

The Expressive Function of Law and the *Lex Imperfecta*

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Abstract — Legal scholars have developed the thesis that a law may convey a social meaning that reinforces or changes the norms of a community, beyond its role in establishing and enforcing rules. This is described as the expressive function of law. It is associated with the University of Chicago, though its adherents are spread more widely. At its core it invites us to consider how rules alter the social meaning of behavior, and in its more muscular forms it acknowledges and even promotes laws that create new norms of behavior. The ways in which individual scholars treat collective action problems, rational choice, and the role of government, vary considerably, however. This article suggests that the Romans themselves implicitly recognized the expressive function of law and indeed employed it with success. The principal example is the *lex imperfecta*. This is a term from antiquity, somewhat disputed, used to describe a statute that prohibits or discourages behavior without assigning a penalty or otherwise voiding the effects of the underlying acts. Other examples from antiquity are considered also.

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I. Introduction: possibilities and problems

My intention is to introduce to some and clarify for others an approach to the understanding of how law works — the expressive function of law — that has received a great deal of attention in the United States in the last twenty years or so, and to indicate some possible applications to the study of Roman law.¹ We can as a point of departure define the expressive function of law as the ability of law, beyond establishing and enforcing rules, to express those rules as a social meaning that can reinforce or change the norms of a community.

A convenient place to begin a discussion lies in the origins of theorizing on this subject, which is closely associated with the University of Chicago. This leads to consideration of the work of some of the leading exponents: Cooter, McAdams, and Sunstein. The focus then shifts to the subject of norms, for reasons that will soon be clear. Next are some instances of legal regulation where the expressive function of law has been thought to play a role. There follows a discussion of the limitations and failures of expressive law theory. We then examine some areas of ancient law where expressive law theory has been invoked in recent years. A modest suggestion of where else we might expect to find the expressive function of law operating in antiquity focuses on the *lex imperfecta*. A brief conclusion rounds off the discussion, with some ideas for future enquiry.

My approach might be described as cautiously optimistic. I try consistently to drive home a point I might as well make at the outset. Expressive law theory is no panacea for legal historians. It is highly controversial in many important respects, and hardly explains all that it sets out to explain. It is no substitute for more traditional methods employed by scholars of Roman law, above all close and careful exegesis of the sources. My goal is the modest one of suggesting that there are a few places in which the sort of insight that expressive law theory offers can be usefully deployed to enhance our understanding of how ancient law — some of it anyway — actually may have worked or may not have worked.

II. Origins: a tale of two schools?

Scholarly concerns with the expressive function of law can be

¹ A fuller and more detailed discussion will appear in T. A. J. McGinn, “La funzione espressiva del diritto,” *Rivista giuridica del Molise e del Sannio* (forthcoming).

traced back at least to the early to mid-1990s.² According to a widely accepted narrative, a development occurred at that time led by legal scholars associated with the University of Chicago.³ What appears to have happened is that a longstanding interest in the study of law and economics was transformed into something new. In other words, the *Old Chicago School* somehow gave rise to the *New Chicago School*.⁴ Let me describe briefly each in turn.

The Old Chicago School (OCS) has a deep interest in the impact of law on behavior. Its exponents examine behavior in economic terms. They view this as consisting of choices that are determined by a rational evaluation of alternatives based on adequate available information about the costs and benefits — in sum, the consequences of each alternative. The goal of such decision-making is assumed to be the maximizing of utility as determined by the preferences of each individual. The OCS then is a branch of what is called neo-classical economics, with its model of rational persons making fully-informed choices aimed at maximizing their utility. These scholars regard the preferences in question as “exogenous and immutable.”⁵ Law in their view can really only affect the opportunity to pursue preferences by in-

² There is broad agreement that R. C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, MA 1991), is a foundational text for expressive law theory. Ellickson examines the interactions between farmers and ranchers in Shasta County, CA, finding that, instead of relying on law, the principals tended to resolve disputes through cooperation. The chief means of enforcing this social norm was ostracism. For a recent critique, see D. Litowitz, “A Critical Take on Shasta County and the ‘New Chicago School’,” *Yale J.L. & Human.*, 15:2 (2013), 295–332.

³ Here I follow in the main L. Lessig, “The Regulation of Social Meaning,” *U. Chi. L. Rev.*, 62 (1995), 943–1045; L. Lessig, “The New Chicago School,” *J. Legal Stud.*, 27 (1998), 661–91; M. Tushnet, “Everything Old is New Again’: Early Reflections on the ‘New Chicago School’,” *Wis. L. Rev.*, (1998), 579–90; and A. Geisinger, “A Belief Change Theory of Expressive Law,” *Iowa L. Rev.*, 88 (2002), 37–73. For an important challenge to this narrative, see below.

⁴ The latter title — and so by implication the contrast between the two “schools” — is attributed to Lawrence Lessig, then Professor at the University of Chicago Law School. See Lessig, “New Chicago School” (note 3), 661, where he avers to adopt the term “playfully.” See also below in the text for important qualifying language.

⁵ For this phrase, see K. G. Dau-Schmidt, “An Economic Analysis of the Criminal Law as a Preference-Shaping Policy,” *Duke L.J.*, 1 (1990), 9. Dau-Schmidt argues for a role for criminal law in shaping not just opportunities, as avatars of the OCS had been accustomed to do, but preferences as well. His discussion of criminal penalties in particular (30–32) might be termed proto-expressivist. So the thrust of the article suggests that the OCS was experiencing an internal development pointing in the direction of expressivism.

creasing or decreasing the costs of each.⁶

For some, this means (over-)privileging the role of law, while others ascribe to law a relatively limited utility, regarding this as something entirely separate from, and somewhat inferior to, social norms, which they think better placed to influence people's behavior.⁷ In fact different branches of the OCS tend to favor different constraints on behavior as opposed to law.⁸ One privileges social norms, believed to be something entirely independent from law. Another, perhaps the largest and most influential, favors the marketplace, conceived as an institutional means of maximizing utility in the most rational way. A third privileges a set of constraints in the physical setting (but now no longer limited to this), commonly defined as "architecture."⁹

So what then is the New Chicago School (NCS)? First, to make a point that may or may not be obvious: in both cases "Chicago School" is in no small measure a term of convenience and therefore something of a misnomer. Not everyone who agrees with the tenets of either Chicago School teaches at the University of Chicago and not everyone who teaches there agrees with these tenets, and even those who do agree may disagree over key points.¹⁰ Also worth pointing out is that even among their leading scholars no one seems to devote him- or herself to this pursuit on a full-time basis.¹¹ It is more accurate to characterize both as branches of the study of law and economics, with notable overlap between them. This is, however, potentially confusing over the course of an extended discussion, so it seems preferable to identify them as the OCS and NCS, with the acknowledgment that this is in no small measure a heuristic tactic.

The exact nature of the relationship of the NCS with the OCS is a matter of some discussion, meaning controversy, but the two do seem to have much in common.¹² For example, although

⁶ So Geisinger (note 3), 38. Cf. R. C. Ellickson, "Law and Economics Discovers Social Norms," *J. Legal Stud.*, 27 (1998), 540, who for this very reason claims that the OCS exaggerates the role of law. See below.

⁷ In simplified terms, these are the two theories of social control criticized by Ellickson (note 2), 133–55 in his path-breaking book.

⁸ For these three strains of the OCS, which he characterizes as "departments," see Lessig, "New Chicago School" (note 3), 665–66.

⁹ For more on "architecture," which has been taken up by exponents of the NCS, see McGinn (note 1).

¹⁰ See Ellickson (note 6), 548 n.55. Thus the NCS, like the OCS, is a brand, not a place.

¹¹ Moreover, a number of scholars have changed their views over time, as we will see below.

¹² The overlap is considered by some to be so great as to raise the

some adherents of the NCS have rejected the rational choice model, in favor for example of a theory of “bounded rationality,” others have not, so that to an extent the same rationale explains obedience to legal and non-legal “rules” across “schools.”¹³ Like the OCS, the new school focuses on social norms as in some way doing the work of law by providing non-material incentives for or against certain behaviors.

Unlike its predecessor, the NCS does not regard these norms as operating independently of law. They only function independently of the enforcement mechanism of the law, that is, the fines, imprisonment, or other civil and criminal penalties laid down by statute.¹⁴ These scholars regard law, in addition to establishing these sanctions, as encouraging adherence to its rules through anticipated or actual criticism by others for failure to obey it and an internal desire to do so, i.e., through ostracism, shame, and humiliation.¹⁵ In other words, they view law as capable not simply of increasing or decreasing the cost of pursuing certain preferences but of changing or sometimes reinforcing those preferences, and this not simply through a physical, material means but through an interpretive one.¹⁶ Like it or not, law produces social norms.¹⁷ And just as law produces norms, so norms can produce law.¹⁸

Sometimes exponents of the NCS draw a distinction between law’s direct influence as a constraint on human behavior and its indirect influence, through norms.¹⁹ There is regulation, and there is meta-regulation.²⁰ What matters is the ultimate change

question of what is “new” about the NCS. See, for example, Tushnet (note 3), 580–82, and the discussion below.

¹³ Lessig, “Regulation of Social Meaning” (note 3), 996, 1001, 1006, 1015, 1021, 1028; E. A. Posner, *Law and Social Norms* (Cambridge, MA 2000), 44–46 (expresses reservations over the bounded rationality model); Geisinger (note 3), 38–39.

¹⁴ Even so, any penalty may be conceded a social meaning in the analysis of some scholars. See, e.g., D. M. Kahan, “What Do Alternative Sanctions Mean?,” *U. Chi. L. Rev.*, 63 (1996), 591–653, and D. M. Kahan, “Social Influence, Social Meaning, and Deterrence,” *U. Va. L. Rev.*, 83 (1997), 349–95. There is also discussion of whether norms can be effectively changed or reinforced in the absence of sanctions: see note 51.

¹⁵ C. Sunstein, “Social Norms and Social Rules,” *Colum. L. Rev.*, 96 (1996), 941–44.

¹⁶ This is described as “preference adaptation” by Kahan, “What Do Alternative Sanctions Mean?” (note 14), 603. The idea traces back to Dau-Schmidt (note 5).

¹⁷ Lessig, “Regulation of Social Meaning” (note 3), 947, 951.

¹⁸ For a different view, see Posner (note 13), 34.

¹⁹ Lessig, “New Chicago School” (note 3), 666.

²⁰ Id., 672.

in social meaning, which can vary over time and from place to place, and which can operate independently of changes in the law.²¹

In sum, expressive law theory focuses on law's ability to reinforce or alter the social meaning of a given behavior. It represents a deliberate attempt at social construction.²² Once one accepts this ability as a basic premise it is but a short step to contemplating the instrumental potential of expressive law theory: if law really can affect the way people think and behave, how can we use law to make people think and behave better? That is the thinking of the norm-interventionists in the NCS,²³ who appear to be in the ascendancy, in contrast with the norm-libertarians, who tend to be skeptical concerning such matters, certainly beyond the scope of the criminal law.²⁴

III. What is a norm?

At this point it might be useful to offer a few reflections on what we mean by "norm" in this context. It is an almost inherently ambiguous word. One reason is that it commonly describes routine behavior — what most people do most of the time — so that it has a descriptive sense, and it also commonly refers to what people ought to be doing, in this way synonymously with "rule," so that it has a prescriptive sense.²⁵ Partly for this reason, it is hardly surprising that expressive law theorists define "norm" in different ways.²⁶ The good news is that they tend to recognize this fact explicitly, which makes it easier to discount some of their differ-

²¹ For a recent exploration of the meaning of "meaning" in expressivist terms, see R. H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge, MA 2015), 240–48.

²² Lessig, "Regulation of Social Meaning" (note 3), 948, 962; Kahan, "What Do Alternative Sanctions Mean?" (note 14), 624, 629; Kahan, "Social Influence" (note 14), 362.

²³ Lessig, "Regulation of Social Meaning" (note 3), 956, 962.

²⁴ See Posner (note 13), who makes a general case for law's role in supporting good norms and thwarting bad ones, though with some hesitation about practical applications.

²⁵ For a cumulation of the two senses given in the text, see Lessig, "New Chicago School" (note 3), 662, with C. A. H. Wells, "The End of the Affair?: Anti-Dueling Laws and Social Norms in Antebellum America," *Vand. L. Rev.*, 54 (2001), 1809; R. H. McAdams, "Conformity to Inegalitarian Conventions and Norms: The Contribution of Coordination and Esteem," *The Monist*, 88 (2005), 253.

