

### Inducing Moral Deliberation

A common take on the comparative merits of standards versus rules expresses a strong view about the virtues of clarity and certainty. Standards, understood as legal directives that incorporate thick, substantive terms, requiring ‘direct application of the background principle or policy [motivating the directive] to a fact situation,’<sup>1</sup> allow for more contextual adjudication, flexibility, adaptation to changing circumstances and the evolution of legal understanding.<sup>2</sup> Rules, understood as legal directives that ‘bind[] a decision-maker to respond in a determinate way to the presence of delimited triggering facts,’<sup>3</sup> allow for greater clarity and certainty. The merits of the one are thought to represent the demerits of the other. The clarity of rules comes at the expense of rigidity and a reduced ability to engage in fine-tailoring. The contextual and individualized adjudications that standards facilitate come, unfortunately, at the expense of notice.

Standards make it more difficult to predict what conduct is permissible or what legal response will be forthcoming. These features are in some tension with our commitments of fairness to give advance warning of subjection to sanction as well as our commitments to horizontal equity.<sup>4</sup> Few think that these qualities force us to abandon standards altogether but they are typically regarded as defects. When we deploy

---

<sup>1</sup> Kathleen Sullivan, “Foreword: The Justices of Rules and Standards,” 106 Harv. L. Rev. 22, 58 (1992).

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id. at 62; see also Antonin Scalia, “The Rule of Law As a Law of Rules,” 59 U.Ch. L.R. 1175, 1176, 1179 (1989).

standards, we do so in spite of them. Attending to these detractions guides us to use them carefully and judiciously.

Something of this sort is at stake in the discussion about the unconscionability standard in contract. Whether or not unconscionability protects the poor as some defend it, or disentangles the judiciary from promoting exploitation, as I do,<sup>5</sup> many duly note that the standard is frustratingly hazy and subjective. For some, its elusiveness represents a necessary cost for the flexibility; for others, its resistance to algorithmic precisification provides sufficient grounds for its rejection as overly subjective.

Similar anxiety about uncertainty partly drives our new constitutional jurisprudence about punitive damages. The discovery of the surprisingly specific constitutional ratios between punitive and compensatory damages<sup>6</sup> explicitly reflects a concern for defendants who operate in ignorance of what liability their malfeasance exposes them to, and, a concomitant worry about the prospect of different damage awards for comparable behavior. Last term, Justice Souter's opinion in the Exxon-Valdez case bespoke these concerns in capital letters. Delivering a federal common law ruling but often analogizing to and opining about constitutional norms, Souter argued that the unpredictability of punitive damage awards carried "an implication of unfairness" (while at the same time fallaciously equating unpredictable awards with "eccentrically high" awards). He concluded that "a penalty should be reasonably predictable in its severity, so that even Justices Holmes's "bad man" can look ahead with some ability to know what the stakes are in choosing one course of action or another...And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten

---

<sup>5</sup> "Unconscionability Doctrine, Paternalism, and Accommodation," *Philosophy and Public Affairs*, (Summer 2000).

<sup>6</sup> See *State Farm v. Campbell*, 538 U.S. 408, xxx (2003).

them with a fair probability of suffering in like degree when they wreak like damage."<sup>7</sup>

Over the last 15 years, the constitutional jurisprudence has taken this concern for the bad man's predictive predicament to heart and has supplemented the standard that punitive damages should not be excessive with an interpretative rule: under the doctrine announced in *State Farm v. Campbell*,<sup>8</sup> punitive damages typically should not exceed 4 times actual damages and unless exceptional circumstances obtain, should never exceed 9 times actual damages.

In this essay, I want to revisit the consensus that whatever their overall merits, it is a common defect of standards that they are hazy, unclear, and provide insufficient notice. To the contrary, what is often deemed a defect of a standard, I submit, operates as a virtue. Our motives of justice may positively incline us to use so-called thick concepts that do not have obvious, predictable, and clear application.<sup>9</sup> In some circumstances, moral and democratic deliberative purposes are served by these features of standards that are not necessarily served by precise rules. In the people to whom they apply (who I will label with partial inaccuracy as 'citizens,' although I mean to include residents in the jurisdiction as well), open-ended standards encourage greater levels of moral deliberation, by which I mean to encompass deliberation about how individuals are to treat one another as well as more political forms of normative deliberation about norms of conduct it is reasonable for us, as a polity, to expect of one another. Citizens must ask themselves, e.g., whether they are treating one another fairly or not, whether they are acting in good faith or not, whether they are taking due care, etc., rather than rotely

---

<sup>7</sup> 554 U.S. \_\_\_\_ (2008) (slip opinion 29).

<sup>8</sup> 538 U.S. 408, xxx (2003).

<sup>9</sup> The term "thick concepts" was introduced by Bernard Williams in *Ethics and The Limits of Philosophy*, 140-xx (1985).

applying a rule. I will argue that this sort of induced moral deliberation is important for our moral health and for an active, engaged democratic citizenry. Other discussions have centered on how standards in constitutional law induce *adjudicators* to deliberate and to render decisions that make the adjudicator accountable and transparently responsible.<sup>10</sup> Far less attention has been paid to the democratic implications for other government officials and for citizens of formulating legal directives in the form of standards generally, inside and outside of constitutional law. Here, it is the citizen's perspective upon which I intend to focus. Indeed, just to lay my cards on the table, although I will use standards as a focal case, my real topic here is not standards *per se* but rather, the use of law to stimulate thinking and dialogue.

I will start with an illustrative example before setting out the positive argument extolling the advantages of induced moral deliberation and the occasional virtues of fog. I will compare how this sort of induced deliberation relates to other forms of induced deliberation in the law and why the kind I celebrate is compatible with a robust commitment to freedom of thought and other forms of respect for autonomy. I will conclude by contending that attention to these virtues need not come at the objectionable expense of the values served by notice and clarity. The specific notice, clarity, and horizontal equity that rules may deliver are not always virtues of justice or requirements of fairness. In many circumstances, the sort of notice justice requires may be satisfied by recourse to open-ended standards and principles.

---

<sup>10</sup> Sullivan at 67-69; Frank Michaelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 33-36 (1986) (discussing how balancing tests engage justices in transparent forms of public reason and how open constitutional discourse by justices engages the public). Cf. Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 Harv. L.Rev. 1685, 1689, 1764 (1976) (focusing on judges and officials' applications of standards).

