THE NEW CHICAGO SCHOOL

*LAWRENCE LESSIG**

ABSTRACT

In this essay, the author introduces an approach (''The New Chicago School'') to the question of regulation that aims at synthesizing economic and norm accounts of the regulation of behavior. The essay links that approach to the work of others and identifies gaps that the approach might throw into relief.

MY aim in this short essay is to outline a research program for what I will (playfully) refer to as the New Chicago School. The outline is of necessity a sketch, and its main objective is simply to mark places where methodological work still needs to be done. But in drawing this sketch, I hope to identify a distinctive approach to the question of regulation—an approach shared by a wide range of scholars (many of course not from the University of Chicago), common in many parts of the academy (within and without the legal academy), and yet usefully seen (rhetorically at least) as a successor to what we might call an Old Chicago School.

Both the old school and new share an approach to regulation that focuses on regulators other than the law. Both, that is, aim to understand structures of regulation outside law's direct effect. Where they differ is in the lessons that they draw from such alternative structures. From the fact that forces outside law regulate, and regulate better than law, the old school concludes that law should step aside. This is not the conclusion of the new school. The old school identifies alternative regulators as reasons for less activism. The new school identifies alternatives as additional tools for a more effective activism. The moral of the old school is that the state should do less. The hope of the new is that the state can do more.

Marking this distinction more completely is the aim of the following sec-

* Jack N. and Lillian R. Berkman Professor for Entrepreneurial Legal Studies, Harvard Law School. This essay was presented at a conference on ''Social Norms, Social Meaning, and the Economic Analysis of Law.'' Thanks to Larry Kramer and Tracey Meares for helpful discussions of an earlier draft of this essay and Bruce Ackerman, Richard Craswell, and Timothy Wu for extremely helpful comments.

[*Journal of Legal Studies*, vol. XXVII (June 1998)]
 0047-2530/98/2702-0018$01.50

tion. In the section following that, I sketch briefly links between this new school and the work of others. In the final section, I point to methodological gaps to be filled if the work of the new school is to have any success.

Chicago Schools, Old and New

Behavior is regulated[1] by four types of constraint.[2] Law is just one of those constraints.[3] Law (in its traditional, or Austinian, sense) directs behavior in certain ways;[4] it threatens sanctions ex post if those orders are not obeyed. Law tells me not to deduct more than 50 percent of the cost of business meals from my income taxes; it threatens fines, or jail, if that order is not obeyed. Law tells me not to drive faster than 55 miles per hour on a highway; it threatens to revoke my license if that order is not obeyed. Laws tell me not to buy drugs, not to sell unlicensed cigarettes, and not to trade across international borders without first filing a customs form—all this with the threat that if these orders are not obeyed, I will be punished. In this way, we say, law regulates.[5]

Social norms regulate as well. They are a second sort of constraint. Norms say I can buy a newspaper, but cannot buy a ''friend.''[6] They frown on the racist's jokes; they tell the stranger to tip a waiter at a highway diner; they are unsure about whether a man should hold a door for a woman. Norms constrain an individual's behavior, but not through the centralized enforcement of a state.[7] If they constrain, they constrain because of the enforcement of a community. Through this community, they regulate.

[1] As will become obvious, I mean ''regulation'' here in a special sense. Ordinarily, ''regulation'' means an intentional action by some policy maker. See, for example, Anthony I. Ogus, Regulation: Legal Form and Economic Theory 1–3 (1994). I do not mean the term in that sense. I mean the constraining effect of some action, or policy, whether intended by anyone or not. In this sense, the sun regulates the day, or a market has a regulating effect on the supply of oranges.

[2] I do not mean that these are the only constraints on behavior.

[3] Compare Robert M. Cover, Nomos and Narrative, 97 Harv. L. Rev. 4, 4 (1983).

[4] Obviously it does more than this, but put aside this argument with positivism; my point here is not to describe the essence of law; it is only to describe one aspect. Its other aspects are well described in criticisms of positivism in its broadest forms. See Jules L. Coleman, Markets, Morals and the Law 3–27 (1988).

[5] How law regulates is a subject I describe more; see pp. 677–80 *infra.*

[6] Meaning that if it were plain that I had ''bought'' the loyalty of another, that loyalty would not be the ''loyalty'' of a ''friend.''

[7] As Richard Posner defines it, a social norm is a ''rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with.'' Richard A. Posner, Social Norms and the Law: An Economic Approach, 87 Am. Econ. Rev. 365 (1997).

So too do markets regulate. Markets regulate through the device of price. The market constrains my ability to trade hours of teaching for potatoes, or my children's lemonade for tickets to the movies. This constraint functions differently from a sanction; so too is its meaning distinct from the meaning of a sanction.[8] It is distinct from law and norms, even though parasitic on law (property and contract) and constrained by norms (again, one does not ''buy'' a ''friend''). But given a set of norms, and scarcity, and law, the market presents a distinct set of constraints on individual and collective behavior. It establishes a third band of constraint on individual behavior.

And finally, there is a constraint that will sound much like ''nature,''[9] but which I will call ''architecture.'' I mean by ''architecture'' the world as I find it, understanding that as I find it, much of this world has been made. That I cannot see through walls is a constraint on my ability to snoop. That I cannot read your mind is a constraint on my ability to know whether you are telling me the truth. That I cannot lift large objects is a constraint on my ability to steal. That it takes 24 hours to drive to the closest abortion clinic is a constraint on a woman's ability to have an abortion.[10] That there is a highway or train tracks separating this neighborhood from that is a constraint on citizens to integrate.[11] These features of the world—whether made, or found—restrict and enable in a way that directs or affects behavior. They are features of this world's architecture, and they, in this sense, regulate.

These four constraints, or *modalities* of regulation, operate together. Together, they constitute a sum of forces that guide an individual to behave, or act, in a given way—the net, as Robert Ellickson might describe it,[12] of the regulatory effect to some behavioral end. We can represent this combination in the following way (see Figure 1):

[8] See the discussion in Dan Kahan, What Do Alternative Sanctions Mean? 63 U. Chi. L. Rev. 591, 617–30 (1996).

[9] I use the word ''nature'' here not unaware of the problems with the term. I mean it in the quite innocent sense of how we find the world at any one time, even though, or even if, how we find it is always made.

[10] Compare Casey v. Planned Parenthood, 505 U.S. 833, 918 (1992) (J. Stevens, dissenting in part): if ''the 24-hour delay is [to be] justified by the mere fact that it is likely to reduce the number of abortions,'' then ''such an argument would justify any form of coercion that placed an obstacle in the woman's path.''

[11] Todd Rakoff, Washington v. Davis and the Objective Theory of Contracts, 29 Harv. C. R.-C. L. L. Rev. 63, 86–87 (1994).

[12] See Robert C. Ellickson, Order without Law 131–32 (1991): ''[D]ifferent controllers can combine their efforts in countless ways to produce hybrid systems of social control''; and Robert C. Ellickson, A Critique of Economic and Sociological Theories of Social Control, 17 J. Legal Stud. 67, 76 (1987). Ellickson's emphasis is slightly different, focusing on the selection among controllers that society might make. But the prescriptive choice requires an evaluation of the consequences of various mixes, and in this sense, the approach is similar.

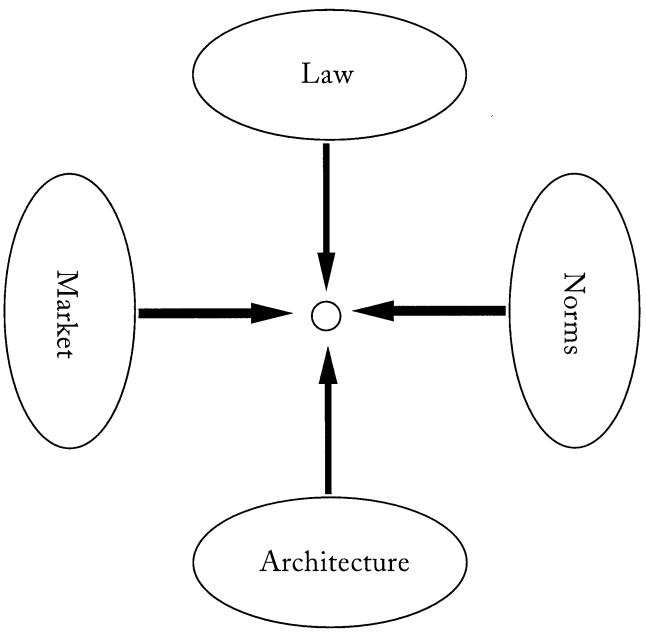

FIGURE 1

In the center is a regulated entity—the entity feeling or suffering the constraints being described. Each of the four ellipses represents one modality of constraint. The net is the sum of these different modalities. Change any one, and you change the constraint that it presents. Change any one, and you change its ''regulation.'' More laws, less norms, different architecture, lower prices: Each changes the constraint on that regulated entity, and changing each constraint changes the behavior of that entity being regulated.

