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Democratic Law

Law and democracy seem oddly estranged in academic philosophical discourse. Aside from some controversies about constitutionalism, there is very little mention of democracy in most contemporary jurisprudential treatments.[2]Likewise, one can leaf through extensive discussions of democracy that do not elaborate any distinctive, essential role that law plays in achieving democratic aims. Law tends to be treated as an instrumental afterthought.

This self-imposed relegation of law and democracy to different intellectual compartments of inquiry does us a disservice. It encourages simplistic instrumental views of law and democracy as institutional devices that control untrustworthy agents and manage sub-optimal circumstances, whether by managing conflict and temptation on the one hand or by refereeing between warring interest groups on the other. Certainly, law and democracy perform these functions but the blinkered emphasis on them deprives us of much articulate insight about why law and democracy are morally powerful and inspiring human achievements. When we lose sight of our aspirations

[1] I'm grateful for advice and constructive resistance from the three Tanner commentators, Richard Brooks, Niko Kolodny, and Anna Stilz; from other friends and colleagues, especially Christopher Essert, Stephen Gardbaum, Barbara Herman, Richard Re, William Rubenstein, Steve Shiffrin, and Jennifer Whiting; and from audiences at University of Michigan Law School, University of Pittsburgh, and University of Southern California. Alexander Cooper, Sarah Fisher, Haruka Hatori, Matthew Strawbridge, and Jordan Wolf provided excellent research assistance through the generosity of the Hugh & Hazel Darling Law Library at UCLA School of Law.

[2] Two important exceptions are Jean Hampton, *Democracy and the Rule of Law*, 36 NOMOS 13 (1994) and Jeremy Waldron, *Can There Be a Democratic Jurisprudence*?, 58 EMORY L.J. 675 (2009).

for these institutions, we begin to ask and expect them to do less than they can. There lies a path to apathy, cynicism, and decline.

I suspect that this academic estrangement bears a complex relation to: positivist temptations to think that the most significant features of law must hold true within non-democratic states like Saudi Arabia;[3] a latent mistrust for law contained within some (often nonpositivist) conceptions of law as essentially coercive; outcome-oriented conceptions of morality that denigrate the significance of motive; and malaise about whether democracy's intrinsic value can be convincingly defended.[4] My mission today is more constructive than diagnostic or critical, however. It is to sketch a distinctive account of democracy's intrinsic value that, non-accidentally, highlights the virtues that law may uniquely display within democratic circumstances. I aim to vindicate my claim that law and democracy enjoy an intimate relationship by offering an account of democracy's intrinsic communicative value and law's special constitutive role in that communicative endeavor through which we represent our institutional, collective expression of justice and other forms of collective morality.

The view I will defend stresses that we must execute some of our collective moral duties through democratic laws generally as well as the democratic generation of some *particular* laws. Neither democracy nor law are well conceived primarily as fungible, if highly effective, *means* of installing the proper egalitarian institutions which themselves are required by justice and that may be specified independently from their mode of generation. To the contrary, the generation of

[3] *Cf.* LIAM MURPHY, WHAT MAKES LAW 118 (2014) ("Most discussions of the obligation to obey the law…take for granted that law can have any content and be created by all kinds of regimes, democratic or despotic.")
[4] *See, e.g.*, Niko Kolodny, *Rule over None I: What Justifies Democracy?*, 42 PHIL. & PUB. AFF. 195, 196 (2014); Niko Kolodny, *Democracy for Idealists*, (2016)(manuscript) (on fine with author).

democratic law is an element of what justice requires and a constituent condition of other requirements of justice. If law's function is, in part, to execute our collective moral duties through collective, communicative means, then a full and proper legal system must be democratic.

My enterprise may be framed as a discussion about the content and value of law in ideal theory, motivated by my disappointment that many current jurisprudential discussions seem, perhaps unconsciously, to be squarely situated in the non-ideal theoretical capital of Riyadh. Some important democratic theories portray democracy's role as one in assisting or partly constituting the struggle to install material and intellectual forms of justice, to temper injustice, or to provide some 'at least we all had a say' style legitimacy to how we bumble along given inevitable failures in achieving just conditions.[5]These are partly insightful accounts but they are also incomplete – assembled midway, so to speak – and fail to capture the full aspirations of both law and democracy, aspirations that are part of the constitutive conditions of realized justice, not only the fair conditions of approximating justice in non-ideal conditions. Important progress can be made in understanding moral and political values by concentrating on what we may aspire to under favorable conditions, rather than tailoring our regulative ideals to a wide range of possible

[5] Here, I signal some disagreement with the approach taken by THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS, (2008). Christiano's theory is perhaps one of the more celebratory accounts, seeing democracy as a way to manifest publicly our recognition of each person's equal claim to advance her interests. But, his celebration often takes an indirect, non-ideal cast. First, Christiano's emphasis is on the implementation of a just scheme of equality, understood as ensuring our equal well-being; but, he notes, no mechanism of direct implementation is at hand so we must construct a just scheme ourselves in a climate of disagreement. Second, a combination of factors of difference and distrust drive his commitment to publicity and democracy. Because we have such different judgments, fairness to each of us demands a system in which no one's biased judgment may exert unequal influence. He frames the need for democracy as responsive to non-ideality and not as, also, part of an ideal system of mutual constitution and mutual regard. *Id.* at 95-96. *See also* DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 6 (2008).

conditions of strife, division, hierarchy, apathy, and non-compliance.[6] So, I will investigate what role democracy and law would play in a state whose institutions otherwise manifest features of material and intellectual forms of justice and whose citizens largely endorse the principles of justice and their instantiation.

Terms

By 'democracy,' I mean, roughly, a political system that treats all its members with equal concern and regards their lives as of equal importance. Further, it treats all competent members of the community (by which I mean those having reached the age of majority and without profound intellectual disabilities) as, by right and by conception, the equal and exclusive co-authors of and co-contributors to the system, its rules, its actions, its directives, its communications, and its other outputs. A healthy democracy is one in which the members have regular opportunities to exercise their rights and do so with some frequency.

It is worth highlighting two preliminary points about the institutions that constitute a democratic system. First, my rough characterization of democracy lends little support to the view that elections, in particular, are the defining characteristic of democracy. For one thing, it should be clear that a free speech regime including the legal right to petition government (and to expect consideration and a response) and a robust, vibrant free speech culture are *as* essential components of a democracy as elections are. Without the ability to discuss, debate, and understand issues and characters with others, elections have little purpose, whether as exercises of deliberate communication, self-determination, or efforts at meaningful preference or ideal

[6]Think, for example, of the intellectual strides made by concentrating on the specific interrelations of the two principles of Rawls' special conception of justice as fairness, rather than on the broader, inchoate general conception of justice – even though, arguably, many extant societies only enjoy the conditions suited to the general conception.

satisfaction. Indeed, because elections are framed with determinate boundaries, whereas a free speech culture is free-ranging with indeterminate boundaries, a free speech culture is arguably more foundational to democracy than any particular mechanism of decision formation, including elections. Moreover, elections of people as representatives inevitably consolidate many disparate issues into one decision at a particular time, whereas a free speech culture permits reasoned but focused discussion and feedback about singular issues and at no time in particular, thereby, et alia, permitting more targeted forms of discussion on specific issues as they arise and progress, as well as information and advice to representatives. I mention these points only as a corrective to the fixation on elections as the sine-qua-non of democracy. To be sure, there is no need to rank them; a free speech regime without elections and other methods for citizens to contribute to deliberations would also be severely impoverished.

