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## PREFACE TO A CONFERENCE ON TRUST

LAWRENCE LESSIG

I begin with two stories, and then an argument.

First, the story: in the testimony leading up to the passage of Congress' latest law to require technology to protect children from porn in cyberspace, the anti-regulation, pro-porn lobby had an interesting ally. Testifying against the statute was the United States Catholic Conference. Though the Conference obviously does not want their students to consume pornography, it also does not want its students to consume pornography simply because they cannot. They want their students to *choose* not to consume pornography; and the only way to teach them to properly choose is to give them an environment where they can choose badly. Thus the conference opposed legislation that would mandate filtering in libraries and schools. Schools should be free, the conference wrote, to choose "ethical internet use policies" over technology if that is what the school prefers.<sup>1</sup>

That is story one; here is story two: one of the most important and troubling industries in cyberspace is an industry that supplies software to companies to make it possible for them to monitor, surreptitiously, the online activities of their employees. And one of the most significant and troubling uses of this software has been explosion of spouse spying—using this code to spy on spouse.<sup>2</sup> With it, emails are captured and reported; electronic contact monitored; and any doubts or lack of trust between spouses, corrected—one way or another.

Now the argument: more than law regulates behavior. More than law constrains how people behave.<sup>3</sup> Norms, for example, also regulate behavior. So too does the market regulate behavior. And, in a sense that will be important to all that follows, architecture regulates behavior. These four modalities together constrain individuals as well as empower them. In this

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<sup>1</sup> See letter from United States Catholic Conference to John McCain, United States Senator (Mar. 22, 1999) (on file with author).

<sup>2</sup> See Libby Copeland, *Cyber-Snooping Into A Cheating Heart: Spyware Gives Suspicious Spouses the Drop on Online Adulterers*, WASH. POST, Aug. 8, 2000, at C01, available at <<http://www.washingtonpost.com/wp-dyn/articles/A52154-2000Aug7.html>> (reporting that the software, originally designed to enable parents to monitor their children's use of the internet, is cheap, easy to obtain, easy to use, and that one such software retailer reports that 95% of its clientele are suspecting spouses).

<sup>3</sup> See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998) (describing law as a force that constrains behavior by establishing ex-post sanctions).

sense, they all regulate. My aim these past few years has been to understand how these different modalities interact.<sup>4</sup> How does law interact with norms to strengthen or weaken the regulatory force of norms? How do norms interact with law to make law more effective? In what ways does the market enable certain forms of democracy? How can democracy assure a well functioning market?

These interactions are crucial for regulatory strategy, and more importantly, they are not obvious. Often, how one modality supports or undercuts another is counterintuitive. Initially this work addressed the first set of these questions—how *law* and *norms* interact to affect, or change, their individual regulatory force. This, of course, has been the work of many others as well. Among lawyers, many of the most prolific are at this conference;<sup>5</sup> one that also inherited the prolific gene, Eric Posner, is not.<sup>6</sup> But more recently I have focused on the interaction between *law* and *architecture*, in that space where architecture is the clearest, or dominant regulator—cyberspace.<sup>7</sup> The question there, like the question that is asked about norms, like the question that any new Chicago-schooler asks generally, is how does one modality interact with another?<sup>8</sup> How in particular does law support certain architectures in cyberspace; how do those architectures, in turn, support certain kinds of law, and more importantly, certain values underlying law?

I agreed with Tamar Frankel that trust was an issue that many disciplines should study because I have become convinced that there is another interaction among modalities that we also need to understand. This is the interaction between *norms* and *architecture*. How do certain architectures enable certain norms; how do norms get undermined by certain architectures?

This is an interaction that is particularly important in the context of trust, and particularly in the context of trust just now. For as you will see, we are entering a time when architectures—structures for interaction, code built into the very environment of our interaction—can substitute for the “trust” we

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<sup>4</sup> See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE ch. 7 & App. (1999); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998).

<sup>5</sup> See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000) (“[T]he ‘sticky norms problem’ occurs when the prevalence of social norms makes decisionmakers reluctant to carry out a law intended to change that norm.”); Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (supporting “the use of norms in economic analysis of law” and arguing that “[n]orms are a vitally useful tool for explaining behavior and predicting the effect of legal rules”).

