Inducing Deliberation

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

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

² Id.
³ Id.
⁴ Id. at 62.
deploy standards, we do so in spite of them. Attending to these detractions guides us to use them carefully and judiciously.

Something of this sort is part of what is at stake in the discussion about the unconscionability standard in contract. Whether or not unconscionability protects the poor as some defend it, or disentangles the judiciary from promoting exploitation, as I do,\(^5\) many duly note that the standard is frustratingly hazy and subjective. For some, its elusiveness may be a necessary cost for the flexibility; for others, its resistance to algorithmic precisification provides sufficient grounds for rejection of the doctrine as objectionably subjective.

Similar anxiety about uncertainty appears in the emerging U.S. constitutional jurisprudence about punitive damages. A large part of what has driven the discovery of the surprising specific constitutional ratios between punitive and compensatory damages\(^6\) is a concern for defendants operating in ignorance of what liability they might expose themselves to through malfeasance and, concomitantly, the prospect of different damage awards for comparable behavior. Last term, Justice Souter’s opinion in the Exxon-Valdez case bespoke this concern in capital letters. Delivering a federal common law ruling but often analogizing to and opining about constitutional norms, Souter argued that the unpredictability of punitive damage awards carried "an implication of unfairness" (while at the same time fallaciously equating unpredictable awards with "eccentrically high" awards). He concluded that "a penalty should be reasonably predictable in its severity, so that even Justices Holmes's "bad man" can look ahead with some ability to

\(^{5}\) "Unconscionability Doctrine, Paternalism, and Accommodation,” *Philosophy and Public Affairs,* (Summer 2000).

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.  

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

In this essay, I want to revisit the consensus that whatever else their merits, it is a common defect of standards that they are hazy, unclear, and provide insufficient notice. To the contrary, what is often deemed a defect of a standard, I submit, operates as a virtue. Our motives of justice may positively incline us to use so-called thick concepts that do not have obvious, predictable, and clear application. Moral and democratic deliberative purposes served by these features of standards that are not necessarily served by precise rules. Open-ended standards encourage greater levels of moral deliberation by the citizens to whom they apply. They must ask themselves, e.g., whether they are treating one another fairly or not, whether they are acting in good faith or not, whether they are taking due care, etc., rather than rotely applying a rule. I will argue that this sort of induced deliberation is important for our moral health and for an active, engaged citizenry. Although others have noted an association between democratic politics and

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9 The term “thick concepts” was introduced by Bernard Williams in Ethics and The Limits of Philosophy, 140-xx (1985).
standards, the focus of these discussions has been primarily on constitutional law and on how standards induce adjudicators to engage in deliberation and dialogue and to render decisions in ways that make the adjudicator accountable and transparently responsible. These discussions have paid less attention to the democratic function served with respect to citizens of formulating legal directives in the form of standards generally, inside and outside of constitutional law. Here, it is the citizen’s perspective upon which I intend to focus.

My plan is as follows: I will first set out the positive argument extolling the occasional virtues of fog and the advantages of induced deliberation. I will compare how this sort of induced deliberation relates to other forms of induced deliberation in the law and why this kind is not incompatible with a robust commitment to freedom of thought.

I will then attempt to explain why attending to these virtues need not come at the objectionable expense of the values served by notice and clarity. I will suggest that specific notice, clarity, and horizontal equity are not always virtues of justice or requirements of fairness. In many circumstances, the sort of notice justice requires may be satisfied by recourse to open-ended standards and principles. Demands for more specific notice may be resisted because they serve no important purpose and because supplying them allows people to game the system. Much of those negative points about notice cover familiar territory. Along the way, I'll discuss some cases where specific notice is important and why (e.g. the void for vagueness doctrine and some aspects of the criminal law).

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10 Sullivan at 67-69; Frank Michaelman, Foreword: Traces of Self-Government 100 Harv. L. Rev. 4, 33-36 (1986) (discussing how balancing tests engage justices with the parties and in transparent forms of public reason and how open constitutional discourse by justices engages the public).
Part One: Inducing Moral Deliberation

A. An illustrative example

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

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

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

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

In at least some contexts, traffic safety is enhanced when salient measures of uncertainty are introduced to the driver. The evident uncertainty about what to do prompts the driver to pay greater attention to his or her driving, to think about how to negotiate a road and how to treat the specific cars and pedestrians around her. This in turn prompts innovation and creativity when traffic patterns stray from the norms imagined by the typical rules. In Europe, advocates have redesigned traffic-ways in villages, removing road markings, signs, and road humps. Thereby, they have reduced both traffic speeds and accident severity.\(^{14}\) Similar experiments, eliminating bicycle

\(^{12}\) For statements of the movement’s views and projects, go to http://www.shared-space.org/.


lanes, curbs, and even traffic signals, at intersections in more densely populated areas including London have yielded similar results. Cars and pedestrians managed to coordinate more safely without highly specific traffic signals and signs.

