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Group Minds and Expressive Harm

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I. PRELIMINARIES

I shall take as my only target for discussion the landmark article by Elizabeth Anderson and Richard Pildes.[1] Their paper touches on many issues in ethics, philosophy of law, and philosophy of language, and I shall certainly not begin to cover many of these. But I do want to highlight some central themes.

First, however, I should like to register a small discomfort with some of the language in front of us. I am not myself convinced that it helps us to think in terms of an "expressive theory of law" or an "expressive theory of action." It is, presumably, uncontroversial that laws express prohibitions and permissions and acceptance of norms, and that legal reasonings express acceptances and exclusions of factors as appropriately bearing upon practical affairs. It is uncontroversial that actions—and not only speech acts—express beliefs, attitudes, emotions, and more complex states, such as, once more, the acceptance and exclusion of factors as appropriately bearing upon practical affairs. Theory here would presumably offer an account of such things as legal standing or the structure of norms that need to be in play for a group to constitute a collective, subject to a legal order. And a full theory would include an account of what it is for a group to constitute itself as subject to a norm in the first place. It is only here that one of my own philosophical views, the doctrine in ethics or metaethics known as expressivism, might have a part to play. But neither of these enterprises is, so far as I can make out, intended in the current works promoting expressive theories of law. So we might query whether we are faced with anything as grand as an overall theory of law or theory of action.

In fact, the label seems intended to cover a number of views about one, but only one, category of harm that the law ought to recognize.[2] To hold an expressive theory of law, then, is to hold that the

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

2. At one point, Anderson and Pildes flirt with the idea of a theory that would "account for both expressive and nonexpressive harms in ultimately expressivist terms." *Id.* at 1531. This strikes me as extraordinary: the harm of physical injury, for instance, has little or nothing to do with the harm of being slighted.

law ought to take note of that kind of harm, and that the law can, in principle, use it to invalidate the acts of courts and other bodies. The suggestion is that the law ought to note cases whereby a person or group can be harmed simply by virtue of the expression of an attitude or other mental state by a person or group. Anderson and Pildes give us a definition of this: "A person suffers expressive harm when she is treated according to principles that express negative or inappropriate attitudes toward her."[3] Here and throughout, Anderson and Pildes's discussion closely links "goals," "attitudes," and "principles." According to them, expressive theories ask, "does performing act *A* for the sake of goal *G* express rational or morally right attitudes toward people?"[4] Here it is the acceptance of a goal *as a reason* for action that tokens both attitude and principle. The leading illustration is that of avoiding visiting one's mother in a hospital for the sake of sparing oneself unpleasantness.[5] Taking this as a reason for staying away from the hospital would be callous, and it is "wrong to express such an uncaring attitude toward one's mother."[6] Anderson and Pildes do not discuss other cases in which it is not the acceptance of a *goal* as a reason that is in question, but, for instance, acceptance of some backward-looking fact, or acceptance of some further principle. Nor do they discuss cases in which the expression of attitude is prompted not by principle but by emotion or habit. However, they offer no argument against generalizing to such examples.

More significantly, I shall argue, they do not extend their descriptions to cover cases where attitudes seem to be expressed, but not principles of any kind. To take one of their examples, teenagers signaling to a friend by making raucous noise around a residential neighborhood at night might reasonably be taken to express inconsiderateness towards their neighbors.[7] 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"). We might see them as acting on such a principle, for example, if they had discussed the matter in just those terms. Otherwise, the principle of their action is more clearly something like: "when you see a friend, express unbridled joy noisily." Since some of the cases in point are ones in which public bodies fail to

3. *Id.* at 1527.
4. *Id.* at 1510.
5. *See id.* at 1511.
6. *Id.*
7. *Id.* at 1512-13.

notice or fail to take proper account of such matters as race and religion, it will be important for Anderson and Pildes to have a view in which such failures not only express attitudes, but also express goals and principles. Or, they could tease apart liabilities due to failure from liabilities due to the presence of goals and principles. I return to this briefly later.

Anderson and Pildes present a large portfolio of theses in the course of their discussion. Although, I should say, I substantially agree with the *thrust* of their position, I have some doubts about the way they present it. Indeed, I shall shortly show that the way they present it seems to be inconsistent. So some adjustments need to be made. When those adjustments are made, I think the way is cleared for a better focus on the issue. In fact, I shall argue that less controversial resources are sufficient for doing all the work that they want to do. These resources include ideas of impermissible reasonings and harms that any theory of law would recognize without controversy.

II. THE ANDERSON AND PILDES POSITION

Anderson and Pildes are clear that they are *not* talking only of cases where the agent consciously intends or purposes a harm, or intends or purposes to belittle or "stigmatize" the group so treated. Anderson and Pildes hold that people may express attitudes through acting negligently or recklessly,[8] or through ignorance of social conventions or norms,[9] or by acting on attitudes or assumptions of which they are unaware.[10] It would not, therefore, be *necessary* for a court to show conscious intention or purpose in deciding that an expressive harm has been committed.[11] Indeed, even the disavowal of an impermissible intent by a public body would not settle the issue in their favor.[12] They could still be held to have committed the harm.[13] I shall call this the "Opacity" element of the position, signifying that the expressive harm of an action need not be transparent to its agent. A rival position, that expressive harm requires conscious intention or purpose, we can call "Transparency."

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8. *Id.* at 1512.

9. *Id.* at 1513.

10. *Id.*

11. *See id.* ("It follows that people's conscious purposes and intentions, while relevant, are not the sole determinants of what attitude their reactions express. . . . Expressive theories of action hold people accountable for the public meanings of their actions.").

12. *See id.*

13. *See id.*

Anderson and Pildes are also clear that the test for expressive harm does not lie in actual consequences, such as distress to the target of some attitude.[14] This would make the issue of harm hostage to, on the one hand, the blithe insensitivity of the target, or, on the other hand, hypersensitivity, whereby distress results from actions that do not in fact express negative or inappropriate attitudes. In what follows, I shall occasionally refer to this as the "Victim's Damage" view of harm, which Anderson and Pildes reject.

