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Democratic Civic Education and Democratic Law

Introduction

The substantive law is a neglected topic in civic education. To be sure, the Constitution is often an object of fixation in civic education and it will feature in my discussion too. Yet, though it is important, it's a small part of the law. Primarily, it directly regulates state actors and that fact, along with the rather text-bound way it is often presented, can encourage a shallow and distant model of citizenship. This emphasis does not nurture the attitude that the law is ours, and our joint responsibility, together, to make it work. A more robust model of the democratic citizen and her duties would require a deeper exposure to a broader band of the substantive law, its purposes, and the associated moral education that citizens need to execute those purposes well.

I will start by discussing some shortcomings, from a democratic point of view, in the implicit picture of citizenship and the relation between citizens and government that is embedded in much civic education, whether in schools or the culture. I will then proceed to defend the importance of a more participatory form of citizenship that requires greater citizen initiative and engagement with substantive law and its purposes, directly and in the supportive social culture. Finally, I will offer some examples and some cautions concerning how civic education could incorporate the sort of moral and legal education necessary to empower a more participatory democratic citizenry.

I. The Model of Separation

Civic education, in school and in public discourse, sends conflicting messages about the role of citizens in government. Alongside the self-congratulatory spirit about 'we the people' wafts a model of civic participation that implicitly emphasizes distance, opposition, and a dilute, haphazard integration of the citizen with the state.

For example, although there is a discourse about citizens having a duty to vote, the invocation of the idea of duty is truncated. The deontic language often does not continue through to framing *how* one should vote or to any idea that one's representatives are delegates of our mutual duties to one another.

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The dominant models of representation often portray the choice confronting the representative as one of whether to vote as their constituents wish, to vote in their constituents' actual interests, or to vote in the general interest of constituents, as a community. The first two options understand representatives as agents of the principal voters, but the conception of the principal is as either a (mere) rights holder or as a beneficiary, defined in welfare-terms. Notice that if, instead, you conceived of citizens as duty-holders, who were delegating their power to discharge their duties, and as representatives as fellow duty-holders, this would affect what we expected of citizens – whether or not the representative is empowered to implement her own judgment, must reflect her own judgment, or should strive for a position that emerges from their joint engagement about their shared collective duties. For, in delegating a duty, one must have sufficient judgment about what the duty requires and who is qualified to discharge it to delegate responsibly. Further, the responsibility lingers with the primary duty-holder who must keep an eye on matters to ensure one's delegate actually discharges the duty faithfully. This requires both oversight and a developed sense of judgment about what the duty requires. Moreover, the relevant duties would be the duties to realize justice and fulfill our other collective responsibilities. Ensuring one's delegates discharged these duties faithfully would require forming judgments not just about one's own interests, but having a conception of the conditions, rights, and needs of others. Assuming our collective responsibilities range outside ourselves, this understanding would demand citizens to develop an understanding of our joint global as well as our domestic responsibilities.[1]

Not only does the framing of the representative's charge in terms of citizens' interests encourage a flaccid conception of citizenship, so does the implicit hand-off model. Citizens vote and hand off power to their representatives. In the interim periods, their everyday participation is conceived of at best in terms of thin compliance, oversight, and accountability. The good citizen observes the speed limit, pays her taxes, reads the newspaper, dashes off the occasional note to their representative, and when things get dire, as they have, attends a protest or donates to a cause or campaign. So long as she colors within the lines, compliance wise, there is no sense that citizens in fact play a crucial role in the everyday implementation of the law or that it could be done in better or worse ways. It's a model that suits a capitalist, individualist, consumer culture, but that's more a diagnosis and indictment than praise for the synergy.

The way we talk about law, in formal civic education and in the culture, reinforces this separation of government from citizens. Much civic education concerns the structure of government – the three branches, separation of powers,

[1] This argument is developed at length in a companion paper, "Democratic Politics: Duty Delegation without Abdication," ms.

bills on Capitol Hill, etc. In formal civic education, very little law is presented, apart from the Constitution, perhaps the fact, but little substance, of some super-statutes, and some discussion of certain statutes as historical landmarks of pitched political battles.[2] The Constitution is prominently discussed, but it is usually presented as a document about limitations on government. This is understandable in some sense because the Constitution only explicitly regulates individuals directly in the Thirteenth Amendment, but as I will go on to argue, many constitutional protections create a culture that must be accepted and supported by citizens for those protections to succeed and achieve the values that justify them.

Yet, on the common model, citizens appear mainly as rights-holders against potential, illegitimate forms of governmental power. They are situated to complain, but not to assume regular responsibility as co-authors of law. On this picture of government, lay citizens have little role to play in government but as legally compliant beneficiaries, potential victims with government-issued shields, observers, and occasional contributors, in elections, suits against government, and protests. Common law, for instance, is a stranger to the civics classroom. Its exclusion perpetuates the myth that the judiciary's role is simply to interpret statutes and constitutions. It also, thereby, submerges any recognition of citizens' roles in the development and articulation of law through their instigation and participation in common law cases as well as their daily habits and interactions with each other that establish both the law on the street but also the customary practice that the law then draws from when identifying and codifying its norms.[3]

This model of separation also implicitly dominates the cultural conversation about interpretation of law. Consider the interpretation debates over what methodology should guide legal interpretation, such as the debates about originalist, textualist, purposivist, or moral reading approaches to the Constitution. Although it is understandable during confirmation hearings that the framing of these debates is in terms of what should a judge or a justice do, it is less understandable that the cultural discourse about methodology almost always contorts itself to fit the limits of this frame. Many arguments about methodology center around what judges are qualified to do and how they should wield their power. But, if one thought of citizens as the co-authors of law, co-authoring with their contemporaries and with

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[2] Substantive law makes an even rarer appearance in popular culture and it is prone to the same treatment, where it often becomes a signifier of political conflict or triumph. The musical *Hamilton* makes an initial stab at explaining the stakes of the debate about the National Bank Act, but then quickly pivots to depicting the statute as the site of a skirmish between Jefferson and Hamilton. See *Hamilton*, (d. Lin-Manuel Miranda) (2016): Cabinet Battle #1.