Second, I will say more about non-legislative democratic institutions tomorrow. Moreover, although elections and referenda may serve as important anchoring mechanisms of influence and political formation by co-contributors, they are not the exclusive means by which a political system may make decisions compatible with a democratic structure. I will say more about this point in due course, but here, I will just register the point that a group of authors may reasonably divide labor and delegate one or more of their members to speak for them in certain fora without sacrificing or compromising their equal status. For the moment, I'll simply add that there is also little reason reflexively to regard other elements of a political system, including judicial, administrative, or custom-based authority, as, ipso facto, anti-democratic or, at least, 'lesser' from a democratic point of view. If, as I will urge, democracy is a system for the joint specification, communication, and implementation of mandatory and discretionary values, then whether we are communicating to deliberate, to report, or to commit, the appropriate mode of

communication may vary, depending upon what value is at issue, to whom we are communicating, and the requisite level of specificity. The 'co-author' characterization harbors no explicit or latent attitude of hostility or resignation to mechanisms of representation, including forms of administrative and judicial authority. Indeed, I'll signal some of the shortcomings of direct democracy ideals shortly and I will discuss some forms of democratic judicial authority tomorrow. As many of us know from happy experience, an egalitarian co-author relation usually involves a division of labor in which each party brings their special talents and insights to bear on producing a joint message.[7] One co-author may take the lead and speak for the group, but the

[7] A single-minded focus on academic co-authorship may mislead, for it has some distinctive constraints that do not hold of all egalitarian co-authorships. Academic co-authors writing an academic article represent their research findings as true, or, at least, they warrant it as representing their expert conclusions. The academic article represents the joint and unanimous consensus about a subject. (At least with egalitarian co-authorship. I leave aside hierarchical practices of co-authorship in the sciences.) The standards of accuracy are quite high and hence disagreement between co-authors may be a sufficient reason to suspend joint communication about that subject or to narrow the scope of the claims made about it to the areas of consensus. The special standards of academic co-authorship are in part tied to the other special norms and obligations of expertise. In part, they are also tied to the fact that what academics publish about and who they publish with is importantly discretionary. There may be some professional urgency for academics to write *something* but an important aspect of academic freedom is that there is no requirement to speak about particular topics at a particular time; hence, there is reduced pressure for co-authors to compromise or forge a pragmatic consensus about a particular topic by a deadline.

These features render academic co-authorship somewhat unusual. Consider, by contrast, the co-authored invitation, condolence card, or committee report. The aim of these communications is not primarily to warrant an account of the truth but to convey an offer, a message, or a joint version of events, recommendations, and commitments. In this way, they more closely resemble the aims of law. They often involve topics on which there is some time-sensitivity to communicate and by parties who have some obligations to communicate and to act collectively. No reasonable recipient of such communications would take each co-author to endorse fully each contribution of every other co-author. The same condolence card may be signed by an observant Jew and a devout evangelical, the latter of whom words his sympathies with a reference to Christ's grace and the afterlife. The recipient of such a card would have no reason to think this was also a conversion notice of the Jewish colleague. More important, the Jewish colleague does not have reason to withdraw her signature in light of the evangelical's sentiments. I think even the agnostic does not have reason to withdraw if the card's printed text itself, and not only the individual signatures, adverts to God. Where the communicative aim is not something akin to an

relation may remain egalitarian so long as each co-author retains the ability at some fundamental level to contribute and exercise decision making authority, each co-author retains equal

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affidavit, the standards for unanimity relax, given the temporal pressures to communicate something as a group. Participants attempting to craft a joint message should understand that the production of a joint message by a group of distinctive individuals with distinctive points of view may defy efforts to craft a unanimously endorsed message, endorsed by each member for shared reasons. So long as they have the right to contribute their thoughts on the matter and contributions are considered in good faith, co-authors of missives like cards, invitations, and reports have reason to accept compromises and other decisions they do not individually endorse as theirs by virtue of the nature of their shared enterprise and by virtue of the nature of their diverse collective perspectives. Recipients of such messages have reason to interpret accordingly: the collective message is not necessarily the individual message of each co-author.

Still, each co-author has a reason to assume responsibility *as a member of the collective* for the joint message that was sent, even while she may disagree with it as an individual. Sometimes that responsibility may take the form of collective pride, e.g. for having participated in the process that lead to successful legislation even if one was a dissenting voice about it. And, sometimes, that form of responsibility may take the form of collective regret. If the religious card offended the mourner, even the agnostic may owe an apology qua member of the collective, even if the agnostic pointed out, at the time, that the mourner might be offended by the card.

Why are there these patterns of responsibility, even when a co-author does not endorse the message and did not fully control the process? Suppose we start with the idea that there are some projects that we must pursue but that we cannot pursue alone – they require a joint effort, whether because they are too cumbersome or difficult for people to perform individually, because their successful pursuit is incompatible with parallel and conflicting individual efforts, or because their meaning demands that they emanate from a collective and not a pool of individuals. Where group action or group communication is imperative, group members have diverse perspectives, expectations of and interpretations presupposing unanimity or complete control by each member seem unreasonable. Plentiful deliberative occasions, arguments, and time will contribute to the formation of a joint decision and will leave open the possibility of achieving worthy aspirations of unanimity. But, taking unanimity to represent a requirement on communication seems unwarranted. It seems either to reflect one or more of the following flawed ideas: that unanimity is more important than timely, if suboptimal, action or communication; that the correct view will emerge in time and be sufficiently evident to everyone; or, that a fair compromise will be identified and evidently acceptable to all parties in a timely way. One worries that insistence on unanimity will instead operate as an implicit demand that some parties insincerely represent that one view or one compromise is actually substantively warranted.

responsibility for the collective endeavor, and those co-authors who take the lead still attempt to speak for and reflect the contributions of all authors, not only or predominantly themselves.[8]

Having indicated what I mean by 'democracy,' parallelism would recommend that I do the same for 'law.' For the sake of getting on with the argument, though, I will allow my use of 'law' to emerge through discussing its democratic virtues and functions. Two brief points, though: (1) Although I conceive of law as public – as having a publicly accessible, even if incomplete and partly inchoate, account of its contents and as having temporal duration –, I do not privilege statutes over judicial or administrative decisions nor the textual ingredients of law over its other ingredients.[9] (2) I sometimes use 'law' to refer to discrete legal decisions that have general application and, where applicable, precedential effect or another form of presumptive duration (whether those decisions are judicial, executive or legislative). At other points, I refer to 'law' as a system composed of such public decisions that aims for (and substantially achieves) some justificatory cohesion. By 'democratic law,' I mean a system of such decisions whose content and generation justifies its characterization as democratic.

Let me now turn to my thesis: Some of our mandatory moral ends require democratic law, generally, for their realization as well as the democratic generation of some *particular* laws. The

[8] This conception of egalitarian power-sharing and division of labor has much in common with Dworkin's democracy-as-partnership conception articulated in RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 384 (2011) and RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 131 (2006), but Dworkin did not emphasize the *communicative* core of democracy.

[9] Here, I agree with my colleague Mark Greenberg. *See e.g.*, Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE LJ 1288, 1288-1342 (2014); Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* A. Marmor and S. Soames, eds., PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW (2011); Mark Greenberg, *How Facts Make Law* 10 LEGAL THEORY 157 (2008). Although Greenberg's targets is the so-called "communicative-content theory of law," his attack is aimed at a theory of legal *meaning* on which legal interpretation hinges entirely on *linguistic considerations*. Such a theory is distinct from, indeed antithetical, to the theory I defend here.

democratic generation of law is not, as many prominent theories would have it, a mere means to achieve just conditions that can be identified without reference to their provenance; nor is it merely the fairest method of identifying second-best outcomes. Democratic law, as I will defend it, is an element of what justice requires even within ideal theory. Moreover, it is not simply one item on a general list of necessities or desiderata. Democratic law is not merely a means to or a complement of independently specifiable just material, social, and intellectual conditions. It is a constituent condition of the full realization of such conditions and hence of the full realization of justice.

The communicative significance of democratic law

My defense starts with a problem for which democratic law is the solution. The problem I am interested in isn't the familiar problem of how to justify coercion, a problem that unduly fascinates many democratic theorists. The problem I am interested in arises prior to disagreement, dissension, threats, and the prospect of disobedience. Even in a largely just society full of citizens of good will, each of us, in communal living, would face significant communicative challenges of a moral nature. Democracy may uniquely address these challenges, often, importantly, through democratic law. Understanding these challenges and democratic law's ability to meet them forms a basis for claiming that democracy is intrinsically valuable as a necessary endeavor of collective moral agency and that, at least in ideal theory, the moral functions of law and democracy are closely intertwined.

What sort of challenges? One concerns our status as equals which I take to be exemplary of the problems we face. The forthcoming argument that describes the challenge and the ingredients for a solution has four major steps, positing: (1) some moral requirements for citizens to

communicate with and to each other; (2) the importance of direct and at least partially articulate communication for certain sorts of messages; (3) the role that actions and commitments play in effective and sincere communication of some morally important messages; (4) the unique role democratic law serves in communicating the morally important messages in question. My path through these steps will be circuitous, departing for a stretch from a political beeline to take an interpersonal detour.

I'll begin with the moral imperative of communication among citizens. Start with the assumptions that: we are all moral equals and that our status, our perception of our status, and our mutual recognition of our status (and the needs and interests that accompany it) influence our sense of self-respect. That is, I assume that Rawls is roughly correct that the social bases of self-respect are a crucial component of the conditions for maintaining one's self-respect. This maintenance, in turn, is an essential component of our mutual flourishing. As Rawls put it, self-respect is, "perhaps the most important primary good."[10] As a just citizen living in community with others, I should be interested in contributing to the social bases of self-respect.[11]

As an individual, I confront the difficulty that the social bases of self-respect are not merely material in nature but are communicative. It matters that we manifest our respect for one another and not merely that we co-exist in circumstances that give everyone access to the basic minimum, that no one sets fire to the central distribution depot, and that we pay our taxes. A just allocation of material resources is compatible with mutual indifference, grudging

[10] JOHN RAWLS, A THEORY OF JUSTICE 396, 440 (1971).