²⁶ E. A. Posner, "Law, Economics, and Inefficient Norms," *U. Pa. L. Rev.*, 144 (1996), 1699; R. H. McAdams, "The Origin, Development, and Regulation of Norms," *Mich. L. Rev.*, 96 (1997), 340–42, 350–51; Ellickson (note 6), 549; Posner (note 13), 7–8, 34.

ences and proceed to generalize.²⁷

Most would define a “norm” in something like the following terms: a non-legal rule supported by a pattern of informal, meaning again non-legal, sanctions. These sanctions include public shaming, criticism, even ostracism, directed at the norm-breaker as well as feelings of guilt and/or shame that arise on the part of the norm-breaker. As one can see, there are two basic categories of impact. Different scholars describe them in different ways; one for example distinguishes between second and third order effects, with the second applying to the external level, the third to the internal,²⁸ while another describes the difference in terms of “objective” and “subjective,”²⁹ and another between controlling behavior directly and indirectly.³⁰ The relationship between these two categories is perhaps more complex than at first it might appear, in that reputation can have an impact on status and that, in turn, might influence the attitudes individuals hold about respecting norms. Either one may be in play at any given time, or both.

Much of the discussion focuses on the question of internalization, which concerns law’s role in both reinforcing and altering social norms. It can refer to either of the two categories of effects just described, though it seems to receive more attention on the subjective level. In any case what is crucial here is the question of a change in social meaning.³¹ How does the law encourage people to take an existing norm more seriously, to adopt a new norm, or to reject a bad one? The NCS recognizes that some norms are more resistant to change than others, but has no generally accepted theory on how internalization works.³²

²⁷ For an interesting discussion of this problem, in which in place of a definition the authors offer a series of subtypes populated by examples, see T. L. Meares and D. M. Kahan, “Law and (Norms of) Order in the Inner City,” *Law & Soc'y Rev.*, 32 (1998), 807.

²⁸ Geisinger (note 3), 39.

²⁹ Lessig, “New Chicago School” (note 3), 677.

³⁰ C. Sunstein, “On the Expressive Function of Law,” *U. Pa. L. Rev.*, 144 (1996), 2024.

³¹ Ellickson (note 6), 449, prefers the phrase “social reception” to “social meaning.”

³² Geisinger (note 3), 43; cf. Lessig, “New Chicago School” (note 3), 682–84, and R. H. McAdams, “The Focal Point Theory of Expressive Law,” in F. Parisi, ed., *Production of Legal Rules* (Cheltenham 2011), 167, who notes the general problem and some of the exceptions to the rule, that is, attempts to develop such a theory, which are discussed throughout this article.

IV. Theoretical approaches

It is opportune here to set forth some of the main theoretical approaches that have been taken to the problem of laws, norms and social meaning. At the same time, it seems easier to focus on some of the individuals behind the ideas in order to think more clearly about the key issues in play.³³

We begin with Robert Cooter, from Berkeley Law School, who focuses on how the process of internalization works.³⁴ Cooter emphasizes the role played by the opinions of other persons, as well as the importance of the idea of obeying the law as a morally correct act — an exercise in civic virtue. He believes that perceptions of self-interest cause people to change their preferences in a rational way.

Like other expressive law theorists, Cooter deals with what specialists call “collective action problems.”³⁵ There are two main types, both of which draw on Game Theory. One is the “cooperation problem,” where ideals of the common good conflict with individual self-interest, such as with littering or cleaning up after one’s dog.³⁶ It is exemplified by the “Prisoners’ Dilemma” (often abbreviated as “PD”), where the rational — but not optimal — outcome is betrayal, not cooperation, with one’s partner.³⁷ The other is the “coordination problem” for which the most popular

³³ The choice of whose work on which to focus in what follows may seem somewhat arbitrary but is not, I would aver, entirely random. For a justification, see McGinn (note 1), with the added discussion of the work of other scholars which could not be included here.

³⁴ See, e.g., R. Cooter, “Expressive Law and Economics,” *J. Legal Stud.*, 27 (1998), 585–607, and R. Cooter, “Do Good Laws Make Good Citizens?: An Economic Analysis of Internalized Norms,” *Va. L. Rev.*, 86 (2000), 1577–1601.

³⁵ See, e.g., E. S. Anderson and R. H. Pildes, “Expressive Theories of Law: A General Restatement,” *U. Pa. L. Rev.*, 148 (2000), 1514–31.

³⁶ Sunstein (note 15) 957.

³⁷ The Prisoners’ Dilemma is frequently cited but not often explained in expressivist literature, which it predates. Put simply, two suspects are apprehended for a major crime and interrogated separately. According to a standard set of premises, if neither confesses, the authorities will be able to confine them only for a lesser offense, say, for one year. If both confess, the term increases symmetrically to two years for each. If one does and the other does not, the result is no time in prison for the informant and three years for his reticent colleague. For a lucid discussion, see J. Hirshleifer, “Evolutionary Models in Economics and Law: Cooperation versus Conflict Strategies,” *Research in Law and Economics*, 4 (1982), 17, and now McAdams (note 21), esp. 24–42. For obvious reasons the dilemma can also be analyzed as a coordination problem: Posner (note 26), 1714–15; Posner (note 13), 13–18; McAdams (note 32), 171; McAdams (note 21), 29–32; cf. Sunstein (note 30), 2029.

example is perhaps the question of what side of the road we drive on. Right or left does not matter from the perspective of utility.³⁸ The choice in this sense is an arbitrary one, though for obvious reasons it is usually better to have government dictate what convention to follow rather than leaving people to sort this out on their own.³⁹

Without anticipating the results of this study, it is worth noting here that there are plenty of instances in the ancient Roman experience where the legal and political authorities address each type of collective action problem. For cooperation problems we have only to look at the law's attempts to balance the interests of traditional sources of authority, such as slave-owners and *patres familias*, against those of the entire class or category of the same, or even — we might say — society as a whole. Examples can be found in the efforts of emperors and jurists to enforce the restrictive covenants forbidding prostitution and mandating manumission of slaves, as well as other measures protecting slaves from mistreatment by their masters.⁴⁰ Examples of rules responding to coordination problems can be found in several areas of property law, such as those relating to ownership and possession, servitudes, and real security. Regulation of the dowry is another area of the law that contains much of relevance regarding attempts to confront coordination problems.

³⁸ See, e.g., R. H. McAdams, "The Expressive Power of Adjudication in an Evolutionary Context," in P. Zumbansen and G.-P. Calliess, eds., *Law, Economics and Evolutionary Theory* (Cheltenham 2011), 162, 167; McAdams (note 21), 22, 76–82, 99–100 (also considering other traffic regulations from a similar perspective).

³⁹ This example is popular perhaps because it is a relatively rare specimen of a "pure" coordination problem in that there is no conflict of interest in play, whereas most instances involve a mix of coordination and conflict: see McAdams (note 32), 167–68.

⁴⁰ On the covenants, see T. A. J. McGinn, *Prostitution, Sexuality, and the Law in Ancient Rome* (New York 1998), ch. 8 generally, and in particular (at 306–11) for imperial legislation protecting slaves against ill treatment of masters as exemplified by such sources as Ulp. (8 *de off. procons.*) D.1.6.2 = [with minor changes] Coll. 3.3.1–3 (Ulpian) = [in part, with changes] G.1.53 = [in part, with changes] Gaius (1 *inst.*) D.1.6.1.2 = [in part, with changes] I.1.8.2; D.1.12.1.8 (Ulp. *lib. sing. de off. praef. urbi*). For an interesting discussion of G.1.53, with recent literature, see A. Caravaglios, ". . . *Male nostro iure uti non debemus*: Abuso di diritto o eccesso di potere nell'esercizio di un diritto?", in F. Reinoso Barbero, ed., *Principios generales del derecho: Antecedentes históricos y horizonte actual* (Madrid 2014), 663–83. On restrictions placed on the treatment of children-in-power by *patres familias*, see T. A. J. McGinn, "The Marriage Legislation of Augustus: A Study in Reception," *Legal Roots: Int'l J. Roman L., Legal Hist. & Comp. L.*, 2 (2013), 7–43.

Richard McAdams, at the University of Chicago Law School since 2007, offers a number of ideas about how expressive law works. Two of his major theories concern focal points and attitudes.⁴¹ Law can provide a way of sorting out coordination challenges by offering focal points to help guide behavior such as determining on which side of the road people should drive. As for attitudes, law, especially statute — at least in a democracy, theoretically — provides information on how other people think about a given subject.⁴² In other words, it can communicate information about behavior that is socially approved or disapproved that can in turn have an effect on how people actually behave.

McAdams takes a particular interest in attempting to explain why the expressive function of law does not always work.⁴³ His categories of explanation include the lack of the element of coordination, such as in the Prisoners' Dilemma, lack of publicity for a legal rule, its unclear content, and its controversial nature, controversial perhaps because it is in competition with other factors, presumably other norms.

Next is Cass Sunstein, for years at the University of Chicago, more recently at Harvard, and in-between the Administrator for the Office of Information and Regulatory Affairs at the White House from 2009–2012.⁴⁴ Sunstein raises some interesting challenges to the rational choice model. Not all norms are perfectly rational, in that some encourage risk-taking behavior, involving for example the use of drugs or alcohol, or reinforce inequality for certain groups in the population.⁴⁵ Often people deviate from economic predictions, that is, they seem not to maximize their

⁴¹ For the first, see R. H. McAdams, "A Focal Point Theory of Expressive Law," *Va. L. Rev.*, 86 (2000) 1649–1730; McAdams (note 38), esp. 162; McAdams (note 32); McAdams (note 21), 22–135; for the second, see R. H. McAdams, "An Attitudinal Theory of Expressive Law," *Or. L. Rev.*, 79 (2000), 339–90; McAdams (note 21), 136–98, though in the latter work an emphasis on "information" largely supersedes that on "attitude." On "esteem theory," see McAdams (note 26), 7; McAdams (note 21), 139. On the "Condorcet Jury Theorem," see D. Dharmapala and R. H. McAdams, "The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law," *Am. L. & Econ. Rev.*, 5 (2003), 1–31; McAdams (note 21), 157–60.

⁴² See in particular Dharmapala and McAdams (note 41); McAdams (note 21), 136–68. See also Geisinger (note 3).

⁴³ McAdams (note 31), 171. See now McAdams (note 21), 16–21, 154, 157, 175, 180, and 186 on the limits of expressivist theory.

⁴⁴ On this experience, see now C. Sunstein, *Valuing Life: Humanizing the Regulatory State* (Chicago 2014), esp. 13, 24–26, on the effect of proposed rules and "guidance documents" on people's behavior.

⁴⁵ Sunstein (note 15), 908, 916.

“expected utility,” because of existing norms.

Instead of classifying such behavior as irrational, however, Sunstein by and large redefines the concept of rational choice, by arguing that such behavior represents a rational response to norms that most individuals are in no position to change.⁴⁶ So disobedience to a new norm advanced by a law can be explained as consistent with the conflicting norm of a subgroup.⁴⁷ The state through its lawmaking can attempt to inculcate or discourage feelings of shame, which many people might regard as an emotional reaction but in his view this is — ideally — accomplished for a rational purpose and — ideally again — met with a rational response.⁴⁸ Good social norms, when they are widely accepted, help solve collective action problems by encouraging people to do useful things like recycling that they might not do without the relevant norms in place.⁴⁹

For me, one of the most valuable aspects of Sunstein’s analysis is his insistence in distinguishing between laws that attempt to change norms — consequentialist, as he terms them — and those that simply make a statement.⁵⁰ The latter are often definable as in some sense symbolic, especially, or perhaps even solely, where they lack a sanction, or at least an effective one. Whether these are truly “expressive” in nature may be left aside for now.⁵¹ In Sunstein’s view, a satisfactory type of expressive

⁴⁶ Id., 909–11, 935, 959; cf. 938. One should note that Sunstein’s later work, increasingly relying as it does on behavioral economics, shows an ever-keener interest in explaining and where possible accommodating irrational behavior. See, e.g., Sunstein (note 44) and below on “nudge theory.”

⁴⁷ Sunstein (note 15), 940.

⁴⁸ Id., 913, 941–44.

⁴⁹ Id., 918.

⁵⁰ Id., 2028, 2045–48. Kahan, “Social Influence” (note 14), 363, makes a similar distinction.

