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EXPRESSION AND APPEARANCE: A COMMENT ON HELLMAN

MATTHEW D. ADLER*

In her subtle and interesting article, entitled *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, Deborah Hellman sheds new light on the expressive dimension of governmental action. The first part of the article defends an appearance-based theory of governmental action: not only are certain officials morally obliged not to engage in various sorts of wrongdoing, but they also have moral reason not to appear to engage in wrongdoing. As Hellman puts it: officials may be obligated to refrain from performing "mimetic wrongs," that is, actions which are wrong because they resemble other, "nonmimetic" wrongs. The second part of Hellman's article considers possible linkages between appearance-based theories and expressive theories. If governmental actors are constrained from performing mimetic wrongs, are they also constrained from expressing (or failing to express) various attitudes or propositions? Hellman's answer to this question is a qualified "no": Appearance-based theories of governmental action do not generally entail expressive theories of governmental action. A limited class of appearance-based theories—those focused on the mental states possessed by government actors—do entail expressive theories. Hellman thinks, however, that this focus on mental states is problematic.

Like Hellman, I am skeptical about the relevance of governmental actors' mental states, and thus about the connection between appearance-based theories and expressive-theories. Unlike Hellman, I am not convinced that there is any appearance-based theory of governmental action that is viable. But I must emphasize that *Judging by*

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1. 60 Md. L. Rev. 653 (2001).
2. See id. at 654-76.
3. See id. at 654. Hellman borrows the term "mimetic" from Julia Driver, who developed an appearance-based theory in *Caesar's Wife: On the Moral Significance of Appearing Good*, 89 J. Phil. 331, 335 (1992). Hellman's theory, however, is significantly different from Driver's. For example, Hellman's theory is deontological in structure, while the theory proposed by Driver is consequentialist.
4. See Hellman, supra note 1, at 676-86.
5. See id. at 677-81, 683-84.
6. See id. at 681-84.
Appearances is an important contribution to the literature on expressivism—given the possible connection between mimetic and expressive theories—and may well spark a whole new scholarly literature about the moral significance of apparent government wrongdoing.

I. IS IT WRONG TO APPEAR TO ENGAGE IN WRONGDOING?

Let me begin by describing and examining Hellman's argument for the moral importance of appearance—for the claim that certain government officials and other agents are morally obliged not to appear to engage in moral wrongdoing. There are three crucial features of Hellman's account. First, the account is relationship-based. Arguably, morality incorporates various special relationships—for example, the relationships between friends, parents and their children, fellow citizens, teachers and students, or governing officials and those they govern—such that the parties to these relationships owe special moral obligations to each other. Hellman suggests that the obligation not to engage in mimetic wrongdoing is a relationship-based obligation: it is owed by one party in a special relationship (or in certain special relationships) to the other parties. Second, and relatedly, Hellman's account is nonconsequentialist. She grants that an agent's performance of an action that appears to be wrong may cause bad consequences, of various kinds—the action may induce others to engage in nonmimetic wrongdoing (by inducing them to believe that what the agent appears to have done is not wrong after all), or it may cause distress to onlookers—but these contingent effects of apparent wrongdoing are not Hellman's focus. Rather, she argues that the party to a relationship (or at least to a certain kind of relationship) has a reason to refrain from apparent wrongdoing which is nonconsequentialist in structure and which obtains even in the case where the creation of the appear-


8. For general discussions of special relationships and their place within morality, see, for example, Person to Person (George Graham & Hugh LaFollette eds., 1989); Shelly Kagan, Normative Ethics 125-37 (1998); Hugh LaFollette, Personal Relationships, in A Companion to Ethics 327 (Peter Singer ed., 1991); Samuel Scheffler, Relationships and Responsibilities, 26 Phil. & Pub. Aff. 189 (1997). Much of the philosophical literature on special relationships is focused on particular kinds of relationships, such as friendship, see, e.g., Marilyn Friedman, Friendship and Moral Growth, 23 J. Value Inquiry 3 (1989); James O. Grunebaum, Friendship, Morality, and Special Obligation, 30 Am. Phil. Q. 51 (1993); or citizenship, see, e.g., A. John Simmons, Associative Political Obligations, 106 Ethics 247 (1996).

ance of wrongdoing does not cause harms. Finally, Hellman's account draws a distinction between *reasonable* and *unreasonable* beliefs about the occurrence of moral wrongdoing. The participant in a special relationship is not obliged to refrain from an action merely because the action will lead other parties to believe that the actor has done wrong; after all, these beliefs might be completely unreasonable and unjustified. Rather, the appearance-based obligation described by Hellman is an obligation to refrain from actions that other parties reasonably (even if mistakenly) believe to be nonmimetically wrongful.

Hellman's account might be schematized as follows:

**A Deontological, Relationship-Based Account of Mimetic Wrongdoing:**

Morality incorporates special relationships. Assume that \{P_1 \ldots P_n\} are the parties to some such special relationship \(R\). This means that a given party, \(P^*\), is subject to various first-order or nonmimetic deontological reasons or considerations, intrinsic to the relationship. Call these \{R_1 \ldots R_n\}. In any choice situation, \(P^*\) is obliged, in virtue of the relationship \(R\), to choose that option favored by the balance of \{R_1 \ldots R_n\}. It is further the case—at least in certain special relationships, and for certain parties—that \(P^*\) is subject to a deontological, mimetic requirement. \(P^*\) has deontological reason not to choose some option that some other, \(P_i\), reasonably believes to be wrong on the balance of the nonmimetic, relationship-based reasons \{R_1 \ldots R_n\}.

This has relevance for governmental officials because Hellman thinks that officials are parties to some special relationships—specifically, to some of the special relationships that generate deontological reasons against mimetic wrongdoing.

Is this account plausible? Hellman's account, as I have characterized it, assumes that special relationships generate moral reasons, binding upon the participants to the relationship, that are deontological in form. This is a contestable assumption. To explain why, I should say just a bit about the distinction between consequentialist and nonconsequentialist (that is, deontological) reasons. Consequentialist reasons are, roughly, features of outcomes or world-states that have the same moral force for all agents. For example, the fact that a

10. See id. at 655, 673-76.
11. Id. at 659.
12. See id.
13. Id. at 676-77.
Given world-state, $W_1$, contains greater overall well-being than another world-state, $W_2$, is (according to utilitarians) a moral reason for all agents to choose actions leading to $W_1$ rather than $W_2$. By contrast, deontological reasons are, roughly, features of outcomes or world-states that have different moral force for different agents. For exam-

14. This may seem an odd characterization of deontological reasons. To see why I adopt it, consider two other possible characterizations of the distinction between consequentialist and deontological reasons: (1) “Consequentialists are concerned with the causal consequences of actions, while deontologists are concerned with actions themselves. Consequentialist reasons are features of the outcomes that result from action, while deontological reasons are features of actions themselves.” The problem with this characterization is that deontologists do care about the causal consequences of actions. For example, the deontological constraint against killing is a constraint against performing actions that cause death in a certain way. (2) “Deontological reasons are reasons to perform actions whose consequences are (or may be) worse than the consequences of alternative options. Deontological reasons are reasons that can oblige agents to produce worse outcomes. For example, the deontological reason to refrain from killing can oblige the agent to refrain from killing even in the case where her act of killing would avert other killings and would therefore have better consequences than not-killing.” The problem with this characterization is that it makes classification of a particular reason or theory as deontological or consequentialist depend upon the answer to the question, “What is a good outcome?” What makes outcomes better or worse is a question of substantive moral theory, one that is hotly debated by moral philosophers. The conceptual task of classifying moral theories and reasons as “deontological” or “consequentialist” is one that we should be able to undertake without first resolving the substantive debate about the nature of good outcomes.