Now obviously, these four modalities do not regulate to the same degree—in some contexts, the most significant constraint may be law (an appeals court); in others, it is plainly not (a squash court). Nor do they regulate in the same way—law and norms, for example, typically regulate after the fact, while the market or architecture regulates more directly. The modalities differ both among themselves and within any particular modality. But however they differ, we can view them from this common perspective—from a single view from which we might account for (1) the different constraints that regulate an individual and (2) the substitutions among these constraints that might be possible.

Chicago schools, as I mean the term, emphasize this multiplicity of constraint and understand it from the perspective of rational choice.[13] The Old Chicago School does this as a way of diminishing the significance of law. It argues that law is, relative to these other constraints, a less effective constraint: Its regulations, crude; its response, slow; its interventions, clumsy; and its effect often self-defeating. Other regulators, the old school argues, regulate better than law. Hence law, the argument goes, would better let these regulators regulate.

This argument emerges from a number of departments within this old school. Some are focused on the market—Chicago school law and economics, for example, arguing in the domain of antitrust, that the market will take care of the problem of monopoly[14] or, in the domain of securities regulation, that markets will clear themselves of failure.[15]

Other departments are focused elsewhere. A growing contingent, for example, studies the effect of law on norms. Ellickson's work here is representative. In a brilliant and rich study of norm behavior among ranchers in Shasta County, California, Ellickson demonstrates law's relative insignificance as a regulator compared with norms. Even among lawyers practicing in the relevant legal field, Ellickson argues, norms, not law, tend to guide and constrain behavior.[16]

And finally, a third department (if not well known among fathers of the Old Chicago School) studies the relationship between architecture (in the broad sense that I mean here) and law. The pedigree here is quite long standing: Jeremy Bentham's panopticon is an obvious example;[17] Goffman's *Frame Analysis* is another.[18] A trivial reading of Michel Foucault (trivial if this were all one took from him) would be a third.[19] They all are understandings about how special and temporal structures regulate. They all

[13] This means simply a commitment to understanding as much of behavior as possible using the tools of economics, broadly defined. Thus, to the extent it adds to an understanding of social behavior, ''economics'' would include behavioral economics as well as conventional economics. See Cass R. Sunstein, Behavioral Analysis of Law, 64 U. Chi. L. Rev. 1175 (1997).

[14] See, for example, Gary Minda, Antitrust at Century's End, 48 S.M.U. L. Rev. 1749 (1995); and Herbert Hovenkamp, Antitrust Law after Chicago, 84 Mich. L. Rev. 213 (1985).

[15] See Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law, ch. 5 (1991).

[16] See Ellickson, Order without Law, *supra* note 12, at 70–71 (noting that local lawyers and judges were unaware of and did not consider important the relevant state fencing law).

[17] Jeremy Bentham, The Panopticon Writings (Miran Bozovic ed. 1995).

[18] Erving Goffman, Frame Analysis: An Essay on the Organization of Experience (1986).

[19] At the end, Foucault plays a much larger role in the story I am telling. See page 691 *infra.*

evince an understanding of how behaviors get constrained by these structures of social life, again whether found or made, whether intended or not. That America was a dispersed republic was a reason, James Madison argued, that it would not be captured by factionalism;[20] that the White House was a mile from the capital (separated by a swamp) was a reason that one would not capture the other. They all are examples of how architectures matter to constrain, and regulate, social life.

All three departments thus argue a common line. All three argue against the dominance or centrality of law. Each separately—and by calling it a school, I want now to consider them together—push the idea that these other domains displace the significance of law. Law should understand, within these separate domains, its own insignificance and, the old school implies, should step out of the way.

The New Chicago School aims at a different end. It shares with the old an interest in these alternative modalities of regulation. And it adopts as well a rational choice perspective that would help understand these modalities alternative to law.

But unlike the old school, the new school does not see these alternatives as displacing law. Rather, the new school views them as each *subject* to law—not perfectly, not completely, and not in any obvious way, but nonetheless, each itself an object of law's regulation. Norms might constrain, but law can affect norms (think of advertising campaigns); architecture might constrain, but law can alter architecture (think of building codes); and the market might constrain, but law constitutes and can modify the market (taxes, subsidy). Thus, rather than diminishing the role of law, these alternatives suggest a wider range of regulatory means for any particular state regulation. Thus, in the view of the new school, law not only regulates behavior directly, but law also regulates behavior *indirectly,* by regulating these other modalities of regulation directly. The point is captured in a modification of Figure 1 (see Figure 2).

Regulation, in this view, always has two aspects—a direct and an indirect. In its direct aspect, the law uses its traditional means to direct an object of regulation (whether the individual regulated, norms, the market, or architecture); in its indirect aspect, it regulates these other regulators so that they regulate the individual differently. In this, the law uses or co-opts their regulatory power to law's own ends.[21] Modern regulation is a mix of the two

[20] James Madison, The Federalist, No. 10, The Federalist Papers (Clinton Rossiter ed. 1961).

[21] There is no sharp line between these two forms of regulation. Obviously, for example, all indirect regulation involves direct regulation—that regulation that effects the indirect regulation.

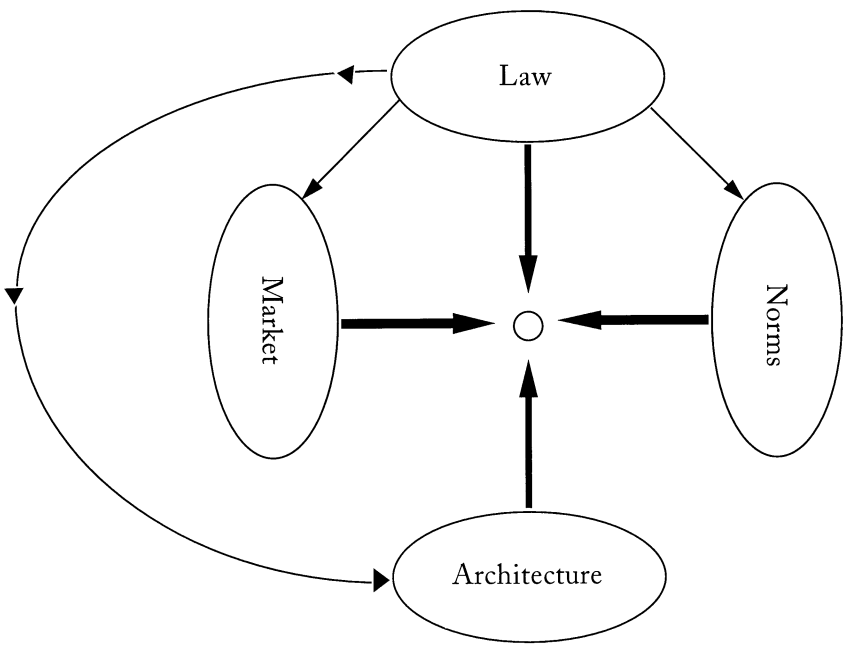

FIGURE 2

aspects. Thus, the question of what regulation is possible is always the question of how this mix can bring about the state's regulatory end; and the aim of any understanding of regulation must be to reckon the effect of any particular mix.[22]

Some examples will drive the point home.

Smoking. Say the government's objective is to reduce the consumption of cigarettes.[23] There are any number of means that the government could select to this single end. A law could ban smoking. (That would be law regulating the behavior it wants to change directly.) Or the law could tax cigarettes. (That would be the law regulating the market to reduce the sup-

[22] My focus in this essay is on law's meta-role in affecting other structures of constraints. But there is an equally important story about the market, for example, affecting other constraints, or norms or architecture as well. And with these other stories, there would be another range of arrows representing influence one way or the other.

[23] See Cass R. Sunstein, Social Norms and Social Roles, 96 Colum. L. Rev. 903 (1996); Smoking Policy: Law, Politics, and Culture (Robert L. Rabin & Stephen D. Sugarman eds. 1993); Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943, 950 (1995).

ply of cigarettes, to decrease the consumption of cigarettes.) Or the law could fund a public ad campaign against smoking. (That would be the law regulating social norms, as a means to regulating smoking behavior.) Or the law could regulate nicotine in cigarettes, requiring manufacturers to reduce or eliminate nicotine. (That would be the law regulating the architecture of cigarettes, as a way to reduce their addictiveness, as a way to reduce the consumption of cigarettes.) Each action by the government can be expected to have some effect (call that its benefit) on the consumption of cigarettes; each action also has a cost. The regulator must test whether the costs of each outweigh the benefits or, better, which most efficiently achieves the regulator's end.

Seat belts. The government might want to increase the wearing of seat belts.[24] It could therefore pass a law to require the wearing of seat belts (law regulating behavior directly). Or it could fund public education campaigns to create a stigma against those who do not wear seat belts (law regulating social norms, as a means to regulating belting behavior). Or the law could subsidize insurance companies to offer reduced rates to seat-belt wearers (law regulating the market, as a way to regulating belting behavior). Or the law could mandate automatic seat belts, or ignition locking systems (changing the architecture of the automobile, as a means to regulate belting behavior). Each action has some effect on belting behavior; each also has some cost. One question again is how to get the most ''belting behavior'' given the costs.