⁵¹ This important issue tends to resolve itself into a debate over the effectiveness of “expressive” norms that are not, and in some cases cannot be, supported by coercive penalties. An acute challenge along these lines arises in the field of international relations. See A. Geisinger and M. A. Stein, “A Theory of Expressive International Law,” *Vand. L. Rev.*, 60 (2007), esp. 114–16, who distinguish among approaches involving persuasion, reputation, and coercion, all of which might in some sense however be regarded as invoking sanctions. McAdams (note 21), 6–7, 62, 173, 199–232 argues that sanctions are not always strictly necessary for rules to have expressive power, not least in the areas of international (67–70, 201) and constitutional (71–76) law. While admitting that purely symbolic rule-making is possible, he tends however to discount the importance of the “merely,” “wholly,” “entirely” or we might say inertly symbolic, insofar as an attempt to influence behavior is usually in play. Id., 12–16, 248–59.

law attempts to impose a legal mandate in place of a “good” norm, accompanied by penalties that are genuinely enforced.⁵² That is not to say that you cannot have expressive laws without vigorous enforcement, provided that they attempt to support or change a norm.⁵³ The key is that “without desirable effects on social norms, there is not much point in endorsing expressively motivated law.”⁵⁴ All the same, “[t]he criminal law is a prime arena for the expressive function of law,”⁵⁵ and the point is that expressivism and consequentialism, to use his terminology, ideally coincide.

Sunstein introduces the idea of norm cascades, where changes in norms occur relatively rapidly on a large scale.⁵⁶ As more and more people accept a norm and conform to it in their behavior, the pressure on others to do the same grows more intense. At times one finds uncritical acceptance of change and over-correction of existing views.⁵⁷ This does not of course mean that everyone will accept the new norm. Conflict and tension are not to be discounted.⁵⁸ Still the observable change can be remarkable with one of these norm cascades. Examples include South Africa with the end of apartheid and Eastern Europe with the end of communism;⁵⁹ more recently there is the ever-accelerating social and legal recognition granted same-sex marriage in the United States.

Finally, there is the role of government in reinforcing good norms and changing bad ones. This may emerge in education, persuasion, taxing or subsidizing certain behaviors, and coercion. All of these can qualify as manifestations of expressivism.⁶⁰ As for his optimism that government can operate in this way without infringing on rights, in some respects this might be regarded as

⁵² Sunstein (note 30), 2032.

⁵³ Id., 2032.

⁵⁴ Id., 2047.

⁵⁵ Id., 2044.

⁵⁶ Id., 2033; see also Kahan, “Social Influence” (note 14), 359.

⁵⁷ A phenomenon termed an “availability cascade” by T. Kurian and C. R. Sunstein, “Availability Cascades and Risk Regulation,” *Stan. L. Rev.*, 51 (1999), 683–768.

⁵⁸ Sunstein (note 15), 925; see also Geisinger (note 3), 68, and the more recent work on “cultural cognition” showing resistance to factual information that conflicts with one’s worldview. See, e.g., D. M. Kahan and D. Braman, “Cultural Cognition and Public Policy,” *Yale L. & Pol’y Rev.*, 24 (2006), 149–72; D. M. Kahan and D. Braman, “The Self-Defensive Cognition of Self-Defense,” *Am. Crim. L. Rev.*, 96 (2008), 269–374; D. M. Kahan, “Ideology, Motivated Reasoning, and Cognitive Reflection,” *Judgment and Decision Making*, 8 (2013), 407–24.

⁵⁹ Sunstein (note 15), 930.

⁶⁰ Id., 948–52.

“easier said than done.”⁶¹

In recent years, publication on expressive law seems to have slowed somewhat, though it shows no signs of ceasing.⁶² One development in particular deserves to be noted, often described as “nudge theory.” Arising from the field of behavioral economics and with deep roots in over three decades of research in cognitive psychology, nudge theory recognizes that individuals do not always make optimal choices for themselves and seeks a remedy by advocating a modest role for government in influencing decision-making and in shaping the popular reception of policy.⁶³ Instead of advocating deregulation or having the State intervene through heavy-handed command and control regulation, its advocates propose a “Third Way,” attempting to leave the widest possible freedom of choice consistent with some role for government. Their proposed methods involve the deployment of what they call “choice architecture,” meaning the arrangement of the context in which individuals make decisions in order to assist them in overcoming the ill effects of various cognitive biases, while allowing them the maximum amount of discretion. The goal is ideally to encourage outcomes in which people are better off as judged by

⁶¹ See Lessig, “Regulation of Social Meaning” (note 3), 1035, 1041; Sunstein (note 15), 966, and Section VI below. On Sunstein’s role with respect to “nudge theory,” see note 63.

⁶² One should note the continuing contributions of Richard McAdams, discussed above in this section. See also, for example, D. K. Citron, “Law’s Expressive Value in Combating Cyber Gender Harassment,” *Mich. L. Rev.*, 108 (2009), 373–415, on sexual harassment in cyberspace; Geisinger and Stein (note 51), on international law; D. Dunson, “A Right to a Word?: The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage,” *Albany Gov’t L. Rev.*, 5 (2012), 552–612, on same-sex marriage; O. H. Dombalagian, “The Expressive Synergies of the Volcker Rule,” *B.C. L. Rev.*, 54 (2013), 469–533, advocating implementation in an expressivist manner of the Volcker rule (on banking regulation), and the literature cited at McAdams (note 21), 265 n.1.

⁶³ The work perhaps most closely identified with this theory is R. H. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, rev. ed. (New Haven 2009). See also D. Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York 2008) and D. Ariely, *The Upside of Irrationality: The Unexpected Benefits of Defying Logic at Work and at Home* (New York 2010) for a particular focus on the role of irrationality in decision-making. See C. Sunstein, “Behavioral Economics and Paternalism,” *Yale L.J.*, 122 (2013), 1826–99; Sunstein (note 44) and C. Sunstein, *Why Nudge?: The Politics of Libertarian Paternalism* (New Haven 2014) for his reflections on his experience with nudge theory as a government official, his restatement of the theory, and his response to critics. See also now C. Sunstein, *Choosing Not to Choose: Understanding the Value of Choice* (New York 2015).

themselves, so aligning their choices with their truer preferences, or even more ideally experience an objectively optimal result. Its avatars characterize the theory with language they argue is only apparently an oxymoron, “libertarian paternalism.”⁶⁴

V. Application of expressive law theory: some examples

Expressive law scholars especially favor examples of the phenomenon under study such as ordinances insisting that people clean up after their dogs, that they not litter, or that they not smoke in certain public places. The reason for this preference is that such rules are not usually aggressively enforced by the authorities and so criminal prosecutions for offenses of this kind are rare to the point of non-existent. But these ordinances have an effect — sometimes a marked effect — in influencing social norms and social meanings.⁶⁵ This is to judge from their evident success in many places. But what explains this? Sunstein claims that their ability to shape social norms and meanings arises “in large part because there is a general norm in favor of obeying the law.”⁶⁶ Shame and pride are at stake and people adjust their personal calculations of self-interest to reflect the new rule.

This does not explain why some such laws succeed and others fail.⁶⁷ To take a tale of one city: Mayor Michael Bloomberg evidently enjoyed great success with his ban on smoking in restaurants and bars in NYC, which is now more than a decade old.⁶⁸ On the occasion of its tenth anniversary, he was able to cite health benefits, such as 10,000 deaths allegedly avoided; the flattery of imitation, so that at least 500 cities in the US have since implemented similar policies; and economic success, namely, a 50% increase in the revenues for the hospitality industry in NYC since March 30, 2003.⁶⁹ A sign of its success is that, remarkably, the bar and restaurant owners who vigorously opposed the ban at the start now support it. Why then did the good Mayor endure such miserable failure with his campaign limiting the sale of huge sugared soft drinks?⁷⁰

⁶⁴ For more on nudge theory and its critics, see McGinn (note 1).

⁶⁵ Sunstein (note 15), 958.

⁶⁶ Id., 958–59.

⁶⁷ See Ellickson (note 6), 550–52.

⁶⁸ On smoking bans more generally, see McAdams (note 21), 100–106, 197.

⁶⁹ H. Bailey, “Bloomberg Touts 10-Year Anniversary of Smoking Ban,” *Yahoo! News: The Ticket* (Mar. 27, 2013) (website).

⁷⁰ See R. Calo, “Code, Nudge, or Notice?” *Iowa L. Rev.*, 99 (2014), esp. 776; B. Galle, “Tax, Command . . . or Nudge: Evaluating the New Regu-

Let us take another of their favored case studies, that concerning dueling. Lawrence Lessig describes how in the nineteenth-century American South a number of states attempted to repress this practice.⁷¹ This was a custom, as many are aware, among male members of the elite whereby an insult would give rise to a confrontation between two parties armed with pistols that often resulted in the death or serious injury of one of the pair. Lessig points out the disproportionality of the procedure.⁷² A very serious consequence might derive from a very minor social slight. He also notes its random outcome. It seems just as likely to have punished — severely — the innocent as much as the guilty. Reliable numbers are not available but deaths were far from rare events and prominent persons were among those killed.⁷³ Given this dysfunctionality, it is not surprising that a number of states outlawed the practice, prescribing criminal penalties for violators. This does not seem to have worked, in part, according to Lessig,⁷⁴ because the rules were not enforced. Another more promising solution was available, however, that of banning violators from holding public office.

Lessig also explains the failure of criminal penalties in terms of elite solidarity: members of the upper classes simply refused to recognize the ban and preferred to accept the penalties rather than the loss in esteem they anticipated enduring from their peers. On the other hand the deprivation of public office in his words “might actually have been more effective” because it “served to ambiguate” the social meaning of dueling, posing a conflict between the idea of dueling as a marker of elite status and that of holding public office as a marker of elite status.⁷⁵ So it allegedly “facilitated the transformation of the social meaning of dueling itself.”⁷⁶

A couple of problems arise, however. One is that it is hard to see why, if the deprivation of public office had this effect, the imposition of criminal penalties did not change the social meaning of dueling too. Actually it did, at least to the extent that some

lation,” *Texas L. Rev.*, 92 (2014), esp. 839 n.7 (on similar initiatives proposed or adopted elsewhere), 885–87 (Bloomberg’s policy has much to recommend it, particularly when compared to a tax); Sunstein, *Why Nudge?* (note 63), 52, 75–80.

⁷¹ Lessig, “Regulation of Social Meaning” (note 3), 968–72.

⁷² See also W. F. Schwartz, K. Baxter, and D. Ryan, “The Duel: Can These Gentlemen be Acting Efficiently?,” *J. Legal Stud.*, 12 (1984), 335.

⁷³ *Id.*, 325.

⁷⁴ Lessig, “Regulation of Social Meaning” (note 3), 970 n.79.

⁷⁵ *Id.*, 971–72.

⁷⁶ *Id.*, 972.

people invoked them as a reason to decline a challenge to a duel.⁷⁷ Moreover, Lessig himself admits that the “ambiguity” he cites seems to have failed as well. This is so because state legislatures continued to pass statutes “grandfathering,” that is excepting, all duels up to the date of the legislation.⁷⁸ It seems to me that this practice might explain the failure of the criminal penalties as well. The point is not so much that Lessig is absolutely wrong about the attempt to manage social meaning, but that his analysis of this case-study leaves something to be desired.⁷⁹

Lessig might have chosen a more suitable historical *exemplum* in the repression of “virgin suicides” in ancient Miletus. Plutarch and Aulus Gellius report an episode that took place in that city at an indeterminate time when for no apparent reason all or nearly all the young unmarried women determined to hang themselves and many succeeded in doing so.⁸⁰ All preventative measures failed, until a city ordinance was passed stipulating that the bodies of women who hanged themselves were to be paraded about naked in public.⁸¹ This put an immediate stop to the practice. We are not told whether the rule was ever enforced, but the prospect of enforcement was evidently taken seriously in this case.

VI. Criticism and failure

This is a good point to give some voice to the criticisms and

⁷⁷ Id., 971 n.83.

⁷⁸ The typical mechanism was to require an oath of an officeholder that he had not been a duelist and then to offer exemptions to individuals from the obligation to take the oath or to reenact the law requiring the oath punishing only prospective violations: J. K. Williams, *Dueling in the Old South: Vignettes of Social History* (College Station 1980), 67–69; Schwartz, et al. (note 72), 326–27.

⁷⁹ It was not long before Lessig’s argument came to be subjected to an extended anti-expressivist critique. See Wells (note 25) and the discussion in McGinn (note 1).

⁸⁰ Plut. *Mul. Virt.* 11 249B–D; Gell. 15.10. Such “copy-cat” or “cluster” suicides especially among young people are familiar from modern experience: L. Coleman, *Suicide Clusters* (Boston 1987).

