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The New Chicago School: Myth or Reality?

On Friday, November 21, 1997, *Roundtable* hosted an event as part of its Interdisciplinary Program Series entitled, "The New Chicago School: Myth or Reality?" The panel discussion had as its origin an article by Jeffrey Rosen which appeared in *The New Yorker's* late October special double issue, called "The Next Issue."¹ In his article, Rosen, talking, among other things, about new kinds of crime control and prevention strategies, quoted former University of Chicago Law School professor and current Harvard Law School professor Larry Lessig. "My aim," Lessig announced, 'is to outline a research program for what I will playfully refer to as the New Chicago School.' This new program, he promised, would study the ways that law can influence behavior indirectly, by changing social norms."

Roundtable invited Lisa E. Bernstein, then a law professor at Georgetown University and now a professor at The Law School; Dan M. Kahan, a professor at The Law School; Tracey L. Meares, an assistant professor at The Law School; Randal C. Picker, a professor at The Law School; and Eric Posner, then a law professor at the University of Pennsylvania and now a professor at The Law School, to participate in a panel discussion in which each talked about his or her work in social norms and then commented briefly on the so-called New Chicago School. Richard A. Epstein, James Parker Hall Distinguished Service Professor of Law at The Law School, was asked to moderate and to comment. What follows is a transcript of the event.

EPSTEIN: Thank you. As I look down the table, the first thing that is clear to me is that all the speakers are representative of the new law and economics, but the moderator of this panel should, in some sense, be regarded as the incarnation of the old law and economics. Now the only point I wanted to make is that while there are many norms at play here today, given the number of people and the scarcity of resources, there is one property rights rule which I will vigorously enforce, and that is the rule that keeps each speaker within the allotted time. It is not random that I am sitting next to the podium. It's to allow swift kicks to the shins [laughter] when someone speaks over the 12-to-15 minute limit.

In terms of order, we combine necessity with choice. We are going to start with Dan Kahan, not because he insists upon going first, but because he has

1. Jeffrey Rosen, *The Next Crimebuster: The Social Police*, *New Yorker* 170 (Oct 20 & 27, 1997).

a seminar, in, of all things, social meaning, I dare say, which he has to attend at four o'clock. He will ungraciously slink out, and in view of the fact that he will not be here to answer questions or to submit to barbs, he'll take a couple of more minutes. At this point, I'm going to sit down, ready to glare at our speakers if they trespass beyond their time, while hoping that, within their allotted time, they both amuse and inform. Dan? Let's get the show going.

KAHAN: I'm going to talk about two things. First, I'm going to say what it is that I'm trying to do with social meaning in my work on criminal law. Then I'm going to address the question posed for the panel, namely, is the work that I'm doing, and that the other panelists are doing, part of a "New Chicago School?"

So let us start with the question, what am I doing with social norms? The answer is trying to negotiate the space between sociology and economics. The debate between these two disciplines has dominated criminal law theorizing for decades—and not just in lecture halls, but in legislative chambers and courtrooms as well. It's a debate that's as hopeless as it is spectacular.

Economics is practical, but thin. From the simple premise that individuals rationally maximize their utility, it generates a robust schedule of policy prescriptions—from the appropriate size of criminal penalties, to the optimal form of criminal punishments, to the most efficient mix of private and public investments in deterrence. Very practical, yet it is the very economy of economics that ultimately subverts its goal: its account of human motivation seems too simple to be believable, and its prescriptions seem too severe to be just.

Sociology, in contrast, is rich but impractical. It supplies breathtakingly complex and realistic accounts of why individuals break the law—from the criminogenic properties of poverty to the self-reinforcing culture of criminality. But these concepts do not really tell us what to do to reduce crime, or rather, they tell us to do something—attack the "root causes of criminality"—that our society has neither the expertise nor the political will to achieve.

What we need, then, is a third way of thinking about criminal law, one that combines the virtues of both economics and sociology without succumbing to the vices of either. And the key to constructing this third option, I think, is social meaning.

Social meaning refers to the information that an action or a law expresses about a person or community's values. It's part of the rich social context that the economic account of crime tends to overlook, but at the same time, it's a phenomenon that's sufficiently discrete and malleable to be regulated efficiently. Adding this little piece of sociology to the economic conception of deterrence generates a host of policy prescriptions that are more efficient, more just, and more politically feasible than the ones suggested by either economics or sociology alone.

Let me give you a couple of practical examples. The first relates to juvenile gun possession. Authorities often try to discourage this conduct by altering incentives in exactly the way that rational choice economics suggests they

should: by rewarding students who voluntarily turn in their guns, and by severely punishing those who do not. This carrot-and-stick approach, however, is notoriously ineffective.

An account that focuses on social meaning can help to explain why. Social meaning is an important part of what motivates students to carry guns to school: possessing a gun can confer status because it expresses confidence and a willingness to defy authority; by the same token, not possessing one can signal fear or timidity and thus invite aggression. Carrot-and-stick policies do not do anything to defuse these connotations; on the contrary, they actually help to construct them: because they demonstrate just how much authorities resent guns, carrot-and-stick policies reinforce the message of defiance associated with possessing one, thereby increasing the expressive value of such behavior.

One policy that *is* believed to be effective is to pay rewards to students who turn in gun possessors. Again, social meaning helps to explain why. This tactic works not just because it facilitates seizure of weapons, but also because it interferes with norms that give guns their meaning. When students fear that their peers will report them, they are less likely to display their guns; when students are reluctant to display them, guns are less valuable for conveying information about one's attitude and intentions. They do not have the same meaning anymore. You are not showing the gun; is that because you are a coward or because you are being prudent? You have ambiguated it. That reduces the value of carrying the gun in a way that the carrot-and-stick approach has actually aggravated it. In addition, the perception that onlookers are willing to sell out possessors counteracts the inference that possessors enjoy high status among their peers. The snitching policy thus reduces the incidence of gun possession both by deconstructing its positive meaning and by disrupting behavioral norms—including the ready display of guns—that are essential to that activity's expressive value.

That is an example of how social meaning influences individual decisions to break the law. But social meaning also influences and constrains *collective* decisions about how to deal with lawbreakers.

Consider in this regard my second example: alternative sanctions. The standard economic analysis defends using fines and community service for serious but nonviolent crimes on the ground that these punishments supply essentially the same amount of deterrence as imprisonment at a substantially smaller cost. This proposal enjoys broad-based support among academics and reformers, but has fallen on deaf ears politically speaking. Why?

The problem is that this account ignores social meaning. Members of the public expect punishment not just to protect them from crime, but also to express their moral condemnation of it. Imprisonment unmistakably expresses moral indignation because of the sacred place of liberty in our culture. The conventional alternatives, in contrast, send a much more ambiguous signal. To the ears of the public, fines seem to say that offenders may buy the privilege of breaking the law. We cannot very well condemn someone for purchasing what we are willing to sell. Community service also sends a confusing message:

we do not *condemn* persons who educate the retarded, install smoke detectors in nursing homes, restore dilapidated low-income housing, and the like. We *admire* them. What's more, saying that such services are fit punishments for criminals insults both those who perform such services voluntarily and those whom the services are supposed to benefit. These recurring expressive objections are what make alternative sanctions politically unacceptable notwithstanding widespread support among commentators and reformers.

If we want to replace imprisonment, in other words, we need an alternative sanction that is not just cost-effective, but social meaning-effective. How about shaming punishments, like bumper stickers for drunk drivers, publicity for toxic waste dumpers, signs or distinctive clothing for sex offenders, and the like? These afflictions unambiguously express moral disapprobation. Accordingly, substituting shame for imprisonment is unlikely to offend the public expressive sensibilities that have blocked the conventional alternatives. At the same time, shaming punishments are likely to work just as well and cost no more to impose than the conventional alternatives. Indeed, shame seems to be taking off. So social meaning helped us to identify an alternative that is more efficient and less severe than imprisonment but that is equally acceptable to the public. Isn't that what the old school would call "Pareto-optimal" or something?

Okay, that is what I am trying to do in my work. Now the question is whether there really is a "New Chicago School." The answer, in my view, is, who cares?

In my view, the only question that I know it's important for each one of us to answer is, what valuable things can you do with social norms, or social meanings, or social origination, or whatever your favorite brand of socialism happens to be, that would not otherwise get done? [Laughter.] It might be the case that there are synergies in our work that allow each of us to do more than he or she could do working alone. But contemplating what those interconnections are abstracted from the practical things we are trying to do—to me that's just professional legal ideology contemplating its own navel. As the old Chicago School would put it, "your opportunity costs could not possibly be low enough to make doing that the best use of your time." Or as the New Chicago School, I hope, would say, "Just get on with it!"

BERNSTEIN: I don't write about the types of issues that Dan writes about, the sort of sexy things that might appear in *The Wall Street Journal* or *The New York Times*. I write about commercial law, more specifically, something that I've labeled private commercial law. What is private commercial law? By the term "private commercial law," I mean the comprehensive sets of substantive contract default rules that have been developed by trade associations to govern transactions between their members. These rules are interpreted and enforced in association-run arbitration tribunals staffed by industry-expert merchant adjudicators. Industries governed by private commercial law have, in effect, opted out of the public legal system—squarely rejecting both the Uniform Commercial Code and state-supplied rules of procedure.