[3] See my longer discussion in *Democratic Law* (2021), Chapter 2. See also Robert Hughes, "Responsive Government and Duties of Conscience," *Jurisprudence* 5 (2014): 244-264.

their forbearers, and as the co-implementers of law, this nearly univocal focus on the judiciary should seem strange. To proceed with the project of joint authorship and to engage in joint implementation, citizens need to be able to understand the content of the law. One might have thought that a desideratum for an interpretative theory is that *citizens* and judges alike could use it to understand the law and that the theory appropriately reflected the status of citizens as co-authors of the law. Putting aside for the moment what theory or theories satisfy that desideratum, the dominance of the judicial perspective in cultural and academic conversations about legal interpretation reveals rather low expectations and constrained opportunities for citizen engagement.

Put bluntly, this model of separation is not a sensible fit for a democratic polity, in which citizens constitute the government and are responsible to each other to ensure that we create and maintain conditions of justice and that we fulfill our other collective responsibilities. A more integrated model of the relation between a democratic government and a participatory citizenry is essential to democracy and its system of civic education should be designed to prepare and empower citizens to play that role. As I will now turn to argue, part of the education of a participatory citizenry must include a greater focus on law.

II. Engagement with Law -- Full Compliance v. Complying to Code

Our current practices of under-education about substantive law and the architecture of its implementation represent a missed opportunity in at least four respects. The first two are familiar, if neglected, and are compatible with the standard model of citizen as both subject and principal/consumer. First, knowing more about law's content would aid citizens in knowing what resources they may call upon and what treatment they may demand, where implementation has gone awry, and where provisions are inadequate and demand reform. Second, understanding how the legal infrastructure facilitates daily living may also inspire greater appreciation for law and generate more substantive and affective grounds for the general motives of compliance with law and democratic participation. The virtues not only serve the interests of citizens qua consumer/beneficiary but also serve the general mission of justice. Still, they both have an easy fit with the separation model in which government provides a service to consumer/beneficiary citizens whose knowledge and pattern of compliance greases the wheels of production and delivery.

I want to focus on some, to my mind, underappreciated points about the advantages of deeper knowledge of the substantive law by citizens. These points that emerge from taking the more participatory perspective on citizenship seriously, a perspective that expects citizens to do more than act as critics and the occasional auditors of the process by which articulate law is generated. To flesh out this more

participatory perspective, I will begin by identifying what more with respect to law would be expected from citizens and why.

Let's start with a fairly obvious point about the nature of legal adherence. Note that I discuss 'adherence' or 'compliance' rather than 'obedience'. The latter I regard as an entirely odious term that has no proper place in a democratic model of government but is at home in and primes one toward the behaviors, attitudes, and expectations appropriate to a hierarchical model of law and government. 'Adherence' and 'compliance' by contrast, I take to be more neutral. They do not have the connotations of submission that 'obedience' has and are compatible with a range of behaviors from mere compliance to more cooperative, participatory forms of engagement with a system of rules. The points I will make all build on this observation that not all conceptions of legal adherence are alike. A flourishing democratic legal system requires citizens to relate to the law in ways that are a far cry from what 'obedience' often conjures.

So, the obvious point is that for social conditions to remain largely free, citizens must, as a general rule, take their own initiative to follow the law without regard to the likelihood of being punished for non-compliance. What I mean by 'social conditions remaining largely free' may be obscure since some may think that compliance under any threat of penalty renders that compliance coerced. I do not believe that the existence of some background, no greater than proportionate, penalties for noncompliance renders all compliance *ipso facto* involuntary for all compliers.[4] Consider those who agree with the laws' validity and comply because of the laws' validity and not because of the penalty. Consider also those who comply because of the law's validity, conditional upon assurance of reciprocal behavior by other citizens. The penalty may reassure them that reciprocity will be forthcoming, thereby paving the way for their voluntary compliance.

So, put that dispute aside. In saying that citizens must take their own initiative to follow the law for social conditions to remain free, what I have in mind is the degree of intrusiveness of the enforcement measures on social life. If a society had to depend upon external enforcement measures alone to achieve the ends of law, it would have to rely on an extraordinary and intrusive level of surveillance,[5] deceptive tactics,[6] disproportionate or even draconian levels of threat, or some

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[4] I elaborate on this point in *Democratic Law*, Chapter 7.

[5] See also Robert C. Hughes, "Law and the Entitlement to Coerce," in Wil Waluchow and Stefan Sciaraffa eds, Philosophical Foundations of the Nature of Law (Oxford: Oxford University Press, 2013), pp. 183-206.