A third, and better, characterization of the distinction between consequentialist and deontological reasons is one that analyzes the former as “agent-neutral” reasons and the latter as “agent-relative” reasons. A reason is a feature of the outcome produced by some action—either some aspect of the causal consequences of the action, or some feature of the action itself. Both consequentialists and deontologists adduce reasons to perform or refrain from actions. Both care about outcomes (in the sense of pointing to some aspect of the outcome produced by an action as grounds for performing or refraining from that action). But consequentialist reasons are “agent-neutral”: these are criteria for ranking outcomes that generate the same ranking regardless of which person is applying the criteria. Deontological reasons are “agent-relative”: these are criteria that generate different rankings, depending on which person is applying them. For example, the fact that an action maximizes overall well-being is (according to utilitarians) a reason for the agent to perform the action. That reason is “agent neutral”: how outcomes $\{W_1, \ldots, W_n\}$ compare with respect to overall well-being does not depend on which person is doing the comparison. By contrast, the fact that an action would increase the welfare of the agent’s child is (according to some deontologists) a reason for the agent to perform the action. That reason is “agent relative”: how outcomes $\{W_1, \ldots, W_n\}$ compare with respect to the welfare of the agent’s child depends, of course, on who the agent is. See, e.g., Thomas Nagel, *Autonomy and Deontology*, in *Consequentialism and Its Critics* 142, 156-67 (Samuel Scheffler ed., 1988) (explaining the concept of “agent-neutral” and “agent-relative” reasons, and deploying that concept to distinguish between consequentialist and deontological views); Amartya Sen, *Rights and Agency*, in *Consequentialism and Its Critics*, supra, at 187, 187-223 (same); David McNaughton & Piers Rawling, *Agent-Relativity and the Doing-Happening Distinction*, 63 Phil. Stud. 167 (1991) (same). For other, general discussions of the distinction between “deontological” and “consequentialist” moral reasons and theories, see Kagan, *supra* note 8, at 70-152; Robert Nozick, *Anarchy, State, and Utopia* 26-53 (1974); Samuel Scheffler, *The Rejection of Consequentialism* 80-114 (rev. ed. 1994); Richard
ple, the fact that Jim performs a killing in a given world-state, \( W_1 \), and refrains from performing that killing in another world-state, \( W_2 \), is (according to deontologists) an especially weighty moral reason for Jim to choose \( W_2 \) over \( W_1 \); other agents may have less reason than Jim to disfavor \( W_1 \). From Jim's point of view, \( W_1 \) (the world in which he kills) is morally worse than \( W_2 \) (the world in which he refrains from killing), but it may not be true that \( W_1 \) is worse than \( W_2 \) from the point of view of other agents, or from an "impartial" point of view. To see this, imagine that \( W_1 \) is a world in which Jim kills and in which Jules refrains from killing, while \( W_2 \) is a world in which Jules kills but Jim refrains from killing. Then, on the deontological account of killing, \( W_1 \) is morally worse than \( W_2 \) from Jim's point of view, while \( W_2 \) is morally worse than \( W_1 \) from Jules's point of view.

A deontological account of special relationships makes a similar claim.\(^5\) Assume that Sean is a parent and thereby has a special relationship to his daughter, Sue. This relationship generates various deontological moral reasons \( \{R_1 \ldots R_n\} \) for Sean. Each parent has a deontological reason, \( R_1 \), that his child's basic needs be satisfied, a deontological reason, \( R_2 \), that his child's important goals be fulfilled, and so on. So, Sean has a deontological reason, \( R_1 \), that Sue's basic needs be satisfied, a deontological reason, \( R_2 \), that Sue's important goals be fulfilled, and so on. That is, if \( W_1 \) is a world in which Sue's basic needs are satisfied and her important goals are fulfilled, and this is not true of \( W_2 \), then Sean has a moral reason to choose \( W_1 \) over \( W_2 \)

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15. David McNaughton and Piers Rawling nicely summarize the deontological account of special relationships:

\[ \text{[T]here are duties which stem from special relationships: duties which I owe to some specified individuals because of the relationship in which I stand to them. Instances of such relationships include those of parent to child, spouse to spouse, friend to friend, as well as purely contractual relationships, such as those of promiser to promisee, of debtor to lender. Why do these relationships generate [deontological] reasons? Because in each case the agent's reason for acting, her obligation to act, stems from the fact that she stands in this particular relation to another. The fact that Alex is Lee's child gives her a reason to look after him which is not shared by anyone who is not also Alex's parent. This is not to say that we have no duty whatever to be concerned about the welfare of other people's children, only that each of us has a distinct and special reason to be concerned about our own.} \]

David McNaughton & Piers Rawling, *On Defending Deontology*, 11 Ratio 37, 39 (1998); see also Scheffler, *supra* note 8 (presenting a general account of special relationships, which views them as generating moral responsibilities that are, seemingly, deontological in structure).
which is grounded in Sue's needs and goals and which is not possessed by other agents, or even by other parents. Tim, the parent of Tom, could have a deontological moral reason to choose the other way, if \( W_1 \) is worse for Tom's needs and goals even though better for Sue's. And a childless actor, one not bound by the deontological obligations of parenthood, would properly ignore \( \{R_1 \ldots R_n\} \) in determining what actions he was morally obliged to choose.

Hellman's deontological account of special relationships is controversial in two ways. First, consequentialist scholars such as Peter Railton and Shelly Kagan have argued that special relationships can and should be understood in consequentialist terms.\(^{16}\) The consequentialist, in effect, sees a particular special relationship (parenthood, friendship, citizenship) as a particular kind of "project," a particular set of valuable activities. Parenthood means, *inter alia*, caring for the child in a direct way, playing a supervisory role in his life, and educating him; similarly, friendship means a certain kind of intimate association and mutual dependence between friends. The consequentialist, then, argues that all agents have equal moral reason to promote the various valuable activities constitutive of special relationships. For example, on the consequentialist account of parenthood, all agents have equal moral reason that parents educate their children. Sean, the parent of Sue, has moral reason to educate Sue (because that is a valuable activity); but Tim also has moral reason to promote valuable activities, and thus specifically has moral reason that Sean educate Sue; and Ron, the childless one, also is subject to the very same moral reason. If Sean educates Sue in \( W_5 \), but not in \( W_6 \), then, *ceteris paribus*, \( W_5 \) is a morally better world from the point of view of Sean, Tim, and Ron.