Private commercial law exists in over fifty different industries, including diamonds, independent films, rice, cotton, hay, and tea. In some industries, transactors agree to be bound by these rules as a condition of membership in an important trade association or exchange. In others, they can opt into these rules on a transaction-by-transaction basis by including a standardized arbitration clause in their contract in situations where it seems to suit their fancy. The tribunals that interpret and enforce private commercial law are quite different from both courts and American Arbitration Association-style commercial arbitration systems. They are not touchy-feely informal tribunals. Rather, they operate under clear, definite, and specific procedural rules complete with pleading requirements, statutes of limitations rules governing offer of judgment, fee and cost shifting provisions, and detailed jurisdictional specifications. Many of them produce written opinions that are similar in form to judicial opinions, while others make only simple awards stating the name of the prevailing party and the amount of damages, if any, awarded.

These private legal systems have the ability to bring to bear on the transactors and the disputants all sorts of pressures that are, for the most part, inaccessible to courts. For example, if you are a transactor in the diamond industry, and you have a dispute with someone, and you go to arbitration, and a judgment is rendered against you, and you don't comply with that judgment, what happens to you? Well, first, you are tossed out of your local diamond association. Second, your picture is faxed to every diamond trading center the world over, it's enlarged, and it's posted, along with a statement that you both failed to meet your commercial obligations and failed to comply with a judgment rendered against you. In some sense, it's an example of one of Dan's good old shaming penalties, so I suppose, in that sense, my work is part of the so-called New Chicago School.

One might ask why I spend my time reading decisions of the arbitration tribunal of the National Grain and Feed Association and back issues of trade publications like the National Hay Association's newsletter, which, just for your information, is called "Hay There." These sources are not exactly exciting reading. So why do I bother? The reason is this: private legal systems provide us with close to ideal commercial law laboratories. They provide a context where it is possible to explore the connection between the formal transactional rules embodied in trade codes and written contracts, and the informal norms that govern work-a-day contracting relationships, free from the complications introduced by imperfections in the public legal systems such as high legal system costs, uninformed transactors, and concerns related to the institutional competence of adjudicators. My hope is that by looking at the reasons why industries governed by private legal systems have opted out of the public system and by exploring the ways that private legal systems create a value for merchant transactions, it will be possible to develop a clearer understanding of the connection between formal rules and work-a-day behavior that can be used to devise ways to improve public commercial law and adjudicative procedure.

Moreover, attempting to create commercial law that is based on a sound empirical basis is an endeavor that is long overdue. Although Karl Llewellyn,

the drafter of Article 2 of the Uniform Commercial Code, acknowledged that the Code should have an empirical basis in merchant reality so as to be accommodating to merchant concerns, when writing the Code, Llewellyn basically sat around in his armchair, sure he visited a few Indians, but mostly he sat around in his armchair imagining what it was merchants would want. Strangely, his wife was out collecting data on these merchant-run private legal systems, but for some reason, the two never seemed to have discussed their respective endeavors. So in many ways I'm trying to bring Soia's empirical work to bear on Karl's theorizing and armchair empiricism.

EPSTEIN [interrupting]: A marriage?

BERNSTEIN: Marriage is a subject I have no personal knowledge of. I seem to be in the Llewellyn camp as far as that's concerned—a pure armchair empiricist. [Laughter.]

In any event, what has my research found? Well, one could say my research has found that Karl got it seriously wrong. Karl wrote a commercial code filled with broad, vague, standard-like terms such as “reasonable.” What types of rules do the Grain and Feed dealers adopt? Bright-line, clear, inflexible rules. Karl loved his notion of “good faith”; he even made it a mandatory rule. The merchants I study act in good faith all the time and impose strong nonlegal sanctions on those who act in bad faith, but do their rules include duty of good faith? Is one implied in their contracts? No. Karl wrote a code that directs courts to look at imminent business norms reflected in the course of dealing, course of performance, and usages of trade in deciding cases. He insisted that merchants would like this, that it would make public commercial law accommodating to merchant concerns. Do merchants want this? Is this the adjudicative approach chosen by their tribunals? No. Do their arbitration opinions mention unwritten customs and usages of trade? Rarely. Do these merchant adjudicators know what the customs are? Assuming for the moment that there are customs, and that is something my work is increasingly challenging, merchants are certainly better able to determine their content than courts, yet these merchant arbitrators don't look at customs. They look at the contract, they look at the rules, they decide the case. They are highly formalistic, Willistonian-type adjudicators.

Well, where are norms in all of this, you might ask. A good question. The closest I can come, really, to answering it is to say that in addition to studying the formal aspects of these systems—what's written in their arbitration opinions and what's written in their rules—I also go out and socialize with these guys. Go to their trade conventions, talk to them, take their training courses. I'm a qualified Grain and Feed arbitrator. [Laughter.] I am. They give you a test just like your commercial law exam in law school, you have to pass it, and they grade it and give you comments and the rest, and they give you a nice certificate in the mail. So I go out, and I meet these guys, talk to them in hotel bars, and all the rest. [Laughter.] I try to find out how they actually do business. Sometimes I send out mail surveys; other times I conduct telephone or in-person interviews. As it turns out, what merchants actually do in their everyday dealings often differs significantly from what is written in their

contracts as supplemented by the industry's bright-line trade rules. Merchants operate under a very different set of norms in their every day dealings. The only times the bright-line trade rules become relevant is when their relationship has broken down, they hate each other, don't want to see one another's face, and are ready to terminate their relationship. In other words, in end-game types of situations.

Essentially, my research focuses on trying to better understand the connections among work-a-day commercial norms, formal commercial rules, and various different approaches to commercial adjudication. I look at these things in an effort to see what we can learn from the operation of private legal systems that can be helpful to us in trying to improve public commercial law and public adjudicative approaches and procedures. As for whether or not this is part of some new school of thought, I basically agree with Dan. If you ask me what unites the people who are sitting up here on this panel, I'd say that it's a willingness to draw from many sub-fields of law and many different sub-fields in social sciences in an effort to come up with more interesting things to say about problems that legal scholars have been writing about for, certainly as long as I can remember, and hopefully as long as Richard can remember as well. [Laughter.]

MEARES: We move from commercial law now, back to the criminal law. There may be fewer differences than one would think. I hope to illustrate the parallels between my work and Professor Bernstein's by demonstrating that a norm-based view of compliance depends upon what we might call private law enforcement—a law enforcement that shares features of private commercial law, which Professor Bernstein just discussed. Whether the work I do is part of a school that is new is a question I'll leave aside because I think you'll find, as I begin to talk, that the underpinnings of the work that I do are really part of a school that's quite old. Although the school I rely upon is called the Chicago School, it's not the old Chicago School of Economics; rather, it's the old Chicago School of Sociology. I'll get to that in a moment. What I would like you to remember, though, as I talk, is that everything that Dan said about economics is probably right, and everything that he said about sociology is probably hopelessly wrong. [Laughter.]

Let's start with what I think is clear. It is quite clear that policy-makers in the criminal law area are myopically focused on an individual-level conception of crime and a corresponding individual-level solution to the crime problem. Let me give you an example. It is uncontroversial to argue that a person who is poor and who is unemployed is more likely to steal than one who is wealthy. If we believe that, then we might also believe that the way to make sure that crime is reduced among people who are poor is to raise the price of crime for the person who is committing crime by having much more severe sanctions for prohibited conduct—in this case, theft. We might also try to enhance the level of the certainty that this person is going to be caught and convicted.

Now it should be obvious that the individual-level explanation of crime has some force. It makes sense that people who are poor are more likely to steal than people who are wealthier. The problem is that the individual-level explanation doesn't explain enough. It doesn't help us to understand, for example, that most people who are poor do not, in fact, commit crime.

A community-level explanation of crime, however, I think, has more explanatory power. This is where this first diagram comes in. [Exhibit 1. Not included in transcript.] This is a diagram of the social organization model I work with that instead of looking to individual-level characteristics to predict crime, factors such as unemployment, ethnic heterogeneity in neighborhoods, whether or not people are moving a lot, mobility in neighborhoods, and the like, says that we should look to community-level characteristics of a neighborhood. What are those community-level characteristics? Prevalence of friendship networks, the extent to which there is community-level supervision of youths and peer groups, as opposed to just parents minding what their own kids do, and, very important, as I'll get to at the end of this talk, the extent to which individuals participate in formal organizations like PTAs, block clubs, and churches.

Now the hypothesis is straightforward. To the extent that you have more of this stuff in the middle—more friendship networks, more community supervision of teen peer groups, more participation in formal organizations—there will be less crime. If you have less of the stuff in the middle box, there should be more crime. This is the bottom line: if you believe that the causes of crime are situated in these community-level characteristics, as opposed to the individual-level ones, you'll be very skeptical about the efficacy of standard-based approaches deterrence to crime. Why is that? The primary problem is that in certain communities where crime is very prevalent, we can predict that the standard deterrence-based approach that relies on raising the certainty and severity of punishment for offenders—typically, its severity—will distribute negative consequences in a way that disrupts the social organization of fragile communities. Severe penalty strategies end up removing large numbers of spatially concentrated individuals—in the case of drug law enforcement, young black men—from their neighborhoods. When this happens, we can expect an increase in family disruption, an increase in poverty, and an increase in joblessness. All of these things, as you can see from the diagram, disrupt social organization processes. Disruption of these processes leads to crime. So the very solution to crime that deterrence-worshippers promote actually exacerbates the crime its promoters seek to address. That's a problem.