[11] By starting with the issue of how democratic law serves as a necessary mechanism through which moral agents may fulfill their duties, my approach dovetails with Anna Stilz's observation that a beneficiary-oriented perspective on the state's value and on democracy's value is objectionably partial, viewing citizens only as 'takers' and not crucially as 'makers.' Anna Stilz, *The Value of Self-Determination,* 2 OXFORD STUD. IN POL. PHIL. 98, 100-01, 119-20 (2016).

accommodation, or even mutual contempt, should the penalties for destructive behavior be severe enough to induce patterns of compliance from even Justice Holmes' bad apple.

Why, it might be asked, should this matter so long as the conditions of material (and intellectual) justice obtain, whether through coercion, grudging compliance, or barely registered automation? How would such motivations diminish the social bases of self-respect? Is it simply a psychological liability that I care what you all think? Perhaps I ought to steel myself against this vulnerability rather than expect you to make ingratiating gestures. A related critic might worry that the need for demonstrations of respect may signal latent distrust of one's peers, showing that this need is a symptom of political non-ideality. This latter objection is thematically related to a cluster of positions claiming that as Daniel Markovits puts it, "perfectly rational and reasonable creatures would not require politics or any political agreement…" or, for that matter, promises or contracts.[12]

I resist these ideas. In hostile circumstances, our mutual sensitivity to each other's attitudes can certainly represent a vulnerability (and an asset). Generally, however, mutual sensitivity is not accurately understood as a mere psychological vulnerability or a symptom of otherwise defective relations or rationality. It flows from a proper sort of moral sensitivity. If I see you as a distinct individual, as a moral agent and as a moral equal capable of moral judgment whose life and thoughts matter, how could I not reasonably care what *you think* about all sorts of matters, including about me? (It is difficult for me not to view as gendered and hierarchical the critics' equation of having interests in recognition and in the alleviation of potential feelings of

[12] *See, e.g.*, Daniel Markovits, *Good Faith as Contract's Core Value*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, 272, 286, 289 (Gregory Klass, George Letsas, and Prince Saprai, eds., 2014); *see also* Daniel Markovits, *Promise as an Arms Length Relation in* PROMISES AND AGREEMENTS, 295, 309-310 (Hanoch Sheinman, ed., 2011). For a rebuttal with respect to promises, *see* Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism* 117 PHIL. REV. 481, 498-508 (2008).

vulnerability with signs of failure, weakness, imperfection and a lack of rationality.)

Furthermore, both as an agent and as a subject of others' agency, it is not sufficient that we live in materially just relations with each other and know indirectly, however incontestably, of each other's good will. It is an aspect of our respect for each other as *individuals* that we afford special significance to agents' efforts to make their thoughts public and thereby to affirm and endorse those thoughts. Our value as individual agents with control over what we reveal about our thoughts renders the distinction between what we intentionally convey and what we leave to be indirectly inferred about our wills normatively meaningful. When I make an intentional effort to convey my respect, other things equal, my action is more meaningful than my leaving my respect to be assumed or inferred by you, because I do not leave it to you to infer my attitudes from my actions and omissions; rather, I assume responsibility as an individual to affiliate myself with that respectful content and I aim to ensure you know it matters enough to me that I exert my agency to convey it.[13]

Although we may reasonably care what we think of each other and whether and how we make it known, one may object that it doesn't follow that my sense of *self-respect* should hinge on others' explicit regard. Consider Justice Thomas' related objection in *Obergefell v. Hodges*, the same sex marriage case, against the majority's argument sounding in dignity.[14] Thomas argued that dignity may be recognized or ignored by the government, but it couldn't be bestowed or deprived by the government. One either has the qualities that confer dignity or one does not. So, too, one either has the qualities that make one a moral equal or one does not. If one does not, their proclamations of one's equality could not make it so. If one does, then one merits self-

[13] There are hazards here, including that my conveyance should not raise the possibility that my respect is morally discretionary. How it is conveyed and with what spirit should dispel this risk.
[14] Obergefell v. Hodges, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

respect as an equal and that merit cannot be diminished by one's fellows' errors in judgment or ignorance.

Of course, the qualities that qualify one as a moral equal among others are ones that cannot be bestowed or deprived through their recognition or denial. Their unjust denial by other intelligent agents may, however, make it difficult to sustain one's confidence in oneself, given our general and important practices of epistemic interdependence and affiliative identification. Furthermore, it matters politically not only that I receive the reinforcing regard I am due as a moral equal, for, that regard is also due to visitors. It matters also that I am respected an equal *member* of the community – as one among her peers whose belonging is secure. When my peers do not acknowledge my standing as one of them, they successfully, if wrongfully, diminish my security as a member. My need for membership somewhere is inherent in my status as a human being but my status *here, in this community* is not; it is conferred, even if, for the lucky some of us, our place of birth makes that conferral feel automatic.

So, it is important that we underwrite the social bases of self-respect both through what I am calling 'material means' – ensuring that people are afforded the opportunities, goods, rights, and services they are due – and through communicative means – conveying that these provisions stem from our non-grudging recognition of each other as equal co-members of our political society. As I have just argued, the communicative component is not conveyed convincingly simply by forbearing from resisting the material component.

Our communicative challenge is compounded by the fact that in our daily lives, it is nearly inevitable that we will send mixed signals about our commitments. As just agents, we may be committed to the equal moral value of our lives and our equal entitlement to secure membership in a society of equals, irrespective of our distinctive individual features – including our race,

gender, ethnicity, beliefs and affiliations. But, these commitments do not regularly read off of the patterns of our daily behaviors, the content of which is often driven by partial commitments – to family, to smaller communities and affiliations, and to associations with strong substantive commitments. The personal value of each of our lives, in large part, derives from our immersion and dedication in these particular and partial activities. This immersion may create the understandable impression, however inchoate, that affiliations do matter for our social and political status; moreover, our immersion in them may create the hazard that we will start, however unconsciously, to associate substantive commonalities with the indices of moral status. To counteract these hazards, we need to convey our mutual recognition of each other's moral status, and our intentional, deliberate implementation of the commitments that flow from it, to ensure: that recognition is communicated; to counteract any inadvertent suggestions to the contrary; and, to remind ourselves of the limits of the significance of our substantive affiliations.

Acting as lone individuals, communicating respect to every other citizen is difficult. Time constraints alone prevent us from reading the essays, ads, or tweets of all fellow citizens.[15] Moreover, my words as a lone individual, absent a collective method of representation, will represent me as a private individual and not the collective. But part of my imperative is to belong to a collective that communicates to its members their inclusion as equal members. I need to communicate as a *citizen*, not only as a private individual.

Moreover, a mere discursive affirmation that one's fellows are moral equals deserving of just treatment would not suffice to convey this commitment convincingly. It is not simply that

[15] Orchestrating a nationwide, daily, digital affirmation would, to be feasible and digestible by its recipients, have to take the sort of bite-sized, standardized form that quickly devolves into empty words; this, arguably, is one of the defects of the Pledge of Allegiance. This and other issues with the Pledge of Allegiance are discussed *in* Vincent Blasi & Seana Shiffrin, *The Story of West Virginia v. Barnette*, *in* CONSTITUTIONAL LAW STORIES (Michael Dorf ed., 2d ed. 2009).

mere words may be received as rationalizing bromides given our more partial patterns of action. The reason why our partial actions may overshadow our discursive affirmations, rendering them mere platitudes, is that some moral beliefs, attitudes, and stances, if they are fully appreciated by those who hold them, dictate appropriately-motivated action. Hence, to an observer and particularly to the putative object of those beliefs, attitudes, and stances, the absence of the relevant action *by me* (and *by us*) may reasonably suggest a failure of full and sincere affirmation. It's not enough that I endorse the pattern of installed justice, for discursive affirmation or endorsement of a system may be issued from a posture of remove that will not succeed as a communication of *respect*, an interpersonal relationship requiring more substantive participation by its members than mere approval of one party's circumstances or another's action toward him. For example, I (a U.S. citizen) may endorse the general approach Sweden takes to economic production and distribution as a rough approximation of what economic justice demands. Yet, in doing so, I do not convey my part in a relation of mutual respect toward the denizens of Sweden because I am not a Swede and my endorsement plays no internal role in generating these relations.[16]

In other words, discursive affirmation of a moral proposition and appropriate, conforming action, when considered or rendered separately, may each be insufficient to communicate the appropriate level of commitment to that proposition. They must be rendered together as a legibly interconnected pair for either component to realize fully its role in the communicative expression

[16] *See also* Stilz, *supra* note 11, at 123. My position on democracy has commonalities with Stilz's associative view, although I contest her division of a democratic view and an associative view along with her related suggestion that the associative view's aspirations could be achieved in a non-democratic state with sufficient opportunities for dissent. *Id.* at 125. Although citizens in such a state could affirm their membership in it, their lack of opportunity to exert agency in jointly crafting the state's actions and commitments would strain the communicative meaning of the state's actions as communicative measures by the citizenry to itself.

of the moral proposition's endorsement. This idea is not unfamiliar to moral life. Action with a particular content and structure, motivated in a particular and transparent way, may be necessary for some beliefs and attitudes to be successfully communicated and to be received as sincere.[17] Let's dwell on an illustrative, quotidian case before returning to politics.