I do not draw libertarian lessons from this case (and that isn’t because it is hard to absorb the counter-intuitive claim that fewer traffic signs may be a good thing). It isn’t necessarily that the example supports the view that less (traffic) law, the better. The issue is what form the law takes, what deliberative impact the form of law takes, and how this affects whether and how citizens comply. I draw the lesson that the background standard that one is to ‘drive safely’ may be more thoughtfully deployed without a myriad of specific signals and rules that, in some contexts, spark complacency and automatonic behavior. Reliance on the less algorithmic and less specific background standard to drive safely keeps drivers more alert and induces them to exercise more responsibility over their driving methods.

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


Nor is this example meant to suggest other bold but implausible theses, such as that rules necessarily suppress or deter deliberation; that rules may always be implemented without substantial forms of deliberation; that rules always carry their typical virtues and that standards always bear theirs; or that rules and standards are mutually exclusive and submit to clear delineation and separation. Another traffic example should belie the more simplistic claims I aim to avoid. As I am reminded by my colleague Jennifer Mnookin, the dominant legal approach in the U.S. to drinking and driving is prima facie rule-based. State jurisdictions designate as illegal driving (or being tested after driving) while having a certain specific blood alcohol level. In California, that level is .08 and all licensed drivers are required to know this legal detail (and are tested on it specifically). We Californians pretty much all know the rule that we may not drive with a .08 alcohol level. But though that rule is clear, specific, precise and easy to memorize, it is not easy for the average citizen to apply it. We do not have access through propriaception to our blood alcohol levels and 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?) that act as rules-of-thumb, so to speak, to help us comply with the governing and quite precise rule. Rules without clear methods of application may require standards as complements and may themselves elicit deliberation despite their clarity and precision on their face.

Trying to articulate a clear distinction to tease apart rules from standards is not my goal here since the claim I want to develop is not one primarily that stresses the
advantages of standards over rules. Rather, I merely want to focus attention on an under-celebrated feature of (many) standards without claiming this feature exclusively obtains when the law deploys standards rather than rules. So with those qualifications in hand, let me proceed to develop the argument that one virtue of standards is that their lack of precision induces deliberation.

**B. Inducing Deliberation**

Standards typically incorporate moral terms that do not admit of immediate precise application. I have in mind standards such as: the unconscionability doctrine in contract law that deems unenforceable contracts or provisions that are ‘unconscionable’ at the time of formation; the contract law’s stipulation that “every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement;” Rule 11’s requirement that an attorney conduct a “reasonable inquiry” and attest that pleadings and motions are not presented for ‘improper purposes’; the various requirements in the tort and criminal law that one act as a ‘reasonable’ person would under the circumstances or take ‘due care’. Although many praise the flexibility and fine-tailoring the incorporation of open-ended terms allows, the uncertainty of application is thought to be a drawback because it exposes citizens to liability without a clear demarcation of the behavior that is off-limits. I contend that the uncertainty of application is, in the appropriate context, among its virtues because it requires that the citizen who aims to be compliant, whether from motives of justice or motives of prudence, grapple with the relevant moral concepts directly.

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16 Restatement of Contracts, 2d., § 208; U.C.C. § 2-302.
17 Restatement of Contracts, 2d., § 205; U.C.C. § 1-203.
18 F.R.C.P., Rule 11 b(1).
Where standards incorporating moral terms regulate conduct, citizens may themselves have to deliberate about what, morally, is proper and should be expected of them. They will not always have to: if like circumstances have presented themselves before and precedent has been established to the effect that certain specific behavior falls inside or outside the rule, the citizen may draw the simple analogy and follow suit. But, where the circumstances differ or it is unclear whether the prior case sets the ceiling or a floor, citizens will have to ask themselves more directly whether their behavior is reasonable, whether they are acting in ‘good faith,’ whether the deal they propose is exploitative or merely savvy, what the other party would want or would to know or to object to, and how the other party might perceive the action.