## Part One: Inducing Moral Deliberation

### A. A partly illustrative example

One of the more shop-worn examples about the virtues of law involves traffic policy. Law, we are reminded, serves important co-ordination functions in an authoritative way. Although it doesn't matter which side of the road we drive on, it matters that we drive consistently on one side or another. Law can solve this coordination problem for us by creating clear traffic rules that settle the matter once and for all so that we do not have to try to solve it for ourselves on the fly.

I have always liked this story because it brings out that law plays a positive role in structuring our environment. The law's role does not always center upon controlling our worst tendencies or targeting and confining Holmes' bad man. In a society without Holmes' rotten eggs, we would still need law and we would flourish for the having of it, properly formulated.

I still like the example for that reason but it is overly simple in some fascinating ways. The first is that it turns out to be a bit of an exaggeration that what side of the road we drive on makes no difference. There is evidence that it may indeed matter, depending in part upon what sorts of vehicles we drive.<sup>11</sup> In a way, that only strengthens the moral of the story: we may have selected the suboptimal side of the road, but nevertheless, we are vastly served by having an authoritative rule about which side of the road to drive on. It is better to have such a law that facilitates our driving in sync even if it is on the worse side.

---

<sup>11</sup> Peter Kincaid, *The Rule of the Road: an international guide to history and practice* (1986).

Second, whether or not designating the side of the road on which to drive enhances traffic safety, the result is not reliably generalizable. That is, there is a tendency to think that the more traffic rules the better, assuming people can absorb them and that enforcement is not overly draconian. But there is evidence to the contrary and a burgeoning traffic architectural movement in response. The basic conceit of the Shared Space movement<sup>12</sup> is not that too many traffic rules overwhelm. Rather, traffic rules such as speed limits and their symbolic analogs – stop signs, traffic lights, etc. carry the hazard that people will absorb them but comply out of rote.<sup>13</sup> They stop paying attention to what they are doing, falsely secure in the sense that they are nested in a set of complex rules whose execution 'guarantees' our safety.

In at least some contexts, traffic safety is enhanced when salient measures of uncertainty are introduced to the driver. The evident uncertainty prompts drivers to pay greater attention their driving, to think about how to negotiate a road and how to treat the specific cars and pedestrians around her. This in turn prompts innovation and creativity when traffic patterns stray from the norms imagined by the typical rules. In Europe, advocates have redesigned traffic-ways in villages, removing road markings, signs, and road humps. Thereby, they have reduced both traffic speeds and accident severity.<sup>14</sup> Similar experiments, eliminating bicycle lanes, curbs, and even traffic signals, at intersections in more densely populated areas including London have yielded similar

---

<sup>12</sup> For statements of the movement's views and projects, go to <http://www.shared-space.org/>.

<sup>13</sup> John Staddon, "Distracting Miss Daisy: Why stop signs and speed limits endanger Americans," *The Atlantic* (July/August 2008) 102. Ben Hamilton Baillie and Phil Jones, "Improvising traffic behavior and safety through urban design," *158 Civil Engineering* 39, 39-40; 43-45 (May 2005).

<sup>14</sup> Ben Hamilton-Baillie, "Shared Space: Reconciling People, Places and Traffic," *34 Built Environment* (2008) 161, 167-8; CSS Transport Futures Group, *Travel is Good: CSS Transport Futures Report*, 30. Sarah Lyall, "A Path to Road Safety with No Signposts," *New York Times* (January 22, 2005); Craig Whitlock, "A Green Light for Common Sense," *Washington Post*, (December 24, 2007).

results.<sup>15</sup> Cars and pedestrians managed to co-ordinate more safely without highly specific traffic signals and signs.

I do not draw libertarian lessons from this case. The example does not vindicate the view that the less (traffic) law, the better. Rather, the issue is what form the law takes, what deliberative impact the form of law exerts, and how this affects whether and how citizens comply. I draw the lesson that the background standard that one is to ‘drive safely’ may be more thoughtfully deployed without a myriad of specific signals and rules that, in some contexts, spark complacency and automatic behavior. Reliance on the less algorithmic and less specific background standard to drive safely keeps drivers more alert and induces them to exercise more responsibility over their driving methods.

To be sure, this is not to say that standards are always superior to rules, however deployed or whatever the context. For instance, a sudden, unannounced, or episodic reversion to standards might work poorly among those reliant and dependent on rules. We may need a contextual clue about which sort of skills we are to depend upon. The evidence from the Shared Space literature does not support alternating rules and standards one intersection after another or randomly eliminating traffic signals to introduce a chilling sort of uncertainty.

Nor is this example meant to suggest other bold but implausible theses, such as that rules necessarily suppress or deter deliberation; that rules may always be implemented without substantial forms of deliberation; that rules always carry their typical virtues and that standards always bear theirs; or that rules and standards are mutually exclusive and submit to clear delineation and separation. Another traffic example should belie the more simplistic claims I aim to avoid. As I am reminded by my

---

<sup>15</sup> Hamilton-Ballie, “Shared Space,” at 169-176; Hamilton-Baillie, “Improvising” at 46.

colleague Jennifer Mnookin, the dominant legal approach in the U.S. to drinking and driving is prima facie rule-based: in most states, it is illegal to drive (or to be tested after driving) while one has a specific blood alcohol level. In California, that level is .08 and all licensed drivers are tested specifically on this detail. But though that rule is clear, specific, precise and easy to memorize, it is difficult for the average citizen to apply directly. We do not have proprioceptive access to our blood alcohol levels. Few own personal breathalyzers. So, although a clear rule governs our conduct, to police ourselves, we must rely upon guesswork and standards (Am I safe to drive? Have I waited a reasonable time after drinking? Did I drink a reasonable amount given my weight and metabolism?). These standards act as rules-of-thumb, so to speak, to help us comply with the governing, precise rule. Rules without clear methods of application may require standards as complements and may themselves elicit deliberation despite their clarity and precision on their face.

That's fine. My goal is not to articulate a clear distinction to tease apart rules from standards or to vindicate the superiority of standards over rules. Rather, I merely want to focus attention on an under-celebrated feature of (many) standards without claiming this feature is always welcome or that it exclusively obtains when the law deploys standards rather than rules. So with those qualifications in hand, let me proceed to develop the argument that one virtue of standards is that their lack of precision induces moral deliberation as well as the deployment and exercise of moral skills.