[6] I have in mind tactics like misrepresentation about the law's content, levels or consequences of enforcement, and misrepresentation about the law's aims. (For selective advocacy of the latter, see Michael D. Gilbert, "Insincere Rules," *Virginia*

combination thereof. For social conditions to offer a modicum of privacy and the freedom that accompanies it, citizens must both generally accept the law and its aims as legitimate and accept that compliance is a matter of personal commitment and initiative; it is not enough to take the view that some take about parking meters, namely that it would be fair if one were ticketed but one will take one's chances at being a free-rider. An attitude of *that* sort practiced regularly, about all sorts of legal requirements, by many people starts to make the case for the surveillance state. So, a democratic legal regime depends on voluntary adherence to law to achieve the democratic end of fostering an environment of (felt) freedom.

Yet, merely voluntary compliance to the explicit letter of the law will not be enough, as I will try to bring out by taking an illustrative detour to another site of social interaction, the workplace, in which some participants can often use a reminder that it is a cooperative venture that thrives when its participants treat it that way and that stalls when participants exhibit various forms of alienation and disrespect. One way that reminder is delivered is through 'work to rule' actions in labor disputes, in which workers do not strike but tailor and confine their participation to what is explicitly delineated in their contracts and employee manuals. It can be an effective strategy in a labor dispute, but that is because it reveals the deep inadequacies of a textualist, top-down approach to cooperation that treats workers as mere subjects rather than as active cooperators. So, too, if at least some corners of the law represent our community's commitments to express and achieve our shared values, our aspirations for the citizen's role cannot be the sort of compliance that resembles 'working to rule' in labor contexts.

In the workplace, working to rule is a rational, ethical response when one is reasonably alienated from the workplace and its authority figures, when one is being exploited and attempting to demonstrate how much the system relies upon one's good will, and when it is part of a coordinated effort to renegotiate the balance of power to achieve greater equity and fairer terms. The reasons why it is such an effective technique during moments of crisis in labor-management relations, however, demonstrate why it cannot be a way of life or standard operating procedure in the workplace. Explicit instructions, when read literally, cannot cover every situation a worker encounters, cannot address the variable abilities and struggles of each worker, and cannot substitute for the judgment the skilled worker brings to bear on assessing the needs of a situation to make adjustments, invent ad hoc solutions, and respond to the efforts and needs of colleagues. The frustration that management experiences when its labor force 'works to rule' is not ameliorated by writing a more elaborate performance code, but rather by making environmental

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Law Review 101 (2015): 2185-2223.) Such misrepresentation by the state is inconsistent with democratic engagement and endorsement and, also, with freedom.

adjustments that elicit the workers' expertise, judgment, and the generous application of their efforts to advance the cooperative mission.[7]

We might draw at least two lessons about a successful democratic legal culture from reflecting on 'work to rule.' One is that minimal conditions of justice are a precondition of truly cooperative activity. Minimal conditions of justice are a precondition to fostering the willingness and sustained morale of participants to participate, whereas exploitation and under-appreciation are toxic to those motives. Minimal conditions of justice also play a supportive role in enabling the success of those participants' efforts. As we know, decent pay, flexible schedules, child care, and guaranteed health care provide the supportive conditions that allow workers to devote their best, focused efforts to their work, rather than their strained and distracted efforts, disrupted by external anxieties. Because our political and legal system is our largest domestic cooperative activity, we have reason to think the successful achievement of democratic law's aims may depend upon its being situated within a conducive social environment that undergirds morale but and that is structured to complement and support its particular aims. In this case, as I will go on to argue, the production of the conducive, complementary social environment requires a deeper understanding of law and its purposes.

The second lesson we might glean is that, as a general matter, 'work to rule' does not represent a minimally acceptable approach to one's labor duties as an individual. "Work to rule" is a protest strategy, used by *organized* groups as an expressive mechanism, when minimal conditions of justice and fair negotiation tactics have broken down. The strategic power of its expressive message hinges on the fact that 'work to rule' is an untenable approach to cooperative activity. The cooperative activity of the workplace depends upon workers often going beyond the letter of the rule and taking various forms of initiative and care that are not required or explicitly spelled out in detail. This may sometimes, I agree, involve the use of discretion to "*deviate* from [the rules] when common sense demands it."[8] But, the discretion that we rely upon from workers is not mainly that they ignore or file down the sharp corners of overbearing rules. Reflecting on 'work to rule' also brings out the converse idea: that the explicit rules, themselves, are often insufficient to

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[7] This is also one way to interpret the animating idea of 'efficiency wages,' which offer workers higher compensation higher than market clearing levels to incentivize higher quality work and self-supervision, to reduce the need for external monitoring and supervision. See e.g., Harvey Leibenstein, *Economic Growth and Economic Backwardness* (New York: Wiley, 1957): 62-76; Samuel Bowles, "The Production Process in a Competitive Economy: Walrasian, Neo-Hobbesian, and Marxian Models," *The American Economic Review* 75, no. 1 (1985): 16-36 at 25-26.

