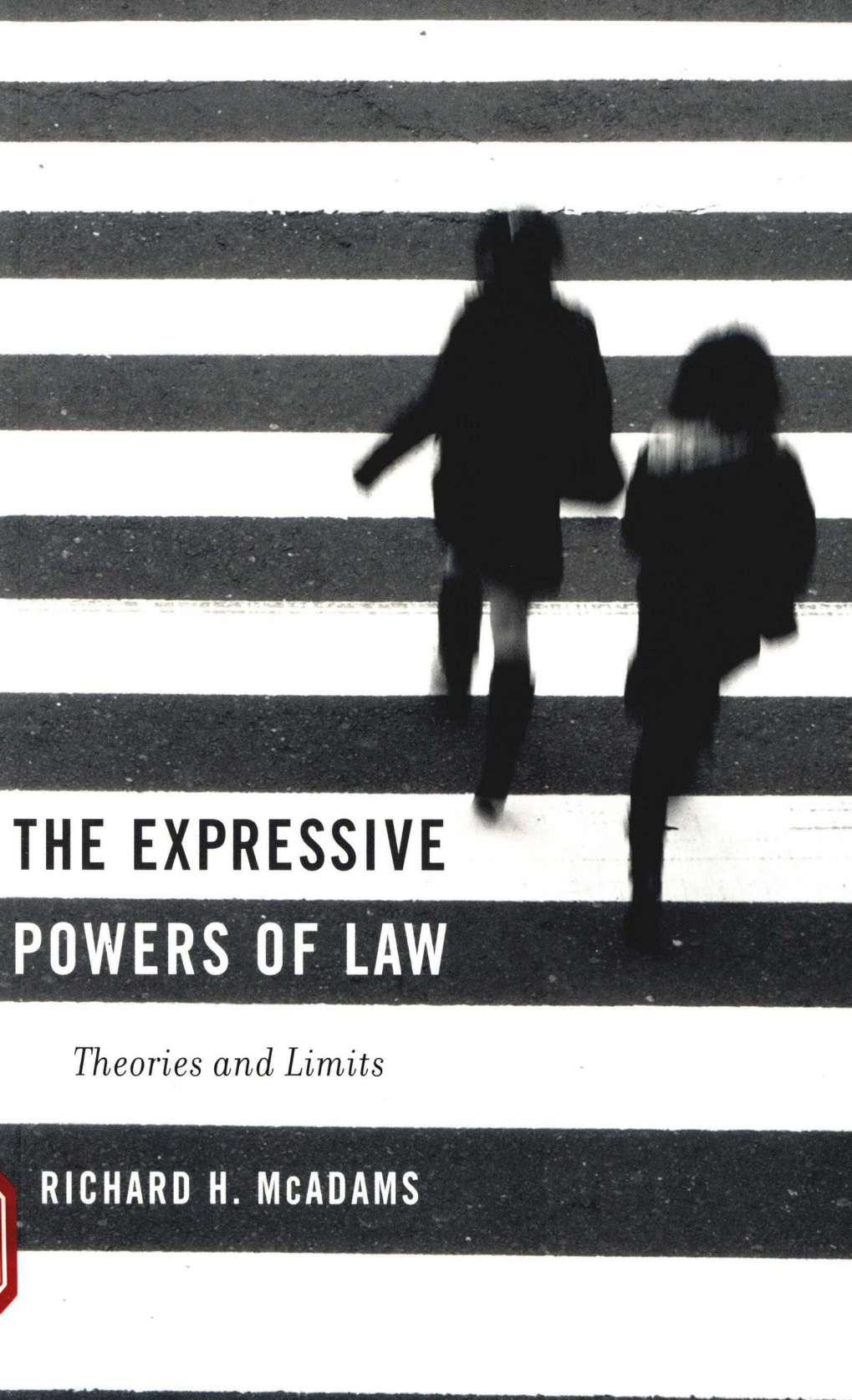

THE EXPRESSIVE POWERS OF LAW

Theories and Limits

RICHARD H. McADAMS

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Introduction

Alternatives to Deterrence and Legitimacy

In the United States, traffic law requires adherence to the yield sign and the solid center line. These are the sort of prosaic traffic rules one learns when studying for a driver's license. The yield sign requires slowing down or stopping to give way to drivers on the other road or lane. The solid center line on a two-lane road forbids a motorist from crossing the line to pass another vehicle; the dashed line permits passing. Frequently, there are two center lines and each indicates the passing rule for a different lane. Basic traffic rules of this kind are so mundane that they rarely make an appearance in the grand theoretical discussion of why people obey the law. Yet there is much to be learned by asking what motivates drivers to comply with these rules (to the extent they do). When a person is in a hurry, and would prefer the other driver to yield, or would like to pass a slower moving vehicle on a two-lane road (and the oncoming lane appears to be clear), why forgo the opportunity to proceed first or to pass? Why comply with the law?