#### B. Inducing Deliberation

Standards typically incorporate moral terms that do not admit of immediate precise application. I have in mind standards such as: the unconscionability doctrine in

contract law that deems unenforceable contracts or provisions that are ‘unconscionable’ at the time of formation;<sup>16</sup> the contract law’s stipulation that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement;”<sup>17</sup> Rule 11’s requirement that an attorney conduct a “reasonable inquiry” and attest that pleadings and motions are not presented for “improper purposes”;<sup>18</sup> the various requirements in the tort and criminal law that one act as a ‘reasonable’ person would under the circumstances or take ‘due care’. Although many praise the flexibility and fine-tailoring the incorporation of open-ended terms allows, the uncertainty of application is thought to be a drawback because it exposes citizens to liability without a clear demarcation of the behavior that is off-limits. I contend that the uncertainty of application is, in the appropriate context, among its virtues because it requires that the citizen who aims to be compliant, whether from motives of justice or motives of prudence, to grapple with the relevant moral concepts directly. This yields not only instrumental benefits, helping people better to comply with their moral responsibilities, but constitutive benefits as well – making possible richer forms of moral and democratic relations than would otherwise be. (This is why I label the traffic cases as only *partly* illustrative because, for the most part, traffic standards only bear the instrumental fruit of helping people be better drivers where the criterion of being a better driver may be independently articulable in non-morally charged terms).

To elaborate: where standards incorporating moral terms regulate conduct, citizens may themselves have to deliberate about what, morally, is proper and should be expected of them. They will not *always* have to: if like circumstances have presented

---

<sup>16</sup> Restatement of Contracts, 2d., § 208; U.C.C. § 2-302.

<sup>17</sup> Restatement of Contracts, 2d., § 205; U.C.C. § 1-203.

<sup>18</sup> F.R.C.P., Rule 11 b(1).

themselves before and precedent has been established to the effect that certain specific behavior falls inside or outside the directive, the citizen may draw the simple analogy and follow suit. But, where the circumstances differ or it is unclear whether the prior case sets the ceiling or a floor, citizens will have to ask themselves more directly 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.

Eliciting this sort of deliberation may benefit the polity in a number of respects by inducing the exercise and reinforcement of moral agency in at least three ways. First, it directly promotes moral relations between agents. Being a moral agent does not merely involve compliance with a set of rules (or standards). It also involves active engagement and understanding of the situations of others; standards of these sorts require such engagement and thereby directly promote moral agency. Being treated with respect sometimes involves others respecting one’s boundaries by steering clear of them. But in many cases, it involves actually being the subject of respectful and sympathetic attention and deliberation. Those dealing with you don’t merely follow the rules and as an effect, treat you well; rather, in many circumstances, respectful treatment involves others apprehending and appreciating *your* needs and interests and responding to them as such.<sup>19</sup>

Second, this sort of deliberation promotes moral health and development. Moral agency is not analogous to a height you attain at some age that stays relatively stable over most years of adulthood without much attention. Moral agency, like muscle tissue, requires exercise through practices of attention and thoughtful consideration.

---

<sup>19</sup> I discuss the interest in being a particularized subject of respect and its connection to an under-discussed aspect of partiality in “Immoral, Conflicting, and Redundant Promises,” ms.

Furthermore, because the situations presented to us vary and change over time, moral relations require agents to apply moral norms to new situations and, in many cases, to exercise moral imagination to discern how moral principles apply to new contexts.<sup>20</sup> To do this, moral agents need to develop familiarity with the details of others' perspectives and needs and not just navigational knowledge of the current, superficial boundaries that are a product of the current configuration of those underlying moral factors. To be prepared to enact this flexibility, they also need the awareness that morally significant situations may require the active deployment of such skills, not merely the will and practice of staying within pre-drawn lines. Standards require that citizens deliberate about the moral properties of their interactions and work with more complex analogies. Because of their relative opacity, standards convey that moral reasoning requires deliberation and thoughtfulness.

Third, the deliberation-inducing feature of standards plays a democratic role. Because standards, at least at first blush, do not admit of any algorithmic interpretation, citizens must engage in legal interpretation through engaging with the underlying purposes of law. As with most subjects for which understanding the foundations is necessary to understand the surface, this engagement promotes a fuller internalization and deeper understanding of the subject. It also stimulates dialogue between citizens about the point and purpose of law and particular legal directives. This enables a richer form of democratic engagement.

This engagement involves citizens directly in producing what we might call “the first draft” of legal interpretation. Of course, citizens' interpretation of a legal standard will be subject to judicial review and a judicial pronouncement on it will be—in some

---

<sup>20</sup> Barbara Herman, cite.

sense- authoritative or, at least will determine how other governmental officials act.<sup>21</sup> Still, how law is understood on the street by everyday citizens may have an important influence on its ultimate judicial interpretation.<sup>22</sup> This is especially true in cases where the relevant norm or the surrounding law refers to the reasonable person, community practice or expectations, or other somewhat normalizing benchmarks. And, of course, where juries engage in the process of review, they too will be engaged in this deliberation and dialogue with each another and, with respect to many standards, must adopt others' perspectives.

We might even go further. In some cases, we deliberately enact standards because we (the community represented by the legislature) want citizens and officials to determine the more precise application and development of the law over time, through deliberative processes, as we come to understand (and sometimes more completely construct and constitute) the meaning and import of our commitment through practice and reflection. On such a conception, standards work as a partial delegation of authority to citizens and in exercising it, they may further constitute and create the law.<sup>23</sup>

### C. Other Deliberation-Inducing Legal Mechanisms

---

<sup>21</sup> I am in substantial agreement with Mark Greenberg that legal pronouncements do not, ipso facto, determine the content of law, although they may have significant bearing on its content. See "How Facts Make Law," and " ".

<sup>22</sup> My claim is in a similar space as that occupied by the popular constitutionalists although my claim is both more modest and broader. It is more modest in that my position is weaker than that of some popular constitutionalists. My position is that that popular interpretation makes a significant contribution to our understanding of law, but I do not make the stronger claim that it is determinative of the content of law. It is broader in that I take the popular contribution to law to range over the entire domain of law (or at least that encapsulated or communicated by standards) and not solely constitutional law.

<sup>23</sup> There are parallels here to agency delegation.

