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The Power of Expressive Theories of Law

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As expressive theories of law have been articulated in the recent law review literature,[1] they suggest a difficult question, a question that Simon Blackburn presses forcefully: "Why bother?"[2] These theories converge on the idea that wrongful governmental expressive acts matter because of the stigma they involve; the theories argue that government should neither make nor enforce laws that express attitudes that unfairly stigmatize people. But unfair stigmatization is morally undesirable in ways that a broad range of traditional theories of law can recognize. Consequentialist theories of law can criticize wrongful stigmatization because of its adverse consequences, for example, because stigma typically causes psychological harm and forms an obstacle to social and economic success.[3] In other words, wrongful stigmatization would seem to gratuitously cause harm, a result that is unacceptable on any plausible consequentialist account. Deontological theories can criticize wrongful stigmatization because it demeans people in ways they do not deserve and hence fails to treat people with due respect.[4] Because unfair and otherwise wrongful stigmatization seems so naturally within the scope of the prevailing normative approaches to law, a question remains unanswered: why should one need anything so grand as an "expressive theory" (or even an expressive account) of law to make sense of morally problematic governmental stigmatization?

Even if the question of why one needs an expressive approach to law is answered only implicitly in contemporary law review articles, some of the historical proponents of expressive theory have been more plain. When the distinguished Victorian jurist James Fitzjames Stephen explained his ideas about the expressive function of criminal

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1. For an explanation and defense of an expressive theory of law, see, for example, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1531-64 (2000), and R. A. DUFF, TRIALS AND PUNISHMENTS (1986).

2. *See generally* Simon Blackburn, *Group Minds and Expressive Harms*, 60 MD. L. REV. 467 (2001) (raising doubts about the need for an expressive theory of law).

3. For a classic statement of consequentialism, see J. J. C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* J. J. C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 3 (1973).

4. For a classic statement of deontology, see ALAN DONAGAN, THE THEORY OF MORALITY (1977).

law, he invoked sex: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." [5] He was on to something. The passions play an important role in both the best explanation and the best justification of law. Part of the function of law is to offer a civilized and social form for those passions that are essential to us as people and to squelch those passions that compromise us as people. It is a good thing that we have the criminal law because it gives voice to an important passion, which Stephen characterized as revenge.[6] Similarly, I think, other areas of law, including constitutional law, bear important relations to others' passions. For example, constitutional law applied against racist legislation may serve to squelch wrongful public sentiments of contempt that are inconsistent with a healthy moral community. Expressive theories of law direct our attention to examining the logic of moral emotions and passions whose proper functioning may be essential to our identity and integrity as a moral community. These theories prescribe expressing forms of the moral emotions, consistent with respect for the persons who are affected by them.[7] As I will argue, traditional normative theories of law fail to adequately explain the role and significance of these emotions and attitudes.

My aim in this discussion is not only to explain the appeal of an expressive theory of law, but also to explain why some of the objections that Blackburn raises against expressive theories miss the mark. Although Blackburn maintains that law should be concerned with stigma and expressive harms generally, he contends that the significance of these harms can be accommodated within a rule utilitarian framework and that there is therefore no need for a distinctively expressive account of law.[8] He also contends that the expressive theory of law developed by Anderson and Pildes is inconsistent.[9] In these contentions, I will maintain, Blackburn is wrong.

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5. JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (1863).

6. *Id.* at 98-99.

7. *See* Peter Strawson, *Freedom and Resentment*, *in* FREE WILL 59, 70-72 (Gary Watson ed., 1982).

8. *See* Blackburn, *supra* note 2, at 489. While I think that the doubts Blackburn faces go to the heart of Anderson and Pildes's theory, and indeed any real expressive theory of law, Blackburn insists that he accepts the "*thrust*" of Anderson and Pildes's position. *Id.* at 469. The main agreement between Blackburn and his target, however, is the idea that wrongful stigma is a bad thing. Surely there must be more to an expressive theory of law for it to be worth developing.