[8] See David Luban, "Misplaced Fidelity," *Texas Law Review* 90, (2012): 668, 688 (reviewing W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010) (emphasis added).

address the wide range of circumstances that workers confront. Cooperative rule-following involves an understanding of the aim of the enterprise as well as the willingness and ability to take initiative to *fill in* the gaps where the explicit rules do not reach.[9] That is, the flourishing of the cooperative activity of the workplace depends on workers regularly applying their discretionary judgment and acting in good faith to advance the ends of their position and the workplace more generally.[10]

So too with law. From a more participatory perspective, knowledge of the law and its purposes facilitates a fuller form of compliance. I have in mind the following distinction. Reflexive compliance sometimes amounts to just doing or omitting exactly and specifically what one is told to do. It may reflect a simplistic textualist sensibility. But full compliance is not and cannot always be thoughtless, reflexive, and simplistically textualist. New laws, new social circumstances, and new recognitions about insufficiently addressed social circumstances, may require fresh interpretation to discern what should be done and even imagination and effort to execute. That is, the path is not always laid out with a red carpet. It might be more like a trail-under-construction, one that is built by individual hikers forging the way and subsequent others deciding to reinforce their tracks. Such interpretation may

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[9] An interesting study in Ontario, Canada documented reduced learning outcomes in elementary school students when teachers, implementing work to rule, only performed the duties specified in their contracts but ceased to perform other cooperative activities such as running extracurricular activities, meeting with parents, and attending administrative meetings. See, e.g., David R. Johnson, "Do Strikes and Work-To-Rule Campaigns Change Elementary School Assessment Results?," *Canadian Public Policy* 37, no. 4 (2011): 479, 492-93.

[10] Thus, my understanding of the mechanisms and lessons of 'work to rule' is importantly more expansive than the account offered by Jessica Bulman-Pozen and David Pozen in their important article. Jessica Bulman-Pozen & David E. Pozen, "Uncivil Obedience," *Columbia Law Review* 115, no. 4 (2015): 809-72 (defining, analyzing, and critiquing uncivil obedience, defined as protests characterized by rigorous and disruptive adherence to formal rules in an unprecedented or unexpected way). They focus on situations in which 'work to rule' and its civic analogs serve as protests of the (explicit) rules themselves and, in particular, some overbearing or unreasonable feature of the (explicit) rules themselves were those rules taken literally and applied without exception. On their model, the primary force of complying to code is either to highlight the unreasonable limit of a 55 mph speed limit or purportedly over-finicky safety rules or to highlight the importance of selective (non)application of these rules. The emphasis on such situations underplays the significance of cases like the Ontario teachers in Johnson, "Do Strikes and Work-To-Rule Campaigns Change Elementary School Assessment Results?," in which work-to-rule actions put into relief the positive contribution of supplementary discretion, judgment and initiative, as opposed to highlighting the overbearing directions of certain regulations.

require a broader understanding of a particular law's aims and purposes, its scope, and how it is situated in the broader legal landscape.

Were we to think of society as a cooperative activity, structured by a set of laws, then the idea that the citizen's sufficient everyday role is to 'comply to code,' even without explicit threats or the probability of penalties for failure, would analogously fall flat. A literal approach to compliance may be a coping mechanism or a protest mechanism enacted under conditions of injustice and alienation, but it is not an aspiration, nor is even a baseline standard for a flourishing polity that makes progress on achieving its cooperative aims.

III. Fuller Compliance Inside Legal Culture and Supporting Legal Culture

Although we are not exactly flourishing at present, the civic behavior I am discussing is not entirely foreign to us – even if I wish it were more familiar. To give a few examples:

First, we often comply without certainty of enforcement. With respect to our taxes, for instance, the law expects and receives our regular, if perhaps sometimes rough, compliance, despite the net expected financial utility of evasion for many given low penalties and the high likelihood that evasions may be missed.[11] As mentioned earlier, voluntary compliance does not simply further the aim of the law complied with, but serves other collective legal aims, including the protection of privacy and the use of resources to advance purposes other than enforcement and surveillance.

Second, our implementation often elicits deliberation and understanding beyond reflexive and reactive fulfillment of pre-specified demands. Whenever the law deploys standards rather than rules (such as when it requires 'equity' or 'equal treatment', forbids 'harassment', appeals to the 'reasonable person,' permits 'fair use' of copyrighted materials, requires 'reasonable accommodation' that does not present an 'undue hardship', or requires 'good faith'), citizens cannot robotically 'comply to code' except in those cases in which an agency has issued highly specific rule-like guidance or a court has ruled on a factually similar case. Standards induce citizens to deliberate about the law's aims and values and how, in good faith, to bring them about.[12]

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[11] James Alm, "Designing Alternative Strategies to Reduce Tax Evasion" in Michael Pickhardt and Aloys Prinz, eds., *Tax Evasion and the Shadow Economy* (Cheltenham, UK: Edward Elgar Publishing, 2012): 13–32, 15; Benno Torgler, "Speaking to Theorists and Searching for Facts: Tax Morale and Tax Compliance in Experiments," *Journal of Economic Surveys* 16, No. 5 (2002): 657-83; James Andreoni, Brian Erard, & Jonathan Feinstein, "Tax Compliance," *Journal of Economic Literature* 36, No. 2 (1998): 818-860.

[12] See my longer discussion in "Inducing Deliberation: On the Occasional Merits of Fog," *Harvard Law Review* 123 (2010): 1214-1246.