A better approach to law enforcement embraces the potential of social organization. The social organization model trades on the potential for government to help individuals who live in communities help themselves prevent crime. But there's a key difference between the social organization approach and the standard approach. And what is that key difference? The key difference is that the social organization approach will focus on *law-abiders* instead of law-breakers. Where the standard approach seeks to try to convince people who are going to commit crimes not to, by making them more afraid, by

raising the punishment that someone will face if they in fact break the law, the social organization approach asks what we can do to create better social structures in communities that can help the transmission and promulgation of law-abiding norms. Importantly, this view of compliance doesn't look to whether or not people obey the law because they are afraid of the consequences. Instead, what it does is rely on the reality that people in fact often obey the law simply because they think that government has the right to dictate to them what law should be. This is a normative view of compliance as opposed to an instrumental view of compliance. What this means is that if you actually increase social organization in the communities, you can create what I like to call "norm highways" in communities, and make it easier for people who care about crime reduction to achieve that by promulgating and transmitting law-abiding norms.

Then the question becomes, how can we improve normative compliance with the law through social organization improvement? Can government play a role? This is Dan's question. What can we do with this fancy theory? It's important to recognize that not only can government play a part, but law enforcement, police organizations and the like, can play a part. But police organizations cannot enforce laws in the usual way. Social organization theory demands that we think about law enforcement differently. In some of the work I've done, I've pointed to three general ways of thinking about how law enforcement can be geared toward social organization improvement.

One way is by spatial, and racial, redistribution of law enforcement outcomes. Let me give you an example. Often, it is thought that an easy and cheap way to achieve reduction of drug-offending is to focus on the people who sell drugs on corners—low-level street dealers. They're easy to find. They're concentrated in particular areas. Police know who they are. So police engage in what is called a "buy-bust." Police pretend that they want to buy drugs, and then they arrest the people who attempt to sell them. But what happens? When law enforcement focuses on this group, then the negative effects of law enforcement will be concentrated in the very communities that can least withstand it. Social organization will, predictably, be disrupted. Thus, buy-busts present a useful example of a policy that confounds its own crime-fighting ends.

Is there a better way? I advocate reverse stings in the *New Yorker* piece. In the reverse sting, police pretend to be drug-sellers. Buyers come, then attempt to buy drugs from police officers, and they are snared. What happens? The negative consequences of law enforcement are redistributed out of disadvantaged neighborhoods, often into the suburbs, a large number of whose residents buy drugs. The statistics I've seen show something like 80 percent of people arrested in Chicago's reverse stings come from outside the area in which the drugs are sold—often suburbs.

Reverse stings ensure that residents remain in the community. Not only that, reverse stings redistribute the consequences of law enforcement racially because it turns out that people who buy drugs are much more demographically varied than those who sell them. It turns out that people who buy drugs

basically look like America. Reverse drug stings, then, reconceptualize who the drug offender is, and these kinds of dynamics, as I explain at length in other work, can set up a regime in which people who live in disadvantaged communities are more willing to trust police officers.

This effect is consistent with the normative view of compliance with the law. When people in the community trust the police, they trust the government. They're more willing to be committed to government, which means we are going to achieve better compliance with the law in the normative view.

Another way we can achieve better compliance with the law is by redistributing social capital within the inner-city communities themselves. Consider the second handout that I gave you with the As and Bs on it. [Exhibit 2. Not included in transcript.] The bottom picture shows what many disadvantaged neighborhoods already look like. If the capital letters represent adults and the lower-case letters represent the kids, what you have is a world in which there are a lot of networks among kids, and not very many networks among adults. That means that the social capital is skewed towards children and, in many neighborhoods, gangs. In such a world, it is very difficult for adults to transmit law-abiding norms. They don't have the networks; they don't have the norm highways that enable them to transmit norms properly.

If we adopt certain law enforcement policies that redistribute that social capital, adults will be able to create networks among themselves so that they can better transmit norms to their children. Curfews and loitering laws can help redistribute these networks. Such policies also are good examples of ways to use law enforcement to redistribute capital without taking people out of the community in the way that the standard approach of law enforcement does.

Now, each of the programs I've mentioned so far is an example of taking a relatively standard law enforcement approach and tinkering with it, re-engineering it in a way that improves social organization. But the real power of the social organization model is that it holds the potential for private law enforcement. It's not so much crime-busting, as the *New Yorker* piece described it; rather, it's more about reconstructing communities so law-abiding norms can be transmitted intergenerationally, norms that each of us hold.

How can we really achieve the full potential of this? What we might be able to do is to try to bring people to institutions that are particularly concerned with promulgation and transmission of law-abiding norms. Maybe schools, and maybe churches. Next we might try to bring these institutions to institutions of government that can help organizations achieve the goals of norm transmission.

My current project is one in which I explore the implications of institutional integration between the church and the police in the city of Chicago. And more specifically, I am exploring the potential for institutional integration in communities in Chicago that are very poor and high in crime. About a year ago, there was a very exciting event in which the commander of the highest-crime police district in the city of Chicago initiated and organized a prayer vigil. Yes, that's right. He initiated and organized a prayer vigil in which several thousand people congregated on corners typically occupied by drug

dealers shouting things like “Rocks and blows!” (Rocks are crack, blows are heroin.) And then people in the community stood on the corners, and they prayed and they sang with police officers. This police commander brought together the leaders of 250 churches in the community that had previously had little to do with one another, let alone the police. These churches continue to work together. My research has shown that it was virtually impossible for anyone else except the state, through the police commander, in this community to bring all of these individuals together.

Now, the first diagram should tell you that the prayer vigil was likely to improve social organization in the 11th District. Certainly my research demonstrates that new networks were created, not only between the police and the church, but among the churches themselves. Church integration with the police is important, but even more important is integration among the only stable and long-standing institutions in some of these communities—the churches. This is the potential value of the social organization view, a norm-based view of compliance, because when people become involved in these kinds of institutions, the theory tells us that crime should be reduced and that the well-being of the community should also be improved.

Now, a final word on all this. One thing I can say about the New Chicago School, if there is one, is that when you are working with norms, you have to be very much concerned about empirical questions. It is very difficult to make predictions about what is going to happen. It is very labor-intensive. A very important part of this work is not just theorizing about the ways in which the standard conception of economics might be wrong, but also a willingness to go out there and do the legwork in the eleventh district in the city of Chicago, in the highest crime district in the city, and see what’s actually really going on.

POSNER: I’m going to speak very briefly about my work, and then I’m going to say a little bit about the New Chicago School, myth or reality. A little background—this will be highly simplified—the dominant mode of legal analysis has been called by Bob Ellickson “legal centrism.”² This assumes, for methodological reasons, that there are two sorts of actors in the world. There’s the government, which has a monopoly on force, and then there are citizens, who are atomized and unable to cooperate. So you have a collective action problem, and the government is there to solve the collective action problem if all goes well.

Now, this is a very useful approach, but it is useful only methodologically; nobody claims that it represents reality very well. In fact, there’s been a long tradition of criticism of this approach. Ellickson himself criticized legal centrism in an influential book quite recently, but before that lots of people criticized it. Members of the critical legal studies movement criticized it,

2. Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard 1991).

members of the Wisconsin school of social norms criticized it back in the 1960s, and before that the legal realists, if you want to go back far enough, criticized this way of approaching the law. So this criticism has been around for a long time, and it has influenced a lot of people.

But it has never really stuck. People agree with this criticism, but they go ahead and do the same old kind of legal centrism that they've always done, and the reason is that there was no theory accompanying the criticism. There was no suggestion for a methodological substitute for legal centrism.

Now, so what does one do? There have been efforts to develop theories; there have been efforts in the sociological literature. My approach is to use game theory and economics, and despite what some people have said, I'm actually quite reductivist myself. In fact, I'm so reductive that even Richard was taken aback, but I think that game theory using the traditional premises that economics uses can explain why social norms exist, or, in other words, how order is possible in the absence of government intervention.

Why is it that people are able to cooperate even when they don't think that the state is going to intervene to punish people who fail to cooperate? I don't want to go into any detail about my ideas, because I've already given two talks about them here, and I've bored a whole seminar of students for a whole quarter. Let me say, very briefly, for those of you who are familiar with these concepts, that I use a combination of repeat game theory and a signaling model. These models show how people are able to cooperate in the absence of legal intervention and why people conform to certain behavioral regularities—which are known as social norms. That is to say, a social norm describes regularities of behavior that you observe in an equilibrium and results when people engage in their rational self-interest. They are not exogenous, as economists sometimes assume, and as sociologists frequently assume. And it's nice to be able to have a theory like this when you talk about what effect the law has on people's behavior. The models enable you to see that the law affects not only the incentives that people have to engage in privately valuable behavior, but also their incentives to engage in cooperation.

Suppose, for example, some people are producing a public good like, as Lisa explains, merchants resolving their disputes in the absence of government intervention. Then the question is, suppose the government decides to intervene? Will that make it easier for the merchants to cooperate or harder? The government's attempt to punish merchants who engage in bad behavior might deter such behavior, but it also might encourage such behavior by undermining the merchants' independent mechanisms for policing themselves. This tension reappears in many other contexts.