But isn't parenthood more than a set of valuable activities? Isn't it the case that the genuine parent performs such activities on the grounds that the child's needs, welfare, and goals have special weight for him—that is, on deontological grounds? Some consequentialists simply deny that the activities constitutive of special relationships need be motivated by deontological reasoning;\(^{17}\) other consequentialists suggest that the parties to special relationships may engage in deontological reasoning, and thereby realize the value of such


\(^{17}\) See, e.g., Kagan, supra note 16, at 357-69.
relationships, without the putative deontological reasons actually existing in any objective sense.¹⁸

Second, Hellman’s deontological account of special relationships might be criticized because of its moral cast. Hellman contends that special relationships generate deontological, moral reasons. Consequentialists will respond that special relationships generate consequentialist moral reasons, while a third kind of theorist (call her the “nonmoralist”) will criticize both Hellman and the consequentialist and will argue that the reasons generated by special relationships are not moral reasons at all. This nonmoralist view is pressed by Bernard Williams and Susan Wolf.¹⁹ Assume that Sean likes chocolate ice cream. This liking on Sean’s part generates some kind of reason for him—he now has a reason to eat some chocolate ice cream—but it is far from clear that Sean has a moral reason to eat chocolate ice cream, or that other persons have a moral reason that he do so. The same could be said of Sean’s parenthood of Sue: this special relationship arguably generates personal but nonmoral reasons for Sean, perhaps the same kind of personal, nonmoral reasons generated by his liking for ice cream.²⁰

Why deny that special relationships generate moral reasons? One worry is that special relationships need not be voluntarily assumed. More precisely, the worry is that the reasons generated by special relationships are affirmative rather than negative—the reasons require action, not merely inaction—and that it is unfairly burdensome to impose an affirmative moral requirement on some agent when the requirement does not flow from a voluntary choice of hers.²¹ Another worry is that the putative moral reasons generated by special relationships create an unfair advantage to certain parties to such relationships.²² Rachel’s parents died young; Sue’s parent, Sean, is still alive. Would it not be unfair to Rachel for Sean to have a special moral obligation to advance Sue’s needs, goals, and welfare, with no one similarly obliged to advance Rachel’s? A third, quite different worry is

²⁰. Or perhaps not. Williams and Wolf do not claim that the nonmoral reasons generated by special relationships are just the same as other nonmoral reasons, such as those generated by a liking for ice cream. Their main concern in the articles cited above, supra note 19, is to criticize the moralized view of special relationships and other components of a good human life, and not to delineate the various categories of nonmoral reasons.
²¹. See Scheffler, supra note 8, at 191-92.
²². See id. at 192-94.
that moral reasons (even deontological ones) have a universal quality that is in tension with the partiality characteristic of special relationships.\(^23\) The genuine parent gives special weight to her child's needs, welfare, and goals "because he's my child," not "because he's my child and it is morally required that each parent give special weight to her child's needs, welfare, and goals." The genuine parent is directly and immediately motivated by certain considerations; but if these considerations were moral considerations, she could not be thus motivated—or so it seems—since she would first need to deliberate about their moral weight. Finally, one might wonder what it is about special relationships that can generate moral reasons, as compared to other features of the world (Sean's liking for chocolate ice cream, for example) that apparently generate personal or prudential, but not moral, reasons.

There is a substantial philosophical literature on special relationships, in which consequentialist, nonmoralized, and deontological accounts are debated.\(^24\) Hellman does not take account of this philosophical debate in her article. There are, of course, limits to what can be covered in a single article, and I am not, in the end, especially bothered by Hellman's failure to consider consequentialist objections to her own views. The parties to special relationships do give special weight to each other's welfare, needs, and so on, at least in certain relationships, and I'm skeptical whether the consequentialist can make sense of that. Note further that even on a consequentialist account, the reasons generated by special relationships are moral reasons, which suggests that Hellman's claims about the moral significance of apparent wrongdoing might be translatable into consequentialist terms.\(^25\)

More troubling, I think, is the fact that Hellman does not defend her deontological account of special relationships against nonmoral-


\(^24\) See supra notes 8, 16, 18, 19, 23 (citing sources of such literature).

\(^25\) For example, a consequentialist could say that a party's apparent failure to engage in the valuable activities constitutive of some special relationship of his is itself an intrinsic disvalue. All agents have reason that parents act like good parents, plus an independent reason that parents seem to act like good parents—or so the consequentialist could claim.
ized views.  

First, the various criticisms voiced by nonmoralists are, collectively, quite cogent. Second, if the criticisms succeed—if the parties to a given special relationship indeed have personal, but nonmoral reasons \( \{R_1 \ldots R_n\}\)—then any matching mimetic reason will also be nonmoral. Each party will have nonmoral reason to refrain from behaving in a way that some other party reasonably believes to be nonmorally wrong, on the balance of \( \{R_1 \ldots R_n\} \). Yet Hellman, like other participants in the debate about expressive theories of law,  

is interested in the moral constraints on government actors.  

The fact that some such actors have nonmoral reasons to refrain from activities apparently inconsistent with their special relationships does not imply—in any direct way—that they have moral reason to be concerned about appearances, or to express or refrain from expressing various statements or attitudes. 

Let me turn now to Hellman's claims about the role of appearances within special relationships. Although her deontological and moralized account of special relationships is a contestable one, as I have just explained, the account is not unreasonable and could at some point become the consensus account in the philosophical literature. So I will henceforth assume the account to be correct. The question then arises: if a special relationship, \( R \), gives rise to deonto-

26. In response to this criticism, Hellman now states that her focus is “voluntarily chosen relationships.” Hellman, supra note 1, at 659 n.8. This response, however, addresses only one of the various grounds I noted for thinking that special relationships might fail to generate moral reasons: (1) the fact that some special relationships aren’t voluntarily chosen; (2) the worry about unfair advantage; (3) the tension between the universality of moral reasons and the partiality characteristic of special relationships; and (4) the puzzle of why special relationships would create moral reasons for agents, by contrast with other features of the world that create personal or prudential, but not moral reasons.

Further, Hellman’s decision to restrict her account to voluntarily chosen relationships creates new problems. Hellman is now claiming, I take it, that voluntarily chosen special relationships create moral reasons (mimetic and nonmimetic), while unchosen relationships may not. Is “voluntariness” here the robust voluntariness required to create contractual and other promissory obligations? If not, then my original objection has not really been answered: Isn’t it unfair to impose affirmative obligations on persons by virtue of special relationships that they’ve chosen only in some weak sense? And what is this weak notion of voluntariness which does not rise to the level of full, robust choice, but is strong enough to create moral duties? Conversely, if by “voluntariness” Hellman means robust voluntariness, then one wonders why “relationships” are part of her account at all. Why not say this: when a person promises, contracts, or otherwise voluntarily consents to undertake some course of action, she creates a nonmimetic duty to do so, plus a mimetic reason to refrain from actions that would apparently breach this nonmimetic duty. Does Hellman think that promises between strangers fail to generate mimetic reasons, while relationships do generate mimetic reasons, even though these relationships themselves generate mimetic reasons only insofar as the relationships are voluntarily chosen?

27. See Adler, supra note 7, at 1367-77 & n.50.
28. Hellman, supra note 1, at 655.
logical, moral reasons \{R_1 \ldots R_n\}, binding upon the parties to the relationship, why think that each party has a further, deontological, moral reason to refrain from a "mimetic wrong"—that is, to refrain from some action reasonably believed by some other party to be wrong on the balance of \{R_1 \ldots R_n\}? When and why do appearances matter, morally, within the context of special relationships?

At certain points in her article, Hellman seems to suggest that every special relationship generates a reason (weaker or stronger) to refrain from apparent moral wrongdoing.\(^{29}\) That claim strikes me as too strong. Perhaps it's true that some special relationships generate a reason to refrain from mimetic wrongs, but I don't see why all special relationships would generate such a reason. Special relationships (on the deontological view) arise when persons stand in a relation to each other strong enough to trigger deontological requirements that are owed to each other, analogous (in their deontological and relational cast) to the requirements generated by promises and by other voluntary commitments. I see no necessary connection, conceptual or otherwise, between the existence of such a relationship and the existence of a specific type of deontological requirement, namely, the requirement to avoid apparent wrongdoing.

One response here is that all special relationships involve trust,\(^{30}\) and therefore do necessarily generate the requirement to avoid mi-

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29. See, e.g., id. at 658 ("It is because the [teacher-student] relationship generates duties . . . 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."); id. at 665 ("[T]he less morally significant the relationship involved . . . the weaker the demand on the actor to confine his behavior to accommodate those with whom the relationship connects him."); id. at 665-66 ("The husband-wife relationship provides a reason for the husband to respect the limitations under which the wife operates. . . . 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. . . . [T]he 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."). Cf. id. at 676 ("[T]he 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.").

