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Injustice and the Normative Nature of Meaning

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INJUSTICE AND THE NORMATIVE NATURE OF MEANING

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A student in my jurisprudence class once argued that no theory could ever fully or acceptably specify the requirements of justice, about which disagreement is inevitable, but that wide agreement might be possible about many important instances of injustice.[1] The student's appeal was to seek theories of injustice rather than of justice. Putting aside possible broader applications of his claim, I believe it provides a quite perspicacious account of important areas of constitutional law. The Constitution hardly attempts to specify the content of an ideal legal order—choice and evaluation of legal orders is largely left to be politically contested. However, in addition to providing an original structure or procedural framework, the Constitution does rule out certain practices—among them, practices that might be described as constituting injustice.

Surely, avoiding injustice requires that a society try to avoid certain material conditions. In my view, this country (and I believe all others) permits gravely unjust degrees of material poverty and denials of various (often socially defined) "necessities." I would contentiously argue that *in some cases*, inadequate distributions constitute a violation of the Equal Protection Clause of the Fourteenth Amendment *even though* neither the Constitution nor any persuasive abstract theory of justice can or does provide precise principles for defining a fully desirable or just distribution. This first claim about injustice is most immediately concerned with outcomes or consequences of the legal regime. This probably has little to do with what is now being called an expressivist theory of law, even though the distributive failure could easily be described as expressing a lack of concern and respect for the poor. Still, in the spirit of the student's remark, this Commentary offers a

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1. The relation between this point and the Rawlsian idea of an "overlapping consensus" should be obvious. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (1993).

further account of injustice and, maybe, of constitutional essentials. This account is one way, but not the only way, to make an expressivist jurisprudence normatively plausible. In doing so, it also remedies or escapes much of Professor Steven Smith's critique of expressivism.

Smith argues that expressivist jurisprudence is normatively counterintuitive (or wrong) or, alternatively, that it could be made normatively appealing (at least to someone like Smith) only by employing metaphysical resources unavailable to those currently espousing expressivism.[2] To offer a substantively appealing account of expressivism, of course, requires that expressivist jurisprudence have (1) a plausible theory of meaning or expression, as well as (2) a normative account of why expression or meaning matters. Smith argues that, as presently elaborated, expressivism fails on both counts.[3] Normative appeal and methodological coherence could be provided only by a pre-modern metaphysical realism scorned by expressivism's advocates.[4]

My initial account of injustice provides one possible reply to Smith's substantive objection(s) to the normative appeal of expressivism. The second Part of this Commentary outlines a theory of meaning that I find to be right, commonsensical, and fully consistent with expressivist jurisprudence as I understand it. It includes methodological speculations about why Smith has, in my view, gone so wrong in his generally scholarly and elegant critique. Finally, I conclude with an examination of how this methodological discussion clarifies some otherwise opaque aspects of the earlier substantive discussion.

I. CONSTITUTIONAL MANDATES AND EQUALITY

John Rawls argued that people within an "original position" would choose two principles for evaluating the justness of the basic structure of society.[5] Without offering a full critique of Rawls's argu-

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2. Smith, *supra* note *, at 574-76; *see id.* at 574 (noting that the expressivist aim of finding objective meanings is necessarily thwarted due to the "impoverished metaphysical framework that characterizes the modern view of the world").

3. *See id.* at 510-24.

4. *See id.* at 574.

5. JOHN RAWLS, A THEORY OF JUSTICE 123-24 (1971). Smith asserts confidence that the "fanciful" original position methodology "does nothing to advance our [ethical or moral] deliberations." Smith, *supra* note *, at 572 n.241. Here is not the place for me to engage in that debate. For a fuller discussion of my views on this debate, see C. Edwin Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895 (1985). Some serious scholars reject (while others modify) Rawls's approach after raising the following serious questions: (1) whether *any* bracketing out (or filtering) of information is proper for moral reasoning, and if so, (2) whether Rawls's device is properly constructed, and, relatedly, (3) whether it improperly envisions a non-dialogic reasoning about issues that can only be approached dialogically. Other com-

ment for this proposed choice or a defense of a counter-proposal, I will offer what I think would be a better choice than Rawls's "difference principle."[6] (I put aside here the question of what type of "equal liberties" a person in the original position would affirm.)

Rawls carefully argued that people in the original position would choose the difference principle rather than the plausible and philosophically popular choice of *average* utilitarianism, and he showed why *maximizing total* utility was an entirely implausible choice. Nevertheless, people in the original position might realize that in their real society, with its multitudinous array of possible goods, everyone might turn out to value certain goods not included in, nor reducible to, Rawls's primary goods—possibly preferring some interpersonal relational or cultural goods to the maximum possible amount of wealth and income. If everyone's favored goods were produced more by institutions other than those favored by the difference principle, then everyone—including the worst off—could favor these institutions, that is, the alternative would be Pareto superior to the institutions called for by the difference principle. The trouble is that in the original position, a person could not know whether she would be in such a society or have such preferences.[7] To provide for this possibility in the original position, however, she might favor principles that do not rule out a design of basic institutions that favored these "other" goods. Thus, my suggestion is that she would want to affirm a strong right of political empowerment to choose basic institutions that favor conceptions of the good that she and others actually do hold in the real world.

A powerful objection that Rawls raised against average utilitarianism could also be leveled against a system of democratic choice, as defended in the last paragraph. A person would not want, and might discover that she would not and could not conform to, an organization of society in which she was left without the resources and opportunities necessary to pursue a meaningful life, *even though* that

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mentators with a lack of engagement with the Rawlsian enterprise and, I often suspect, with fear of the uncomfortably egalitarian implications of the approach, provide more superficial bases for rejecting Rawls's approach. Smith's footnote gives some evidence of falling into the second category, although my claim here may be unfair to him, given that Rawls was in no respect a concern of his article and that his footnote was appropriately conclusory.

6. *See* RAWLS, *supra* note 5, at 83 ("Social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged . . . .").

7. Rawls uses the "veil of ignorance" to impose this lack of knowledge. When behind the veil of ignorance, parties "do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations." *Id.* at 136-37.

organization might be justified by utilitarianism or chosen by a "one person, one vote" political process. Even if she herself did well with the result (the majority would presumably like it), she could not expect those people left in such unfortunate circumstances to have any reason to see themselves under any obligation to the legal order that created the situation; this creates both instability and the experience of oppression. These considerations combine with that of the last paragraph to suggest that equality requires, first, that society treat everyone as having an equal right to participate in choosing laws and institutions, which will inevitably favor one or another conception of the good; and, second, a right to those resources or opportunities that the society treats as basic for a full and meaningful life.

These two principles, however, are not all that a person in the original position could justifiably choose. The rationale for the political right rather than the difference principle is that people may want to pursue conceptions of the good that are advanced by particular basic institutional structures, which they should be able to choose politically, but these structures may be disallowed by direct application of more abstract principles such as the difference principle. However, a person in the original position might want to rule out certain political choices. Just as she has no reason to accept a political order that denies her the minimal resources needed in her society or that does not give her an "equal say" in the political process, she has no reason to accept a political order that does not respect her worth equally with the worth of other persons. Even if other individuals may have a right to disrespect her for any reason they want, the same does not hold for the collective order.

