NEW MEXICO LAW REVIEW

Volume 31
Issue 1 *Tenth Circuit Judicial Conference (Winter 2001)*

Winter 2001

Law and Economics

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LAW AND ECONOMICS

INTRODUCTORY REMARKS BY
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PANEL DISCUSSION BY
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INTRODUCTORY REMARKS

PROFESSOR GARRETT: As a fourth generation Oklahoman—and no matter how long I've been in Chicago, I will always be an Oklahoman—it is particularly gratifying to appear before the Tenth Circuit today. Law and economics is the strongest interdisciplinary force in the academy, so to think about its future is challenging. It's hard to imagine a future as influential as its past. I want to talk today about an application of law and economics that I expect to see in the future. The topic may surprise you, because it's in an arena that we don't think of as characterized by rational economic men and women or by logical rules and regulations. That is the arena of the political process.

As members of the judiciary and the bar, you may have noticed that interesting cases dealing with issues of the political process are increasingly coming to the courts—cases on voting rights, term limits, the subjects of direct democracy, the line-item veto, and delegation principles. As we continue to grapple with these issues in the academy, in the bar, and in the judiciary, we may bring to bear the tools of law and economics.

It should not surprise us that law and economics, sometimes called public choice theory, has application to the political process. After all, politics is a market. Most politicians in a modern democracy operate within the constraints of a competitive electoral market. No matter why you're a politician—if you want to adopt your vision of the best policies, if you're motivated by influence, prestige, and power, or if you seek the benefits from special interests that accrue to those who are lawmakers—you must be reelected in a competition, and that is the quintessential market.

To put it another way, politics is a market where some people demand a product—legislation—and lawmakers supply that product. Some groups are better at demanding legislation than others. Those groups that can organize, obtain financial resources, and present their views persuasively do better than those of us unorganized, diffuse citizens who merely pay taxes to fund all those programs. So just like any other market, we find the political market has market failures. What we have to do as lawmakers, professors, judges, and lawyers is to implement structures that ameliorate those market failures. The structures ought to take account of the fact

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that people acting within them are rational, self-interested people trying to obtain certain objectives.

Now, to make this more concrete, I will apply the insights of law and economics to a case that the Court handed down on Monday[1] in the political process area. The case is *California Democratic Party v. Jones*,[2] which deals with the blanket primary in California. There are three opinions in the case; none of them explicitly talks about law and economics. In a seven-to-two decision, Justice Scalia held that the blanket primary imposed on the political parties in California was unconstitutional.[3] Justice Kennedy wrote a concurrence,[4] and Justice Stevens wrote a dissent.[5] Both the majority and the dissent would have benefited by more explicit discussion of the principles of law and economics.

By way of background, a blanket primary is one of three ways of organizing a primary in an electoral process. There is the traditional, closed primary, where voters have to declare party affiliation before an election and vote in that party's primary. There is an open primary, which currently twenty-one states use, where voters don't have to declare that they are members of the party, but voters can vote in only one party's primary.[6] So in one election, a voter can vote in the Republican primary. In another election, several months or years later, she can vote in the Democratic primary.

The blanket primary, which three states use,[7] is an unusual formation in that voters can vote in different primaries for different offices in the same election. So a voter can vote for the Democratic candidate for the governor, the Republican candidate for the lieutenant governor, and the Green Party candidate, in the state auditor's election. So in a way, this is a kind of menu. You go to a restaurant, and you just pick and choose.

In California, the voters, by ballot initiative, decided that they would use the blanket primary rather than the closed primary system, which the political parties favored.[8] Justice Scalia applied traditional constitutional jurisprudence and decided that the blanket primary was imposed on the parties unconstitutionally.[9] He said that members of political parties have associational rights under the First Amendment.[10] Part of those rights is the ability to exclude nonmembers from certain activities, like voting in a primary.[11]

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1. June 26, 2000.
2. 530 U.S. 567 (2000).
3. *Id.* at 577.
4. *See id.* at 586-90 (Kennedy, J., concurring).
5. *See id.* at 590-603 (Stevens, J., dissenting).
6. California Democratic Party v. Jones, 984 F.Supp. 1288, 1291 (E.D.Cal. 1997), *rev'd by* 530 U.S. 567 (2000).
7. Those states are Alaska, Louisiana, and Washington. *Id.*
8. The voters approved the adoption of the blanket primary system by supporting Proposition 198 in the 1996 state election. The measure was codified in CAL. ELEC. CODE § 2001 (2000).
9. *California Democratic Party*, 530 U.S. at 572-77 (citing cases supporting "the freedom to join together in furtherance of common political beliefs" and the right not to associate, *see, e.g.*, Tashjian v. Republican Party of Conn., 479 U.S. 208, 214-15 (1986)).
10. *Id.* at 574-75.
11. *Id.*

That's an important right, but, of course, it's not an absolute right. No First Amendment right is. So Justice Scalia analyzed the state interests that had been brought forward to defend the blanket primary. He found that some were not compelling, and, in some cases, the blanket primary was not narrowly tailored to serve the interests.[12] The interests that were identified by California in favor of the blanket primary included making candidates more representative and less partisan, increasing voter participation, and protecting the privacy of voters, who would no longer have to declare whether they are Republicans or Democrats.[13]

Let me suggest how law and economics might have helped decide the case. Political parties in the political marketplace are very much like public utilities.[14] They have some private aspects, just as utilities do. We ought to be careful about government intervention into the private aspects of political parties.