Third, on important occasions, we act on the law's values in our social and personal lives in ways that support legal culture, even when it is ambiguous or even clear that such action exceeds the law's expectation. This behavior is by no means uniform or universal but it is at least familiar. For example, many citizens in their everyday, social lives take inspiration from First Amendment and the values that underlie it. They affirm some version of free speech principles for their personal interactions, although they are not state agents. The content of the principles (and/or their application, depending on the height of one's perch of abstraction) may vary, of course. Private individuals and associations may respect freedom of speech without acting evenhandedly in their own distribution of benefits, for instance. Nonetheless, it seems difficult to deny that private dispositions and practices of tolerance, open-mindedness, and engagement play a significant role in the success of a legal culture of freedom of speech in myriad ways.

For one thing, these habits of listening and engaged, responsive toleration and open-mindedness to divergent views acculturate citizens to enduring, rather than suppressing, uncomfortable ideas. This may prepare and support officials to respect freedom of speech. It may also reduce some of the flashpoints that inspire government abuse as a response to public outcry. That is, the acculturation of endurance may both reduce pressure on the state to engage in suppression and may blunt the shock of state toleration of uncomfortable ideas. The private practice, by partly mirroring the state practice, helps to support the legal climate by lowering the political temperature and costs of state compliance.

But the success of the legal culture is not judged solely by the costs of enforcement and legal compliance. The success of the legal culture is also judged by the degree to which the values underlying the law are achieved. The First Amendment's values are not limited to the control of state abuse and excess. The First Amendment's justifications also include its role in promoting the sort of robust debate necessary for democracy's flourishing as well as its role in promoting the advancement and appreciation of knowledge, intellectual development, moral agency, and authentic social relationships. The achievement of these ends is valuable in itself but also important to the success of the democratic state. Yet, while state action can stymie or facilitate their attainment, state action cannot achieve them alone. A complementary social free speech culture allowing and encouraging citizens to cultivate their minds, entertain and evaluate new (and old) ideas, and exchange them with others without debilitating repercussions for voicing divergent views or making mistakes, is essential for the realization of these ends, even to a modest degree.

IV. The Role of Citizen Discretion and Judgment – The Example of Freedom of Speech

A final ingredient worth mentioning in the interplay of the social and legal culture of free speech is that of individual judgment and discretion in how to exercise freedom of speech and in what venues. The citizen's role in a free speech culture is not exhausted by participation, respectful engagement with others, and toleration of difference in the form of abstention from private suppression and recriminations that exceed substantial criticism. The generous application of good faith judgment about what to say and when and where to say it serves both the legal and the social culture by reducing pressure on the systems and avoiding unnecessary flashpoints.

What sort of 'good faith' judgment do I have in mind? I'll take some examples from the U.S. context in which lying without proof of audience harm is protected by the First Amendment,[13] as is much offensive speech that causes emotional distress,[14] as is some hate speech that does not threaten or harass specific persons and that occurs outside work and educational contexts.[15] The 'pure lie' (by which I mean a lie whose false content is not relied upon parties to their detriment) may be protected under First Amendment doctrine, but its production is not a good faith exercise by any citizen. Insincere factual claims advanced as testimony as well as covert insincere advocacy do not reveal or express the speaker's thoughts and do not advance the listener's knowledge; insincere opinions do not contribute to the process of democratic negotiation because they do not represent real perspectives to which citizens should attend out of mutual respect. But, their production does corrode mutual trust and exhausts the attention. Their prevalence may deplete citizens of an interest in responsive, respectful participation.

Protected lies represent just one example of the claim that citizens acting in good faith should not exercise their speech rights up to the legal limit. Offensive speech that causes emotional distress and hate speech offer further examples, although the details here differ. Offensive speech and hate speech (obviously overlapping categories) may indeed express the speaker's thoughts. Further, their expression may educate listeners at least as to the speaker's mindset, if not directly through the content. Even where the content is simply abhorrent, the content's expression may alert listeners to ignorance or dangerous instability on the part of the speaker that requires refutation or another sort of attention. These categories of speech engage

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[13] *United States v. Alvarez*, 567 U.S. 709, 719, 730 (2012). For criticism of the *Alvarez* decision, see my *Speech Matters: On Lying, Morality, and the Law* (Princeton, NJ: Princeton University Press, 2014), Chapter 4.

[14] *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

[15] Ibid.; See, e.g., *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 396 (1992); *Virginia v. Black*, 538 U.S. 343, 367 (2003).

with free speech values in a way that pure lies do not. At the same time, a free speech culture will not thrive if these objectionable utterances are regularly voiced and, in particular, if they are regularly voiced in fora of mass dissemination. It isn't primarily because their content is factually or normatively mistaken, although that is true of hate speech and often true of other forms of offensive speech that causes emotional distress. To be sure, the ignorance embedded within them can exacerbate the damage they inflict, but, at the same time, part of the point of the free speech protection is to give citizens space to entertain mistakes and to come to exorcise them through conversation, realizations, and intellectual evolution.