No doubt, many people comply with many traffic rules out of habit. But habit is only a proximate rather than ultimate explanation. First, people usually act out of habit only when there is no great advantage or possibly no time to reconsider their habitual action. Given enough construction delay, for instance, drivers will rethink and abandon their habitual routes. Yet drivers sometimes obey traffic rules when there is an apparent advantage to disobedience and an occasion to reflect. When the driver is stuck behind a slower vehicle, there is time to consciously consider whether to

obey the law and a motivation to disobey—to minimize the delay from not passing. Why obey law in this context?

More fundamentally, it takes time to acquire a habit, so the explanation only postpones the deeper question of why people bother to comply *before* they acquired the habit of obeying a particular law. Presumably, newly licensed drivers have not yet complied for a sufficient time to have developed the habit of complying with the yield sign or solid center line, yet they will never develop the habit if they do not, at first, *consciously* decide to comply with the rule. Why do they do so?

Before I identify the expressive explanations that are the central focus of this book, let us consider the two conventional accounts of legal compliance. Economists famously emphasize *deterrence,* that legal sanctions change the costs of behavior, making compliance cheaper than noncompliance. The prototypical example is the deterrence of criminal punishment, but economists focus on the deterrent effect of monetary damages throughout the law. The literature is vast.[1]

When I have made this point to legal scholars, I sometimes hear the response that economic analysis has long recognized a *facilitative* or *enabling* role for law. There are many nonmandatory rules in the law, such as contract default rules or the rules defining the consequences of choosing certain business organizations or familial relationships (e.g., to be a partner or adoptive parent). Here the law offers ready-made devices for achieving certain ends without using legal sanctions to compel their selection. Yet even when one can choose to opt out of particular legal rules, or not to opt into them, the question I am asking is why the rules—*once adopted*—affect behavior. The economic answer is implicit but obvious: because the government stands ready to use legal sanctions to enforce such rules against anyone who consents to them. By the economic logic, the reason that contractual default terms facilitate commercial projects is that courts enforce those terms against contracting parties who fail to opt out. Otherwise, "opting in" would have no bite.

Returning to the traffic example, deterrence theory posits that the new driver complies with the yield sign and the rule against passing over a solid center line, even before developing the habit of complying, in order to avoid getting a ticket (a fine), which might also have the effect of raising her insurance rates. For the experienced driver, the fear of legal sanctions backs up the habit, motivating compliance even when the annoyance of the yield sign or solid center line causes the driver to consciously consider

violating the rule. To a lesser degree, economists also discuss the *incapacitation* effects of legal sanctions, as where incarceration makes it physically impossible for inmates to commit certain crimes (e.g., bank robbery).[2] Those in fear of losing their license—knowing that the sanctions for driving without a license would deter them from driving—might comply for that reason. In both cases, however, the economist emphasizes legal sanctions. On this view, the law matters only because the legal sanctions matter.

The second conventional account of legal compliance is *legitimacy*. Max Weber said that a person's actions might be guided by "the belief in the existence of a legitimate order," such that "its violation would be abhorrent to his sense of duty (of course, in varying degrees)."[3] Indeed, Weber claimed that legitimacy is a more stable source of order, compared to self-interest and habit, because legitimate order "enjoys the prestige of being considered binding."[4] "[T]he most common form of legitimacy," Weber observed, "is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner."[5]

Many contemporary legal scholars share this view.[6] A standard claim of legal psychology is that "[p]eople are more likely to obey the law when they view the law generally as a legitimate moral authority."[7] When law merely reflects an existing moral consensus, telling people to do what they already feel obligated to do, then it might have no independent effect on behavior. The moral consensus might motivate the behavior, not the law reflecting the consensus. Yet on more contested matters, with no clear social consensus, law might be able to leverage its legitimacy to persuade members of the public to change their moral view, thus affecting their behavior.[8]

There is a lively contemporary exchange on the sources of legitimacy. The psychologist Tom Tyler emphasizes *procedural* sources, finding evidence that people are more likely to obey the law (and cooperate with law enforcement) if they perceive that courts and police treat them fairly and with respect, more generally, if the legal processes are fair.[9] By contrast, John Darley, Janice Nadler, and Paul Robinson emphasize the *substantive* sources of law's legitimacy, which depend on how well or badly the legal rules and outcomes align with the public's moral intuitions.[10] Regardless of its source, where there is legal legitimacy, people are more likely to have internalized a preference—unreflectively or consciously perceived as a

moral obligation—to obey the law. And that preference or obligation generates greater compliance. In our example, the driver obeys the yield sign and the center line's ban on passing because she perceives the government's traffic rules, or law generally, as legitimate and worthy of obedience.