An interpersonal interlude: gratitude

Consider a case of gratitude for neighborly concern. Suppose, for two years worth of Tuesdays, you (my neighbor) have regularly knocked on my door to remind me that my car is, in danger of ticketing due to street cleaning, yet again. Occasionally, I succeed at remembering for myself, but I haven't entirely changed my behavior to make your help superfluous. Nor have I gently rebuffed your efforts to help. For me, morally speaking, you are no officious intermeddler;[18] rather, I regularly, if implicitly, rely on you, relieved that you have my back. I could just voice my gratitude for your generosity. Sometimes a card suffices. It may depend upon what the gratitude is for –whether a trivial one-off or whether something ongoing or more substantial. It also depends on what I am positioned to do and whether you have a roughly comparable need. Where you have no roughly comparable needs, gratitude may effectively take a purely discursive form.

But, where the circumstances of reciprocity present, then action may be required to communicate gratitude successfully. Suppose you plan to travel this summer, but you care about your garden. It is a fitting expression of gratitude that, when I come to know of your need, I promise to water your plants while you are away and, then, that I keep the promise. Other things

[17] Similar points about apology are made in Jeffrey Helmreich, *The Apologetic Stance*, 43 PHIL. & PUB. AFF. 75 (2015).

[18] *Compare* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 (AM. LAW INST. 2011) (evincing a legal preference for contracting and denying restitutionary compensation to officious intermeddlers, that is, to parties who voluntarily confer unrequested benefits).

being equal, where you have a need that I could fulfill without unreasonable effort, but I do not, my gratitude could be called into question, even as I drop off my ornately lettered card. My ability and failure to reciprocate in the face of your apparent need would signal that I do not completely appreciate your efforts or that I somehow take them for granted as my entitlement.

My promise and my practice of watering, by contrast, convey my gratitude. In the circumstances, these behaviors may be what are communicatively required. The entire episode of gratitude here involves a promise with a particular content, an explanation behind the proffer, a performance of the promise, the underlying motives that give rise to the promise and the performance, and their expression through the promise and the performance. All these elements, intertwined, play an important role in the gesture's operation as a communication of gratitude. My watering would fail as gratitude if I did it *because* I was paid by a reality show to do so. Were I just to water your plants secretly, your needs might be met but even if your informant identified me as the waterer, the watering would not read, between us, as an intentional communication of gratitude from me to you. It matters that my offer be substantially and transparently motivated by a deliberatively-grounded sense of gratitude and that a similar motivation propels my ongoing performance (here, nestled within and buttressed by a sense of promissory duty). Further, it matters that these motives have recognizable deliberative roots – that they arose from my recognition of the magnanimousness of your efforts and not from some delusional story or gratitude-adducing pill – and that I convey them to you. Certainly, interpersonal delicacy may often require an indirect approach to returning a favor, yet whatever indirect methods are deployed must be sufficiently transparent that the observant recipient can infer the actions were intended as a gesture of thanks. Subtle maneuvers may be suited to fragile

relations or very well-established ones; still, explicit articulation is often an important way to convey gratitude and disambiguate it from other motives and objects of gratitude.[19]

Not only do the behavior, the motive, and its communication matter. So does the form the gratitude takes. Suppose you left town without a promise but I sent a weekly email reporting that it so happened this week that I watered your plants. In so doing, I would convey some gratitude but my method of expression would also convey its limits, namely that I regard fulfillment of your ongoing need as a matter of my discretion that I may elect not to fulfill, subject to my own interests and weekly whims.[20]It would not convey that I acknowledged an obligation to respond appropriately to your reciprocal need.[21] Even where the recipient has reason to trust in your abiding gratitude or can infer it through observation, by communicating your gratitude, you thereby take responsibility for ensuring your attitudes are known and to contributing to the content and health of the relationship. Your articulate communication relieves the recipient of the burden of performing inferential and charitable work on her behalf.

[19] My interest in gratitude owes a great deal to Barbara Herman and Collin O'Neil. Other important moral dimensions of gratitude are discussed in Herman's *Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality*, 109 J. PHIL. 341(2012) and O'Neil's *Lying, Trust, and Gratitude*, 40 PHIL. & PUB. AFF. 301 (2012).

[20] Even were I to set an automatic timer that indefinitely guaranteed the watering, if I did not disclose it to you, I would not enact adequate gratitude because I would not convey the guarantee I put into action.

[21] Doesn't it matter that your assistance to me is sporadic, prompted by your happening to be at home and to notice that my car is in danger? You've made me no promise. Doesn't that make my sporadic response appropriate in return? One major difference here is that I am capable, at any time, of changing the facts that put me in need by parking more prudently. More importantly, you repeatedly see my need, arising again and again, and have apparently resolved to address it when you see it. Once you embark on a trip, you have an ongoing need; to address it satisfactorily requires an explicit commitment in response. There may be further things to be said here about whether expressions of gratitude may appropriately be expected to exceed the magnitude of the original beneficence, but they would take us further afield than necessary.

In addition to its assurance value, the promise plays an important communicative role. Offering the promise expresses gratitude through the concrete action of altering my degrees of moral freedom. Performing on the promise not only delivers you a service responding to your need, but also conveys the strength and constancy of my gratitude which serves as an appropriate, fitting response to your constancy in alerting me each time I was at risk. The promise coupled with the performances are not only especially clear methods of expression. Other things being equal, they approach being uniquely appropriate methods of communication; doing less or only 'saying' something discursively may convey something limply that is lesser. Other things may be unequal. If I have a lethal touch with plants, a better concretization of my gratitude might be to clean your gutters before the winter rains if delaying roof work is your weakness. Still, at some juncture, a failure to act beyond only *voicing* gratitude signals an incomplete or insincere gratitude. More generally, in some cases, the circumstances and the content of a significant moral attitude demand action on that attitude and not merely its discursive expression. Similar points have been made about punishment and the idea that an appropriate educative condemnation of a criminal act may require a (rehabilitatively motivated) sanction, not simply a critical telegram.[22] For those inclined to contest either example, my quarry is neither neighborly relations or moral education, but the more philosophical points embedded in the example, namely that: an action may perform communicative work, in conjunction with speech and speech acts, and that a combination of circumstances – both my neighbor's need and my ability to fulfill it—could work to render inadequate exclusively

[22] *See e.g.*, Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984); Robert Nozick, PHILOSOPHICAL EXPLANATIONS 370-74 (1981). *See also* Joshua Kleinfeld, *Reconstructivism: the Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016) (portraying criminal law as well as criminal punishment as a partly expressive enterprise that aims to reconstruct a shared, concretized moral code that is threatened by criminal activity and its communicative content).

discursive efforts at communication, exclusively behavioral efforts at repayment, as well as disconnected discursive and behavioral gestures.[23]

My analogous claim is that the communication of our respect for others as moral equals within a political community may be imperative in the way that conveyance of gratitude may be imperative. Likewise, the gravity of the moral value at stake, coupled with our circumstances, require a form of communicative action with, but not limited to, discursive content.

Turning back to politics – the role of democratic law

Before our foray into gratitude, I described four structural problems in satisfying this political imperative that might be summarized as follows:

1. We cannot convey our mutual respect to one another as equal members on an individual basis, given what, in this context, sincere and effective communication of a collective commitment would require.
2. Much of our behavior is communicatively ambiguous. Our valuable relations of partiality are often open to interpretations that are in tension with a stance of mutual respect. Further, mere compliance with just institutions is compatible with an absence of mutual respect and recognition.
3. Mere endorsement, whether vocal or mental, of a just distribution and of other elements of a just basic structure is insufficient to discharge this communicative obligation.