As I noted earlier, Hellman has now restricted her account to voluntarily chosen relationships. See supra note 26. Even so, I remain unconvinced. In the text below, I argue first against the claim that all special relationships generate mimetic reasons, and second against the claim that the subset of special relationships characterized by a certain kind of ignorance generates mimetic reasons. Those arguments carry over, I think, to Hellman's newly restricted account. That is, the arguments undermine the claim that all voluntarily chosen special relationships generate mimetic reasons and also the claim that the subset of voluntarily chosen special relationships characterized by a certain kind of ignorance generate mimetic reasons.

30. Cf. Trudy Govier, Dilemmas of Trust 12 (1998) ("Relationships really do go better with trust; in fact, most go very badly without it."); Lawrence C. Becker, Trust as
metic wrongs—the requirement Hellman describes. Trust is a concept that Hellman invokes at various points in the article, and it could perhaps be her view (although I may well be misinterpreting her here) that the general linkage between special relationships and trust is what makes the no-wrongful-appearance requirement a general feature of such relationships. Consider the following argument:

**From Trust to Appearance: Why Mimetic Wrongdoing Is Always Wrongful (Within Special Relationships):**

Assume $P_i$ is one member to a special relationship and $P_j$ is another member, bound by reasons $\{R_1 \ldots R_n\}$. Then $P_j$ ought to comply with $\{R_1 \ldots R_n\}$. This implies that $P_i$ is entitled to trust that $P_j$ will comply with $\{R_1 \ldots R_n\}$. In other words, $P_i$ is entitled to believe that $P_j$ will comply with $\{R_1 \ldots R_n\}$. If $P_j$ acts in a way, such that $P_i$ reasonably believes that $P_j$ has not complied with $\{R_1 \ldots R_n\}$, then $P_i$'s trust has been violated. In short, $P_j$ has a moral reason, grounded in $P_i$’s trust, to avoid apparent moral wrongdoing.

I think this argument is flawed. Consider the following example. Mike is my investment adviser. I entrust him with $10,000 for a long-term investment. Mike has reason to maximize the financial return on the $10,000, which is in fact what I want him to do. Further, I want (and would want under ideal conditions) that return-maximization be Mike’s sole aim in managing my money. Where Mike is faced with two investment options, such that the first will end up producing the highest returns over the long term, and the second will reasonably appear

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Noncognitive Security About Motives, 107 ETHICS 43, 43 (1996) ("[Trust is] a crucial element in the formation, stability, and productiveness of both individuals and large-scale social organizations . . . ."). But see Diego Gambetta, Can We Trust Trust?, in TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 213, 223 (Diego Gambetta ed., 1988) ("Clearly, the higher the level of trust the higher the likelihood of cooperation, but cooperative behaviour does not depend on trust alone, and the optimal threshold of trust will vary according to the occasion.").

Note that one must not conflate descriptive claims about the prevalence of trust in interpersonal relationships, and about the efficacy of trust in maintaining these relationships, with the normative claim that participants to these relationships have a deontological, moral reason not to breach each others’ trust. A consequentialist might concede that trust is essential to relationships, but deny that these relationships generate the deontological reason just described or any other deontological reasons, and instead construe relationships as valuable projects that everyone has reason to promote. See supra notes 16-18 and accompanying text.

31. See, e.g., Hellman, supra note 1, at 661 ("The judge has an obligation to the litigants before him to avoid causing them to distrust his good faith."); id. at 665 ("[The husband] ought to not give [the wife] a reason to distrust him."); id. at 668 ("The type of relationship we have chosen with our [elected] representatives . . . includes an obligation to respect normative trust."); id. at 661-63 (confirming that trust, specifically “normative trust,” is important to Hellman’s account).
to me (for some time) to be the option that would produce the highest returns over the long term, I'd like Mike to choose the first option—even if the predicted difference in returns between the two options is slight. In short, I want (and would want under ideal conditions) that Mike ignore how the investment choices appear to me and choose those investments that (he believes) actually maximize long-term returns. Thus, it would not be a violation of my trust for Mike to choose investment options that maximize long-term returns, even if those options reasonably appear to me (unsophisticated as I am in investment strategy) to be nonmaximizing. Indeed, the opposite is true: what would violate my trust in this scenario would be for Mike to sacrifice actual returns so that he can appear to me to have made the maximizing choice.\(^3\)

What this example shows is that we must distinguish between objective trust and epistemic trust. Where objective trust is at stake in a special relationship, \(P_i\) trusts \(P_j\) in the sense that \(P_i\) counts on \(P_j\) to behave in a certain way. \(P_j\) is obliged to comply with a set of moral reasons, \(\{R1 \ldots R_n\}\), and \(P_j\) breaches \(P_i\)'s trust just in case \(P_j\) acts wrongly on the balance of \(\{R1 \ldots R_n\}\). This is the investment-adviser case. By contrast, where epistemic trust is at stake in a special relationship, \(P_i\) trusts \(P_j\) in the sense that \(P_i\) feels assured that \(P_j\) will behave in a certain way and counts on \(P_j\) to preserve this feeling of assurance.\(^3\)

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32. Hellman responds, "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." Id. at 662. I'm not sure I would agree with that. I certainly wouldn't agree that Mike should explain his investment choices to Matt where such explanation has costs (in time or money) to Mike. After all, Mike will spread these costs to Matt through a higher management fee, lowering Matt's investment return; and yet Matt's objective, we agreed, was to maximize his return. Matt would not want Mike to explain his investment decisions to Matt if doing so would be costly and thereby reduce Matt's return.

At most, then, I might agree to the weak claim that Mike should explain his investment decisions to Matt where such explanation would be costless for Mike, and therefore would not affect Matt's return. But I'm not sure I'd agree even to this. Wouldn't Mike and Matt have the power to draft a contractual provision relieving Mike of even this weak mimetic duty? If so, Mike would not have the weak mimetic duty in the case of a contractual override. And even without a contractual override, shouldn't the existence of this weak mimetic duty depend upon whether Mike and Matt would hypothetically choose to create it, were they to fully specify the terms of their relationship in a contract? But my assumption is that Matt cares about investment returns, not his own feelings of assurance. Thus, there is no reason to think that, hypothetically, Mike and Matt would agree to place a weak mimetic duty on Mike.

33. See, e.g., Govier, supra note 30, at 6 ("To trust people is to expect that they will act well, that they will take our interests into account and not harm us."); Gambetta, supra note 30, at 217 ("[T]rust . . . is a particular level of the subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both before he can monitor such action . . . and in a context in which it affects his own action.");
A relationship involves epistemic trust if the point or purpose of the relationship (at least in part) is to produce a certain mental state—specifically, a kind of assurance—for some party to the relationship. My claim is that epistemic trust is not at stake in the investment-adviser case. More generally, whatever the best analysis of special relationships—whether the reasons they generate are grounded in actual social conventions, in idealized preferences, or in some nonconventional source other than idealized preferences—it will not be the case that all special relationships involve epistemic trust. Conventionally structured relationships need not incorporate epistemic trust, and persons need not prefer, or ideally prefer, that it be incorporated. Thus, the putative argument from “trust” to a general relationship-based obligation to avoid mimetic wrongdoing is flawed: relationships need not embody the epistemic trust from which such an obligation would flow.  