The rationale for the individual's right to choose whether to respect another person is founded on recognizing the individual as a free, autonomous agent. In contrast, the rationale for a collective order and for its decisionmaking capacity follows instrumentally from its capacity to advance individual interests, not because it has any intrinsic value. Thus, the rationale of a collective order of which all individuals could willingly be a part does not include any notion of the collective having any freedom to exhibit such disrespect. Rather, its rationale extends only to embodying collective solidarities, choosing values that are implicit in frameworks of group interaction, and having the capacity for pursuit of ends that require collective efforts. An individual has no reason to find acceptable a political order that "disparages" her as a person or that "expresses" disrespect for her inherent worth. (Of course, these terms, both of which object to particular communicative content, must be unpacked; but they, like the first two

principles, identify a range of either mandatory or improper political decisions). In other words, this third principle asserts that any law is objectionable if it disparages her (equal) worth as a person—that is, any law that *expresses* this disparagement as part of its meaning or as an explicit or implicit premise. Basically then, the claim made from the original position is not that everyone must be equally benefited by the legal order, nor that all behavior must be equally rewarded or even condoned. Rather, the claim is that in order for the legal order to respect everyone as an equal, it must provide: (1) equal political rights, (2) effective opportunity to have "just wants" or appropriate minimum levels of socially recognized needs fulfilled, and (3) a right not to have one's equality of worth as a person disparaged or denigrated. Without further specifying these three principles, note that the second provides a way to object to a legal order on the basis of its consequences, while the third provides a way to object on the basis of a law's expression or purpose.

Of course, competing or supplemental accounts of the constitutional significance of law's expressive content are possible. For the illustrative purposes of this Commentary, however, I will stick with this one (to which I in fact subscribe). But before turning to the methodological issue of understanding a law's meaning or expression, a point of potential confusion should be noted. The above account of the normative significance of a law's expression clearly does not suggest that its expressive meaning is the sole criterion for evaluating a law. Smith's quotation of William Marshall's advocacy of "a jurisprudence that is primarily 'symbolic' and not 'substantive'"[8] might suggest that some expressivists think otherwise. Although some might, this is certainly not implied by the argument. Actually, I, and probably most "expressivists," agree with most pragmatists that the primary concerns of a society normally ought to be with the substantive consequences of a law.

The expressivist point is much more limited. The claim is that, either as an end or as a feature of the means, the legal order should not be permitted to manifest certain judgments. The expressivist assertion is only that *one way* a law can be unjust is in the values that it expresses—the values, for example, expressed by intentionally establishing racially identified bathrooms in the context of American racial segregation. This expressive flaw, however, is surely not the only nor-

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8. Smith, *supra* note *, at 519 (internal quotation marks omitted) (quoting William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 498 (1986)); *see also id.* at 548 (suggesting that expressivism makes law's meaning "the basis of law's normative status").

mative concern with laws and not the only determinant of their normative status. Depending on the specifics of the constitutional theory, a law's expressive content is not even necessarily the only way a law can be an unconstitutional denial of equality. In any event, the Constitution prohibits certain injustices. Passing the constitutional tests hardly means that a law is good, normatively desirable, or even just. The account of equality described above only suggests that legal rules can be unconstitutional because of certain effects (do they leave people without the minimal level of resources or opportunities required for meaningful life within their community or without equal political rights) or because of discriminatory meaning. As my student's comment suggests, a single abstract constitutional or ethical theory might indicate multiple ways in which a law could be invalid or unjust even if it cannot provide adequate criteria for what makes a law meritorious.

II. MEANING, INTERPRETATION, AND MENTAL STATES

Reading Smith's article, I constantly found myself at odds with his portrayal of language, communication, and meaning. Here I will first provide a different, overtly stylized account of the nature and relation of "intention," "meaning," and "understanding" and then stipulate some related terminological usages. This account hopefully will suggest reasons to resist Smith's criticisms of the expressivists' notion of meaning. It will also help explain the way expression or meaning can be a crucial aspect of a law within a constitutional theory such as the one summarized above.

Consider the following epigrammatic hypothesis: the realm of *intention* is in the heads of speakers/actors, the realm of *understanding* is in the heads of perceivers/interpreters, while the realm of *meaning* is in humanly and collectively created social practices, conventions, and contexts. I admit here overstatement and simplification. Later I will observe that in addition to having intentions, speakers must also understand something—existing conventions and practices, for example—to be able to engage in a communicative activity called speaking, and that perceivers/interpreters always have some motivation or, loosely, intentions that lead them to their interpretation or understanding. And even though meaning may lie in the realm of the social, the notion of meaning presupposes intentionality on the part of both speakers/authors/actors (although not always an intention to communicate a meaning) and motivation of listeners/readers/interpreters. Thus, this epigrammatic claim admittedly is a simplification that requires more elaboration. However, it suggests an orientation. Here, the first and maybe the most important thing to note is that it

asserts the existence of a realm largely missing or ignored in many theoretical legal (and positivist social science) accounts. This missing realm can be dubbed that of the "social" or of the group or collective. In crucial ways, adding this third realm allows the analysis to be methodologically neither individualistic nor materialistic.[9]

One of the hottest constitutional law topics of the 1970s illustrates the failure to recognize this third realm. The issue concerned the attributes that make a state action—usually a law or program or practice—a violation of Equal Protection. Many lawyers and scholars assumed that the only possible alternatives were either the "effects," which have a material impact but can be expressively mute or benign at least as far as their constitutional relevance was concerned, or "intents" or "motivations" or "purposes," which were often assumed to be equivalent and in any event were assumed to refer to often hard to prove "mental" events, or some combination of effects and intentions. Smith's analysis largely tracks these alternatives. For example, when he discusses conventions, he indicates that the conventions must exist somewhere, implicitly locating them in people's heads.[10] Similarly, Smith's summary of modern ethical theory describes two traditions: consequentialism, which seems to refer to material "effects," and versions of Kantianism, which Smith describes as focused on subjective

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9. The importance of this point must be underlined. As I see it, an understanding of this "social" realm is absolutely fundamental to an understanding not only of meaning and interpretation, but of the social sciences generally. As I read them, despite their many differences, most insightful philosophers of the social sciences or of communication, including Habermas, Gadamer, the later Wittgenstein, Peter Winch, and Rorty, to name a few who have influenced me, rely on this point. See also the excellent essays in INTERPRETATIVE SOCIAL SCIENCE: A READER (Paul Rabinow & William M. Sullivan eds., 1979) (essays by Bellah, Fish, Gadamer, Geertz, Hirschman, Kuhn, Ricoeur, and Taylor). On the other hand, in a discussion at the Symposium, Steven Smith indicated that he did not believe in this social realm (although, his remark may merely reflect a rejection of my awkward or inadequate attempt in this Commentary to describe the concept). Still, taking Smith at his word, I believe he is by no means unique; and, in fact, an attempt to do without a notion of the social realm or to find the concept meaningless is quite common in many positivist, methodologically individualist, social science circles.

Although I cannot make good these hypotheses here, I suggest that a notion of the social is crucial both for a useful understanding of "meaning" and for social criticism. *Cf.* KENNETH BAYNES, THE NORMATIVE GROUNDS OF SOCIAL CRITICISM (1992). I suspect that if pressed hard, ignoring it leads to one of two results: either an especially dysfunctional relativism (no systematic relation between individual subjectivities and a sense of meaninglessness to action except in respect to how it instrumentally relates to people's arbitrary, individual, subjective interests) or an escape through the invocation of some, often religious, type of essentialism. In a sense, Smith's analysis, with its implicit rejection of the social, corroborates this hypothesis—he finds that the expressivists inevitably flounder in a relativist universe (his view of them, not their own) unless they adopt a pre-modern framework much like religious (or pre-modern) essentialism. *See* Smith, *supra* note *, at 574-76.

