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# ESSAY

## INDUCING MORAL DELIBERATION: ON THE OCCASIONAL VIRTUES OF FOG

*Seana Valentine Shiffrin**

Legal *standards* are often valued for their flexibility and their susceptibility to nuanced, context-sensitive interpretation. Legal *rules* are usually celebrated for their clarity and certainty. The received wisdom is that the merits of the one form represent the demerits of the other. Standards, for instance, facilitate contextual, individualized application of the law and allow for greater adaptation to changing circumstances and an unfolding evolution of legal understanding,[1] but these virtues are thought to come, *unfortunately*, at the expense of notice and transparency.[2]

In this Essay, I dispute the accepted wisdom by celebrating rather than lamenting the opaque features of standards. I argue that the stock story offers an incomplete perspective. By framing the prima facie unclarity and uncertainty of legal standards as a defect, the traditional picture ignores the salutary impact that superficial opacity may have on citizens' moral deliberation and on robust democratic engagement with law. The superficial opacity of standards is often a virtue.

To be sure, the received wisdom makes some sense. Other things being equal, rules, understood as legal directives that instruct "a decision-maker to respond in a determinate way to the presence of delimited triggering facts,"[3] offer precision and transparency. Standards,

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[1] Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992).

[2] *See id.* at 64–66.

[3] *Id.* at 58.



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understood as legal directives that incorporate thick, substantive terms that require the "direct application of the background principle or policy . . . to a fact situation,"[4] may make it more difficult to predict what conduct is permissible or what legal response will be forthcoming.[5]

These features stand in apparent tension with our commitments to fairness: to achieving horizontal equity, to rendering the law accessible, and to providing advance warning of subjection to sanction.[6] Few contend that these qualities force us to abandon standards altogether, but they are typically regarded as defects.[7] When we deploy standards, we do so in spite of these features. Attending to these detractions guides us to use standards carefully and judiciously.

Something of this sort is at stake in the discussion about the unconscionability standard in contract. Whether criticizing the standard, defending it as protecting consumers and the poor, or defending it as disentangling the judiciary from complicity with exploitation,[8] many duly note that the standard is frustratingly hazy and subjective. For some, its elusiveness represents a necessary cost of its flexibility;[9] for others, its resistance to algorithmic precisification provides sufficient grounds to reject it as overly subjective.[10]

Anxiety over uncertainty also fuels our new constitutional jurisprudence about punitive damages. The discovery of the surprisingly specific constitutional ratios between punitive and compensatory damages[11] explicitly reflects a concern for defendants' ignorance of their

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[4] *Id.*

[5] Of course, rules are not always simple to decipher. For instance, they may make reference to highly technical terms or to objective factors that are nonetheless difficult to discern, or, as is sometimes claimed about the rules of the tax code, they may be so voluminous as to stymie straightforward application. *See* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1, 8 (1993) ("[S]tandards may be more transparent than more precise defaults.").

[6] *See, e.g.*, Sullivan, *supra* note 1, at 62; *see also* FREDERICK SCHAUER, THINKING LIKE A LAWYER 194–98 (2009); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–79 (1989).

[7] *See, e.g.*, Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 37–38, 53–56, 58–59 (2000) (discussing the difficulties of the uncertainty that standards introduce but denying that standards should be altogether eschewed).

[8] *See* Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 205 (2000).

[9] *See, e.g.*, M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 814–15 (1969) (arguing that the vagueness of U.C.C. section 2-302 is necessary to address tensions in modern contract law).

[10] *See, e.g.*, Arthur Allen Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487, 504, 516 (1967) (criticizing U.C.C. section 2-302 for its reliance on subjective interpretation and application by judges, and the difficulty of determining whether a contract is invalid).

[11] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (finding that, as a matter of substantive due process, punitive damages generally should not exceed nine times the amount of compensatory damages).

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exposure to liability for malfeasance and a concomitant worry about the prospect of different damage awards for comparable behavior.[12] Justice Souter's recent opinion in *Exxon Shipping Co. v. Baker*[13] bespoke these concerns in capital letters. Delivering a federal common law ruling but often adverting to constitutional norms, Justice Souter argued that the unpredictability of punitive damage awards carried "an implication of unfairness."[14] He concluded that:

> [A] penalty should be reasonably predictable in its severity, so that even Justice 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 them with a fair probability of suffering in like degree when they wreak like damage.[15]

Taking this concern for the bad man's predictive predicament to heart, our recent constitutional jurisprudence has supplemented the standard that punitive damages should not be excessive with an interpretive rule. Under the doctrine announced in *State Farm Mutual Automobile Insurance Co. v. Campell*,[16] punitive damages typically should not exceed four times actual damages and, unless there are exceptional circumstances, should never exceed nine times actual damages.[17]

In this Essay, I aim to unsettle the received wisdom about standards that propels this jurisprudence. I reconsider the aversion their vagueness and unpredictability provoke, and I provide moral and democratic reasons to champion their haziness. This reconsideration serves as an occasion to initiate a more general investigation about how and when legal form and content may stimulate moral thinking and dialogue. Although I use the common wisdom about standards as a stalking horse to provide a focal point of discussion, standards offer merely one salient example of the larger topic of how law and legal form may induce moral deliberation. Consequently, at points the discussion ranges beyond the use of standards and touches on other contexts where the law may attempt to induce deliberation or otherwise influence moral thought, whether permissibly — as with efforts at direct persuasion to recycle — or more problematically — as with efforts to inculcate directly; to inculcate, harass, or harangue under the pre-

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[12] *See id.* at 417, 427.

[13] 128 S. Ct. 2605 (2008).

[14] *Id.* at 2627. The same passage fallaciously equated unpredictable awards with "eccentrically high" awards. *Id.*

[15] *Id.* (citation omitted) (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)).

[16] 538 U.S. 408.

[17] *See id.* at 425.

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text of encouraging deliberation; or to spark deliberation by threat or under circumstances that are ill-suited for productive deliberation.

I begin by questioning the consensus that, whatever their overall merits, it is a common defect of standards that they are hazy, unclear, and provide insufficient notice. Instead, I contend that these supposed defects may often operate as virtues. In some circumstances, these very features of standards serve moral and democratic deliberative purposes. Rather than applying a rule by rote, citizens must ask themselves, for example, whether they are treating one another fairly, whether they are acting in good faith, whether they are taking due care, whether they are behaving reasonably, and the like. I contend that this sort of induced moral deliberation is important for our moral health and for an active, engaged democratic citizenry.

For the people to whom they apply (whom I label with partial inaccuracy as "citizens," although I mean to include residents as well), open-ended standards may encourage greater levels of moral deliberation than would clear guidelines. Moral deliberation encompasses individual forms of deliberation about how citizens (and those they represent as employees, colleagues, agents, etc.) are to treat one another — whether in their one-on-one interactions or in larger collective settings. I also mean to encompass deliberation between individuals, for example, in conversation, as well as deliberation performed in and by collective bodies such as associations, corporations, and juries, and by people in larger political fora about what norms of conduct it is reasonable for us, as a polity, to expect of one another.