[23] There are, of course, other familiar examples of the further point that a promise may serve an essential communicative and performative function, as with efforts to convey concern in a way consistent with conveying recognition of the recipient's dignity and independence. A promise may be necessary, not just ongoing beneficient deeds. See also Shiffrin, *Promising, Intimate Relationships, and Conventionalism* 117 PHIL. REV. 481, 498-508 (2008).

4. There is the risk that our valuable relations of partiality may become overly dominant and transgress their normative limits, if they are not tempered by activities that generate, convey, and reinforce our commitments to impartiality.

Democracy and democratic law play unique roles in addressing these problems. My argument follows fairly closely from the statement of the problem. Each of us needs to perform (and receive) a form of communicative action that enacts and thereby expresses our commitment to the respectful treatment that each of us merits as a moral equal and joint member of our social cooperative venture. Even if endorsed by each of us individually, in our hearts and in our editorials, a system of civil and economic rights that satisfied the substantive requirements of justice with respect to each member's just entitlements, claims, or needs, would fail to satisfy this communicative need. The system must, therefore, not only be endorsed by us but must be *our* product. Its production must have a communicative component to it, one that could be publicly grasped. So, other things equal, each of us must be involved in the generation and maintenance of this (otherwise) just system for its creation to be *our* product and for each of us to fulfill our communicative duties through it. The involvement must take a democratic form because each of us must have the opportunity to participate for the communication to be ours and publicly so. The terms of that participation must themselves be equal, under some salient description, or else, the message will not be *each* of ours and the participatory structure will belie at least part of the message of our mutual equality.

Law plays a special role in fulfilling this communicative mission. Recall how the promise played an important role in accomplishing what gratitude required. First, by limiting my degrees of moral freedom, the promise committed me to a course of action that justified normative expectations by the recipient and thereby facilitated reliance that made my actions of gratitude

more valuable. Second, the intertemporal nature of the promise underscored the expression of gratitude. Finally, the promise itself created those expectations through communicative means and thereby transmitted both my recognition that I owed gratitude and that my actions were intended to be taken as such by the recipient. The promise was itself communicative and substantive at once. Likewise, law also has the capacity to communicate our collective stance, and at least one embodiment of our motive, while also achieving substantive normative results. Although the analogy is imperfect, the articulate generation[24] of a law with specific content is analogous to the promise, its implementation and enforcement are akin to the performance of the commitment, and its democratic provenance is what makes the law and its implementation an expression of our voice.

Were we just to perform what justice (otherwise) requires of us without declaring our commitment through law, in a sense, we would perform the right actions and we might act from respect but we would fail to do so clearly, under the banner of a self-assumed, joint public commitment. Some actions, especially those implicating fundamental status, require deliberately communicated motivation of a particular kind from the proper recognition of the relevant reasons.[25] Of course, it can be better for the conforming action to be taken without an accompanying clear message of recognition and commitment, than for no action to be taken at all. Take the familiar friend who always denies error and who does you a wrong. When confronted, she may resist recognition of the error, but subtly begin to alter her conduct and

[24] I use the phrase "articulate generation" to underscore that my thesis encompasses not only legislatively generated law, but also other forms of the generation and articulation of law including through the development of common law, judicial interpretation, and executive interpretation.

[25] At the same time, other conforming actions embroider their motives on their sleeves but are more meaningful without further commentary. See the related point in SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 180-81 (2014).

engage in small kindnesses that work some compensatory repair. Sometimes such gestures are a sufficient form of communication themselves, but in other cases, something more articulate may be required – such as when the transgression is substantial or a repeat offense, the denial was outrageous, or the principle at stake is fundamental. The behavioral change matters, as do the material offerings, but the friendship may not be fully repaired without the more articulate recognition of the relevant principle, the shortcoming, and their articulation as part of a commonly understood history and commitment going forward. Similarly, even if we were to vote, day by day, to endorse and enable these performances in a thorough exercise of direct democracy, we would not be undertaking a commitment to which its recipients could point as publicly common ground. It would be akin to my repeated but still spontaneous decisions to water my neighbor's plants. True, certain overtures and some deliberate patterns of behavior directed at others may themselves generate reasonable forms of reliance that exert normative force akin to the force of a promise.[26] But, at best, such overtures only indirectly and ambiguously convey a commitment to a substantive expression of respect with longevity. They ambiguate between a commitment and a more temporary grant supplemented by a perpetual re-authorization process. Patterns of beneficence without the backing of a commitment render awkward, to put it mildly, appeals and references to the prospect of continued performance by their beneficiaries.

Even back in what now seem like the halcyon days of the Obama Administration, the lack of presumptive longevity was the shortcoming of DACA and DAPA, the executive orders that refrained from enforcing immigration controls against undocumented residents who arrived here as children and their families. Even assuming their contested constitutional validity and,

[26] This principle is encapsulated legally in the doctrine of promissory reliance. RESTATEMENT (SECOND) OF CONTRACTS, § 90 (AM. LAW INST. 1981).

counterfactually, their perpetual and predictable renewal by successive Presidents,[27] an ongoing discretionary refusal to enforce an extant law authorizing deportation, rather than a long-term commitment to inclusion, conveys only a partial recognition of belonging and deprives such residents of security as well as the ability to demand recognition and the rights of members.

Whereas, by generating public commitments through law, we give evidence that the system of justice is endorsed by us, so much so that we choose it and we choose to commit to it in a public way that typically carries a substantial degree of longevity. As with promises, public commitments through law deliberately alter the normative status of recipients to provide them with a common reference point on which to base expectations and to form entitlements to call upon our adherence. Analogous to promises, by virtue of our collective, evinced willingness to

[27] Under President Obama, the U.S. Department of Homeland Security (DHS) implemented a policy known as Deferred Action for Childhood Arrivals (DACA) in 2012, allowing certain undocumented immigrants who entered the United States as minors to apply for temporary relief from removal, and employment authorization. See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. In 2014, DHS expanded eligibility for DACA and also implemented Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), allowing certain undocumented parents of U.S. citizens and lawful permanent residents to apply for the same benefits of the DACA program. *See* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf. Subsequently, some states challenged the 2014 DAPA program and a preliminary injunction went into effect soon after the program's creation. *See* Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015), aff'd, 809 F.3d 134 (5th Cir. 2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016). Before litigation about the program concluded, the Trump Administration rescinded the program. *See* Memorandum from John F. Kelly, Sec'y of Homeland Sec., to Kevin K. McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et. al., Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (June 15, 2017), https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful.

enact the associated normative changes, they partly achieve their normative communicative aims simply through their generation and public declaration.

Other expressive theories of law have focused predominately on the negative expressive potential of law[28] – to oppress, to marginalize, to disparage, or to discriminate through expressive means – and neglect what I have been emphasizing, namely, the positive communicative capacity of law.[29] I think this difference in emphasis may trace to the fact that many expressive theories work, often implicitly, with a nondemocratic model in which the government or state as speaker is treated as distinct and separate from its audience.[30] Whereas, a democratic legal approach understands government speech as, ultimately, ours. If law embodies our speech to ourselves, then when its expressive content subordinates or disparages a portion of our community, we are implicated and not only entitled to a horrified reaction from the sidelines.

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[28] One important exception is Marianne Constable who explores a range of specific ways that legal activities, through their use of language, function as forms of mutual communication and dialogue that invoke conceptions of justice and, as speech acts, contribute to the characterization and constitution of our political community. MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS (2014).

[29] *See e.g.*, CHRISTOPHER EISGRUBER & LAWRENCE SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 124-28 (2007); DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 38-41 (2008); Deborah Hellman, *The Expressive Dimension of Equal Protection,* 85 U. MINN. L. REV. 1, 2 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1527 (2000). *But see* Richard Brooks' fascinating forthcoming work on titles and addresses, THE FIRST LAW OF ADDRESS (ms.), which explores both the positive and the negative expressive power of titles and addresses, whether privately or legally conferred. Some other accounts are also focused on what the government expresses and may be understood to mean, whereas I use the term 'communicative' to emphasize that what matters is not only what is said but successful conveyance and uptake by the audience. This marks a substantial departure from Anderson and Pildes who are interested predominantly in speaker meaning. Anderson & Pildes at 1508, *but see id,* at 1571-72.

[30] This implicit assumption also operates in the literature on criminal punishment. In that literature, expressive theories have also highlighted the constructive communicative function of punishment but have not imagined the communication as bi- or multi-directional, but rather unidirectional, from state to criminal. *See also supra* note 22.