10. *See* Smith, *supra* note *, at 557-58.

intents or motivations of individuals. He suggests that these are the only two real possibilities absent a return to a pre-modern, usually religious form of realism.[11] In contrast to either the opposing sides of the 1970s debate or to Smith's current suggestions, I will claim that a proper normative concern focuses on "meanings" that exist in the social realm, and that this meaning can make a state action a violation of the Equal Protection Clause.

Related to my epigrammatic hypothesis, I want to stipulate a linguistic usage that is implicit in some (although implicitly rejected in other) Court opinions. Admittedly, my proposed usage is not universally accepted—partly because, in common language practices, usage of these terms overlap and my stipulation highlights only certain aspects of each term and excludes other accepted usages. But also, I believe, some commentators will find my usage odd (though confirmed by any good dictionary) in part because they remain blind to the existence of the social realm asserted above.

I suggest that "intent" and "motivation" are terms properly used to refer to a *subjective realm* that encompasses "mental events." "Effects" refer to a *material realm* of consequences that are observable in an external world, purported without any need for an external observer to refer either to meanings or mental events. Of course, the choice of which effects to thematize or observe obviously must come from some other realm. For example, practices—including language practices—within the social realm commonly emphasize or make some effects prominent. Although the extremists among the "effects" camp want to claim a greater neutrality for their descriptions, the effects orientation is consistent with, and in fact requires, the necessarily "motivated" subjectivity of an observer, commentator, or interpreter, who inevitably determines which effects will be observed. This is *one* reason that the social sciences can never be really value-neutral. And it is true even though "effects" themselves are in a sense mute, presumably without intrinsic meaning, and are purportedly measurable objectively. Moreover, although not inevitable, and from some perspectives arbitrary, my stipulation uses the term "effects" to refer only to aspects of the external world that are observable to the social scientist or lay observer, thereby excluding "mental events" or purely subjective reactions or experiences.

Finally, "purpose" often refers, as "meaning" does more uniformly, to a *social realm* that provides the basis for people to understand texts and other objects created by humans. Purpose and

11. *See id.* at 537-38.

meaning exist here, in this social realm, not as "mental events" in the heads of either creators or perceivers. It is by participation in, and access to, this social realm that both creators and perceivers have the ability either to create or find meanings or purposes. Within this usage, a concern with purpose is not with, and cannot be fully reduced directly to, any particular human's subjective intents or motivations.

Admittedly, my notion of "purpose" will sometimes seem strained. In some circumstances I would be as happy to use related terms. Still, "purpose," as well as the notions of "function" and "meaning," are at home in describing aspects of the social realm of humanly created objects or texts or contexts. People often can, and do, use the concept of "purpose" in this way, and it has clearly been so used by the Supreme Court. The Court, for example, located purpose within the social realm *rather than* within the minds of the authors when it said, in the context of defending its making "purpose" a central constitutional inquiry, that an ordinance's "seemingly permissible ends . . . could [not] be impeached by demonstrating that racially invidious motivations had promoted [its passage]."[12] Here, the ends or value presuppositions that a person properly attributes to a law, given its social context, not motivations, is precisely what is meant by "purpose."

The word "purpose" is ill-suited for a secular, nonmetaphorical reference to something that a tree or rock or cliff has, at least unless these are integrated into a current or planned human project (or into a teleological metaphysics). This fact illustrates the word's location outside the purely material realm. In contrast, people comfortably say that a chair or an umbrella has a purpose. Or, to use a dictionary's examples of things with purposes, both temporary classrooms and a summit meeting have a purpose.[13] This fact illustrates the word's location outside a purely mental realm, leaving the social world as the term's obvious home. Sense can be made of the purpose or function of these human creations given various surrounding circumstances (context), including understood social practices. Clearly, however, none of these items has subjectivity. Even if it is acceptable to say that a chair or an umbrella has a purpose, or acceptable for a stranger who does not know the ways of our society to ask what such an object's purpose is, it would be quite odd to attribute an intent or motivation to either a chair or an umbrella. Likewise, although asking about a law or a summit meeting's "intent" would be quite strange, a reference to their purpose is acceptable.

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12. Washington v. Davis, 426 U.S. 229, 242-43 (1976).

13. THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2421 (1993). The dictionary also uses "purpose" as a rough equivalent to "intent." *Id.*

Several features of this usage have relevance for a normative evaluation of the law. Initially, note that this usage implies that purpose or meaning of an object or phrase will be highly *context specific.* If found at the edge of a stage set, the purpose of an umbrella might be described as serving as a prop rather than keeping off the rain. In a sales rack at a store, its purpose might be seen as helping the store owner make money. And, of course, like objects, the meaning or purpose of words is similarly context specific.

Second, note that an object or text at a given time and place (that is, in a particular context) is subject to *multiple, usually nonconflicting descriptions or characterizations,* depending on the feature(s) that an observer (or a reader) wants to thematize. The purpose of a particular umbrella in the sales rack might be seen by the owner as increasing profits and by the customer as keeping the rain off. One discussion will correctly note one purpose or meaning while another discussion will correctly identify a very different purpose or meaning of the same object or the same text with everything about the context except the interests of the discussants being the same. Or, to give another example, a letter writer may understand the purpose of her letter as providing information, while the recipient might see, either approvingly or not, its (possibly unconscious) purpose as showing care and a wish to thicken the relationship. Of course, these thematizations could be reversed or held by both parties, but noted or emphasized at different times in different discussions or reflections. The meaning or purposes thematized inevitably depend on the interests or motives of the person doing the thematizing.

Finally, note that although someone might argue that "purpose" or "meaning" inevitably refers back to someone's intent, that is, to someone's subjective purpose,[14] this seems wrong. The purpose of an item or the meaning of a text *does* necessarily refer back to human practices and conventions, which themselves assume participants who have intents and were developed as a result of many people's past intentional actions. But the purpose of the object or text does not necessarily refer to any specific person's intent. The benign understanding of "temporary classrooms" as providing space for students in the over-crowded school system is not undermined by the fact that the school rooms were constructed because the mayor's sister, a building contractor, did not have enough private business and got her loyal brother, the mayor, to authorize paying her to build those architectural monstrosities. The builder *intended* to make money, and the

14. *See, e.g.*, Smith, *supra* note *, at 542-43, 558 nn.189-190.

mayor *intended* to help his sister, and neither intended anything about the students and their welfare.

Of course, for various reasons, an observer—a newspaper exposing corruption in city building contracts, for a dramatic example, or more simply, another party to a conversation who asks, "Do you really mean that?"—could take an interest in a "subjective purpose," that is, an intent of a particular creator or speaker. But when an observer comments, as she might, that these classrooms were built for *corrupt* purposes, that a person used the umbrella for an *unusual* purpose, or that this speaker had a *peculiar* meaning in mind or made the statement to convey an *odd* meaning, the comment necessarily builds on and assumes knowledge of conventions and social practices, as well as context. The observer makes a claim about a subjective element that contrasts with more objective meanings or purposes given by the conventions and social practices created by the activities of countless others. And the observer's comment relies on this more "objective" notion of purpose or meaning in attributing the term "corrupt" or "unusual" or "peculiar" to an individual's purported intentional or subjective purpose. Moreover, if the observer is interested in the object or text and not in something psychological, ethical, or otherwise personal about the creators or authors, the objective, social purpose or meaning often will provide an appropriate characterization, even though it diverges from a creator/author's intent or motivation. Describing and evaluating something from the perspective of this comprehensible purpose or meaning requires *no* assumption about anyone's subjective intent or motivation. And this purpose or meaning is often the one in which the observer or listener is interested. When determining purpose, the issue usually is identifying specific human practices into which the object most coherently fits given the context, not identifying a specific person whose psychology or intent is determinative.

