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Standards, Rules, and Social Norms

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STANDARDS, RULES, AND SOCIAL NORMS

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I want to discuss three things: the economic literature on rules and standards, the economic approach to social norms, and the rule of law. The connection between these topics might be hard to see. The economic literature on rules and standards deals with the optimal form of the *law,* whereas the economic literature on social norms deals with *nonlegal* phenomena and the rule of law as a political *ideal.* But I will argue that the three topics are closely related, and that analysis of them together illuminates each.

I. RULES AND STANDARDS

My exposition of the economic analysis of rules and standards relies heavily on a model used by Professor Kaplow.[1] For the sake of brevity, I will skip a number of important details, including the role of precedent; the interested reader should consult the original.

When the legislature enacts a rule, it specifies in advance of some action whether that action will be penalized. When the legislature enacts a standard, it delegates to a court the authority to determine after the action whether that action will be penalized. Rules state that you may not do A, B, and C; a standard typically says that you may not behave "unreasonably," or "negligently," or "unconscionably," leaving it to the courts to determine whether an action meets these criteria.[2]

Suppose a legislature contemplates regulating some action X. It does not know whether the action will cause harm but does know the probability that it will cause harm. Should it use a rule

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1. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis,* 42 DUKE L.J. 557, 624-29 (1992); *see also* citations therein.

2. As Kaplow points out, the rule-standard issue should not be confused with the optimal complexity of a rule or standard. *See* Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules,* 11 J. L. ECON. & ORG. 150 (1995).

or a standard? The simplest case assumes that affected parties do not inform themselves about the law, whether the law is a rule or a standard. The legislature must determine two quantities. The first quantity is its one-time cost of promulgating a rule. The second quantity is computed by multiplying the cost of judicial enforcement by the expected number of accidents (which is itself a function of the number of affected parties and the care they take given the cost of the precautions available to them, their uninformed prediction of the chance of accident, and the expected harm that would result from the accident). If the first quantity exceeds the second, the legislature should enact a standard. The reason is that when few accidents are likely to occur, and the judiciary is efficient enough at evaluating them, the legislature should not bother incurring the costs of engaging in the necessary research into the possible harmful consequences of the action.

If the legislature believes that affected parties will invest in legal advice in advance of their conduct, regardless of whether the law is a rule or a standard, its calculation should change. Initially, to know whether the parties will invest in legal advice, the legislature must know the price of legal advice, and also the difference, for each person, between his total expected costs if informed and his total expected costs if uninformed. To determine the former, the legislature must perform the person's cost-minimization calculations, and *this* involves estimating the marginal value of increased precautions in reducing the probability of harm, a calculation that requires the person (in the model) to know or (more likely) to estimate the level of harm. Having determined that regulated parties will inform themselves of the law, the legislature must now compare the cost of promulgating a rule with the sum of (1) the total amount of legal costs incurred by all regulated parties, and (2) the cost of all the enforcement proceedings that result when informed parties take their optimal precautions.

The legislature might also believe that affected parties will invest in legal advice in advance of their conduct if the law is a rule but not if the law is a standard. This belief assumes that a person can more cheaply inform himself of a rule than inform himself of a standard, a plausible assumption given that the person (or his lawyer) merely consults the legislative code in order to determine the content of a rule, whereas he would have

to study and interpret a body of case law in order to predict how a court would apply a standard. To determine whether to use a rule or a standard, the legislature must take account not only of promulgation and enforcement costs, but also of efficiency gains that result because a rule enables parties to take more efficient precautions than a standard does, precautions that result in an accident rate different from the rate that would exist under a standard.

Finally, if, as is plausible, some people will not inform themselves of rules or standards, some people will inform themselves of rules but not of standards, and some people will inform themselves of both rules and standards, the choice between rule and standard will depend on the fractions of the population that will invest in each level of information, and on the relative gains enjoyed by each population under each regime.

