the locus of my disagreement with the holding of *Shaw v. Reno*\(^\text{106}\) and with Richard Pildes and Richard Niemi's interpretation of it.\(^\text{107}\) *Shaw* is one of the cases most often cited as evidence for the Supreme Court's acceptance of the view that the expressive dimension of state action has constitutional significance. While I believe that *Shaw* is right to acknowledge the importance of the social meaning of state action, I reject its particular holding—that the shape of the North Carolina congressional district violated Equal Protection because it sent a message that race was the dominant factor in the drawing of the district lines.\(^\text{108}\) In an attempt to provide what they take to be the best reconstruction of the case's rationale, Pildes and Niemi argue that the shape of the district impermissibly expresses a rejection of value pluralism.\(^\text{109}\) What is missing from their account, and not at all obvious, is an argument for why Equal Protection requires value pluralism. Using the analogy, we disagree about the definition of the nonmimetic wrong.

But Smith is wrong to therefore conclude that once we have identified the nonmimetic wrong we will have no reason to care about the mimetic wrong.\(^\text{110}\) His mistake is to confuse a conceptual limitation for an epistemic one. In order to identify the mimetic wrong, we must have a reasonably well-formed idea of the nonmimetic wrong. Otherwise, what is the expression an expression of? But the fact that we need to know what we are looking for does not mean that we are guaranteed the means or ability to find it.

\(^{105}\) Hellman, *supra* note 85, at 13-14.


\(^{108}\) Shaw, 509 U.S. at 646-49.

\(^{109}\) Pildes & Niemi, *supra* note 107, at 500-01.

\(^{110}\) See Smith, *supra* note 102, at 325, 331.
The *Spires* case discussed earlier illustrates this point. In that case, we have a clear conception of the nonmimetic wrong. The judge should decide the case on the merits and not allow his opinion to be influenced by the Paper's positive profile of him. Wrong action consists in deciding the case for the wrong reasons, reasons dictated by personal vanity rather than legal merit. However, the fact that we have a clear idea about what wrong action is, conceptually, does not imply that we are able to know if and when it has occurred. The inner workings of the judge's mind are inaccessible to the public and may even be opaque to the judge himself. It is because the litigants can't directly assess whether or not wrong action occurs that the appearance standard is necessary. The limitation is epistemic, not conceptual.

To return to the Establishment Clause example, Smith is right that a theory of that Clause must articulate a conception of the moral norm (neutrality, perhaps) that animates the Clause. But to say that government may not favor one religion over another or religion over non-religion does not exhaust the task. We still do not know what kinds of state action count as violations of neutrality. An expressive theory of the Establishment Clause argues that actions that express favoritism violate the Clause. We are looking for action whose public or social meaning conflicts with the principle of neutrality in matters of religion.

**Conclusion**

This Article begins with an inquiry into whether there are non-consequential reasons to avoid the appearance of wrongdoing in the hope that this examination might provide useful insight into the question of this Symposium: whether the expressive dimension of governmental action ought to have constitutional significance. The reason that analysis of the first may be helpful to understanding the second is because both focus on whether actors have responsibility for how their actions are reasonably interpreted by others.

The Article then focuses on constitutional theories that argue that constitutional guarantees prohibit the state from adopting policies for the wrong reasons. Using the analogy, the Article points out that in both expressive state action and action by officials that appear wrong, observers are hampered in their ability to know whether the actor acts rightly. In the case of the appearance of wrongdoing, I argued that the relationship between the actor and the observer obliges

111. See id. at 331.
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the actor to constrain his behavior to accommodate the epistemic limitations of the observer. Because the state also stands in an important relationship with those whom it governs, the state also should defer to the limitations of its constituents. Thus, the state must ensure that the meaning its actions express comports with relevant constitutional norms.

Along the way, I have also tried to clarify some confusion that I see in the current debate about expressivism in law. In particular, I have argued that the view that the expressive content of state action matters constitutionally does not yet tell us what content the state must refrain from expressing. The claim that mimaetically wrong actions may be wrong does not provide an account of nonmimetically wrong action. The nonmimetically wrong action must be described independently. In the case of constitutional guarantees, it is the content of those guarantees that provides the expressive norm at issue. For example, in the case of Equal Protection, the state must not enact laws that express unequal regard for people.

Lastly, this discussion has helped me clarify what I mean by the expressive dimension of state action. In developing the ideas in this Article, I see that for me it is the meaning of what is manifest or displayed that alone is crucial. While others, like Professors Anderson and Pildes, also emphasize the paramount importance of the public meaning of expressive action, they also continue, at the same time, to emphasize the connection between actual mental states and expressive conduct. While this makes sense in a moral theory of individual action where intention is clearly central (though they are right to point out, not sufficient) to the determination of moral blameworthiness, it is not obviously appropriate when judging state action. In that context, we need care only about the action itself. The theory I endorse emphasizes that it is the public meaning of action that alone matters, rather than the collective mental state that it expresses.