Transfer all the remarks about subjective *intent*, material *effect*, and objective, public, or social *purpose* to a discussion of "meaning," either of a literary or legal text. Here I want to make five observations about understanding "meaning"—that is, about interpreting a text.

First, Smith properly observed that in the secular modern view of the world, which I fully accept, words or texts have no objective meaning *in the sense of* a meaning independent of actual human purposes and variable human practices. Words do not mirror a real world of essences. Since meaning comes from humans, Smith was led to ask: Who has meaning-giving responsibility? To whom (or what) should the modern interpreter look to find meaning? Smith offers as the

only possible modern secular answers either authors or perceivers. Both possible answers rely on methodological individualism. Each alternative assumes an individual meaning-giving party, either an author or perceiver;[15] each answer is concerned about what happens in the discrete heads of the chosen party—author's intentions or perceiver's understanding. Meaning in this account is a matter of specific mental events.

This methodological reductionism is, however, descriptively too impoverished and is untrue to experience. Quite clearly, authors are able to control neither meaning nor what perceivers understand. At least, authors are not able to control meaning in general, even though they can stipulate a meaning in their own usage of particular words. The stipulation itself, however, must rely on common linguistic practices for its effectiveness, and the stipulation may itself express something unintended about the speaker. (Consider what a person communicates in the following statements: "When I say 'he,' I mean either a man or woman" or, "When I say 'people,' I include Jews and women.")

Likewise, for idiosyncratic purposes, a reader or hearer is free to use a text as she likes—she can decide to understand the next word she hears, at least for her own personal purposes, to mean "God" or "red," and whenever she later hears that word, she can continue to understand it so.[16] Still, in any normal claim of understanding a text or the speech of another, the perceiver does not have a free choice of assigning meaning. Normally, a person, in claiming to understand a created text, must be able to provide an argument, even if somewhat unusual or perverse, for why her proposed understanding properly fits *that* particular text. Or, more specifically, as will be emphasized below, she must at least implicitly be able to identify a social context and explain social practices, including language practices, into which

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15. Smith does consider the possibility that meanings can be given by a group—framers or a legislative body or a group of perceivers, say, the public or Harvard philosophers. However, in continually invoking the problem of collective intentions, Smith apparently always wants to locate meanings in someone's head, and, if a group, he assumes the necessity of some additive method to sum or combine these subjective understandings. This tendency is illustrated, for example, when he misinterprets Deborah Hellman, assuming that she means her Habermasian move to invoke the "subjectivity" of an "imaginary or fictional observer." *Id.* at 560 (discussing Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 23-24 (2000)).

16. This possibility follows from the fact of human agency (it would be curious if postmodernist deconstruction turns out to depend on such a modernist notion), but this person could not avoid having others wonder about her mental or psychological condition unless she could tell a story about her practice that others, relying on *conventional* understanding, find coherent.

she inserts the text. And the interpreter should potentially be able to give reasons for her choices. On learning that the author intended something else, she often can properly argue that the author misunderstands what he said. Thus, both the author and reader, in their meaning-creating roles, must refer to or rely on social practices and conventions—even if some creative artists or visionary interpreters consciously deviate from the rules of the practice or convention.

Second, in her reliance on practice and convention, the reader need not assume anything about any particular or identifiable person or about anyone's (for example, the author's) intentions. She can, but need not, speculate about what an author intended or what most members of the public would unreflectively think about the text. The reader (as well as the author) must, however, be able to use or understand features of the social or cultural realm. To begin, she must understand those normal word usages that various contextual factors, including the text itself, suggest are relevant for understanding the text. Next, she must understand the text's surrounding context and the social practices relevant in that context. For instance, in discussing whether to reject one interpretation in favor of another, it is always appropriate for someone who advances an alternative interpretation to point to a previously unnoticed or unconsidered aspect of the context in which the text is found, or to the social and linguistic practices of which the text or speech is a part. This unnoticed or unconsidered aspect of context could make the second interpretation a better fit. Thus, it is also always appropriate for someone to point to how the challenged interpreter misunderstands aspects of an accepted social practice, including a particular language usage. Once an interpreter sees these ignored or misunderstood factors, her understanding of the text will likely change. These facts help explain why the *best understanding* of the meaning of a text would result from a conversation that, in principle, is open to anyone and in which any participant is permitted to point to and explain aspects of the context and of practices that she suspects are relevant and fears others are ignoring.[17] (This dialogic point has obvious relevance for institutional design features of a democracy in general and the judicial system in particular.)

Third, in understanding a text, a reader cannot leave behind her own prior understanding of the world or the practices with which she is familiar. The prior understandings that she brings will necessarily

17. This dialogic element, not a fictional observer, is the point of Hellman's Habermasian move referred to above. *See supra* note 15.

affect what meanings she will take from, or attribute to, a text. The text, however, gives or tells her something new—the text itself was not part of her prior world. Its capacity to bring her something new results, in part, because the text was an intentional creation (usually, but not necessarily, an intentional communicative act) of someone whose expression resulted from a different understanding of the world.

It seems obvious, if trite, to observe that here there is some merger of knowledge or perceptual "horizons" of the reader/listener and the author/speaker.[18] The content of the merged horizons depends on the vision of *both* the author and the particular reader. If these claims are right, then the assignment of meaning cannot be the task or responsibility of one person alone—it must take account of both author and reader, and most importantly, it must involve their knowledge and use of practices and conventions in the social world. Moreover, these observations show that meanings *necessarily* and properly change as readers change. Each reader will bring her different horizon, and, as the fourth point below emphasizes, her own projects. This horizon affects the meaning that she can properly and accurately take from the text. Of course, the more she is similar in relevant respects to other readers—people in the same community at the same time are often similar in many potentially relevant respects—the more the meanings each finds will be similar. In any event, an *interpreter's* meaning-giving responsibility is not only necessarily shared with one or more authors, but is also necessarily part of a social practice of communication that relies on a social realm not easily comprehended within a methodologically individualistic perspective.

Fourth, the remarks so far may seem consistent with the assumption that, at least for a single perceiver with her particular "horizon," there is a single correct understanding of the "meaning" to be discovered by considering the text in light of the relevant practices and context. That assumption, however, is wrong. Understanding of meaning is *always* part of a particular human project (or set of projects), and those projects can vary. Understanding *is not* analogous to the text being like an elephant—which seems very different depending on what portion the blindfolded person touches, but which is always the same elephant that the person can, after touching enough portions, completely comprehend. Rather, understanding of a text *is* like a completely observed elephant that offers something very different to different people—a research zoologist, an ivory hunter, a person

18. I obviously borrow here (as well as more generally) from the hermeneutic tradition.

wanting a ride, a tourist, or a National Geographic photographer. A text communicates different truthful messages depending on the concerns of the interpreter. A poem or television program does not have a single correct interpretation—although there are incorrect or largely unsustainable ones. The author's psychiatrist or friend might search for and find meanings in a text that refer specifically to the author's mental life—possibly intended meanings or possibly unconscious disclosures. A biographer might find other meanings more relevant. The social or political historian may have an entirely different focus; she might want to know how the text was understood or misunderstood by people whose subsequent behavior made history. Certainly, neither of the different meanings relevant to the Marxist and conservative historian is necessarily wrong—although either could be, as might be discovered in the conversation imagined above. Literary critics can have a huge number of agendas and, therefore, can properly find and be interested in a vast array of meanings. That is, meanings differ, first, because the text's meaning results from a connection to (or merger with) different people's necessarily different experience (or horizon). But, second, they differ because different people have different projects, or even the same person can play more than one of the above roles. That is, even a single person can have, at different moments, different projects for which a text's message is relevant, but for which its meaning will differ.