Other thoughtful 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; these processes in turn may generate prospective and reactive public discourse that influences adjudicators' interpretations.[18] Far less attention has been paid to the direct democratic implications — for other government officials and for citizens — of formulating legal directives in the form of standards generally, whether inside or outside of constitutional law.[19] Here, then, I intend to focus on the citizen's

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[18] *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1528–32 (1988) (discussing how the "indeterminacy" of some constitutional norms and their interpretation constructively interact with and feed both political movements and more informal but transformative forms of citizen engagement and dialogue); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34–36 (1986) (discussing how balancing tests engage Justices in transparent forms of public reason and how open constitutional discourse by Justices engages the public); Sullivan, *supra* note 1, at 67–69; *cf.* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1752–53, 1764–66, 1771–73 (1976) (focusing on judges' and officials' applications of standards).

[19] *But cf.* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1659, 1670–75 (1997) (pre-

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perspective and the salutary role that standards, to take one example, may have in inducing deliberation by citizens.

Unlike Meir Dan-Cohen's famous argument that some forms of legal vagueness virtuously obscure legal provisions that operate best when they remain opaque to the public,[20] my defense of standards will hinge upon their being known. I wish to highlight the salutary aspects of citizens engaging with and interpreting legal materials that do not admit of simple interpretation and application on their face. That is, I will presuppose that citizens, or at least those they might consult for legal information and advice, know the legal standard and attempt to follow it where relevant (or to apply it, for example when they engage in the work of juries or, more generally, in cultural and legal evaluation). Although this assumption of transparency may be overly optimistic with respect to some areas of law, it is a fair assumption to make with respect to the dominant criticism of standards in the literature that I am challenging. The complaint that standards do not provide sufficiently specific notice and guidance similarly presupposes that citizens are aware of, albeit mystified by, the law presented in the form of a standard.

I start with an illustrative, although only partially analogous, example of the deliberative advantages of hazy norms. Then, I articulate a positive, theoretical argument extolling the advantages of induced moral deliberation and the occasional virtues of fog. I proceed to compare how deliberation induced by standards compares with other, less salutary 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 go on to contend 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, recourse to open-ended standards and principles may satisfy the sort of notice that justice requires. I conclude with some preliminary observations about what factors should influence us in deciding whether a

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senting a nuanced discussion of and proposals for fashioning procedural directives and legal ethical norms in order to spark and reflect greater levels of democratic deliberation and dialogue about the form and timing of civil rights litigation, whether undertaken by individual litigants or by groups); David Alan Sklansky, *Police and Democracy* 103 MICH. L. REV. 1699, 1776, 1811 (2005) (discussing William Muir's advocacy of self-conscious reflection by police officers and the ability of community policing programs to provide the public a role in stimulating police reflection).

[20] MEIR DAN-COHEN, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, *in* HARMFUL THOUGHTS 37, 48–49, 65–67, 69–73 (2002) (arguing that the vagueness of certain decision rules, such as those of duress, facilitates their fair application by judges while precluding their wrongful exploitation by citizens).

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particular context is an apt one for inducing deliberation through standards.

## I. INDUCING MORAL DELIBERATION

### *A. A Partly Illustrative Example*

One of the more shopworn examples about the virtues of law involves traffic policy. Law, we are reminded, serves important coordination functions in an authoritative way. Although it does not matter which side of the road we drive on, it matters that we drive consistently on one side or the other. Law can solve this coordination problem 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 highlights the positive role that law plays in structuring our environment. The law's role does not always center upon controlling our worst tendencies or targeting and confining Holmes's bad man. Even in a society without Holmes's rotten eggs, we would still need law, and we would flourish for the having of it, properly formulated.

Nonetheless, this oft-told tale is overly simple in some fascinating ways. First, it turns out to be a bit of an exaggeration that which 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 use.[21] In a way, that evidence 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.

Second, and more important for my purposes, whether or not designating the side of the road on which to drive enhances traffic safety, the result is not reliably generalizable. There is a tendency to think that the more traffic rules the better, assuming that people can absorb them and that enforcement is not overly draconian. But there is evidence to the contrary and a burgeoning traffic design movement in response. The basic postulate of the Shared Space movement is that traffic rules, such as speed limits and their symbolic analogs (stop signs, traffic lights, and so forth), carry the hazard that we will absorb

[21] PETER KINCAID, THE RULE OF THE ROAD: AN INTERNATIONAL GUIDE TO HISTORY AND PRACTICE 2–8, 25–39 (1986) (discussing historical origins of the rules of the road and the effects of right-hand versus left-hand rules for various forms of traffic). Some evidence suggests "keep right" results in more deaths than "keep left." Peter Kincaid speculates that this may be partly because driving is safer for right-handed drivers if their right (dominant) eye is closer to the center of the road and because most drivers are right-handed. *See id.* at 25–39.

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the rule or signal unthinkingly and comply merely by rote.[22] We stop paying close attention to what we are doing, falsely secure in the sense that we are nested in a set of complex rules whose execution "guarantees" our safety.[23] As the movement's founder, Hans Monderman, observed: "The many rules strip us of the most important thing: the ability to be considerate . . . . We're losing our capacity for socially responsible behavior."[24]

In at least some contexts, traffic safety is enhanced when salient measures of uncertainty are introduced to drivers. The evident uncertainty prompts drivers to pay greater attention to their driving, to think about how to negotiate a road, and to think about how to treat the specific cars and pedestrians around them. This heightened attention 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, both traffic speeds and accident severity have been reduced.[25] Similar experiments that have involved eliminating bicycle lanes, curbs, and even traffic signals at intersections in more densely populated areas — including London — have yielded similar results.[26] Cars and pedestrians managed to coordinate more safely without highly specific traffic signals and signs.

I do not draw libertarian lessons from this case. That is, the example does not vindicate the view that the less (traffic) law, the better. Rather, the issues are what form the law takes, what deliberative impact the form of the law exerts, and how the form of the law 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

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[22] *See* SABINE LUTZ, SHARED SPACE INST., SHARED SPACE — FINAL EVALUATION AND RESULTS 3–19 (2009), http://www.sharedspace.eu/en/publications/downloads/doc_download/20-shared-space-final-evaluation--long (describing the Shared Space movement's theory, method, and goals and evaluating its progress); Ben Hamilton-Baillie & Phil Jones, *Improving Traffic Behaviour and Safety Through Urban Design*, CIV. ENGINEERING, May 2005, at 39, 39–40, 45; John Staddon, *Distracting Miss Daisy: Why Stop Signs and Speed Limits Endanger Americans*, ATLANTIC, July/Aug. 2008, at 102, 104; Shared Space Institute, http://www.sharedspace.eu/en/home (last visited Jan. 31, 2010).

[23] *See* Hamilton-Baillie & Jones, *supra* note 22, at 44–45.

[24] JEFF MAPES, PEDALING REVOLUTION: HOW CYCLISTS ARE CHANGING AMERICAN CITIES 71 n.1 (2009) (quoting an interview with Monderman in *Der Spiegel*) (internal quotation marks omitted).

[25] CSS TRANSPORT FUTURES GROUP, TRAVEL IS GOOD 30 (2008); Ben Hamilton-Baillie, *Shared Space: Reconciling People, Places and Traffic*, 34 BUILT ENV'T 161, 167–69 (2008); Sarah Lyall, *A Path to Road Safety with No Signposts*, N.Y. TIMES, Jan. 22, 2005, at A4; Craig Whitlock, *A Green Light for Common Sense*, WASH. POST, Dec. 24, 2007, at A9.