This brief summary does not do justice to Kaplow's argument, but it suffices to illustrate the tremendous amounts of information that even a simple economic analysis requires. Indeed, we have only talked about the question of whether the legislature should choose to use a rule or a standard. Having exhausted itself in making this determination, it still must choose, among other things, the optimal complexity of the rule or standard,[3] not to mention (if a rule) the normative content of the law!

The claim that economic analysis requires superhuman information-processing capabilities is an old and hackneyed criticism of law and economics. One of the economist's responses, one with which I agree, is that models usefully draw our attention to variables that should be taken into account even if they cannot always be taken into account with precision. A slightly more aggressive version of this defense holds that people can actually apply the model to the world by supplying the values for the parameters from guesses based on their rough intuitions.

This response is valid sometimes but not always. The model of rules and standards may be one of those cases in which the response fails. To see why, observe that ideally we want to economize on the total cost of the legal system, including the

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3. *See* Kaplow, *supra* note 2 (regarding complexity).

creation and enforcement of laws. Call this amount *C*. Now *C* is clearly a function of the efficiency of a particular law. If a speed limit of 55 m.p.h. is more efficient than a speed limit of 65 m.p.h., for example, then a legislature that chooses to enact the first speed limit minimizes *C* relative to the choice of the second speed limit. But suppose it is more costly for a legislature to fill in the content of the speed limit than it is for the courts to apply a speed limit standard—for example, requiring people to drive at "reasonable" speeds. Then to minimize *C*, we want the courts to do the work, not the legislatures. *C*, then, is a function both of the content of the law and of the *process* by which it is created (rule or standard). This is where Professor Kaplow's analysis stops. But we can go further. Suppose it is cheaper for the legislature to determine the process by which a law is created in a particular case by using rough, intuitive guesses of the value of the variables in Professor Kaplow's model rather than by sponsoring hearings and studies for the purpose of obtaining more precise estimates. Then to minimize *C*, we want the legislature to use the rough guess method. *C* is therefore a function of the content of the law, the process by which it is created, *and* the method used to determine which process to use to create the law. But how should the legislature know whether to rely on rough, intuitive guesses rather than sponsor hearings and studies for the purpose of obtaining more precise estimates? Maybe, it should mimic what it did last time it faced a question like the one under consideration, or maybe it should sponsor a study to determine the most efficient method for determining the method used to determine which process to use to create the law. You should get the point by now: there is an infinite regress.

Or to put this another way, notice all of the quantities that the legislature must estimate in order to determine whether to use a rule or a standard: the cost of promulgating a rule, the cost of enforcing a standard, the probability of accident given that people are informed of the law, the probability of accident given that they are uninformed, the expected harm they would suffer in an accident, the cost of legal advice, and so on. Where do the numbers come from? How does the legislature make "rough guesses" about these quantities?

One possible answer to these questions is that the legislature obtains these numbers by holding hearings and funding studies.

But what does the legislature learn from these hearings and studies? If "hearings and studies" are defined broadly as activities that supply the legislature with *all* relevant numbers, then when it engages in "hearings and studies" in order to determine whether to use a rule or a standard, it thereby also learns the numbers necessary to choose the optimal content of the law—in which case the legislature should go ahead and issue a rule rather than force a court to duplicate this information gathering. Thus, if "hearings and studies" are defined broadly, legislatures would never issue standards.

If "hearings and studies" are defined narrowly as activities that supply the legislature with just those numbers that are necessary for performing calculations at a particular stage of analysis, for example, the rules-versus-standards stage of analysis, then the infinite regress returns. If hearings and studies would tell the legislature only that, say, a rule would be superior to a standard, the legislature must still (before knowing this) hold hearings and commission studies to determine whether hearings and studies are appropriate, rather than imitation or whatever, ad infinitum.

A second possible answer to the question how legislatures make rough guesses is that they bring with them prior knowledge about the world, and they use this knowledge to estimate the quantities needed to do the rules-standards calculation. But why should we think that they have the right kind of knowledge to make the choice between rules and standards, but not the right kind of knowledge to determine the optimal content of the law rather than deferring to the courts? If this is the case, the rules-standards analysis is irrelevant. And if we do not, then we plunge back into the regress. This time, to be sure, the regress is not necessarily infinite—at some earlier stage the legislatures might have sufficient prior knowledge about the world—but we still do not know what stage that is.