The first four points emphasize the following: (1) "meanings" are human creations, but are not reducible to mental activities that occur in the heads of single individuals; instead, "meanings" lie in a social realm; (2) "meanings" depend on practices and context that are shared by multiple people, and, therefore, the best interpretation or understanding of meaning would result from a conversation that is ideally open to all potential contributors; (3) an interpreter's necessary reliance on her own social history or perspective implies that there will be multiple "correct" interpretations that will vary with the interpreter—any merger of "horizons" will partly reflect the horizon of the particular interpreter as well as that of the author; (4) the existence of interpreters' different projects means that there will be different correct understandings of the same text, even for a single person.

These four observations are, I believe, fairly standard in hermeneutic theory, even if still somewhat controversial. Finally, however, related to the fourth point is a fifth—unfortunately one not always noted in the scholarly literature—that distinguishes legal from many other forms of interpretation.

Often, interpreters are relatively free to choose the point of their apprehension of (or inquiry into) meaning—a fact on which many post-modernists often rely. In contrast, in the legal context, although the content of the project or aim of interpretation is still contestable, it is much more narrowly constrained. Even the grounds of contestation are circumscribed. Thus, this last point is: (5) the aim or purpose of legal understanding is comparatively defined and requires a specifically ethical or normative justification precisely because the understanding allocates rights, provides or fails to provide for capacities to do things, and can result in applying force or violence or in other coercive denials of freedom. This aim or purpose, the nature of this project, properly guides legal interpretation.

Unlike the psychiatrist, the legal interpreter is typically unconcerned with whether the author had a happy childhood and, unlike the literary interpreter, whether the text makes an implicit comment about Eliot or Pound. A *legal theory* of *legal interpretation*, unlike a theory of interpretation in general, is (or should be) a normative theory about the project in which a person doing the interpretation should be engaged—a project that determines if and when a person should be subject to, or be able to call upon, the coercive power of the state. (This might be contrasted with a political science theory of legal interpretation that might be about many different things—for example, how legal texts reflect and influence the nature, distribution, and influence of power in the society in which the legal texts exist, or about how the ideological values of judicial personnel influence their interpretive choices.) The responsibilities of a legal interpreter are, thus, very different and more narrowly defined than those of a literary or even a historical or social science interpreter.

III. CONSEQUENCES OF THE SOCIAL BASIS OF MEANING AND THE PROJECTS OF LAW

To the extent that my account of interpretation and of meaning is accepted—I must admit to a fear that Samuel Johnson's comment applies to what I have said[19]—many anomalies that otherwise exist in language practices disappear, and many difficulties that Smith had with the expressivists evaporate.

The expressivists want to know not only the "meaning" of the law in terms of behavioral directives, but also whether the law's "meaning"

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19. Smith refers to Johnson's comment to a would-be author: "Your manuscript is both good and original; but the part that is good is not original, and the part that is original is not good." Smith, *supra* note *, at 523.

conforms to it being a proper legal directive. These two inquiries about meaning, one concerned with "What does the law direct?" and the other with "Can the directive be justifiably applied?" are different questions and are part of somewhat separate inquiries about the same text. Since the two inquiries come up with different meanings, Smith is led to wonder which "meanings" expressivists want enforced. Specifically, he asks this question in relation to what he calls "noncommunicative meanings," or what might be better understood as implicit meanings—commitments or judgments expressed by the texts other than the behavioral standards that the law most overtly supplies.[20] For example, when reading a text that directs that blacks be kept separate from whites, the expressivists conclude that the text also expresses a view that blacks are inferior to whites. Although Smith cannot decide whether the expressivists want this meaning enforced, he concludes that if they do not, their making it relevant for other purposes "underscore[s]" the confusion created by finding multiple meanings,[21] which are relevant for differing purposes. In contrast, given the notion of meaning described here, this phenomenon of different meanings for different purposes would be understood to be quite normal. An interpreter is involved in a different, even if related, project when determining whether the law expresses an unacceptable message—whether it is unjust—than when determining the guidance it gives for behavior.

Seeing that meaning lies within the social realm explains language practices inexplicable on Smith's account and provides obvious answers to a number of his questions. For example, when a person "misspeaks," the person's words do have a meaning, but that meaning comes from conventions, social practices, and the context in which the words were spoken, not from author's intent. The description "misspeaks" involves a claim that, due to accident, carelessness, or lack of knowledge, the speaker's words did not express what the speaker intended. Smith argues that "conventions can at most provide an account of (and perhaps the resources for ascertaining) authors' or perceivers' meanings [but] they cannot supply any meaning *in addition to* those meanings."[22] I conclude the opposite in respect to the final por-

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20. "Noncommunicative meaning" is a somewhat misleading nomenclature that Smith attributes to the expressivists. *Id.* at 516. I have not been able to find the term in their writing, and it would be a strange locution for them to use. I believe the term is Smith's own invention. He uses "noncommunicative meaning" to refer to meanings that expressivists suggest a law *communicates*, whether or not the law's authors specifically intend to communicate that message. *Id.* at 515-16.

21. *Id.* at 517.

22. *Id.* at 558.

tion of this claim. Although conventions do provide resources for the first project, and although a listener could be interested in a speaker's *intent*, that is not necessarily so. In the case of misspeaking, the author's intended meaning supplies no part of the meaning of her speech. Instead, the meaning is entirely determined by conventions and social practices. The phenomenon of misspeaking is easily understood with the resources provided by the view of communication described above. It becomes quite obscure, however, if meaning is thought ultimately to be, as Smith believes, what the speaker intends.

Of course, normally a speaker/author uses her knowledge of language, practice, and context to choose words to communicate something in (and appropriate to) a particular context. Consequently, the words' meaning, as determined by social practices and context, will normally encompass, even if only roughly and partially, that which the speaker intends. And usually the listener/reader, relying on the same type of social knowledge as did the speaker, will assume that this connection between intent and meaning held for the speaker, and this listener/reader consequently will believe that what she understands reflects roughly that which the author intended. For language to function the way it does, these facts must *normally* be true. That does not mean, however, that the meaning is reducible to either the author's or the perceiver's meaning as opposed to the meaning provided by conventions, language practices, and context that exist in the collectively created social realm.

For some purposes, but certainly not all, a perceiver's primary concern will be more with subjective intent, which is often distinguishable from the meaning. In reading novels, plays, and poems, it is coherent to be agnostic about whether the author, who transcribes the voice of the muse, fully understood the meaning of what she says. Reasonable, useful, interesting, and not "wrong" interpretations do not need to represent themselves as taking any position on whether they represent what the author intended. Finding that an interpretation does not represent the author's intent, certainly not her conscious intent, does not require abandoning the interpretation. Even the author herself may disclaim a full understanding of the meaning of her inspired writing. More generally, most perceivers normally look for meaning without explicit regard for author's intentions, assuming that this method can successfully find meanings. Thus, in contrast to "misspeaking," a case of "misunderstanding" typically occurs when the listener/interpreter either does not *note* some relevant aspect of the context or does not *know* some aspect of the relevant language, social practices, or conventions. To correct the misunder-

standing, a third party (or sometimes even the speaker[23]) is less likely to point to the speaker/author's "real subjective intent"—mental acts are somewhat hard to point to and might be hard to interpret if seen—than to point to unnoted aspects of the context or to explain aspects of the social or linguistic practices that the perceiver did not previously know.