[26] Hamilton-Baillie, *supra* note 25, at 169–78; Hamilton-Baillie & Jones, *supra* note 22, at 46–47.

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contexts, spark complacency and automatous 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, I do not contend 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 dependent on rules. We may need contextual clues about which sort of skills we are to deploy. Although some of its ideas are novel, the Shared Space movement does not go so far as to advocate 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: rules necessarily suppress or deter deliberation; rules may always be implemented without substantial forms of deliberation; rules always carry their typical virtues and standards always bear theirs; or 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 Jennifer Mnookin reminded me, the dominant legal approach in the United States to drinking and driving is prima facie rule-based: in most states, it is illegal to drive while one's blood alcohol level exceeds a specified limit (or exceeds that limit when tested soon after driving). In California, that level is 0.08%,[27] and all licensed drivers have been tested specifically on this detail. Although that rule is clear, specific, precise, and easy to memorize, it is difficult for the average citizen to apply directly. Lacking precise interoceptive access to our blood alcohol levels, we cannot perceive our exact intoxication levels. Few of us 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 precise rule. Generally, rules without clear methods of application may require standards as complements and may themselves elicit deliberation despite their facial clarity and precision.

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 that this fea-

[27] CAL. VEH. CODE § 23152(b) (West 2000).

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ture is always welcome or that it is exclusive to standards and never holds of 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 lend themselves to immediate, reflexive, precise application. I have in mind standards such as: the unconscionability doctrine in contract law, which deems unenforceable contracts or provisions that are "unconscionable" at the time of formation;[28] the stipulation in contract law that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement";[29] Rule 11's requirement that an attorney conduct a "reasonable" inquiry and attest that pleadings and motions are not presented for an "improper purpose";[30] the remedial rule providing relief where another has been "unjustly" enriched; and the various requirements in tort and criminal law that one act as a "reasonable" person would under the circumstances or take "due care." That is, mainly I have in mind those standards that directly and explicitly incorporate evaluative terms, some of which are straightforwardly moral, for example "improper purposes," and others of which may require analysis of the underlying moral and prudential purposes of the legislation to be well interpreted, for example "degrading" or "safely."[31]

Although many praise the flexibility and fine tailoring that 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.[32] 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, grapple with the relevant moral concepts directly. This effect yields

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[28] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *see also* U.C.C. § 2-302(1) (2005).

[29] RESTATEMENT (SECOND) OF CONTRACTS § 205; *see also* U.C.C. § 1-304.

[30] FED. R. CIV. P. 11(b).

[31] Although it is not my focus, some of my argument also applies, indirectly, to standards using nonevaluative terms. A standard requiring the use of "thick" roof materials rather than specifying a minimum width in inches or centimeters will require a contractor to consider the purposes of the roof, the stresses it will fall under, and, most importantly, what risks are reasonable for those housed underneath the roof to bear. A more specific rule is less likely to invite this form of deliberation.

[32] *See, e.g.*, Ayres, *supra* note 5, at 13 ("Simple standards needlessly interject ambiguity into the law").

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not only the instrumental benefit of helping people to better comply with their moral responsibilities, but also the constitutive benefits of making possible richer forms of moral and democratic relations than would otherwise take place. (For this reason, I label the traffic cases as only partly illustrative. In large part, traffic standards induce reasoning that instrumentally promotes safer driving, but they do not promote reasoning that deepens moral character or inspires enriched moral conceptions of good driving.)

To elaborate: Where standards incorporating moral terms regulate conduct, citizens may themselves have to deliberate about what is morally proper and should be expected of them. They will not always have to: if like circumstances have presented 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 when the circumstances differ or when it is unclear whether the prior case sets the ceiling or the 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, or how the other party might perceive the action.[33]

Eliciting this sort of deliberation may benefit the polity 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 legal di-

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[33] In a deep and reflective article discussing provisions of domestic and international law that prohibit "cruel," "inhuman," "inhumane," and "degrading" punishment, Jeremy Waldron celebrates the use of standards as opposed to rules because standards may improve the "quality of moral argument" by calling on us "to reflect upon and argue about whether a given practice is degrading or inhuman." Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves* 7–8 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-36, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1278604. I am in utter agreement with him on this point. We may, however, part ways with respect to how the deliberation is to proceed or what its target is. He contends that we should consult "some shared sense of positive morality, some 'common conscience' we already share" rather than engaging our "own critical views on what counts as inhuman and degrading." *Id.* at 42. In my view, when applying legal standards to a situation, whether for purposes of compliance, evaluation, or adjudication, we must not only consult the shared social interpretation of that standard, but we must also invoke our own critical understanding and ask what the proper moral interpretation of the standard is. Often no shared understanding has developed, and we must engage our critical capacities to begin to form one. But, in any case, what matters most is to identify the morally correct interpretation and, in time, strive to move the shared understanding so it squares with our critical sense of what we are actually committed to. We should investigate the shared understanding not because it settles the matter, but in order to calibrate the distance between it and our critical views for purposes of social evaluation, to develop a view of which interpretation is consistent with the current reasonable expectations of others, and to ensure our interpretation does not stray too far from where other aspects of our democratic commitments would situate us.

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rectives. It also demands 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 requires that others respect your 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 do not merely follow the rules, and as an effect of compliance, thereby treat you well. Rather, in many circumstances, respectful treatment involves others apprehending and appreciating your needs and interests and responding to them as such.[34]

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 effort. Maintenance of moral agency, like muscle tissue, requires exercise through practices of attention and thoughtful consideration. 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.[35] 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 existing configuration of those underlying moral factors. To be prepared to enact this flexibility, moral agents 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. By (partly) incorporating their purpose or rationale into their articulation, standards educate citizens about the underlying justifications and aims of law. Further, because, at least at first blush, standards do not admit of algorithmic interpretation, citizens must engage in legal interpretation by engaging with the underlying purposes of law. As for most subjects for which understanding the foundations is necessary to grasp the surface, this engagement promotes an even fuller internalization and deeper mastery of the law. It also stimulates

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[34] I discuss the interest in being a particularized subject of respect and its connection to an under-discussed aspect of partiality in Seana Valentine Shiffrin, *Immoral, Conflicting, and Redundant Promises*, *in* REASONS AND RECOGNITION: ESSAYS FOR T.M. SCANLON (Rahul Kumar et al. eds., forthcoming 2010) (on file with the Harvard Law School Library).

[35] BARBARA HERMAN, MORAL LITERACY 79–82, 276–99 (2007).

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dialogue between citizens about the purpose of law and particular legal directives. These processes enable a richer form of democratic engagement and mutual understanding.[36]

These forms of engagement involve citizens directly in producing what we might call "the first draft" of legal interpretation. Of course, citizens' interpretation of a legal standard may be subject to judicial review and a judicial pronouncement on it will be — in some sense — authoritative, or at least it may strongly influence how other government officials act.[37] Still, how law is understood on the street by everyday citizens may actually, and rightly, have an important influence on its ultimate judicial interpretation.[38] This influence is especially apparent in cases where the relevant norm or the surrounding law refers to the reasonable person, community practice or expectations, or other somewhat normalizing benchmarks.