The sort of induced deliberation I mean to defend may be brought into sharper relief by considering some contrasting uses of law to elicit deliberation.

### 1. Penalty Default Rules

The idea that the formulation of an explicit legal norm might be designed to encourage deliberation is not novel. Think for instance of penalty default rules. Penalty default rules also aim, by conception, to encourage deliberation between contracting parties. The main differences are what sort of deliberation is encouraged, how and why. Penalty default rules, as they are conceived, aim to encourage parties to reveal information to one another that might otherwise be concealed by them and to negotiate to a settlement both parties would prefer over the default rule, whether because the default rule may impose an outcome that is worse for both or for one party who is willing to compensate the other for a different outcome. The information revealed may be information about the party's potential risks or payoffs. Or, it may be about the contract, as when the party who operates under presumptions of interpretation in cases of ambiguity has the impetus to educate the other party about the contract's intricacies.<sup>24</sup>

A classic, though contested, example is the zero-quantity rule: that contracts that do not specify the quantity of goods to be sold will be unenforceable. Although the UCC will fill in the price if it is not specified, harking to the common market price, it will not fill in a reasonable quantity – even if one could be discerned and even if it is clear the parties aimed to form a contract. The failure to supply the missing term and the consequence of complete unenforceability induces parties to both deliberate about exactly

---

<sup>24</sup> See e.g., UCC xxx; Ayres, “Default Rules for Incomplete Contracts,” 587.

what they want and to reveal it to one another and to third parties, saving courts from expensive methods of investigation *ex post*.<sup>25</sup>

Another example is that of *Hadley v. Baxendale*, the rule that in contract, only those consequential damages foreseeable at the time of formation are recoverable; this rule encourages parties with unusually large risks to reveal information about their situation than they otherwise would, which may: alert the other party to hazards, thereby making for better performance; protect the disclosing party from under-compensation; and, afford the non-disclosing party a better sense of the value of the contract and the appropriate bargaining posture.<sup>26</sup>

Notice, the sort of deliberation championed by the advocates of penalty default rules that is encouraged is primarily prudential, albeit in a cooperative setting. The motivation for deliberation likewise is prudential: if such a bargain is not reached, at least one party risks suffering a vastly dispreferred outcome. The spur to deliberate is indirect and punitive: a default rule is selected that is likely to rankle in order to catalyze revelation or negotiation to an alternative. But, deliberation is not required nor is it necessary to apply or follow the extant law. Penalty default rules are, after all, rules:<sup>27</sup> they specify a clear and fairly determinate outcome, just one that proves objectionable and hence triggers deliberation and negotiation to find an alternative. Deliberation is elicited by threat. Finally, the point of *our* imposing a penalty default rule is to encourage more finely

---

<sup>25</sup> Ian Ayres and Robert Gertner, “Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules,” 94 *Yale Law Journal* 97, xxx (1989); Ian Ayres, “Default Rules for Incomplete Contracts,” *New Palgrave Dictionary of Law and Economics* 587 (19xx); S Cal Symposium, etc.

<sup>26</sup> *Id.* But see Eric Posner, “There Are No Penalty Rules...”

<sup>27</sup> Penalty default standards could be used, however, to similar effect on the parties but depending on how hazy and open-ended the terms, their deployment might undermine one of the main motivations for using penalty defaults, namely to save the judiciary from having to investigate and substitute judgment for the parties. One of the spurs to negotiate out of the penalty default rule is how clear it is that an untoward result will ensue if one does not.

tailored negotiations and information exchange between parties: to encourage parties to negotiate so that courts do not later have to investigate and make *ex post* decisions.<sup>28</sup>

## 2. Moral and Political, Not Primarily Prudential

The use of standards to encourage deliberation to which I am calling attention is quite different. First, the point is not, primarily, to flush out otherwise hidden information or to encourage more precise and explicit prudential reasoning and negotiation between private parties. The sort of deliberation that is encouraged is moral in nature: those subject to the standard must consider what is or is not *fair* or *reasonable* or *unconscionable* -- not merely what is or is not in their interest.

Second, the posture of the law, in this circumstance, is not to encourage citizens to displace it with their own invention. The standard doesn't serve as a disposable default rule. Similarly, the aim is not --as with penalty default rules - to bypass the need for judicial discretion and interpretation. Instead, standards of this sort involve citizens more directly in understanding and implementing the law. Citizens are to exert similar sorts of discretion and interpretation to develop and exercise their moral capacities, to stimulate morally sensitive interaction between citizens, and to involve citizens directly in preliminary stabs at legal interpretation and a deeper understanding of our mutual expectations of one another.<sup>29</sup>

Third, the solicitation to deliberate is more explicit and direct. The behavior directly called for by the legal norm requires interpretation by the citizen in order to comply with the norm. There may or may not be serious consequences if a citizen elects not to interpret the legal norm and thereby falls afoul of its requirements but it depends

---

<sup>28</sup> Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 94 Yale Law Journal 97, xxx (1989).

<sup>29</sup> Cf. Kramer, Siegel, Rowe, Whittington, Adler, Powe, Friedman

on the significance of the norm and the remedies attached to it. Unlike penalty default rules, a threat is not the intended impetus for deliberation. The standard posture of compliance is sufficient to impel deliberative activity whether or not the citizen is interested in the remedial reaction to nonfeasance.

Finally, the aim is not –as with penalty default rules - to bypass or eliminate the need for judicial discretion and interpretation. Rather, it is to involve citizens in similar forms of deliberation to develop and exercise their moral capacities, to stimulate morally sensitive interaction between citizens, and to involve citizens directly in preliminary stabs at legal interpretation and a deeper understanding of our mutual expectations of one another.<sup>30</sup>

#### D. Objectionable Thought Induction

This justification of standards that I have been defending involves encouraging and even inducing morally inflected deliberation and conversation. This emphasis on promoting moral agency may seem strange for a liberal. But, even liberal polities that adhere to some version of the view that it is inappropriate to ‘enforce’ morality or to circumvent autonomous agents’ ability to construct and pursue their own conceptions of the good may (and indeed must) design legal systems with an eye to encouraging and supporting the development and exercise of moral agency. A well functioning polity and a system of justice depend upon (most) citizens having fully developed moral personalities and putting them to use. Fostering basic forms of moral agency may be essential even while it is impermissible to require certain forms of virtuous display or

---

<sup>30</sup> Cf. Kramer, Siegel, Rowe, Whittington, Adler, Powe, Friedman

attitudes or to require that specific moral decisions about the character of individuals' personal, intellectual, and religious lives be made.<sup>31</sup>

Nevertheless, even if one agreed that the liberal state may and must encourage the development of exercise of moral agency, questions might arise about the use of this particular mechanism. This justification for the use of standards aims to encourage moral agency, but not through direct exhortation or efforts at persuasion. This mechanism does not involve a clear statement of the government's positions and reasons, allowing for a transparent evaluation and rejection or acceptance by the citizenry, as do campaigns to increase environmental awareness and more responsible recycling practices.