To some degree, social scientists endorse more than one theory. Psychologists and sociologists do not invariably deny the existence of deterrence.[11] Nor do all economists ignore the role that legal legitimacy plays in compliance. Relevant here is evidence that the perception of fair tax procedures or fair tax burdens explains much of the compliance with tax laws.[12] The economists Raymond Fisman and Edward Miguel generalize the point in a striking way.[13] They looked at the compliance with New York parking rules by United Nations diplomats. Because of diplomatic immunity, these individuals faced absolutely no threat of legal sanctions for parking violations (at the time; there is now a voluntary agreement to submit to sanctions), and yet there was enormous variation in compliance rates among diplomats from different nations, with some never running afoul of the law. Fisman and Miguel found that the greater the corruption in a diplomat's home country, which plausibly means the lower the legal legitimacy that diplomat experienced before moving to New York, the greater the diplomat's violation of New York parking laws. So the economists identify some role for legitimacy or at least some role for legal influence not dependent on legal sanctions.

Nonetheless, this kind of theoretical pluralism is distressingly rare. The main drama of the empirical study of legal compliance is a long-running conflict between the social sciences, a battle between the rival hypotheses of deterrence and legitimacy.[14] The dominant struggle diverts our attention away from the possibility of other explanations. The result is unfortunate because legal compliance is a matter of fundamental concern. We often want more compliance than we have. If the issue were less important, we might be content to know (if it were true) that sanctions and/or legitimacy generate *most* of the legal compliance we observe without worrying about what generates *the rest*. Yet because compliance is of paramount concern, we should seek to understand *all* the causal mechanisms that produce it. I hope to demonstrate that, in some contexts, an alternative, *expressive* mechanism plausibly causes more of the compliance we observe than deterrence *or* legitimacy. But primarily I want to identify the expressive mechanisms so we can begin the work of empirically isolating their effect.

Return to the driver, the yield sign, and the center line. It should be obvious that there is more going on with compliance than fear of legal sanctions or deference to legitimate authority. An overwhelming motivation of drivers is to avoid automobile accidents either from colliding with other drivers or running off the road. Complying with traffic rules offers drivers a way to avoid these accidents. In two respects, the law's expression creates an incentive for compliance.

The first expressive power is what I call *law's coordinating function.* Driving is a situation in which individuals seek order. Avoiding a collision is a matter of coordinating one's movements with those of the other motorists to avoid driving one's car into a space at the same time it is occupied by another car. Traffic law facilitates this coordination when it specifies an orderly means of driving, a set of priority rules. The yield sign is one example (as are stop signs, traffic lights, one-way signs, etc.). When two motorists wish to drive across each other's path or to occupy the same lane, the law offers a means of avoiding a collision when it expresses the rule that one driver is to yield to the other. Because each driver has an incentive to coordinate and there is no other obvious means to do so, the government's proposed solution possesses a natural attraction, a *power of suggestion.* The driver told to yield is less likely to expect the other driver to yield; if the second driver is not going to yield, the first *prefers* to yield, so as to avoid a collision. Because compliance is the most obvious way to avoid a collision, the law is, to some degree, self-enforcing. In simple game theory terms, legal expression provides a "focal point" that solves the coordination problem.

The center line works, in part, in the same way. The law says that motorists should stay to one side of the road, in one's own lane. By marking the road with a center line, the state creates the different lanes, giving clear meaning to "one side of the road." The clarity makes it easier to comply with the legal requirements, which drivers wish to do to avoid an accident. When drivers approach a hill, curve, or other obstruction, they have a limited view of oncoming traffic. By the time the drivers see one another, and realize that they are on a path to a collision or sideswipe, there may not be time to safely avoid each other, given that swerving presents its own dangers. The center line offers a simple solution, a *focal point.* If each motorist stays on her side of the line, they will pass each other without incident. When a driver is speeding around a curve so that centrifugal forces edge the car towards the other lane, the line gives immediate feedback on how

far it is safe to venture in that direction and at what point one risks disaster. Again, by offering the drivers a means of coordinating, a mode of order, the traffic rule is (to some degree) self-enforcing.