Neither does the harm need to arise from actual communication, whereby the target registers the negative or inappropriate attitude expressed and is thereby injured.[15] We can call this "Victim's Uptake." It is not necessary to the harm Anderson and Pildes have in mind. That harm is not a *consequence* of the action at all. The contrast they seem to have in mind is only falteringly expressed in the following sentence: "The expressive harm is a result of acting on an unjustified expressive principle (a principle that expresses the wrong attitudes), while the nonexpressive harm is a causal consequence of the action."[16] This is not very useful unless we know a contrast between results, on the one hand, and causal consequences, on the other, which is hardly transparent. But I take it that the drift is clear: the harm lies *in* the negativity expressed, not in its effects. We might say that the harm occurs at the time and place of the expressive act, not in virtue of anything that happens at later times or places. In this Aristotelian sense, it may be that a dead person can be harmed by later derogatory expression. It is not entirely easy to understand this, but as a first shot, a harm in this sense may be thought of as something like a diminution of status. A person's status can diminish after he or she dies, and, similarly, a person's status might be said to diminish as others treat her in the derogatory way described. But perhaps a better formulation would say that an expressive harm is anything done or said to or about an object that gives a person who cares for the object reason to protest.[17] For example, a person would have reason to make an objec-

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14. *Id.* at 1527. To convey this point, Anderson and Pildes use an analogy in which a neighbor cavalierly tosses her bottles onto your lawn. *Id.* You suffer an expressive harm when treated "according to principles that express negative or inappropriate attitudes,"—in this case, your neighbor's rudeness—and not in the actual consequence of the burden and inconveniences of picking up the beer bottles. *Id.*

15. *Id.* at 1529. Anderson and Pildes explain that a "failure to communicate . . . can constitute a repudiation, retraction, or withholding of the acknowledgement of a valued social relationship with someone else." *Id.*

16. *Id.* at 1530.

17. This is very rough. So, for instance, we might wonder whether it is only someone who cares about the object who has this reason, or whether it should be a reason from "the common point of view." A full analysis at this point would need to concentrate on differ-

tion to someone expressing derogatory thoughts about an object for which she cares.

This view is therefore fundamentally nonconsequentialist.[18] But by the end of my Article, I shall raise doubts whether it is wise or necessary to mingle in this way the language of harm with the deontologically oriented doctrine that certain kinds of expression, by certain kinds of bodies, are impermissible in law. I shall argue that the introduction of expressive harm is an unnecessary mongrel. It is, however, a stylistic variant on something that is important.

Over the matter of Victim's Uptake, it is appropriate to issue a warning. There are many locutions that are unfortunately ambiguous just at this point. Consider the informal idea that legislators should not act in ways that "send a message" that, say, one religion is preferable to another.[19] There is a sense in which "send a message" is a success word, so that if the audience does not receive and understand it, you fail to send (them) a message. But there is another sense in which you send the message, just as you can send a parcel, whether the audience accepts it and understands it or not. The denial of any need for Victim's Uptake would insist on the latter reading.

Given Opacity, denial of Victim's Damage as a necessary condition of expressive harm, and a similar denial of Victim's Uptake, doubts might naturally arise about the epistemology of expressive harm. Anderson and Pildes offer us the basic ideas that "[e]xpressive theories of action hold people accountable for the public meanings of their actions," and that only "external normative judgement" is the determinant.[20] "[T]he public meaning of an action is not even determined by shared understandings of what the action means."[21] Public meanings are "socially constructed"—they are a "result of the ways in which actions fit with (or fail to fit with) other meaningful norms and

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ences between, say, disliking something, regretting it, and objecting to it. Fortunately, not very much hangs on this in what follows.

18. I should remark in passing that this makes their endorsement of Justice O'Connor's reasoning in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Lynch v. Donnelly*, 465 U.S. 668 (1984), surprising. *See* Anderson & Pildes, *supra* note 1, at 1549-50. O'Connor explicitly singles out government action that has "'the effect of communicating a message of government endorsement or disapproval of religion.'" *Id.* at 1550 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). But it is not the effect that Anderson and Pildes want to make salient.

19. *See, e.g., Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

20. Anderson & Pildes, *supra* note 1, at 1513.

21. *Id.* at 1524.

practices in the community."[22] So, in particular, they insist that even when the agent is a legislative body, the articulated reasons of the group are not dispositive of public meaning.[23] Again, the expressive meaning of a norm is a "product of interpreting the norm in the full context in which it is adopted and implemented."[24] It is the "external attribution of meaning."[25] I shall call this the "External Construction" view of expression, and it too will be salient in what follows.

The central target of "expressive theories of law" is not the derogatory or stigmatizing actions of individuals, but those expressed by public bodies. So Anderson and Pildes need a theory of what makes it legitimate to talk of a group as having a belief, or intention, or attitude, or goal, or principle of action. They do this by subscribing to the valuable work of Margaret Gilbert.[26] Gilbert approaches the concerted action problem as one of describing the difference between our doing things individually and our doing things together—things like conversing, or singing, or going for a walk, or digging the snow. She locates the difference in joint commitments, where each manifests a "*conditional commitment* of his will, understanding that only if the others express similar commitments are all of the wills jointly committed to accept a certain goal when the time comes."[27] Such plural subjects are now a "we," bound by norms of expectations and joint commitments. A group may then be attributed a belief or other propositional attitude:

> When an individual believes that p, he grants the proposition that p the status of an assumption in his own private reasoning. When people jointly accept that p, they commit themselves to granting p the status of an assumption in their public reasoning, their discussions, arguments, and conversations with the relevant others in the contexts at issue.[28]

Gilbert argues persuasively that this account accords with many of our intuitive judgements of group belief.[29] In particular, she contrasts the way this approach handles the notion of the group belief with a more "summative" account whereby a group can be said to have a

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22. *Id.* at 1525.
23. *Id.* at 1526-27.
24. *Id.* at 1525.
25. *Id.* at 1526.
26. Anderson and Pildes "draw heavily" from MARGARET GILBERT, ON SOCIAL FACTS (1989), in their discussion of expression and collective action. Anderson & Pildes, *supra* note 1, at 1515 n.20.
27. GILBERT, *supra* note 26, at 205.
28. *Id.* at 309.
29. *See id.* at 308-12.

belief only if a sufficient majority of individual members of the group have the belief.[30] Her criterion departs so far from the "summative" account that a group can have and express a belief that is held by none of its members.[31]

And this seems right. A court, for instance, might express the belief that the defendant is innocent although each member privately believes he is guilty. It does this when enough members of the court commit themselves to granting the guilty verdict the status of an assumption in their public reasoning. Parallel accounts would cover group hopes, fears, principles, goals, and attitudes.