Eliciting this sort of deliberation may benefit the polity in a number of respects by inducing the exercise and reinforcement of moral agency. First, it directly promotes moral relations between agents. Being a moral agent does not merely involve compliance with a set of rules (or standards) but also involves active engagement and understanding of the situations of others; standards of these sorts require such engagement and thereby promote morality directly. Being treated with respect sometimes involves others respecting one’s boundaries by steering clear of them. But in many cases, it involves actually being the subject of respectful and sympathetic deliberation. Those dealing with one don’t merely follow the rules and as an effect, treat one well but they treat one well because they have apprehended and appreciated your needs and interests and responded to them as such.\(^{19}\)

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\(^{19}\) I discuss the interest in being a particularized subject of respect and its connection to an under-discussed aspect of partiality in “Immoral, Conflicting, and Redundant Promises,” ms.
Second, this sort of deliberation promotes moral health and development. Moral agency is not analogous to a height you attain at some age that stays relatively stable over most years of adulthood without much attention. Moral agency, like muscle tissue, requires exercise through practices of attention and thoughtful consideration. 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.\(^\text{20}\) To be able to do this, moral agents need to develop familiarity with the details of others’ perspectives and needs and not just navigational knowledge of the current, superficial boundaries that are a product of the current configuration of those underlying moral factors. To be prepared to enact this flexibility, they also need the awareness that many 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 has a democratic role. Because standards, at least at first blush, do not admit of any algorithmic interpretation, citizens must engage in interpretation of the law through engaging with the underlying purposes of law. As with most subjects for which understanding the foundations is necessary to understand the surface, this engagement promotes a fuller internalization and

\(^{20}\) Barbara Herman, cite.
deeper understanding of the subject. It also stimulates dialogue between citizens about the point and purpose of law and particular legal directives.

Further, this engagement involves citizens directly in producing what we might call “the first draft” of legal interpretation. Of course, citizens’ interpretation of a legal standard will be subject to judicial review and a judicial pronouncement on it will be authoritative, but how law is understood on the street by everyday citizens may have an important influence on its ultimate interpretation. This is especially true in cases where the relevant norm or the surrounding law refers to the reasonable person, community practice or expectations, or other somewhat normalizing benchmarks. And, of course, where juries engage in the process of review, they too will be engaged in this deliberation and dialogue with one another and, with respect to many standards, asked to take on the perspectives of others.

C. Other Deliberation-Inducing Legal Mechanisms

1. Penalty Default Rules

The idea that the formulation of an explicit legal norm might be designed to encourage deliberation is not novel. Think for instance of penalty default rules. The contrast between the ideal purposes of penalty defaults and the moral inducement I have been discussing may further clarify what I have in mind. Penalty default rules also aim, in their conception, to encourage deliberation between contracting parties. The main differences are what sort of deliberation is encouraged, how and why. Penalty default rules, as they are conceived, aim to encourage parties to reveal information to one another that might otherwise be concealed by them and to negotiate to a settlement both parties would prefer over the default rule, whether because the default rule may impose an outcome that is worse for both or because one party strongly desires to avoid the risk of
the penalty default and is willing to pay the other party (or otherwise persuade her). 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 a motivation to educate the other party about intricacies of the deal.  

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

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

21 See e.g., UCC xxx; Ayres, “Default Rules for Incomplete Contracts,” 587.  
and, afford the non-disclosing party a better sense of the value of the contract and the appropriate bargaining posture.²³

The sort of deliberation championed by the advocates of penalty default rules that is encouraged is primarily prudential, albeit in a cooperative setting. The motivation for deliberation likewise is prudential: if such a bargain is not reached, at least one party risks suffering a vastly dispreferred outcome. The spur to deliberate is indirect and punitive: a default rule is selected that is likely to rankle in order to catalyze negotiation to an alternative. But, deliberation is not required nor is it necessary to apply or follow the extant law. Penalty default rules are, after all, rules:²⁴ 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 exchange between parties: to encourage parties to negotiate so that courts do not later have to investigate and make ex post decisions.²⁵