Discrimination against the disabled. The disabled bear the burden of significant social and physical barriers in day-to-day life.[25] The government might decide to do something about those barriers. The traditional answer is a law barring discrimination on the basis of physical disability. But the

[24] Cass Sunstein points to seat-belt laws as an example of ''government regulation permit[ing] people to express preferences by using the shield of the law to lessen the risk that private actors will interfere with the expression [through normative censure].'' Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev 1129, 1144 (1986). Alternatively, seat-belt laws have been used as the factual basis for critique of norm sponsorship as ineffective and no substitute for direct regulation. See Robert S. Alder & R. David Pittle, Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation? 1 Yale J. on Reg. 159 (1984). However, the observations may have been premature. John C. Wright, commenting on television's normative content, claims that ''we have won the battle on seatbelts, just by a bunch of people getting together and saying, 'It is indeed macho to put on a seatbelt. It is macho and it is smart and it is manly and it is also feminine and smart and savvy and charming to put on a seatbelt.' '' Charles W. Gusewelle *et al.*, Round Table Discussion: Violence in the Media, 4 Kan. J. L. & Pub. Pol'y 39, 47 (1995).

[25] The analysis here was in part suggested by Martha Minow, Making All the Difference (1991).

law could do more: It could, for example, educate children so as to change social norms (law regulating norms to regulate behavior). It could subsidize companies to hire the disabled (law regulating the market to regulate behavior). It could regulate building codes to make buildings more accessible to the disabled (law regulating architecture to regulate behavior). Each regulation might be expected to have some effect on discriminating behavior. Each also has a cost. The government must weigh the costs against the benefits and select the mode that regulates most effectively.

Drugs. The government is obsessed with reducing the consumption of illicit drugs. Its main strategy has been the direct regulation of behavior, through the threat of barbaric prison terms for violations of the drug laws. This policy has obvious costs and nonobvious benefits. But for our purposes, consider some nonobvious costs.[26]

As Tracey Meares argues, one way to reduce the consumption of illegal drugs is to use the social structures of the community within which an individual lives. These norms, she argues, could aid in the struggle against addiction since addiction is a social cost.

Law can support these structures of community. And law can undermine them as well. It can undermine them by weakening the communities within which these norms have their effect.[27] Meares argues that this is the effect of the extreme sanctions of the criminal drug laws.[28] In their extremity, these sanctions undermine the social structures that would otherwise support anti-drug policy. This is an indirect effect of the direct regulation of law, and an effect that at some point might overwhelm the effect of the law—a Laffer curve with respect to crime.

Of course the net effect of these different constraints cannot be deduced as a matter of theory. The government acts in many ways to regulate the consumption of drugs. It acts, through extensive public education campaigns, to stigmatize the consumption of drugs (regulating social norms to regulate behavior). It seizes drugs at the border, thereby reducing the supply, increasing the price, and reducing demand (regulating the market to regulate behavior). And at times it has even (and grotesquely) regulated the

[26] Tracey L. Meares, Social Organization and Drug Law Enforcement, Am. Crim. L. Rev. (1998), in press.

[27] Eric Posner points to contexts within which government action has had this effect. See Eric A. Posner, The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action, 63 U. Chi. L. Rev. 133 (1996).

[28] See Tracey L. Meares, Charting Race and Class Differences in Attitudes toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law, 1 Buff. Crim. L. Rev. 137 (1997).

architecture of illegal drugs, making them more dangerous and thereby increasing the constraint on their consumption (by, for example, spraying them with paraquat).[29] All of these together influence the consumption of drugs. But as advocates of decriminalization argue, they also influence the quantity of other criminal behavior as well. The question for the policy maker is the net effect—whether, as a whole, the policy reduces or increases social costs.

Abortion. One final example will complete the account. This is the regulation of abortion. Since *Roe v. Wade*,[30] the Court has recognized a constitutional right of a woman to an abortion. This right, however, has not totally disabled the power of governments to reduce the number of abortions. For again, the government need not rely on the direct regulation of abortion to ban abortion (which under *Roe* would be unconstitutional). It can instead use indirect means to the same end. In *Rust v. Sullivan*,[31] the Court upheld the right of the government to bias family-planning advice by forbidding doctors in (government-funded) family-planning clinics from mentioning abortion as a method of family planning. This is a regulation of social norms (here, within the social structure of medical care) to regulate behavior. In *Maher v. Roe*,[32] the Court upheld the right of the government selectively to disable medical funding for abortion. This is the use of the market to regulate abortion. And in *Hodgson v. Minnesota*,[33] the Court upheld the right of the state to force minor women to wait 48 hours before getting an abortion. This is the use of architecture (here, the constraints of time) to regulate access to abortion. In all these ways, *Roe* notwithstanding, the govyernment can regulate the behavior of women seeking or needing an abortion.

* * *

[29] In 1977, the U.S. government sponsored a campaign to spray paraquat (a herbicide that causes lung damage to humans) on the Mexican marijuana crop. This sparked a public outcry that resulted in congressional suspension of funding in 1978. However, following a congressional amendment in 1981, paraquat spraying was also used on the domestic marijuana crop during the 1980s. The publicity surrounding the use of paraquat in Mexico is generally believed to have created a boom in the domestic marijuana industry and also an increase in the popularity of cocaine during the 1980s. See generally A Cure Worse than the Disease? (Paraquat Spraying), Time, August 29, 1983, at 21; Michael Isikoff, DEA Finds Herbicides in Marijuana Samples, Wash. Post, July 26, 1989, at A17. See also Sandi R. Murphy, Drug Diplomacy and the Supply Side Strategy: A Survey of United States Practice, 43 Vand. L. Rev. 1259, 1274 n.99 (1990) (giving a full history of the laws passed relevant to paraquat).

[30] 410 U.S. 113 (1973).

[31] 500 U.S. 173 (1991).

[32] 432 U.S. 464 (1977).

[33] 497 U.S. 417 (1990).

In each example, law is functioning in two different ways.[34] In one, its operation is direct.[35] When it is direct, it tells individuals how they ought to behave and it threatens a punishment if they deviate from that directed behavior. Law could say, ''You may not smoke, you must wear seat belts, or you may not discriminate against the disabled; you may not take drugs; or abortion is prohibited.'' These would be examples of law regulating directly; they are a paradigm of legal action; they are the model of legal action against which most of our rights are checks.[36]

But in all of these examples, law is also regulating indirectly as well. When regulating indirectly, law changes the constraints of one of these other structures of constraint. Law can tax cigarettes, directly regulating the market so as to indirectly change the consumption of cigarettes. Law can put advertisements on television showing the consequences of not wearing seat belts, directly working on a norm against seat belts so as to indirectly effect the use of seat belts. Law can order that buildings be built differently, directly regulating building codes so as to indirectly regulate discriminating behavior with respect to the disabled. And obviously, law can regulate all three of these constraints simultaneously, when, for example, it cuts the

[34] Richard Craswell suggests other examples making the same point: the government could (*a*) regulate product quality or safety directly or it could (*b*) disclose information about different products' quality or safety ratings, in the hope that manufactures would then have an incentive to compete to improve in those ratings; the government could (*a*) allow an industry to remain monopolized, and attempt to directly regulate the price the monopolist charged, or it could (*b*) break up the monopolist into several competing firms, in the hope that competition would then force each to a more competitive price; the government could (*a*) pass regulations directly requiring corporations to do various things that would benefit the public interest or (*b*) it could pass regulations requiring that corporate boards of directors include a certain number of ''independent'' representatives, in hope that the boards would then decide for themselves to act more consistently with the public interest.

[35] This distinction between ''direct'' and ''indirect'' of course has a long and troubled history in philosophy, as well as law. Judith J. Thomson describes this difference in her distinction between the trolley driver who must run over one person to save five and the surgeon who may not harvest the organs from one healthy person to save five dying people. See Judith J. Thomson, The Trolley Problem, 94 Yale L. J. 1395, 1395–96 (1985). This difference is also known as the Double Effect Doctrine, discussed in Phillipa Foot, The Problem of Abortion and the Doctrine of Double Effect, in Virtues and Vices 19–32 (1978). See also W. Quinn, Actions, Intentions and Consequences: The Doctrine of Double Effect, 18 Phil. & Pub. Aff. 334–351 (1989); Thomas J. Bole III, The Doctrine of Double Effect: Its Philosophical Viability, 7 Sw. Phil. Rev. 1, 91–103 (1991); Frances M. Kamm, The Doctrine of Double Effect: Reflections and Theoretical and Practical Issues, 16 J. Med. & Phil. 571–85 (1991). But the trouble in these cases comes when a line between them must be drawn, and here I do not need to draw any line separating one from the other.