The infinite regress does not arise from any flaw in Professor Kaplow's reasoning, but is a characteristic of the optimizing methodology of economics. It is described as follows:

> Suppose that we first formulate a decision problem as a conventional optimization based on the assumption of unbounded rationality and thus on the assumption of zero deliberation cost. Suppose we then recognize that deliberation cost is positive; so we fold this further cost into

the original problem. The difficulty is that the augmented optimization problem will itself be costly to analyze; and this new deliberation cost will be neglected. We can then formulate a third problem, and so on. We quickly find ourselves in an infinite and seemingly intractable regress.[4]

This objection has been recognized for a long time, and there is no reason to consider it a decisive blow against economics or law and economics. One should recognize, however, that the problem looms larger in some contexts than in others. It does not seem to be a problem when one tries to determine the relative advantages of different remedies for breach of contract and other questions of substantive law. But the problem becomes hard to ignore in discussions about how laws allow legislatures, courts, and other agencies to economize on their lawmaking costs. If a law seems justified because it allows a lawmaking body to economize on its resources, a claim that the lawmaking body *chose* that law for that purpose by engaging in an optimizing methodology is caught in the snares of the infinite regress.

These objections are not merely theoretical. When one turns from theory to the practices of legislatures or courts, one sees very little of what Professor Kaplow models. This is particularly true of courts. When courts interpret precedents, they face the question whether to treat them as standards or rules. Professor Kaplow's model implies that courts should consider the cost of promulgation, the future cost of enforcement, the legal costs of affected parties, and so on, but courts do not do this or even act "as if" they did this. Instead, courts engage in a kind of practical reasoning. If earlier cases use similar reasoning and come to similar holdings with respect to a recurrent set of facts, a court may derive a rule from them; if earlier cases are inconsistent or sparse or difficult to understand, a court may assert a standard (effectively saying that future courts must determine the rule). Professor Kaplow's model also does not describe legislative behavior. Legislatures like courts generally imitate what came before them: the common law or customary law, which is codified, or earlier statutes, which themselves are based on still earlier statutes, some of them taken from foreign countries, most of which are derived ultimately from the common law or

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4. John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LIT. 669, 687 (1996).

customary law.[5] One might argue that in all these cases the decision-maker is optimizing in the face of its high promulgation costs, but this response makes the rules-standards analysis trivial.

The theoretical objection raised by the infinite regress and the empirical dependence of lawmaking on imitation imply that a proper analysis of rules and standards must approach the subject from a different angle. I will suggest an approach in Part III, after what might seem to be a digression on social norms in Part II. But the connection between the two topics will presently be clear.

II. SOCIAL NORMS

In economic models in which rational actors take others' actions as given, individuals cannot cooperate for the purpose of creating collective goods. Everyone would cheat on the cooperative project, because each person does better by cheating if the others cooperate (he then obtains part of the surplus without contributing to it) and each does better by cheating if the others cheat (he avoids incurring the costs of contributing to a surplus that would not be created). Yet people often engage in cooperative activities, including the production of the various standard public goods, in the absence of legal enforcement, sometimes even in the face of legal penalties. Examples include the merchants who resolve disputes among themselves without resorting to the courts; the cattle ranchers who help each other maintain fences; and the diamond.dealers who refuse to do business with those who have engaged in bad business practices.[6] One explanation of these phenomena is that "social norms" deter the undesirable conduct, but this explanation is not satisfactory. One wants to know why social norms deter the undesirable conduct, which means

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5. For a survey of evolutionary theories of the law, see E. Donald Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985); see also William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995) (discussing Alan Watson's theory of legal transplants).

6. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); *see generally* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

understanding how they come into existence in the first place. Why do people create and enforce social norms?[7]

There have been numerous attempts to answer this question, none of them wholly satisfactory but many of them illuminating and useful. I focus on two of them.