9. Blackburn, *supra* note 2, at 474.

I. THE SCOPE OF EXPRESSIVE THEORY

There is little unity among expressive theories of law.[10] Indeed, unwieldy variety marks the things that can be expressed in expressive theory. They include attitudes, sentiments, resentment, revenge, emotions, respect, indignation, and disgust. The dominant expressive theory of law in the legal academy today is due to Elizabeth Anderson and Richard Pildes.[11] Their theory is rich, complex, and, thus, hard to summarize. In his critique of expressive theories of law, Blackburn focuses on a statement from Anderson and Pildes's article that seems very important to their view: "'A person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her.'"[12] Blackburn takes Anderson and Pildes to say that an expressive theory of law tells government when and how to stop engaging in harmful expressive acts.[13] In other words, an expressive theory lays down the logic of wrongful governmental stigmatization. At any rate, my focus in this discussion is on legally expressive acts that stigmatize people.

Although Blackburn is correct about the expressive theses he attributes to Anderson and Pildes, it would be a mistake to regard the theses as capturing the central idea of expressive theories of law, even as these theories treat stigma. Expressive theories do more than tell government when and how to stop stigmatizing people. In fact, stigmatization is often morally valuable. One of the most important functions of government is to stigmatize people who deserve to be stigmatized, or at least to see to it that those who deserve to be stigmatized are stigmatized. For example, people who commit crimes may deserve the stigma that comes with punishment, and people who commit torts may deserve the different stigma that comes with tort liability. A society that wholly eschewed these forms of stigma would be strange and not obviously attractive; it would take less seriously the wrongs done to victims of crime and tort than do the societies we know. Indeed, by refusing to stigmatize and thus by tolerating wrongdoers, a society would show cold indifference to victims of wrongdoing.[14] So an expressive theory of law may be concerned not only with

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10. *See* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1364-73 (2000) (describing the expressive theories of law that have been proposed by various legal scholars).

11. *See* Anderson & Pildes, *supra* note 1.

12. Blackburn, *supra* note 2, at 468 (quoting Anderson & Pildes, *supra* note 1, at 1527).

13. *See id.* at 3-4.

14. *See* Alan Strudler, *Mass Torts and Moral Principles*, 11 LAW & PHIL. 297, 320-21 (1992) (explaining that allowing the injured to go uncompensated results in the portrayal of a society that acquiesces to the injurer's actions).

the conditions under which it is wrong for government to stigmatize people, but also with when it is right for government to stigmatize people.

II. ADVANTAGES OF EXPRESSIVE THEORY

Even though stigma may sometimes be morally valuable, it seems obvious that government should be careful about whom it stigmatizes. Stigma is harm, even if not tangible or monetary harm, and harm, particularly wrongful harm, should not be taken lightly. When government creates or applies law that treats innocent people with contempt, the stigma it imposes is wrongful. To take some obvious examples: slavery laws wrongly treat people with contempt and thus wrongly stigmatize them, and so do laws that treat people as inferior by virtue of race, gender, disability, or sexual preference. If it is clear that government must not wrongfully mete out stigma, do we need an expressive account of law to instruct us on this? An examination of the resources of standard consequentialist and deontological normative theories suggests a positive answer to this question.

A consequentialist theory measures the rightness of an action in terms of the goodness of the action's consequences.[15] Utilitarianism is a typical consequentialist theory. It provides that it is right for an agent to engage in an action as long as her doing so would produce at least as much happiness as would any alternative action available to the agent.[16] Although utilitarianism focuses on the production of happiness, consequentialist theories need not have that focus. It is consistent with consequentialism to define right actions in terms of the realization of other aims; consequentialists, in other words, may differ in how they define "good consequences." For example, a consequentialist could consistently say that an action is right if it maximizes the level of the sea, so long as she also held that the level of the sea was morally significant.[17]

One might think that a consequentialist theory can obviate any need for an expressive account of law. Stigmatizing a person involves creating a morally significant consequence. A consequentialist can thus say that the morally right action is that which creates an optimal

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15. Brian Barry, *And Who Is My Neighbor?*, 88 YALE L.J. 629, 629-30 (1979) (book review).