[36] As I argue more extensively below, constitutional law is well suited to the resolution of claims based on direct regulation and not well developed in its resolution of claims based on indirect regulation. In part, this distinction may be grounded in principle, but in the main, I suggest it is historical accident. See pages 687–90 *infra*.

supply of drugs, runs ''just say no'' campaigns, and sprays fields of marijuana with paraquat. Law can select among these various techniques in selecting the end it wants to achieve. Which it selects depends on the return from each.

These techniques of direct and indirect regulation are the tools of any modern regulatory regime. The aim of the New Chicago School is to speak comprehensively about these tools—about how they function together, about how they interact, and about how law might affect their influence. These alternative constraints beyond law do not exist independent of the law; they are in part the product of the law.[37] Thus the question is never ''law *or* something else.'' The question instead is always to what extent is a particular constraint a function of the law, and more importantly, to what extent can the law effectively change that constraint.

At its core, then, this is the project of the New Chicago School. Its aim is not only to understand the ways in which alternatives to law regulate,[38] but to understand how law might be used to make selections among these alternatives. How law, that is, functions as a regulator and meta-regulator; how it might direct itself, or might also co-opt, use, or regulate, these alternative modalities of regulation so that they each regulate to law's own end.

Links

Simple words (''new'') sometimes confuse, and so it might help to clarify a few points before going on. By calling this school ''new,'' I mean no radical break with the past. I do not mean to claim any extraordinary discovery or launch an approach to law that has to date not existed. Indeed, the work that I would include within the tent of this school has gone on for some time, at many different places.

The sense of ''new'' that I mean here is ''new'' for a *Chicago* school. The idea is to mark, within each of these separate departments, second-generation work for projects begun long ago. The label is less about discovery and more about organizing work that otherwise proceeds separately. Thus the test of the school's significance is not its distance from, or the drama of its break with, other work. The test is whether when viewing this work

[37] In this class of familiar argument, there is, for example, the point that the market is not independent of the law but itself constituted by the law. See Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873 (1987).

[38] There is growing empirical work attempting to measure the influence of normative constraints on behavior beyond the constraints of law. For an exceptional example, see K. Kuperan & Jon G. Sutinen, Blue Water Crime: Deterrence, Legitimacy and Compliance in Fisheries (working paper, Univ. Rhode Island, Dep't Environmental and Natural Resource Economics, December 1997) (arguing that the consideration of factors beyond the expectation of being caught for violating fishing rules is necessary to understand the behavior of fishermen).

together, we can draw insights that would otherwise be missed: insights, that is, about a common problem—understanding, and using, the various techniques of regulation.

The greatest attention to this new school within law has been to the work in just one of its departments—norm theorists.[39] The attention is drawn by the drama of some of its conclusions[40] and by the break it is said to mark with more traditional law and economics.

But the work here sets a pattern that I suggest is common throughout. First-generation norm theory established the relative autonomy of norms from law. This was much of the teaching of the early law and society movement;[41] it was also the conclusion of the most significant effort to bring the insights of that movement into mainstream law and economics—Ellickson's book, *Order without Law*. The lesson was that norms constrained independently of law; that they were not simply the dictates of law, and that they were not open to the simple control or direction of law. Norms were relatively fixed, essentially immovable, unyielding to the influences of law—they were in this sense nonplastic.

Second-generation work is skeptical about this antiactivist conclusion. For just because law cannot directly or simply control norms, it does not follow that there is not an influence in both ways (norms influencing law or law influencing norms) or that one cannot be used to change the other. New school thought within the department of norms is devoted precisely to the question of this interaction and to understanding the tools by which one may influence the other.

The scholars here are many, and their work is of growing influence. Lisa Bernstein's work, for example, emphasizes the importance of separation between the spheres of business norms and law (Llewllyn notwithstanding): because of a dynamic between commercial law and business norms, one may, she argues, crowd out the other.[42] Eric Posner likewise emphasizes the complexity of law's interventions into the domain of norms—how law can

[39] Enough attention to merit their own symposiums, and a recent article in the New Yorker. See Symposium, Law, Economics, and Norms, 144 U. Pa. L. Rev. 1643 (1996) (including pieces by Eric Posner, Lisa Bernstein, David Charny, Jason Scott Johnston, Edward B. Rock, Walter Kamiat, Richard H. McAdams, Wendy J. Gordon, and Richard Delgado); Jeffrey Rosen, The Social Police: Following the Law Because You'd Be Too Embarrassed Not To, New Yorker, October 20 & 27, 1997, at 170.

[40] Kahan, *supra* note 8, at 630–52.

[41] Though not to old school ends, the foundation for this work is still Stewart McCaulay, Non-contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55 (1963).

[42] See Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765, 68 (1996); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115 (1992).

destroy the norm it seeks to support, or how norms may explain the success or failures of laws.[43] Richard McAdams's work as well offers an understanding of esteem as a basis for norms and, hence, considers law's role in constructing and (more importantly) reconstructing esteem.[44] Dan Kahan considers curfews to reinforce community's norms, as well as shaming penalties to the same end.[45] Meares studies policing practices and their effect on social structures.[46] All this is second-generation work in the sense that I have described. All aims at understanding an interaction between the domains of law and norms;[47] and all yields conclusions about how law might better regulate norms so that norms better regulate to law's end.[48] All aims, that is, to understand both the direct and indirect ways in which law might regulate through the use of norms.[49]

The same pattern exists in the oldest department of the Old Chicago School—that department studying the interaction between law and the market, ordinarily monikered ''law and economics.'' First-generation work established the relatively autonomous and efficient regulations of a market relative to law. This was Chicago school law and economics.[50] But the second generation works to more completely understand the interaction between law and the market, as a means to understanding better how law might use the market to its own ends. Examples are work substituting incentive-based regulation for command and control regulation,[51] or work creating markets

[43] See, for example, Posner, *supra* note 27.

[44] See Richard H. McAdams, The Origin, Development and Regulation of Norms, 96 Mich. L. Rev. 338 (1997).

[45] See Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349, 373–89 (1997). For criticism of Kahan's shaming views, see, for example, James Q. Whitman, What Is Wrong with Inflicting Shame Sanctions? 107 Yale L. J. 1055 (1998).

[46] See Meares, *supra* notes 26 & 28; Tracey L. Meares, It's a Question of Connections, 31 Val. U. L. Rev. 579 (1997).

[47] A related body of work is represented in Tom Tyler, Why People Obey the Law (1990). Tyler is similarly addressing the constraint of norms, though his account is more directly psychological. See also Robert H. Frank, Passions within Reason (1990).

[48] Law's relation to norms need not always be supportive. An important function for law is to combat ''bad norms.'' Posner, *supra* note 7, at 367. The best example of this is in the context of social norms about racism. See Lessig, *supra* note 23, at 965–67.

[49] I would also include in this context the extraordinary work of Randal Picker. Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms, 64 U. Chi. L. Rev. 1225 (1997). Picker models norm development, suggesting small perturbations can at times yield significant shifts in norms. One conclusion is that a government could experiment with the changing of norms, by tinkering with existing norms, to discover how behavior here might change.

[50] See, for example, Gregory S. Crespi, Does the Chicago School Need to Expand Its Curriculum? 22 Law & Soc. Inquiry 149 (1997).

[51] See Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 1–4 (1992); Stephen Breyer, Regulation and Its Reform 270 (1982); E. Donald

in pollution rights as a means to better control pollution.[52] The work of Susan Rose-Ackerman in *The Study of Corruption*[53] or of Jon Hanson and Kyle Logue in the regulation of cigarettes[54] are two examples of a much larger class. This work seeks a more articulated understanding of the relationship between regulation and market incentives and seeks to use this better understanding to better understand how to achieve regulatory ends.

And finally, there is a department of architecture in this new school—again, a department focused on how architectures can be used to achieve law's ends and how law can affect these architectures. Of course within architecture proper—the study of building and community design—this has been the attention of this century's work.[55] But within law, I mean ''architecture'' in a more notional sense. The examples here range at two extremes—at one, students of political geography and of the relationship between community design and political ends. Jerry Frug and Richard Ford are the best examples of this approach.[56] Both examine the relationship between geographic and political communities and the values that these communities make possible. In both cases, the relationship is not passive: Each considers how architecture can be used to change social life, or differently constrain individual life, the better to advance social or collective ends.

At the other extreme are students of the regulation of cyberspace, exploring how architectures of cyberspace embed and extend political values. First-generation work here spoke of the architectures of cyberspace as given; they treated the relative *unregulability* of the space as a necessary feature of the space, and they reveled in the libertarianism that this architecture would yield.[57]

Elliott, Recipe for Industrial Policy: Blending Environmentalism and International Competitiveness, 19 Can.-U.S. L. J. 305, 313 (1993).

[52] See John DeWitt, Civic Environmentalism: Alternatives to Regulation in States and Communities (1994); Tom Tietenberg, Environmental and Natural Resource Economics (2d ed. 1988); Susan Rose-Ackerman, Rethinking the Progressive Agenda: The Reform of the American Regulatory State (1992).

[53] Susan Rose-Ackerman, Corruption: A Study in Political Economy (1978).

[54] Jon D. Hanson & Kyle D. Logue, The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation, 107 Yale L. J. 1163 (1998).

