

Comments on Seana Shiffrin's "Inducing Deliberation"  
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Seana Shiffrin makes a persuasive case that what is generally thought to be a shortcoming of standards in the law is actually a virtue: because they are often "hazy, unclear and provide insufficient notice," (3) standards require of legal agents that we engage in moral deliberation. Such induced moral deliberation is, she continues, "important for our moral health and for an active, engaged democratic citizenry" (4), and thus provides an example of a larger point, "the use of law to stimulate thinking and dialogue."

I am in broad agreement with the aims of the larger project and find the specific application of it here to standards pretty convincing. So rather than criticizing Seana's talk, I'll let it induce my own deliberation in the hopes that my comments can, in their turn, induce a dialogue. In particular, I want to pull further apart some categories that Seana distinguishes in order to ask whether her larger project is best thought of as one or many.

In the course of Seana's talk, we meet with at least three different forms of thinking about the law's impact on one's actions. The first, which is perhaps most common in legal analysis but which is of less interest to both of us, is basically prudential reasoning: how to do the best for me in a given situation. Good prudential reasoning requires that I take into account the environment I face, and that includes both the law and, in many cases with which the law is concerned, other people. One clear function the law can play is to get me to pay more or better attention to other people, perhaps by fortifying their power to refuse my exploitative plans for them. The law, as it were, can force me to the bargaining table, and thus to cut a deal that is more equitable than I might otherwise have

done. This, I take it, is the motivation behind penalty default rules. Seana makes a point of clearly distinguishing this form of reasoning induced by the law and the type of deliberation that she thinks standards can induce. In her terms, deliberation is moral and political, not merely prudential.

As she puts the point, “Where standards incorporating moral terms regulate conduct, citizens may themselves have to deliberate about what, morally, is proper and should be expected of them... citizens will have to ask themselves ... whether their behavior is reasonable, whether they are acting in ‘good faith,’ whether the deal they propose is exploitative or merely savvy, what the other party would want or would know or would object to, and how the other party might perceive the action” (10). When we engage in such thinking, we are not merely reasoning prudentially, but, I will say, deliberating morally.

Such deliberation involves thinking about other people with whom one interacts, and possibly the wider public whose interests may be affected, not merely as parts of a choice environment, obstacles to be navigated around as one maximizes one’s profit, but as beings to whom one owes certain kinds of moral regard and with whom one ought to stand in certain kinds of moral relationship. It is because of these features of moral deliberation that engaging in it can promote moral agency and moral health.

It is important to distinguish, as Seana does, two benefits here. The first (her second) is that deliberation about following standards keeps us morally fit in the exercise sense of the word: it works our capacity for moral deliberation so that it is ready to be called on when needed. This is a kind of instrumental benefit of standards. But there is also a more constitutive benefit: one of the marks of a moral relationship is that it is guided by

just such deliberation. I can't show you a full measure of moral respect by treating you unreflectively according to a set of moral rules. I need to be relating to you in a way that involves, as Seana puts it, "respectful and sympathetic attention and deliberation." (10) So insofar as standards serve to induce moral deliberation, they promote moral relationships by both prompting us to develop and hone the skills we need to maintain such relationships but also by prompting us to act within our relationships in ways that make those relationships moral. So far, so good.

Note, however, that for all the sympathetic and moral attention this form of moral deliberation pays to others, it is still something that looks like it can be done by each of us alone. Faced with a set of legal standards, I have to think more carefully and deeply about whether my actions are acceptable, and that does require me thinking about how they affect you and the meaning of those effects for you. But as Seana repeatedly says, this involves my asking myself these questions, not necessarily asking you. Well, Seana doesn't say this explicitly, because she often elides individual moral deliberation and the third form of thinking (what I'll call dialogue) under a vague plural: "citizens must ask themselves...". But I think we can distinguish the thought behind talk of citizens asking themselves and citizens asking each other the same kinds of questions.