⁸¹ Gellius adds that the noose used in the suicide was to accompany the naked body in question: 15.10.2. The Romans regarded hanging as a particularly ignominious form of suicide. See Serv. *in Aen.* 12.603, which offers an etiology of this attitude in the actions of Tarquinius Superbus, who, in order to deter those who, seeking to evade laboring on his public works projects, hanged themselves, ordered their bodies to be attached to crosses. If true, this would be a very early Roman example of expressive law policy: according to Servius, the change in social meaning regarding suicide by hanging remained successful down to his day.

failures of expressive law theory.⁸² It has low predictive capability with regard to future conduct in specific situations and cannot explain the motive for obedience in terms of distinguishing internalization of a norm from fear of sanctions.⁸³ The adherence to a rational choice theory poses challenges to interpretation on a number of levels.⁸⁴ It might be possible to explain some of the resistance to some new norms in terms of the existence of competing norms, or even norm subcommunities, as expressivists frequently do,⁸⁵ but there is something of a circular nature to this argument,⁸⁶ a point that not only brings into consideration the definition of subcommunity and how large and complex this can be, but raises the question of whether some cultures are more norm-resistant than others, and why that is so.⁸⁷

It is worth asking, among other things, if sheer emotion or

⁸² For a guide to some of the literature both criticizing and defending expressive law theory, see B. E. Harcourt, "After the 'Social Meaning Turn': Implications for Research Design and Methods of Proof in Contemporary Criminal Law Analysis," *Law & Soc'y Rev.*, 34 (2000), 180. I want to call attention to the extensive critique of M. D. Adler, "Expressive Theories of Law: A Skeptical Overview," *U. Pa. L. Rev.*, 148 (2000), 1363–1501. Though raising a number of valid points and pointing to genuine problems in the expressivist literature, Adler's conception of social meaning in narrowly linguistic terms detracts from his main arguments. See further Anderson and Pildes (note 35), 1564–75; the reply by Adler (M. D. Adler, "Linguistic Meaning, Nonlinguistic 'Expression,' and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes," *U. Pa. L. Rev.*, 148 (2000), 1577–94); and a defense by McAdams (note 21), 267 n.14.

⁸³ Geisinger (note 3), 50–51.

⁸⁴ Id., 54–55. The reliance on Game Theory partly explains this feature. See, e.g., McAdams (note 25), 247–50, who does however allow a role for social conventions promoting unfairness and also for bounded rationality. More generally, such adherence is explained as a legacy of the law and economics movement.

⁸⁵ Lessig, "Regulation of Social Meaning" (note 3), 961, 967; Sunstein (note 15), 918, 925, 939–40; Geisinger (note 3), 68.

⁸⁶ Cf. the account of Kahan, "Social Influence" (note 14), 350, 375, who shows how in some social settings criminal behavior can be viewed as status enhancing, even, or especially, when it leads to punishment, or at least certain forms of punishment. In context this response appears to be deemed rational in nature, however. I note McAdams's argument that often not a lot needs to be spelled out for social signaling to operate successfully: McAdams (note 25), 244.

⁸⁷ I am grateful to my colleagues at the University of Naples, especially Professors Cosimo Cascione and Osvaldo Sacchi, for their insights on this issue. Some recent work on "cultural cognition" theory addresses this problem; see, e.g., Kahan and Braman, "Cultural Cognition" (note 58); Kahan and Braman, "Self-Cognition" (note 58); Kahan, "Ideology" (note 58).

other non-rational motives may play a role in some of this resistance.⁸⁸ The same holds for the assertion that internalization cannot (always) be assumed to succeed⁸⁹ or that it is difficult to change culture / social meaning⁹⁰ or that some “types” of norms succeed and others fail.⁹¹ All true, perhaps, but not especially helpful.

On the other hand, objections that the efforts at social control that expressivists advocate amount to a nascent totalitarianism often seem overblown, especially when we contemplate the object of some of their actual or proposed reforms.⁹² Polemical language describing all or even some of these initiatives as instances of paternalism or an attempt to establish a Nanny State may (or may not) be acceptable as political argument but is not generally convincing in substance.⁹³ This is especially true given that some expressivists posit a limit on attempts to change norms where basic rights are concerned.⁹⁴ To be sure, unintended consequences are not unknown.⁹⁵ In any case we can dispense with these concerns, indeed, with many if not most of the criticisms noted here, as well as with the problems with prediction; in fact, the same holds for any facet of the instrumental aspect of expressivism. Our concern is after all with explaining the past, not predicting or influencing the future. We can leave all that to

⁸⁸ One may note an obvious challenge, in that different definitions of “rationality” and “emotion” are current. As seen above, avatars of economics and law tend to treat emotions as a rational response to a norm or its violation. There are exceptions, and there is in fact no small amount of discussion of this subject in this literature, though it is somewhat scattered. See McGinn (note 1).

⁸⁹ Lessig, “New Chicago School” (note 3), 680.

⁹⁰ Lessig, “Regulation of Social Meaning” (note 3), 957, 963; Tushnet (note 3), 588.

⁹¹ Lessig, “New Chicago School” (note 3), 683–84; McAdams (note 21), 166–68.

⁹² See Lessig, “New Chicago School” (note 3), 691; Tushnet (note 3), 587. I would posit as an exception Toni Massaro’s thoughtful criticisms: T. M. Massaro, “The Meanings of Shame: Implications for Legal Reform,” *Psychology, Public Policy, and Law*, 3 (1997), 645–704; T. M. Massaro, “The Gang’s Not Here,” *Green Bag* (2nd ser.), 2:1 (1998), 25–34.

⁹³ See Tushnet (note 3), 590. One should note the adoption of the slogan “libertarian paternalism” by advocates of nudge theory: above.

⁹⁴ Kahan, “What Do Alternative Sanctions Mean?” (note 14), 630; Sunstein (note 15), 966; Kahan, “Social Influence” (note 14), 390. For all that there is rather less discussion of ethics or morality in this literature than one might expect. Among the exceptions are Cooter (note 34), esp. 597, 600–607. See also Posner (note 26), 1709, 1720–21.

⁹⁵ Sunstein (note 30), 2028; McAdams (note 26), 349.

the University of Chicago.⁹⁶

More of a concern than the fact that some attempts at reinforcing or changing norms succeed and others fail and there is no way to predict the outcome is that only rarely have there been attempts to develop a theory to enable us to understand the reasons behind such success or failure.⁹⁷ A legitimate criticism of the expressivist literature is that it tends to offer “a rather high ratio of programmatic statements and illustrative (and short) anecdotes to actual investigations of real norms in real social settings.”⁹⁸ Proof of effectiveness in many if not most contexts seems elusive.⁹⁹ Another legitimate criticism is that its exponents show little interest in history.¹⁰⁰ Fair enough, but this raises the question of whether and to what extent one might apply the tenets of the expressive function of law to the evidence from antiquity. Aside from the instances mentioned above, is there reason to believe that the ancients attempted to change or reinforce the social meaning of certain behaviors through law? If so, were they successful?

VII. Applications to ancient law

I believe the answers to both of these questions are in the affirmative, and in support of this assertion it is possible briefly to introduce four recent articles which have examined this problem, two of them my own and two by other scholars. Three of these concern Rome, two examining specifically various aspects of Augustus’ so-called social and/or moral legislation, while the other discusses Republican sumptuary legislation. The fourth deals with ancient Athens.

The first of these is an article in which I examine the category of Augustus’ legislation identified by modern scholars as “social” or “moral” in nature, finding that much uncertainty reigns among

⁹⁶ To be clear, evaluating the success of a law in past time from an expressivist perspective, when information is available, simply seems easier and more reliable in principle than attempting to predict the future performance of one. “Easier” does not of course mean “easy”; see below.

⁹⁷ See above Section III.

⁹⁸ Tushnet (note 3), 586–87. See Kahan, “Social Influence” (note 14), 367, for a similar criticism.

⁹⁹ Harcourt (note 82), esp. 181, 186–97, emphasizing, among other things, the need for not just quantitative, but qualitative, analysis. The issue is taken up in McAdams (note 21), which is greatly concerned with matters of compliance: see esp. 3–4, 22, 135, 193, 233–59.

¹⁰⁰ For exceptions, see Lessig, “Regulation of Social Meaning” (note 3) on dueling; McAdams (note 21), 13–14, 202–203.

these scholars as to its definition and content.¹⁰¹ I suggest that the emperor's interest in social control through status-maintenance helps us understand them better, both as individual statutes and as a category. I begin by examining some laws that are not usually classed as social or moral to show how this concern with social control was more pervasive than it might otherwise appear, and then move on to discuss legislation that might fairly be regarded as lying at the heart of this category. These are in my view the marriage and adultery laws, the sumptuary law, and the laws on manumission of slaves.

The expressive function of law does not figure in this summary — so far. One focus of interest throughout the discussion concerns the effectiveness of these laws, and the light this factor is able to shed on Augustus' intentions in framing them in the first place. In other words, how serious was he about enforcing his rules, and to what extent were they in fact respected, as far as we can tell? I do not argue that all of these laws were effective, or that those that were effective were equally so, but I do conclude that most were more successful than they are usually assumed to have been. I reach this conclusion in part through examination of the concepts of legal symbolism and expressive law, which in my view help clarify important aspects of the enforcement of the rules deriving from this category of Augustan legislation. The question of enforcement leads us, of course, right back to the problem of social control. It is also of relevance to the issue of legislative intent and, in turn, to the problem of how to define this category of laws.

Concern with the effectiveness of the Augustan legislation has an excellent Romanist pedigree in the work of Dieter Nörr, which I discuss in the second article,¹⁰² one that is more specifically devoted to the Augustan marriage legislation — the two laws known by the composite title *lex Iulia et Papia* — or, more exactly, to its legacy in the classical period of Roman law.¹⁰³ Nörr

¹⁰¹ T. A. J. McGinn, "Something Old, Something New . . . : Augustan Legislation and the Challenge of Social Control," *Ancient Hist. Bull.*, 22 (2008), 1–32.

¹⁰² McGinn, "Marriage Legislation" (note 40). As a pure curiosity on this subject, I mention C. J. Reid, "Law Reform in the Ancient World: Did the Emperor Augustus Succeed or Fail in His Morals Legislation?," U. St. Thomas Legal Stud. Res. Paper no. 15-06 (2015).

¹⁰³ See D. Nörr, *Rechtskritik in der römischen Antike* (Munich 1974); D. Nörr, "Planung in der Antike: Über die Ehegesetze des Augustus," in H. Baier, ed., *Freiheit und Sachzwang: Beiträge zu Ehren Helmut Schelb-skys* (Opladen 1977), 309–34, repr. in T. J. Chiusi, et al., eds., *Dieter Nörr: Historiae Iuris Antiqui*, 2 (Goldbach 2003), 1093–1118; D. Nörr, "The

observes that the legislation did not provoke a reaction that criticized its purpose and aims in a fundamental way. This is somewhat surprising because, as he himself points out, these laws did inspire a response that was remarkable in its intensity, resounding more loudly perhaps than for any other legislation in the history of the Romans. This fact in itself seems largely to explain the pessimistic conclusion of many scholars that it was unsuccessful. How could such an unpopular measure enjoy anything but failure? Nörr rightly emphasizes that the criticism, fierce as it is, is overwhelmingly if not exclusively devoted to what we might describe as side issues, above all, the impact of the laws' penalties, and not least the activities of the *delatores* they unleashed on the upper reaches of Roman society.

The nature of the reception is also surprising because the laws were in conflict with values that were dear at least to some Romans.¹⁰⁴ Not everyone wished to marry and have children; some evidently thought that their primary relationship in life, whether marital or not, should be dictated by personal choice and not by the law, and there was not only a longstanding tradition of loyalty to a decedent spouse that militated against remarriage, especially for widows, in the face of the widespread upper-class practice of remarriage, but even some admiration for those who declined to divorce a spouse on the ground of childlessness. Despite some very partial, limited precedents, the laws were, regarding certain key aspects of their subject matter, and especially in their scope, strictly unprecedented, and so trespassed on the principle that law should not intrude in such a sphere to such a degree.