In these cases, the primary culprits are the animus and insensitivity contained and conveyed in the speech, which, when widely or carelessly deployed, may inflict substantial emotional distress, reinforce systemic inequality, and undermine the foundations of mutual trust and respect that sustain the willingness of citizens to engage in genuine, reciprocal communicative exchanges. For these reasons, even those who believe such speech cannot be comprehensively banned should agree that cooperative citizens should not regard or encourage this speech as ordinary, as unexceptional, as entertainment, or as a perfectly respectable form of self-expression or blowing off steam. Mass media sites have good reason to discourage or prohibit its expression on their channels and to shunt it into smaller fora where its free speech values could be realized but that would insulate others, especially captive audiences, from some of its destructive impact and that may be more likely to elicit the close engagement, whether therapeutic, resistant, or substantively responsive, that is appropriate. That is, citizens may need space to entertain and exorcise mistakes but that space need not be the size of a football arena. Of course, the sensibility of these prescriptions depends mightily on one's conceptions of hate speech, where the line falls between productively provocative speech and truly offensive speech, and the relevant causes of emotional distress. Alighting on the correct conceptions and on a sense of what fora are appropriate calls for careful judgment. This is not the occasion to defend any specific conceptions of these categories. The more limited point I want to make is that while it may be foolhardy, dangerous, or inappropriate for the state to make judgments about where the boundaries of acceptable and unacceptable public speech in these areas lie, that does not mean it is foolhardy, dangerous, or inappropriate for every citizen to make such judgments. The arguably necessary abdication of judgment by the state renders it incumbent that citizens and other private parties exercise their own judgment.

Free speech may be the most familiar and perhaps the most developed example of a parallel social culture that provides a critical complement and support to a legal culture, but it isn't an outlying case. Parallel (though not always isomorphic) social cultures complement legal cultures by developing extra-legal norms of equality and equal treatment, procedural fairness in nongovernmental institutional and other group settings, and dispute resolution (both with respect to norms of impartiality as

well as discretion about what disputes to pursue to resolution and what disputes to let go). In these domains as well, parallel social norms reduce tensions over demanding legal norms, and prepare citizens with the knowledge, character, abilities and habits necessary for legal compliance and implementation without draconian enforcement. They also establish the sort of social relations, including forms of abstention from standing on one's rights on every possible occasion, that are necessary for the full achievement of our collective legal ends.[16]

At the same time, as is obvious, these parallel cultures are insufficiently developed and ensconced across all corners of our legal lives. For instance, the woefully inadequate absorption of norms of equality and the appreciation of the causes and manifestations of inequality reverberate across nearly every aspect of our collective lives. Although we have some budding practices of equality of recognition and anti-discrimination in informal social life, the absorption of the importance of equality of status and its wider ranging implications represents one of many places where citizens and the officials they become could do substantially better; their doing so might bolster and strengthen the legal culture here as well. My diffident suggestions are that civic education has a role to play in achieving progress and that these examples of our partial successes offer reasons for optimism.

V. Some Implications for Civic Education

What are the implications of these arguments for civic education? Preparing and empowering a democratic citizenry to address a wide range of imperatives, problems, and temptations, quotidian and structural, requires a multi-faceted approach, drawing on the humanities, the social sciences, and the sciences.[17] My basic contention is that this multi-faceted approach should include greater attention to legal literacy to encourage and inform democratic participation. To sustain the

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[16] See also my discussion in *Speech Matters*: *On Lying, Morality and the Law*, 164-167, of some instances of legal forbearance as a valuable form of compassionate recognition and accommodation of human imperfection.

[17] Unsurprisingly, I am not alone in this conviction. In particular, I applaud the vision and the detailed plans offered by the Educating for American Democracy Project. https://www.educatingforamericandemocracy.org/our-vision/ . That vision advocates for a substantial reinvestment in civic education through all thirteen years of primary education and a curriculum that emphasizes knowledge of government, the cultivation of civic virtues such as civic friendship and civil disagreement, and a deeper understanding of our shared history. The country will be better if the project is implemented. This essay may be seen as a complement to it, making the case for a greater educational focus on substantive law, its purposes, and methods of interpretation and implementation.

participatory culture of citizenship we have and to achieve a more thoroughgoing and substantive sort of participatory compliance, the substantive content and normative underpinnings of law should be a greater part of civic education, alongside some philosophical training about how to interpret and apply rules and values. What I have in mind would represent a corrective to the dominant focus on the highlight reels from the Bill of Rights plus a smattering of procedure (elections, the three branches, and how a bill becomes law), supplemented by the social history of upheavals (wars and social protests) when these procedures fail or are stymied.

Understanding the justifications for more of the law that structures our lives would serve at least five purposes. First, where the law is just, it offers an internal reason for compliance for the sake of the law itself, deepening the motivations for voluntary compliance beyond a thin commitment to the rule of law. Second, as I have argued, legal interpretation often requires understanding the justifications and aims of law and to the extent that citizens serve as first-line interpreters of law, understanding the values and purposes is necessary for this role. Third, successful realization of the law's aims often depends upon a hospitable social environment that supplements state action and legal purposes and enacting such an environment requires an understanding of the purposes of law. Fourth, understanding the best justifications for law also informs voters' understanding of how legal institutions must function and coordinate and what sorts of officials are best placed to serve and reform those institutions. And, fifth, understanding the best justifications for the law may also expose the weaknesses, failures, and inequities of the law itself or our track record at implementing it fairly and effectively. This understanding may help to inform reform efforts and inspire more effective and meaningful resistance.