Instead, standards enlist citizens to deploy their moral agency through a more indirect method than direct efforts at persuasion. This sort of indirect effort to influence citizens' speech and thought may raise questions about its moral and constitutional propriety in light of our fundamental commitments to freedom of speech and thought. A related, but perhaps slightly different way of putting the concern might highlight our general discomfort with mandatory forms of adult education. While liberals defend (and many celebrate) the importance of providing education for all children (and not permitting children's educational opportunities to be arrested by their parents or by other social circumstances), mandated adult education is entirely off the agenda. Although liberals may approve of required adult education to earn or exercise a privilege (e.g. a license to practice medicine or law or to drive) or in response to an offense (e.g. rehabilitative education or anger management), entirely non-elective adult education is so discomfiting that liberals tend to shy away from the topic entirely. Although the concern

---

<sup>31</sup> I develop this position in greater depth in "The Divergence of Contract and Promise," 120 Harvard Law Review 708, 710-717.

is rarely voiced, I suspect the liberal concern is that once citizens have achieved adulthood, efforts to enroll adults in compulsory forms of education violate their rights of autonomy and in particular, their freedom of thought.

Although concerns of these sorts may be valid in a wide range of circumstances, I do not think they are raised standards, even when their use is conceptualized as a method of continuing moral education for adults. Let me briefly articulate some salient theoretical differences between this educative use of standards and objectionable interferences with adult's freedom of thought. I will then proceed to develop these differences by discussing some contrasting examples that may illuminate how and when standards should be used in this way.

First, the use of a standard to facilitate moral deliberation does not aim for some specific content to be uttered by or thought by citizens; quite the contrary – for this aim to be met, citizens must generate the content through their own deliberation and not merely parrot a state message or other forms of state content. This also obviates the risk that the effect, independent of the aim, of such standards will be that citizens come to imbibe a scripted party-line. Further, in many cases of deliberation-eliciting standards, fairly safe space can be identified; citizens wary of exercising their judgment may forbear. For example, the risks of uncertainty associated with the unconscionability standard arise when one attempts to push the envelope or engage in creative transactions; plenty of acceptable clauses and safe harbors already exist along the way as permissible models.

Second, the deliberation being stimulated is crucially related to developing the character traits strongly associated with democratic citizenship. Third, the rationale for

eliciting such deliberation does not insult or compromise the dignity, autonomy, or privacy of citizens.

These features mark important contrasts with some other prominent examples of eliciting speech or thought that give pause. For instance, the sort of compelled speech involved in *West Virginia Board v. Barnette*<sup>32</sup> (compelled pledge of allegiance) and in *Wooley v. Maynard*<sup>33</sup> (compelled use of license plates sporting the motto “Live Free or Die”) did require that extremely specific content be parroted by citizens irrespective of whether they agreed with it or not and irrespective of whether they independently considered the content’s validity. As I have argued elsewhere, scripted compelled speech of that sort may have the objectionable aim, or may run the risk of having the objectionable effect, of influencing citizens’ thoughts on important matters through a mechanism that bypasses their independent deliberation.<sup>34</sup> The rationale for standards I have been discussing does not aim to impart specific content through bypassing independent deliberation but rather aims to spark independent deliberation; although the standards themselves incorporate moral concepts and so, in that way, aim to elicit an interpretation or conception of what is morally apt or appropriate, no specific content to that interpretation is dictated by the standard that elicits deliberation.<sup>35</sup> Nor do these standards themselves compel close forms of association: they may regulate associations

---

<sup>32</sup> 319 U.S. 624 (1943).

<sup>33</sup> 430 U.S. 705 (1977).

<sup>34</sup> Vincent Blasi and Seana Shiffrin, “The Story of *West Virginia State Board of Education v. Barnette*” *Constitutional Law Stories: An In-Depth Look at Ten Leading Constitutional Cases*, ed. Michael Dorf, (2004). See also Seana Shiffrin, “What’s Really Wrong with Compelled Association?,” 99 *Northwestern Law Review* 835-884 (2005).

<sup>35</sup> This may seem like a strange claim given that these standards are legally enforceable: if one gets it wrong, a judge or jury may impose punishment or another remedy. True enough, but unlike predicated content meant to be absorbed without deliberation, standards often admit of a range of acceptable alternative methods of compliance. Further, one may present one’s reasons for one’s interpretation to adjudicatory bodies who are open to persuasion.

that occur for other reasons—e.g. in the case of unconscionability, contractors who typically voluntarily come together or in the case of traffic, drivers and pedestrians who may not choose one another but do not come together because the use of a standard, rather than a rule, compels it.<sup>36</sup>

The motivation for eliciting such deliberation also represents an important contrast with the more objectionable sort of compelled deliberation litigated (and upheld) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>37</sup> *Casey* involved, et alia, a substantive due process challenge to a regulation requiring women seeking abortions to review informational materials about pregnancy, childbirth, and the physical development of fetuses and embryos and to endure a 24 hour waiting period after the provision of the information. Such regulations raise interesting issues about mandatory education of adults. Even under the most benign interpretation of their purpose, they aimed to elicit deliberation about very specific content (and, under a less benign interpretation, aimed to elicit abortion-rejecting conclusions with a quite specific content) within a quite specific time period rather than just to elicit more diffuse and open-ended moral deliberation as with the sorts of standards I have been discussing.<sup>38</sup>

---

<sup>36</sup> This marks a related difference with the sort of deliberation induced by mandatory speech with opt-out provisions, such as the pledge (or similar provisions for prayer that have been struck down). Although one may think that all citizens should consider how they conceive of their relation to the state—whether that relation is of fealty or not and whether it takes the same form as the state’s conception of fealty – the pressure to deliberate feels objectionably coercive when it is exerted on these specified occasions in which one must register one’s dissent in public, without much control over how, and without any meaningful opportunity to discuss or explain one’s position. Thus, I agree with Seidman’s criticism of the opt-out pledge, though I disagree that it amounts to a criticism of *Barnette*’s holding that the mandatory pledge is unconstitutional; rather, I think the criticism speaks in favor of taking *Barnette* further and treating the pledge in the same way that mandatory prayer has been handled.