Yet the solid center line is interesting for an entirely different reason, which brings us to the law's second expressive power. Law also has an *information function.* The fact that the government allows motorists to pass on some parts of a two-lane road but prohibits passing on other parts is itself information. Unless one believes that governmental agents are completely arbitrary or perverse, a reasonable inference is that the bureaucrats in charge of road safety believe that passing is relatively dangerous on the part of the road where it is prohibited. These traffic engineers are in a position to know in detail the road's grade and curvature and other obstacles that determine the probability of an accident while passing. Drivers should update their beliefs about the safety of passing based on the fact that the law, in this location, prohibits passing. Indeed, at night or in other situations of limited visibility, drivers not already familiar with the road may have almost no basis for estimating the risks other than the existence of this prohibition. As a result of these inferences from the law's existence, the desire for self-preservation creates an incentive not to pass, which is to comply with the legal prohibition. To some degree, informational updating makes the law self-enforcing. Thus, legal expression has at least two effects that generate compliance: coordination and information.

One might think that coordination is also about information, but it is not, at least not in the same way. The yield sign need not reveal any information about the physical circumstances of the driving situation. Given two equally sized merging roads, for example, one could put the yield sign on either road. If the choice is arbitrary, the fact that it is on one road rather than the other does not imply any facts about the physical situation. Instead, a driver makes an inference not about the physical situation but about how the other driver will behave. By contrast, the placement of a sign prohibiting passing is not arbitrary; traffic engineers select the locations based on the road conditions—the angle of the curve, tilt of the road, obstructions to vision—that determine the risks of passing, so the important inference is about those physical circumstances that determine risk, not about how other drivers will behave.

What these examples demonstrate is that law has expressive powers independent of the legal sanctions threatened on violators and independent of the legitimacy the population perceives in the authority creating and

enforcing the law. That is the central thesis of this book. My aim is to describe and explore these two largely overlooked causal mechanisms—coordination and information—by which legal expression influences behavior, usually in the direction of compliance. Using rational choice assumptions, I hope to convince economic thinkers that we must amend the conventional wisdom of legal compliance. Law deters and incapacitates, but it also *coordinates* and *informs.* As part of my effort to persuade the economist to inquire systematically about law's expressive effects, I even show that legal sanctions owe their power *entirely* to the law's ability to facilitate coordination expressively.

I also seek to convince the legitimacy theorist that the law's behavioral effects not attributable to deterrence or incapacitation *cannot* necessarily be attributed to law's legitimacy or moral authority. For example, when we observe tribunals successfully resolving disputes despite lacking any power to sanction the disputing parties (even indirectly), we can no longer assume this is evidence of legitimacy, because the tribunal's influence—the reason the declared loser concedes—may be due instead to its expressive powers.

The expressive theories I offer are not only rivals to these conventional theories of legal compliance; they are also supplements. Deterrence and legitimacy turn out to be more potent because of their interactions with law's expressive powers. As should be evident from this claim, I do not seek to repudiate or depose deterrence or legitimacy theory. I am instead advocating a *theoretical pluralism* about compliance, the proposition that law brings to bear multiple powers at the same time.[15] I criticize alternate theories only because and to the degree it is necessary to recognize the distinct power of law's coordination and information powers, to show where these theories provide the best explanation of compliance.

Finally, I work to persuade many legal commentators to be *less* exuberant and more cautious in making expressive claims. There may be a rhetorical advantage to defending or attacking a law or legal action by saying it will *send a message* of the right or wrong sort, but the indiscriminate assertions of expressive consequences lowers the apparent value of all such analysis. The theories I offer entail clear limits to the plausibility of expressive claims, which should helpfully constrain expressive claims to those worthy of sustained attention and empirical testing.

In short, deterrence and legitimacy dominate the social science discussion of law's effect on behavior, while other important mechanisms of influence are neglected, an omission I hope to correct. I find the law's

expressive powers at work in constitutional and international law; property and contract disputes; criminal punishment; the regulation of smoking, voting, and driving; race and sex discrimination; the historic success of informal tribunals lacking the power of sanctions; the relationship between law and social movements; and the legal codification of custom. The collection of examples hopefully carries the thesis more convincingly than any one example can.