Becker, supra note 30, at 50 (“To say that we trust others in a noncognitive way is to say that we are disposed to be trustful of them independently of our beliefs or expectations about their trustworthiness.”). None of these various definitions require trust to be epistemic rather than objective. All allow that Pi can trust Pj in the sense of counting on Pj to behave in a certain way (to perform actions satisfying some moral or nonmoral criterion), and not necessarily in the sense of counting on Pj to produce a certain mental state in Pi. Cf. L. W. Sumner, Welfare, Happiness, and Ethics 81-137 (1996) (distinguishing between mental-state accounts of well-being, which make a person’s welfare depend upon his mental states, and preference-based accounts, which make welfare depend upon whether the outcomes that a person prefers actually occur).

34. Hellman replies to these criticisms by positing a different kind of trust—“normative trust”—which, she thinks, inheres in relationships and grounds mimetic duties:

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. 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 . . . . 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.

Hellman, supra note 1, at 663. I fail to see the difference between normative trust and what I’m calling epistemic trust. Consider Hellman’s assertion: Mike ought “not to act in a way that gives Matt . . . a reason to distrust his good faith.” Id. Assume Mike acts properly on the balance of nonmimetic considerations arising from his relationship with Matt. In what sense could such action by Mike still give Matt “a reason to distrust [Mike’s] good faith”? In the epistemic sense, and only in the epistemic sense, as far as I can see. Matt’s “reason to distrust [Mike’s] good faith” is a reason for Matt to believe that Mike is acting wrongly. Even though Mike actually acts properly on the balance of nonmimetic considerations arising from his relationship to Matt, it could be reasonable for Matt to believe otherwise. But to say that (1) Matt’s beliefs about Mike’s conformity with the relevant nonmimetic reasons have moral weight independent from those reasons themselves, is just to say that (2) epistemic trust, as I’ve defined it, is at stake in the relationship between Mike and Matt.

If epistemic trust and Hellman’s “normative trust” are no different, then my arguments about epistemic trust apply equally to normative trust. First, epistemic trust does not
Trust is not the only value seemingly invoked by Hellman to explain the wrongness of mimetic wrongdoing. At certain points in the article, she suggests that inability to know is what triggers the obligation to avoid mimetic wrongdoing. Specifically, she seems to claim that a party, $P_j$, in a special relationship has a moral reason to avoid action reasonably believed by $P_i$ to be wrong on the balance of $\{R_1 \ldots R_n\}$, where $P_i$ cannot know whether $P_j$ has in fact engaged rightly or wrongly. In explaining why the judge in *Spires v. Hearst Corp.*[^35] was obliged to recuse himself for apparent bias, Hellman focuses on the public's inability to know whether the judge was really biased:

[T]he 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.[^36]

An inability to acquire knowledge (or at least direct knowledge) is also at stake in all of Hellman's specific examples of mimetic wrongdoing: the teacher-student case, where the students do not perceive what occurs at the female student's house;[^37] the "fake-fur" case, where "the coat [is] a great fake, convincing to those who see it and undressed with a 'Great Fake' button or anything else that would dispel the confusion," so that onlookers can't know just by looking that the fur is fake;[^38] and the wedding-ring case, where the husband has no wrongful intentions, but would have a mimetic reason to wear the ring "[i]f the man's wife is unable to know his real intentions."[^39] Finally, inhere in all special relationships; thus, it does not warrant the claim that all special relationships create mimetic reasons. Second, it's not clear whether epistemic trust can ground mimetic reasons in any special relationships, since epistemic trust seems to be an "essential byproduct," rather than something that can be directly pursued.

[^35]: 420 F. Supp. 304 (C.D. Cal. 1976); see Hellman, *supra* note 1, at 660-61 (discussing *Spires*).
[^36]: Hellman, *supra* note 1, at 663 (emphasis added).
[^37]: See id. at 658. Hellman explains:

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. . . . The [teacher's] 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.

*Id.* at 658-59.
[^38]: *Id.* at 664 (footnote omitted).
[^39]: *Id.* at 665.
Hellman draws a link between ignorance and mimetic wrongdoing in the conclusion to the article, where she states: "[in the case of] action by officials that appears wrong, observers are hampered in their ability to know whether the actor acts rightly."\textsuperscript{40}

So what Hellman may mean to argue is the following: if some party, \(P_i\), to a special relationship, \(R\), is unable to know whether \(P_j\) complies with the reasons, \(\{R1 \ldots R_n\}\), generated by the relationship, then \(P_j\) has reason to avoid actions that lead \(P_i\) reasonably to believe that \(P_j\) has failed to comply with \(\{R1 \ldots R_n\}\). Let us call this the "Inability-to-Know Argument." By "inability to know," I take it, Hellman means some persistent or structural limitation on \(P_i\)'s access to the facts about \(P_j\)'s compliance,\textsuperscript{41} such that \(P_i\) will not \textit{know} that \(P_j\) behaves rightly or wrongly even in the event that \(P_i\)'s beliefs about \(P_j\)'s compliance happen to be true. The judge case, the teacher-student case, the "fake-fur" case, and the wedding-ring case are all cases in which this sort of structural limitation obtains—or so Hellman seems to suggest.\textsuperscript{42}

The Inability-to-Know Argument strikes me as problematic. Traditionally, "knowledge" is defined as justified true belief.\textsuperscript{43} Assume for the moment that the traditional definition of knowledge is correct, and further assume that there is no difference between justified belief and reasonable belief. Given these assumptions, the Inability-to-Know Argument is false. Why? \(P_i\), by hypothesis, is unable to know whether \(P_j\) behaves wrongly on the balance of nonmimetic reasons \(\{R1 \ldots R_n\}\). \(P_i\)'s belief that \(P_j\) behaves wrongly on the balance of nonmimetic

\textsuperscript{40} Id. at 686.

\textsuperscript{41} See id. at 669 ("[Adler] 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{42} In these cases, as described by Hellman, the actor \(P_j\)—the judge, teacher, fake-fur-wearer, and husband—does in fact behave properly. But Hellman also states that the onlooker \(P_i\)—the citizen, the students, the fake-fur-viewers, and the wife—does not \textit{know} that \(P_j\) behaves properly. See id. at 656-65 (setting forth these cases).

Further, Hellman doesn't suggest that the actor \(P_j\) couldn't behave improperly. The judge \textit{could} be improperly biased; the teacher \textit{could} be having improper sexual relations; and so on. And yet the onlooker \(P_i\)—the citizen, the students, the fake-fur-viewers, and the wife—are unable to know whether \(P_j\) behaves properly. \(P_i\) is constrained from knowing that \(P_j\) behaves wrongly, while \(P_j\) is not constrained from behaving wrongly. In other words, \(P_i\) will not \textit{know} that \(P_j\) behaves wrongly even in the case where \(P_j\) does behave wrongly.

In sum, \(P_i\) will not \textit{know} that \(P_j\) behaves rightly or wrongly even in the event that \(P_i\)'s beliefs about \(P_j\)'s compliance happen to be true.

\textsuperscript{43} See, e.g., JONATHAN DANCY, AN INTRODUCTION TO CONTEMPORARY EPISODEOLOGY 23 (1985) ("The standard account of knowledge... defines knowledge as justified true belief; it holds that \(a\) knows that \(p\) if and only if (1) \(p\), (2) \(a\) believes that \(p\), (3) \(a\)'s belief that \(p\) is justified."). I do not mean to embrace the traditional account of knowledge here.
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 Pi's part implies that Pi cannot form a justified belief to the effect that Pj has failed to comply with the balance of nonmimetic reasons \( \{R1 \ldots Rn\} \). But if "justified belief" and "reasonable belief" are no different, it follows that Pi cannot form a reasonable belief to the effect that Pj has failed to comply with the balance of nonmimetic reasons \( \{R1 \ldots Rn\} \). The only reasonable course for Pi is agnosticism; a belief on Pi's part that Pj has engaged in nonmimetic wrongdoing would be unjustified and unreasonable.