Smith argues that to call music "sad" or to say that it expresses "sadness"—an example he drew from Anderson and Pildes[24]—must imply either that the music will cause "some listeners to have a feeling of sadness," that the music "expresses a sadness felt by the composer," or that it "at least manages to express an attitude of sadness that an imaginary subject *would* feel."[25] Given a single-minded focus on intent and mental states, Smith seems right—for sadness to be expressed, Smith must find someone's mental state in which to locate the sadness. The contrary social meaning account asserts that through composers' and musicians' expert use of convention, they can lead the audience to recognize and even feel the music's eloquent *expression* of sadness, without the audience or the musicians or anyone else actually being or even feeling sad and without even any need to imagine a sad person. In fact, the eloquence of the expression of sadness likely stimulates feelings better described as feelings of awe or a sense of grandeur at the beauty, power, creativeness, and accuracy of the expression of sadness.

Anderson and Pildes claim that legislative bodies adopt conventions or mechanisms through which they manifest their purposes and that members of these bodies "are deemed to have accepted these mechanisms."[26] Smith objects, noting that conventions are far from clear and that no one can force a member to accept those conventions; but "more importantly," he argues that nothing would turn the meanings thus constructed with these conventions into "*actual* 'mental states' or 'intentions.'"[27]

Smith is right on the facts of each point, but is wrong as to what he implies his factual points establish. I put aside that Smith makes

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23. Although the speaker might say, "I meant *x*," describing the statement in different words, that approach suggests that her original statement may have been ambiguous or a case of misspeaking. Her statement invites the reply, "Yes, but you said *y*, with the implicit claim that *y* means something quite different from *x*." To justify her original statement, she would instead refer to aspects of context or convention that make the meaning clear.

24. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1508 (2000).

25. Smith, *supra* note *, at 563.

26. Anderson & Pildes, *supra* note 24, at 1523.

27. Smith, *supra* note *, at 552.

this point only in the context of showing a possible inconsistency in the Anderson/Pildes position. Anderson and Pildes arguably mislead him here.[28] In any event, Smith constantly maintains that the expressivists' real concern must be with mental states or intentions (unless it is with material consequences, which is Smith's other alternative). Given an exclusive concern with mental states, Smith's point that conventions cannot turn the constructed meaning into mental states seems quite telling. Smith is right that a legislature's conventions do not force a legislator to intend "no" when she says "no." She can intend "yes" when she says "no." But for most legal purposes relating to lawmaking, actual intention is not the concern. Given our actual practices and conventions, the legislator's intent or mental state would not stop the legislature or the legal order from concluding that the bill failed passage when her "no," added to the "no" of others, denied the bill a majority. The meaning of what the legislature did

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28. I agree with most of the central claims about expressivist constitutional theory as developed by important expressivist scholars. Examples include Anderson and Pildes, *supra* note 24, and Hellman, *supra* note 15. However, I want to note two caveats, the first relevant here. Anderson and Pildes seem to place an importance on "mental states" that the substance of their argument does not require and that many of their statements seem to contradict. *Compare* Anderson & Pildes, *supra* note 24, at 1506 ("'Expression' refers to the ways that an action or a statement . . . manifests a state of mind."); *id.* at 1508 ("[A]n expressive theory . . . evaluates actions in terms of how well they express certain intentions, attitudes, or other mental states."); *id.* at 1514-20 (explaining how a collective or group can have a "mental state"); *id.* at 1574 (objecting to Adler's statement denying "that collectives can have mental states," which Anderson and Pildes take as crucial), *with id.* at 1513, 1512 ("[P]eople's conscious purposes and intentions, while relevant, are not the sole determinants of what attitudes their actions express. . . . Expressive theories of action hold people accountable for the public meanings of their actions," but "attitudes people intend to express . . . can deviate from the public meaning . . . ."); *id.* at 1523-24 ("[E]xpressive theories of action . . . do not treat agents' own conscious intentions . . . as controlling the expressive meaning of action."); *id.* at 1525 ("The expressive meaning of a particular act or practice, then, need not be in the agent's head, the recipient's head, or even in the heads of the general public. Expressive meanings are socially constructed."). For the reasons described in the text, it should be clear that I agree with the second, but not the first, set of statements. In a review of their article, I would attempt to show that their—or any good expressivist's—theory does not require, and often contradicts, the first set of statements about intentions and mental states.

The second point relates to expressivism and affirmative action. At the Symposium, Jamie Raskin correctly observed that some commentators find expressivist jurisprudence to provide support for those desperately seeking a normative basis for their objection to affirmative action. Despite arguable support in some expressivists' writings, these commentators misunderstand and distort expressivist theory and mischaracterize affirmative action. At least in most contexts, affirmative action programs express a critique or rejection of existing conditions of inequality. They are properly understood as policies that express a concern with the equality of people. Affirmative action in no way expresses the view that either those who benefit from the policy or those who do not are inherently more worthy or capable or less worthy or capable. Thus, under an expressivist jurisprudence, affirmative action programs are normally constitutionally unproblematic.

comes from the conventions that the legislature and the legal order generally recognize. That meaning, resulting from determinant conventions, not people's intentions, controls in this legal context.

Smith invokes Campos's example of a person attempting to understand "R E A L" as drawn in the sand. Although the perceiver must "suppos[e] an author,"[29] contrary to Smith's belief, the example does not show that she must understand herself as "trying to discern *what the authors of those texts intended* to express."[30] Here again, the inquirer/interpreter can just as easily be seen as trying to know context (including hypotheses about the language capacity of the creator, if any, and the context of the creation), than as trying to get at the author's intent (although, as noted earlier, the two inquiries often have considerable overlap). Thus, the inquirer/interpreter would want to know whether human effort or the wind created the image "R E A L," and if humanly created, whether the "writer(s)" knew Spanish or English, whether the writer made the marks while contemplating nature after taking drugs or while playing "sand scrabble," whether those letters are the same as the initials of the people who created them, and anything else relevant about the context of this expression. Intents, without relevant context and practices, would not be enough to give meaning to "R E A L," but context without any knowledge or supposition about intent would. Whether the perceiver is more interested in the symbol's contextual meaning or in the author's intentions will always depend on the particular point of the perceiver's inquiry.

Smith gets part way to the right conclusion when he says that "[w]hen we try to figure out what a statement or a text means, we are already, of necessity, making use of linguistic conventions."[31] He is only wrong to think the effort of figuring out meaning always, at least implicitly, goes beyond this—that the effort always attempts to reach or to assume something about the author's subjective meaning. Admittedly, contextual, social, or objective meaning can be evidence of intent, and intent can be suggestive of meaning, but the two are not the same. It is wrong to think that the effort at understanding necessarily aims at knowing what the author or speaker intended. Rather, the question of intent is a separate inquiry in which a perceiver may or may not be interested. The claim that "'conventions' (or 'the rules of language') can[not] give . . . more than what speakers' or perceivers'

29. Smith, *supra* note *, at 543 n.152 (citing Paul F. Campos, *Against Constitutional Theory, in* PAUL F. CAMPOS, PIERRE SCHLAG & STEVEN D. SMITH, AGAINST THE LAW 116, 118-19 (1996)).

30. *Id.* at 543.

31. *Id.* at 559.

meanings already offer"[32] is wrong, as the examples of misspeaking and misunderstanding suggest.

Of course, there are many difficulties with understanding the "meaning" of a law, with interpreting it. However, the law's meanings do not become "eery, mirage-like" upon reflection[33] because there are no collective intentions.[34] (Or, in deference to a further example of Anderson and Pildes's that purports to show that, in some narrowly defined contexts, there are collective intentions, Smith argues that there are no collective intentions in the case of legislatures.[35])

The difficulties of interpretation exist for various reasons. Particularly important is that people fight over which conventions are properly relevant, the actual content of the factual context, as well as over how these conventions and context are best understood. They fight over the conventions that determine *which*, if any, intents matter and *how* they should matter for legal meaning. These differences often reflect perspectives associated with cleavages in factors such as social or economic status and ethnic, racial, or sexual identities. The difficulties are only compounded by the fact that different aspects of a law's meaning may be legally relevant for different legal purposes—for example, for determining whether it expresses impermissible values or what behavior is required in a given context.