16. MICHAEL SLOTE, BEYOND OPTIMIZING: A STUDY OF RATIONAL CHOICE 141 (1989). Another variety of consequentialism urges that instead of getting the most good consequence possible, a merely satisfactory or adequate amount will suffice. *See id.* at 142.

17. Barry, *supra* note 15, at 630.

amount of stigma. There is more than one reason why such a consequentialist account fails.

First, consequentialist theory, as so far defined, does not explain stigma. It does not explain which government actions wrongly stigmatize and which actions acceptably stigmatize. It instead prescribes creating an optimal amount of stigma. But an adequate account of law should help explain when stigma is good and when it is bad, not merely identify its optimal amount. As noted earlier, not all stigma is of equal worth. For example, it is not problematic to stigmatize a person who deserves to be stigmatized because he committed a crime, but it is problematic to stigmatize a wholly innocent person. It is unclear how consequentialism can take this distinction seriously, but the distinction will be central in an expressive approach to criminal law.

There is, however, an even more fundamental reason that a consequentialist theory does not obviate the need for an expressive account of law: embrace of a consequentialist theory necessarily requires expression of the wrong attitude. On a consequentialist account, it is always, in principle, possible to justify undeservedly stigmatizing one person because of the beneficial consequences of doing so. For example, suppose that Jim Crow laws are in effect and that a judge contemplates striking them as unconstitutional. He fears, however, that society is not yet "ready" for integration, that his judicial activism will cause social unrest, and, in the long term, that it will thwart the cause of racial justice. It is this judge's view that more wrongful stigma will occur if he strikes the law than if he allows it to stand, even though most of that stigma will occur in the future and at the hands of others. As a consequentialist, he conceives of the practical question before him as: should I create a bit of wrongful stigma now so that I can be assured that others will be less likely to create wrongful stigma in the future?

No matter which decision our consequentialist judge ultimately embraces regarding the Jim Crow law, by reasoning as he does, he expresses an attitude that fails to show equal concern and respect for those adversely affected by it. This happens because he is willing to wrongly stigmatize one person to ensure that others do not wrongly stigmatize other people in the future. If the judge is willing to sacrifice one person to create advantages for others, he fails to treat that person with the most respect possible. And that is an inexcusable slight, I suggest. It follows that consequentialist moral theories cannot capture the absolute quality that characterizes respect for individuals and that they compel less than the expression of full respect for people who deserve full respect.

In his critical discussion of expressive theories of law, Blackburn suggests that a special version of consequentialism—indirect or rule consequentialism—may provide the best treatment of legal stigma.[18] A rule consequentialist will say, very roughly, that a legally stigmatizing act is morally right if it accords with a rule that would maximize good consequences.[19] In our hypothetical Jim Crow case, instead of saying that a judge should do whatever maximizes good consequences, one might say that a judge should do whatever complies with a general rule that would maximize good consequences. Unfortunately for Blackburn, couching consequentialism in rule consequentialist terms does not seem to create any advantages. Even a rule consequentialist should be willing to treat people with undeserved contempt if doing so complies with a rule that, if generally complied with, would maximize good consequences. But a rule consequentialist judge must then seriously consider the possibility that compliance with a Jim Crow law will create more utility than the alternatives, and that the Jim Crow law is morally correct. By merely taking this possibility seriously, however, the judge expresses wrongful contempt for potential victims of Jim Crow laws. Hence, even a rule consequentialist approach inherently expresses a wrongful moral attitude.

It seems clear, then, that a consequentialist normative theory, whether simple act consequentialism or the more sophisticated indirect or rule consequentialism, cannot accommodate expressivist concerns. The main textbook alternative to consequentialism is deontological normative theory.[20] It is a more complex and diffuse moral theory than consequentialism, and hence is more difficult to quickly summarize. A deontological theory declares that certain actions are morally required, and certain actions are prohibited, regardless of the quantity of utility or other good consequences that these actions produce. Deontologists take seriously questions about what a person morally deserves and typically suggest that, in certain contexts, it is the role of government to see that a person gets what she deserves. Certainly, the leading deontological moral theorist was Immanuel Kant.[21] Many expressive theorists, including Elizabeth Anderson and Anthony Duff, follow Kantian themes.[22] Indeed, there is a very natural—even essential—link between Kantian moral theory

18. *See* Blackburn, *supra* note 2, at 489.