It is in these areas, where the values represented by the laws were in conflict with other values held by at least some Romans, that we find perhaps the bitterest criticism, some of which appears to come close to a critique of the legislation's fundamental purpose(s).¹⁰⁵ The reason why it does not go any further in this direction can be found in Nörr's entirely plausible explanation

Matrimonial Legislation of Augustus: An Early Instance of Social Engineering," *Irish Jurist* (n.s.), 16 (1981), 350–64, repr. in T. J. Chiusi, et al., eds., *Dieter Nörr: Historiae Iuris Antiqui*, 2 (Goldbach 2003), 1369–84.

¹⁰⁴ On expressivist recognition that law may reach more than a single audience, not all of whom may prove equally receptive, see McAdams (note 21), 20, 154.

¹⁰⁵ See above all Tac. *Ann.* 3.25–28, a text that merits more discussion than can be offered here. Suffice it to say that I do not believe it refutes Nörr's thesis. For now, see just Nörr, *Rechtskritik* (note 103), 63–64, 76–77; Nörr, "Planung" (note 103), 1099; Nörr, "Matrimonial Legislation" (note 103), 1373.

that Augustus successfully appropriated the traditional moral standards most widely shared among Romans. In other words he argues that the substance of Augustus' initiatives was grounded in deeply-rooted values to which the vast majority of his contemporaries subscribed.

It is rather easy to translate Nörr's analysis into expressivist terms. We have here a conflict between social norms. The legislation attempts to reinforce what Augustus considered the good norm of marrying and raising children and to change the bad norm of not doing these things. It is of course entirely to Nörr's credit that he did not need the theory to achieve this important result, which I believe correctly represents the emperor's intentions. So why do we need the theory? One response is that it allows us to take his analysis one crucial step further in speaking about the effects of the laws.

In a broad sense, Nörr is agnostic about the laws' impact, asserting that we simply lack the data to reach firm conclusions. From this perspective he develops a highly plausible argument that the statutes established a mechanism for enforcement that, insofar as it was balanced between the goals of revenue and reproduction, was in a sense fail-safe: the state could not lose in that one aim succeeded in proportion to the failure of the other. With regard to the demographic purpose itself, which he regards as primary, Nörr is inclined to pessimism, though prepared to admit the possibility of some success with members of the Italian and provincial elites.

Here I would argue that the experience of the New Chicago School should inspire no small measure of humility on our part. While expressivists are often able to discern whether a particular piece of legislation has been effective, they are rarely, as we have seen, in a position to declare why it has succeeded or why it has not, as the case may be. For the Romans, we have difficulty simply knowing whether a law has been successful. We lack, for instance, an adequate statistical base to make drawing such conclusions easy. For example, there is the evidence of the census figures. I think Nörr's position is correct, namely, that it suggests success but does not prove this. Fortunately, we have abundant data of another sort to help us, and it is here that I would argue that attention to the expressive function of law can help, at least in this instance.

What I do is to examine the question of the laws' effectiveness on a narrow front, by focusing on certain important aspects of

their reception by later political and legal authorities.¹⁰⁶ The treatment of the Augustan marriage legislation itself by subsequent emperors has been fairly well studied, so that it is possible to say here simply that its goals received broad support over time, though of course some emperors were more supportive than others. As for the jurists, we have an unusual, and highly important, programmatic statement from the second-century jurist Terentius Clemens: “... the statute was enacted for the common good, namely, to promote the procreation of children, [and so] is to be furthered through interpretation.”¹⁰⁷ Given its formulation and context, this declaration may be attributed to Julian, so that Clemens simply endorses it.¹⁰⁸ In any case, it is powerful evidence for how the norms promoted by the Augustan legislation were received by the jurists, a phenomenon supported by plenty of other evidence, as I hope to have shown in this article. Such a reception is relatively easy to demonstrate for both jurists and emperors regarding various measures that were, I argue, taken pursuant to the *lex Iulia et Papia*, meaning that they favored children in a comparable manner. These include the alimentary programs and the *scc Tertullianum* and *Orfitianum*.¹⁰⁹

The alimentary programs are of particular interest. Here we have a series of initiatives public in nature, but sponsored by private individuals in some instances and the state in others, that directly provided material support to children (and, arguably, their families) across a broad sector of the population, especially on its lower levels.¹¹⁰ It seems that the state took its cue from earlier legislation regarding the policy pursued and from the practice of private individuals as far as the method was concerned. We might reasonably suppose that the latter had been inspired in turn by that same legislation on the level of ideology.

¹⁰⁶ McGinn, “Marriage Legislation” (note 40).

¹⁰⁷ D.35.1.64.1 (Ter. Clemens 5 *ad legem Iuliam et Papiam*): ... *legem enim utilem rei publicae, subolis scilicet procreandae causa latam, adiuvandam interpretatione.*

¹⁰⁸ This is the suggestion of Riccardo Astolfi, which has considerable merit: R. Astolfi, *La Lex Iulia et Papia*, 4th ed. (Padua 1996), 165. If true, it renders the significance of the statement all the greater.

¹⁰⁹ The same is true for the other relevant Augustan statutes, not least the law on adultery, on whose positive, at times even enthusiastic, reception by later emperors and jurists, see McGinn, *Prostitution* (note 40), ch. 6. For a discussion in expressivist terms, see McGinn (note 101).

¹¹⁰ This raises an issue of great general interest, namely, to what extent law, and more generally public policy, was developed with an eye to the sub-elite, an issue of obvious significance beyond the Augustan marriage legislation and its companion law on adultery. See the considerations in McGinn (note 101); McGinn, “Marriage Legislation” (note 40).

By the second century at the latest a broad social consensus emerges in favor of providing material support to children that resonates in various areas of Roman private law.

This relatively late development might be viewed as in itself problematic, in that it would seem to postulate a significant delay in the realization of a norm change / reinforcement.¹¹¹ One might argue that this perception is in part a function of the quality and quantity of the evidence, in that the words of the second-century jurists survive better than those of the first century. The marriage legislation seems to have enjoyed better initial success among the upper orders, and here in the sense that it facilitated the social and biological replacement of the older city aristocracy from among the ranks first of the Italian, then of the provincial elites.¹¹² This may not have been Augustus' first choice,¹¹³ but insofar as he designed his laws to foster a "meritocracy of virtue" they seem to have succeeded on this level.¹¹⁴ One also has the sense that the ideology behind the legislation was not static or inert in this period, but operated as a kind of moral capital accumulating interest, which comes to be more fully realized about a century or so after Augustus.¹¹⁵

Late in coming or not, this is about as close as we can expect to get with the ancient evidence to Sunstein's idea of a norm cascade. Let one example suffice. Here is a comment by the second-century Pomponius on the interest of the community as a whole in dowries: "The legal institution of the dowry is always

¹¹¹ For the argument that Augustus' personal and familial moral shortcomings spelled failure for the legislation, see A. M. Kemezis, "Augustus and the Ironic Paradigm: Cassius Dio's Portrayal of the *Lex Julia* and *Lex Papia Poppaea*," *Phoenix*, 61 (2007), 278. While the characterization of "failure" is far from justified, it certainly seems possible that a general lack of moral leadership on the part of the first and to some extent the second imperial dynasties did retard its success in some measure.

¹¹² See McGinn (note 101), 17–18.

¹¹³ This would seem certain to be the case if we could accept as genuine Augustus' warning, as communicated by Cassius Dio, to a group of unmarried equestrians that if they do not procreate they will be replaced by Greek and non-Greek provincials. It is, however, laced with irony on two counts: afterwards this development did to no small extent take place and the author and his family benefited from it: Dio 56.7.5–6. See Kemezis (note 111), 280.

¹¹⁴ McGinn (note 101), 14, 26.

¹¹⁵ The expressivist literature only seldom addresses the question of how much time it can take for a new rule to have an impact; see Posner (note 26), 1712–13, 1729; cf. Harcourt (note 82), 192, a critic who appears to assume a period of two years or more as impossibly long.

and everywhere of the greatest importance. For it is also in the public interest that dowries be preserved for women, since for the procreation of offspring and the replenishment of the community with children it is emphatically necessary that women have dowries.”¹¹⁶ The important point is that the jurist does not cite the Augustan statutes themselves, but the public policy that they advanced. An expressivist would say that Pomponius has internalized the norm of the Augustan marriage legislation and expresses its social meaning in the context of dowry.

Beyond Rome, in the setting of classical Athens, a case has been made for an expressive effect of legislation that prohibited male prostitutes from participating actively in political life. One law forbade (male citizen) prostitutes from speaking in the Assembly and from holding various public offices.¹¹⁷ Other civic disabilities were perhaps imposed as well, including a ban on entering temples and the agora, so that it is open to question whether (male citizen) prostitutes suffered partial or full ἀτιμία, meaning loss of civic rights. The other law established a procedure, δοκιμασία, to stop an alleged (male citizen) prostitute from even attempting to exercise a forbidden right.¹¹⁸ Only male citizen prostitutes were addressed by the legislation; metics, slaves, and women were excluded from exercising most of these rights as a matter of course.

In a recent article, Adriaan Lanni places the laws against political participation in the context of anxieties about pederasty, which began to manifest themselves in the mid-fifth century.¹¹⁹ The laws may reflect a tendency to conflate pederasty with prostitution, as she argues, and/or may represent the fruit of a political compromise that sought to repress an aspect of the former deemed particularly objectionable — Lanni suggests that the offense punished under the laws might have been construed even in the absence of payment. Another concern might have been with perceptions of the upward social mobility of prostitutes in the wake of the beginning of the Peloponnesian War and the advent of the plague, in the era of the New Politicians, a time of great uncertainty and instability as to issues of personal status. In any

¹¹⁶ D.24.3.1 (Pomp. 15 *Sab.*): *Dotium causa semper et ubique praecipua est: nam et publice interest dotes mulieribus conservari, cum dotatas esse feminas ad subolem procreandam replendamque liberis civitatem maxime sit necessarium.* See also D.23.3.2 (Paul 60 ed.).

¹¹⁷ Aeschin. 1.19–20.

¹¹⁸ Aeschin. 1.28–32.

¹¹⁹ A. Lanni, “The Expressive Effect of the Athenian Prostitution Laws,” *Classical Antiquity*, 29 (2010), 45–67.

case, Lanni argues that the statutes' impact was broader than the few cases of prosecution of which we know¹²⁰ (of course, we can hardly be sure we know of them all), because the laws, which did not ban prostitution, altered its social meaning by associating it explicitly, in an evident expression of community sentiment, with dishonor.¹²¹

Finally, mention must be made of a recent article by Giuseppe Dari-Mattiacci and Anna Plisecka on the subject of Roman sumptuary legislation.¹²² The authors refer to expressive law theory a couple of times briefly in passing. They are more interested in signaling theory and in developing mathematical models to "predict" behavior. Signaling theory is based on ideas that ultimately derive from the economist Thorstein Veblen and concerns here the use of wealth to signal social status.¹²³ As for the mathematical models, whatever one makes of the results they generate, it ought to be noted that they are based on assumptions about maximizing utility that would be entirely at home in the publications of leading exponents of both Chicago Schools. As to the expressive function of law, Dari-Mattiacci and Plisecka draw an entirely appropriate distinction between the impact of enforcement and the impact of social meaning, though they reach pessimistic conclusions about both.

VIII. The *lex imperfecta*

There are a number of other possibilities for the application of expressive law theory, for heuristic purposes, to the ancient evidence, as we shall see below in the very last section, but for now it seems good to focus at some length on a single illustration: the *lex imperfecta*. All Roman legal historians know the definition of this

¹²⁰ See Aeschin. 1; Ar. *Eq.* 876–879, with Lanni (note 119), 57.

¹²¹ Lanni (note 119), 59–65. See also A. Lanni, "Social Norms in the Courts of Ancient Athens," *J. Legal Analysis*, 1 (2009), 720, on the expressive function of the Athenian courts. On legal rules on prostitution in classical Athens, see now T. A. J. McGinn, "Prostitution: Controversies and New Approaches," in T. K. Hubbard, et al., eds., *A Companion to Greek and Roman Sexualities* (Chichester 2014), 81–101. The contrast of Athens with Rome raises questions concerning the relationship between expressivism and constitutional form. On this subject, see below in the notes.

¹²² G. Dari-Mattiacci and A. E. Plisecka, "Luxury in Ancient Rome: An Economic Analysis of the Scope, Timing and Enforcement of Sumptuary Laws," *Legal Roots: Int'l J. Roman L., Legal Hist. & Comp. L.*, 1 (2012), 189–216.