<sup>37</sup> 505 U.S. 833 (1992).

<sup>38</sup> Discuss juries.

The forced education requirements in *Casey* were objectionable in at least two respects. First, the timing was insulting. Women were required to expose themselves to materials after they had already elected to abort and then were required to forbear from implementing their prior decision for a day, despite the terrific inconvenience and difficulty that would raise for working women, women trying to keep the procedure confidential, and women compelled to travel long distances because abortion clinics were absent in their area. The suggestion was that the outcome of their prior deliberation was incomplete or inadequate. That implication diminished how serious a decision abortion is for women who elect it. Women who elected childbirth were not required to undergo such education before proceeding with their decision.

Second, as this structure brings out, these education requirements were duplicitously labeled as ‘informed consent’ provisions. The point, as the timing revealed, was not to encourage serious deliberation; that might better be done in high school or upon notification of pregnancy. Rather, the ‘informed consent’ requirements of this sort seem designed to pose an obstacle to or to discourage in illicit ways the exercise of the right to abort.<sup>39</sup>

The use of standards I have been advocating does not engage these concerns. It is not targeted in the same way at particular people or specific decisions. Further, the aim is

---

<sup>39</sup> It is not always inappropriate for the government to discourage exercise of a right. For instance, the government might appropriately discourage protected racist speech even in public fora. But, discouragement of the exercise of a right is a delicate matter and must be done in ways that do not harass, imply repercussions for resisting the discouragement, or insult citizens who resist the discouragement by, for instance, suggesting they are incompetent or disloyal. It is one thing to discourage racist speech through general education campaigns or calls for tolerance; it is another thing to demand authors undergo racial sensitivity training on the eve of the publication of their racist book. I hope it is evident that I do not regard the parallel between having an abortion and engaging in racist speech as extending any further than the fact that both involve the exercise of a fundamental right with which some or many disapprove.

not to discourage exercise of a right or to suggest that certain decisions reflect inadequate or irresponsible deliberation.

A more difficult case of induced deliberation is that implicit in the Missouri law reviewed in *Cruzan v. Director, Missouri Department of Health*.<sup>40</sup> *Cruzan* upheld what was, in essence, a default rule –some might regard it as a penalty default rule - about end-of-life treatment. If one had failed to leave clear and convincing evidence that one wished for the termination of life-support in the event one fell into a persistent vegetative state, treatment would be continued *even if* the preponderance of evidence indicated one wished termination. *Cruzan* and the law it upheld might be thought of as aiming to elicit deliberation and speech. If one's wishes concerning end of life care were to be respected, one would have to deliberate and to engage in quite explicit communication -- say by drafting a living will. For those who preferred termination, the law operated as a sort of penalty default rule: that information would have to be revealed and formally codified or else a rather dire consequence would be implemented.

This sort of penalty default differs from some of those envisioned in contract partly because the consequences are so dire and because the issue touches upon quite sensitive, personal decisions. In addition, unlike some penalty default measures, the default provision represents one highly controversial position on a highly personal matter. In this latter respect, it resembles the scheme at issue in *Casey*. But, by contrast with *Casey*, the deliberative requirement is not compelled at a particular time and is not presented as a specific reaction to an individual decision deemed poor or inadequate. Further, one might contend that the compelled deliberation in *Casey* was relatively gratuitous. There was no demonstrable need to require the deliberation to occur for the

---

<sup>40</sup> 497 U.S. 261 (1990).

relevant right to be implemented and exercised. By contrast, one of the reasons why *Cruzan* represents an interesting and hard case is that if there is a right to determine and direct one's own treatment, then there is some need to elicit communication from individuals about their preferred mode of treatment; in the absence of such communication, some default must be implemented (although it could be a default method of collecting evidence of the patient's preferences). The aim to elicit deliberation and communication in this case is not insulting and, because the deliberation and communication are not triggered by an episode or by an effort to exercise a right, the timing also is not insulting.

Putting aside the particular substantive default (life maintenance) the Missouri law enacts and the objections that might be made to it, what might be troubling about *Cruzan* is that the strength of the evidentiary standard requires a level of depth of deliberation, communication and articulacy about a matter that citizens find difficult to face. Many people engage in denial that they will die or that they face the risk of being in a persistent vegetative state. Making and formalizing a decision about end-of-life care involves confronting not only difficult prudential and ethical issues but also just confronting these features of the human condition that many work hard to avoid. It is one thing to share one's views, perhaps in tentative ways and halting language, in a tender moment with a friend. It is another to devote the sort of sustained attention and care required to codify one's views with the precision necessary to convey one's wishes to a stranger. Subjecting citizens to a rather severe default rule unless they engage in articulate and specific communication about personal matters around which they are frail, will operate as rather substantial manipulation bordering on coercion if it works; where

the barriers to deliberation are so deeply seated, eliciting deliberation through threat may simply fail. Every time I teach *Cruzan*, many students are shocked by the outcome; others think it is entirely fair that those who fail to fill out living wills are subject to the state's preference to continue life-support. What strikes me though is that months later, at the end of the term, no greater percentage of students has filled out a living will form – even when I pass these forms out in class. Some very strong sort of avoidance seems in operation. If is evidence is not merely anecdotal, it should give us pause about justifying the sort of default rule litigated in *Cruzan* as a deliberation-eliciting device. It either fails to work or if it were to, it works through overly severe mechanisms.

If this criticism of the Missouri law that *Cruzan* upheld is persuasive, does it have implications for the conscious use of standards as a deliberation-eliciting mechanism? Briefly, I think it does. It suggests that it may be misguided to attempt to induce deliberation about important subjects that we know human beings avoid, or are frail with respect to, through mechanisms that, in essence, threaten severe consequences. Such mechanisms only purport to induce deliberation but, in effect if not through intention, will often tend to provide an excuse for imposing severe consequences on the class of those who have these frailties. The laudable motive of inducing deliberation cannot be used as an excuse for trap-setting or taking advantage of others' deliberative blocks or predictable failings.