Of course, if a case involves jurors, they too will engage in this deliberation with each other. Many of the standards they apply (for example, what care the reasonable person would have taken in a given situation they themselves may not have encountered) require them to adopt others' perspectives. Further, achieving consensus at the end of a deliberation that begins with divergent preliminary conclusions will require that jury members come to understand each others' positions and their motivations.

There is an additional democratic dimension of inducing moral deliberation through standards. 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, as we come together to understand (and sometimes more completely construct and constitute) the

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[36] *Cf.* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 531–32 (1994) (remarking that a definitional dispute about a concept like art may "enrich[] the wider debate in which the disputed concept is deployed").

[37] 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* Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 162–66, 190–97 (2004) (arguing that although law practices may contribute to the content of law, they cannot alone be fully determinative); Mark Greenberg, *The Standard Picture and Its Discontents* 31–33 (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 08-07, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103569 (describing how the legal significance of a statute or opinion may differ from what its explicit language says or connotes).

[38] My claim resides in a space similar to that occupied by many popular constitutionalists although my claim is both more modest in one respect and broader in others. It is more modest in that my position is weaker than that of some popular constitutionalists. My position is that popular interpretation makes a significant contribution to our understanding of law, but I do not make the stronger claim that it does or should completely or largely determine the content of law. My focus 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 over constitutional law.

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meaning and import of our commitment through practice and reflection. On such a conception, standards partially delegate authority back to citizens. By exercising that authority, citizens may further constitute and create the law.[39]

My celebration of induced deliberation does not imagine an unrealistic model in which individuals identify an evaluative term, come to a considered judgment about its proper application, and adjust their conduct accordingly on the spot. Deliberation may be a lengthy affair with both spoken and silent components, conscious and unconscious elements, and errors as well as insights. The process by which deliberation affects behavior and articulates cognition may be more akin to a slow, sometimes clogged, drip than to a quick, direct injection.

Quite often, deliberation will have an interpersonal dimension — whether between individuals, in more collective settings such as associations, juries, or workplace groups, or in the collectively shared but individually consumed broadcast and print media.[40] For instance, individuals may consult their attorneys about the governing law. Discovery that an evaluative standard is germane may prompt a discussion, for example, about what would and would not constitute an unconscionable term or what "good faith" requires in the situation. Some of that conversation may be about precedent, but where precedent runs out, the parties will have to try to articulate for themselves what sorts of conduct are beyond the pale and whether the conduct they contemplate falls within or outside that line — for example, whether a framing of the choice unreasonably obscures the costs to consumers, thereby eliciting acceptance of potentially exploitative terms. Of course, such consultation need not be on one's own personal behalf. Although corporations are collective entities, they are managed by individuals who must make decisions about what conduct complies with law. They may consult attorneys, of course, and may also engage in internal deliberations about what conduct seems fair and best

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[39] This argument extends the claim often made about leaving interpretive room in legislative language to allow for agency delegation to the case of citizens and the law more generally. *See, e.g.*, SCHAUER, *supra* note 6, at 194–96 (discussing the advantages of making room for the contributions and insights of future decisionmakers). In this respect, it resembles some of Charles Sabel's and others' arguments about delegating back to citizens, but my argument emphasizes the moral dimensions and advantages of such delegation, whereas he and his coauthors emphasize the prudential and cooperative benefits of delegation to smaller groups of citizens. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283–90 (1998); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1067–82, 1094 (2004).

[40] For a longer discussion of the relationship between freedom of thought, thought development, and associations, see Seana Valentine Shiffrin, Essay, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839 (2005).

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represents their judgment and their companies' values. In this sense, even corporations may deliberate.[41]

Interpersonal deliberation need not take the form of a discussion between client and representative, though, and need not occur among people who collectively represent a single entity. Evaluative standards embedded in law may empower citizens in their interpersonal relations to ask that others alter their conduct or take seriously considerations that might have been neglected or otherwise received relatively short shrift.[42] A standard-based requirement that an employer ensure a nondiscriminatory workplace and protect employees against a "hostile" atmosphere[43] may provide employees leverage to ask others to make certain moral considerations more salient in their deliberation and in their conduct. It may also prompt both maddening and illuminating conversations between employees, and between employees and management, about what sorts of behavior are and are not experienced as "hostile" or "offensive." An honest and full exchange on this topic will necessarily involve adducing considerations about, inter alia: what constitutes reasonable and respectful behavior, what constitutes admirable or necessary candor and self-expression versus what constitutes gratuitous hostility, what constitutes an incursion versus what constitutes a reasonable protection of privacy, what is friendly and what is exclusionary, and what sort of humor is offensive and what sort is compatible with respect and recognition of equality. Of course, it may be only in the rare workplace that direct and open conversations about these topics succeed with any immediacy, but such conversations may, elsewhere over the long and medium terms, directly and indirectly, alter moral awareness, even if only partially.[44]

It may be objected that people will react to a standard not by deliberating directly, that is, by "think[ing] straight,"[45] but by trying to figure out how others would think the standard applies, for example, by predicting how a prosecutor, judge, or jury would apply the standard. Thus, they may not engage in moral deliberation themselves, but will try to guess the outcomes of others' deliberation.

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[41] For a related discussion, see Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 747–48 (2007), which examines the application of moral norms to corporate behavior in the promissory context.

[42] Thus, I disagree with the sentiment that "[p]rivate citizens . . . are not fundamentally empowered by law; they are merely required to obey its commands." Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CAL. L. REV. 491, 492 (1994).

[43] 29 C.F.R. § 1604.11(a) (2009).

[44] The progress made through such consciousness-raising may sometimes be facilitated by the complementary assistance of rules and more concrete guidelines, especially in early days. *Cf. infra* p. 1240.

[45] THOMAS NAGEL, THE LAST WORD 19 (1997) (emphasis omitted).

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Of course, we may all agree that a substantial degree of sensitivity to what others think is requisite to complying with the law given that the law's assessment of compliance correctly does not turn merely upon whether one has complied by one's own lights. Further, we learn a great deal by attending to the considered judgment of others. Indifference to settled understandings about the law's demands is incompatible with good faith compliance (at least where those settled understandings are not profoundly unjust). But, I take it, the objector concurs with me that the (social) application of some standards on some occasions is not clear on its face. Where precedent does not immediately settle the matter, further thought, argument, and discourse may be required. Although I have been arguing that such situations bode well for citizens and the polity because they may induce a salutary form of moral deliberation, dialogue, and sometimes further self-determination, the objector may respond that citizens will evade this deliberation and engage instead merely in sociological prediction, which will not stimulate the relevant forms of moral probing and understanding.

Perhaps some citizens will react this way, although I am not sure this concern is fully compatible with our operating assumption that we are dealing with people who are trying, in good faith, to comply with the law. That is, the stance of mere prediction already has a strong Holmesian flavor to it.[46] Rather than reasoning about what the law is by bringing the most salient and germane resources available to bear, one asks instead what others will think. The question suggests one's eye is on whether one will be caught or on the self-regarding consequences of one's conduct, instead of upon whether one's behavior actually conforms to the spirit of the governing legal directive.