¹²³ For an application from expressive law theory see Posner (note 13), 18–22.

term, which refers to a type of statute that prohibited some form of behavior without, however, either laying down a penalty for a violation or voiding the forbidden conduct.¹²⁴ The definition, however, is reconstructed from a deplorable lacuna at the beginning of a collection — possessed of a good classical pedigree but (at minimum) drastically compressed in the form that has come down to us — known as the *Tituli ex corpore Ulpiani*:¹²⁵

Tituli ex corpore Ulpiani 1.1. <... Imperfecta lex est, quae vetat aliquid fieri et, si factum sit, nec rescindit nec poenam iniungit ei, qui contra legem fecit. . .>.

<... A *lex imperfecta* is (the type of statute) that forbids something to be done and, if this has been done, neither voids it nor imposes a penalty on the person who has violated the law. . .>.

This reconstruction forms part of a trichotomy that is accepted as beginning with the definition of a *lex perfecta* before proceeding to that of the *lex imperfecta* and then a *lex minus quam perfecta*. The entire discussion of the *lex perfecta* and much of that of the *lex imperfecta* has been lost. There is a general consensus on how this part of the passage should be reconstructed and integrated with what survives in terms of substance, even as the precise

¹²⁴ So the *lex imperfecta* falls into “a subtler and more interesting class of cases, of special importance for understanding the expressive function of law. These cases arise when the relevant law announces or signals a change in social norms *unaccompanied by much in the way of enforcement activity.*” Sunstein (note 30), 2032 (his emphasis).

¹²⁵ The text is taken from D. Tuzov, “La nullità per legem nell’esperienza romana: Un’ipotesi in materia di *leges perfectae*,” *RIDA* (3rd), 56 (2009), 158. See recently on this work, whose date, title, and authorship have been much discussed: M. Avenarius, *Der pseudo-ulpianische liber singularis regularum: Entstehung, Eigenart und Überlieferung einer hochklassischen Juristenschrift* (Göttingen 2005); M. Avenarius, “Il *liber singularis regularum* pseudo-ulpiano: Sua specificità come opera giuridica altoclassica in comparazione con le *Institutiones* di Gaio,” *Index*, 34 (2006), 455–77; M. U. Sperandio, “*Incip(iunt) Tituli ex corpore Ulpiani: Il liber singularis regularum pseudoulpiano e il codex vaticanus reginae 1128*,” *RIDA* (3rd), 58 (2011), 357–92; F. Mattioli, “Un tentativo di messa a punto riguardo alla più recente dottrina sui *Tituli ex corpore Ulpiani*: Ipotesi e prospettive di ricerca,” in G. Purpura, ed., *Revisione ed integrazione dei Fontes Iuris Romani Anteiusustiniani (FIRA): Studi preparatori*, 2 (Turin 2012), 85–117. Avenarius, *Pseudo-ulpianische* (this note), 50–52, persuasively shows that *Tituli ex corpore Ulpiani* cannot be the title of the original work. It can serve however for the version that we possess: Mattioli (this note), 85 n.1.

wording can differ. For example:¹²⁶

Tituli ex corpore Ulpiani 1.1. <Leges aut perfectae sunt aut imperfectae aut minus quam perfectae. Perfecta lex est, quae vetat aliquid fieri et, si factum sit, rescindit: qualis est lex . . . Imperfcta lex est, quae vetat aliquid fieri et, si factum sit, nec rescindit nec poenam iniungit ei, qui contra legem fecit: qualis est lex *Cincia*, quae plus quam . . . donari> prohibet, exceptis quibusdam <personis velut> cognatis, et si plus donatum sit, non rescindit. 2. Minus quam perfecta lex est, quae vetat aliquid fieri et, si factum sit, non rescindit, sed poenam iniungit ei, qui contra legem fecit: qualis est lex *Furia testamentaria*, quae plus quam mille assium legatum mortisve causa prohibet capere, praeter exceptas personas, et adversus eum, qui plus cepert, quadrupli poenam constituit.

<Statutes are either *perfectae* or *imperfectae* or *minus quam perfectae*. A *lex perfecta* is (the type of statute) that forbids something to be done and, if this has been done, voids it. An example is the *lex* . . . A *lex imperfecta* is (the type of statute) that forbids something to be done and, if this has been done, neither voids it nor imposes a penalty on the person who has violated the law. An example is the *lex Cincia*, which> forbids <more to be given as a gift than the value of . . .>, with certain <persons> exempted, <such as> blood relatives, and if a greater value has been given, does not void it. 2. A *lex minus quam perfecta* is (the type of statute) that forbids something to be done and, if this has been done, does not void it but imposes a penalty on the person who has violated the law. An example is the *lex Furia* on wills, which forbids taking as a legacy or a gift with a view toward death more than the value of a thousand *asses*, apart

¹²⁶ The text is taken, with minor changes, from Tuzov (note 125), 158. An exception to the general agreement on the reconstruction of the lacuna is that not all versions include the reference to an absence of a *poena* in the definition of the *lex imperfecta*; another is that some omit the insertion <personis velut> or simply substitute *personis* for *cognatis*. See A. Wacke, "Die Rechtswirkungen der *lex Falcidia*," in D. Medicus and H. H. Seiler, eds., *Studien im römischen Recht: Max Kaser zum 65. Geburtstag gewidmet von seinen Hamburger Schülern* (Berlin 1973), 212; M. Kaser, *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht* (Vienna 1977), 9; J. Pansegrau, *Die Fortwirkung der römischrechtlichen Dreiteilung der Verbotsgesetze in der Rechtsprechung des Reichsgerichts: Zur Vorgeschichte des § 134 BGB* (Göttingen 1989), 44 & n.27; M. Elster, *Die Gesetze der mittleren römischen Republik* (Darmstadt 2003), 256; Averarius, *Pseudo-ulpianiche* (note 125), 164–65.

from exempted persons, and against that person who will have taken a greater value it establishes a penalty of fourfold.

It has been repeatedly observed that this is the only instance where the term *lex minus quam perfecta* appears in our sources, an observation that holds for the other two terms, namely, *lex perfecta* and *lex imperfecta*, only in the sense that they are read into the lacuna, apart from one actual exception for the latter:¹²⁷

Macrobius, *Commentarii in somnium Scipionis* 2.17.13. Sed quia inter leges quoque illa imperfecta dicitur in qua nulla deviantibus poena sancitur, ideo in conclusione operis poenam sancit extra haec pracepta viventibus, quem locum Er ille Platonicus copiosius executus est saecula infinita dinumerans, quibus nocentum animae, in easdem poenas saepe revolutae, sero de tartaris permittuntur emergere et ad naturae suae principia, quod est caelum, tandem impetrata purgatione remeare.

But because among statutes as well that one is called “incomplete” (*imperfecta*) in which no penalty is laid down for its violators, for this reason (the elder Scipio) at the end of (Cicero’s) work lays down a penalty for those who live in defiance of this teaching. That Er of Plato’s has rather fully described this point by counting out the endless ages in which the souls of the guilty, after having often revisited the same penalties, are at a late stage allowed to rise from the underworld to return to their natural point of departure, the sky, after receiving purification in the end.

This source confirms that the designations accorded the three types of laws were by this time certainly conceived as, respectively, “complete,” “incomplete,” and “less than complete.”¹²⁸ It also conveys the sense that an incomplete law is also defective, precisely because it lacks a sanction. The other relevant information is of course the reference, in a slight paraphrase, to the “lex imperfecta.” The fact that the phrase *lex perfecta* appears nowhere in a source that has been preserved, and the other two enjoy only one such attestation each, ought in my view to encourage considerable caution in assuming that we know what

¹²⁷ J. M. Chorus, *Handelen in strijd met de wet: De verboden rechts-handeling bij de romeinse juristen en de glossatoren* (Leiden 1976), 41–42; Kaser (note 126), 10; Tuzov (note 125), 172.

¹²⁸ Macrobius and his work are dated to the late fourth century AD at the earliest. G. B. Conte, *Latin Literature: A History*, trans. J. B. Solodow, rev. D. Fowler and G. W. Most (Baltimore 1994), 629–30.

language originally appeared in the lacuna in the text of the *Tituli*. Even if we accept that the trichotomy did appear in the version we possess more or less as reconstructed and, moreover, that it has a classical pedigree, this does not mean that all jurists viewed the matter in precisely this way or that the editor(s) of the *Tituli* themselves did not simply abbreviate and (over)simplify a more nuanced discussion.

The Macrobius passage, for example, suggests that some ancients may have seen a dichotomy where many modern scholars postulate a trichotomy.¹²⁹ Macrobius simply speaks of the absence of a *poena* for the *lex imperfecta* type, suggesting perhaps that this idea of a penalty embraced the voiding of the act forbidden, at least for some. If so, he or his source would postulate only two types of laws, those which enjoined penalties, including the *lex perfecta* as well as the *lex minus quam perfecta*, and a second type that contained no sanction at all, the *lex imperfecta*.

Moreover, this is not the only way one might construct a dichotomy along these lines. Some scholars distinguish between the *lex perfecta* and the “not-perfect” type, so placing together the *lex imperfecta* and the *lex minus quam perfecta*.¹³⁰ The trichotomy has also been criticized on other grounds, with some objecting to it precisely because it does not properly distinguish between voiding an act and punishing its doer — a tetrachotomy has even been posited, containing a fourth type called a *lex plus quam perfecta* that would inflict both nullity and penalty.¹³¹

¹²⁹ See Tuzov (note 125), 173, who emphasizes the inconcreteness between the scarce legal and equally scarce literary evidence. Given the state of our knowledge, we cannot be absolutely certain that Macrobius does not represent a later development in thinking about the classification, is simply ignorant of the other view, or exploits it tendentiously. One can also take him, albeit with far less assurance in my view, as reflecting Cicero’s thinking on the matter, so that the dichotomy dates much earlier (see next note).

¹³⁰ Wacke (note 126), 215; Chorus (note 127), 37 (“een niet-perfekte norm”), 39–40, 42 (“niet-perfektie”). Kaser (note 126), 10–12 proposes on the basis of the Macrobius text, evidently assuming that this reflects the thinking of Cicero, that a dichotomy consisting of laws with penalties (*leges perfectae*) and laws without (*leges imperfectae*) preceded the trichotomy. While he distinguishes between nullity and penalty he also regards them as two types of sanction (“Sanktionsarten”): id., 21. Ankum agrees about the dating of the dichotomy, explicitly invoking the authority of Cicero to this end, while reconfiguring the terms of the dichotomy so that it refers to laws that prescribe, or do not prescribe, nullity: H. Ankum, “Verbotsgesetze und Ius Publicum,” ZSS (RA), 97 (1980), 292 (A French version appears in *Iura*, 28 (1977) 173–208). For cogent criticism, see Pansegrouw (note 126), 67–68.

¹³¹ This is dismissed by Wacke (note 126), 212 n.13, as “unrömisch”

It seems worth pointing out that even if we assume a classical pedigree for the trichotomy it is likely to trace its origins to a point in time much later than the actual introduction of the *lex imperfecta*, meaning that it is unlikely that these laws were described, or thought of, as somehow “incomplete,” let alone “defective,” at the time of their debut.¹³² We have examples of statutes that can be described as such that date as late as the first century AD, but others that are from the third century BC, and perhaps earlier.¹³³ The point is that the latter, almost certainly, were introduced free from the conceptual assumptions that inform the

and by Kaser (note 126), 10 n.4, as a “Phantasieprodukt.” On the meaning of *rescindere*, see Sciuto’s recent discussion, which does not appear to distinguish between a statutory prescription of nullity and the absence thereof, as we find with the *lex imperfecta*: P. Sciuto, *Concetti giuridici e categorie assiomatiche: L’uso di rescindere nell’esperienza di Roma antica* (Turin 2013), 68–73. Cf. S. Di Paola, “Leges Perfectae,” in *Synteleia Vincenzo Arangio-Ruiz*, 2 (Naples 1964), 1075–94, who alleges the absence of a Roman conception of nullity; P. Cerami, *Potere e ordinamento nella esperienza costituzionale romana* (Turin 1987), 126–28, for whom lack of nullity is a sign that the statutory prohibition possessed only a certain generic quality.