So, for instance, I suspect that the use of standards to delineate the permissible age of sexual majority is a poor idea. Judgment about whether a potential partner is sufficiently mature may well be substantially colored by sexual desire, wishful thinking, and projection of a distinctive sort. Many of those who may be at risk for violating the

legal norm against initiating sexual relations with a minor are themselves often younger and less experienced at calibrating their judgment in light of the distorting effects of sexual desire; others who are at risk have life-long difficulties in this domain. Expecting sound moral deliberation and judgment to occur at this juncture may itself be overly idealistic. Given the terrific stakes of a mistake for both the minor and for the perpetrator, there is a strong argument for using more rule-like formulations in the articulation of the crime of statutory rape.<sup>41</sup>

This isn't to say that standards have no place in the criminal law and even in its conduct rules. With respect to the defense of self-defense, for instance, we may reasonably have fewer qualms that we are unrealistically demanding the predictably ill-equipped to overcome hazards of poor judgment that are too hard to surmount. The use of a standard in this circumstance operates less as a 'blind,' trapping those who might otherwise steer clear of hazard and instead may allow for more nuanced judgment about whether another person threatens to use illegal force and whether the use of force in response to such a threat is indeed 'necessary.'<sup>42</sup>

These examples underline that our use of the mechanism of standards (or any other mechanism) should be sensitive to a variety of facts about how and in what contexts we think well or especially poorly. Using standards to induce deliberation may promote sound moral agency in some domains; in others, it will be unwise and may turn into an occasion for hectoring or gratuitous punitiveness. One may welcome the fact that standards induce deliberation without taking the view that we are to foster deliberation

---

<sup>41</sup> There may, however, be grounds for adjudicators to apply a more standard-like norm (or decision rule) when assessing guilt, level of culpability, or excuse. See also Meir Dan-Cohen, "Acoustic Separation in Criminal Law," in his *Harmful Thoughts* (2002).

<sup>42</sup> William Stuntz, 121 *Harv. Law Rev.* 1969, xxx (2008) (discussing examples in German criminal law of requiring specific behavior to be "wrongful" in order to be subject to conviction).

and analysis at all moments as though the democrat's ideal is to become as neurotic as Woody Allen.

### Part Two: Fairness, Notice and Horizontal Equity

Thus far, I have argued that a(n) (occasional) virtue of standards is in their lack of immediate clarity. The uncertainty this introduces may spark deliberation and conversation on the ground. This redounds to the moral health of citizens and a democratic polity.

I now turn to the objection that this method of inducing deliberation is unfair. It is not merely that full notice is sacrificed as a side-effect of an otherwise permissible aim. This mechanism works, if it does at all, by depriving citizens of fully explicit notice about what the law requires of them and, in cases of standards used within remedy provisions, how the law will respond to their lapses. It may be objected that to deprive intentionally citizens of notice of the law's content subverts the rule of law. Furthermore, where there are not clear rules, substantial risks develop that horizontal equity will be sacrificed and that like cases will not be treated alike.

I will tackle this objection in two stages: first, with respect to remedial rules and then, separately, with respect to the substantive legal directives that directly regulate conduct. The objections are, I believe, much stronger with respect to the latter than the former, but in neither case are dispositive.

I will take for granted what seems to be the common ground in most discussions of rules and standards. Namely, putting aside those cases in which an arbitrary but certain declaration must be made (e.g. how many days may elapse between the filing of an opening brief and a reply brief), rule-centered approaches, by and large, with

numerous exceptions, run the risk of being over- and under-inclusive with respect to the conduct aimed to be elicited, deterred, or delivered.<sup>43</sup> Rule-based approaches may deliver greater clarity and precision but sacrifice the narrow-tailoring and nuance standards may afford; on the other hand, if standards depend on deliberation and the judgment of disparate actors, they may run the risk of going off the rails. I want to assume these points are in the background for the following reason: I take it that the relevant framing of the issue is not that, in the germane cases, a rule-based approach would deliver absolutely correct results and give perfect notice and a standard-based approach would deliver imperfect results and imperfect notice. In the germane cases, both approaches run different sorts of risks of inaccuracy, so to speak.<sup>44</sup> The question I am interested in is whether the deliberate use of standards to invoke deliberation is objectionably insensitive to individual's claims to more specific forms of advance notice (albeit forms that come, part and parcel, with a sort of inaccuracy about whether that conduct truly is what we may legitimately or what we wish to regulate).

Let me start with remedies and in particular with Souter's anthem that the bad man deserves specific notice, *ex ante*, of the cost of his misbehavior. Why exactly does the bad man want to know the precise cost of his misbehavior? It seems reasonable to demand that damage awards are fair – among other things that they are a reflection of an honest assessment of the prohibited behavior and not an opportunistic reaction to the agent, that do not represent an over-reaction or an excessive penalty, and that they do not reflect the arbitrary whim or caprice of the adjudicator. Prima facie, though, I don't understand why the bad man has a foundational claim of justice to a more specific price

---

<sup>43</sup> Kennedy, *supra* note x, at 1689, 1695, 1697.

<sup>44</sup> *Id.* at 1696.

for the behavior unless we take ourselves to be running a market and selling off permissions to misbehave.<sup>45</sup> That economic attitude, however, seems inconsistent, with the usual predicate for punitive damages – that the behavior in question must constitute a true wrong. Of course, it may be argued that the only way to ensure basic fairness and non-arbitrary treatment is through more specific notice and not other mechanisms of constraint and oversight. But that evidence needs to be provided. It is not an argument that specific notice itself is a requirement of justice, but merely that notice requirements may act as prophylactic policing mechanism. Perhaps they are necessary and perhaps they aren't, but I do not see a strong argument of principle here.

From the perspective of justice, it seems important that: people have sufficient notice to make them alert to what sorts of conduct are legally prohibited or, if you'd rather in the civil case, what sorts of conduct are subject to legal remedies; and, that whatever remedies are imposed are fair reactions to the conduct, are not themselves excessive. A potential wrongdoer has an interest in sufficient notice to plan his or her conduct to avoid wrong-doing and entanglement in the remedial system. But beyond that, it is hard to articulate a legitimate interest in predicting the remedy with specificity.<sup>46</sup> These constraints, however, may be satisfied without resorting to a pricing schedule; they therefore make room for the use of standards in applying remedies and therefore for deliberation by judges and juries about the magnitude of the wrong in question and what sort of response would be appropriate in the circumstances.