At the same time, because democratic law is ours, we are enabled to perform our communicative duties through it.

As with other forms of communication, the appropriate mode may vary depending on the subject matter. In some cases, a democratic provenance with longevity may not be enough, given the myriad forms of democratic action and the levels of commitment that the law may enact. The particular mode of democratic conveyance may matter. Consider, for example, the legal status of women vis-à-vis our government and our fellow citizens. Achieved through a hodgepodge of statutes and constitutional decisions, roughly speaking, women enjoy an equal legal status with men in the sense that *governmental* gender discrimination is putatively illegal. (Some major forms of private discrimination against women are illegal but, notably, although private racial discrimination in all forms of contracting is recognized as illegal in theory, the same is not true in theory or in practice about gender discrimination in contracting.)[31] Putting aside the substantial shortcomings in enforcement, as a pure method of recognition, the achievement of this status seems wanting, primarily because the more straightforward and direct methods of acknowledging our equal status have been rebuffed. We were excluded in the original Constitutional declaration of equality; the most straightforward, direct acknowledgment of our equal status, the Equal Rights Amendment, was rebuffed; and the constitutional

[31] *See* IAN AYRES, PERVASIVE PREJUDICE: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001). While Ayres draws important attention to the problem and its financial ramifications with respect to car sales, he is mistakenly sanguine about California's efforts to address this discrimination. *Id.* at 3, 136. California's Gender Tax Repeal Act of 1995 prohibits gender discrimination in *service* contracts but not contracts for the sales of goods. Cal. Civ. Code § 51.6 (1999); *see also* Harold E. Kahn & Robert D. Links, CALIFORNIA CIVIL PRACTICE: CIVIL RIGHTS LITIGATION § 10.4 (2016); Amy J. Schmitz, *Sex Matters: Considering Gender in Consumer Contracting* 19 CARDOZO J.L. & GENDER 437 (2013); Whitney Brown, *The Illegality of Sex Discrimination in Contracting*, 32 BERKELEY J. GENDER L. & JUST. (forthcoming 2017) (arguing that, *contra* common interpretations, private gender discrimination in contract violates the Civil Rights Act of 1866.)

enshrinement of our equality affords intermediate but not strict scrutiny of gender discrimination. Our claim to equality is cobbled together does not take a direct and straightforward form, and must be reargued at every turn; we may win many of the intermediate scrutiny battles, but they have to be fought. Our equality is not a definite right we can claim and demand accountability for, but is in the continual process of being forged. The outcome may resemble equality, it's a lot better than the practice preceding it, but, in historical context, the message feels ambivalent.

I mention this example not to pursue the specific complaint but to underscore two themes of my discussion: First, the installation of the 'pattern' justice requires is significant, but often insufficient as an adequate manifestation of mutual recognition. Second, what is insufficient about the governmental action qua recognition is neither that the entire country or the full legislature isn't vocally supporting inclusion or equality nor that some citizens harbor ambivalence in their hearts. Rather, the expression is inadequate because the moral message, to be communicated properly, requires a communicative commitment of the right form and content. Democratic law embodies commitments on behalf of an entire collective. Where fundamental principles of equality and inclusion are at stake, an explicit, direct, and unequivocal commitment and an acceptance of accountability are required, advanced for the right reasons, from a collective that is correctly constituted and empowered.

As I earlier observed, the analogy between promise and law is inexact. The *form* of law provides two important points of contrast with the form of promise. First, in addition to grounding legitimate expectations in the recipient, laws often also empower the declarer to form substantial normative expectations of the recipient such as that residents will file taxes by April 15th, notify the state of a car accident causing substantial damage within ten days, and refrain from deceptive commercial advertising. Whereas, not all promises generate expectations about

the promisee. Reciprocal promises where both parties make entangled commitments conditional on each other do so, of course. Arguably, at least some promises create normative expectations that the promisee will, where reasonable, waive the promissory commitment, but expectations of waiver are fairly dilute requirements compared to the more robust expectations law generates. Notably, when we are both co-authors and co-recipients of law's address, this idea that a communicative declaration could empower declarers to expect something substantial of their audience makes more sense than it does in non-democratic authority relations. Second, absent conditions of excuse, a promise, being irrevocable, is normatively resilient to the promisor's change of mind. A law has greater normative resilience than a mere stated intention (which can be revoked on the spot) because a change of law requires following procedures that usually take time. Especially with respect to democratic law, these procedures include the ability of the audience (and authors) of the law to comment on and deliberate together about the change of law. But, with the exception of some entrenched constitutional provisions, most laws are revocable through collective expressions of will, making laws less normatively resilient than promises. This feature is not a shortcoming but fits the requirements of a communicative agent whose composition alters over generations and with that compositional change, its deliberations and its message. Hence, the commitments made through law have normative force and for some duration but, normatively, the duration is more discretionary and subject to change than with a promise.[32] Still, these notable differences do not threaten my use of the analogy. Both types of commitment, law and promise, fulfill the need to communicate through public, normative

[32] Depending on your theory of excuse, non-performance of a promise may be excused by a wider range of circumstances than failures to comply with or enforce the law.

achievements that have duration.[33] Making such commitments reinforces the social bases of self-respect by creating and communicating publicly common normative ground.

Of course, even absent public, official commitments, citizens can and must call upon each other to fulfill their duties of justice in extra-legal contexts. In part, they must do this in order to ensure that we generate more explicit and official forms of legal recognition. Still, the ability to refer to democratic law has some special moral force, even when its content is co-extensive with what justice already demands.[34] In myriad cases democratic law renders determinate how principles of justice are to apply in the instant context. Justice may clearly demand, for instance, fair equality of opportunity, but the law may, in response to the specific needs and threats encountered in the relevant environment, render significantly more concrete how that requirement will be implemented. Thereby, the law gives specific shape to the direction of our actions and the content of our expectations. Concretizing a partly indeterminate obligation figures among the standard functions of a democratic law and is crucial to the generation of a particular polity's distinctive identity.

Still, it would be worth considering the (possibly hypothetical) case where the law is fully redundant of the requirement of justice, adding no detail or specific content. For instance, some (though not I) might think this characterization holds of the First Amendment's commitment that the state "shall make no law respecting an establishment of religion, or prohibiting the free

[33] Unlike mere custom, for example, law, as a system, involves public, official commitments whose alteration and interpretation themselves involve public procedures; custom does not involve a *commitment* between citizens to honor their mutual equality. Further, the methods by which customs may change permits non-deliberate drift, change propelled by some without the input or agency of others.

[34] *See* Seana Valentine Shiffrin, *Immoral, Conflicting and Redundant Promises, in* REASONS AND RECOGNITION: ESSAYS ON THE PHILOSOPHY OF T.M. SCANLON (R. Jay Wallace, Rahul Kumar, and Samuel Freeman, eds., 2011).

exercise thereof." Even if redundant, its *articulation* has distinctive communicative moral resonance because it conveys to everyone that we know we have this duty, we know it is relevant to our situation, and we aim to convey our knowledge of this duty to each other as fellow duty holders and claimants. Putting it into words, and putting it into our own words, conveys sincerity and a sense that this moral commitment is sufficiently important to make salient. This acknowledgment is a central moral good for the recipient, and may also assure the recipients and induce reliance. This point is a familiar one in criminal procedure circles. Officers should recite the Miranda warnings to their arrested peers, to lawyers, and to repeat offenders even when their recipients obviously already know their rights. Recitation of the warnings to the knowledgeable conveys that the reciting officer knows the applicable rights, is acknowledging them to the party those rights protect, and therefore conveys a commitment to respect them.[35] Articulation is not only important to the recipient but to the duty-holder who articulates it. Public articulation forges a personal connection to the duty in a way that silent acknowledgment does not, reinforcing the duty's role as an organizing principle for the speaker.

Finally, articulation alters the moral dynamics between speaker and listener. When a duty-holder conveys her acknowledgement and affirmation to the person to whom it is owed, she also acknowledges that the beneficiary has a stake in her performance and in being assured. By establishing the duty as common ground between them, she invites the beneficiary's perspective

[35] *See* Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 6-7 (1986). Of course, mere recitation of rights (even when sincere) may fall short of effective communication and in some circumstances, may induce a false complacency by suspects that other rights and interests of theirs are protected by the police. Adequate communication in many circumstances may require ensuring accurate understanding (as well as good faith implementation of the voiced commitment).

on the performance.[36] This invitation enhances the meaningfulness of the communication and alters the moral posture of the claimant. When I ask you to perform your unacknowledged duty, the dynamic is likely to be one of demand or moral education. Our mutual posture structurally tends toward the hierarchical or the adversarial. By contrast, when I ask you to perform a duty you have publicly affirmed, the dynamic is more one in which I supply a reminder. Because of your public acknowledgment of the duty and my stake in it, my reminder could fit more into a cooperative model. I am reminding you of something you have affiliated yourself with and that, to some extent, is publicly connected to your identity and your integrity. We could understand my reminder as a partial effort at joint collaboration in working out how and when to advance something of mutual, shared concern.