These assertions and the traffic example raise a great many questions and objections. At a general level, what are the conditions necessary for law to have either a coordinating or informational effect? How commonly do these conditions arise and why do they permit so much noncompliance to remain? And how do the two expressive mechanisms I describe compare to other expressive claims in the existing literature? The book addresses these questions and many more in developing the expressive theories of law.

After this introduction, the book proceeds in the following order. Chapter 1 places the argument of this book in the context of the various discussions about the expressive dimension of law. I identify two positive and two normative branches of the scholarly literature on legal expression. The book primarily concerns the first branch of the literature, though I engage all four.

The next three chapters (2, 3, and 4) describe and elaborate the claim that legal expression can provide a *coordinating focal point* for behavior. Chapter 2 lays out the elementary game theory of coordination and focal points, which identify a situation in which "mere" expression can influence behavior. Chapter 3 applies this theory to law, identifying the circumstances where legal expression works by creating a focal point around which individuals coordinate. Through a series of examples, this chapter shows the large domain in which law has this effect. Both chapters 2 and 3 review the relevant experimental literature on the expressive construction of focal points in situations of coordination. The empiricism here is in the early stages; it does not definitively prove the extent of the law's coordinating function. As I said previously, I want to identify the expressive mechanisms, to render them plausible in a large array of legal contexts, so as to justify further empirical study of their effect.

Chapter 4 further extends the theory and applications by considering the law's focal point power in a more dynamic setting. When the law seeks to change behavior, it often faces the challenge of competing with an

existing social norm, custom, or convention, which also operates as a focal point. I show how law's focal point power is nonetheless important when social movements are already unsettling an extant convention or where the law seeks only to clarify some ambiguity in a custom.

The following two chapters (5 and 6) describe and elaborate the second expressive mechanism: that legal expression can convey or "signal" information, which affects beliefs and behavior. In both cases, the behavioral effects are largely, but in important ways not entirely, in the direction of legal compliance. Chapter 5 focuses on two types of information revealed in legislation: (1) the current state of public attitudes and (2) some collective evaluation of the risks or rewards of regulated behavior, either of which can cause people to update their beliefs and change their behavior. Chapter 6 discusses the informational effects of judicial and executive enforcement, with a particular emphasis on criminal law. Again, I note the relevant empirical studies along the way, but the larger goal is to render the theory sufficiently plausible and clear so as to identify, as I do, a variety of testable implications.

Chapter 7 discusses the power of arbitral expression, particularly the ability of arbiters to resolve disputes without wielding the power of sanctions or legitimacy over the disputants. In history and around the world, there have been many successful tribunals without enforcement powers. I contend that the expressive theories offer a useful way to understand this noncoercive dispute resolution and that my account works better as an explanation than legitimacy theory. This chapter stands apart from the preceding ones because only here do I *combine* the coordination and information theories, finding a synergy between them when an arbiter declares how a dispute should or must be resolved.

In sum, most of this book explicates law's function in providing coordinating focal points and information, functions I aim to place alongside deterrence, incapacitation, and legitimacy (henceforth, I will drop the reference to incapacitation, which is mostly limited to certain criminal punishments and is therefore less general than deterrence or legitimacy). The bulk of the book is therefore positive, focusing on the effects of law's expression. But Chapter 8 is normative. It discusses the implications of the law's expressive effects for both the optimal use of resources and the structure of legal doctrines that resolve expressive disputes. For example, the power of law as a coordinating focal point offers a new advantage of rules over standards; where coordination is required, rules may be specific

enough to align expectations when standards are not. As another example, the power of law to reveal information offers important insights into the need for the Establishment Clause, as we can now understand how the government's symbolic endorsement of religion can have behavioral effects on religious practice. In general, compliance is a central issue for law; expanding our understanding of the mechanisms generating compliance produces a variety of normative insights for law.

1

Expressive Claims about Law

Legal scholars and political actors make broad claims about the *expressive* dimension of statutes, judicial opinions, prosecutorial decisions, jury verdicts, and criminal sentencing decisions. Expressive theories span topics as diverse as rape shield laws, property law, patents, the regulation of CEO compensation and corporate directors' duties to creditors, the legal concepts of the appearance of impropriety and standing to sue, cyberstalking regulation, the fourth amendment exclusionary rule, international law, and bank regulation.[1]