². Moral and Political, Not Primarily Prudential

The use of standards to encourage deliberation to which I am calling attention is quite different. First, the point is not, primarily, to flush out otherwise hidden information or to encourage more precise and explicit prudential reasoning and

²³ Id. But see Eric Posner, “There Are No Penalty Rules…”
²⁴ Penalty default standards could be used, however, to similar effect on the parties but depending on how hazy and open-ended the terms, their deployment might undermine one of the main motivations for using penalty defaults, namely to save the judiciary from having to investigate and substitute judgment for the parties. One of the spurs to negotiate out of the penalty default rule is how clear it is that an untoward result will ensue if one does not.
negotiation between private parties. The sort of deliberation that is encouraged is moral in nature: those subject to the standard must consider what is or is not fair or reasonable or unconscionable -- not merely what is or is not in their interest.

Second, the deliberation aims to interpret the governing legal norm rather than to replace it. The standard doesn’t serve as a disposable default rule. The posture of the law, in this circumstance, is not to encourage citizens to displace it with their own invention. Instead, standards of this sort involve citizens more directly in understanding and implementing the law. In this way, it is an immediate form of deliberative democracy – not by affording direct opportunities for selecting the governing legal norm but in fashioning the preliminary interpretation of its application to a specific setting.

Third, the solicitation to deliberate is more explicit and direct. The behavior directly called for by the legal norm requires interpretation by the citizen in order to comply with the norm. There may or may not be serious consequences if a citizen elects not to interpret the legal norm and thereby falls afoul of its requirements but it depends on the significance of the norm and the remedies attached to it. Unlike penalty default rules, a threat is not the intended impetus for deliberation. The standard posture of compliance is sufficient to impel deliberative activity.

Finally, the aim is not –as with penalty default rules - to bypass or eliminate the need for judicial discretion and interpretation. Rather, it is to involve citizens in similar forms of deliberation to develop and exercise their moral capacities, to stimulate morally sensitive interaction between citizens, and to involve citizens directly in preliminary stabs at legal interpretation.26

D. Objectionable Thought Induction

This justification of standards that I have been defending involves encouraging and even inducing deliberation and conversation. This emphasis on promoting moral agency may seem strange for a liberal. But, even liberal polities that adhere to some version of the view that it is inappropriate to ‘enforce’ morality or to circumvent autonomous agents’ ability to construct and pursue their own conceptions of the good may (and indeed must) design legal systems with an eye to encouraging and supporting the development and exercise of moral agency. A well functioning polity and a system of justice depend upon (most) citizens having fully developed moral personalities and putting them to use. Fostering basic forms of moral agency may be essential even while it is impermissible to require certain forms of virtuous display or attitudes or to require that specific moral decisions about the character and content of individuals’ personal, intellectual, and religious lives be made.27

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

Instead, standards enlist citizens to deploy their moral agency through a more indirect method than direct efforts at persuasion. This sort of indirect effort to influence citizens’ speech and thought may raise questions about its moral and constitutional propriety in light of our fundamental commitments to freedom of speech and thought. A related, but perhaps slightly different way of putting the concern might highlight our general discomfort with mandatory forms of adult education. While liberals defend (and many celebrate) the importance of providing education for all children (and not permitting children’s educational opportunities to be arrested by their parents or by other social circumstances), mandated adult education is entirely off the agenda. Although liberals may approve of required adult education to earn or exercise a privilege (e.g. a license to practice medicine or law or to drive) or in response to an offense (e.g. rehabilitative education or anger management), entirely non-elective adult education is so discomfiting that liberals tend to shy away from the topic entirely. Although the concern 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 this use of standards, even when this use is conceptualized as a method of continuing moral education for adults. Let me briefly articulate some salient theoretical differences between this educative use of standards and objectionable interferences with adult’s freedom of thought. I will then proceed to develop these differences by discussing some contrasting examples.
First, the use of a standard to facilitate moral deliberation does not aim for some specific content to be uttered by or thought by citizens; quite the contrary – for this aim to be met, citizens must generate the content through their own deliberation and not merely parrot a state message or other forms of state content. This also obviates the risk that the effect, independent of the aim, of such standards will be that citizens come to imbibe a party-line. Further, in many cases of deliberation-eliciting standards, fairly safe space can be identified; citizens wary of exercising their judgment may forbear. For example, the risks of uncertainty associated with the unconscionability standard arise when one attempts to push the envelope or engage in creative transactions; plenty of acceptable clauses and safe harbors already exist along the way as permissible models.