It is important that there is nothing "spooky" here. For all the facts about the group mind supervene on beliefs and attitudes of the members. It is just that those beliefs and attitudes relate in a more complex way to the upshot than on anything like an aggregative or summative account. Anderson and Pildes sum it up in a definition, which they accept:

> A group, *G*, has mental state *M* if and only if the members of *G* are jointly committed to expressing *M* as a body.[32]

Gilbert's own formulation is a little more complex:

> *A group G believes that p* if and only if the members of G jointly accept that p.[33]

This in turn may be explicated thus:

> The members of G *jointly accept* that p if and only if it is common knowledge in G that the members of G individually have intentionally and openly* expressed their willingness jointly to accept that p with the other members of G.[34]

Anderson and Pildes do not suggest any divergence from Gilbert here. Therefore, I believe it is provisionally fair to assume that they are aligned in their positions, although I shall eventually offer them a necessary divergence. I shall call the view that gains full-dress expression in the last quote, "Open Affirmation."

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30. *See id.*

31. Gilbert asserts that through negotiation, intimidation, or perhaps even coercion, a group may end up jointly accepting a view that each member thinks is incorrect. *Id.* at 307-08.

32. Anderson & Pildes, *supra* note 1, at 1517.

33. GILBERT, *supra* note 26, at 306.

34. *Id.* The term "openly*" in this context means that there are no cross-purposes or hidden glitches in the fact that everyone knows of everyone's commitments and their knowledge of those commitments.

Anderson and Pildes offer not only an account of when a group has a mental state, but also a general account of expression of such a state.[35] They offer examples where what is expressed is, in effect, something that is *indicated*, or something that is embodied and realized in the action.[36] When music expresses sadness, the sadness is in the music itself. When his sigh expresses his misery, he sighed, and he was miserable. It is, of course, a very difficult thing to say that the relation between the misery and the sigh makes it true that the one expresses the other. But they both have to be there. Anderson and Pildes say that "[t]he expression of a mental state brings that state into the open, for oneself and potentially for others to recognize."[37] We can call this a "Revelation" account of expression, whereby an action reveals something further true of the agent. On the Revelation account, what is revealed must actually exist. Only then can it be brought into the open and recognized.

There is an option here that Anderson and Pildes do not take. Expression is often more "intensional" than this. We can say that a person can express a belief or attitude that she does not hold. She can do this by adopting appropriate means of expression that would normally, or conventionally, or customarily, or in some way be thought to indicate a mental state, although on this occasion there is no such mental state. In this sense, someone saying p may express a belief that he does not hold, and someone saying that x is wonderful may express admiration for x, although in fact she detests him.

III. DIFFICULTIES

But now a contradiction looms. On the face of it, Open Affirmation is inconsistent with Opacity. And thence it is inconsistent with External Construction. Open Affirmation requires awareness, whereas Opacity allows meanings that are concealed from agents, even when the agency is that of a group.

Consider the issue in the light of Open Affirmation. For a group to hold a principle—say, that race is a satisfactory reason for imposing disadvantage on a class of people—the group has to jointly accept the principle, and that means that it is common knowledge amongst them that they have "individually and intentionally and openly" expressed willingness jointly to accept the principle. This is what is meant by Open Affirmation. It is inconsistent with the view that the group may

35. Anderson & Pildes, *supra* note 1, at 1506-07.
36. *Id.*
37. *Id.* at 1507.

accept, as a group, an assumption or principle of which it is unaware. On this account, there *can be no such thing* as a group *having* a belief of which it is unaware. Lack of Transparency entails that the group has no such belief, although individual members may.

Gilbert's Open Affirmation formulation is confined to *beliefs*,[38] and we might wonder whether it is to be extended to cover mental states such as attitudes or dispositions to hold attitudes because of principles. I do not think this worry would be well directed, however, for three reasons. First, the whole thrust of Gilbert's discussion suggests that parallel common knowledge or openness clauses should govern any case of propositional attitude and not just cases of belief. Second, the principles at the center of the discussion are usually thought of as objects of belief: people are said to believe in a principle of equality or to hold that some goal justifies some end. But, third, in the quotation above, Anderson and Pildes overtly extend the treatment to cover any mental state.[39]

The contradiction is only immediate if we are talking of attitudes, beliefs, or goals that groups are supposed to *have*. But Anderson and Pildes might try to avert the contradiction by retreating from the Revelation concept of "expression." As I have said, you can only bring into the open what is there; a group can only bring into the open its belief that lesbianism should be suppressed if it believes that lesbianism should be suppressed. By Open Affirmation, therefore, this has to be common knowledge and openly affirmed among group members for it to be true.

Anderson and Pildes *could* abandon Revelation in favour of an intensional view of expression. Then, the target of External Construction need not be a belief or other state that the group has. And this would allow Opacity to govern this target (the public meaning), while Open Affirmation only governs states that they possess. But I do not think this is really open to them. For surely courts cannot be interpreted as employing such a division. This is because the intensional reading of "expression" does not fit with an ambition of finding principles that *governed* action. Principles can govern action only if they exist, that is, if they are held by the person or group whose action is sensitive to a representation of them. A belief cannot govern the action of an agent who does not hold the belief. We must remember that the reason for External Constructivism is often the suspicion that

38. *See supra* text accompanying notes 31 & 33-34 (explaining Gilbert's proposition of how a belief may be attributed to a group).

39. *See supra* text accompanying note 32.

an articulated reason is only a "pretext" or a "rationalization" when some other attitude or goal is actually doing the work. Anderson and Pildes cite cases that expressly state that it is the actual purpose, such as the "'purpose of discriminating against Negroes,'" that invalidates a law.[40] So at least a large part of the court practices they cite as supporting their position suggests that courts do conceive of themselves as looking for attitudes, principles, or goals that were present and actually governing decisions, whether wittingly or not. And then, if Revelation is retained, Open Affirmation is inconsistent with Opacity and with External Construction.