¹³² The trichotomy appears to have emerged in the late Republic at the earliest and more likely during the classical period, and therefore long after some of the legislation it attempts to categorize; see Kaser (note 126), 67; Ankum (note 130), 292; Pansegrouw (note 126), 57. This well raises the question of how vital or even genuine we might regard such a classification, an issue I think that must be considered whatever view one takes of the role played by praetorian discretion in such matters (see note 148). See G. Pugliese, “Intorno al supposto divieto di modificare legislativamente il *ius civile*,” in G. Moschetti, ed., *Atti del congresso internazionale di diritto romano e di storia del diritto, Verona 27-28-29 – IX – 1948*, 2 (Milan 1951), 63–88, repr. in G. Sacconi and I. Buti, eds., *Scritti giuridici scelti*, 3 (Naples 1985), 3–26, at 18; L. Maganzani, “La *sanctio* e i rapporti fra leggi,” in J.-L. Ferry, ed., *Leges Publicae: La legge nell’esperienza giuridica romana* (Pavia 2012), 57. My interest lies in addressing the possible reasons for the absence of penalties and of the nullification of proscribed acts, not in defending (or criticizing) the categories. Since the statutes I discuss were promulgated long before the invention of the trichotomy, it seems not only useful, but arguably even necessary, to discuss them on their own terms.

¹³³ Kaser (note 126), 30–32, cites as examples of the former the *scc Vellaeanum* and *Macedonianum*. For the earlier instances, see below. Selb usefully invokes as parallels Republican *senatusconsulta* and the urban Praetor’s edict: W. Selb, “Gedanken zur römischen *lex imperfecta* und zu modernen Normvorstellungen in der Rechtsgeschichte,” in G. Baumgärtel, et al., eds., *Festschrift für Heinz Hübner zum 70. Geburtstag am 7. November 1984* (Berlin 1984), 253–54, 259. Armisen-Marchetti’s argument that *leges imperfectae* were the most numerous type is without foundation: M. Armisen-Marchetti, *Macrobe: Commentaire au Songe de Scipion*, 2 (Paris 2003), 203.

trichotomy.¹³⁴ So it may well be the case that the term *lex imperfecta*, with its intimations of “incompleteness,” let alone “imperfection,” “deficiency,” or “weakness,” did not arise until long after the introduction of the type, which may itself have postdated the so-called *lex perfecta*. All of this suggests that resort to the so-called *lex imperfecta* type of statute was the product of specific historical circumstances in each case, even as the rules might remain in place for many years to come, and does not easily map onto a theory of evolutionary development in which Roman legislative technique moved from “imperfect” to “perfect.”¹³⁵

Examples of *leges imperfectae* include — possibly — the *lex Publicia de cereis* of 209 BC, which addressed a situation in which patrons were oppressing clients by demanding from them, at the time of the Saturnalia, excessive gifts, allegedly out of motives of greed.¹³⁶ The law forbade the giving as gifts by the *tenuiores* to the *ditiōres* on this occasion of anything but candles. The sole attestation is in Macrobius, in the context of a discussion of the origins of exchanging candles as gifts at the time of this festival:¹³⁷

¹³⁴ As Paul du Plessis observes (private communication), these conceptual assumptions do little to assist our understanding of the XII Tables, for example. See the important recent discussion in M. Humbert, “La codificazione decemvirale: Tentativo d’interpretazione,” in M. Humbert, ed., *Le Dodici Tavole dai Decemviri agli Umanisti* (Pavia 2005), 3–50.

¹³⁵ To be sure, the oldest certain example of a *lex perfecta* in the prevailing opinion is the *lex Voconia* of 169 BC: Kaser (note 126), 20, 50; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford 1996), 698. For an example of how the terminology can drive assumptions about the historical process, as well as assumptions about the effectiveness of different types of legislation, see Kaser (note 126), 13 (cf. 16), who notes a pronounced tendency in the scholarship to place the laws assumed to have the weakest impact (*leges imperfectae*) earlier in time than those assumed to have the strongest (*leges perfectae*). See also Chorus (note 127), 29; Pansegrouw (note 126), esp. 58–63. Despite criticism, this evolutionary hypothesis appears, in various formulations, even today to be the dominant opinion: see Ankum (note 130), 291; Selb (note 133), 255; Tuzov (note 125), 174–79.

¹³⁶ The Romans tend to view such problems from a moral perspective. For an interesting economic analysis of gift-giving, see Posner (note 13), 49–67. For an evaluation of the regime of the *lex Cincia* (below) and its impact in economic terms, see K. Verboven, *The Economy of Friends: Economic Aspects of Amicitia and Patronage in the Late Republic* (Brussels 2002) [= *Collection Latomus*, 269], 75–78. More generally for antiquity, see now the essays in M. L. Satlow, ed., *The Gift in Antiquity* (Malden 2013), and those in F. Carlà and M. Gori, eds., *Gift Giving and the “Embedded” Economy in the Ancient World* (Heidelberg 2014).

¹³⁷ See Elster (note 126), 242–43, for the date and other details. On

Macrobius, *Saturnalia* 1.7.33. Illud quoque in litteris invenio, quod cum multi occasione Saturnaliorum per avaritiam a clientibus ambitione munera exigerent idque onus tenuiores gravaret, Publicius tribunus plebi tulit, non nisi cerei ditioribus missitarentur.

I also find the following recorded in the literary tradition, that when at the time of the Saturnalia many were demanding gifts from their clients out of motives of greed and in competition with each other, and this burden was weighing heavily upon the less wealthy, the tribune of the plebs Publicius carried a law that prohibited anything but candles to be sent as gifts to the more wealthy.

The application of the new rule to the time of the Saturnalia is not made explicit, but can reasonably be inferred from the context.

Another example, often cited as the only certain one,¹³⁸ is the *lex Cincia de donis et muneribus* of 204 BC, which placed various restrictions on giving gifts.¹³⁹ A penalty was prescribed for one type of violation, namely, accepting compensation for providing forensic assistance to litigants, but no penalty was set for violating a more general ban on giving gifts above a certain (unknown) amount and beyond an extensive circle of exempted persons,¹⁴⁰ and in neither case was the transaction rendered void. This means that the law was, according to the later classification, in part a *lex imperfecta* and in part a *lex minus quam perfecta*.¹⁴¹ A passage of Livy suggests a broadly similar reason motivated the general ban on gift giving as held for the *lex Publicia*, a point reinforced by the numerous exceptions allowed under the statute.

the custom of giving candles as gifts to social superiors at the time of the Saturnalia, see Varro *LL* 5.64; Paul. *Epit. Festi* 47L.

¹³⁸ For example, by Sciuto (note 131), 68. Aside from the relevant *senatusconsulta*, which are not of course *leges*, one might consider as perhaps more than a mere possibility a certain *lex Valeria* mentioned by Livy (10.9.5), on which see Selb (note 133), 257.

¹³⁹ On the evidence for the law, see M. H. Crawford, ed., *Roman Statutes*, 2 (London 1996), 741–44.

¹⁴⁰ G. G. Archi, *La donazione: Corso di diritto romano* (Milan 1960), 21–22, points to this last detail to suggest that the law in no way sought to restrict “normal” gift-giving, that is, spontaneous generosity that was in no sense coerced, and cannot be regarded as any type of sumptuary law. On this last point, see also F. Casavola, *Lex Cincia: Contributo alla storia delle origini della donazione romana* (Naples 1960), 19–21, and below in the notes.

¹⁴¹ For an argument, not widely accepted, that the *lex* was *imperfecta* in both respects, see I. Shatzman, *Senatorial Wealth and Roman Politics* (Brussels 1975), 70–73.

This occurs in the speech he attributes to the elder Cato arguing against repeal of the *lex Oppia* in 195:¹⁴²

Livy 34.4.9. Quid legem Cinciam de donis et muneribus nisi quia vectigalis iam et stipendiaria plebs esse senatui coeperat?

What (provoked the passing of) the *lex Cincia* on gifts and compensation except for the fact that the lower orders had at that point begun to be tributary to and a source of revenue for the Senate?¹⁴³

What then is the rationale for the *lex imperfecta*, a law that lays down no sanctions for its violators, not even nullity of their actions? Scholars have in the past advanced a variety of explanations, none of which seems to enjoy broad adherence.¹⁴⁴ One older view holds that the rise of the *lex imperfecta* reflects a situation, prevailing in an early period, in which the *ius* enjoyed a predominance and independence with respect to legislation, certainly *plebiscita*, so that *lex* could not alter *ius*. This position is criticized by Peter Stein, who points out that the *lex Aquilia*, for example, most certainly changed the *ius* before our laws were passed.¹⁴⁵ Stein argues that *lex* could not alter *ius* only with respect to certain legal transactions such as *donatio*.¹⁴⁶ Max Kaser holds for the capacity of the *lex* to alter *ius* as early as the Twelve Tables, but allows that there might have been some lingering hesitation in this matter as late as the mid-Republic, encouraging resort to the *lex imperfecta*.¹⁴⁷ This is speculative, of course, and perhaps a bit circular, if we consider that “leges imperfectae” (in the form of *senatusconsulta* of course) continued to appear as late as the second half of the first century AD.

Legal recourse in such cases, certainly in the wake of the

¹⁴² This attribution has been doubted. For a discussion see F. Cassola, *I gruppi politici romani nel III secolo a.C.* (Trieste 1962), 286–88.

¹⁴³ That *plebs* here does not stand as a reference to the earlier conflict between plebeians and patricians is noted by Casavola (note 140), 12–14.

¹⁴⁴ Kaser (note 126), 13–20, effectively disposes of a number of these, making it unnecessary to review them in this place.

¹⁴⁵ P. Stein, *Regulae iuris: From Juristic Rules to Legal Maxims* (Edinburgh 1966), 15–16, depending in part on Pugliese (note 132). See also P. Frezza, “Il preceitto della legge e il preceitto della autonomia privata nel diritto romano,” *Jus* (n.s.), 12 (1961), 473–82, repr. in F. Amarelli and E. Germino, eds., *Scritti: Paolo Frezza*, 2 (Rome 2000), 307–16; L. Winkel, “The Roman Notion of *Lex*,” in J.-L. Ferry, ed., *Leges Publicae: La legge nell’esperienza giuridica romana* (Pavia 2012), 252–53.

¹⁴⁶ See also P. Stein, [Reviewing Kaser, *Über Verbotsgesetze*], *TvR*, 47 (1979), 347–48.

¹⁴⁷ Kaser (note 126), 18–19.

introduction of the formulary system, came from the Praetor, who might refuse an *actio* for a claim that violated the law, grant an affirmative defense (*exceptio*) if someone succeeded in bringing a claim in violation of the law, or perhaps, in certain circumstances, allow an *in integrum restitutio* (or even a *condictio*) if such a transaction had already occurred.¹⁴⁸ Of course to the extent that the prohibitions of “*leges imperfectae*” were enforceable by the legal system one might be led to question whether the category itself really existed.¹⁴⁹ But even if the framers of such legislation, as does not seem unlikely, knew that the Praetor was in a position to enforce the rules they promulgated, and intended precisely that he do so,¹⁵⁰ this does not explain why they chose this manner of legislating in the first place.

Stein and Kaser, like their predecessors, focus on the law and not on the social norms in question and try to explain the *lex imperfecta* in terms of what it — allegedly — could not do and why it could not do this, from a strictly legal perspective. Just what were the Romans trying to accomplish here?

The theory of the expressive function of law offers a possible answer. I would suggest that both laws attempted not so much to change but to reinforce existing norms. Roman society was not prepared to tolerate certain exploitative practices in gift-giving but, as with other aspects of the social institution of *clientela*,¹⁵¹ it was also reluctant to regulate this very much at law. Gift-giving

¹⁴⁸ Under the *legis actio* system, the Praetor might in my view also refuse an action in pursuit of a goal that violated what is later called a *lex imperfecta*. For discussion of these matters, about which scholars are not always in agreement, see Archi (note 140), 145–65; Casavola (note 140), 115–70; J. Bleicken, *Das Volkstribunat der klassischen Republik: Studien zu seiner Entwicklung zwischen 287 und 133 v. Chr.*, 2nd ed. (Munich 1968), 44–45; Wacke (note 126), 219; Chorus (note 127), 35–37; Kaser (note 126), 27–28, 32; O. Behrends, *Die Fraus Legis: Zum Gegensatz von Wortlaut- und Sinngebung in der römischen Gesetzesinterpretation* (Göttingen 1982), 23–24; Selb (note 133), esp. 260; Pansegrouw (note 126), 32–34, 37–38, 57–67; M. Kaser and K. Hackl, *Das römische Zivilprozessrecht*, 2nd ed. (Munich 1996), 261 n.34; Zimmermann (note 135) 699–700; Avenarius, *Pseudo-ulpianiche* (note 125), 163, 165.

¹⁴⁹ See the comments of Chorus (note 127), 40–41, who points out (43) that by the late classical period the jurists would scarcely be inclined to distinguish between nullity under praetorian and under civil law. See also Selb (note 133), esp. 254–255, 258–261.