Second, the deliberation being stimulated is crucially related to developing the character traits strongly associated with democratic citizenship. Third, the rationale for eliciting such deliberation does not insult or compromise the dignity, autonomy, or privacy of citizens.

These features mark important contrasts with some other prominent examples of eliciting speech or thought that may give pause. For instance, the sort of compelled speech involved in *West Virginia Board v. Barnette*\(^{28}\) (compelled pledge of allegiance) and in *Wooley v. Maynard*\(^{29}\) (compelled use of license plates sporting the motto “Live Free or Die”) did require that extremely specific content be parroted by citizens irrespective of whether they agreed with it or not and irrespective of whether they independently considered the content’s validity. As I have argued elsewhere, scripted compelled speech of that sort may have the objectionable aim, or may run the risk of

\(^{28}\) 319 U.S. 624 (1943).
having the objectionable effect, of influencing citizens’ thoughts on important matters through a mechanism that bypasses their independent deliberation. The rationale for standards I have been discussing does not aim to impart specific content by bypassing independent deliberation but rather aims to spark independent deliberation; although the standards themselves incorporate moral concepts and so, in that way, aim to elicit an interpretation or conception of what is morally apt or appropriate, no specific content to that interpretation is dictated by the standard that elicits deliberation. Nor do these standards themselves compel close forms of association: they may regulate associations that occur for other reasons—e.g. in the case of unconscionability, contractors who typically voluntarily come together or in the case of traffic, drivers and pedestrians who may not choose one another but do not come together because the use of a standard, rather than a rule, compels it.

The motivation for eliciting such deliberation also represents an important contrast with the more objectionable sort of compelled deliberation litigated (and upheld) in Planned Parenthood of Southeastern Pennsylvania v. Casey. Casey involved, et alia, a constitutional challenge based on substantive due process to a regulation requiring women seeking abortions to review informational materials about pregnancy, childbirth, and the physical development of fetuses and embryos and to endure a 24 hour waiting period after the provision of the information. Such regulations raise interesting issues about mandatory education of adults. Even under the most benign interpretation of their

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purpose, they aimed to elicit deliberation about very specific content (and, under a less
benevolent interpretation, aimed to elicit abortion-rejecting conclusions with a quite specific
content) within a quite specific time period rather than just to elicit more diffuse and
open-ended moral deliberation as with the sorts of standards I have been discussing.

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

Second, as this structure brings out, these education requirements were
duplicatively labeled as ‘informed consent’ provisions. The point, as the timing revealed,
was not to encourage serious deliberation; that might better be done in high school or
upon notification of pregnancy. Rather, the ‘informed consent’ requirements of this sort
seem designed to pose an obstacle to or to discourage in illicit ways the exercise of the
right to abort.32

32 It is not always inappropriate for the government to discourage exercise of a right. For
instance, the government might appropriately discourage protected racist speech even in
public fora. But, discouragement of the exercise of a right is a delicate matter and must
be done in ways that do not harass, imply repercussions for resisting the discouragement,
or insult citizens who resist the discouragement by, for instance, suggesting they are
The use of standards I have been advocating does not engage these concerns. It is not targeted in the same way at particular people or specific decisions. Further, the aim is not to discourage exercise of a right or to suggest that certain decisions reflect inadequate or irresponsible deliberation.

The more difficult case of induced deliberation is that implicit in the Missouri law reviewed in *Cruzan v. Director, Missouri Department of Health.*33 *Cruzan* upheld what was, in essence, a default rule –some might regard it as a penalty default rule - about end-of-life treatment. If one had failed to leave clear and convincing evidence that one wished for the termination of life-support in the event one fell into a persistent vegetative state, treatment would be continued even if the preponderance of evidence indicated one wished termination. *Cruzan* and the law it upheld might be thought of as aiming to elicit deliberation and speech. If one’s wishes concerning end of life care were to be respected, one would have to deliberate and to engage in quite explicit communication -- say by drafting a living will. For those who preferred termination, the law operated as a sort of penalty default rule: that information would have to be revealed and formally codified or else a rather dire consequence would be implemented.