The first model uses the theories of repeat games and signaling. It begins by noting that people who cooperate often (usually?) do so over a long period of time during which each can observe the actions of others and decide on the basis of those actions whether to continue cooperating or stop. When each round of play is followed by another, players know that if they cheat in one round they may have no chance of obtaining high payoffs in the next. Some level of cooperation, and a concomitant production of some level of the potential surplus, can be sustained by various strategies, most famously, the "tit-for-tat" strategy in which a player cooperates in every round except those that succeed a round in which the other players cheated.[8] Although the results have to be interpreted with care because of the problem of multiple equilibria—and this is true especially when information is imperfect and the number of players is greater than two—the results are nonetheless highly suggestive of the possibility of nonlegal cooperation.

Although this theory takes great strides toward explaining how people can cooperate in the production of collective goods, it does not explain what a social norm is. In the diamond trade, for example, merchants no doubt refrain from misrepresenting the value of a diamond because if they were discovered, other merchants would stop doing business with them, but the repeat game theory does not explain why the merchants seal their contracts using traditional words and record their contracts in a traditional and consistent way.[9] These practices are norms. One might argue that these practices are the cheapest way to make a record, but this argument is implausible, because it does not explain why *every* transaction takes the same form. Surely, when

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7. This question has drawn the attention of economists and legal economists. *See* Eric A. Posner, *Signals, Symbols, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. (forthcoming 1998), for one effort and for citations to both literatures. The interest among legal economists can be traced to ELLICKSON, *supra* note 6.

8. The literature on this topic is vast; the interested reader should consult standard game theory texts for discussion and citations. *See, e.g.,* ERIC RASMUSEN, GAMES AND INFORMATION (2d ed. 1994).

9. *See* Bernstein, *supra* note 6, at 122.

traders know each other better or worse, or the value of the transaction is higher or lower, the optimal form of the writing would change as well. What needs to be explained is why that does not happen.

This is where the idea of signaling comes in. Suppose that in a merchant community some people are better contractual partners than others. This may occur for several reasons: the "high" types care more about future payoffs, or they feel guilty easily, or they cannot hide their intentions well, and so on. The "low" types are the opposite. When seeking partners in contractual endeavors, high types want to match up with other high types, but low types want to match up with high types. Low types hit upon the strategy of sending "signals" that they think high types will think that only other high types can send. But because a high type who accepts a low type as a contractual partner risks being cheated, high types will send their own signals. They might mimic the signals of the low types in order to avoid the impression of being low themselves, or they might send even more costly signals than the low types do. Depending on the cost structures of the various signals, it is possible to obtain equilibria in which only the high types send the signal, or equilibria in which everyone sends a signal. (Other possibilities exist as well.) The latter equilibria are not informative, and do no one any good, but they can be sustained because no one wants to deviate from the equilibrium signal lest as a consequence others believe that he is a low type.

There are many examples of such signaling in everyday life, of which gift-giving is probably the most intuitive. People give gifts to each other in order to show that they care about maintaining relationships: low types find it hard to give gifts, or good gifts, because they are costly and they require a costly inquiry into the other person's tastes.[10] In the example of the diamond community, the peculiar use of the writing may have begun as a signal of one's type. A low type may have introduced the writing as a way of persuading the other person that he was a high type. After all, the writing is costly in the sense that the existence of a record makes it more difficult to cheat one's partner by misrepresenting the transaction to arbitrators or witnesses in

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10. *See* Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises,* 1997 WIS. L. REV. 567 (1997).

case of a dispute. The high types, who may have been happy enough with oral transactions, would hasten to mimic the low types, so that their partners would not think that *they* are the low types. Social norms, then, reflect signaling behavior: unlike efficient behavior in transactions, which one can expect to vary according to the type of transaction, signaling behavior is always patterned, norm-like.[11]

The second theory focuses on coordination games, rather than on prisoners' dilemmas. In a coordination game, both players do better if they engage in a similar or symmetrical action than if they do not. An old example draws on the problem of two people driving towards each other on roads without lanes. If both people drive on the right or both people drive on the left, they receive high payoffs. If one person drives on the right while the other drives on the left, they crash. It can be shown that if people generally imitate people with higher payoffs (those who do not crash), and if enough people start off choosing the same strategy, over time one strategy will drive out the other and result in an equilibrium that is stable against occasional mistakes or experiments with novel strategies.[12] The equilibrium strategy, for example driving on the right, can be called a social norm. What is striking about this result, and what distinguishes it from the earlier model, is that it holds even if people are strangers who are not self-consciously involved in a cooperative endeavor.