Although I have presented the contradiction starkly in this Part, I think there is a way out of it. But the way out, which may indeed be the way that Anderson and Pildes would take, is best explored after we have seen reason to modify Open Affirmation in any case.

IV. ACCORD AND GOVERNANCE

Before beginning a reconstruction, we need to be firmly aware of a famous ambiguity. According to the formula quoted, expressive harm occurs when a person or group is treated "according to principles that *communicate* negative or inappropriate attitudes toward [them]."[41] Now a treatment may *accord* with certain principles, but not be *directed* by them. Behaviour may conform to certain norms or rules, or it may be governed by them. Kant's famous example of the distinction is the shopkeeper who gives a child the right change, in accordance with a principle of honesty, but who is actually acting out of a principle of self-interest.[42] My polite behaviour towards a person may accord with a principle of respect, although I am actually motivated by hope of advantage.

The epistemology of accord is easier than that of government. Indeed, Kant thought that the epistemology of government, establishing, for instance, that an action was the upshot of respect for a principle of duty, was impossible: "we can never, even by the most strenuous self-examination, get entirely behind our covert incentives, since, when moral worth is at issue, what counts is not actions, which

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40. *See, e.g.*, Anderson & Pildes, *supra* note 1, at 1535 (quoting City of Richmond v. United States, 422 U.S. 358, 378 (1975)).

41. *Id.* at 1528. Anderson and Pildes refer to this subset of expressive harms as "communicative harms." *Id.* at 1527.

42. IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, *in* PRACTICAL PHILOSOPHY 41, 53 (4:397) (Mary J. Gregor ed. & trans., 1996) (1785).

one sees, but those inner principles of actions that one does not see."[43]

The problem with mere accord is that the epistemology is *too* easy, leaving it alarmingly indiscriminate. That is, as the example of the shopkeeper shows, the same act may accord with a principle of respect for honesty, or accord with a principle of self-interest, or with many other principles yet again. The sentence passed on a criminal might accord with a principle of disrespect, being the very sentence one might have wanted in order to demean or stigmatize him, but it might also accord with principles of justice. The former fact could not properly be used to strike down the sentence absent further argument—for instance, that the sentence was passed *because of* disrespect for the defendant. If no further argument were required, then in effect we would be saying that if an act is that which would have resulted from following *some* principle expressing negative attitude, then it is impermissible. But then, any act at all will stand condemned. My drinking coffee at eleven o'clock *accords* with the principle of either drinking coffee or hurling racial abuse at eleven o'clock. But it wasn't *directed* by the latter principle.[44]

An act may accord with a principle in this sense if the agent acted "as if" holding that principle. The problem is that any act *could* be the upshot of any number of different principles, just as any conclusion could be the result of reasoning from any number of different premises. This problem seems endemic to the area. Consider, for instance, Justice O'Connor's concern that the state not ally itself with particular religions.[45] An act may be the act expected of, and in that sense allied with, the operations of many different principles, including ones abhorrent to its agent. The fact that a judgement is "what you would have got" if the state had a goal of supporting Christianity as opposed to Islam is no more proof of the presence of that goal than the fact that my behaviour is "what you would have got" if I had the principle of drinking coffee or hurling racial abuse proves the presence of that principle.

The indeterminacy here parallels a well-known problem in the philosophy of language: the so-called rule-following considerations. Any pattern of answers to any series of questions—for instance, to give

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43. *Id.* at 61-62 (4:407) (footnote omitted).

44. The example is deliberately artificial. Even so, the principle *could* be that which directs my coffee-drinking, if, for instance, I listen to Voices, and the Voices told me either to drink a coffee or hurl racial abuse, and fortunately coffee was to hand.

45. *See* Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring) (discussing and applying a state endorsement test).

the result of adding two numbers—is compatible with indefinitely many interpretations of which rule the subject was following. If we think the subject was following a unique rule, we apparently cannot say that it, and it alone, was "manifest" in the pattern of answers, for many other rules would have given exactly the same pattern.

If the problem with the "accord" reading is that it lets in too much, the problem with the "government" reading is that the epistemology becomes, at least, very difficult. Even if it is not impossible, as Kant held, we seem to enter an epistemological wilderness, the desert of hermeneutics. Does the External Construction view give us a chart across this wilderness?

A preliminary suspicion that it does not arises from the very phrasing in terms of attempt to discover "the public meaning" of an action. The problem is that in contested cases, there is no such thing as "the" public meaning—there is only the different interpretations different groups put upon whatever was done. In their anxiety to avoid what I call "Victim's Uptake," Anderson and Pildes may have forgotten that the actions of a body may mean different things to different people. Similarly, those meanings may change over time. So, for instance, the language in a work by Mark Twain may have expressed unexceptionable, even liberal and progressive attitudes towards race in the middle of the nineteenth century, but such language is interpreted by many today as racist and unacceptable. If it is a question of Mark Twain's mindset, then the public meaning at the time is what is important. If it is a question of whether, for instance, to allow the books in the school curriculum, the contemporary meaning is more important. This, in turn, suggests that the purpose of legislative review may dictate different directions of the court's gaze.

V. GROUP GOALS

At stake here are serious issues of legislative practice. If we sympathize with Open Affirmation and must have a Revelation account of expression, then any doctrine of expressive harm has very limited application. A reasoning body would have to have made clear in its actual recorded reasonings that an impermissible purpose or impermissible principle governed their deliberations. For otherwise, there would be no evidence for common knowledge and openness among the members of the body. The scope for review and repeal would be extremely limited. If, on the other hand, we keep Open Affirmation, but deny the Revelation condition on expression, admitting that a body can express a principle that it does not hold, then the scope for creative reinterpretation becomes wide indeed. Remember-

ing Opacity, and the denial of Victim's Uptake, and Victim's Damage, it becomes alarmingly possible that External Constructivism, like modern literary criticism, takes us towards a landscape where anything goes.