Now, what's the New Chicago School? Many of you know that the term was coined by Larry Lessig at a symposium last spring.³ My view is that there

3. Lawrence Lessig, *The New Chicago School* (contrasting the old Chicago School of Economics with the so-called New Chicago School, which uses social norms, rather than economics, to understand behavior).

is very little to this school. There was very little at that time, and there is very little now. First of all, there is no coherence in methodology. As you can see, I like to use game theory, Tracey likes to use sociology, Randy uses computer-generated models, Dan uses a variety of sources. Second, there is no unity in normative implications. We all have different ideas about what one should do. It's not like the old Chicago School, or other schools, in which there was an ideological and normative label that was easily attached to it. The only thing that unifies us is subject matter. We all talk about social norms, although we use the term in different ways. We talk about how the government can affect people's beliefs. But people have been talking about these things for ten, twenty, thirty, forty, a hundred, a thousand years. So at the time that Lessig wrote this comment, my view was that his claim would die a deserved death almost immediately. And I think it would have except for the intervention of the all-powerful media.

Now, I'm going to tell a "New Chicago School" story about the New Chicago School. This is my prediction, which will occur, I would say, with twenty percent probability. Rosen chose to write about a handful of scholars when a hundred could have been included in his article. This, of course, immediately engaged all the insecurities and jealousies that academics are famous for. What might happen now is that some scholars will write articles charging that there is nothing coherent, interesting, or new about the New Chicago School. But in order to make this argument, they are going to have to describe what the New Chicago School is. And as they describe it, gradually the School will take on meaning. Some will be embarrassed to be identified with such ideas and disassociate themselves. Other people will join the School and defend it. Gradually, over time, the New Chicago School will develop into a coherent body of thought. So when that happens, there *will* be a New Chicago School.

PICKER: Well, let me tell you what this is about. This "New Chicago School" stuff, it's just P.R. and marketing, although, I've actually grown to think that's quite important. We wouldn't be having this meeting otherwise, so I'm in favor of that. It is in that sense that there is a New Chicago School. More meaningfully, is there a cluster of overlapping, related research going on at The Law School right now? I think there is, and that's very exciting. It's exciting for us as colleagues because it means that we have more people to talk to who understand what we're doing and we can help each other. Plus, we are all starting to write together too. Whether there's otherwise a "New Chicago School," well, that is something I don't find to be all that interesting.

Robert Ellickson's book⁴ is what gets this going. He did a wonderful job combining different kinds of hard research. Both Tracey and Lisa are doing that in their work, and you can't admire that enough, for it really is hard to do. Ellickson combined that hard, empirical, thick research with a sophisticated

4. Ellickson, *Order Without Law* (cited in note 2).

theoretical understanding of game theory—the sort that Eric does and that I’ve done in the past as well. It’s a marvelous fusion. It’s hard to express how good the book really is. I’ve taken some of the game theory and said, we’ve got a new set of tools now which go beyond what Ellickson did in his book and that go beyond what we did in the game theory book that I wrote with Gertner and Baird.⁵ Now the question is, how do those tools address the issues that we have been talking about today? I’m interested in one particular, narrow issue at this point. Eric Posner, Cass Sunstein, and Larry Lessig have all said there may be a problem, a collective action problem, in how norms emerge and how norms form. Eric’s University of Pennsylvania piece talks about the fact that we may have social meanings which are inefficient and that we may be getting to the wrong norms.⁶ That is the inquiry I would like to try and explore. I want to examine the question, is there a serious risk of a collective action problem as we create norms?

I start with some very simple coordination games.⁷ I have two players, each of whom has two choices. There are payoffs associated with those choices.⁸ The two players can’t coordinate explicitly. They can’t contract. If they successfully coordinate, they both play left, and each player gets a payoff of one. If they don’t coordinate, only one player will play left, and the other will play right, or vice versa. As a result, they get nothing. If they successfully coordinate on right, they get a payoff of “b.” In all my models, b is going to be greater than one. This situation would be the best case in that each player will have a shared interest in getting to the right outcome.

If we find a collective action problem in a context in which the players have a shared interest, imagine what it’s going to look like when they have diverging interests. We’ll want to talk about that later. I start with the basic

5. Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law* (Harvard 1994).

6. Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U Pa L Rev 1697 (1996).

7. A note regarding Professor Picker’s presentation: much of the work Professor Picker discusses in his presentation refers to computer simulations he performed representing computer-run experiments in self-organization. These computer models of interactive situations were shown directly to the audience during the panel discussion. The computer simulations presented were by their very nature dynamic and will not be reproduced here. To gain a better understanding of the simulations, please see generally Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U Chi L Rev 1225 (1997). This article contains a color insert that sets out snapshots of the various simulations referenced in Professor Picker’s presentation. A CD-ROM version of the paper is also available from the University of Chicago Law Review. Requests should be directed in writing to Dawn M. Matthews, Business Manager, The University of Chicago Law Review, 1111 East 60th Street, Chicago, Illinois 60637. The simulations are also posted at <<http://www.law.uchicago.edu/Picker/aworkingpapers/norms.html>>. Throughout this transcript, where appropriate, general descriptions of the simulations will be provided.

8. For a visual representation and further explanation of the spatial framework Professor Picker describes, see Picker, 64 U Chi L Rev at 1237-1240 (cited in note 7).

case in which they have a shared interest. Now, to know when you've actually got a collective action problem, it turns out you really should have a collective. So far, I have only two players and, except for the former Soviet Union, that's not a collective. So I create a collective now, and let me tell you what that will look like.⁹ I take the players, and I place them in a much larger framework. I will use an "n \times n" board, where "n" will be equal to 101. There will be 10,201 players. I have 10,201 cells, and I will just lay them out on a grid. Each player has neighbors. Start with a nine-cell grouping—three-by-three with Player X at the center. I have Players A, B, C, D, X, E, F, G, and H. Player X plays this simple coordination game with each of her eight neighbors. She makes a single choice of left or right, and that applies to each of her eight neighbors. Her payoffs in each round are determined by her choice and the choices of her neighbors. So, for example, suppose X chooses left, A, B, C, and D each chooses right, and E, F, G, and H each chooses left. Player X did not coordinate with A, B, C, and D because, after all, they played right, and she would thus get a zero payoff from those interactions. She did successfully coordinate with E, F, G, and H, so she gets a payoff of one from each of those interactions, for a payoff of four.

Now the question is, how do people make decisions in this framework round by round, and to what extent will this society successfully converge on the right norm? That, just so we are clear, is to get to everyone playing right/right since, after all, $b > 1$, we would like to have this society somehow get to the point where everyone who's playing is playing right. Each round Player X will get her payoff, plus, she is going to observe how her neighbors did. In the next round, she is going to select the strategy that received the highest payoff among those she observed in the just completed round. So, for example, if player A was surrounded by a bunch of right players other than player X, player A would successfully coordinate with seven right players and would get a payoff of $7b$. That's quite possibly the highest payoff that X would observe. If X saw that scenario, X would say, "I saw A play right. She got a payoff of $7b$. That looks like a pretty good strategy. That's what I'm going to do in the next round."

That tells you everything you need to know to view the computer simulations except the color scheme.¹⁰ Here's the color scheme. In the very first round, people who play left are coded as blue; people who play right are coded as red. In subsequent rounds, people who play left two rounds in a row are coded as blue, right two rounds in a row are coded as red. Left followed by right, is yellow and right followed by left is green. When you see the simulations, you will see why the colors matter. [Runs program.]

Let me tell you what I have here. I have 10,201 players, with 50 percent of them playing left (that's blue), and 50 percent playing right (that's red). They are allocated at random on the grid.¹¹ In this particular example $b =$

9. Id.

10. See id.

11. Frame 1. This figure depicts a snapshot in which there is a significant mixture of

1.05, so there is very little advantage to getting to the all-red equilibrium or the all-right equilibrium. But there is some advantage. The question is what happens when we play with the decision rules I've described. [Runs program.]

That was pretty fast. I will go through this frame by frame so you can see what happens. Roll this back to the beginning, to the first decision period. What happens? You can see that we have many people who are changing strategies—a lot of mixing, right? People who are yellow are people who used to play left. They looked around and said, “I see someone else doing better playing near me playing the right strategy. I'm going to switch to right.” Green are people doing just the opposite. The information they observe suggests that the thing to do was to switch strategies, and that's what they've done. Obviously some people, the blues and the reds, are sticking with their strategy.¹² As another round goes by, we are starting to see spontaneous order of the sort that Eric was talking about. You see patches of red, people who are playing right, and patches of blue, people who are playing left, emerging. You also see a relatively quick decrease in the number of people switching strategies.¹³ Then, as we go round by round, by round, by round, by round, we get to a point where the system stops. No one wants to change strategies given the decision rule I have described.