This sort of penalty default differs from some of those envisioned in contract partly because the consequences are so dire and because the issue touches upon quite sensitive, personal decisions. In addition, unlike some penalty default measures, the

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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 clear that I do not regard the parallel between having an abortion and engaging in racist speech as extending any further than the fact that both involve the exercise of a fundamental right with which some or many disapprove.  

default provision represents one highly controversial position on a highly personal matter. In this latter respect, it resembles the scheme at issue in *Casey*. But, by contrast with *Casey*, the deliberative requirement is not compelled at a particular time and is not presented as a specific reaction to an individual decision deemed poor or inadequate. Further, one might contend that the compelled deliberation in *Casey* was relatively gratuitous. There was no demonstrable need to require the deliberation to occur for the relevant right to be implemented and exercised. By contrast, one of the reasons why *Cruzan* represents an interesting and hard case is that if there is a right to determine and direct one's own treatment, then there is some need to elicit communication from individuals about their preferred mode of treatment; in the absence of such communication, some default must be implemented (although it could be a default method of collecting evidence of the patient's preferences). The aim to elicit deliberation and communication in this case is not insulting and, because the deliberation and communication are not triggered by an episode or by an effort to exercise a right, the timing also is not insulting.

Putting aside the particular substantive default (life maintenance) the Missouri law enacts and the objections that might be made to it, what might be troubling about *Cruzan* is that the strength of the evidentiary standard requires a level of depth of deliberation, communication and articulacy about a matter that citizens find difficult to face. Many individuals engage in routine denial that they will die or that they face the risk of being in a persistent vegetative state. Making and formalizing a decision about end-of-life care involves confronting not only difficult prudential and ethical issues but also just confronting these features of the human condition that many work hard to avoid.
It is one thing to share one's views, perhaps in tentative ways and halting language, in a tender moment with a friend. It is another to devote the sort of sustained attention and care required to codify one's views with the precision necessary to convey one’s wishes to a stranger. Subjecting citizens to a rather severe default rule unless they engage in articulate and specific communication about personal matters around which they are frail, will operate as rather substantial manipulation bordering on coercion if it works; where the barriers to deliberation are so deeply seated, eliciting deliberation through threat may simply fail. Every time I teach *Cruzan*, many students are shocked by the outcome; others think it is entirely fair that those who fail to fill out living wills are subject to the state’s preference to continue life-support. What strikes me though is that months later, at the end of the term, no greater percentage of students has filled out a living will form – even when I pass these forms out in class. Some very strong sort of avoidance seems to be operating. Assuming the evidence is not merely anecdotal, this should, I think, give us pause about justifying the sort of default rule litigated in *Cruzan* as a deliberation-eliciting device. It either fails to work or if it were to, it works through fairly severe mechanisms.

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

So, for instance, the use of standards to delineate the permissible age of sexual majority is probably a poor idea. Judgment about whether a potential partner is sufficiently mature may well be substantially colored by desire, wishful thinking, and projection. Many of those who may be at risk for violating the legal norm against initiating sexual relations with a minor are themselves often younger and less experienced at calibrating their judgment in light of the distorting effects of sexual desire; others who are at risk have life-long difficulties in this domain. Expecting sound moral deliberation and judgment to occur at this juncture may itself be overly idealistic. Given the terrific stakes of a mistake for both the minor and for the perpetrator, there is a strong argument for using more rule-like formulations in the articulation of the crime of statutory rape.34

This isn’t to say that standards have no place in the criminal law and even in its conduct rules. With respect to the defense of self-defense, for instance, we may reasonably have fewer qualms that there are predictable blind-spots when it comes to an agent’s ability to assess whether another person threatens to use illegal force and whether the use of force in response to such a threat is indeed ‘necessary.’

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 may reasonably be expected to think well, or in which practice will be relatively safe. Using standards to induce deliberation may promote sound moral agency

34 There may, however, be grounds for adjudicators to apply a more standard-like norm (or decision rule) when assessing guilt, level of culpability, or excuse. See also Meir Dan-Cohen, “Acoustic Separation in Criminal Law,” in his Harmful Thoughts (2002).
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 the contemplative life is to be implemented at all times.