In any case, it may not be possible to apply a standard featuring evaluative norms properly while entirely evading moral deliberation. First, predicting how others will apply a moral norm, in good faith, often involves trying to figure out the right answer for oneself. This will be all the more true when there is possible disagreement over the application of the standard and when one's own thought and input on the matter may affect others' thinking. Moreover, figuring out how others think about a moral issue may further and deepen one's own moral thinking (even if that is not one's immediate aim). Learning the moral stances of others also enhances one's ability to relate to others in democratic dialogue.

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[46] Indeed, this was Holmes's famous position: "[A] legal duty . . . is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court . . . ." Holmes, *supra* note 15, at 458.

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Second, some contexts of application represent the end of the line. For instance, when juries or judges are charged with applying a legal standard, no one else's judgment is relevant. To do their job, they have to apply the standard directly and think the matter straight. More generally, it is difficult within interpersonal conversation on the matter to avoid the deliberation called for by a standard. Asking what others would think as though their thoughts entirely answer the question looks evasive, cynical, or rude.

Despite the understandable temptation to rely solely upon prediction, in the end, citizens acting in good faith who are confronted with new situations governed by legal standards will have to engage in some moral deliberation to comply fully.

### *C. Contrasting Penalty Default Rules: Moral and Political, Not Prudential*

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

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 aim, by conception, to encourage deliberation between contracting parties. The main differences concern what sort of deliberation is encouraged, how, and why. Penalty default rules, as they are conceived, aim to encourage parties to reveal to one another information that they might otherwise conceal and to negotiate to a settlement that 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.[47]

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 U.C.C. will fill in the price if one is not specified, harking to the common market price,[48] it will not fill in a reasonable quantity — even if one could be discerned and even if it is clear that the parties aimed to form a contract. The failure to supply

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[47] *See* Ian Ayres, *Default Rules for Incomplete Contracts*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 587–88 (Peter Newman ed., 1998) (using the examples of *contra proferentem* and penalty default rules).

[48] U.C.C. § 2-305(1) (2005).

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the missing term and the consequence of complete unenforceability induce parties both to deliberate about exactly what they want and to reveal their preferences to one another and to third parties, saving courts from expensive methods of investigation after the fact.[49]

Another classic example is that of *Hadley v. Baxendale*,[50] which articulates the rule that in contract, only those consequential damages foreseeable at the time of formation are recoverable;[51] this rule encourages parties with unusually large risks to reveal more information about their situation than they otherwise would. Such revelations may alert the other party to hazards, thereby making for better performance; protect the disclosing party from undercompensation; and afford the nondisclosing party a better sense of the value of the contract and the appropriate bargaining posture.[52]

Notice that the sort of deliberation championed by the advocates of penalty default rules is primarily prudential, albeit often taking place 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 in this model, deliberation is not necessary to apply or follow the extant law. Penalty default rules are, after all, rules:[53] 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 tailored negotiations and information disclosure between parties — to encourage parties to negotiate so that courts do not later have to investigate and make ex post decisions.[54]

The use of standards to which I am calling attention — to encourage moral deliberation — is quite different. First, the point is not, primarily, to flush out otherwise hidden information or to encourage

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[49] *See* Ayres, *supra* note 47, at 587; Ayres, *supra* note 5, at 11–12 (arguing that no default quantity would satisfy most parties); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95–97 (1989).

[50] 9 Ex. 341, 156 Eng. Rep. 145 (1854).

[51] *Id.* at 151–52.

[52] Ayres & Gertner, *supra* note 49, at 101–04 (discussing *Hadley*). *But see* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563 (2006).

[53] Penalty default standards could be used, however, to similar effect on the parties. *See, e.g.*, Ayres, *supra* note 5, at 9–15. 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.

[54] *See, e.g.*, Ayres & Gertner, *supra* note 49, at 97–100.

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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, as I am defending it, the posture of the law, when it deploys standards, is not to encourage citizens to displace the law with their own invention. The standard does not serve as a disposable default norm. 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. Standards direct us to exert similar sorts of discretion and interpretation in order to develop and exercise our moral capacities, to stimulate morally sensitive interaction between us, and to involve us directly in preliminary stabs at legal interpretation and a deeper understanding of our mutual expectations of one another.

Third, standards issue a more direct and explicit solicitation to deliberate. The behavior the legal directive directly calls for requires interpretation by the citizen. There might be serious consequences if a citizen elects not to interpret the legal norm and thereby falls afoul of its requirements, depending on the significance of the norm and the remedies attached to it. But 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.

## II. IS INDUCED DELIBERATION JUSTIFIED?

### *A. Justified Versus Objectionable Thought Induction*

This justification of standards that I have offered 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 toward encouraging and supporting the development and exercise of moral agency.[55] A well-functioning polity and system of justice

[55] *See* JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 24–25 (Currin Shields ed., Library of Liberal Arts 1958) (1861) ("[As t]he first element of good government . . . being the virtue and intelligence of the human beings composing the community, the most important point of excellence which any form of government can possess is to promote the

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depend upon the general citizenry having active, fully developed moral personalities. Fostering basic forms of moral agency may be essential and is a far cry from doing what is impermissible, to wit, requiring certain forms of virtuous display or attitudes, or requiring that specific moral decisions about the character of individuals' personal, intellectual, and religious lives be made.[56]

Nevertheless, even if one agreed that the liberal state may and must encourage the development and 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, efforts at persuasion, or tax subsidies to take ethics courses. The mechanism of legal standards does not involve a clear statement of the government's positions and reasons that might be thought to allow for a transparent evaluation and rejection or acceptance by the citizenry, as do campaigns to increase environmental awareness and more responsible recycling practices.[57]

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 this justification's 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 insist on 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. Liberals may approve of required adult education to earn or exercise a privilege (for example, a license to practice medicine or law or to drive) or in response to an offense (for example, rehabilitative education or anger management). Still, entirely nonelective adult education is so discomfiting that liberals tend to shy away from the topic entirely. Although the concern 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 by standards, even when standards are conceptualized as a method of continuing moral educa-

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virtue and intelligence of the people . . . ."); JOHN RAWLS, A THEORY OF JUSTICE 395–587 (1971); Shiffrin, *supra* note 41, at 714 (discussing a just society's dependence on a moral citizenry).

[56] *See* Shiffrin, *supra* note 41, at 710–19 (developing this position in greater depth).

[57] *See* Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1251–52, 1269–70, 1285 (2001) (discussing use and effectiveness of persuasive techniques in recycling campaigns).

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tion for adults. Let me briefly articulate some salient theoretical differences between this educative use of standards and objectionable interferences with adults' freedom of thought. I will then proceed to develop these differences by discussing some contrasting examples that may shed some light on how and when standards (and law more generally) should be used to induce deliberation.

Three features of induced deliberation through legal standards demark it from less savory legal methods of requiring thought or speech. First, the use of a standard to facilitate moral deliberation does not dictate that some very specific content 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 mechanism 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. To be sure, this is not to say that any answer or any interpretation is correct. The standard's interpretation must, in the end, be a plausible one, capable of being recognized as such by other good faith reasoners. For citizens wary of exercising their judgment, they may often forbear. In many cases of deliberation-eliciting standards, fairly safe space can be identified. 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 and troubling examples of eliciting speech or thought, examples that do not involve deliberation-inducing standards but instead use more blunt legal mechanisms. For instance, the sort of compelled speech involved in *West Virginia State Board of Education v. Barnette*[58] (compelled pledge of allegiance) and in *Wooley v. Maynard*[59] (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 and irrespective of whether they independently had 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

[58] 319 U.S. 624 (1943).
[59] 430 U.S. 705 (1977).