19. *See* SLOTE, *supra* note 16, at 67.

20. *See, e.g.*, SHELLY KAGAN, NORMATIVE ETHICS (1998).

21. *See generally* IMMANUEL KANT, THE METAPHYSICS OF MORALS (Mary Gregor trans. & ed., Cambridge Univ. Press 1996) (1797).

22. *See generally* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); DUFF, *supra* note 1.

and expressive approaches to law. Kantian theory requires that people be treated with due respect; it regards this requirement as a moral absolute, something that cannot be compromised or traded off for any reason. Similarly, expressive theories of law may recognize an absolute requirement that governmental action expresses an attitude of respect. The respect required by Kantian theory is a complex idea, but at its core, it involves respect for a person's autonomous choice. It hardly seems possible to respect a person's choice without focusing on the expressive dimension of one's action. To respect a person's choice involves responding to her perceptions about what constitutes acceptable treatment of her; it therefore requires attending to the perceived meaning of action; it requires finding the depths of stigma. This is part of the subject matter of expressive normative theories.

But Kantian theory has only limited resources for dealing with the problems addressed by an expressive theory of law. The expressive theory of law addresses the social sources of legal stigma, which are fixed by social conventions, practices, and norms, whose existence is distinct from the state of mind of whoever engages in these acts. Despite the thematic links between Kantian moral theory and expressive theory, it seems plain that Kantian theory cannot replace an expressive theory of law because Kantian theory does not explain the social contribution to stigma. Legislation sanctioning "separate but equal" schools, for example, means something different in a society with a racist history than it does in a society without such a history. Expressive theory differs from Kantian moral theory at least in respect to explaining the contribution of social meaning to wrongfully stigmatizing legislative acts. Still, it appears that a deontological approach fits more squarely with an expressive account than does a consequentialist theory. Perhaps, then, deontological moral theory is consistent with an expressive account, even if it does not entail an expressive account.

III. FLAWS IN THE EXPRESSIVE THEORY?

Even though standard deontological and consequentialist normative theories seem inadequate to the uniquely expressive elements in law, Blackburn argues that deep flaws mar the expressive theory alternative, particularly as expressive theory is developed by Anderson and Pildes.[23] He devotes substantial critical attention to Anderson and Pildes's contention that "'[a] person suffers expressive harm when she is treated according to principles that express negative or inappro-

23. *See* Blackburn, *supra* note 2, at 469.

priate attitudes toward her.'"[24] Blackburn apparently thinks that this statement is internally flawed, but that when one remedies its problems, it undermines the distinctive content of Anderson and Pildes's expressive theory. He suggests that Anderson and Pildes's position seems to make the most sense if it is interpreted as holding that expressive wrongs involve acting on a principle directed at compromising a victim's interests.[25] But, Blackburn argues, their position is mistaken—refuted by counterexamples such as the following:

> [T]eenagers signaling to a friend by making raucous noise around a residential neighborhood at night might reasonably be taken to express inconsiderateness towards their neighbors. But they most obviously do this through having *failed* to consider their neighbors' interests. It is not right to think of them as acting on a principle whose subject is their neighbors' interests (such as: "never show any consideration for your neighbors' interests").[26]

He concludes: "Their failure is a sure indication of disrespect, not because a principle of disrespect was ever openly affirmed, but just because they could not have acted as they did had they respected the neighbors."[27] Surely, Blackburn is correct that his raucous gang members never openly affirmed a principle whose subject is the interests of neighbors. Is that a problem for expressive views of law generally, or for Anderson and Pildes's view in particular?

