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Symposium

THE EXPRESSIVE DIMENSION OF GOVERNMENTAL ACTION: PHILOSOPHICAL AND LEGAL PERSPECTIVES

INTRODUCTION

DEBORAH HELLMAN*

The articles and commentaries contained in this issue were presented at a Conference held on October 13-14, 2000, at the University of Maryland School of Law. The Conference was sponsored jointly by this law school and by the Institute for Philosophy and Public Policy at the University of Maryland and was funded, in part, by the Pearl, Lawrence I. and Lloyd M. Gerber Memorial Lecture Fund. The Conference, *The Expressive Dimension of Governmental Action: Philosophical and Legal Perspectives*, was designed to address the question whether the expressive content of state action ought to have legal, and especially constitutional, significance. It was organized in response to some recent Supreme Court cases in which the *meaning* or expressive dimension of a law was judged to be constitutionally relevant. This approach is significantly different from more familiar approaches to assessing the constitutionality of laws or governmental practices. Commonly, it is either the *intent* which motivated enactment of the law or policy that matters or the *effect* that the law has on those whom it touches that is relevant in assessing its permissibility. The claim that what state action *expresses* ought to matter is thus both novel and provocative.

In order to address the question—whether the expressive dimension of state action *ought* to be constitutionally relevant—it is impor-

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tant to first examine a more basic philosophical question: is the expressive dimension of action, generally, morally significant? And if so, when and for what reasons? The articles of Simon Blackburn and Marcia Baron focus on these questions. In pursuing this inquiry, it became necessary to distinguish the reasons why the meaning of action might matter. In particular, an action's meaning might matter because of the consequences of such expression, or it might matter in itself—irrespective of whether that meaning is effectively communicated to others and harms them in some predictable way. This issue is relevant to controversies in the legal arena because some scholars who believe that the expressive content of state action matters do so because of the harm caused by that expression—perhaps a state action stigmatizes certain people. This reason for focusing on the expressive dimension of law is not really *expressivist*. Rather, for those who adopt the view that meaning matters when it harms, the focus of constitutional inquiry is still on the effect of law rather than simply on its expressive content. My own article addresses this question by asking whether there are nonconsequential reasons to criticize action with certain expressive content.

With a clearer sense of the philosophical issues, Conference participants then turned their attention to the legal arena. In particular, the Conference addressed two questions: First, ought the *meaning* or *expressive content* of state action to matter in assessing whether that action violates constitutional guarantees—Equal Protection and non-Establishment, most especially? Second, if the meaning of laws matter, how ought courts to determine what any particular law means? After all, many controversial laws or policies are controversial precisely because people interpret them in significantly different ways. Steven Smith's article addresses the first of these questions, and Shari Diamond and Andrew Koppelman's article addresses the second.

Each of the writers submitted his or her article one month in advance of the Conference, allowing ample time for an assigned commentator to assess the ideas and arguments presented. As a result, the discussion at the Conference was serious, thoughtful, and in-depth. In the months following the event, both writers and commentators had an opportunity to revise their work in light of this interaction. The result—the series of articles and commentaries presented here—was significantly improved thereby. On behalf of the other Conference sponsors at the University of Maryland School of Law and the Institute for Philosophy and Public Policy, I hope you find this issue interesting and thought-provoking.