<sup>6</sup> ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

<sup>7</sup> LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

<sup>8</sup> Lessig, *The New Chicago School*, *supra* note 3, at 661. Both the “old” and “new” Chicago schoolers approach the question of regulators other than law. However, while the old Chicago school seeks to minimize the role of law and activism, the new Chicago school, endorsed by a wide range of scholars, seeks to enhance activism through the use of alternative regulators, and hopes that the law can do more than it is currently doing. See *id.*

ordinarily associate with the interactions humans have with humans. Humans, in other words, can interact with machines, in ways that obviate their need to develop trust with other humans. The need for “trust,” then in these cases at least, disappears. Trust, in these cases, gets supplied through other institutions.

One example will make the point. Imagine you are in an online discussion space where people are talking about some health matter. Members of this community join the community simply by signing up. Imagine they spend many months in this community exchanging views about some matter of health—for example, cancer, or AIDS. Now imagine some in this community represent themselves to be doctors. They assert that they are doctors, and then make the sort of claims that should be respected only if they are in fact doctors.

How would members of that community know these people are doctors? Well of course, in the exchange and in the coming to know these people on the list, members could come to believe, through the nature of the exchange, that those calling themselves doctors are in fact doctors. Members could, in other words, come to *trust* them. But equally so, we could imagine the use of a technology—a digital certificate, for example—to replace the trust we individually must have. This certificate would be signed by, for example, the American Medical Association, and would establish with very high probability that the holder of the certificate was who he said he was.<sup>9</sup>

We can thus use *code*, or a technical architecture, to make it so that we do not need to trust. Or more precisely, we can trust the technology rather than develop the knowledge we need to trust humans. That of course is also the point of the second story I told above: suspicion is often (though not often enough) baseless; baseless suspicion can be cheaply erased; technology can make that erasing possible. It could substitute, that is, for other more painful, and difficult, modes by which trust between spouses can be achieved (like talking to each other).

The trade-offs in all these contexts are obvious, but the full range of consequences are not. For it is the view of many that there is an externality created by our willingness to substitute technology for trust, and that this externality presents a classic public goods problem. For any particular trade-off, it might be individually rational to substitute technology for trust, but collectively, the cost may well outweigh the benefit. We may, in other words, lose something by losing the ability to use norms to support trust, rather than technology.

This trade-off would not be understood by denying the dilemma. Claims such as “trust makes relationships efficient”<sup>10</sup> may well be true given a certain constellation of technology, but another constellation technology may be more

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<sup>9</sup> LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 10, at 35, 38-39, 42 & 49-53.

<sup>10</sup> FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 150 (1995) (“Contracts allow strangers with no basis for trust to work with one another, but the process works far more efficiently when the trust exists.”).

efficient than that supporting institutions of trust. The point is that the value of trust for a particular purpose is obviously, and plainly, contingent upon a pile of factors that cannot be known in the abstract. How one will substitute for the other is something we can only know in particular cases. But the general question is whether this substitution affects other social abilities. Does it harm other aspects of a social environment that are not fully accounted for in the narrow account of the efficiency of any particular kind of transaction? These other abilities may be, for example, the production of social capital. The substitution of technology for norms may have the side effect of undercutting ecologies that support the production of social capital. Burglar alarms make it less necessary for you to know your neighbors; credit card verification systems make it less necessary to know your customer. These each may be locally rational, but the question is whether they have a side effect that is collectively harmful.

It is the work of many who are here, as well as Robert Putnam who is not,<sup>11</sup> to argue that in fact we are seeing an environmental effect in the production of social capital.<sup>12</sup> Like the ozone layer, a hole in social capital has opened up in social space, and the question is why. The answer is not to condemn technology indiscriminately—some technologies produce social capital, just as some might support building trust. Rather the answer is to investigate how this interaction between structure of control through norms and structure of control through code works.

This is important now not because this is the first time we have seen an interaction between norms and technology. Obviously, technology is not new, and we have been struggling with the effects for as long as we have been struggling. But what is new is a difference of degree that matures, in my view, into a difference in kind. So plastic and so controllable is the environment of cyberspace, and so complete and pervasive will that environment become in our life, that we must with new energy focus a series of questions about how one may affect the other.

My suggestion is that this inquiry leads us into oddly different directions. It forces us to focus on the question that the Catholic Conference understood. But once we understand that that is the question we must answer, we will also see how little we understand about its answer.

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<sup>11</sup> See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 65 (1995) (attributing the decline of social capital ("features of social organization such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit") to a combination of factors, including the emergence of women in the labor force, a change in the demographic makeup of the family, and the technological transformation of leisure).

<sup>12</sup> FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY, *supra* note 10, at 11 (noting that while it is relatively easy for governments to enact policies that deplete social capital, it is much more difficult to replenish the supply).