Anderson and Pildes defend themselves against skepticism about finding public meaning derived from public-choice theorists.[46] But they do not consider an allied range of arguments. Some of the difficulties of reading back from actions to principles, in social groups, are illustrated by the following fascinating kind of case, highlighted by Philip Pettit.[47] Imagine a three-member board deliberating on the publication of a paper in a journal that they control. They have reduced the question to three elements. To publish the paper, they must find that it is original, that the topic is important, and that it is presented in a scholarly manner. We suppose that there are three members of the board, *A*, *B*, and *C*, and individually they hold the following views:

Member	Original?	Important?	Scholarly?	Verdict/C
A	Y	Y	N	N
B	Y	N	Y	N
C	N	Y	Y	N
Verdict/P	Y	Y	Y	

Here the board might reach one of two verdicts. If the members are asked to vote on a conclusion (verdict/C is what Pettit calls conclusion-driven reasoning or voting), they each reject the paper. If they are asked to vote separately on each premise (verdict/P is what Pettit calls premise-driven reasoning), then each premise will gain a majority, and the paper will be accepted. So a different verdict results depending on which procedure is adopted (yet no member of the board is inconsistent).

The dilemma of which procedure to adopt generalizes to cases with any number of premises and any number of members of the group. All it requires is the following: that there is a conclusion to be decided on a conjunction of independent premises, so that the conclusion is to be accepted if the premises are; that each member makes a judgement on the premises and on the conclusion; that there is a

46. Anderson & Pildes, *supra* note 1, at 1521-23.

47. Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES (forthcoming 2001). My discussion of Pettit's work here, and throughout this Article, is based upon an early draft of this forthcoming piece.

majority in favor of each premise, but a different majority for each; that the intersection of those majorities supports the conclusion; and that the intersection of the majorities is itself not a majority. In the case illustrated, the intersection of the majorities is null, as nobody supports the conclusion outright.

The same structure arises if a decision requires only that a group accepts one of a disjunction of premises. Suppose the paper should be published if it meets any of three criteria: it must be original, or it must be useful to students, or it must be a valuable summation of the state of the art for scholars. Now we have:

Member	Original?	Useful?	Summation?	Verdict/C
A	Y	N	N	Y
B	N	Y	N	Y
C	N	N	Y	Y
Verdict/P	N	N	N	

Here the paper is rejected if the vote is taken on each criterion. But it is accepted if each member is asked whether it should be accepted.

Pettit argues convincingly that organized groups should impose the discipline of reason on themselves at the collective level. This means that they ought to find out what "we" think about each premise, and then what "we" think about the conclusion, based upon what we have already accepted. In this first case, this means that the paper was to be accepted; in the second case it is rejected, although each member of the board believes there is a decisive reason that determines acceptance. The core of Pettit's argument concerns groups that have specific goals and that recognize the need to present themselves as "credible promoters" of those goals. This will require fidelity to past judgements and fidelity to consistency and coherence in a pattern of judgements. A group allowing majority voting on each issue as it comes up, with no regard to previously established commitment, will easily fall into contradiction.

If a group does let itself establish only a verdict/C, then it may be impossible to infer back anything about its attitude towards the elements of the case necessary to support verdict/C. Consider the first, conjunctive case. The disgruntled writer might suppose, given the verdict, that "they" didn't consider the paper original or that "they" didn't think it was scholarly. But two out of the three thought each of these things. Or, consider the disjunctive case. Here, if the verdict/C is communicated, the delighted scholar may suppose that "they" considered the paper original, or useful to students, or a good summation

for the scholar. But in each case, there is no sufficient reason to say "they" did. An aggregative story would say that "they" thought the reverse of each of these things, of course. And Open Affirmation would force us to denial: in the absence of deliberation and discursive reasoning on each of the premises, we cannot say *anything* about the premises the group accepted in delivering its verdict/C. There is no state of acceptance that meets the condition of Open Affirmation. So any proposition of the form "the group accepted premise" is false. And in this case this seems correct. There is no public commitment.

Now imagine that our author is aggrieved and, turning his back on Open Affirmation, resorts to an External Construction hermeneutic. Suppose the paper was on Derrida, and he says that the verdict accorded with the principle that work on Derrida is not important, or that the rejection "sends a message" that work on Derrida is unimportant, or has the "public meaning" that this is so. There are things he can say in support of this. He can say that the verdict is what you would have expected had the committee accepted that work on Derrida is not important. The second is more normative: the verdict is one that would "make sense," or predictably be the verdict of rational agents who in fact hold that work on Derrida is not important.

Although these things can be said, they should not be accepted. For in the case described, there are the other interpretations about which exactly the same can be said. The verdict equally "sends a message" that the author's paper is not scholarly, although work on Derrida is important, or the message that his work on Derrida is not original, although it is scholarly and on an important writer. Yet none of these views would actually have commanded a committee majority or have gained assent had it been put to a vote.

In other words, these structures suggest that when only verdict/C is on the table, the process of extracting a "public meaning," sending a message according to some hidden principle, is too indeterminate to be respectable. There is no such thing as "the principle that best justifies" their verdict, for instance, since any of many different combinations of belief equally yields the verdict.

In his discussion, Pettit advances, as reasons for collectives to adopt "premise-driven" reasoning procedures, that these are ways to guard against partiality, or otherwise hidden agendas. These procedures bring out into the open the collective opinion of the group. And once the collective opinion of the group has been settled—for instance, by accepting the result of a declaration or by a voting procedure—then, as a plural or collective agent there is nothing more to be

said. "We" have spoken—regardless of the private opinions or agendas of the agents making up the group.

Yet someone might go in for External Constructivism, even when a group has submitted itself to the discipline of public reason. Even if it makes manifest its own reasoning procedures, coming to a verdict/P we can open yet further interpretative space. For example, suppose the committee accepted that originality is a proper member of the set of premises. Then we can ask what "message" this decision sends, and, treating it as a conclusion, think of principles in accordance with which such a conclusion follows. The same hermeneutic indeterminacy follows.

We could have made the same point in terms of goals. If instead of premises necessary for a verdict we had constructed the example in terms of institutional goals, we can again get the structure whereby a majority accepts each goal, but their conclusion-driven decision favors an action that accords with none of them. Or we could get cases where an action suggests a goal that, in fact, could not command group assent. Again, it will be very dangerous to infer back goals and principles allowing courses of action to be pursued for the sake of goals simply from raw decisionmaking. In the absence of a process of information exchange and certification, there are too many "as ifs" around—too many principles, any of which might equally or justifiably be advanced as the very one with which action accorded.