¹⁵⁰ Selb (note 133), 254, writes of the law offering the public official a kind of authorization to act. See also Kaser (note 126), 27–28, 32. In effect, the law would acquire a “consequentialist” status, despite the lack of relevant statutory language.

¹⁵¹ For another exception to this principle, see XII Tab. 8.10 with Crawford (note 139), 689–90.

in this context raised a classic collective action problem, as we can see very clearly with the situation addressed by the *lex Publicia*. Those *ditiores* who were appalled by the extortionate practices of their peers perhaps felt it was impossible all the same to yield them too much of a competitive advantage. Those *tenuiores* — probably most of them — who resented such practices perhaps felt that they could not risk the consequences of finding themselves among the few who resisted them. The statute gave both groups permission to opt out of these disagreeable usages and stigmatized the behavior of those who did not — as something possibly immoral but certainly against the law.

The same logic applies to a more certain example of a *lex imperfecta*, the *lex Cincia*.¹⁵² Its enactment does not necessarily mean that its predecessor was a failure. On the contrary, it was perhaps all too successful on its own terms, bringing to an effective close the undesirable practices of gift-giving at the time of the Saturnalia while doing nothing to discourage them from taking place at other times of the year. The latter may even have increased in proportion to the decline of the former. On this view, the very success of the *lex Publicia* made apparent the need for a more general approach, one that would serve the same constellation of interests, not simply those of the rich, or of the poor,¹⁵³ but both of the relatively advantaged and of the relatively

¹⁵² That the *lex Cincia* was a sumptuary law, as some have argued, is refuted by Kaser (note 126), 26 (building on Archi (note 140), 21–22, and followed by E. Baltrusch, *Regimen Morum: Die Reglementierung des Privatebens der Senatoren und Ritter in der römischen Republik und frühen Kaiserzeit* (Munich 1989), 66–67), who points out that the final years of the Second Punic War were an unlikely time for ostentatious consumption, and that it is more likely that a social and economic elite under duress sought to shore up its position by extorting material advantages out of the lower orders, in particular, its own clients. See also P. Stein, “Lex Cincia,” *Athenaeum* (n.s.), 63 (1985), 148, who accepts both explanations, namely, that the law was designed to restrain “undue luxury” and to protect the interests of those who found themselves obliged to make large gifts to their social and economic superiors. Kaser’s argument against identification as a sumptuary law also holds for the *lex Publicia*, which too has been viewed as such: F. Wieacker, *Römische Rechtsgeschichte*, 1 (Munich 1988), 415 (as also for the *lex Cincia*: 417); Baltrusch (note 152), 61–63 (albeit only in a peculiar sense); Elster (note 126), 243.

¹⁵³ Unpersuasive is the view of Selb (note 133), 255–56, that the *lex imperfecta* represents an effort on the part of the plebeians to bind the patricians, or, to avoid anachronism, of the lower orders to impose on their social superiors, because his position overlooks the interest of the higher ranking parties in such matters. This last is suggested by the support expressed by Cato in the passage of Livy given above and perhaps even

disadvantaged.¹⁵⁴ The context is crucial. The law passed at a time, even closer to the end of the Second Punic War than its predecessor, when even slight economic strains might have been deeply felt, and not just by those whose fortunes were ruined by the conflict, who were not well-placed after all to make gifts of any value.¹⁵⁵ This same logic also explains why the law did not revoke gifts once they are made.¹⁵⁶ Those who do not respect the law are not entitled to its protection.¹⁵⁷

So it is perhaps not useful to think of such laws as in some way “imperfect,” “deficient,” or “incomplete.”¹⁵⁸ Were they effective? Certainty is impossible, though the continued validity of the *lex Cincia* over many centuries implies that its rules catered to Roman values on a deeper level than might suggest the mix of circumstances that appears to have led to its passing in the first place.¹⁵⁹ Further, a non-legal source may hint at a positive recep-

more by the efforts to secure the law’s passage on the part of the aristocratic Q. Fabius Maximus, described as a *suasor legis Cinciae de donis et muneribus* by Cic. *Senect.* 10. It seems that both the *lex Cincia* and the *lex Publicia* enjoyed significant support among the elite: Baltrusch (note 152), 61–69.

¹⁵⁴ Baltrusch (note 152), 65, 69, makes the interesting point that before the law’s passage the better off clients enjoyed a distinct advantage in consequence of more lavish gift-giving that provoked disquiet among the aristocracy.

¹⁵⁵ This is overlooked by Casavola (note 140), 21–24, who explains the law’s passage as a top-down effort by the elite to assist those impoverished by the war. It is pointless to speculate over which of the two measures advanced by the law was its “true” motivation, as does Baltrusch (note 152), 64.

¹⁵⁶ See Kaser (note 126), 25, for the general principle and some exceptional circumstances. Behrends (note 148), 19 n.29, is right to argue against Kaser’s claim that the statute specifically forbade an *actio*.

¹⁵⁷ This does not mean the Praetor might not intervene where the facts of a particular case seemed to call for, for example, *in integrum restituere*: see above. The explanation of Kaser (note 126), 26, followed by Zimmermann (note 135), 699, is unconvincing when he argues that the point was to spare powerful and influential members of the elite from the inconvenience and bad publicity attendant upon litigation.

¹⁵⁸ Thus it is unnecessary to explain the lack of a sanction as the fruit of adverse political influence; see F. Wieacker, “Privatrechtsgesetzgebung und politische Grundordnung im römischen Freistaat,” *Die Antike*, 16 (1940), 176–205, repr. as “Lex Publica. Gesetz und Rechtsordnung im römischen Freistaat,” in F. Wieacker, *Vom römischen Recht: Zehn Versuche*, 2nd ed. (Stuttgart 1961), 45–82, at 71–72.

¹⁵⁹ See the remarks of Kaser (note 126), 28–29; Behrends (note 148), 28 n.47. If the position adopted above on the discretionary powers of the Praetor is correct, an adequate enforcement mechanism seems to have been in place as a matter of law, but this does not address the question of to what extent the law was respected in practice. Anecdotal evidence

tion of the norms against abusive gifting that were enacted into law:¹⁶⁰

Plautus, *Pseudolus* 177–184.

Ballio:

Facite hodie ut mi munera multa huc ab amatoribus
conveniant.

Nam nisi mihi penus annuos hodie convenit, cras poplo
prostituam vos.

Natalem scitis mi esse diem hunc: ubi isti sunt quibus vos
oculi estis,
quibus vitae, quibus deliciae estis, quibus savia, mammia,
mellillae?

Maniplatim mi munerigeruli facite ante aedis iam hic assint.
Quor ego vestem, aurum atque ea quibus est vobis usus,
praebeo? [Aut] quid mi
domi nisi malum vostra opera est hodie? Improbae vini modo
cupidae estis:
eo vos vostrosque adeo pantices madefactatis, quom ego sim
hic siccus.

Ballio: Make it happen that many gifts from your clients wind up here for me today. For unless a year's worth of provisions arrives for me today, tomorrow I will prostitute you to the populace. You know that today is my birthday. Where are the men whose eyes you are, whose lives, whose pleasures you are, whose lips, breasts, and honey-pots? Make it happen that these gift-bearers show up right at this moment in front of my house arrayed in ranks. Why do I provide you with clothing, gold jewelry, and the other things of which you make use? What payoff have you provided here for me today but trouble? You wicked women lust only for wine. This is why you soak yourselves and your stomachs as well, while I am dry here.

Of course it is perfectly logical that a (greedy) pimp will seek to

must be treated with caution: see Baltrusch (note 152), 67–68. On later changes to the ban on forensic gifts and reinterpretation of the more general prohibition, see Nörr, *Rechtskritik* (note 103), 75 n.113, 117.

¹⁶⁰ Exponents of the NCS are sensitive to the idea that social meaning is more a matter of fact than of law, and so comes to be reflected in non-legal sources as much or more than in legal ones. In a modern setting, these include “media reports, op-ed pieces, and letters to the editor.” Kahan, “What Do Alternative Sanctions Mean?” (note 14), 607.

maximize the value offered by the clients of his prostitutes. But in light of the legislation discussed above, it is tempting to view the spectacle of Plautus' Ballio demanding his underlings secure lavish birthday presents for him as a sardonic comment on the sorts of gift-giving discouraged by the two laws in question. Such exploitative practices, not to speak of sheer greed, define one of the most despised characters on the Roman social spectrum. In other words the actions of the *ditiiores* in demanding lavish gifts from their clients are stigmatized by Plautus as those of a pimp. We know that the *Pseudolus* was first staged in 191, which seems to offer plenty of time for the broad adoption of this norm.¹⁶¹

That Plautus associated pimps with the *lex Cincia* is shown by the fragment from an unknown play cited in Paul the Deacon's abridgment of the work of the grammarian Festus, though the exact nature of the connection in this case is unclear:

Paul, Epitome Festi 127L. MUNERALIS lex vocata est, qua Cincius cavit, ne cui liceret munus accipere. Plautus: Neque muneralem legem neque lenoniam, rogata fuerit, necne, flocci aestimo.

That statute is called "On Gifting" in which Cincius laid down that it is permitted to no one to accept a gift. So Plautus: "I don't care a hair whether that law on gifting or on pimping was passed or not."

It seems possible given the *Pseudolus* passage that these laws are one and the same, though certainty eludes us.

Whatever one makes of this argument, in the final analysis of course any absolute certainty over the effectiveness of these laws must remain elusive. I can only hope that my reflections on the expressive function of law help undermine the automatic assumption that they were not.

IX. What next?

In the same vein of cautious optimism, tinged with guarded pessimism, that informs this article from the start we do well to conclude with both an encouragement and an admonition. With regard to the former, it is worth noting that the focus of our examination has been placed chiefly on *leges* and to a lesser extent on senatorial decrees and juristic writings as sources of law. What of others, such as rescripts and edicts?

There is no obvious reason why any particular type of

¹⁶¹ Conte (note 128), 50.

lawmaking should be excluded from analysis.¹⁶² Rescripts and court judgments, while generally not as public in terms of broad dissemination as some other forms of lawfinding could be, such as *leges* and *senatusconsultla*, often did enact changes in the law that come to be reflected beyond the scope of the initial case.¹⁶³ A similar point holds for imperial edicts, which in a number of cases were meant to be (relatively) widely publicized.

What might be scrutinized especially is the aim of reform lying behind a particular exercise in lawmaking. So Diocletian's reliance on the edict as a vehicle for his political and legal agenda presents no small amount of promise for future investigation. This approach might seem more obvious in the case of those that repressed incest, Manichaeism, and Christianity, but perhaps ought not to be ruled out even for the *Edict on Maximum Prices*, which in essence attempts to address a collective action problem, and the Preface of which, at any rate, contains language whose understanding might be enhanced through an expressivist perspective.¹⁶⁴ Like other emperors, Diocletian presents his reforms, far from utterly gratuitously, as a return to the ancestral tradition and a reassertion of the values of the past, so that to some extent his legislation presents a combination of attempts both to change and to reinforce existing norms, a pattern we have noticed above.

With regard to the caution, let the obvious point be made that

¹⁶² See for example Posner (note 13), 1702–1703, 1719.

¹⁶³ At the same time, the form of the law may not inevitably be a matter of indifference in evaluating the status of a given example as expressive, certainly in terms of its effects. One might usefully contemplate the contrast of validation by a comitial law, benefiting from the notional weight of the community behind it, with that of a rescript resting on the authority of an individual emperor. The moral (and so, in the years subsequent to their reigns, legal) authority of individual emperors might vary considerably. Differences in political systems might also be taken into account, as a democracy, for example, might be deemed better suited to muster and communicate the sentiment of a polity, though it is clear that the roles of influential interest groups and highly motivated minority positions must be factored in. I thank Professor Adriaan Lanni for consideration of the latter point. For some useful reflections, see now McAdams (note 21), 144–46, 169–98 (on non-legislative legal vehicles for affecting behavior, such as court cases and executive orders). Expressivists tend to assume the contemporary United States as the exclusive type of system operating in the background (at least) of their analysis, which does not mean of course that their arguments and conclusions do not find application elsewhere.

¹⁶⁴ For that matter, late antique imperial legislation in general presents a vast field for scrutiny through an expressivist lens. See, e.g., Constantine's law on abduction marriage: C.Th. 9.24.1 (320/326).

not all law is expressive and not all expressive law is effective. If these points have already occurred to the reader of this article, and more than once by now, I shall have succeeded in one of my principal goals.