Blackburn thinks that his raucous gang commits a wrong, but that the wrong is in a negligent act.[28] In fact, Anderson and Pildes say that wrongful expressive acts can occur negligently.[29] On the surface, then, there is much agreement. Is there also a problem? Blackburn seems to take the mere fact that one may negligently do an expressive harm to a person as undermining Anderson and Pildes's claim that "a person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her."[30] The raucous gang does not act on a principle that expresses a negative attitude because it acts on no principle at all, Blackburn explains.[31] But expressive theorists, including Anderson and Pildes, never say that one commits an expressive wrong *only* when one is moved to do so by

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24. *Id.* at 468 (quoting Anderson & Pildes, *supra* note 1, at 1527); *id.* at 486-88.
25. *Id.* at 467-68.
26. *Id.* at 468 (footnote omitted).
27. *Id.* at 487.
28. *See id.* at 487-88.
29. Anderson & Pildes, *supra* note 1, at 1512.
30. *See* Blackburn, *supra* note 2, at 486-88.
31. *See id.* at 487-88.

some vicious principle or when one intentionally acts on a morally problematic principle. If a drunk driver negligently kills someone, then he may negligently violate the principle that requires respect for human life, and, *a fortiori*, his action may express such disrespect, even though he is not moved by principle. Wrongs, including expressive wrongs, can occur when someone negligently, as well as intentionally, violates principle.

Still, I think that Blackburn's complaints against the expressive theory on issues of intentionality are both insightful and important. He stakes out what I take to be a genuine tension in expressive theories of law. On the one hand, these theories instruct us to search for the wrong in expressive wrongs in the minds of expressive agents. On the other hand, these theories instruct us to find the wrong in expressive wrongs in the public meanings of expressive actions. These instructions are not obviously consistent. The meaning that derives from the legislative mind and the meaning that derives from the social significance of an action differ. Which matters?

Indeed, Blackburn aggressively pursues a charge of inconsistency against Anderson and Pildes's expressive theory. I cannot reproduce the intricacy of his argument in this short space. My strategy instead will be to present an argument for inconsistency that I take to be Blackburnian in spirit, but that is far more simple than the argument he actually endorses. I will then introduce some additional complexity from Blackburn's argument. In the end, I offer what I take to be a reasonable approximation of Blackburn's argument. And I will maintain that the argument fails to establish inconsistency in the expressive theory.

Here is the simple version of the argument: First, in a premise he dubs "Revelation," Blackburn says that the expressive theorist holds that law reveals something about the values of those who engage in legally expressive acts.[32] Second, in a premise he dubs "Opacity," Blackburn says that the expressive theorist holds that the meaning of legally expressive acts may be opaque to the legal actor.[33] By this he means that the person who engages in an expressive act may not understand the expressive significance of the act because this significance is often externally constructed, in the sense that the source of meaning is social conventions, practices, and norms whose existence is distinct from the state of mind of whomever engages in the legally expressive act. But Opacity and Revelation are inconsistent, one

32. *Id.* at 474.
33. *Id.* at 469, 474.

might argue, because Revelation says meaning comes from the legal actor and Opacity says meaning comes from social practice, but the content of the mind of the legal actor and the content of social practices will often differ.

How might the alleged contradiction surface in practice? Suppose, for example, that a naïve legislature approves a statute sanctioning "separate but equal" academic facilities for two different racial groups on the theory that doing so shows respect for distinct cultural traditions. In fact, the members of the legislature feel no contempt toward any race, but they unwittingly approve legislation that, for historical reasons, will be viewed by reasonable people as racist. The social meaning of their acts differs from the meaning they intended to express. An anti-expressivist may think that this creates a problem for the expressive theory of law, which, he thinks, requires that an act reveal the state of mind of the entity that engages in the act and that the meaning of an act be fixed by social practices that exist independently of the intention of the actor. These two requirements cannot be jointly satisfied in our "separate but equal" legislative case. So the expressive theory is not internally consistent, the anti-expressivist may conclude.

I am not convinced that this anti-expressivist argument identifies a problem with the expressive theory of law. On the contrary, Opacity and Revelation seem consistent. Although, as Revelation requires, expressive acts reveal something about their expressor, and they can do so without corresponding to much in the expressor's mind. After all, revealing "something" need not be revealing much. For example, a legally expressive act may reveal that the expressor was lazy and negligent and that she had some beliefs that were not well expressed in her act, not that she was contemptuous of those stigmatized by the act. To the extent that there is a divergence between (1) what one reveals about oneself and what one intends in an expressive act and (2) the expressive content of that act, the expressive content may be obscure to the legal actor, and hence Opacity may be true. Therefore, Opacity and Revelation are consistent.