[55] See, for example, the work of Jane Jacobs, The Death and Life of Great American Cities (1961).

[56] See Richard Ford, The Boundaries of Race: Political Geography in Legal Analysis, 107 Harv. L. Rev. 1841 (1994); Jerry Frug, The Geography of Community, 48 Stan. L. Rev. 1047 (1996).

[57] See, for example, John Perry Barlow, A Declaration of the Independence of Cyberspace: ''I declare the global social space we are building to be naturally independent of the tyrannies you [the governments] seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear''; and David R. Johnson & David Post, Law and Borders—the Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1387–91 (1996).

Second-generation work, however, is more critical of this relationship between architecture and regulability. Joel Reidenberg and Ethan Katsh are good examples.[58] Both explore how law might be used to regulate the architectures of cyberspace so that the architectures of cyberspace might better advance the ends of law—so that it might, that is, become more regulable. Again, the causation is not simple—no one believes that law can simply dictate how architectures are to be. But the failure of simple regulation is a problem for first-generation work only. The lesson of second-generation work is to look beyond the simple direct regulation that law might effect, toward the more complex mix of indirect regulation that it might yield. It might be impossible directly to order the architecture of cyberspace in one way, but might nonetheless be possible, through a mix of direct and indirect regulation, to achieve the same end indirectly.[59]

In each case, then, there is a common move. In each, a second generation reacts to passivity in a prior generation; in each, the second generation uses the insights of an earlier generation to understand how one domain may influence the other, how one might regulate the other.

A New Chicago School seeks a perspective that can speak in terms just as general as the regulatory terms of real world regulators. Regulators intervene invoking all four constraints; the New Chicago School seeks a way of understanding their interventions that is similarly comprehensive.

To find this understanding, however, there are a series of methodological gaps that must be filled. Identifying these is the real aim of this essay, and it is to that that I now turn.

Work to Be Done

I have outlined a structure of analysis that I call the New Chicago School and have linked that analysis to some representative work within the academy. In this last section, my aim is to identify methodological work left to

[58] See Joel Reidenberg, Lex Informatica: The Formulation of Information Policy Rules through Technology, 76 Tex. L. Rev. (1998), in press; M. Ethan Katsh, Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace, 1996 Chi. Legal F. 335.

[59] Thus, for example, Eugene Volokh makes the claim that government could not implement a digital identity system since it would be very easy simply to post digital IDs and have anyone copy them. Eugene Volokh, Freedom of Speech, Shielding Children, and Transcending Balancing, 1998 Sup. Ct. Rev. 31, 33 n.7. This analysis is incomplete, not only because it does not account for the self-policing power of digital certificates but also because it presumes that any such regulation is regulation alone, as it were. The requirement for digital IDs would no doubt be coupled with strict penalties for using fraudulent IDs, trafficking in fraudulent IDs, or using unverified IDs. The test for the success of regulation such as this is not whether any individual piece succeeds but whether the package succeeds. My claim is not that it necessarily would—just that whether it would depends on much more than the ability to evade any single part.

be done. What tools does the New Chicago School need? And what questions will this project leave unanswered?

My assumption is not that the tools that I describe do not exist or that they do not exist within economics. My claim is only that they need to become the ordinary tools of legal analysis, if the analysis the New Chicago School is to be carried into effect. Just as traditional law and economics has carried some of the tools of economics into law, my argument is that this broader project must carry these other tools into law. I am not arguing that it can; I am only identifying what would be needed if this more ambitious project were to succeed.

Objective and Subjective Constraints

As I have described the structure of constraints that regulate behavior, an ambiguity about ''constraint'' has been obvious. This is an ambiguity in the ways in which a constraint might function or operate as a constraint. Constraints can be either objective or subjective, or both.[60] A constraint is subjective when a subject, whether or not consciously, recognizes it as a constraint. It is objective when, whether or not subjectively recognized, it actually functions as a constraint. Not all objective constraints are subjective; nor are all subjective constraints objective. The risk of cancer from smoking is an objective constraint on smoking; denial is the condition of someone who subjectively ignores this objective constraint. The threats of a horoscope are not objective constraints, yet for many, they are subjectively quite significant. There is therefore a slippage between objective and subjective constraints, and this slippage will affect the optimal regulatory strategy.

The reasons for this slippage, or gap, are far broader than these two examples might suggest. Some have to do with the problems of rationality that Daniel Kahneman, Amos Tversky, and others describe.[61] But others are not the product of non- or irrationality. Some gaps are the product of incomplete internalization, in the sense that Robert Cooter describes.[62] And

[60] Because of this range of possibilities, I have not so far explained how it is that law or norms regulate. If, on the one hand, in the sense that I describe in this section, the constraint of law or norms is subjective, then law or norms regulate through the internal mechanisms of subjective constraints. If, on the other hand, the constraint of law or norms is merely objective, then the constraint regulates merely through the knowledge that someone has about the likely costs of one course of behavior over the other. In this sense, if I obey the law because it ''feels right,'' then that is subjective; if I obey the law because I calculate the expected value of following the law and it turns out to be positive, that is objective.

[61] See, for example, Amos Tversky & Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, in Judgment under Uncertainty (1982); Sunstein, *supra* note 13.

[62] See Robert Cooter, Normative Failure Theory of Law, 82 Cornell L. Rev. 947, 948 (1997).

some gaps are intended—purposefully built into a regulatory structure for the purpose of optimizing the incentives within that regulatory structure. Gaps of the first kind are considered in Cass Sunstein's article,[63] and I will not discuss them here. But consider the gaps from incomplete internalization and gaps intentionally maintained.

Incomplete internalization is most apparent in the contexts of norms:[64] Think of a foreigner coming to a community where the customs are quite different from her native land; she must learn these new customs, and in this process of learning, she miscounts the objective constraints on her behavior. Subjectively she is not constrained by the norms of this community, even if objectively she is. Or think of a child learning to behave within a family—taught what is right and what is wrong and, over time, internalizing what is right or what is wrong. In both cases, subjective constraints are constructed by the use of objective constraints on deviating behavior.

Contrary to the suggestion of some, however, internalization is relevant in contexts beyond norms.[65] In principle, one can internalize law just as one internalizes norms. Brokers in a market internalize the constraints of the market in a way that nonbrokers have not. And likewise, much of a child's education is about teaching the child to internalize the constraints of real space architecture, where those constraints do not in this sense take care of themselves. (Think of brushing one's teeth.) In each case, there is a structure to facilitate internalization; and in each case, the effectiveness of a regulation within this structure depends on whether and how behavior in each is regulated.

Cases of an intended gap are the subject of Meir Dan-Cohen's work on ''acoustic separation.''[66] Here rules create the impression of a constraint—subjectively, to guide individuals in the ordinary case to behave in what they believe to be a prescribed way. But in fact, in these cases, there is no objective constraint, or at least, the objective constraint functions differently from what the impression conveys. This might be an efficient use of a gap between objective and subjective constraints, even if, in many cases, the gap is unintended and counterproductive.[67]

In general, then, to understand the nature of a particular constraint, we

[63] Cass R. Sunstein, Selective Fatalism, in this issue, at 799.

[64] Becker defines norms as internalized, see Gary S. Becker, Accounting for Tastes 225 (1996), but following Posner, I think a norm can exist whether or not internalized. See Posner, *supra* note 7, at 365 n.1.

[65] See *supra* note 62.

[66] Meir Dan-Cohen, Decision Rules and Conduct Rules, 97 Harv. L. Rev. 625 (1984).

[67] See Carol Steiker, Counter-revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2532–51 (1996).

must determine first the extent to which an objective constraint *is* subjectively effective; second, the extent to which an objective constraint can be *made* subjectively effective; and, third, the extent to which what is not an objective constraint is, or could be made, subjectively effective. All three questions yield different answers depending on the constraint and context within which the constraint operates. But to understand how any particular regulation can be made effective, one must account for these dimensions of the four different constraints.[68]

[68] The differences here suggest two further dimensions along which we might order constraints, emphasizing again that constraints as kinds will not always order in the same way: immediacy, and plasticity. I sketch these briefly here.

Immediacy. By immediacy, I mean the directness of a particular constraint—whether other actors, or institutions, must intervene before the constraint is effective as a constraint. A constraint is immediate when its force is felt without discontinuity of time, or agency. Gravity (an aspect of architecture in the sense that I mean the term) is immediate; its force is constant and subject to the agency of none. Laws against tax evasion are temporally mediated, delivered long after the law-violating behavior occurs, and mediated by agency—a prosecutor must intervene for any objective force of the constraint to be felt. Tax laws need not be mediated of course: I may be the sort of person who feels the constraint of tax laws subjectively, and hence immediately, regardless of objective mediation.

All else being equal, the more immediate a constraint, the more efficient or effective it is as a constraint; the less mediated, the less effective or efficient is its constraint. For one seeking a more effective constraint, then, making its effect more immediate is one possible way.