In the case of the merchant group, the form of writing could have been a convention in this sense. If some people started using writings at random or as an experiment or as the result of a misunderstanding, and it turned out that they were later involved in fewer disputes, others might have started imitating the first. Notice that the use of the writing may be value-maximizing, but it survives as a result of a kind of natural selection, not because of rational optimization. But this means that people may continue to imitate both the use of a writing and the particular form of the writing long after it ceases to be value-maximizing.

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11. *See* Posner, *supra* note 7 (regarding symbols).

12. *See* ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION, AND WELFARE 34 (1986).

These models do not explain all forms of collective action; indeed, they raise as many problems as they solve. But they appear to have fruitful implications, which I will discuss below. Also, notice that the first model relies on the standard optimizing methodology of economics, whereas the second assumes that people mimic rather than optimize—or, to use the trendy phrase, it assumes that people are "boundedly rational."

III. IMPLICATIONS

A. *Positive Implications*

It is difficult to interpret Professor Kaplow's model as a positive model, because it puts too heavy an epistemic burden on legislatures and courts, and because the evidence suggests that legislatures and courts do not typically weigh costs and benefits when choosing between rules and standards. The signaling model and the evolutionary model offer some alternatives.

To illustrate the application of the signaling model, assume that legislators, like our merchants and cattle ranchers, have an interest in signaling that they are high types. Space limitations prevent me from defending the assumption, but something like it can be found in various models of the political process. If this is so, time-consuming and expensive legislative studies emerge as signals in equilibrium. The reason is that if people cannot directly observe the quality of laws, and therefore cannot vote for legislators on the basis of the quality of the legislative product, they might infer the type of a legislator from the energy that he puts into legislation. A legislator might then overinvest in legislation, which could take the form of supporting rules over standards, because by hypothesis standards cost the legislature little. (Legislators might also overinvest by supporting lots of different laws.) They might create standards only (or usually) when the subject of the law is controversial, thus requiring courts to absorb the political costs of taking the wrong position. One might thus expect uncontroversial laws (traffic regulations, tax codes) to appear as rules and unpopular . or controversial laws (abortion regulation, affirmative action programs) to appear as standards.

The first model also suggests that if judges want to have influence, they can cause other judges to follow them on some cases if they can commit themselves to following those judges on other cases. One way to commit oneself, if one otherwise cares about the content of an opinion, is to follow another judge even when one does not agree with him or her.[13] If this is true, rules may emerge in areas of law where disputes are common and not in areas of law where they are rare, for only in the former will it be clear enough that a judge is following another judge rather than contradicting him.

To illustrate the application of the second model, assume that legislatures mimic other legislatures. They might do so because the effect of most laws on social behavior is so complex that a boundedly rational legislator could not predict it. Ironically, it is possible that the results of Professor Kaplow's model will be vindicated. For if laws containing optimal rules and standards are more likely to survive (in the sense that legislatures revise rules and standards only when they lead to observable pathologies), then imitation of them will cause them to spread. However, it is also possible that lags will occur.

Finally, assume that courts are also boundedly rational, and imitate prior opinions when the facts underlying those opinions sufficiently resemble the facts of the case before them. When such imitation occurs, observers (or the court itself) will say that the precedent states a rule. When a case is novel, and the court must decide on the basis of the facts, it will appeal to a standard. So when, in a particular area of law, facts vary considerably from case to case, that area of law will be more standard-like, whereas in other areas of the law rules will emerge.