If I am correct about the looseness of the connection between what one intends by engaging in a legally expressive act and the expressive content of that act, it raises obvious questions about the importance of Revelation. The expressive theory of law is concerned with the meaning of law. Because an expressor's state of mind—the concern of Revelation—does not determine the meaning of law, why be interested in it? Anderson and Pildes devote several pages to explaining how a collective entity like a legislature can intend or mean

something.[34] If the intent of the legislature does not determine the meaning of legislation, then why work so hard to explain the possibility of collective intentions?

There are good reasons for expressive theorists, including Anderson and Pildes, to be concerned about an expressive agent's intentions and about what an expressive agent means by engaging in an expressive act; the cogency of these reasons is perfectly consistent with the idea that an expressive agent's intention does not determine the meaning of legally expressive acts. And these reasons apply with full force when the expressive agent is a collective entity, such as a legislature. First, it makes sense to hold a legislature responsible for expressive acts only if the legislature has intentional states relevantly connected to those expressive acts. Indeed, it makes sense to suppose that law has meaning only if some enacting body intentionally stands behind the law. Second, even though legislative acts may have meaning that is distinct from the intentions of the legislature, those intentions may be relevant to the interpretation of those acts. Third, even though the objective meaning of a law is not constituted by legislative intent, it may have evidentiary value relevant for interpreting the law. It follows that an expressive theorist has reason to be interested both in the intentions of legislatures and judges that stand behind legally expressive acts and in the meanings that those acts may have, independent of those intentions. Revelation and Opacity are consistent, even though the relation between them is complex.

IV. LEGAL COMMITMENT AND LEGAL MEANINGS

To bolster his case for inconsistency in Anderson and Pildes's expressive theory, Blackburn adds some ideas about legislative practice to Opacity and Revelation. He focuses on the plausible claim that an entity that engages in a legally expressive act must, at a minimum, demonstrate commitment to the attitude expressed in its act (for simplicity, I will call this idea Commitment, even though it is merely a rough stand-in for an idea that Blackburn calls "Credibility").[35] The concern with Commitment seems particularly powerful for legally expressive acts that are engaged in by collective entities like legislatures. It may become problematic to attribute the relevant attitudes to collective entities unless there is some sort of unambiguous commitment

34. *See* Anderson & Pildes, *supra* note 1, at 1514-27.

35. *See* Blackburn, *supra* note 2, at 483 (defining "Credibility" as the principle that "[a] group may be said to have been committed to a belief (goal, principle) if there is no way—no credible way—that the group could rationally sustain their open affirmations were they not also prepared to stand by the belief (goal, principle)" (emphasis omitted)).

to the attitudes they express. But once we have reason to think that such commitment occurs, then the issue of how Opacity may obtain it becomes problematic because it seems doubtful that the members of a group can commit themselves to a collective attitude without being clear among themselves about their commitment to that attitude. That clarity required for Commitment is inconsistent with Opacity, Blackburn suggests.[36]

In theory, however, a legal actor may engage in a legally expressive act and be committed to the content of that act, even though that content is Opaque with respect to the actor. Commitment is sometimes a stupid mistake. This is demonstrated by the case discussed earlier, in which a naïve legislature unwittingly enacts Jim Crow laws without appreciating the racist significance of its act. Because of the social context, the legislative act expresses a racist expressive attitude, and through the voluntary or even negligent endorsement of the act, the legislature has committed to the racist attitude, even though it has no racist intent. More generally, it is not clear that commitment to an attitude requires understanding of the attitude, or even requires understanding the content of the attitude to which one is committed. Suppose, for example, that I believe you said that Amsterdam is lovely, but in fact you said that Amsterdam is ugly. I respond, "I endorse your assertion," and then we jointly say, "We agree." Arguably, both I individually, and we as a collective entity, are committed to an attitude that is in fact Opaque with respect to me because I don't fully understand the content of what I or we said. Something like this happens in the above discussed hypothetical of the naïve legislature. It mistakenly commits itself to racist legislation. Engaging in expressive acts does not seem to require the sort of commitment that suggests a problem reconciling Opacity and Revelation.