Immediacy is important in part because of its predictive force. An immediate constraint is more likely to be effective. But more significantly, immediacy is important because the immediacy of a constraint can in principle be changed. The norms of table manners might operate only objectively for a young child; but over time, they can be made to operate subjectively as well. Whether and how the immediacy of a given constraint is changed depends on its plasticity. Some mediated constraints can be made immediate—Rohypnol makes the effect of drinking felt immediately; some immediate constraints can be mediated—alcohol might hide the pain of broken heart. How and whether these constraints can be changed depend on their plasticity, a quality that I now consider.

Plasticity. Plasticity describes the ease with which a particular constraint can be changed. If a bad song on the radio is a constraint on my happiness, that constraint is plastic: I can simply change the station. If a bad ''State of the Union'' address is a constraint on my happiness watching television, then that constraint is less plastic: most channels will carry the same event, so my ability to select out of it constrained. Plasticity also describes by whom a constraint can be changed. A constraint can be either individually or collectively plastic. We as a community may be able to change the norms of table manners. If so, then table manners are collectively plastic. But just because a constraint is collectively plastic, it would not follow that it would be individually plastic as well. Protest as I may, I cannot acting alone change the meaning of chewing with my mouth open or spitting at the table.

This distinction between collective and individual plasticity is relevant to the effectiveness of a given regulation. The less individually plastic a constraint, the more effective it is as a constraint; the more collectively plastic an otherwise individually nonplastic constraint, the more regulable that constraint is as a constraint.

The constraints of law are a paradigm here. Acting alone, I cannot change the law. But though laws are not individually plastic, they are, ideally, collectively plastic. I may not be able to change the law, but at least for some laws, it is the essence of democracy that we

This distinction between objective and subjective constraints, and these differences in directness and plasticity, point to the first tool that a New Chicago School requires if it is to describe the effect of constraints together. The tool is a way to distinguish objective from subjective constraints, as well as a way to understand what might make a constraint subjectively effective.

This tool is foreign to ordinary economics, since within ordinary economic analysis, such a distinction is not terribly important. Any entity that did not internalize objective constraints will, over time, fail. But within the broader structures of constraint that the New Chicago School explores, internalization cannot be presumed. Internalization, or subjective effect, is a variable to be explored, not a condition to be assumed. For in evaluating the relative strength of one regulatory strategy over another, the questions will always be to what extent the strategy relies on internalization (an efficiency question) and, second, to what extent it should.

Meaning as a Constraint

A second tool for the work of the New Chicago School is the capacity to speak of *meaning* as distinct from *norms.* The distinction is more than a terminological quibble. Something more than norms is needed if the constraint of norms is to be understood.[69]

If one watched what norm theorists did, one would think this point too obvious to remark. But when one listens to what they say, it is clear that there is more to be said. The regulatory effect of norms comes not from something physical or behavioral. The regulatory effect comes from something interpretive. The cost (whether internal or external) of deviating from a social norm is not constituted by the mere deviation from a certain behavior; it is a cost in part constituted by the *meaning* of deviating from a certain behavior. That meaning is a price, associated with a given action; but one

collectively be able to change such laws. Laws, in a democracy, are collectively plastic, while individually nonplastic.

Again, there is no fixed correlation between types of constraint and types of plasticity. Laws may seem quite plastic, until one thinks about constitutional law. Norms might seem quite rigid, until one thinks: bell-bottoms. Markets in places seem flexible (the music industry), in other places not (the auto industry). And architecture can seem absolutely inflexible (we will not travel faster than the speed of light, Star Trek notwithstanding), as well as plastic (plastics).

For the regulator, the significant question in any context is, Which constraint, among the four is, for a certain regulatory aim, most collectively plastic, while individually not plastic? In some contexts, that constraint may be law; in others, it may not. But whatever it is, the aim in a given context must be to identify which among the a set of constraints is most easily changed.

[69] I argue this point in Lawrence Lessig, Social Meaning and Social Norms, 144 U. Pa. L. Rev 2181, 2182–3 (1996), though the argument there is slightly different.

only understands that price by *interpreting* the action consistent with a norm, or the action deviating from this norm, in its context.[70]

Norm talk leaves ambiguous this distinction between the interpretive and behavioral. The traditional economist need not confront the fact that he is talking about something different—since ''norms'' sound behavior based, and economists have acted as if behavior interprets itself. Norms are treated simply as constraints enforced without the state.[71]

But my claim is that to understand this constraint, we must speak of ''social meaning.''[72] By ''social'' meaning, I mean to make an obvious distinction—the distinction between what some individual might think that an act, an omission, or a status means and what that same act, omission, or status means to a community of interpreters. Within law, there is a long tradition of speaking of the latter as an ''objective meaning'' and the former as a ''subjective meaning.'' We speak of a contract's objective meaning, for example, knowing quite well that a party may well not have intended the contract to have that particular meaning.[73] The same distinction exists in ordinary life as well: If an Englishman says to an African-American teen, ''Boy, how do I get to the subway,'' that statement is objectively an insult, even if subjectively it was neither intended, or understood, to be insulting.

My focus is on objective meaning, for only objective meaning is realistically manageable—either pragmatically or, I would suggest, consistent with principles of liberalism. In principle, that is, one might say that subjective meaning could be manipulated (think about ''brainwashing''); but it is easier, and more consistent with liberalism, to speak about techniques for manipulating objective meaning.

Richard Posner's article helps clarify the point.[74] There he points to an

[70] Of course there is an endless store of rich work on social meaning, both within law and outside law. I discuss this work in Lessig, *supra* note 23. See also William Ian Miller, Humiliation (1993), for a wonderfully rich example of a collection of such interpretive judgments. As Ellickson has argued, from the perspective of rational choice, the only weakness in many of these accounts is that they do not fit well into a theoretical perspective (Ellickson, A Critique of Economic and Sociological Theories of Social Control, *supra* note 12, at 98). We have many meanings but no theory of how meanings change.

[71] See, for example, Posner, *supra* note 7, at 365.

[72] Lessig, *supra* note 69, at 2183. McAdams offers a second, and extremely powerful, account of the necessity for interpretation. In his view, norm behavior is best explained through a theory of esteem. One obeys norms, that is, because in a particular context, not obeying a particular norm makes one a ''bad neighbor,'' a ''disloyal union member,'' or a ''dishonest person.'' What, in a particular context, entails those esteem judgments cannot be determined a priori. Instead, they each must be interpreted in a given context. In my language, that interpretation yields the social meaning of one action over another. It is, in McAdams' account, an essential feature of understanding the normative force of social norms. McAdams, *supra* note 44.

[73] See the discussion in Rakoff, *supra* note 11, at 76–82.

[74] Richard A. Posner, Social Norms, Social Meaning, and Economic Analysis of Law: A Comment, in this issue, at 553.

example that I have discussed elsewhere, regarding the regulation of dueling.[75] My claim was that if our aim was to change the ''meaning'' of refusing to duel, then different punishments could have different effects on this meaning. Within an honor culture, before the state attempts to regulate dueling, we might presume that the meaning of ''refusing to duel'' is relatively unambiguous: It means that one is a coward. In that context, if the state threatened jail for dueling, then that punishment would not change the meaning of ''refusing to duel''—the refusal would still signify cowardice, though perhaps a more understandable sort of cowardice.

But if the state made dueling a disqualification from public office, then ''refusing to duel'' may now have an ambiguous meaning. For now, an interpreter reading the refusal has two very different accounts of why the refusal was made: On one account, the refuser is a coward; but on another account, the refuser is answering a call to a higher duty—namely the duty of the challenged to keep himself open to serve in public office. By trading on the coin of honor, this punishment *ambiguates* the dishonor in a refusal to duel.

One can see this ambiguation, however, only if one distinguishes between objective and subjective meaning. For it is absurd to believe that the state's law *on its own* changes what the refusing dueler subjectively intends by refusing to duel. My claim is not that. My claim is only that the law changes (in the sense of ambiguating) the objective meaning, whether or not the subjective meaning has been changed. It changes the objective meaning because—without knowing more about the subjective intent of the refusing participant—there are now two plausible reasons for his refusal to duel, whereas before there was only one. And because there are two plausible reasons, the meaning of the refusal is now ambiguous.

Richard Posner believes that we can avoid all this talk about objective and subjective meanings if we simply translate all this into talk about ''signaling theory.'' Signaling theory is an important part of the meaning story; but it is not a full account. The claim that it is assumes away the interpretive problems in figuring what a signal is—is the signal what the party intends to say, what the receptors of the signal interpret it to be, or something different? These are the questions of interpretation, distinct from a model of behavior.

The real problem with social meaning talk, however, is not this tiny question about whether meaning is objective, or how it is to be interpreted. The real problem is to distinguish among *kinds* of social meaning. My claim is that there are at least two, and that a full account of social meaning must distinguish both.

[75] *Id.*

One kind—call it type A social meaning—is meaning that is, in context, contestable; the other—call it type B social meaning—is meaning that in context is not contestable. Obviously I must say more about what makes something contestable or not,[76] and obviously no clear line between the two can be drawn. But assume that some line could be drawn: My claim is that meanings of type A *function differently* from meanings of type B, and that an account of social meaning might take this difference into account.