The thought behind talk of citizens asking each other brings us to the third type of moral thinking that appears in the talk: dialogue. Dialogue involves reasoning with others, not merely because talking to them is the best way to navigate around them, and not merely because talking to them is the best way of showing them the proper moral respectful attention, but because among the many things that I am doing, at least some of them are things we are doing together, and insofar as we are doing things together, we are

the co-authors of what we do, and so I need not only to act in good faith towards you and be properly responsive to your needs and vulnerabilities, but to act with you. Moral deliberation may lead us to engage in dialogue, but when it does so, I want to suggest, it leads us to engage in a different kind of moral activity.

The point of clearly distinguishing deliberation and dialogue in this way is not to say that dialogue is missing from Seana's account. She clearly wants the law to be able to induce both. My point is rather that once we separate out these activities more fully, it looks as if their relationship to the law, and the mechanisms by which the law can induce them need to be distinguished. To see this, consider these five mechanisms by which the law induces thinking: 1) standards: as a result of the unconscionability doctrine in contract law, I have to engage in moral deliberation about whether the contract I am proposing to the unsuspecting dupe off of whom I hope to profit is unconscionable or merely savvy, and this might require me to think more deeply about the effect of this contract on him, 2) deliberative bodies composed of ordinary citizens: as a result of the jury system, I will, from time to time, be expected to make a collective decision with a random sampling of fellow citizens, and thus to engage in a dialogue with them about the application of the law (this might be expanded by creating citizen oversight boards of all sorts of public agencies or through making something like James Fishkin's deliberative polling part of a legislative process), 3) public comment on regulations: as a result of a law guiding the implementation of a new regulation, a government agency may be required to solicit public comment, and thus to encourage citizens to deliberate about the law, and also to engage in dialogue, at hearings and beyond, about the appropriate interpretation of the regulation. 4) creation of public space: a set of laws and regulations

might aim to shape some aspect of the public sphere, perhaps through zoning laws and the setting aside of public spaces, to encourage citizens to come together informally in the hopes that it will trigger dialogues, “talking with strangers” to use Danielle Allen’s evocative phrase. 5) Referendums: In Illinois, the current state constitution requires that at least every 20 years, the public be given the chance, through a referendum, to convene a new constitutional convention to rewrite or revise the state’s constitution. It thus leads to periodic reflection and dialogue on the constitution itself, and possibly, on particular items within it.

It seems to me that only the first of these is clearly tied to the difference between standards and rules, and yet only the first does not directly induce dialogue, although it does induce deliberation. Seana mentions juries and something like my case three, where standards are given determinate content via public discussion, and points out that in these cases, one of the subjects about which dialogue may focus is the proper interpretation of standards. And so in these cases, it will be the case that the dialogue induced will be richer for being a dialogue about the interpretation of standards rather than merely the application of rules. But it still looks from these examples as if the mechanisms by which the law induces deliberation and the mechanisms by which it induces dialogue may be very different. So, by way of shifting from deliberation to dialogue, let me end by asking Seana the following questions: Is this right? Does it matter? And, assuming the answers to those questions are “yes,” then are there particular ways that standards could be used that induce not only deliberation but also dialogue?

I HAD TO CUT THIS PARAGRAPH, BUT I THOUGHT THE IDEA IN IT WAS WORTH SHARING

In passing, it occurred to me that the kind of defense of standards given here might be a useful contribution to debates currently underway about how to reform regulation of the financial sector. One of the standard attacks on greater government regulation of any industry is that regulation stifles innovation, creativity and entrepreneurial spirit. Where this isn't just code for saying that regulation gets in the way of people making obscene amounts of money in complete disregard of the public interest, such an argument imagines regulation as a set of precise rules rather than general standards. Seana's talk makes me wonder whether or not a regulatory scheme built on standards that induced moral deliberation could both protect the public and yet not stifle creativity and innovation.