“How is our society doing?” you ask. Well, “looks fine,” says Richard, right? [Laughter.] The resulting picture looks a lot like chess on *Star Trek* [describing the resulting computer screen image].¹⁴ There are two things we can say about this result. First, we have lots of people playing blue and that's a bad thing. That means that these people are successfully coordinating, but they're successfully coordinating on left/left. Thus, they are only getting one from each of their eight interactions with neighbors, when, had they coordinated on right, they would have obtained 1.05 from each interaction. Second, everywhere you see a boundary, red against blue, this indicates that those people are not coordinating. They get nothing from that interaction, as they're failing to coordinate, and that's loss of value. Applying this outcome to social norms, we might ask, can we count on private actors to successfully coordinate on the right norm, and do we have a collective action problem? You might say that this reflects a pretty severe problem: there are lots of blue patches and many situations where left is being played right next to right. But this is just one example! How would another look?

blue and red. Id at 1248 (color insert, Figure P1).

12. Frame 2. This figure shows the formation of larger patches of blue and larger patches of red, with hints of yellow and green throughout the frame. Id at 1248 (color insert, Figure P2).

13. Frame 3. This figure shows a snapshot with larger patches of red and blue, with only very slight hints of yellow and green. Id at 1248 (color insert, Figure P3).

14. Frames 4-6. These figures depict a movement within each successive frame toward clear patches of red separated by a smaller number of blue patches. In Frame 6, the figure exhibits primarily red patches with a number of blue patches. Id at 1248 (color insert, Figures P4-P6).

In the second example, I'm going to take b and boost it from 1.05 to 1.25. Again, in the first round, 50 percent play left, and 50 percent play right. We see the same decision-making rule that I described before. What does this look like?¹⁵ Well, it looks like Windows versus Macintosh, unfortunately. [Laughter.] It's funny, unless, of course, you happen to be a long-time Mac user. The question is, we have two standards, how does a society choose between those standards? What happens here is a convergence to all-red. From a social standpoint, this is great, as everyone has managed to get to the good strategy. We have no patches of blue, and we have no boundaries with red bordering on blue.

How general is that? Remember what I did here? I took b from 1.05 to 1.25. Suppose I start off with $b = 1.25$, and I start off with 80 percent playing left and 20 percent playing right. What will happen?¹⁶ You can see we have a lot more blue. We end up with this little group playing red huddled against the edge, and otherwise, we go to where we don't want to be.

So far, I've shown you particular examples. The thing to do here is to do what I've done: run a quarter of a million simulations with a 10,000 player model.

I set b at 1.65, and I ran sets of one hundred simulations. I start with one percent of the players playing left and 99 percent playing right, and I ask of the hundred simulations, what fraction of those, or how many of that hundred, get to the all-red equilibrium?¹⁷ I do this percentage by percentage, going from (1,99) to (99,1). When I have lots of players playing right and very few players playing left, in one hundred percent of the cases, we get to the all-red equilibrium. This result continues up to starting conditions of 84 percent left and 16 percent right.¹⁸

That tells me the following. When $b = 1.65$, when there is a huge advantage to successfully coordinating on right, unless I have very adverse starting conditions, I am going to get to the right equilibrium in all of the cases. I will get the right social meaning, and the right norm is going to emerge. Put differently, if my starting conditions aren't too adverse, I don't have a collective action problem. That's one point that I think is particularly worth noting. I also have a very sharp phase transition.¹⁹ It turns out that this system

15. Frames 7-12. Within each successive frame, these figures depict a progression from a highly mixed picture with many, very small blue and red patches (Frame 7) to a picture with significant patches of red and blue with hints of yellow and green (Frame 9) to a final frame that is completely red (Frame 12). *Id.* at 1249 (color insert, Figures P7-P12).

16. Frames 13-17. These five snapshots show each frame becoming more blue with each successive frame. Frame 13 shows a mostly blue frame with hints of red throughout. By Frame 15, the picture is almost entirely blue, but there is one small, concentrated spot of red. In the last two frames, the picture remains essentially the same—primarily blue, with a small patch of red (Frames 16-17). *Id.* at 1249 (color insert, Figures P13-P17).

17. For further explanation of the phase transition and accompanying graphs Professor Picker discusses here, see *id.* at 1250-1264.

18. *Id.*

19. *Id.*

changes from one phase to another. There is a very small region in which the behavior of the system changes very rapidly, almost violently, from one hundred percent conversion on the red equilibrium, to one hundred percent conversion on the blue equilibrium. Of course, when $b = 1.65$, getting to the right equilibrium is very valuable. What happens as we reduce b ? As we go from $b = 1.55$ to $b = 1.35$ and to $b = 1.15$, we're still doing quite well.²⁰ Two things are happening. One is that the cutoff for the phase transition shifts farther and farther to the left. The second point of interest is that I get a second phase transition. Remember the first frame I showed you, the sort of funny checkerboard?²¹ We had some players playing left, some players playing right, with patches of red and blue? Well, when you drop b to $b < 1.6$, in this framework, a region emerges where in one hundred percent of these cases, the system converges to a checkerboard, a funny checkerboard to be sure, but a checkerboard where some of the players are playing left and some of the players are playing right.

Now look what happens here as we go from $b = 1.15$ to $b = 1.14$ —a dramatic shift in the system occurs.²² All of a sudden now, my society isn't doing very well. For large chunks of the parameter space, we end up in an inferior equilibrium. In these checkerboard outcomes, value is being lost, as we have large numbers of players following the inferior blue strategy, plus we have red-blue boundaries.

Let me say a couple of things in closing. These models tell us that the extent to which a collective action problem is going to emerge has to be understood very concretely with regard to the relative values of the competing norms. It turns out that the outcome is also sensitive to the choice rule I use. I was using the choice rule in which you looked at what your best neighbor was doing and made your choice based upon that. If, instead, you ask how the average strategy is performing near you, you will find that when you use the highest average rule, instead of just the single highest one, you get one hundred percent conversions a lot farther on. So that turns out to matter a great deal. We will need to examine this outcome further.

I have one more example I want to show you. One of the ideas I float in this paper—this is in the Chicago piece—is the idea of seeding a norm cluster.²³ Let me show you what that means, and then I will stop.²⁴ The idea

20. *Id.*

21. Professor Picker is referring to Frames 3-6. These figures depict a movement within each successive frame toward clear patches of red separated by a smaller number of blue patches. In Frame 6, the figure exhibits primarily red patches with a number of blue patches. *Id.* at 1248 (color insert, Figures P3-P6).

22. The right-most point where 100% of the simulations converges to the good norm decreases from 60% to 17% when b is decreased from $b=1.15$ to $b=1.14$. *Id.* at 1259.

23. *Id.* at 1284.

24. Frames 18-23. These six figures show snapshots of frames that become increasingly red. Frame 18 shows a picture that is essentially blue, with one small square of red in the center. Frames 19-22 show pictures of this small red square becoming increasingly large, overtaking the blue background. In Frame 22, blue exists only in the four corners of the

here is that the government may be able to take a situation, create a small group of people who are getting value from a particular norm. Other people will see that norm succeeding, and that norm will spread. So in this framework, I have a case where the board is basically completely full of bad norm players. We've got this very small cluster of good norm players, and $b = 1.65$. The question is, how does my norm do when it's been created in the face of these conditions? As you can see, it spreads quickly and completely displaces the old, inferior norm.

Do we have historical examples of this? Well, there is Gerry Mackie, who has talked about the decline of foot-binding in China in exactly these terms.²⁵ Foot-binding was something which survived, apparently, for the better part of a thousand years. It ended in a single generation. What happened? Christian missionaries went to China and were able to induce local groups, small clusters, to implement the following rules: they would not foot-bind their daughters, they would not let their sons marry the foot-bound. So now you've got a marriage market locally that works, and that practice spread very quickly in the space of a generation and ended a thousand-year-old practice. This looks exactly like seeding a norm cluster.

The other point to make is that the government has no unique role here. This is something that was done by Christian missionaries. It could be done by lots of us. Richard, for all we know, is probably seeding norm clusters every day. But it is a role that the government could play. We could create very small pilot programs, create some local cohesion, and see what happens. Then we see if it spreads. I think it's a very natural role for government—a very small, limited role, but nonetheless, a natural role that government could play.

EPSTEIN: On this panel, I basically assume two roles. So now I will step out of my moderator's position to take two or three minutes to comment on these presentations from the point of view of the older generation, as I am sorry to have to describe myself, having entered teaching thirty years ago, when I was younger than everyone here is today. The attitudes that I have to these new intellectual movements show certain internal conflicts. I am basically sympathetic to all intellectual adventures, but have some cautionary words about the subtle changes in orientation that are characteristic of the newer intellectual trends.

I entered legal education in a world of legal centrism. Our basic business was to start with legal opinions. You read them; you tried to figure out why they made sense, if they made sense. You sought to figure out how this decision would work as a precedent in future cases. You thought of incremental reforms of the applicable rule and ways in which it might be fundamentally

snapshot. Finally, Frame 23 shows a picture that is completely red. Id at 1249 (color insert, Figures P18-P23).

25. Gerry Mackie, *Ending Foot-binding and Infibulation: A Convention Account*, 61 *Am Sociological Rev* 999, 1015 (1996).

revised. In effect, you thought as a lawyer, a judge, and a legislator might about the various uses of the law in a multitude of social settings.