Still, these difficulties and controversies do not make the "meaning" eery and mirage-like. That problem occurs only if one thinks, as Smith apparently does—or, given his possible allegiance to what he describes as a pre-modern metaphysics, maybe I should say, as Smith thinks the moderns must think—that meaning depends on assuming the existence of group mental states that do not exist.[36]

IV. RETURN TO SUBSTANCE

If meaning exists in context and practices, not in intents or mental states, the question remains whether meaning has normative relevance. It does not if the only legal/normative concerns are effects (objective consequences) and subjective intents (mental states). The

32. *Id.*

33. *Id.* at 541.

34. *See id.* at 541-42 (denying the existence of collective intentions, and proposing that the absence of such intentions lies at the heart of the problem of legal meanings).

35. *See id.* at 550-53.

36. Smith argues that the mysterious nature of meaning of laws reflects their dependence on group minds, which he asserts do not exist. *See id.* at 541-42. Though I do not disagree with him about mental states not existing in anything other than individuals, my claim is that meaning depends not on mental states, but on the "social" realm—in which, at least in discussion at the Symposium, Smith said he does not believe.

criminal law category of *mens rea* (and of attempts) illustrates that intent can be normatively important and objectionable—but can a law or act's social meaning also be relevant? Smith repeatedly suggests that even if the expressivists successfully described a sort of objective meaning that laws could have, that (limited sense of) objective meaning would not be sufficient for the expressivists' normative purposes.

Smith's further point—that the secular project of the Enlightenment leaves humans with a scarcity of meaning—seems right. As far as I can see, he is also right that the type of objective meaning that the expressivists—or that I in this Commentary—attribute to law does little to remedy that scarcity.[37]

However, Smith did little to show why law should be or is the realm in which to find a solution for the modern world's experience of a scarcity of meaning. Certainly, for the expressivists, at least at any overt level, the normative relevance of the legal meanings lies elsewhere. Because the expressivists look primarily for *offensive* meanings that would make a law unconstitutional or impermissible, it seems a little odd to think they are placing their hope for a solution to existential despair in the meanings of law that they find. Still, the expressivists owe, and sometimes fail to give, their readers an explanation of why bad meanings matter. This obligation to give an explanation returns the discussion to my opening remarks.

My initial claim was that a major role of the Constitution is to rule out certain identifiable injustices. I then made a hopefully plausible use of John Rawls's original position device—although, following Rawls's later search for conceptions that can be accepted within an overlapping consensus, as well as his ultimate reliance on obtaining a reflective equilibrium, a use that reached conclusions that I hope can also be persuasive on other grounds. Specifically, I claimed that the Constitution should be understood to contain three substantive principles related to a conception of equality. As to the first, people's equal right of political participation, I put aside here the complex question of what form of inequalities would make provision for this right unjust—although I am inclined to think the Court in the late 1960s and the 1970s got the question basically right. As to the second principle, I put aside how to identify absences of basic levels of goods and opportunities that make for fundamental injustice—but again I am inclined to think the Court's initial development of a welfare rights Equal Protection and irrebuttable presumption jurisprudence during roughly the same period was making useful progress on this

37. *See id.* at 576-77.

question. Both inquiries investigate the content of a requirement that the state "express" in its laws respect for people's equality of worth. Nevertheless, note that the ultimate answers to these two inquires are specified largely in terms of "effects" or requirements related to physical circumstance or quantifiable features of a context—equally proportioned electoral districts, for example. However, it is the third principle, concerning not disparaging or denigrating or denying the equality of worth of people, to which I want to turn.

The basic institutional structure of society, as well as more variable elaborations, inevitably responds differently to different conceptions of the good, and people should be able to participate in determining which arrangements to favor. This fact, combined with the variable possibilities of the conceptions of good that people will actually hold, explains why the first principle was that people can properly demand a political participation right and a government with the capacity to make choices in furtherance of collective projects. My third claim, however, involved a crucial caveat to this assertion. In the original position, a person has no reason to favor a society in which people have political rights to disparage or denigrate the inherent worth of anyone because she herself could turn out to be the person disparaged or denigrated.[38] Most political projects could, at least potentially, benefit everyone—but not this one. Thus, people in the original position could object to allowing political projects that have this invidious purpose (and maybe other invidious purposes)—or, to use the language of this Symposium, objectionable expression. In a more complete argument, I would argue that people in the original position would also rule out choices premised on the propriety of denying human autonomy and human dignity as well as equality, but I can put that aside here.

Assume that one accepts that there is both a realm of subjective intent, which presumably refers to mental states of individuals, and a realm of social or public or objective meaning, which lies within a more social realm and in understandings that make essential (if often implicit) reference to conventions and contexts. The question can be properly raised concerning which realm is relevant, or whether both realms are relevant, in giving content to the normative principle de-

38. This is obviously a potentially controversial claim and various argumentative strategies could be used to support it, including one analogous to an argument Rawls used to support the difference principle, RAWLS, *supra* note 5, at 145, 156, 176-77 (discussing "strains of commitment"), that a person in the original position could realize that she would not be able to give the support for the legal order required of her if she turned out to be a person whom the legal order disparaged and purposefully subordinated.

scribed above. Is the normative objection properly directed at bad purposes and meanings or at bad intents and mental states? Is the proper normative concern with the subjective or the social realm—or, of course, can normative fault be found in either?

People in a Rawlsian original position could reasonably conclude that when an individual acts as representative of the state, she should be prohibited from acting with an impermissible intent or motive. However, as I have argued, human creations—whether objects or texts, such as laws—are not properly reducible to mental states, but they do have expressive meanings. These facts intuitively tilt toward the view that in evaluating laws, what the law expresses, not how various people were motivated, should be the crucial concern. Further consideration supports this initial thought.

Go back to the original argument. Individual political rights and collective political authority—that is, the existence of lawmaking discretion to do things, for instance, to deviate from maximizing the wealth and income or other primary goods of the worst-off—exist, at least within my original argument, because people in a community should be able to pursue legitimate collective projects or conceptions of public good potentially available to, or endorsable by, everyone. When the best understanding of a law is that it stigmatizes, denigrates, or otherwise expresses a denial of the worth of some people—say, the worst-off referred to above, or a sexual, racial, or ethnic group, but more generally, any people—this expression does not correspond to why lawmaking power exists. This stigmatizing or denigrating law is not potentially endorsable by the stigmatized or denigrated group.

A defender of the law that allegedly disparages the inherent worth of some people can try to point to conventions and context to show that the law is better understood as doing something else. She would try to show that the law has legitimate, credible purposes that do not disparage or deny the equal worth of people. Nevertheless, whatever the *intentions or motivations* of the lawmakers—for example, to please the party chiefs, to vote "yes" so they can go home to dinner, to vote "yes" even though they privately hold that "yes" means "no," to favor the law because it never occurred to them that segregation did not merely embody the natural or God-given order of the world, or whatever else—if no credible, explanatory, permissible *purposes* for the law can be shown to apply, there is no reason why people that see this law as disparaging and injurious should find the law to be acceptable. Whether intentions were good, bad, or non-existent, the problem is that the law cannot be given a defense consistent with why lawmaking discretion exists. When, in context, there is a basis for seeing the law

as invidious and no basis to give it a benign interpretation, there is no reason to treat the law as an acceptable exercise of democratic lawmaking power.[39] What the law expresses—its purpose or objective meaning—should make it invalid.