For example, in the judge case, if the public really cannot know whether the judge's outlook is biased, then (on the traditional account of knowledge) they cannot be justified in believing that it is; reasonable members of the public would not conclude that the judge is biased or unbiased, but instead would realize that they have no basis for a belief either way. The same analysis applies in the teacher-student case, the fake-fur case, and the wedding-ring case: although the behavior of the teacher, the fake-fur-wearer, and the husband might cause the students, the onlookers, or the wife to believe that an impropriety has occurred, these beliefs will not be the reasonable beliefs as to wrongdoing that Hellman makes an integral part of her account. At least such beliefs will not be reasonable if the students, the onlookers, and the wife are unable to know about actual wrongdoing, as Hellman suggests they are.

Hellman might try to respond to these criticisms by driving a wedge between knowledge and justified true belief. Or, she might

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44. Strictly speaking, what follows from the traditional account of knowledge is that Pi cannot form justified beliefs about Pj's compliance in cases where those beliefs are true. Pi would still be capable of forming false justified beliefs. But it would be a very odd theory of epistemic justification that precluded Pi from forming true justified beliefs, yet permitted him to form false justified beliefs. I'll therefore assume that (1) Pi cannot form true justified beliefs about Pj's compliance implies (2) Pi cannot form justified beliefs about Pj's compliance.

45. The traditional account of knowledge was shaken by Edmund Gettier's article, *Is Justified True Belief Knowledge?,* 23 *Analysis* 121 (1963), which described cases where truth, justification, and belief were all (seemingly) present, but knowledge was (seemingly) absent. One response to Gettier is to add a further element to the traditional account, such that truth, justification, and belief are necessary but not sufficient for knowledge. Another response is to stick to the traditional account, but to refine the concept of justification, so that justification is actually lacking in the kinds of cases described by Gettier. See Dancy, *supra* note 43, at 23-36 (discussing Gettier's objection to justified-true-belief account and possible responses to it). If Hellman wants to address my criticisms by driving a wedge between knowledge and justified true belief, she needs to engage in this debate about Gettier. Specifically, she would need to adopt some nontraditional account that makes justification, truth, and belief insufficient for knowledge. She would need to show why the
respond by driving a wedge between reasonable belief and justified belief. I'll not speculate about the plausibility of either response. My point is simply this: on a traditional account of knowledge, it is impossible for a person to be both unable to know that another has done wrong and, at the same time, justifiably suspicious that the other has done wrong. If Hellman really wants to argue that inability to know is what triggers the requirement to avoid an appearance of impropriety, she'll have to probe more deeply into the nature of knowledge than her article now does.

Let me return to the idea of epistemic trust. I've denied that all special relationships generate a reason to avoid apparent wrongdoing. I've also denied that a particular kind of special relationship—one where some parties are unable to know whether other parties have engaged in actual wrongdoing—generates a reason to avoid apparent wrongdoing. I have not yet claimed that no special relationships gen-

strategy of refining "justification" and retaining the traditional account is not adequately responsive to Gettier. Finally, she would need to explain why her nontraditional account allows Pt to form justified beliefs about Pj's noncompliance with \{R1 \ldots Rn\} even though Pt cannot know whether Pj complied. 46. In response to my criticism of the Inability-to-Know Argument, Hellman briefly suggests that there is a difference between reasonable belief and justified belief. However, she doesn't elaborate what that difference is. See Hellman, supra note 1, at 670 ("[T]he 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."). 47. She may not really want to argue this. Hellman now states: 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.

Id. Her suggestion here is that the Inability-to-Know Argument should be reframed as an Inability-to-Acquire-Direct-Knowledge Argument. Such an argument would run as follows: where Pt is unable to know through direct observation whether Pj complies with \{R1 \ldots Rn\}, then Pj has reason not to act in a way that leads Pt reasonably to believe that Pj has failed to comply with \{R1 \ldots Rn\}. This argument avoids the criticisms I leveled against the Inability-to-Know Argument. If Pt can know (albeit not directly) that Pj fails to comply with \{R1 \ldots Rn\}, then Pt can justifiably believe that Pj fails to comply.

However, I find it difficult to see why Pt's inability to acquire direct knowledge would generate mimetic duties on Pj's part. The main thrust behind Hellman's original argument was that Pt's epistemic limitations required accommodation by Pj. See, e.g., Hellman, supra note 1, at 659 ("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."). If Pt can form justified and reasonable beliefs about Pj's compliance (through circumstantial evidence rather than direct observation) and can thereby acquire knowledge about Pj's compliance, in what important sense is Pt epistemically limited? Although Pt "can only judge by appearances," Hellman, supra note 1, at 658, if those appearances are sufficiently probative of Pj's actual behavior that Pt can know what Pj has actually done, why should Pj give independent moral weight to appearances rather than focusing on actual compliance with the applicable nonmimetic reasons \{R1 \ldots Rn\}?
erate a reason to avoid apparent wrongdoing. Perhaps appearance does matter, morally, within a subset of special relationships—if not in the subset where parties are unable to know about each other’s wrongdoing, then perhaps in some other. Why not say, for example, that relationships designed to reassure the parties as to each other’s fidelity—relationships where epistemic trust is part of the point or purpose of the relationship—do oblige the parties to refrain from conduct that appears to be wrongful?

Epistemic trust is certainly a value. It’s a good thing to feel sure that another is acting appropriately, where your interests are concerned. But epistemic trust seems to be the kind of good that Jon Elster calls an “essential byproduct.” It can be realized only indirectly, not directly. If I want to be reassured that \( P_j \) is acting on the balance of \( \{ R_1, \ldots, R_n \} \), then I should not want \( P_j \) to take into account my desire on this score. For if I thought that \( P_j \) were putting into the balance not merely \( \{ R_1, \ldots, R_n \} \), but also my desire for reassurance, then I could hardly feel assured that he was acting on the balance of \( \{ R_1, \ldots, R_n \} \). To return to the investment-adviser example: I might want reassurance that Mike, the investment adviser, is maximizing financial returns on my nest egg; but learning that Mike is (partly) motivated by the aim of reassuring me, and not solely by the aim of maximizing returns, will be unsettling rather than reassuring. This suggests to me that epistemic trust, albeit valuable, cannot be the point or purpose (even partly) of a special relationship: that value is disserved by giving parties a reason to avoid apparent wrongdoing.

Perhaps I am incorrect here. Or perhaps there are some grounds, other than epistemic trust, for thinking that in a certain class of special relationships, parties have both nonmimetic reasons \( \{ R_1, \ldots, R_n \} \), plus a reason to avoid actions reasonably believed by some party to be wrong on the balance of \( \{ R_1, \ldots, R_n \} \). Such a special relationship will be characterized by the following:


49. Hellman has supplemented her analysis by identifying joint participation in a common project as a feature of some (or all?) special relationships that supposedly generates mimetic duties. For example, in the teacher-student case, she states: “[Given that] 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.” Hellman, supra note 1, at 658. My response to the joint-project suggestion, briefly, is this: \( P_i \) and \( P_j \)'s joint project may or may not make reference to \( P_i \)'s and \( P_j \)'s mental states. For example, \( P_i \) and \( P_j \) may have the joint project of producing certain beliefs, sensations, and so on, or they may have the joint project of producing a particular state of the world, defined independent of their own mental states. In the latter case, \( P_i \)
Possible Conflicts Between Mimetic and Nonmimetic Reasons:

The balance of \{R1 \ldots Rn\} may point in favor of one option, while some party reasonably believes that the balance of \{R1 \ldots Rn\} points in favor of a second option.