It might be objected that the recommendation to teach the purposes and justifications of law and the second cited virtue of doing so presupposes a particular interpretative methodology that, by no means, commands a consensus of the public or of jurists. To be candid, as I signaled earlier, I do think that a democratic, citizen-oriented approach to interpretation has implications for interpretative theory.[18] In the constitutional context, classic forms of originalism and textualism involve an exaggerated posture of deference to the particular judgments of prior citizens, many of which were forged under discriminatory conditions of exclusion. This posture and the conditions of origin seem difficult to square with a democratic commitment to the self-governance of contemporary citizens. Further, originalism (and textualist variants that advert to originalist understandings) place high epistemic demands on interpreters that would be difficult for ordinary citizens to meet. Even outside the constitutional context, approaches to statutory interpretation that afford extraordinary or exclusive emphasis to legislative intent or the explicit wording of the text are susceptible to similar criticisms and are more vulnerable to others,

[18] See also Jack Balkin, *Living Originalism* (Cambridge, MA: Harvard University Press, 2011).

given that statutes and regulations often govern non-state actors. As the prior discussion of work-to-rule was meant to bring out, full and effective compliance requires a more active and collaborative form of interpretation. Interpretative theories that stress how contemporary citizens would achieve the purposes and commitments of the law are more appropriate for democratic law.

Rather than defending this position further, it seems more important to note that the objection can be answered more directly. Although resolving interpretative disputes is important in many legal contexts, their resolution is not central to my argument about civic education. Whether a grasp of the purposes of law is essential to understand the law or whether it is essential to understanding how to contribute to a social culture that supports the purposes of law or both, the democratic citizen will need some practice at identifying those purposes and their implications.

To nurture this understanding requires developing a certain form of moral intelligence that is philosophical, although it may not be best learned by everyone through the exclusive study of philosophical essays. History and literature, for example, may also convey philosophical lessons. Sometimes and for some students, more narrative depictions, whether fictional or nonfictional, may convey certain lessons more powerfully than abstract argument. On the other hand, abstract argumentation may activate the critical perspective and stimulate cross-contextual, imaginative applications of principles. I won't evaluate the comparative merits of teaching philosophy directly versus through another discipline, but will posit that there is some role for more direct philosophical education to impart some of the skills of interpretation, analogous reasoning, critical evaluation, and extension of principles to new situations. In any case, I'll focus on moral and political philosophy here given my expertise and just offer a caution.

There have been admirable efforts to incorporate more philosophy into the K-12 curriculum that I applaud.[19] Philosophy of most forms feeds the curious and trains capacities for imagination, abstraction, active questioning, justification, organization and argumentation. For the purposes of civic education, though, some sorts of philosophy may be better onramps than others. I'm not here making the obvious point that moral and political philosophy may be more relevant than ancient metaphysics to contemporary political issues. Rather, some entry points to philosophy that may captivate young readers may not impart some of the skills and knowledge that advance civic education. For example, many are tempted to introduce students to philosophy through the Trolley Problem, moral dilemmas, or

[19] Promising initiatives are discussed in Lauren Bialystok, Trevor Norris, and Laura Elizabeth Pinto, "Teaching and Learning Philosophy in Ontario High Schools," *Journal of Curriculum Studies* 51, no. 5 (2019): 678-697 and various articles in Maughn Rollins Gregory, Joanna Haynes, and Karin Murris, *The Routledge International Handbook of Philosophy for Children*, (New York: Routledge, 2017).

other puzzles and paradoxes.[20] I have four reservations about this approach, which I might characterize as an introduction to philosophy by way of difficult, improbable, high-stakes problems complemented by a stream of counter-examples to solutions.

First, part of what is appealing about the Trolley Problem is also a drawback, namely that the choice of who dies at the business side of a vehicle feels very much like making choices in a single-player video game. On the one hand, the game set-up unrealistically inflates the agency of the protagonist. On the other hand, because the scenario is far-fetched, the stakes are both high and empty, removed from the reality of the reader's life and, specifically, removed from the recurring challenges citizens face and need to master.[21] Although philosophy is entertaining, there are hazards in pushing that trait as its leading feature. While we have been made vividly aware of the life-and-death stakes of our participation in collective behaviors like mask-wearing and social-distancing, most of our individual decisions are not or should not be *difficult* choices about who lives and dies (and in which, no matter what, someone must die).

Second, the fact that the Trolley Problem involves an *individual* decision-maker making these lethal decisions renders the Problem (and its analogs) poor choices for civic education in particular. The Problem itself, in its set-up and constraints, does not encourage students to look for collective solutions to recurring problems or to cultivate the skills necessary to implement them, including understanding the needs and ideas of others and finding acceptable and practicable consensus points. Its constraints are better suited to the training of a benevolent dictator with a penchant for micro-management and an antiquated transportation system.

Third, introducing students to philosophical thinking by way of consulting intuitions[22] about wrenching problems and moral dilemmas without fully satisfying answers encourages a perspective on philosophical thinking as the domain of

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[20] See, e.g., Sean M. Lennon, Jeffrey M. Byford, and J. T. Cox, "An Ethical Exercise for the Social Studies Classroom: The Trolley Dilemma," *The Clearing House: A Journal of Educational Strategies, Issues and Ideas* 88, no. 6 (2015): 178–181; Vaughn Bryan Baltzly, "Trolleyology as First Philosophy: A Puzzle-Centered Approach to Introducing the Discipline," *Teaching Philosophy* 44, no. 4 (forthcoming 2021).

[21] See also Laura Martena, "Thinking Inside the Box: Concerns about Trolley Problems in the Ethics Classroom," *Teaching Philosophy* 41, no. 4 (2018): 381–406 at 390-392 for a discussion of other objectionable artificial features of the Trolley Problem, including its acontextuality.