These sketchy examples should not persuade anyone that Professor Kaplow's analysis is right or wrong. For one thing, Professor Kaplow's analysis is normative, and these examples are all of positive analysis. For another, the first model relies on the same optimizing methodology that I criticized while discussing Professor Kaplow's model. I do think that the infinite regress is less of a danger in the first model than in Professor Kaplow's model, mainly because the first model does not ask players to

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13. *See, e.g.,* Thomas J. Miceli and Metin M. Cosgel, *Reputation and Judicial Decision-Making,* 23 J. ECON. BEHAV. & ORG. 31 (1994); Eric Rasmusen, *Judicial Legitimacy As a Repeated Game,* 10 J. L. ECON. & ORG. 63 (1994).

economize on deliberation costs, but I do not have the space to defend this argument. The lesson of the discussion is more modest: it is that models that analyze incentives to engage in cooperative action may be helpful for explaining important features of the legal system, including the use of rules and standards.

B. *Normative Implications: The Rule of Law*

The different models have many normative implications, but I want to focus on the implications for the rule of law. By the rule of law I mean an ideal that law should inflict punishment only on people who engage in actions that conform to general categories identified by that law, and not on people who engage in actions or have characteristics that the authorities conclude are undesirable after the fact. Because the rule of law implies a preference for identification of proscribed actions in advance, it implies (as the name suggests) a preference for rules over standards.[14] Although a legislature, by issuing a standard, announces in advance of the regulated conduct that anyone who engages in that conduct now risks a sanction, in practice this announcement does not amount to much. To announce, for example, that product liability will henceforth be determined by the standard of negligence does not tell people what is permitted and what is not permitted, though it gives them something of an idea. I do not mean to suggest, however, that standards are inherently bad: the rule of law is one among many values, and departure from it on occasions to economize on lawmaking costs may be justified. Indeed, this is one interpretation of Professor Kaplow's analysis.

The signaling model suggests deeper problems with standards, problems that arise because people's behavior may be more sensitive to standards than to rules. Consider an example from Professor Lessig, which I will quote at length:

> Before the 1960s, motorcyclists in Soviet Russia did not wear helmets. In part this was because of a lack of any perceived need to wear helmets; in part it was because the Soviet economy failed to produce any helmets. . . . Soon Russians

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14. *See generally* Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991).

began to wear motorcycle helmets produced in Western Europe....

When these helmets first began to appear, the Soviet government quickly reacted against them. For despite bearing the medical costs associated with cycling accidents, the Soviets perceived a much greater cost to the Soviet state associated with individuals wearing helmets, that is, the invasion of Western style. Because helmets were produced only in the West, wearing them was a political statement antithetical to the message the Soviet government wanted broadcast.

Thus began an extraordinary and self-conscious campaign by the Soviet government to vilify the wearers of motorcycle helmets. Cartoons appeared in the popular (read: government-controlled) press.... By the early 1960s, people began wearing helmets only at night, to avoid easy detection.

The night-riding behavior suggests the campaign attacking helmet wearing as "imperialism" had some effect. For no laws were passed banning the wearing of helmets.[15]

When the Soviet Union finally began manufacturing helmets in its own factories, people began to wear helmets again (presumably, during the day): the stigma now was not against wearing any helmet, only against wearing imported helmets.[16]

In the United States, any opinion by the President or other important officials on the desirability of motorcycle helmets would be widely ignored if not ridiculed, just as President Carter's urging that people lower their thermostats was widely ridiculed. It certainly would not influence the frequency with which people wear helmets. The United States, in fact, uses laws to encourage people to wear helmets.

What accounts for this difference? An answer is that in the Soviet Union having a reputation for loyalty to the state was, in the eyes of the authorities, far more important than it is in the United States. In the Soviet Union, a bad reputation could result in expulsion from the Communist Party, and as a consequence in denial of education, desirable jobs, and other benefits. In the United States a bad reputation matters less because the state does not punish you for having it. To put this in terms of the

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15. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 964-65 (1995).