Blackburn would not be satisfied with my characterization of the legislature that passes Jim Crow laws. He thinks that a plausible interpretation of Commitment precludes regarding the Jim Crow legislature as committed to the content of the expressive act in which it engages, and that unless one is restrictive in how one identifies what a group means by a legislative act, then these acts will be too easily susceptible to multiple and conflicting interpretations.[37] The members of a collective entity must be so tightly committed to the meaning of their expressive acts that Opacity becomes impossible, Blackburn

36. *See id.* at 475-76.

37. *See id.* at 478-79 (noting that if a reasoning body does not make its purposes and principles explicitly clear, Opacity widens the scope of creative, multiple, and possibly conflicting interpretations of the body's actions).

seems to think. His motivation for this strong sense of Commitment bears some resemblance to the standard skeptical social choice arguments regarding democratic choice, which were first lucidly made by the Eighteenth Century mathematician and philosopher, Marquis de Condorcet, but which in this century have been given mathematically precise form by Kenneth Arrow.[38] These skeptical arguments make much of the fact that in a fairly broad range of circumstances, no mechanical or mathematical procedure allows one to infer that the collective choice expressed in a group vote captures what members of the group "really" want.

Expressive theorists have already worried about the problems posed by Condorcet and Arrow. Anderson and Pildes suggest that if we look at institutional practices, we will find the resources to reliably discern group intention and group meaning, even if the process by which we do so involves a generous use of interpretation rather than application of purely mechanical mathematical procedures.[39] I believe that Anderson and Pildes are entirely correct about the prospects for finding group intentions and group meaning, and that their position holds up even in the face of the formidable mathematics of social choice theory. Indeed, many philosophers, in my view, have more than adequately answered Arrow's skepticism about social choice. Blackburn raises no doubt about the standard responses to social choice skepticism or about Anderson and Pildes's response to social choice skepticism.[40] But he suggests that Anderson and Pildes's position on the possibility of discerning group intention and group meaning nonetheless falters, because it does not address the special challenge that Philip Pettit raises in an unpublished paper on social choice,[41] a challenge that Blackburn reproduces in his article.[42] Pettit argues that, unless certain restrictive conditions are satisfied, we cannot reliably infer that a collective vote expresses what the voters really want.[43] I do not wish to cast any doubt on either the originality or the importance of Pettit's paper. But before an expressive theorist wor-

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38. *See* THOMAS CHRISTIANO, THE RULE OF THE MANY 93-97 (1996) (discussing the Condorcet method of aggregating preferences and Arrow's impossibility theorem).

39. *See* Anderson & Pildes, *supra* note 1, at 1525.

40. For a general discussion of social choice theory skepticism, see CHRISTIANO, *supra* note 38, at 95-97 (discussing social choice skepticism); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1990) (rebutting theories of social choice skepticism).

41. Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES (forthcoming 2001)

42. *See* Blackburn, *supra* note 2, at 478-82.

43. *See id.* at 480.

ries too much about Pettit's result, he or she should first be provided with an argument that it poses any different challenge to the expressive theorist's interpretive approach to finding group intention and group meaning than the challenges posed by Condorcet, Arrow, and the whole array of skeptical social choice theorists. Although Blackburn suggests that Pettit's approach poses a special challenge, he never explains how it differs from the traditional skepticism of Arrow and the previous generation of social choice skeptics. So we are left with no reason to doubt that Anderson and Pildes's critique of Arrow and other social choice theorists also applies to Pettit.

V. CONCLUSION

The expressive theory of law, particularly as it is developed by Anderson and Pildes, stands up quite well against Blackburn's criticism. He is wrong to suggest that Anderson and Pildes's theory contains an inconsistency and he is wrong to suggest that a rule utilitarian theory can, in principle, adequately address the concerns of an expressive theory of law. Moreover, much of Blackburn's critical argument relies on social choice skepticism that Blackburn never establishes and that there is no reason to accept. More importantly, there remains good reason to suppose that the concerns raised through the expressive theory of law are important and not adequately addressed by other normative theories.