---

<sup>45</sup> Cf. Kennedy, *id.*, at 1695 (noting that rules facilitate gaming behavior by the bad man and that uncertainty may provoke moral behavior by making people cautious in order to avoid crossing a line they cannot discern).

<sup>46</sup> Insurance to protect victims? Interest of society perhaps. May be a reason to prefer rules though interest may largely be satisfied by predictability facilitated by real enforcement of non-excessiveness constraint.

But what of the lapses then in horizontal equity? I submit there is a difference between deliberately aiming to treat treat like cases unlike and treating like cases differently not deliberately but because one (or many) are attempting to alight upon the right result but have differing opinions or because their understanding of what constitutes right treatment evolves. The first case does violate strictures that we treat each other equally or with equal respect. The second case need not. (It is, after all, something we live with or perhaps embrace as a general feature of jurisdictional barriers.)

What matters to our assessment of failures of horizontal equity, I submit, is the cause of difference: if it is intentional or if it systematically reflects and compounds factors that are arbitrary from a moral point of view (e.g. race, class, gender), there is a failure of justice. If, however, there is no excessiveness, no concentrated disproportionate impact or discriminatory design, and the response reflects a reasonable effort to respond to a wrong, then variations of treatment that are the side-effect of attempting to get things right do not seem like objectionable lapses of fairness.

This idea may strike some as substantially more persuasive in the case of remedies than with respect to conduct norms. It is one thing to refuse to specify the remedy to a clearly delineated wrong and to tolerate variant reactions by juries and judges to behavior that was avoidable; it is another thing altogether to be coy about specifying what the wrong is in the face of a sincere request by a party who aims to comply.

Practically, I'm not so sure that fair results require specific notice. As Bill Stuntz has recently argued, the deployment of vague standards in criminal contexts may be more likely to result in measured, egalitarian justice than our current regime because vague

standards elicit the contextualized judgments of local juries who may also resist enforcement of laws with disproportionate impact or discriminatory design.<sup>47</sup>

Theoretically, the defect of that complaint is that it stacks the deck in a certain way I wish to resist, namely by implicitly assuming that the target audience of law is the Holmesian amoralist who also lacks anthropological resources. For, it isn't as though standard-based approaches to articulating required conduct hide the ball; they do not amount to a bare announcement that remedial norms will be applied where warranted based on a fair assessment of conduct. Standard-based approaches **do** specify what conduct is allowed or disallowed. What they fail to do is specify it at a level of particularity that facilitates identification of the conduct at issue by a party who refuses to exercise her moral faculties, whether directly or indirectly (by consulting others). They require of a person that she either hone and exercise her moral faculties or be sufficiently self-aware to realize that these faculties are under-developed, or in the particular circumstance, prone to distortion, and that she needs assistance. This, of course, is no different than what morality asks of all of us, everyday and what most of us must do, as a general matter, if the polity is to thrive.

Nonetheless, there may be epistemic gaps between what citizens reasonably believe is warranted and what prosecutors and juries reasonably believe is warranted under the relevant standards. The hazards associated with these gaps may provide us direction about where to use of rules may be wise: where the potential for prosecutorial overreaching is high given the subject matter or the sociological terrain; where anxiety about unpredictability chills salutary behavior; where our cultural evolution surpasses our

---

<sup>47</sup> William Stuntz, "Unequal Justice," 121 Harv. Law Rev. 1969, (2008); see also Kennedy, *supra* note x., at 1705.

individual intuitions and experience. That is, where standards might be subject to abuse, we have more reason to use specific rules to curtail prosecutorial zeal and to police the abuse of power.<sup>48</sup> Where, for cultural and political reasons, citizens are independently fragile and skittish, we may have reason to provide clear guidelines about what conduct is protected. Both these considerations underwrite the justifications for the ‘void for vagueness’ doctrine with respect to regulations that touch upon speech interests.

Pockets of cultural divide or jolts of cultural progress may also mark spots where rules are especially germane. Where communities differ with respect to their normative assessments or where the law plays a leadership role in establish new standards and moral progress, citizens may require quite specific guidance in order to orient or recalibrate their judgments.<sup>49</sup> The introduction of sexual harassment laws may serve as an example: to make progress on achieving welcome environments for women in a domain in which gender roles, ideology, and historical practice may have created blind spots, many may have need quite specific guidance about what sorts of behaviors are unwelcome or hostile; perhaps illustrative examples to complement the standards will suffice or perhaps only quite specific rules will fit the bill. It depends on context. Over time, the need for specific guidelines might dissipate as the moral lessons of these examples become internalized and the general concept becomes the more salient method of categorization. Other cases may include those domains in which participation and coordination is essential but where suspicion that compliance and reciprocity norms are frayed may be paralyzing: highly specific rules and aggressive enforcement in the short term may reset a

---

<sup>48</sup> Kennedy at 1706 (and connection to issue just below re cultural divide – here b/t judiciary and executive)

<sup>49</sup> Cf Kennedy at 1704.

pattern that is broken and revitalize the mutual expectations that underpin a thriving local moral culture.

One need not dispute there may be major pockets of our joint life together in which specific counsel is appropriate: whether as acknowledgment and management of reliable areas of frailty in judgment, broken trust, or as propaedeutic steps toward lasting moral progress. But, we should steer clear of mistaking these adjustments for an ideal methodology for law. We shouldn't conceive of law exclusively as a device to replace individual moral judgment, to reify specific moral judgments of the community, or to, as far as possible, to decouple the functions of law and the functions of moral judgment. A lot may be gained by relegating the bad man to the back burner of our theoretical attention. We are not Holmesian characters, by and large; nor are we playing a game in which it is essential to the function of that game that we pretend we are or may turn Holmesian at any moment. If we conceive of ourselves as democratic citizens and of the democratic endeavor as having a moral purpose (rather than just as a constraining device), then we must conceive of ourselves as moral agents. And it would be awfully strange to think that our moral judgment when voting was the only time that judgment with respect to our mutual relations could and should be called upon. If our political mode of organization presupposes that we have moral judgment and if we also believe that moral judgment requires engagement and practice to stay supple, then it is not unfair to induce moral deliberation through law and indeed, in appropriate circumstances, it may enhance our capacities and deepen our practice of self-legislation.