Not only should the lawmakers' intents not be determinative of the law's constitutional validity, neither should the unreflective understanding of members of the public. In a number of affirmative action cases, Justices Brennan and Marshall lead one group on the Court to say that the constitutional flaw in racist or discriminatory laws is the disparagement or denigration of one group of people. As they put it in *Bakke*, laws that "stigmatize . . . are invalid without more."[40] Justice Powell, writing for the majority, replied that treating stigma as key makes the law turn on "standardless" "subjective judgment[s]," and he plausibly noted that affirmative action is likely to be "perceived as invidious" by those denied its benefits.[41] Powell could equally have observed that some minority beneficiaries may also feel disparaged—although the general support for affirmative action practices within the African-American community suggests that many minority beneficiaries either find compensating, redeeming virtues in the law or find the programs not inherently disparaging. In any event, Brennan and Marshall's implicit response to Powell is to look to context and to possible benign justifications or explanations in order to characterize the affirmative action program.[42] They conclude that though stigma

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39. The Court implicitly adopts this view when it says that bad motivations will not invalidate the law if the law can be shown to have a good purpose that would have caused it to be enacted anyway—that is, the good purpose will not be discredited by the existence of the bad motivations. Thus, in *Washington v. Davis*, Justice White, writing for the majority, explained that an ordinance's "seemingly permissible ends . . . could [not] be impeached by demonstrating that racially invidious motivations had prompted [passage of the ordinance]." 426 U.S. 229, 242-43 (1976). Although Justice Powell's terminology differs from that which I have used here (as compared to Justice White, Powell constantly seemed sloppy on this point, which may have reflected his confusion about affirmative action), his analysis is the same. In *Arlington Heights*, writing for the Court, he stated: "Proof that the decision . . . was *motivated* in part by a racially discriminatory purpose would not necessarily have required invalidation . . . . Such proof would . . . have shifted to the Village the burden of establishing that the same decision would have resulted [anyhow]." Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (emphasis added).

40. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357-58 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

41. *Bakke*, 438 U.S. at 294 n.34.

42. *See id.* at 374 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (noting the program's legitimate purpose of "overcom[ing] the effects of segregation by bringing the races together," a purpose they derive from context); *id.* at 375-76 (rejecting a characterization of the law as stigmatizing on the basis of features of the program and other contextual factors that show that it could not "reasonably . . . [or] justifiably be regarded" as stigmatizing).

would be fatal if present, the program can be properly understood as a response to existing inequality or, more specifically, a response to past injustice.[43] A program pursuing a more racially equal distribution of opportunity and wealth does not express a denial of the equal worth of those who are, or those who are not, its beneficiaries—any more than does any other program with an egalitarian purpose, *or any other legitimate purpose,* disparages those who do not receive the program's benefits.

Although I find Brennan and Marshall's response to be fully adequate, the issue of affirmative action is, of course, controversial. The point here, however, is more limited. Brennan and Marshall were concerned with stigmatization—that is, with expression or meaning. But they find the program's (or law's) meaning through examining context and the reasons that can be given in its support. They make no effort to examine or speculate about the subjective intentions of any lawmakers or program designers—or even to identify who the relevant authors are. They also implicitly reject the relevance, contrary to Justice Powell's suggestion, of the unreflective understanding of people who have heard of the law or who are denied its benefits.[44] In a sense, they point to reasons that people in the imaginary conversations, which Smith criticizes Deborah Hellman for proposing,[45] presumably would find persuasive as to the meaning of the program. Justice Brennan and the three Justices joining him might be—although I do not think so—unpersuasive in the substance of their argument. But more importantly, their methodology is precisely that which I defend here; such a methodology is unavailable within Smith's intents/consequences view of the world.

Of course, consequences are always a cause for concern and attention. A concern with individual motivation or intent is also justified for many purposes—ranging from imposing moral blame to promoting mental health and developing personal relationships. The claim here, however, is that there are also good normative reasons to constitutionally prohibit laws that have particular meanings or express objectionable content. I have tried to illustrate this in one context—equality. The same conclusion is likely true in other contexts. The person in the Rawlsian original position may conclude that a legal order's failure to provide everyone with the capacity for effective speech does not necessarily amount to injustice. But that person could still conclude that an expressed or implicit purpose to suppress

43. *See id.* at 370-71.
44. *See Bakke,* 438 U.S. at 363.
45. Smith, *supra* note *, at 560.

autonomous expressive or listening choices of speakers or listeners is not a legitimate purpose of a law. The pragmatic goal of trying to form a desirable political order might justify prohibiting state endorsements of religion. Other reasons may make the expressive or objective meaning of laws that relate to the negative Commerce Clause or federalism a constitutional concern. I put those issues aside.[46] My hope is that I have said enough to show that, at least in some contexts, an expression or meaning-oriented constitutional jurisprudence has merit.

V. POSTSCRIPT: AN EXAMPLE

Finding an impermissible purpose different than intent or motive is well illustrated by the following situation. Although in the actual case, evidence of intent or motivation was somewhat fuzzy, at one time some legislators apparently wanted the social security system to give women greater benefits. Other legislatures apparently wanted a parent, after the death of the parent's (working) spouse, to be able to stay at home with the couple's child (or children). All good legislators, of course, presumably want to avoid unjustified expenditures—expenditures except for policies they affirmatively view as needed.

Each of the above purposes is legitimate. The Court has unanimously held that, in appropriate cases, government affirmative action—special preferences—for women, even those women against whom there is no evidence of unconstitutional or illegal discrimination, as opposed to general societal and economic discrimination, is permissible.[47] It is also evident that providing special benefits for children or for families with children is permissible. So is saving money. However, providing increased money for all those in either category favored by some—all women or all parents whose working spouse (that is, a spouse eligible for social security benefits) was deceased—would be very expensive. In this circumstance, those favoring one permissible purpose might compromise with those favoring the other permissible purpose to save money while still getting some of what they want. They could agree to provide money for those *parents* who were spouses of a deceased eligible working person and who were also *women*.[48] But how should this rule be understood? What principle(s) would explain it other than as a *modus vivendi*? Neither permissible

46. *Cf.* Anderson & Pildes, *supra* note 24 (examining other applications of an expressivist approach).

47. Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam).

48. That is, if one-third did not want to spend money on anyone, one-third wanted to spend money only on women, and one-third wanted to spend money on parents with a

rationale can explain the law's limitation on benefits. Instead, the law can be parsimoniously described as (1) the government giving working men greater benefits than it gives working women (the men's compensation includes a better "insurance policy" for their spouse), or (2) an embodiment of the notion that the proper place of women, but not of men, is at home with the children. A rule that has either of these purposes or meanings is impermissible. It denies an equality of role opportunities to women who want to work or to men who want to stay home. Thus, the Court struck down the law.[49]

Note that this case illustrates a possible utility of a common judicial practice that otherwise would be difficult to justify. When a law seems to have an impermissible purpose, looking for a fit between the law and an *asserted* legitimate purpose can be seen as trying to determine whether the asserted purpose is explanatory. Only if it is not explanatory, only if the fit is unpersuasive to justify understanding the law in that way, must the law instead be understood as expressing the impermissible purpose—as expressing a constitutionally forbidden meaning.

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deceased spouse, then two-thirds would want to spend money, but only on those who were both women and parents with a deceased spouse.

49. Wienberger v. Wiesenfeld, 420 U.S. 636, 653 (1975).