There is one clear benefit to this approach. We do not lose sight of the role of coercion in a legal centric system. And even in a world that is filled with implicit norms and social sanctions, the dominant question has to be, to what extent and in what circumstances do we think that the use of public coercion is justified against ordinary individuals? Coercion raises the stakes, and is always a two-edged sword. It is strictly necessary to control misconduct by some, and when it does so, it operates as a social good. But when it is misdirected, it can be the source of great social mischief. In dealing with the current concerns with social norms, we must, paradoxically, develop a normative view of when coercion is required.

I think the presentations that we heard today are, in fact, very comforting on this point because I found that all our speakers exhibited an implicit libertarian bias, which I am happy to report to you. The reason for this conclusion is as follows. I think that the gist of what Lisa Bernstein said, and what to some extent both Eric Posner and Randy Picker endorsed, was that a legal system could be both part of the problem and part of the solution. In some cases, it will intrude where it is not needed, and make informal adjustments more difficult than otherwise might be the case. To counter that risk, it may well be best to limit the occasions on which the state is prepared to back its commands with force, but to make sure that when it does exert force it goes for the knockout punch. But that said, within very broad ranges it is willing to tolerate all sorts of behaviors of which public officials might not approve. Even so, these behaviors will not attract coercive sanctions, positive or negative. That seems to be a fairly accurate description of the hands-off approach that government takes to the informal resolution of private disputes, and it could be easily carried over to other areas.

On this view, one can then mount a case for a limited government that is also a powerful government. But to do that, we have to figure out exactly where that government interferes with private conduct. Generally, that answer boils down to two separate cases, the first of which is breach of contract, where people who wish to resort to the legal forum have committed themselves to it in advance.

The second area has to do with the criminal side, the subject of remarks from Dan and Tracey. I think it is quite possible to find a system in which the use of aggression is only controlled by private contract. So what kinds of sanctions should be invoked to deal with aggressive behavior? One point that seems clear is that the optimal level of deterrence will not be obtained by using only ex post strategies that focus on individuals once they have already committed wrongs. Those rules pay little, if any, attention to the social conditions in which the wrongful conduct takes place. A fuller theory requires us to look at the local determinants of criminal behavior in the first place. And that, in turn, gets us to worry about the influence of intermediate institutions, which was the subject of Tracey's comments, and about the expressive functions of punishment, and the need to contain low-level signs of

social pathology, which is what Dan talked about. Finally, it is abundantly clear that social sentiments on wrongdoers have some influence over the crime rates. Let ordinary criminals be regarded as local heroes who act in defiance of state power, and that unfortunate sense of social solidarity will work to increase the overall crime rate.

Yet into this concern with social sanctions and moral persuasion, I want to stress a point that is too easily forgotten: in the midst of our revived interest in social sanctions and intermediate support networks, we ought *never* to forget that these systems are not, and cannot be, sufficient unto themselves to respond to the threat of criminal behavior. Rather, their role is one of important supplements to the traditional modes of criminal enforcement. The police do not only attend local meetings; they do not only act as public symbols; they do not have solely an expressive function. They also strong-arm individuals and throw them into jail. Given that power, we had better make sure that they are directing their force against individuals who should be targeted and not at those who should be protected.

Once we recognize that traditional enforcement is not displaced by social sanctions, then we should be alert to dual sanctions as the reason for the recent decline in levels of criminal behavior. In figuring out the influences for our recent good fortune, it is necessary to think about low levels of public surveillance and increased police presence on the streets. But it is also notable that the percentage of crimes that have been solved and cleared have moved up; that the period of incarceration for serious crimes has again started to increase; and that the conditions for parole have also been toughened. These factors taken together indicate that a fair bit of the old Chicago School—more deterrence leads to less crime—has to be included in the explanation for the recent drop in crime levels. And I think that there is less novelty in these joint explanations than is sometimes allowed. Perhaps, therefore, the “new law and economics” should not be oversold any more that we should oversell the New Deal.

With that said, I want to return to the ecumenical spirit that has characterized the remarks from the panel by noting that any successful understanding of, or response to, complex social phenomena or legal problems requires multiple levels of analysis, in which old-fashioned deterrence is mixed with new-fangled social theory. The theory of diversification that influences our investment decisions counsels us against putting all our financial eggs into one basket. In organizing our social response to criminal conduct, we should follow the same general strategy. We have to worry about the use and limits of legal coercion, which operates both as a complement to and as a substitute for various forms of social restraint. Working through this issue does not require a high-minded ideological commitment of the sort that I can generate on other occasions. But instead, it requires us to focus on the more mundane task of figuring out where social resources should be deployed so as to achieve the greatest net result from combining separate approaches. Any social or legal intervention is likely to generate both local and global effects, so that the task

of sound implementation will test our resolve and ingenuity in the years to come.

In closing, what I think is so nice about our panel is not so much that they all fall under a single rubric that they all have disclaimed, but rather that their diversity of approaches promises to yield overlapping insights on the proper organization of social and legal institutions. There are powerful interdependencies among individuals in society so that in one sense we all thrive or fall together. The choice of the correct social and legal norms can give us the tools to help improve our collective fate.

So with that said, and having kept, as everyone else did, in time, what we are going to do is take questions. You should address them to the panelists. I will be a very benevolent traffic cop to the extent that I think that there is something to traffic about. So questions, please?

AUDIENCE MEMBER 1: As I heard you say, many of these methods need to work together. As I understood many of the panelists say, the old school is sometimes and necessarily incompatible with the new social norms. How do you determine how much of each you need to bring to bear on any given situation?

POSNER: I'm not sure I have an answer to the question. It seems to me that we have different methodologies. There is some overlap and some difference, but methodology in a discipline means that you commit yourself to certain assumptions, follow through on them, see what rigorous adherence to those assumptions might produce, and apply them to different areas of life. I read sociology for the empirical data it supplies, and I read history, and I think about how I can explain these things using my framework. I'm open to other theories from other disciplines, but I have never found them as persuasive or powerful as I have found game theory, but Tracey would probably say the opposite, as would others.

MEARES: Eric's right, I probably would say the opposite. It might be because of the types of problems that I work with. His model, repeat games, I think, is not as useful to answering the questions that I'm trying to answer which address the ways in which poverty and crime are located in specific areas. The social organization model that was developed in sociology through the old Chicago School by two researchers named Clifford R. Shaw and John McKay in 1942 is particularly suited to that model.²⁶ It is very useful to look at communities rather than what individuals do—which I think is the game theory model really. Although I think both Eric and Randy would say maybe we are doing something at the community level, especially Randy's work. Randy wants to aggregate individual choices, and that is where it gets especially sticky. If you start doing a lot of reading in sociology, the community-level conception of social organization actually tries to distinguish that kind of

26. Clifford R. Shaw and Henry D. McKay, *Juvenile Delinquency and Urban Areas* (Chicago 1969).

aggregation from something that comes from the community. That gets really tough. So when you say, how much of the old model do I use? The answer is, very little. It is just not relevant to what I do, other than to say that this conception that I am working with really has much more explanatory power.

EPSTEIN: I would put the argument in the following way. Formally, what you have is a set of inputs, and you try to predict the outputs. Descriptively, the simplest form of the model says that we have a series of legal constraints on the one hand and social ones on the other. What we are trying to do is estimate the coefficients both to the legal sanctions and to the social sanctions, to predict the overall output. The model should never take the form that sets one or the other of these coefficients at zero. Rather, it generally turns out that as you move from area to area, the coefficients of the two items may well shift first one way, then the other. It seems to me that the model remains perfectly constant across these areas and that the only question to ask yourself is whether you are amenable to one form of understanding or the other. So, for example, if you were trying to figure out how exchange mechanisms work with respect to Professor Bernstein's standard fungible goods, you would predict a very rapid velocity of transactions with this homogenous product, which, in effect, allows you to have substituted commodities and so forth. Whereas the moment you start dealing with service industries, you would predict that the level of velocity of exchanges would be much slower because the substitution of one worker for another could alter the benefits provided. The legal rules reflect that difference with respect to both assignment and delegation. Free assignment for standard commodities, and no free institution of labor. One would surely expect that the social practices on some substitution . . .

BERNSTEIN [interjecting]: Except if the transaction turns out to be terribly important or complex despite the fact that you are dealing with a relatively standardized commodity. Even with standardized commodities, assignment is not looked upon in a terribly favorable light. [Professor Epstein begins to speak, and Professor Bernstein responds.] After you, Richard.

EPSTEIN: No, no, I think this is important. The grading system does not make cotton into a fungible commodity. Lisa told me the reason is that grading is sufficiently difficult, so that what you are purchasing is not only the cotton, but also the assessment that someone makes out of it, so that these are, in fact, service transactions that are embedded in commodities transactions. Once you understand these interactions, then it proves that the model is robust. Commodities are not pure types, service transactions are not pure types, and then you try to work your way through the cotton blenders . . . [interrupted by laughter]. I think a lot of what the panel members are saying is that you can be both rigorous and ecumenical.

AUDIENCE MEMBER 2: I am interested in the blending of church and state and police force, and I am curious as to whether, in your research, you have come to any conclusion about whether there should be more blending in the public education.