In the light of all this, it seems to me very difficult to control an External Constructivist approach to the "public meaning" of group decisions. When a group has not submitted itself collectively to a discipline of reason, wide indeterminacies open up. And when a group has committed itself to the discipline of reason as a collective body, any attempt to get behind their overt acceptances and to conjure hidden principles "in accordance with which" they were acting enters a similar hermeneutic desert. So the argument of this section suggests that it is wise to stick with Open Affirmation.

VI. MORE ON COMMITMENTS

But let us reconsider. Open Affirmation, as it stands, looks to be too restrictive. Surely there should be some respectable cases in which a group that has not given open affirmation of a belief or principle may be said to have committed themselves to it.

One kind of case would arise from deductive closure. If a group has openly affirmed each of several premises, then we would reasonably hold them committed to the conclusion of those premises, even if they had never explicitly considered the conclusion. A similar kind of

case would come from the explicit extraction of principles of inference that were "implicit" in their reasonings.[48] The first quotation I gave from Gilbert is certainly consistent with these extensions of Open Affirmation.[49] For in that, she talks only of people "committing" themselves to things, and it is often reasonable to say that people have committed themselves to beliefs or principles, perhaps unwittingly and certainly without the open affirmation required in the second Gilbert formulation.[50] In this sense we commit ourselves to a principle of uniformity of nature when we reason from past to future. A group who argue "*A*, so *B*," commit themselves to the conditional "if *A*, then *B*."

This is what I had in mind as an escape route from the contradiction of Part III. It enables us to back away from Open Affirmation—the second Gilbert account—in favor of a less overt conception of "Commitment." In the formulation I quoted, Anderson and Pildes offered "joint commitment,"[51] which certainly sounds more like Gilbert's Open Affirmation" criterion. But they may have intended the first, which accords better with External Construction.

These relaxations of Open Affirmation do not, I think, get us very far by themselves. The interpretative method they do allow is simply that of the logician. But they suggest at least one kind of formula that may be of more use than the dangerously lax formulae of "according with" goals or principles. As a first shot, the formula they suggest is that in which a joint affirmation simply *could not* have been made without the belief necessary for making sense of the inference, or *could not* have been held had not the further implicit belief also been held. Then I should gloss "could not have been held without a belief" in the following principle, which I shall call "Credibility:"

> *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).*

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48. These principles might be purely formal, but they might include "material" conditionals and generalizations. A public body saying in one breath that all *A*s are *B*, in the following breath that all *C*s are *D*, and in the third breath inferring that all *A*s are *D*, could be said to be committed to the view that all *B*s are *C*.

49. *See supra* text accompanying note 28 (setting forth the text of the first quotation).

50. *See supra* text accompanying note 34 (setting forth the text of the second quotation).

51. Anderson & Pildes, *supra* note 1, at 1574.

The proof would be that there is no way to make sense of the explicit statements of the body, unless they were also committed to the implicit principle or premise teased out this way.

Credibility is obviously more exacting than formulation in terms of actions "according with" principles. It is also more exacting than a "best explanation" criterion. The problem with that is that where a number of interpretations are in play, even the "best" may fall far short of making the others incredible, even by quite low standards of credibility. If there are nine hypotheses in play, one with a probability of 0.2 and the others with a probability of 0.1, the first is the "best." But it is far from incredible—in fact, it is more probable than not—that something else was going on. Of course, standards of what is credible may vary here as elsewhere. It will require judgement to say which interpretations of a body's doings are too far-fetched to be credible.

To see the formulation in action, consider a corporate case, such as the recent Microsoft case.[52] Suppose the question is whether some corporation intended to drive competitors out of business by abusing its monopoly power. Unless prosecutors are lucky, they will be unlikely to find open affirmations of this intention, of Gilbert's kind. But they may find decisions, and whole patterns of decisions, of which there is no credible way of making sense without supposing the corporation to have had this intent. They may find evidence of what Durkheim considered a mark of the "group mind"—namely, a coercive culture organized around an understood implicit commitment to the intention in question.

Consider another case somewhat analogous to the zoning law examples. Suppose a club makes an open affirmation to bar from membership all those living south of the river. And suppose the only salient common factor is that those living north of the river are white and those living south are black. Even though the issue was never raised (never breathed, one might say), Credibility could sustain the view that this decision was racially motivated. For it may be that nobody in their right mind would suppose that geographic relationship to the river *per se* had a bearing on any of the club's goals. There *might* be a legitimate purpose—a club might have the goal of serving a local function, like a football club, for example—but if all the candidates

52. *See generally* United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000) (final judgment and order); 87 F. Supp. 2d 30 (D.D.C. 2000) (district court holding); 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact).

are sufficiently far-fetched, Credibility will sustain the racist interpretation.

Credibility is not favorable to wild interpretative stabs in the dark. The aggrieved author may say that the journal intends to refuse papers on Derrida. But even if in fact they have taken no papers on Derrida, Credibility will not sustain the charge for exactly the reasons displayed above. There are too many equally credible competitors. For this reason it may not deliver all the verdicts that Anderson and Pildes would want to support. For example, consider the case of a town council allowing land to be used for Christmas symbols that happen to be Christian.[53] It seems to me that there may well be other ways of making sense of their decision, without imputing any purpose or intention to promote Christianity and to demean other religions. They may simply hold only some principle of continuing a tradition that a majority of townspeople want to continue, for instance, and if that dominated their overt affirmations, Credibility will offer no purchase for a conspiracy theory in which concealed purposes are unmasked.

Credibility does well, I believe, in a case such as that of flying the Confederate flag over public buildings. There might, say, be three contenders for the purpose or principle that explains a state doing this. The purpose may be to honor a way of life that enslaved black people. Or, the purpose may be to honor the goal of dissolving the union of the states. Or, the purpose may be to signal remembrance of the dead. Suppose the first two purposes are deemed constitutionally impermissible, but the third is not. Then Credibility requires that we discover that one or the other of the first two is the state purpose. This may not be as difficult as it sounds, if, for instance, substitute symbols of memorials to the dead, which carry no risk of the impermissible interpretation, have been publicly rejected, or not even considered. If this kind of reasoning rules out the legitimate purpose, then the only interpretations that remain require one or the other of the impermissible purposes, and therefore imply illegitimate intent.[54]

Where Credibility is satisfied, we can, if we like, talk of public meaning. I do not think this phrase adds anything to simply talking of commitments without which the agents' actions could not, rationally, have occurred. But along with a number of philosophers, I am skepti-

53. *Cf.* Lynch v. Donnelly, 465 U.S. 668 (1984) (analyzing a factually similar scenario).