The difference might be seen by considering the work of Dov Cohen.[77] Cohen describes the different meanings of ''insult'' between Northerners and Southerners. Actions that a Northerner might take as silly, or a nuisance, Southerners take as insulting or inflaming. These are differences, of course, in the meaning of the actions that each group reads. But what is significant about these differences for my purposes is that they are, importantly, unnoticed: If one asked the groups about these differences, Cohen reports, people would not understand or report the differences to the degree that Cohen finds. The differences that Cohen is describing are differences in meaning; but these differences in meaning are in a sense unconscious, or subconscious. They are for each group taken for granted, background to ordinary thought, part of how each group ''naturally'' acts, yet they are themselves culturally set: They are, like meaning, social, yet they function as if uninterpreted. They constitute, for these people, understandings that set the terms up on which these people understand the world.

Cohen is describing meanings of type B. They are meanings that have, in a sense, become automatic for the relevant public. They have their effect without thought; they have become internalized and automatic. They are simply taken for granted: part of the interpretive furniture of that social context.

But not all meanings are meanings like these. Indeed, ordinarily the ''meanings'' of academic discourse (Cohen's exceptional work the exception) are meanings of type A. Martha Nussbaum's article, for example, tells a story about the meaning of prostitution.[78] She is offering an interpretation of that practice—telling us what the meaning of that practice is, or what we should understand it to be. In doing this, she is interpreting ''prostitution.'' In doing this, she is reporting a meaning. And the meaning that she reports is, though persuasive, contested. It is not the sort of meaning that

[76] I discuss some of this in Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 Geo. L. J. 1837 (1997).

[77] Dov Cohen and Joe Vandello, Meanings of Violence, in this issue at 567.

[78] Martha C. Nussbaum, ''Whether from Reason or Prejudice'': Taking Money for Bodily Services, in this issue, at 693.

Cohen describes. It is an argument for a meaning—a claim that a certain practice should be *understood* in a particular way. It is experienced and functions, I want to claim, in a way that is different from how type B meanings functions. Type A meanings interact with social life and constrain differently from how type B meanings function and constrain.

This difference is important for understanding how one changes meanings of each type. The techniques, that is, that might change meanings of type A are not necessarily the techniques that would change meanings of type B. Moreover, the constraint of a type A meaning is not necessarily the same as a constraint of type B meaning. Type B meaning might be less plastic and more significant—closer to the identity of the person who holds it, not contestable, political, or subject to change.

The differences between these two types of meaning suggest that we need a way to interpret the meaning of a particular act, or omission or status, and more generally, a way to interpret whether a socially operative text is type A or type B. The first tool is needed to say what the meaning of an act is: If someone says ''burning a cross on an African-American's front lawn *means* that the love of Christ burns strongly,'' this tool would say that reading is false. The second would help us distinguish cases where the answer to the first question is clear from cases where the answer to the first question is contestable.

The line between the contestable and uncontestable is no doubt hard to draw. Cohen's work might suggest one technique—indirectly discovering meaning without relying on people's report of what things mean. But however broadly these indirect techniques might reach, we face an unavoidable problem. We cannot describe social meanings simply by counting the number of people who say what one is. What people think is obviously determinative; the question is inescapably empirical; yet, its answer does not admit of any simple counting. Any claim that a given behavior has a certain meaning will always be met with the following sort of reply: ''Well, *X* does not believe that *Y* has that meaning.'' The question sounds empirical, but always there will be dissenters from the count and no way to resolve what an adequate count is. The dissenters will always claim to draw the social meaning into doubt; yet this doubt will not always undermine the force of the meaning.

If there is an answer to this problem, it comes from understanding this dynamic of contestability a bit more completely. Elsewhere I have suggested an account that might help divide the contestable from uncontestable, and I will not repeat that argument here. Whether that account points us in a useful direction or not, its aim is one we cannot avoid: To speak about the place that meanings hold in the regulation of social meaning and

law, we need a way to bifurcate our talk about meanings. And so far, my sense is, we do not have any such tool.

Evolution versus Activism

A third tool is a way clearly to distinguish changes in constraints that are a product of self-conscious action from changes in constraints that are a product of what we might call evolution. Both accounts are theories of why a constraint might change; what distinguishes the two accounts, however, is that one imagines self-conscious action directed to a certain change in one, while with the other, one can point to no similar action that results in such change.

In the social meaning world, the latter is the domain of Jack Balkin's work.[79] Balkin's model is evolutionary. Memes (like genes) compete for dominance within a particular culture. The spread and growth of these memes Balkin explains with an evolutionary model he calls ''cultural software.'' Cultural software is an account of how meaning can come to change, without relying on a story about how individuals acted to change social meanings.

This explanation is no doubt valuable, but it is distinct from the objectives of the Chicago school. The Chicago school aims to intervene into what otherwise would be, with the purpose of changing what otherwise would be. It aims to act where ideas otherwise would not take hold. This requires both an understanding of what would have happen without intervention and an understanding of how intervention will matter. The first is a part of Balkin's analysis, but the second is the objective of the New Chicago School.

The distinction between the two, of course, is not an easy distinction to draw. In terms of Figure 2, it is made more difficult since in principle, each of the four constraints described has a direct and indirect regulatory effect on the others. Architecture might regulate individuals directly, but it also affects norms. Norms regulate directly, but changing norms will obviously affect markets. The market constrains directly but also indirectly affects the constraints of architecture. A complete account of how constraints change is an account of how these different constraints interact, but the complexity of this complete account easily overwhelms.

But all the New Chicago School needs is a marginal analysis; it need only ask what, on the margin, a given action by government will do both directly and indirectly to the behavior being regulated.

[79] Jack Balkin, Cultural Software: A Theory of Ideology (1998).

The Nature of Substitutions

A fourth tool would help us understand the consequences of substituting one constraint for another. What is the consequence of substituting architecture for law? Or law for norms? The aim of this tool would be to develop a way to speak of the consequences—for efficiency and other values—that substitutions might raise.

Consider efficiency first. Much of the New Chicago School's writing evaluates substitutions along a dimension of efficiency. The question is how a substitution might improve the effectiveness of a given constraint or undermine the effectiveness of a parallel constraint. The model is instrumental, and the criterion is effectiveness. Thus, for example, a community of contractors might be regulated by norms; but when that community grows too large, the contractors might need law (through contract law) as a regulator. Using contract law may or may not be as efficient as norms were; it is a substitute, but whether an effective one is an open question.

But as well as concerns about efficiency, there are broader questions. For example, there is a growing debate in science about whether basic science should be ''propertized''—about whether, for example, all basic science should be patentable so that researchers could get financial reward for their work.[80] A truncated economic account might suggest that the answer is obvious: Propertizing basic research would increase the incentives researchers have; increased incentives would increase production; thus propertizing would increase the supply of basic research.

But a more complete account would ask not just what incentives a property regime would produce, but also what incentives it would displace. For plainly, basic science as it is just now has built within it plenty of incentives. These are the incentives of the university—of prestige, and honor, accorded to excellent and fundamental research. Propertizing behavior in this domain would change these incentives, since commodifying these relationships would undermine the basis for rewards such as prestige and honor. A full account must ask whether the change would on balance benefit or hurt basic research. Or put differently, a full account must ask whether substituting the constraints of the market for the constraints of social norms would, on balance, more efficiently achieve a given social end.

This full account, however, raises a second issue about substitutions as well. The choice of modalities of regulation itself might present questions of value. One kind of regulation (through law, for example) might pre-

[80] See, for example, Arti Rai, Regulating Basic Science: The Influence of Intellectual Property Law and Norms (unpublished manuscript, Univ. San Diego Law School, March 1, 1998); Rebecca Eisenberg, Proprietary Rights and the Norms of Science in Biotechnology Research, 97 Yale L. J. 177 (1987).

serve a value that is otherwise not present when the same regulation is effected through another means (through norms, architecture, or the market). Thus substituting one modality for another might be more efficient, but it might sacrifice a value that is otherwise important. The question then would be whether this other value should control in selecting the regulatory means.

An article by Richard Posner offers a simple example of this more general point.[81] In contrasting the benefits of regulation through norms with the benefits of regulation through law, Posner criticizes norm regulation for its failure properly to value human freedom.[82] Norms, he argues, are internalized; one obeys them without thought. But external constraints (like law) are weighed before obeyed, and this weighing is an expression of choice and freedom. Habit in this view is freedom reducing; choice is freedom enhancing. And a regulator, valuing freedom, should choose a means of regulation that respects this freedom-enhancing value.

One need not agree with the example to get its point:[83] A norm regulation might be more efficient than law in achieving some social end; but other values (here freedom) might weigh against the more efficient regulator. Posner is recognizing these other values and weighing them in the balance to decide which modality should be selected. Efficiency in this case might be sacrificed if freedom is to be advanced. Or so Posner here seems to suggest.