Mandatory Deception:

In some of the cases just described, the balance of \{R1 \ldots Rn\} will only weigh slightly in favor of the 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.\(^5\)

and \(Pj\) would have a relationship-based reason to advance the project. But they wouldn't have a relationship-based reason to provide assurance to each other that the project was being advanced; whether the project is really being advanced, and whether \(Pi\) or \(Pj\) believes that it is, are two different things. Cf supra notes 33-34 and accompanying text (distinguishing between epistemic and objective trust).

50. A helpful example illustrating this point was discussed at the Symposium where the papers comprising this issue of the Maryland Law Review were first presented. Imagine, plausibly, that a rabbi has a relationship-based reason to keep kosher—a reason grounded in his relationship to his congregation. Assume that the rabbi is faced with the choice between two foods (one of which he must pick, or else he will starve): a BLT sandwich with the bacon hidden from view, or a tofu cheeseburger that looks like real meat. If the rabbi eats the BLT sandwich, he will break kashrut, but will appear to the congregation to be keeping kosher; if the rabbi eats the cheeseburger, he will be keeping kosher, but will appear to the congregation to be breaking kashrut. Assume, finally, that the rabbi's apparent breach of kashrut will not have further consequences—it will not alarm the congregation or lead them to breach their own religious obligations.

I find it counterintuitive that, in such a case, the rabbi could be required to choose the BLT sandwich. Moreover, I find that counterintuitive even if the breach of kashrut were small, in the sense that this is only one food item with a small amount of meat. But Hellman's theory implies that the rabbi would be required to eat the BLT sandwich—he would be required to mislead the congregation—if the breach of kashrut were small. I therefore find the theory counterintuitive. I do not think that actors can be obliged to engage in actual nonmimetic wrongdoing so as to avoid the appearance of nonmimetic wrongdoing.

Hellman suggests that my "mandatory deception" point 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. . . . We cannot assume at the outset that right action is that which is mandated by nonmimetic reasons only.

Hellman, supra note 1, at 672. I disagree. I do not think that my "mandatory deception" objection to mimetic reasons begs any questions. I did not say that the actor would be obliged to engage in actual wrongdoing so as to avoid the appearance of wrongdoing. Rather, I said that the actor would be obliged to engage in actual nonmimetic wrongdoing so as to avoid the appearance of nonmimetic wrongdoing. And indeed he would. If an agent's nonmimetic reasons \{R1 \ldots Rn\} point in favor of one option, and if his mimetic
Possible Conflicts of Appearance: Interpersonal and Intertemporal:

The actor $Pi$ has two options. $Pj$ might reasonably believe that one option is required by the balance of nonmimetic reasons \{R1 \ldots Rn\}, while $Pk$ might reasonably believe that the other option is required by the balance of nonmimetic reasons. So $Pi$ has an appearance-based reason for choosing the first option and a conflicting, appearance-based reason for choosing the second. More strikingly yet: $Pj$ might reasonably (albeit mistakenly) believe that one option is required by the balance of nonmimetic reasons and later come to believe, reasonably and correctly, that the second option is. Here, too, $Pi$ has an appearance-based reason for choosing the first option and a conflicting, appearance-based reason for choosing the second.

In short, a special relationship where appearance matters, morally, will be rife with moral conflict—between what's really (nonmimetically) right and what's apparently (nonmimetically) right, and between what's apparently (nonmimetically) right from one viewpoint versus another. This may be a conflict worth tolerating; a moral view that allowed no conflict at all would be implausibly monistic. But to show that the particular conflicts I have just described are worth tolerating, Hellman needs to explain more precisely what subset of special relationships generates mimetic requirements and why it is they there arise. This will also help determine whether government officials are obliged to avoid apparent wrongdoing: once the relevant class of special relationships is specified, we can then consider whether the relationship between government officials and citizens falls inside or outside that class.

II. Appearance and Expression: What's the Connection?

Let me now turn to the second part of the article, where Hellman distinguishes between appearance-based theories and expressive theories. To summarize her views: It is not true that an appearance-based theory of governmental action entails an expressive theory of governmental action. Only a narrower proposition is true, namely this: an appearance-based theory of governmental action, together with a theory duty to avoid action reasonably thought wrongful in light of \{R1 \ldots Rn\} point in favor of a second option, and all things considered, the agent should choose the second option, then he has indeed performed actual nonmimetic wrongdoing so as to avoid the appearance of nonmimetic wrongdoing. Pace Hellman, I'm not assuming at the outset that this second option is wrong. Rather, I'm pumping the reader's intuitions and inviting her to conclude that the second option is wrong because it gives priority to mimetic over nonmimetic considerations.
of nonmimetic wrongdoing focused on the attitudes or mental states behind governmental action, entails an expressive theory.\(^5\)^1 However, Hellman doubts that such a nonmimetic theory is correct.\(^5\)^2 Therefore, she doubts that the moral requirements applicable to governmental action, or the constitutional provisions that incorporate these requirements, are systemically expressive in form:

[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 . . . . However, there are reasons to doubt whether this way of conceiving of constitutional protections (as prohibitions on reasons for action) is justified. If not, one may still adopt a modest expressivism—one that grows out of an understanding of the content of particular constitutional guarantees.\(^5\)^3

Note, to begin, that Hellman’s denial of a general linkage between appearance-based and expressive theories—her denial of the claim that every appearance-based theory of governmental action implies some kind of expressive theory of governmental action—presupposes her rejection of a particular definition of “expression.”\(^5\)^4 Consider the following definition: action \(A\) expresses proposition \(P\) if \(A\) evidences, indicates, or signals \(P\), that is, if \(A\) is reasonable grounds for someone to believe that \(P\).\(^5\)^5 Assume, now, an appearance-based theory of governmental action, such that actor \(P_j\) is obliged to comply with reasons \(\{R_1 \ldots R_n\}\) and to avoid action reasonably believed by some \(P_i\) to be wrongful on the balance of \(\{R_1 \ldots R_n\}\). Then \(P_j\) is automatically subject to an expressive requirement, given the definition of “expression” just offered. \(P_j\) has reason not to take action reasonably believed by some \(P_i\) to be wrongful on the balance of \(\{R_1 \ldots R_n\}\); equivalently, \(P_j\) has reason not to take action that expresses the proposition, “\(P_j\) is a wrongdoer on the balance of \(\{R_1 \ldots R_n\}\)”.

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51. See Hellman, supra note 1, at 677-81.
52. See id. at 681-84.
53. Id. at 683-84.
55. The philosopher Paul Grice, in his seminal article on the concept of “meaning,” explains that an action, state, etc., can possess a “natural” or nonlinguistic meaning. Paul Grice, Meaning, in Studies in the Way of Words 213 passim (1989). The definition just offered is, very roughly, what Grice meant by nonlinguistic meaning. See Adler, supra note 7, at 1384-85 (discussing Grice’s definition of meaning).
appearing to engage in wrongdoing, \( P_j \) necessarily signals or indicates, and in that sense "expresses," his status as a wrongdoer.