Of course, that's the ideal case. If you are recalcitrant, things may take a turn for the testy. But, in simpler cases where I need to call on you to plan your own performance so I can coordinate and plan, or where you forget or procrastinate, your acknowledgement of your duty facilitates, more naturally, a cooperative dynamic given the voiced mutual understanding. Even when we have conflicting interpretations, our discussion will tend to center more on what we mean and value about dis-establishmentarianism, for example, rather than whether religion or atheism are bunk.

I suggest the same thing is true in politics. To take just one example, this may sometimes characterize the posture of parties in litigation about cases of first impression. Both sides have a strong view about what justice requires, but they also regard the process as a necessary one of working out, with greater articulation, the implications of our prior voiced commitments. That

[36] *See also* Shiffrin, *Immoral Promises*, *supra* note 34, at 156; Jorah Dannenberg, *Promising Ourselves, Promising Others*, 19 J. ETHICS 159, 178 (2015).

we need to work it out does not always reveal the other side as evil or recalcitrant. Even in an adversarial context, there can be an underlying cooperative spirit.

I began by arguing that even were our material relations already just, each individual would have a need for an organized social forum that affords each person the opportunity to participate in a communicative endeavor, alongside others, directed at all her fellow citizens. Equally, she has a need to receive that forum's communicative output. The assumption of realized justice was not meant to be plausible, but to highlight that the value of democratic law is not fully captured by its role in obtaining the results of material justice, whether in circumstances amenable to social consensus or social conflict. But, of course, the material components of justice do not come to us pre-packaged and pre-installed. Consequently, our individual obligations of justice are not confined merely to taking ownership of an otherwise extant system of justice in a communicatively resonant way, but to ensuring that the material components of justice are crafted and realized in a communicatively resonant way as *ours*.

As with the communicative burdens with which I began, these individual obligations could not be discharged through individual, uncoordinated action. But, they can be achieved collectively through an organization to which we all belong and contribute that manifests equality in its explicit structure, its processes of creation and implementation, and the consequences of its output. While each of us cannot *show* our recognition of each other's mutual equal status and belonging through our everyday interpersonal conduct, our legal system can do this. It can adopt explicit laws that declare and support our equal status and needs. Its laws can aim to create environments in which individuals interact with one another on an equal basis, including the avenues of access to power. Further, its own internal procedures of generation, implementation and enforcement can reflect this fundamental recognition. These processes and

outputs themselves may serve as our collective expression to ourselves, when their generation arises from processes that pay tribute to our mutual equality.

The state is the crucial organizational structure to achieve these communicative aims. Families and voluntary associations cannot achieve their values while paying full tribute to the value of inclusion. Families cannot achieve intimacy while embracing a stance of terrific inclusiveness. To achieve the substantive affiliative values and purposes of voluntary associations, they must have the ability to exclude on the basis of perceived fit and congeniality as well as on the basis of substantive dissonance.[37] They cannot even be achieved by a group that includes everyone in virtue of some common substantive feature or aim, such as our each being a child of God. For, while the all-inclusive association may insist on our common possession of the feature, the individual may disavow its possession or importance. The association will thus fail to convey the appropriate message of inclusion, one that must be capable of being received and endorsed by the included. To convey our endorsement of the value of belonging, we need an organization that has the qualities and resources necessary to be a site of unselective inclusion, namely one that has some control over a geographical space and sufficient resources to ensure that its members can be afforded access to them that will allow them to function effectively within its space as an equal member. The democratic state has a unique ability to convey this mutual recognition that is connected to its unique ability to respect and address a related, fundamental moral fact, namely that we each, as social beings, have a legitimate need to have a home among others – a place to which we belong and in which our other needs have standing, just in light of our status as a human being. (This desideratum places pressure on citizenship and immigration policies to be, in some respect, automatic, random or, at least, not qualification-

[37] *See* Seana Valentine Shiffrin, *What is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839-88 (2005).

based.) Fulfilling these two interconnected missions – expressing through action the recognition of our mutual equality and our legitimate claim of inclusion and membership in a collective moral body– are the fundamental charges of the state, achieved in their most meaningful form through laws crafted within a democratic setting in which we each have participatory powers in the construction of law and the mode and direction of implementation.[38] Those powers allow the state's expressive actions to be reasonably attributed to its citizens. Two features of law do work here: (1) law effects a persistent institutional commitment applicable to all and (2) in a democratic structure, law has a communicative dimension whose content may be attributed to all of us together, even if not to each of us as individuals.

Participation and Interpretation

This account offers answers to puzzles that dog other democratic theories: it offers reasons why one has reason to participate in democratic processes even when, predictably, one's preferred position would win without one's support or lose even with one's support; it offers

[38] Contrast Kolodny, *Rule over None I*, *supra* note 4, at 221-22 who highlights the insulting message conveyed by an unequal distribution of power, but identifies nothing positive about democratic schemes to recommend them. Thus, his theory, as he concedes, lacks the resources to object to a system of universal, disempowered, but equal subjection imposed by a benevolent dictator from afar who imposed a basic structure (otherwise) compliant with justice. On Kolodny's view, a commitment to democracy only clearly yields a commitment to substantive levels of power equally shared because no benevolent distant dictator, who could equally subordinate ourselves to a just structure without power, happens to be on the horizon as an equally palatable alternative. Whereas, my view identifies the positive contribution of democratic schemes that schemes of equal subordination lack; democratic schemes enable us to meet our communicative duties to one another. Daniel Viehoff's account of political authority, which emphasizes the importance of 'coordination without subjection' or of avoiding political authority emanating from unequal relations of power, is also vulnerable to a similar complaint; as he acknowledges, his argument for the special connection between political authority and democracy does not rest on any special positive feature of *democracy*, but only the absence of subordination – an omission that holds just as well of decision making by coin-flipping. See Daniel Viehoff, *Democratic Equality and Political Authority*, 42 PHIL. & PUB. AFF. 337, 374-75 (2014).

reasons to follow and respect laws; and, it supplies a connection between the two endeavors. My reason to vote is not exhausted by my interest in influencing the election's outcome, but is provided by the imperatives that I should express my affiliation with the joint collective body that has the function of embodying our commitment to our equal status, and that I, as a co-author, should contribute to the joint deliberation about and determination of the particular form that commitment should take (whether directly as with a referendum or indirectly when we elect agents who themselves offer a concrete vision of how to make our joint commitment more determinate). Even when I believe that my substantive policy positions or representative choices are doomed or over-determined, there are independent grounds to contribute my voice to the public communicative affirmation of the process as itself part of the substantive embodiment of our commitment to equality.

Adherence to law may be given a similar treatment. My reasons to adhere include the communicative recognition that democratic law is an ongoing effort to express our joint mutual respect.[39] By adhering to it, I express my affiliation with and ongoing effort in that joint affirmation, even when I might have urged us to express our joint mutual respect in quite

[39] I believe an account of this kind may evade the criticisms Liam Murphy lodges against other efforts to connect democratic law with reasons to respect the law, criticisms noting a gap between arguments for democracy *as an institution* and arguments for *individual* compliance. *See* LIAM MURPHY, *supra* note 3(2014). The argument I have pursued for democratic law foundationally connects the institution of democratic law to individual duties to show respect for others and so avoids the gap. Moreover, the communicative grounds for respecting democratic law does not appeal to the disrespect that disobedience may show to others who comply or vote, whether because of concerns about free-riding or unfairly substituting one's own will for the general will. Rather, the reason to vote and to respect democratic law that I identify is grounded in the *positive* communicative respect such actions distinctively convey because they are distinctive ways of endorsing a system whose structure and content is designed to embody respect for others as equals.

different terms.[40] Protest and other visible, vocal means of dissent work alongside voting and compliance. Separate from any hope of sparking repeal or future reform, these activities add nuance, complexify, and even meaningfully ambiguate the message conveyed by an election or the passage of a law. They render vivid, where necessary, that a particular law's claim to represent *us* may be especially precarious (and not only dis-preferred by a large minority) and that it certainly does not represent the judgments of many of us as individuals. This symbiotic complementarity of participations in elections, following the law, *and* vocal protest underscores a point I made at the outset that a free speech culture is as essential to democracy as elections and other representative devices.