MEARES: In education? You should have asked me about my research! I can kind of speculate about the extent to which that would be beneficial to the organization. The theory says yes. As far as the actual empirical research, one of the interesting features of it is that the schools play very little role and some of them played absolutely no role in implementing this at all. I am not really sure why. One speculation is that the norms of church/state separation are much stronger and established with respect to schools and churches, and schools know this is something that they are not supposed to do. No one even thought about it with respect to the police, so when it was tried, I think City Hall and other institutions were shocked, and when it turned out to be beneficial and successful, they were cowed into not saying anything. But to get back to your first question, I think the implications and the theory behind it suggest that it would probably be a good idea. This, of course, means that someone will have to seriously think about the constitutional law questions. I have done a little of that, but that is certainly not my area. I have talked to Michael McConnell, who used to be here, about it, but those of you who know anything about First Amendment jurisprudence know that it is pretty much a mess and there is room to think about these issues.

EPSTEIN: Yes! I have a comment. I think that Tracey's instincts are right, and I will tie it into the general matters of decentralization. The Chicago school system, for example, until recently, was a highly centralized model. Everything came from the top, and it was very difficult to get at the reactions between the community of parent groups and church groups and crime groups. The parochial school system in the city of Chicago essentially works on a system of budget decentralization—"Monsignor, priest, operator, here is your budget for the year. You run this place, and at the end of the year, we will haul you onto the carpet and hold you accountable." That decentralization allows for a much greater interaction to take place between the school on one hand and other groups in local communities. And the success of the school system, I think, is going to come from the degree to which the public schools can engage in that degree of decentralization, or that voucher-type institutions and charter schools can push the process a little further. And those of you who saw the Mayor [Richard Daley] when he came here on Tuesday [November 18, 1997] would recognize that he is a raging bull when it comes to education inside the city. He regards it as his number one priority. If you do not work education, crime, illegitimacy, and jobs, then you do not stay together as a neighborhood. And it is nice to have a leader who feels strongly about this issue. Yes, questions?

AUDIENCE MEMBER 3: This is a question for Professor Picker. Have you done any work analogizing your model to the old school of law and economics? And by that I mean, say that you have a market for norms, transaction costs dominate the gains in superior norms, and that is what the services include?

PICKER: The answer is no, I guess. In these models there are no transaction costs—there are no costs of switching and no costs of identifying.

AUDIENCE MEMBER 3: Can you include information?

PICKER: Absolutely, and subsequent work is doing exactly that. At this point, I do not have anything to conclude. It is clear that introducing an even richer framework makes these issues more complicated. We can do this in six months, and maybe I will have an answer, but I do not have an answer now.

AUDIENCE MEMBER 4: It seems to me the norms that we have been discussing are more private norms. Surely there are norms out there that would involve what might be called public norms, that is, involving the government in some way to resolve a dispute instead of private mechanisms that have been developed between people. To the extent that those norms exist, has any of your research taken into account the public choice problems that might come to bear on these types of norms?

POSNER: I am critical of some work by others on similar grounds. They seem to think that when a bad social meaning exists—for example, people thinking that cigarette smoking makes them look cool—the appropriate response is simple. If the government could just tell people this is not true, that would change the social meaning of cigarette smoking; if the government could convince people to think that cigarette smoking was bad, then people would stop smoking. Their argument is that governmental discouragement is better than if the government did something more costly like throwing smokers in jail or subjecting them to other sanctions.

There are two problems with this theory. If the government intervenes too much in behavior people already value a great deal, they will be suspicious of the government rather than willing to change their views about some kind of behavior. Consider cigarette smoking. The government has indeed engaged in education campaigns to persuade people not to smoke, and while it is true that adults smoke less than they used to, teenagers are smoking more. You can tell a story about how teenagers like to rebel, and whenever the government says something is bad, they interpret that as good. In fact, there's a study which suggests that teenagers who read the warning labels on cigarette packages are more likely to smoke than teenagers who do not, which prompted the editor of the journal to write that maybe the government warning label should say, "Smoking is Cool."

The other problem is the public choice problem which is more directly your question. People are going to lobby the government to change social meanings. To give an example: flag burning. There are lots of disputes which are trivial in the sense of what is at stake. When you burn a flag, no one is injured in any material way, and yet recently, this was a huge issue, and the question is why? You can again tell stories about people lobbying against flag burning not because they care so much about whether somebody burns a flag or not, but because they want to show other people in their group that they are loyal to whatever the group's values are. But if the government actually did suppress flag desecration, the meaning of the flag might change. To honor the flag when the government is holding a gun to your head is not really to honor it. The flag becomes an empty symbol. Such paradoxes arrive where people lobby for laws which are self-defeating and interfere with the values

that they care about. So the analysis is quite difficult, and I am quite pessimistic about the government's ability to manipulate people's beliefs.

EPSTEIN: In terms of the cigarette model, the period of greatest decline in cigarette smoking was the period that had dubious health claims. Because when somebody puts smoking in an advertisement that somebody else cares to watch, the message that my cigarette does not hurt you contains the implicit message that everybody else's will kill you. The smokers of the other brands read that message, and most of them don't switch to the preferred brand, but drop out altogether. So in the 1954-to-1956 period, declines were rapid, and this suggests, in effect, that in some cases the centralized norm management will have very deleterious effects. And the other point is, when a government creates a norm at the center of that table, it does not act solely by persuasion. Governments will always rely on coercion. The rise of Jim Crow and the rise of Nazism both had very extensive propaganda machines that were associated with them. I do not like that coupling arrangement. I think state norms are much more dangerous than missionary norms, regardless of whether we like the missionaries. They can't do much harm to you; the state can.

PICKER: Two things. Eric's example on smoking just shows us that if you do a bad job of manipulating how people see things, you get bad results. I agree, but the government must be sensitive to how people will perceive what the government is doing. This is just to say that social context matters and having the government say it is different than having the coolest kid in school say it. That's a big shock. [Laughter.] On the second point about coercion, I think that there is a risk of coercion, that the public choice issue is a genuine one, and that nothing I say addresses this issue. I have to figure out a story about how the government should do these things, but I do not have one right now. Nothing in the model itself envisions coercion—it is more a question about creating opportunities, creating coordination. In these models, once you create coordination, that is enough to drive things. And creating coordination does not necessarily involve any sort of mandatory force at all.

POSNER: But it could.

PICKER: It could, sure, the government could always be bad.

EPSTEIN: But it cannot always be good. [Laughter.] Never mind.

AUDIENCE MEMBER 5: To the extent your work has sociological ramifications and implications, are any of you working with sociology professors and people in that field?

MEARES: The answer is yes. I cannot continue my work without consulting people who have spent many years being trained in the sociology field. I mean, I have spent lots of time reading, and I have some pretty good conversations with sociologists like Robert J. Sampson, who is here at the University of Chicago and is considered the leading, or one of the leading, criminologists in the country. But you do not learn in law school how to do the empirical research that I have to do to make this project worthwhile and valid. The way to do that easily is to collaborate with other partners. Fortunately, at the University of Chicago, we have top-rate departments in sociology, economics, political science, and the like, and it is really easy to do.

POSNER: I don't.

PICKER: It's just me and my computer at this point.

BERNSTEIN: I talk with them, but don't always follow what they suggest.

AUDIENCE MEMBER 6: Is there a common philosophy behind this? I know we talked about interdisciplinary economics and sociology. Is there, or should there be? Because I am wondering if at one point something would unite the people on the panel besides just the buzzword of "social norms?" Is there some underpinning philosophy, or is that something you see would be a good addition to the New Chicago School, if there is anything like that, or should it shy away from some kind of philosophic notion about the way laws and individuals work together?

EPSTEIN: What you might do is to rank the people on the panel on a scale of the size of government from smallest to largest, and what will happen is that the array of views on social norms will find a continuum which is not dissimilar to that of people who do more traditional doctrinal analysis. The interesting question is whether there are shared perceptions—first, whether you think it should be big or small, and second, how people line up. And I would say, in this group, there are certainly no members of the continuum on the hard left. There are some people here who are certainly more to the right. [Picker points in Epstein's direction.] It goes from liberal to conservative or liberal to libertarian rather than far-left to far-right.

POSNER: I do not think my work has any particular ideological bent.

EPSTEIN: I have heard your speech on public choice. That was an ideological speech.

POSNER: I think that my work has interesting implications for how governments can change signals that produce harm.

EPSTEIN: It also has implications for them to describe the size of government.

POSNER: Well, it is not clear. The models that I use suggest that spontaneous order can be quite bad. You can get destructive fads and pointless fashions which are illustrated nicely in Randy's computer work. You can get inefficient equilibria, and it's never clear whether government intervention is going to make people better off or worse off in any given context. It's too difficult, too fact-specific an inquiry.

PICKER: You need a much richer model about how the government operates—to go back to the public choice question—before you can make that comparison, don't you think?

POSNER: I think you can be critical of facile proposals to use government to change people's views and behavior, but it's much more difficult to be positive, to make proposals. Questions about desirable government behavior can only be answered through trial and error and difficult practical judgments. Very little of what I do would shed light on this; I resist any ideological label.

AUDIENCE MEMBER 7: What are the possibilities for doing controlled experiments, talking about trial and error? Can social norms in the real world be tested or used for preventing some sort of negative outcomes?

PICKER: I think it's very hard. One of the things I like about this—I don't spend too much time confusing my models with the real world—is that one of the things we lack in social science is a framework in which we can run tests. And to the extent that the richer I make my computer models, the closer I come to something that tracks reality in a richer way than traditional economics does—the way people talk about building artificial societies and do some testing—to actually take that into the real world and do systematic tests, that's more a question for Tracey or Lisa.