54. There is an interesting piece of logic at this point. In this case, we may be sure that a disjunction (illegitimate purpose *A* or illegitimate purpose *B*) is certified by Credibility, although neither disjunction is. It would be interesting to compare this with court practice where other examples of the same structure arise.

cal of the full "Gricean" panoply of intentions that have been thought necessary for meaning.[55] I prefer to remember the original, core notion of natural meaning from which Grice departed, and to work with the idea that one thing means another if it is a sure enough indication of it. The principle of Credibility accords with exactly that core notion. Hence, it legitimizes a sense of public meaning that does not require Open Affirmation.

VII. PRINCIPLES AND FAILURES

However, although we now open a category of public meanings determined via Credibility, I actually do not think that these are what we need to concentrate upon. The reason has to do with the element of *failure* that I mentioned at the beginning. Consider two cases: the teenagers that scream round the neighborhood inconsiderately, and the INS treating immigrants demeaningly. Is it sensible to look for goals and principles expressed in these actions?

There *could* have been open affirmations, of Gilbert's kind. The teenagers might have gone into a huddle and agreed to do whatever they could to show the neighbors how little they cared about them. The INS could have assented in a meeting to a policy of displaying contempt of, or hostility towards, those who hold green cards. In the case where no such reasons came out for open affirmation, the most natural thing to say is only that these actions express *failures* and *absences*. The relevant bodies simply did not take into account some things that by some standard or another we believe they *ought* to have taken into account. The teenagers *should* have recognized their actions to be inconsiderate, and the INS *should* have recognized its actions to be demeaning.

I do not set much store by an ontological difference, as it were, between failure and flawed intent, or between omissions and commissions. To fail to reply to someone's invitation is to slight them. As Anderson and Pildes say, a failure occurring when a particular response is demanded can itself be an action: a manifestation of disrespect or a stigmatization.[56]

Let me then concentrate upon the one example of the INS. Suppose we say that reasonable efficiency in dealing with legitimate inquiries and needs is demanded of government organizations. Hence,

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55. For a recent forceful statement of skepticism, see PAUL HORWICH, MEANING 4, 19-20, 20 n.6 (1998).

56. *See supra* note 15 (acknowledging Anderson and Pildes's "failure to communicate" argument).

its grotesque failures to implement such standards convicts the INS, and ultimately Congress, of failure of respect—that is, contempt of, or hostility towards, green card holders.[57]

We have here a large class of cases that depart from Open Affirmation. To make the above interpretation of the INS, we do not have to find open affirmation of Gilbert's kind. The ur-phenomenon is a failure, or lack of care. And it seems as though Credibility gives us a determinate interpretation.

The reason Credibility gives us this result is that we are not going so far as to attribute any goal, purpose, or principle to the INS. There need be no one goal visible in the individual decisions that make up the ethos. Failure to publish rules is just bungling; failure to make appointments is lack of secretarial funding; failure to ensure elementary civil rights is congressional error, and so on. The fact of contempt is only needed to rationalize the pattern. The same is true of the teenagers. 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.[58]

Why are these cases free of the alarming indeterminacies that opened up above? Because we are stopping short of introducing principles with which acts accord as candidates for "public meaning." We

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57. Obviously this requires detail. It is not hard to find. To give one example, it is a general civil right that one not be punished twice for the same crime, nor be punished without trial. *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); U.S. CONST. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ."). Since 1996, however, it seems that neither provision has applied to "alien residents" living in the United States. In 1996, Congress adopted the Antiterrorism and Effective Death Penalty Act of 1996, which was intended to give government agents greater authority to detain and deport alien terrorists. *See* Pub. L. No. 104-132, 110 Stat. 1216 (codified as amended in scattered sections of 8, 18, and 42 U.S.C. (2000)). While Congress's intentions in passing this law may have been noble, the effects of the law have been disastrous: Immigration and Naturalization officials now use this law to "detain and deport noncitizens because they have previously been convicted of a crime, no matter how long ago or how minor. Among those being detained are lawful permanent residents—those who have lived in the country for at least seven years, have married American citizens or have children who are citizens." Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at A1. This has effectively denied to alien residents the constitutional rights enjoyed by other American citizens.

58. Of course, such a judgement is defeasible, given a context that makes other explanations credible. They might have believed that it was New Year's Eve and all the adults were partying like them, for instance. There are, of course, very difficult issues connecting pure failure with responsibility. But in the kinds of cases that Anderson and Pildes consider, a doctrine of "strict liability" would seem appropriate. We are not so concerned with groups' responsibilities as with whether to strike out their decisions.

say instead that the teenagers' behaviour could not have occurred without them having neglected the interests of the neighbors. The INS could not behave as it does, did it not disregard interests that it ought to protect. The behaviours are not, to repeat, a sure indication of any goals or principles or beliefs that the agents have. A judgement of negligence is not hostage to what people actually thought, but only to what they did not think.

VIII. DO WE NEED EXPRESSIVE HARM?

The verdicts that might be made on this account have the form, "such-and-such a body should not have acted as it did, because it could not have done as it did without failure to respect some norm." Now this is, surely, a common and uncontroversial form of judgement in law. A court may have its verdict struck down, for instance, because it failed to respect some norm of trial procedure. A court that failed to take into account required evidence could not have acted as it did without so failing; a court that failed to abide by exclusionary rules could not have acted as it did without breaking those rules.

The "failure to abide by a norm" formula relates in an interesting way to the idea that we ought to find an impermissible commitment in order to reject the reasonings of a group. A norm *may* have the form of striking out as impermissible a purpose, goal, or form of reasoning—for instance, taking racial classification as relevant in some context. And then it takes the cautious interpretative strategy I have described to determine whether an impermissible goal, purpose, or form of reasoning indeed animated the group making the decision. But a norm may more directly forbid various kinds of negligence or trespass in reasoning procedures. And these do not require finding hidden meanings, purposes, or goals. So the effect of my proposal may be to expand the kinds of cases with which we should be concerned.