A communicative account also offers reasons of a different kind for a Dworkinian, morally-tethered approach to legal interpretation. Very roughly speaking, the drive to legitimize law's intrinsic coercive power drives Dworkin's argument for a morally-infused justificatory element of interpretation.[41] A conception of law as coercive, however, evokes some of the estrangement and resignation toward law and democracy I gestured towards at the outset – starting with the

[40] This argument is not intended to be exclusive, but is compatible with other accounts of the reasons to vote and of reasons to respect the law. With respect to the latter, my argument may be a version or specification of Scheffler's recent argument in which he argues that when membership in a group is non-instrumentally valuable, there are prima facie obligations to abide by its norms. See Samuel Scheffler, *Membership and Political Obligation,* 25 J. POL. PHIL. (forthcoming 2017) http://onlinelibrary.wiley.com/doi/10.1111/jopp.12125/full. I find his argument intriguing, but I am more confident that it is persuasive when there is a close substantive connection between the group's system of norms (or conformance with them) and the reasons why membership in the group is non-instrumentally valuable. That connection need not always hold but it does in the case of democratic law where the norms themselves, the system of their generation, and the effort to abide by them aim in conception to express respect for our mutual equality and the achievement of a concrete realization of our equality is, partly, why membership is valuable.

[41] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE, 108-12 (1986). The emphasis on legitimating state coercion also drives David Estlund's defense of democracy and elections. Estlund, *supra* note 5, at 65-66, 99. *See also* HANS KELSEN, THE ESSENCE AND VALUE OF DEMOCRACY 27-34 (Nadia Urbinati & Carlos Invernizzi Accetti eds., Brian Graf trans., 2013).

idea that law fundamentally envisions reluctant compliers toward whom we must imagine how, morally, we could threaten them. When one keeps foremost the idea that law is *ours*, coercion might not figure among the ur-qualities to recite about law unless one conceived of oneself as weak-willed or perhaps into bondage. For these and other reasons, I have never been persuaded that coercion is an essential feature of law. But on a communicative view, moral readings do not arise from a need to legitimate otherwise suspect or regrettable threats; thus, a communicative view of democratic law should be positioned more naturally to explain why a morally-tethered interpretative approach is also apt for the governing rules of voluntary associations – even those that forswear coercive methods of enforcement. Legal materials should be interpreted, insofar as possible, to be sensitive to the demands of justice for two reasons other than the justification of coercion: First, if an essential function of democracy is to convey jointly to each other our commitment to justice and our other moral aims, then the principle of interpretative charity recommends that democratic legal materials should be interpreted in light of this aim. Second, a judge herself, as a citizen representing the collective, has reason to contribute to the moral communicative process of which law is a component by infusing its legal decisions with appropriate moral content. A judge would be sensitive to precedent and continuity with the past (what Dworkin labels 'fit') in order to realize our interest in expressing ourselves, when called for, with the constancy that contributes to the depth and steadiness of our commitments. Attending to fit also preserves and extends the coherence of our distinctive voice as a community over time. Finally, to the extent that fit roughly serves the values of horizontal equity, albeit intertemporally, sensitivity to fit also institutionally manifests our commitment to equality.

Bread and butter laws

Suppose laws forged and maintained in democratic circumstances do play a role in the articulation of our moral status and our joint moral values. Why not view this communicative function as an important anomaly true only of a handful of legal materials dedicated to high values, such as the Constitution and quasi-constitutional statutes like the Civil Rights Acts and the once, aspiring to be great, Affordable Care Act? My theory may seem a poor characterization of bread-and-butter law, by which I mean not only agricultural laws like those that regulate the purity of the food supply but also the laws and regulations enforced by the department of weights and measures or the regulation establishing the fee per hour at a parking meter. Most laws do not sport the high values of a constitution. Most laws are crafted by officials, rather than a gathering and simultaneous expression of the electorate. In other words, what significant value and relation do *we* convey to one another through the DMV's setting a $2/hour parking rate?

In response, I deny the premise that there is a substantial qualitative distinction between everyday law and high constitutional and statutory law. First, bread and butter laws, when justified, serve to promote our moral ends together. Often, they enable us to pursue our own robust ends as individuals, allowing for meaningfully autonomous lives compatible with our simultaneous participation in collective life. Bread and butter laws often do so at a material level, aiming to ensure that food production is done safely, that transport routes and other elements of infrastructure are maintained, etc. When they operate well, everyday laws support a structure that frees us from addressing daily and directly the safe provision of each of our material needs; the legal structure supports a social division of labor that we may rely on as safe, fair, and adequate to the task. Everyday law also preserves public spaces, which in turn serve public values, including that of free social interchange, which, itself, is a constituent of democratic culture. Even parking regulations serve an important moral end by enabling a variety

of people to flow through public space, rather than permitting access points to be monopolized by a few. When it operates well, private law likewise shoulders some burdens to facilitate individuals' concentration on their own projects permitting strangers and intimates alike to arrange their lives together on just terms with some security and direction for the range of unforeseen or suboptimal circumstances that may arise. Further, private law, like public law, encodes other commitments and facilitates other forms of healthy moral relationships. Contract law, for instance, may be considered as a legal structure dedicated to upholding the public values of promissory honesty and fidelity and to supporting a culture of trust. Once we consider the underlying moral purposes of quotidian law, it seems difficult to sustain a sharp contrast between its normative communicative functions and the more express aspects of the Constitution.

Conclusion

I have been arguing that a system of democratic law is an essential mechanism through which the community's members express to each other their joint recognition of each other's membership – their belonging by right and their equal status, substantively understood. This argument might serve as a counterpoint to the widespread sense of many that democracy has no intrinsic value or that it serves mainly as a mechanism of fair conflict-management among disputants. It might also revive some interest in the law by democratic theorists and perhaps encourage the idea that the role and function of law (or legal materials) in a democracy differs substantially from its role in unjust systems.

Such a theory lends itself to a more positive, inspirational view of law, democracy, and their aspirations, than many extant views that cast law and democracy as methods of controlled skirmish between opposed interest groups. There is a puzzling mismatch between the dedication

and zeal people have for democracy and the resigned air of many desultory accounts of democracy. Having the resources to describe democratic law as aspirational would have the virtue of befitting the urgency of democratic movements worldwide and the courage and sacrifices made by their members. Effective communication of a deliberate and sincere motive of inclusion in a society of equals through articulate and practical means is a cause; its achievement is a moral accomplishment.

On some views, successful efforts at moral agency represent the realization or at least the pinnacle of freedom. Certainly, the public affirmation, in discourse and action, has substantial meaning to its recipients that goes beyond the pattern of action it produces. One lives in a substantially superior community when one knows that one is treated as an equal because the community knows and values one's equality, and has gone to the effort to make this palpable, rather than because the community will suffer economic sanctions if international observers perceive a pattern of discrimination. Successful communication of a deliberate motive of inclusion is a rather substantial achievement, of great importance and one that has the personal, expressive dimension that makes something an end and a deliberate destination, rather than merely the site upon which one is deposited if one has avoided important dangers and catastrophes. Moreover, given the palpable challenges of moral understanding and communication, and the elements of creativity and expression in moral performance, the process of articulating our moral commitments together may contribute to a climate of trust and cohesion, and the pursuit of a collective political identity. These accomplishments in turn may allow us to proceed to embark on modes of moral expression that represent us as a distinctive

moral community. The moral and expressive collective opportunities that democracies afford, not their status and function as lesser evils, are what make sense of the passion for democracy.[42]

[42] It may be helpful here to remark on the relationship between the view I advance here and deliberative models of democracy such as those defended by Joshua Cohen and others. *See, e.g.*,

(2009). Along with some deliberative democrats, I understand democracy as the egalitarian and free way we have to think together and thereby to justify to ourselves the actions we undertake together, especially those pursued under the rubric of justice. Through our mutual, deliberative participation, we achieve a sort of self-understanding – that we are doing something together and why. This idea represents a piece of the view that I affirm, but sometimes, and perhaps it is only a matter of emphasis, the ideal celebrated by many deliberative democrats hits more notes of self-understanding and reflection on what we are doing than on the communicative value to each other of doing it together and the special significance of democratically generated *law* as the way we do it together. (Many of the deliberative democrats' points have no essential place for law but could be satisfied, were there time enough, through robust discussion about each discrete action we undertake.) Rather than thinking that democracy is the only way we could permissibly go about fulfilling a distinct set of duties (like making sure that when I keep my debts I do so by using my own property rather than stealing), democratic law is an essential procedure by which we fulfill those duties (so it is more akin to repaying the debt on purpose, rather than accidentally transferring my money that happens to be received by a debtor).