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mechanism that bypasses their independent deliberation.[60] 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, the standard that elicits deliberation dictates no specific content to that interpretation.[61] Nor do these standards themselves compel close forms of association: they may regulate associations and interactions that occur for other reasons — for example, in the case of unconscionability, contractors who typically come together voluntarily, or in the case of traffic, drivers and pedestrians who happen to interact but not because the use of a standard, rather than a rule, compels their association.[62]

"Informed consent requirements" like those litigated (and upheld) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[63] may appear at first glance to be a more benign method of stimulating moral thought. The statute at issue in *Casey* required women seeking abortions to review informational materials about pregnancy, childbirth, and the physical development of fetuses and embryos, and to endure a twenty-four-hour waiting period after the provision of the information.[64] Statutes of this sort[65] may seem to avoid the difficulties asso-

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[60] *See* Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 409 (Michael C. Dorf ed., 2d ed. 2009); *see also* Shiffrin, *supra* note 40.

[61] 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 pre-dictated content meant to be absorbed without deliberation, standards often allow for a range of acceptable alternative methods of compliance. Further, one may present one's reasons for one's interpretation to adjudicators who are open to persuasion.

[62] This marks a related difference from the sort of deliberation induced by mandatory speech with opt-out provisions, such as the pledge (as well as similar provisions for prayer that have been struck down). One may think that all citizens should consider how they conceive of their relation to the state — whether that relation is one of fealty and whether it takes the same form as the state's conception of fealty. However, 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 that dissent is presented, and without any meaningful opportunity to discuss or explain one's position. Thus, I agree with Michael Seidman's criticism of the opt-out pledge, though I disagree that his criticism is properly targeted at *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. *See* LOUIS MICHAEL SEIDMAN, SILENCE AND FREEDOM 153–66 (2007); *see also* Blasi & Shiffrin, *supra* note 60, at 449–53.

[63] 505 U.S. 833 (1992).

[64] *See id.* at 844.

[65] *See, e.g.*, GA. CODE ANN. §§ 31-9A-3 to -4 (2009); LA. REV. STAT. ANN. § 40:1299.35.6 (2008); MISS. CODE ANN. §§ 41-41-33, -35 (2009). A comprehensive list of the thirty-four states that impose mandatory counseling and the twenty-five states that impose a waiting period appears in GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: COUNSELING AND WAIT-

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ciated with mechanisms of compelling speech (to influence thought) because they purport to seek consent, not to dictate any particular content, and they do not seem to aim to bypass the independent deliberation of those subject to the requirement.

That description might hold true of some well-designed informed consent requirements that provide information to which citizens generally would not have had prior access or that might provide insulation against citizens being pressured to commit irrevocably before they had a reasonable opportunity to review relevant information.[66] But the mere label of "informed consent" is insufficient to establish that so-called requirements are adequately designed and motivated. The *Casey* provisions and their ilk provide a case in point of objectionable efforts to compel deliberation nestled under the cloak of "informed consent." Even under the most charitable interpretation of their purpose, the provisions are aimed to elicit deliberation about very specific content within a quite specific time period rather than to elicit the more diffuse and open-ended moral deliberation that standards may invite. Under a less charitable interpretation, but plausibly a more accurate one in light of the slant of the information provided, the provisions aimed to elicit abortion-rejecting conclusions with a quite specific content and so may not be fairly thought to avoid the charge that they aim to instill state-scripted content.

To elaborate, these forced education requirements in *Casey* were objectionable in at least two respects. First, the timing was insulting. Women were required to examine 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 this delay 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.[67] The adoption of the requirements seemed to suggest that their prior deliberation was incomplete or inadequate.[68] That implication dimi-

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ING PERIODS FOR ABORTION (2010), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf.

[66] Although it is not aimed to encourage moral deliberation in particular, I have in mind the quite different design of the Federal Trade Commission's "Cooling Off" rule, which permits buyers in a door-to-door sales transaction (that is, buyers who have not sought out the sale and may, reasonably, be unfamiliar with the product) three business days to rescind the transaction in case, upon reflection, the transaction seems undesirable. *See* 16 C.F.R. § 429 (2009). Although buyers are afforded time to reconsider, they are neither required to wait three days to transact nor to take affirmative action to complete the transaction after three days. *See id.*

[67] *See* Brief for Petitioners and Cross-Respondents, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 551419, at *16, *39–40; Sylvia A. Law, *Abortion Compromise — Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 940 (listing burdens of requirement).

[68] *See* Law, *supra* note 67, at 940 (noting that the requirements made false assumptions about women's decisionmaking processes).

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nished how serious abortions are for women who elect them.[69] Notably, women who elected childbirth were not required to undergo education about the risks of childbirth and the challenges of parenting before proceeding with their decision.

Second, given their design, these education requirements were duplicitously labeled as "informed consent" provisions. The point, as the timing revealed, was not to encourage serious deliberation; if initiating serious deliberation, rather than intimidation, were the aim, that aim might better be achieved over a longer term — through thorough sex education in high school or through a comprehensive and balanced presentation of options upon notification of pregnancy. Rather, "informed consent" requirements of this sort seem designed to pose an obstacle to, or to discourage in inappropriate ways, the exercise of the right to abort.[70]

The use of standards that I have been advocating does not elicit these concerns. Their use is not targeted in the same way at particular people or specific decisions. Further, the aim is 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*.[71] *Cruzan* upheld what was, in essence, a default rule — some might regard it as a penalty default rule — about end-of-life treatment.[72] If a person failed to leave clear and convincing evidence that she wished for the termination of life support in the event she fell into

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[69] Evidence suggests that even minors take the decision whether to abort seriously and deliberate beforehand. *See* Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 205 (1992) (observing that in their study of 1500 abortion decisions by minors in states without parental notification requirements, "[a]ll minors reported that at least one person — a relative, a friend or a professional — had taken part in the decision process or had helped them arrange the abortion").

[70] *See* Brief for Amicus Curiae American Psychological Ass'n in Support of Petitioners, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006399, at *18–20. It is not always inappropriate for the government to discourage the 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 in a way disfavored by many.

[71] 497 U.S. 261 (1990).

[72] *See, e.g.*, James Lindgren, *Death by Default*, LAW & CONTEMP. PROBS., Summer 1993, at 185, 219–20 (arguing that the Missouri law and other similar laws are penalty default rules because polls suggest that most people would prefer termination rather than life support in a variety of end-of-life situations).

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a persistent vegetative state, treatment would be continued even if the preponderance of evidence indicated she wished termination.[73] *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 recorded or else a rather dire consequence would be implemented.

This sort of penalty default rule differs from some of those envisioned in contract law 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 an extremely controversial position on a highly personal matter. In this latter respect, it resembles the scheme at issue in *Casey*. But, in 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 for the 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 it would help 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 episodic effort to exercise a right and do not tend to obstruct its exercise, the timing also is not offensive.