The core appeal would be in the first place to an impermissible failure—a failure to abide by some constitutionally obligatory standard, or a failure to take account of aspects of things that it was obligated to take into account. It is this that convicts the teenagers, the INS, or perhaps even the insensitive town council that allows only Christian symbols on the common ground. Just as their goals or principles do not enter in, neither do harms arising in virtue of the expression of imputed meanings. These are short-circuited by direct concentration on failure to meet obligatory standards.

This view does justice to two elements that Anderson and Pildes highlight in the actual practice of the law. The first is the nonconse-

quential direction of the court's gaze. Asking whether the agent failed to accord with some obligatory norm is not asking about the consequences of their actions. The gang's failure is just that, regardless of whether it actually wakes any sleepers. Just as certain protections can be regarded as upholding "rights against rules," others uphold "rights against normative trespasses": omissions or commissions in the deliberative processes of bodies that trespass against constitutional or other requirements.

Once this is said, however, it seems to make unnecessary the mongrel doctrine of expressive harm. The norm against which the group trespasses may indeed be a norm that is there precisely to defend people in general against harm. But the harm here will be *ordinary* injury, loss, or diminution of well-being, rather than any *sui generis* expressive harm. A rule against accepting public reasonings that fail to respect people's equal political standing can be justified consequentially, in terms of ordinary harms, and then the failure of a group so to reason is a self-standing, determinable matter. If this is so, we have the familiar combination of consequentialism and deontology that is found across the law. The speed limit is there to prevent public harm, but the policeman and the court do not have to prove actual harm or even increased risk of harm on each occasion on which the rule is enforced.

This is a structure of "indirect consequentialism" in which the rules are justified by the consequences, and cases are decided on the rules. The second point of accord with court practice is that such an approach better explains some writing that might appear to be expressivist. Consider Paul Brest, for example, on the Equal Protection Clause, talking of harms resulting from race-dependent decisions:

> Often, the most obvious harm is the denial of the opportunity to secure a desired benefit—a job, a night's lodging at a motel, a vote. But this does not completely describe the consequences of race-dependent decisionmaking. Decisions based on assumptions of intrinsic worth and selective indifference inflict psychological injury by stigmatizing their victims as inferior. Moreover, because acts of discrimination tend to occur in pervasive patterns, their victims suffer especially frustrating, cumulative and debilitating injuries.[59]

This does not require the mongrel doctrine. It is reasoning that any classical utilitarian could accept. This is especially so when we

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59. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8 (1976).

have become sensitive to the idea that self-worth, including the Hegelian reflection of worth from the eyes of others, is an ineliminable and central component of well-being. The same remarks apply to those decisions that hinged on formulations whereby a message may harm "'a person's standing in the political community.'"[60] We should admit that this does not make the issue hinge on whether *actual* harm to standing occurred, but without for a moment supposing that "frustrating, cumulative, and debilitating injuries" have nothing to do with it. The median is that such a message is of a kind that is *apt* to harm, just as in recklesness and negligence in general. And then an indirect consequentialist reading becomes apposite.

Consequences sometimes lie a long way from principles—so far that some philosophers will suppose they do nothing to support their authority. I do not want to prejudge this hard question of moral theory. In one kind of case, a state decision governing finance was struck down as "'inconsistent with the very idea of political union, even a limited federal union.'"[61] In these cases, a state's purpose in passing some law is deemed to be protectionist, and the protectionist principle is cited as impermissible. It is not expressly stated that the principle is consequentially harmful. But it is inconsistent with another principle (of political union between the states) that, in this context, is taken as sacrosanct. This leaves open whether the sacrosanct nature of the background principle is itself justified on consequentialist grounds.

A similar silence about the status of the background principle may arise when we consider equal concern and respect for all persons (or at least, all citizens) under the law. This is treated as a sacrosanct principle. Where reasonings are struck down as flouting it, there need be no judgement as to the status of the principle itself. It may ultimately be justified on consequentialist grounds, or on some doctrine of natural rights, or on Kantian or contractualist grounds, or elsewhere yet. What is salient, however, is that where judgement is *silent* on the status of such background principles, it is also *silent* about expressive harms. What it is not silent about are impermissible trespasses against compulsory norms.

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60. Anderson & Pildes, *supra* note 1, at 1547 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

61. *Id.* at 1554 (quoting Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1113 (1986)). Anderson and Pildes cite additional material from Regan, but the cited material does not talk of expressive harms, only of legitimate purposes. *See id.* at 1554 nn.139-41.

My formulation of the notion of expressive harm made it something to which an agent who cared for its object had reason to object. A person who cares for another has reason to object if another expresses hurtful or demeaning attitudes towards them, regardless of the actual consequences. On the indirect consequentialist account, the application of this requires finding that the attitudes or principles expressed are apt to cause more ordinary kinds of harm. In most cases, of course, we could go so far as to say that this is their function: a demeaning remark is there *for* causing harm. In other cases, the attitudes or principles may be impermissible on more "deontological" grounds, existing quite regardless of aptitude to cause harm. To repeat, for the purpose of this Article, I do not have to solve for how wide this latter class may be.

The salient point is that in either event, on this analysis, the legal judgements involved are not different from those the law must make over most of its domain. The law looks to the kinds of principle or kinds of reasoning behind a collective's decision. I have suggested that we tighten the idea of External Construction at this point by using the principle I called Credibility. If it finds that the reasonings and principles are impermissible—either because they are apt to cause tangible harms, or because they are inconsistent with fundamental norms of justice, equality, or our understanding of what is owed to people—the law can strike out the decision. The law may or may not then choose to adopt the language of expressive harm, provided that the underlying logic is clear. This would, as it were, be window dressing, and like most window dressing, it carries the risk that style is mistaken for substance.

Of course, it would be presumptuous of me to offer this as a panacea for all the difficult cases. First, the judgement whether a group could have behaved as it did had it not trespassed against a norm will remain a judgement, and difficult cases will remain difficult. All that a proposal like mine could hope to do is to clear the way for a view of the principles that ought to determine judgement in such cases. Second, however, without further analysis, it remains a speculation whether a substantial proportion of the cases in which doctrines of expressive harm have been invoked would solve themselves in this interpretatively much clearer way. But from the philosophical sidelines, it looks to me as though they would.