MEARES: One of the things I'm trying to do with the church study is to use lots of different methods of gathering information. You can do qualitative interviews and surveys and focus groups, and you can gather information in all sorts of different ways and try to sit there and sift through it and try to isolate all the different phenomena that way. What we are trying to do with the church study is to try to show that there is a net social organization benefit with the social integration between the church and the police. It's not immediately obvious that there would be a net social organization benefit, because even as people become more embedded in institutions that suddenly have something to do with each other that historically have not, people embedded in a church, let's say, may withdraw, because they may not like the fact that the church now has something to do with the police. And police officers may think, "This is not really part of my job, this is not law enforcement." They may think that the job of police is to be primarily concerned with violations or some fraud thing that Richard likes to talk about—government is primarily concerned with . . .

EPSTEIN: What I said was . . .

MEARES: The problem is that law enforcement might be much more effective in communities when that distinction between law-abiders and law-breakers can be ambiguated in certain ways, so that those lines aren't as distinct. I understand what he is saying, that we want to continue to have police officers who continue to enforce the criminal law the way we often think about it. I want to also say that police officers can play a role in encouraging private law enforcement, and in the areas where I have been working, they have to play a role, because that is the only way you can have this kind of institutional coordination that makes private law enforcement possible.

EPSTEIN: My point was not that police only enforce the law, but also that they represent the law. When the police engage in one set of activities, it's going to influence the way they behave and are perceived by others. I think they'll be much more successful if they establish community relations—bike police, foot police, the whole bit, even church police—I'm all for it.

PICKER: It seems to me that cross-industry comparisons would be illuminating for this.

BERNSTEIN: Yes, although it is imperfect, I can go through my data and note that my industries have different damage measures and look at how that affects the types of disputes that come to arbitration and other elements of the system. Or I can look at industries that have an equivalent of the Code's

impossibility provision and those that don't and go and look at how transactors actually react when a force majeure occurs, in an effort to gain a better understanding of how a rule affects what goes on out there in the world. Of course, you are not going to get the most pristine types of comparisons because there are always other aspects of the industries that need to be taken into account. The important thing is that you can get further than you could by ignoring the issue entirely, which is what scholars have done for generations.

AUDIENCE MEMBER 8: I wondered about one of the big problems of interdisciplinary scholarship generally and at UChicago in particular: often among lawyers who go out of their field, they kind of do it in a half-hearted way, and they are radically unfamiliar with the methods and the sorts of things that are being done in that field. I'm thinking in particular about history where lawyers often abuse history and come up with sweeping historical conclusions without really doing any of the historical work. I think this is really blatant in *The Tempting of America*²⁷—as sympathetic as I may be to its conclusion. I wonder what you have to say about that generally.

BERNSTEIN: Well, I guess in my view I do not necessarily see sociology as being outside of the law, nor do I see economics as being outside of the law. So I do not see myself as going so much into other areas. Lawyers have to be concerned with the ways that contracts are drafted and the ways clients behave when they actually perform contracts. These are things that are pretty squarely within the realm of what lawyers should know about. They may be things that are outside the realm of what legal academics usually think about when sitting in the library, but I do not think they're outside the realm of what lawyers think about in their practice.

There are a few areas in which I do feel I am on unsure ground—sometimes my analysis relies on properly understanding religious or regional social norms. When I studied the diamond industry, the fact that many transactors are Orthodox Jews meant that I had to go look at the religious court system and what it meant to have a judgement against you in terms of what happened to you in synagogue on Saturday, in terms of who would sit with you and who would invite you to Sabbath dinner. And it was helpful that I had some personal experience in that community. But when I'm going and talking to Southern cotton dealers who mention the remains of the "culture of honor" in the old South, I'm a little further removed from my personal experience and do wish that I knew a little bit more about participant-observer sociological research. Still, I think you're overstating a little bit the extent to which at least I am crossing disciplinary bounds.

PICKER: To say that it's hard to do it right is right. It is. It's hard to do that and actually master a substantive area of the law. We just have high expectations at the University of Chicago Law School—you know that as well,

27. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free 1990).

I guess. I have a great feature in that this is completely new and in a bunch of different areas there a people trying to do this. It's not as if there's this 40-year tradition of computer-based agent research that I'm working within. I'm not. We're all stumbling around in the dark trying to figure out what piece of the elephant we're touching. Ten years from now we'll have a better feel for it. Me, I mean, I have no discipline and no standards!

POSNER: There's always a danger of superficiality in interdisciplinary work. It is a danger on both sides. Economists sometimes produce bad arguments about the law, because they do not understand the legal issues that are involved. Lawyers sometimes use bad economics.

MEARES: Often if you look at the sociological literature I have been working with, it is not that there are sociologists who are trying to do law, there are sociologists who fail to recognize the relevance of law, in particular the relevance of government power in the models they're looking at. For example, the Shaw-McKay piece I've been talking about—the way that communities are constructed.²⁸ The way that they imagine this is that these spaces in the cities were created entirely by the market, that is, that the places that were likely to have the forced organizational structures, the police-prevalent friendship networks and community-level supervision of teen peer groups and the like, were functions of the fact that the least desirable places in the cities are next to industrial parks, and the people who are willing to move to those areas are recent immigrants and poorer people, and over time and depending on their circumstances, they would move, but this was entirely the result of the market. There was nothing the government could do to manipulate the structure of the community. And of course, a lawyer would look at that and say that was absolutely wrong and this is exactly what we do. So there are lots of things that we can do to actually add to sociology qua sociology and help better explain it.

EPSTEIN: I think that infrastructure is extraordinarily important, even in and for markets. There is a tendency for people to forget that. And as for the disciplinary side, there are only three cures to the ill. One is that you could become jointly expert; we get lots of joint J.D.-Ph.D. types, which was certainly uncommon when I first came out of law school. Second, you can collaborate; and third is to have lunch and attend conferences with people and hope to pick up knowledge in other fields. The answer is that there is no dominant strategy. A lot depends on the work you are doing, on your intellectual bents and biases, and on your curiosities and energies.

AUDIENCE MEMBER 9: Did any of you tell Jeffrey Rosen that there was no New Chicago School, or did he miss it?

EPSTEIN: He did not ask. Not only that, you've got to understand he did not quite understand the old Harvard school. His description of Langdell was, to put it mildly, wrong. One of the reasons you misconstrue novelty is you don't understand the past. If you haven't read the classical authors, you can

28. Shaw and McKay, *Juvenile Delinquency and Urban Areas* (cited in note 26).

describe them in two sentences and get them wrong. It's not necessarily perverse, but it is inaccurate.

PICKER: The story here is no school, no story. He's a journalist building up a story, and if the existence of a Chicago school is a useful fiction for doing that, I'm all in favor of it.

EPSTEIN: And on that note, we'll take one more question.

AUDIENCE MEMBER 10: I'm still puzzled by the question of norm seeding. I guess my problem is, I'm trying to determine to what degree what is being said here is purely descriptive or if it has some prescriptive element to it. If we take into account what Ellickson said, what Picker said, what Bernstein said, we're getting a private seeding of norms going on, in which case I do not see that there is anything that can really be done. Either private parties will seed, or they won't. I do not see what anyone on the outside can do. If we do say that a government can seed positive social norms, my question is, if there is internal support in the government to seed these norms, wouldn't we imagine that if these norms already exist and there are pockets of them and if they do already exist and they haven't spread in the way that Professor Picker would have predicted they would spread, maybe we can come to the conclusion that those aren't positive social norms and aren't worth having the government seed them?

PICKER: What matters most directly in my model is the difficulty in achieving coordination. That's the narrow issue. It's certainly quite plausible that the norm hasn't taken off because it's just no damn good. The other possibility is that coordination hasn't happened. The joy of norm-seeding is that it's going to be difficult for the government to coordinate people and say, "Guys, you have this, now take this norm and run with it." If it's not a good norm, it will die, and they'll revert back to the old. That is why I think my losses are pretty bounded, and the upside is there, I think.

POSNER: That's not true, though. You can imagine the government seeding a norm which is highly beneficial to the majority and highly harmful to the minority of people.

PICKER: Yes, my model is one in which we have lots of homogeneity, and what this looks like when we get a real situation has to be looked at very carefully.

EPSTEIN: But one other point: Ellickson's title is a bit overstated. It's called *Order Without Law*.²⁹ In the preface, he noted that he first tried to do this study with respect to walls between neighbors where there are lots of different variations that he thought were grist for his empirical mill. What he found out was that he could not do the study. There had been a federal regulatory system or a state system which had been imposed which had essentially said that everyone had to build party walls in the same way. And the difference is this: Ellickson is talking about norms which had no public enforcement—that is the open fields and closed fields. This party wall stuff

29. Ellickson, *Order Without Law* (cited in note 2).

had a state inspector coming around, and you get legal centrism wiping out decentralization. Whether it's good or whether it's bad is a different question, but the idea that all these customs on private walls are going to be robust against legal enforcement depends on whether you're talking about common law enforcement by private parties or about centralized administrative enforcement. When you go to the latter, the stakes get higher, and if you're wrong, you're very wrong, and even if you're right, God bless you. And with that, I'd like to thank our panelists.

[Applause].

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