16. *See id.* at 965.

signaling model, it was more important to signal one's loyalty to the state in the Soviet Union than it ever has been in the United States. Thus, in the Soviet Union, people would voluntarily engage in patriotic displays, refrain from criticizing the government, and even refrain from wearing motorcycle helmets when doing so was defined as disloyal or unpatriotic. In the United States this phenomenon is rarer because the commitment to the rule of law generally restricts the ability of legislatures to enact vague standards (for example, "you must be patriotic") that can lead to the pooling behavior that occurred in the Soviet Union.

The conformity-inducing properties of standards, however, do not depend on secret police. In the United States, standards would be enforced by the courts. If people cannot anticipate in advance which actions conform to the standard and which actions violate it, they will engage in actions that serve as signals that they possess the characteristics that they believe courts would look for. The result would be pooling of the sort that occurred in the Soviet Union, though no doubt on a smaller scale. A commitment to the rule of law, in contrast, forces legislatures to specify the desired behavior in advance. Because it is (comparatively) clear what is permitted and what is not permitted, less pooling can be expected. Or to put it in terms of the model, when the signal of loyalty or good behavior is too costly, people will not use it, instead satisfying their nonreputational preferences. People may abide by rules in a casuistic manner, sometimes defeating the policy they implement, but they will overcomply with standards.

Should this bother us? From the perspective of social welfare in the economist's sense, this question is quite difficult. Pooling equilibria can be socially costly because everyone incurs costs in sending signals that do not produce any informational benefits. But if sending a signal (like wearing a helmet) causes less total harm than would exist in a separating equilibrium (in which only some people wear helmets), then the pooling equilibria would be superior on efficiency grounds. This means that, even if some regulated behavior will occur rarely and there will be few enforcements, a standard may be inappropriate, because it may cause overcompliance.

But from a different perspective—from the perspective of *autonomy*—the use of standards is more clearly troubling. When

people feel that they must signal in order to avoid inferences that they are low types—unpatriotic or disloyal or careless or unreasonable—then they will engage in various forms of patterned behavior rather than satisfying their tastes or pursuing their goals. The Soviet authorities never had to say that wearing bicycle helmets is a punishable offense: once it had expressed its disapproval, people would overreact to avoid the inference of disloyalty. Vague statements about the undesirability of various jobs, pursuits, hobbies, social relationships, and views would likely cause a similar reaction. Indeed, even if the state expresses no opinion on these issues, but punishes anyone deemed unpatriotic, people will struggle to act in conformity with whatever norms they think the state would approve.

When reputation matters a lot, people will conform to whatever pattern of behavior they believe that everyone else approves. When reputation matters a lot to the *state*, with unpleasant consequences to those who have a bad reputation, people will conform to whatever pattern of behavior they believe that the state approves. The state exploits this phenomenon by announcing standards of behavior (the patriotic citizen, or the good socialist), rather than announcing rules, for rules give people the freedom to choose among the actions that are not specifically prohibited. This is why states in which people have freedom also have a strong commitment to the rule of law, and it may be why the rule of law is such a powerful political ideal that overrides short-term concerns about social welfare.

IV. CONCLUSION

This talk has consisted of a hodgepodge of points, none of them strongly supported, all of them speculative, so let me briefly summarize the most important in a manner that does not exaggerate their strength. First is an uneasiness with the optimizing method in some (but not all) contexts of legal decision-making: one may be able to overcome this uneasiness by embedding the decision in a game in which people spontaneously cooperate, so that legal decisions are an outcome of their cooperative behavior; or one may overcome this uneasiness more directly by modeling bounded rationality. But though the latter approach is exciting and perhaps theoretically more pure, it is hampered by the primitive state of the methodology. Second is the claim that the rule of law is

important not because rules are better than standards on efficiency grounds—in fact, Professor Kaplow's analysis plausibly suggests that sometimes rules are better and sometimes standards are better. The rule of law is important if we care about autonomy, because standards, more so than rules, encourage self-reinforcing conformity to the imagined goals of the state rather than actions that reflect one's authentic values and interests.