The point is a general one: A complete account of substitutions must account for the range of social values, including the values implicit in one mode of regulation over another. It must describe, that is, the values implicit in these different structures of regulation and make explicit the choice that these different structures embrace.

Constitutions

There are two lessons for constitutionalism that the new school might teach. The first is relevant to developed constitutional democracies; the sec-

[81] Posner, *supra* note 7.

[82] *Id.* at 367.

[83] The point does have a long tradition in philosophy. Following Immanuel Kant, one might say that what is important is not so much doing right as choosing to do right. So under this view, if one could program individuals always to do the right thing, this would not be unobjectionable. As my discussion of internalization suggests, however, I would quibble with the distinction between internalized norms and externalized law. I think that laws can be as internalized as norms (say, by an experienced district court judge), and norms can be as external as law (say, by a foreigner). Richard Posner's point, I suggest, is more about internalization generally, and so understood, it connects with another long anti-Burkian tradition, valuing, as Roberto Unger might put it, the distancing of oneself from the routines of context. Roberto Mangabeira Unger, Social Theory: Its Situation and Its Task (1987).

ond, to transitional or developing constitutional regimes. Consider the two in turn.

Constitutional law in America is uncertain about the relationship between indirect regulation and constitutional constraints. It has, I suggest, no systematic or coherent approach to the various contexts within which law regulates in these alternative ways. My example about abortion highlights this point: The very same end can be achieved through direct or indirect regulation; yet the constitutional constraint on the various modes of regulation is in each context quite different. Why?

The point is not that the same constraint should obtain, regardless of the means of regulation. Regulating through spending no doubt raises different issues from regulation through direct control. But I do think that the most developed aspects of constitutional law are in the context of direct regulation by law and less in the context of indirect regulation. Yet an increasing proportion of ''regulation'' is regulation through these other means. And if a constraint effected directly through law would be unconstitutional, we need a better understanding of whether that same constraint, effected indirectly through the market, norms, or architecture, should also be reckoned as unconstitutional.

That such a gap exists is understandable. Our constitution was written with direct regulation in mind—not because the framers did not understand indirect regulation, but rather because its significance was not great enough systematically to account.[84] To simplify brutally: Theirs was a world where most state regulation was direct regulation; they wrote a constitution to deal with that world. But what then of a world where most regulation is indirect? How are constitutional values preserved there?

A systematic account of direct and indirect regulation may, through its discipline, help us generate an understanding of indirect constitutionalism equivalent to our understanding of direct constitutionalism. It might help us, that is, develop a way to translate constitutional constraints that exist strongly in the context of direct regulation into constraints that might function sensibly in the context of indirect regulation as well. Or if not directly, then at least by revealing inconsistencies, drawing to attention the parallels in regulation, this mode may push constitutionalists to a more complete account. The point is not that we must imagine a single theory of indirect regulation in constitutional law; rather it is that we do not yet have a body of learning that deals systematically with the range of constitutional questions raised by indirect regulation.

The lesson for developing constitutional regimes is far more fundamen-

[84] For an illustrative example, see the discussion in A. Michael Froomkin, Reinventing the Government Corporation, 1995 Ill. L. Rev. 543, 551–53.

tal, and it is drawn from the embarrassment of recommendations offered by American constitutionalists to the problems of transition in postcommunist Europe.

For many, the problem of constitutional development in postcommunist Europe was simple—draft a constitution modeled on Western constitutions, ratify it, and apply it. Constitutionalism, in this model, was a text; the solution to the absence of constitutionalism was likewise a text.

But a New Chicago School perspective suggests something important about why that advice is so hopelessly incomplete.[85] For what makes a constitutional text function in Western constitutional democracies is as much the development of a strong legal culture as it is any grammatical structure in a document called ''the constitution.'' It is because we have a structure of norms that operate on judges, for example, to allow them to think of themselves as independent of the government, that we have a system of judicial review that at times resists the will of the government. Other constitutional regimes with the very same (or even stronger) constitutional texts but without this tradition fail to achieve this judicial independence[86]—in large measure because of this difference in legal culture.

An Old Chicago School response might be that constitutionalism in such places is impossible—that the norms of a legal culture may disable a constitution and, therefore, that constitutions are hopeless in such places. But a New Chicago School approach simply accounts for this difference in culture when determining how best to bring about a constitutional regime. The problem is more complex—it now includes not only how best to structure the relationships of power among branches of government but also how to change the norms of actors within that government so that they support the ideal structure. This complexity is just the sort of analysis that transitional

[85] Lawrence Lessig, What Drives Derivability: Responses to Responding to Imperfection, 74 Tex. L. Rev. 839, 874–80 (1996).

[86] Japan is an example. The text of the Japanese Constitution has a much stricter requirement of judicial independence than the American Constitution. Article 76(3) of the Japanese Constitution states: ''All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.'' Article 76(1) and (2) of the Japanese Constitution state that ''(1) The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law'' and ''(2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.'' Despite this strong language, it is broadly understood that Japanese judges exhibit far less judicial independence than their American counterparts. See Rajendra Ramlogan, The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins? 8 Emory Int'l L. Rev. 127, 182–90 (1994) (listing cultural and institutional factors that compromise judicial independence in Japan); J. Mark Ramseyer, The Puzzling (In)Dependence of Courts: A Comparative Approach, 23 J. Legal Stud. 721 (1994) (indicating ways in which the ruling party controls judicial behavior); Yasuhei Taniguchi, Japan, in Judicial Independence: The Contemporary Debate 205, 205–18 (Shimon Shetreet & Jules Deschenes eds. 1985).

constitutionalism attempts;[87] the New Chicago School suggests well its place in comparative constitutional development.

The Problems with Indirection

One final gap can be considered more briefly, though I suggest it is the most significant for modern government.

I have suggested that we think in general about indirect regulation so as better to understand the tools that an activist state has for effecting its regulatory agenda. I have also argued that the selection of tools may itself raise questions of value. But now I want to point to an important question of value fundamental to this whole approach. This is the problem of regulatory indirection. For what unites these indirect modes of regulation is that each may allow the government to achieve a regulatory end without suffering political cost.

Consider again my point about *Rust* from the first section above. The regulation at issue in *Rust* is a common tool of the modern regulatory state. It is regulation through conditional spending. It achieves a political end that citizens need not directly attribute to the government's choice. The whole structure of the regulation was designed to achieve the government's end—to reduce the number of abortions—without that end being attributed to the government. It was a device for reducing publicity.

One might think this a reason for questioning the means that the government chose. I believe that to be so, but I do not care to argue the point here. It is enough to see that it is plausible at times to understand indirect regulation as indirection, without believing that every time the government chooses indirect regulation it is a form of indirection. Speed bumps are an example. Speed bumps are indirect regulation. Rather than spending more on police to arrest those who speed, the government changes the architecture of roads so as to slow the speed of cars. But no one who slows her or his car for a speed bump thinks to her or himself that this speed bump is natural, or not the product of the government's policy. The speed bump is indirect regulation, but it wears its status as a *regulation* on the surface.

The perspective of the New Chicago School might help us draw this same distinction between indirect regulation and indirection more generally. The project would be strengthened if we had a better understanding of the distinction. For as the tools of regulation multiply, the tools of indirection multiply as well. Some of these uses of indirection may well be justified—my point is not that every acoustically separated regime is improper. But

[87] Compare Ruti Teitel, Transitional Jurisprudence: The Role of Law in Political Transformation, 106 Yale L. J. 2009 (1997).

some, I believe, are not, and attention to this distinction might well flesh the latter class out.

* * *

These are some of the methodological gaps in the program of the New Chicago School. No doubt there are others, and no doubt I have understated the significance of these. But my aim in this essay is simply to advertise the holes as an invitation to those outside legal analysis with tools that could be usefully imported. Again, my claim is not that other disciplines (such as economics, sociology, or social psychology) cannot answer the questions I have raised.[88] My expectation is that they can. More importantly, my hope is that their answers can be translated into the simple language of legal analysis and that, with that language, a better understanding of regulation and its constraints might follow.

One final point. I have offered a picture of the New Chicago School in a spirit of positive analysis. This should not obscure its darker side—indeed, the dark character of the whole project. The regulation of this school is totalizing. It is the effort to make culture serve power,[89] a ''colonization of the lifeworld.''[90] Every space is subject to a wide range of control; the potential to control every space is the aim of the school.

There are good reasons to resist this enterprise. There are good reasons to limit its scope. I offer the description here in its complete sense, however, not to deny these good reasons, but instead to make their salience all the more real.

[88] Ellickson is skeptical about economists and sociologists. See Ellickson, A Critique of Economic and Sociological Theories of Social Control, *supra* note 12, at 98.

[89] Compare Michel Foucault, Discipline and Punishment: The Birth of the Prison 27–28 (1979).

[90] 1 Jürgen Habermas, The Theory of Communicative Action: Reason and Rationalization of Society (1981) 339–44 (Thomas McCarthy trans. 1984).