[22] If one thought that moral intuitions are valuable guides to moral thinking when and because they encapsulate the lessons wrought from years of moral experience and deliberation, one might question whether adolescents have the relevant experience that would make their intuitions worthy starting places.

possibly unanswerable and therefore purely academic questions to be explored mainly by the most intrepid and indefatigable intellects. To be sure, philosophy may indeed be a refuge for (seemingly) intractable questions but that is only one aspect of its brief and of its contributions to public life. By introducing students to the most difficult and possibly intractable questions at the outset, one risks pigeonholing philosophy in the minds of students in ways that diminish its perceived resources.

Finally, for related reasons, an early, immediate sense of dissatisfaction and irresolvability may also encourage premature conclusions of defeatism, intellectual skepticism, and relativism. To be sure, imparting a hefty sense of humility and open-mindedness to citizens is an important task. Further, education about the range of responses to disagreement and diverse thinking, including relativism, is important. There's a difference, though, between the quick relativism arrived at by way of frustration and the one earned after extended exposure to the strengths as well as the limits of philosophical thinking.

In sum, I worry that the introduction-by-trolley-problem approach fails to illustrate the resources and techniques of philosophical thinking, principles, and values important for everyday life for democratic citizens and for understanding the more commonplace problems and the norms, dispositions, collective behaviors, and institutions that address them.

What would the alternatives look like? The broad desiderata would involve exposing students to how values and principles may underlie collective actions and institutions, to the considerations and arguments underlying alternative principles, to how values and principles may extend to new situations, and how role ethics and individual ethics interact with the ethical principles that structure institutions.

As an example, rather than starting with the trolley problem, one might start with arguments for equality and tracing out the arguments (and counter-arguments) for deriving same-sex orientation equality from principles of gender equality and then asking what the further implications, if any, of traditionally conceived gender equality principles are for the treatment of transgender and nonbinary people. One could explore whether the activities of the Food and Drug Administration are best understood in terms of benevolent paternalism or a cooperative division of epistemic labor. A discussion of role-responsibilities might be used to explore the different free speech freedoms and obligations of government actors, institutional actors, and individual citizens.

One might also introduce students to what often feel to laypeople like esoteric areas of the law monopolized by elites, e.g. bankruptcy, taxation, contracts, or torts, and encourage them to begin to identify the values that drive its structure and its gaps, whether that structure is normatively coherent or sufficiently comprehensive, what alternative structures might address the underlying issues,

and what role citizens play in supporting that structure or reforming it or both, as the case may be. For example, students may be asked to consider how society should manage the costs of accidents, what role law plays in nurturing personal responsibility, and whether personal responsibility and financial responsibility should be co-extensive in an economically unequal society. Or, students might be asked how they should approach contractual relations (from a standpoint of personal profit maximization, fairness between the parties, or broader social concerns), what degrees of legal freedom they should enjoy in contractual relations and why, and how their approach relates to their convictions about distributive justice, social justice, and climate change.

Conclusion

As may be obvious, I have not yet touched directly on the specific topic of civic education in polarized times, the subject of this symposium. Many of my judgments about it are probably already obvious. I find it difficult to shake the impression that ignorance, alienation, and a generalized distrust of government are major drivers in our current predicament. For example, undifferentiated and unsubstantiated distrust in government and a failure to view oneself as a member of a mutually beneficial collective seem to be significant factors in vaccine-hesitancy, mask-resistance, and persistent inaccurate belief in widespread election fraud. Because I suspect that some of this entrenched ignorance may be traced to an inadequate investment in a broad-ranging civic education, I retain some optimism that, alongside governmental reform and greater progress toward justice, civic education could make some difference to forestalling repetitions of our unproductive divisions and to channeling disagreements toward more worthy, less lethal controversies.

Incorporating a deeper knowledge of laws and their purposes and a stronger sense of citizen ownership and responsibility for their selection and fulfillment might play a salutary role in at least two ways. First, understanding the specifics of our legal structure and its values may do work to prevent generalized, unsubstantiated distrust from gaining a foothold in the psyche of the citizenry. To be sure, there are sound reasons for nuanced, targeted distrust of government given its historical and ongoing treatment of many populations, the potential for abuse in any concentration of power, and, in particular, the behavior of the last administration. Nuanced distrust, however, is capable of being overcome – whether through supplying evidence that it is misplaced or through change and reform. When coupled with transparent protections, it is not inconsistent with a willingness to participate and cooperate. Whereas, undifferentiated distrust is more insidious. It can prove more resistant to evidence and to sincere efforts at change because it is an attitude that discredits counter-evidence from the outset. It also generates a feedback loop that recruits, reinforces, and feeds off of a sense of alienation, distance, and a profound hesitance to cooperate and participate with all but the

most stalwart allies. Equipping students with a deeper understanding of government and their role in it would, I hope, inoculate them against susceptibility to those who would instill undifferentiated distrust.

Second, learning more about the what and the why of democratic law, rather than predominantly the origin story of how it came to be, may, if nothing else, nurture a sense of ownership and entitlement over the system (whether positive or critical), a greater sense of identification with the common condition of its members, rather than a sense of distance, fragmentation, and alienation, and a greater sense of their own shared agency and responsibility over the content and success of democratic law.