Putting aside the particular substantive default (life maintenance) that the Missouri law enacts and the objections that might be made to it, what is troubling about *Cruzan* is that the strength of the evidentiary standard requires a level of deliberation, communication, and articulacy about matters that citizens find difficult to face, much less to imagine and predict how they will feel and what they will want when the relevant circumstances arise. 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 involve confronting not only difficult prudential and ethical issues, but also those features of the human condition that many work hard to

[73] *See Cruzan*, 497 U.S. at 282–83.

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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 record one's views with the precision necessary to convey one's wishes to a stranger. Precise articulation is especially difficult for those who worry that they may change their mind but lack the ability or opportunity to correct the formal record or who worry that an advance directive will not be interpreted subtly but instead will operate as an excuse to end care prematurely.[74]

The act of subjecting citizens to a rather severe default rule unless they engage in articulate and specific communication about personal matters around which they are frail may 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 and even among those who are advocates of advance directives. Some very strong sort of avoidance seems to be in operation. If this evidence is not merely anecdotal,[75] it should give us pause about justifying the sort of default rule litigated in *Cruzan* as a deliberation-eliciting device. The rule either fails to work or works only through overly severe mechanisms.

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[74] *See, e.g.*, Jane Seymour et al., *Planning for the End of Life: The Views of Older People About Advance Care Statements*, 59 SOC. SCI. & MED. 57, 63–66 (2004) (discussing some elderly patients' resistance to advance care directives because they prefer a nonstatic, dynamic decision-making procedure that more actively involves family members and more nuanced forms of trust in medical professionals).

[75] *See* Lewis M. Cohen et al., *Denying the Dying: Advance Directives and Dialysis Discontinuation*, 38 PSYCHOSOMATICS 27, 29–31 (1997) (discussing literature on death denial and reporting a study in which seriously ill patients and their doctors largely lacked advance directives and failed to remember conversations about terminal care preferences); Lewis M. Cohen et al., *Patient Attitudes and Psychological Considerations in Dialysis Discontinuation*, 34 PSYCHOSOMATICS 395, 398–99 (1993) (discussing denial phenomena even among those aware of the opportunity for advance directives and concluding "it may be unrealistic to expect healthy or chronically ill individuals to render binding agreements regarding life support," *id.* at 399); Louise Harmon, *Fragments on the Deathwatch*, 77 MINN. L. REV. 1, 91–129 (1992). *But see* Seymour et al., *supra* note 74, at 63–66 (identifying factors other than denial that may account for reluctance to write advance care directives, including concern that one's views may change); Camilla Zimmermann, *Death Denial: Obstacle or Instrument for Palliative Care? An Analysis of Clinical Literature*, 29 SOC. HEALTH & ILLNESS 297, 302–03 (2007) (critiquing methodology of some studies on denial and advance directives for apparently equating denial with failure to write advance directives rather than showing a causal relationship).

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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. The criticism suggests that it may be misguided to use legal mechanisms that, in essence, threaten severe consequences in order to induce deliberation (and rather precise articulation of one's deliberation at that) about important subjects that we know human beings avoid, or with respect to which they are frail. Such mechanisms purport only 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 potentially distorting effects of sexual desire; others have lifelong difficulties in this domain. Many who are at risk of being victims are inexperienced at negotiating sexual situations and sexual power dynamics to match their level of readiness and comfort.[76] Expecting sound moral deliberation and judgment to prevail over temptations to rationalize at this juncture may be overly idealistic. Given the grievous stakes of a mistake for both the minor and for the perpetrator,[77] there is a strong argument for using more rule-like formulations in the articulation of the crime of statutory rape.[78]

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[76] *See* Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 708–10, 728–33, 752–53 (2000) (discussing literature on early sexual experiences).

[77] I recognize this is complicated ground. Whether and to what degree sexual activity between adults and minors is harmful may depend upon the age difference, the gender of the participants, and the cultural setting. *See* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 158–63 (2d ed. 2004). Possibly, some relations for some minors in particular settings may be consensual and not harmful, but for many others these encounters may be psychologically traumatic and may also have long-lasting physical, social, and personal effects, for example those incurred from teen pregnancy. *See* Oberman, *supra* note 76, at 704–06, 705 nn.6–9 (discussing literature on the risks of adolescent sexual activity). These harms are substantial enough to justify even those rule-like formulations that may preclude or deter less deleterious encounters among the willing.

[78] There may, however, be grounds for adjudicators or enforcement officers to apply a more standard-like norm (or decision "rule") when assessing guilt, level of culpability, or excuse. *See* DAN-COHEN, *supra* note 20, at 42–43, 58–62; *see also* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 268 (1974) (discussing the ad-

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This is not to say that standards have no place in 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 the standard places unrealistic demands upon those who are 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 danger. Instead, because the standard here operates as a defense in response to a conduct norm, it may allow for more nuanced judgment about whether another person threatened to use illegal force and whether the use of force in response to such a threat was indeed "necessary."[79]

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 ought to foster deliberation and analysis at every turn. The democrat's ideal is not to produce an entire population as neurotic as Woody Allen.

### *B. Fairness: Notice and Horizontal Equity*

So far, I have been arguing that a virtue of standards lies in their lack of immediate clarity. The uncertainty that standards introduce may spark deliberation and conversation on the ground, redounding to the moral health of both citizens and a democratic polity. I have also been arguing that whether standards or other legal mechanisms are used, legally induced deliberation, to be justified, must be sensitive to the circumstances under which citizens will deliberate, respectful of citizens' autonomy, and careful not to indoctrinate or to attempt to indoctrinate.

I now turn to the objection that, even when well crafted and even when used in appropriate circumstances, this method of inducing deliberation is unfair. It is not merely that full notice is sacrificed as a side

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vantage of a clear, numerical speeding rule coupled with officer discretion to waive a ticket when the speeding driver is responding to an emergency).

[79] *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2039 (2008) (discussing German legal doctrine that permits the general defense that even if the elements of a crime are satisfied, the conduct "was not sufficiently 'wrongful' to merit punishment"); *see also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 779–98 (Oxford Univ. Press 2000) (discussing the German doctrine); Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 680–81 (2005); Heribert Schumann, *Criminal Law*, *in* INTRODUCTION TO GERMAN LAW 387, 394–97 (Mathias Reimann & Joachim Zekoll eds., 2d ed. 2005).

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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 intentionally depriving 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 they 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 (for example, how many days may elapse between the filing of an opening brief and an opposition brief), rule-centered approaches — by and large, with numerous exceptions — run the risk of being over- and underinclusive with respect to the conduct meant to be elicited, deterred, or delivered.[80] On the one hand, rule-based approaches may deliver greater clarity and precision but sacrifice the narrow tailoring and nuance that standards may afford; on the other hand, if standards depend on the 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 as given 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 whereas 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.[81] The question I am interested in is whether the intentional use of standards to invoke deliberation is objectionably insensitive to individuals' claims to more specific forms of advance notice.

Let me start with remedies and in particular with Justice Souter's anthem that the bad man deserves specific notice, ex ante, of the cost of his misbehavior, to which I reply: why exactly does the bad man want to know the precise cost of his misbehavior? It seems reasonable to demand that punitive damage awards be fair — that, among other things, they reflect an honest assessment of the prohibited behavior

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[80] *See* Ehrlich & Posner, *supra* note 78, at 267–71; Kennedy, *supra* note 18, at 1694–99.