However, no actual expressivist employs this evidentiary definition of "expression." The expressivists that I criticized in my article, *Expressive Theories of Law: A Skeptical Overview*, equated "expression" with linguistic meaning.\(^{56}\) Richard Pildes and Elizabeth Anderson, in their recent article defending expressivism, link expression and attitudes: on their definition, to express is to express an attitude, that is, to manifest the attitude or make it recognizable.\(^{57}\) Given either a linguistic definition of "expression" or the Anderson and Pildes definition, Hellman's denial of a general linkage between appearance-based theories and expressive theories is quite correct. Assume \( P_i \) has reason, \( \{R_1, R_2\} \), not to cause physical harm to \( P_j \) or to destroy her property. Then \( P_i \) has reason not to appear to cause physical harm to \( P_j \) or to appear to destroy her property. But some action, \( A \), of \( P_i \) can appear to cause physical harm to \( P_j \) or to destroy her property—the action can appear to be wrongful on the balance of \( \{R_1, R_2\} \)—even though the action (1) is not linguistically meaningful, and (2) does not manifest some attitude of \( P_i \)'s. Conversely, there is no linguistic statement, or attitude, such that by uttering that statement or manifesting that attitude \( P_i \) necessarily appears to engage in wrongdoing on the balance of \( \{R_1, R_2\} \).

Hellman herself does not adopt either a linguistic definition of "expression" or the Anderson and Pildes definition. Rather, in a recent article defending an expressive account of the Equal Protection Clause, Hellman equates "expression" with social meaning or public meaning: "[T]he expressive dimension of a law or policy is best understood as the meaning that we would arrive at if we were to discuss the interpretive question together under fair conditions."\(^{58}\) Here, too, there seems to be no general entailment from appearance-based theories to expressive theories. In particular, note that an action, \( A \), can give \( P_i \) reasonable grounds to believe some proposition, \( P \), without it being the case that \( A \) socially means \( P \). After all, \( A \) might be contestable. Some of us (deliberating under fair conditions) would take \( A \) to mean \( P \), so that linking \( A \) and \( P \) is reasonable; but others of us (deliberating under fair conditions) would not take \( A \) to mean \( P \), so that \( A \) lacks a "social meaning" in Hellman's sense.

\(^{56}\) See Adler, *supra* note 7, at 1985-87.
\(^{57}\) See Anderson & Pildes, *supra* note 7, at 1506-08.
\(^{58}\) Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 23 (2000); see also id. at 3 n.10 (explaining that the terms "social meaning" and "expressive dimension" are synonyms).
Rather, according to Hellman, what does entail expressivism is an appearance-based theory that focuses on mental states or motivating reasons. "[I]f 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." This is not true given a linguistic definition of "expression," nor does it seem to be true given Hellman's own definition of "expression"—the social meaning definition—but it is true on the Anderson and Pildes definition. Imagine an appearance-based theory that enjoins parties to a special relationship not to possess a particular mental state (say, contemptuous beliefs about the other parties to the relationship) and further enjoins them not to appear to possess that mental state. Pj can appear to possess the mental state without performing a linguistic utterance; conversely, Pj can utter a contemptuous utterance without appearing to be contemptuous himself (if, for example, Pj utters a sentence whose conventional meaning is contemptuous, but it is clear to the other parties that Pj does not grasp the conventional meaning of the sentence). However, if some party reasonably believes that Pj is contemptuous, then, necessarily, Pj has "expressed" his contempt in Anderson and Pildes's sense: Pj has manifested that contempt to the other party by performing some action in which contempt is properly "recognized," that is, an action that is reasonably taken as grounds for the conclusion that Pj is contemptuous. Conversely, if Pj has "expressed" or manifested his contempt to some party, then, necessarily, that party reasonably believes (or at least could reasonably believe) that Pj is contemptuous.

59. Hellman, supra note 1, at 680.

60. Pj can be reasonably perceived as contemptuous, without his actions possessing a contemptuous social meaning—without there existing an ideal, consensus perception that Pj is contemptuous. And would it not be possible for ideal discussants to agree in attaching a contemptuous meaning to Pj's behavior while also agreeing that his actual attitudes were not contemptuous?

61. A moral theory that focuses on mental states need not globally proscribe certain mental states; instead, the theory might enjoin persons from holding certain mental states in certain contexts. Here, too, an appearance-based theory entails an expressive theory on the Anderson and Pildes definition of expression, but not on a linguistic definition or a social-meaning definition.

62. Anderson and Pildes are not crystal clear in their definition of "expression." It may be that the Anderson and Pildes concept of an action "manifesting" or "making recognizable" an attitude is narrower than I've described it here. Perhaps an action can cause an onlooker to have the reasonable belief that the actor possesses a given attitude without "manifesting" or "making recognizable" that attitude. If so, my claim here—that an appearance-based theory focused on mental states or motivating reasons leads to an Anderson and Pildes-type expressive theory—would be untrue.
So Hellman is correct to think that, at least on one definition of "expression"—the Anderson and Pildes definition—a limited class of appearance-based theories do entail expressive theories. Hellman further suggests that this limited entailment should prompt me to espouse expressivism, assuming I'm persuaded by her argument in the first part of the article in favor of appearance-based theories. She states: "[w]hile this approach will not address the reservations of all who oppose the expressivist conception of constitutional law, it will address the views of some prominent critics like Professor Adler." I demur from this further suggestion, for two reasons. First, as I've just shown, appearance-based theories focused on mental states do not entail the sort of expressivism that has hitherto interested me, namely, linguistic expressivism. Second, and more fundamentally, my own theory of governmental wrongdoing is not focused on mental states. In my article, Rights Against Rules: The Moral Structure of American Constitutional Law, which Hellman cites, I contend that constitutional doctrine is focused on the legal rules enacted by legislatures and other governmental bodies. I do not there contend, nor would I now claim, that "constitutionally impermissible action is action that is adopted for the wrong [motivating] reasons." An unconstitutional rule can be defined as a rule that is objectively wrongful—for example, overinclusive or underinclusive. A rule-focused theory need not in any way be focused on the reasons that actually motivate governmental officials or some other mental states that they may possess.

In claiming that Hellman has misread my own views about mental states, I hardly mean to gainsay the importance of the second part of Hellman's article (or of the article as a whole). Hellman, quite correctly, distinguishes between appearance-based theories and expres-

63. Deborah Hellman, Judging by Appearances: Professional Ethics, Expressive Government and the Morality of How Things Seem 24 (Sept. 2000) (original draft, on file with author). This suggestion has been altered in the final draft of Hellman's article. See Hellman, supra note 1, at 677 ("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."). However, I have retained in this Commentary my response to the original suggestion. As a staunch anti-expressivist, I feel compelled to explain why Hellman's arguments for appearance-based theories do not lead me to embrace expressivism.

65. See Hellman, supra note 63, at 24 n.33.
67. Hellman, supra note 63, at 24 n.33.
sive theories; she points out, insightfully, that there is a limited and interesting connection between the two, centered on motivating reasons; and she evinces skepticism about the moral importance of motivating reasons, a skepticism I actually share. Hellman also, more briefly, describes a second kind of connection between appearance-based theories and expressive theories: “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.”68 This, too, is quite correct. If an appearance-based theory is correct, that is, if an actor can be held responsible for how his actions reasonably appear to others, then, a fortiori, he can be held responsible for the linguistic meaning and for the social meaning of those actions. Hellman's arguments in the first part of the article, in defense of the claim that certain persons are obliged to refrain from apparent moral wrongdoing, will (if successful) have the ancillary effect of dispelling a particular objection to expressivism, one that rests on a narrow view of individual responsibility.

68. Hellman, supra note 1, at 655.