Part Two: Fairness, Notice and Horizontal Equity

Thus far, I have argued that a(n) (occasional) virtue of standards is in their lack of immediate clarity. The uncertainty this introduces may spark deliberation and conversation on the ground. This redounds to the moral health of citizens and a democratic polity. I now turn to the objection that this method of inducing deliberation is unfair. It is not merely that full notice is sacrificed as a side-effect of an otherwise permissible aim. This mechanism works, if it does at all, by depriving citizens of fully explicit notice about what the law requires of them and, in cases of standards used within remedy provisions, how the law will respond to their lapses. It may be objected that to deprive intentionally citizens of notice of the law’s content subverts the rule of law. Furthermore, where there are not clear rules, substantial risks develop that horizontal equity will be sacrificed and that like cases will not be treated alike.

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

In the background of each discussion I will take for granted what seems to be the common ground in most discussions of rules and standards. Namely, putting aside those cases in which an arbitrary but certain declaration must be made (e.g. how many days
may elapse between the filing of an opening brief and a reply brief), rule-centered
approaches, by and large, with numerous exceptions, run the risk of being over- and
under-inclusive with respect to the conduct aimed to be elicited, deterred, or delivered.
Rule-based approaches may deliver greater clarity and precision but sacrifice the narrow-
tailoring and nuance standards may afford; on the other hand, if standards depend on
deliberation and the judgment of disparate actors, they may run the risk of going off the
rails. I want to assume these points are in the background for the following reason: I
take it that the relevant framing of the issue is not that, in the germane cases, a rule-based
approach would deliver absolutely correct results and give perfect notice and a standard-
based approach would deliver imperfect results and imperfect notice. In the germane
cases, both approaches run different sorts of risks of inaccuracy, so to speak. The
question I am interested in is whether the deliberate use of standards to invoke
deliberation is objectionably insensitive to individual’s claims to more specific forms of
advance notice (albeit forms that come, part and parcel, with a sort of inaccuracy about
whether that conduct truly is what we may legitimately or what we wish to regulate).

Let me start with remedies and in particular with Souter’s anthem that the bad
man deserves specific notice, *ex ante*, of the cost of his misbehavior. Why does the bad
man want to know the precise cost of his misbehavior? It seems reasonable to demand
that damage awards are fair – among other things that they are a reflection of an honest
assessment of the prohibited behavior and not an opportunistic reaction to the agent, that
do not represent an over-reaction or an excessive penalty, and that they do not reflect the
arbitrary whim or caprice of the adjudicator. Prima facie, though, I don’t understand why
the bad man has a foundational claim of justice to a more specific price for the behavior
unless we take ourselves to be running a market and selling off permissions to misbehave. That economic attitude, however, seems inconsistent, with the usual predicates for punitive damages – that the behavior constitute a true wrong. Of course, it may be argued that the only way to ensure basic fairness and non-arbitrary treatment is through more specific notice and not other mechanisms of constraint and oversight. But that argument needs to be made and is not an argument that specific notice itself is a requirement of justice, but merely that notice requirements may act as prophylactic policing mechanism. Perhaps they are necessary and perhaps they aren’t.

From the perspective of justice, it seems important that: people have sufficient notice to make them alert of what sorts of conduct are legally prohibited or, if you’d rather in the civil case, what sorts of conduct are subject to legal remedies; and, that whatever remedies are imposed are fair reactions to the conduct, are not themselves excessive. A potential wrongdoer has an interest in sufficient notice to plan his or her conduct to avoid wrong-doing and entanglement in the remedial system. But beyond that, it is hard to articulate a legitimate interest in being able to predict the remedy with specificity.35 These constraints, however, may be satisfied without resorting to a pricing schedule; they therefore make room for the use of standards in applying remedies and therefore for deliberation by judges and juries about the magnitude of the wrong in question and what sort of response would be appropriate in the circumstances.

But what of the lapses then in horizontal equity? I submit there is a difference between deliberately treating like cases unalike and treating like cases differently because one (or many) are attempting to alight upon the right result but have differing opinions or

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35 Insurance to protect victims? Interest of society perhaps. May be a reason to prefer rules though interest may largely be satisfied by predictability facilitated by real enforcement of non-excessiveness constraint.
because their understanding of what constitutes right treatment evolves. The first case does violate strictures that we treat each other equally or with equal respect. The second case need not. What matters to our assessment of failures of horizontal equity, I submit, is the cause of difference: if it is intentional or if it systematically reflects factors that are arbitrary from a moral point of view (e.g. race, class, gender), there is a failure of justice. If, however, there is no excessiveness 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 lapses of fairness.

[Material on conduct rules to be filled in]