[81] *See* Kennedy, *supra* note 18, at 1695 (noting "the mechanical arbitrariness of rules and the biased arbitrariness of standards").

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and not an opportunistic reaction to the agent, that they do not represent an overreaction or an excessive penalty, and that they do not reflect the arbitrary whim or caprice of the adjudicator. Prima facie, though, the bad man has no foundational claim of justice to a more specific price for the behavior,[82] unless we take ourselves to be running a market and selling off permissions to misbehave. 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 nonarbitrary treatment is through more specific notice and not other mechanisms of constraint and oversight. But that case needs to be made. It is not an argument that specific notice itself is a requirement of justice, but merely that notice requirements may act as prophylactic policing mechanisms. Perhaps they are necessary and perhaps they are not, but I do not detect a strong argument from principle here.

From the perspective of justice, it seems important both that people have sufficient notice to make them alert to what sorts of conduct are subject to legal regulation and that whatever remedies are imposed are fair reactions to the conduct and are not themselves excessive. A potential wrongdoer has an interest in sufficient notice to plan his or her conduct to avoid wrongdoing and entanglement in the remedial system.[83] But beyond that, it is hard to articulate a legitimate interest in predicting the remedy with specificity.[84] These constraints may be satisfied without offering a tear sheet of prices; they therefore make room for the use of standards in applying remedies and 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.

But what then of the lapses in horizontal equity? I submit there is a difference between, on the one hand, deliberately aiming to treat like cases unalike, and on the other hand, treating like cases differently —

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[82] *See* ANDREI MARMOR, LAW IN THE AGE OF PLURALISM 190–91 (2007) (criticizing the idea that potential criminals have any additional claim to predictability of punishment over and above more general claims to be treated fairly and with proportionality); Kennedy, *supra* note 18, at 1695–96 (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).

[83] *See* Waldron, *supra* note 36, at 535 ("The citizen needs to know what the law requires of him, but that is not necessarily the same as needing to know exactly how far he can go before his behavior becomes an infraction.").

[84] There may be social interests in ensuring that remedies are sufficiently predictable to allow for the underwriting and availability of insurance. These interests may be served, however, through insurers' setting policy limits based on frequency of occurrence rather than solely through precise rules.

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not deliberately — because we are attempting to alight upon the right result but have differing opinions or because our 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, at least not if the variations are not enormous in degree. (Such variation, after all, is something we live with and perhaps even embrace as a general feature of jurisdictional barriers.)

What matters to our assessment of failures of horizontal equity, I submit, is the cause of the difference in treatment: If it is intentional or if it systematically reflects factors that are arbitrary from a moral point of view (for example, race, class, gender, corruption) and compounds the illegitimate effects of their influence, then 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.

These rejoinders 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 varying 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, if the concern that animates the objection is the desire to protect defendants' interests, I am not so sure that fair results always require specific notice. As William Stuntz has recently argued, the deployment of vague standards in criminal contexts may be more likely to result in measured, egalitarian justice than in 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.[85]

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.[86] For it is not as though standard-based

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[85] Stuntz, *supra* note 79, at 2034–39; *see also* Kennedy, *supra* note 18, at 1705–07, 1771–77 (discussing how standards may empower adjudicators and offer an avenue for resisting dominant, but flawed, ideology).

[86] That is, the opportunity to consult with moral agents and to predict their judgments may suffice to provide adequate notice for the inveterate amoralist. Nonetheless, as I argue above, an individual's habitual practice will be insufficient for understanding the law and for compliance with its spirit. A general, widespread, social approach of this sort will fail to provide determinate content and to achieve compliance with its letter as well. *See supra* p. 1228.

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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 underdeveloped — or, in the particular circumstance, prone to distortion — and that she needs assistance. This, of course, is no different from what morality asks of all of us every day 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, judges, or juries reasonably believe is warranted under the relevant standards. In some cases, a reasonable, good faith mistake about what a standard requires should perhaps be relevant when considering the appropriate remedy or punishment.

Furthermore, the hazards associated with these gaps may provide us further direction about where the 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, and where our cultural evolution surpasses our 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; where there has been a history of abuse of discretion, the use of specific rules may also signal the depth of the commitment to change.[87] 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 of 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, albeit temporarily, appropriate. Where communities differ with respect to their normative assessments or where the law plays a leadership role in establishing new standards and moral progress, citizens may require quite specific guidance in or-

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[87] *See* SCHAUER, *supra* note 6, at 192 (discussing specificity of provisions in the South African Constitution as reflecting an understandable reluctance "to grant discretion to mostly the same police officers, prosecutors, and judges who had been in power during apartheid"); Kennedy, *supra* note 18, at 1706 (making a similar point about the judiciary's introduction of rules to control the executive).

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der to orient or to recalibrate their judgments.[88] 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, at first many people may need quite specific guidance about what sorts of behaviors are unwelcome or hostile. Perhaps illustrative examples to complement the standards will suffice; perhaps only quite specific rules will fit the bill. It depends on context. One might reasonably be suspicious of a hard and fast pronouncement about which legal form is superior. Other cases may include those domains in which participation and coordination are essential but where suspicion that compliance and reciprocity norms are frayed may paralyze cooperative behavior: highly specific rules and aggressive enforcement in the short term may reset a pattern that is broken and revitalize the mutual expectations that underpin a thriving local moral culture.

Over time, the need for specific guidelines may dissipate as the moral lessons of these examples become internalized, trust is earned or regained, and the general concept becomes the more salient method of categorization. Indeed, in the case of sexual harassment (et alia), genuine and full compliance over the long term may depend upon citizens' internalizing the rationale behind the rules, acting on the general aim to treat each other equally, and having the ability to recognize how that aim should be realized in fresh situations. Thus, sexual harassment law figures in my discussion twice: first, to illustrate the salutary potential of open-ended standards and second, to illustrate why, even where standards may be appropriate, there may be an initial need for specific guidelines to establish some basic background expectations, to partly destabilize preexisting but subordinating patterns and power dynamics, and to lay the foundation for the more productive deliberative dialogue that standards may enable.

## III. CONCLUSION

One need not dispute that 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 and 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 should not conceive of law exclusively as a device to replace individual moral judgment, to reify specific moral judgments of the community, or as far as possible, to decouple the functions of law and

[88] *See* Kennedy, *supra* note 18, at 1702–05 (discussing the role of rules in areas of "moral flux," *id.* at 1704).

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the functions of moral judgment. Much may be gained by relegating the bad man to the back burner of our theoretical attention.

We are not Holmesian characters, by and large. We are not playing a game in which it is essential to its function that we pretend we are Holmesian bad men or that we act as though a pandemic may strike at any moment that would infect us with the bad man's personality. If we conceive of ourselves as democratic citizens and of the democratic endeavor as having a moral purpose (rather than being only a constraining device), then we must conceive of ourselves as moral agents. And it would be awfully strange to think that voting was the only time when our moral judgment with respect to our mutual relations could and should be called upon.[89] 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. Indeed, in appropriate circumstances, such inducement may enhance our capacities and deepen our practice of self-legislation.

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[89] *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY 67, 79 (James Bohman & William Rehg eds., 1997) (arguing that "[i]nstitutions in a deliberative democracy do not serve simply to implement the results of deliberation," but also to establish the conditions to "make deliberation possible" (emphasis omitted)).

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