The nature of the claims varies greatly. Commentators say that legal change will "send a message" of some sort, for example, that legalizing medicinal marijuana will convey to teenagers the harmlessness of smoking pot, that strengthening drunk driving or domestic violence laws will articulate the grave harm those behaviors cause, and that a jury verdict in favor of a rich but undeserving defendant will communicate a message of unequal justice. Some legal scholars claim that people comply with certain laws, such as seat belt mandates and smoking restrictions, because of the expressive (or symbolic or educative) effect of these rules.[2] Or that the law can work by changing the "social meaning" of a behavior, as where the historic introduction of a law against dueling created a new meaning to the decision to refuse a duel: not that one was a coward without honor, but that one felt an honorable duty to obey the law.[3]

Legal scholars also offer to explain the existence of certain laws by their symbolism. For example, there may be little or no behavioral effect from the legislative repeal of constitutionally unenforceable segregation or

sodomy laws, from laws recognizing English as the "official" language, or from local ordinances declaring a nuclear-free zone, but voters may demand and support such laws for the values they are understood to express. Even when a law has some behavioral effect, the politics of its enactment may be dominated by its symbolic importance. Pro-life voters may like what a law against "partial-birth abortion" expresses even if the law, by permitting other abortion procedures, has no effect on the total number of abortions.[4] Commentators explain legal rules of market inalienability such as the ban on selling human organs, sexual services, or electoral votes by the public's desire to express the incommensurability or pricelessness of certain values.[5]

There are also many normative claims about legal expression. Some constitutional theorists claim that the Equal Protection Clause of the Fourteenth Amendment should be read to forbid laws that express the inferiority or subordination of a racial group or sex, because such laws create "expressive harms" regardless of whether there are further consequences from the law.[6] The Supreme Court arguably took an expressive stance when it ruled that the clause prohibits racial gerrymandering that creates bizarrely shaped electoral districts because it sends a "message" that "members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls," and when it ruled that the clause prohibits public single-sex higher education and gender-based jury selection because they reinforce gender stereotypes.[7]

Not surprisingly, the meaning of the term "expressive" is *not* constant across the scores of articles discussing all these expressive claims. What might at first appear to be a single legal literature about *the* expressive theory of law is really a set of distinct literatures employing the same term. There is no grand unified "expressive theory" that encompasses all of these literatures. This observation is not a criticism of any of the expressive literatures. Instead, the word "expressive" has enough flexibility to cover an array of inquiries. One can believe in the value of each inquiry without thinking that the inquiries are essentially the same. Thus, I have no interest in trying to limit the use of the word "expressive" to the use I make of it and no quarrel with legal scholars describing their theories as such even though they differ from the ones that concern me. (Indeed, if the reader is unable to tolerate my using the term *expressive* in this book as I do, please feel free to imagine a different term, perhaps "communicative" or "educative.").

The contrary assumption—that there is a single field of "expressive law"—has generated confusion. Without a clear understanding of the distinct projects using the term "expressive," there is a tendency to lump together articles that address different topics. To avoid further confusion, I am at pains to observe that this book concerns, at least primarily, only *some* of the expressive law literatures. To explain, I must distinguish the various expressive literatures, which I do by offering a simple typology.

Four Types of Expressive Claims about Law

I count four categories of expressive claims in the legal literature: (1) that law influences beliefs, emotions, or behavior by what it expresses, an *expressive theory of law's effects*; (2) that expressive politics determine the content of law, an *expressive-politics theory of law*; (3) that the normative status of law depends on its meaning, a *normative theory of expressive law*; and (4) that the normative status of the private behavior the law regulates depends on its meaning, a *normative theory of expressive conduct*.[8]

Only the first of these categories (the one in italics in Figure 1.1) is the main subject of this book. The coordination and information theories are *expressive theories of law's effects* (category 1). Although I emphasize *behavioral* consequences throughout, there are other consequences. In my behavioral theories, for example, legal expression first changes beliefs, which in turn changes behavior. Yet belief change by itself is an expressive consequence. Indeed, perhaps the most obvious expressive effect is the emotional reaction to the beliefs the law inspires. If one subjectively feels respected by the law, that gain is an expressive consequence. If one feels disrespected, that loss is an expressive harm. I shall occasionally refer separately to these reactive emotions, but the main event here is behavior.

Now let's consider the other three categories. A prominent example of an *expressive-politics theory of law* (category 2) is Joseph Gusfield's explanation

Positive Claims	1: *expressive theories of law's effects*	2: expressive-politics theory of law
Normative Claims	3: normative theory of expressive law	4: normative theory of expressive conduct

FIGURE 1.1 Categories of Expressive Claims About Law