Political parties are also very public institutions, just like public utilities. The Court, in the term limits case a few years back, discussed the importance of an expansive freedom of voters to choose whom we want to represent us.[15] That's all well and good to say, but realistically, our choice is constrained by who appears on the ballot. And that decision is largely left up to the political parties. So, while parties have some private elements, they also have a substantial impact on the electoral process and the electoral marketplace. Some government regulation is important and necessary; the question is what kind of regulation.

Justice Scalia, in finding that the blanket primary was too intrusive a regulation, might have thought about the role of parties in organizing the political marketplace. The political marketplace is a place where *groups* participate. You and I don't have much influence as individuals. We have influence when we come together as a group of people, sharing common and intense preferences, to lobby and participate. Political parties are large intermediary structures[16] where the activity of smaller interest groups can take place and where the activities of those with intensive preferences can be organized, made less chaotic, and rendered into a discernible and relatively rational platform and ideology.

So these intermediating structures serve vital public interests. They structure the government; they allow the Congress to work with the President and the judiciary. They structure the electoral process and the party organization. They select, fund, and organize candidates. Justice Scalia might have said that political parties are important intermediary groups in our political marketplace, and we have to be wary of rules and regulations that might weaken them substantially. After all, the intention of the blanket primary was to weaken parties, and I think that would have been the effect.

In addition, political parties provide cues for those of us who vote but, rationally, do not spend twenty-four hours a day learning everything we can about every

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12. *Id.* at 582-86.
13. *Id.*
14. See LEON EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 157 (1986).
15. *See* United States Term Limits v. Thornton, 514 U.S. 779, 819-21 (1995).
16. *See* Samuel Issaacaroff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

candidate for every office, from governor and president down to dogcatcher.[17] But when we go to the polls, rationally ignorant of many details about candidates, we know that we might have more in common with a Democrat than we do with a Republican, or vice versa. That's an important cue for us as rational voters. It helps us vote competently with imperfect information. If the blanket primary system would have reduced the value of that informational cue by decreasing party differences, by making parties look very much like one another, so a Republican would be no different from a Democrat from a Libertarian, etc., that development would hurt us as voters. Justice Scalia could have made this point in support of strong political parties, drawing from law-and-economics literature.

What about Justice Stevens and those who thought that the blanket primary was an acceptable system, if the voters chose to adopt it? Here I will draw a bit on corporate law. It may not surprise you that law and economics has an enormous influence in the corporate field. Law and economics teaches us that if we want managers and corporations to act consistently with our interests as shareholders and not their own interests, we ought to have a competitive and robust market for corporate control. We ought to make sure that managers know that shareholders could, if they wanted to, replace them. Therefore, a strong marketplace for corporate control will keep managers' interests aligned with shareholders more effectively than any legal doctrine ever could.

Take that idea into the political marketplace. Our representatives are more likely to represent us accurately and adequately if there is a robust electoral competition.[18] But, the rules of the political games are determined by the very people who play the game. Incumbents and major political parties set the rules of the game, and they select rules that benefit incumbents and major political parties. I'm sure that doesn't surprise anybody here. They choose rules that make it harder for challengers, minor parties, and new voices to be heard in the political marketplace.

What Justice Stevens might have said in his dissent is that the blanket primary is a way to dislodge some of the entrenched political interests. And he might have pointed out that this reform was adopted through direct democracy, one way to circumvent entrenched interests. Initiatives allow the people to get around those who are pursuing their self-interest at the expense of the public good.

How would the case have come out if the justices had applied a law-and-economics perspective? It might lead to the conclusion that the harm to the political parties, important intermediaries in a well-functioning political process, was greater than the threats posed by a partisan lock-up. One fact supporting that conclusion is that the Republican and Democrat parties were not alone in attacking the blanket primary. The Libertarian and Peace parties,[19] hardly entrenched players in any political system, were also attacking the blanket primary. Nonetheless, we might feel much more comfortable about that conclusion in this case if courts would generally

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17. *See* Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1544-50 (1999).

18. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331.

19. California Democratic Party v. Jones, 530 U.S. 567, 571 (2000).

recognize the potential threat of partisan lock-up, which is exacerbated by other laws that keep voices from being heard in the political marketplace. For example, ballot access laws keep independent and minor parties off the ballot and other state laws prohibit fusion candidacies. The entrenched interests, primarily the two major political parties, pass these laws to protect themselves and drown out other voices.[20]

In other words, law and economics doesn't entirely change the judicial inquiry; we still have to balance interests to reach conclusions. What law and economics provides is a different structure to shape the balancing process in a more rigorous and thoughtful way. We will continue to apply that perspective to various legal problems in the breakout session after lunch. Thank you.

PANEL DISCUSSION

GARRETT: Let me introduce the two panelists who have joined me to talk more about law and economics. We have, to use a law-and-economics term, entered into a precommitment arrangement that we will each speak for only about ten minutes. So, we will have plenty of time to open up discussion about the principles and how they might affect your work.

Let me introduce the two illustrious panelists on either side of me. Professor Art LeFrancois attended Beloit College,[21] and he earned his J.D. at the University of Chicago Law School. So he's perfect for a law-and-economics panel, given his training. He is now a professor at the Oklahoma City University Law School, where he works primarily in the areas of criminal law, criminal procedure, and jurisprudence. He's currently at work now on a number of revisions to the Oklahoma Constitution.

On my other side is a good friend of mine, Judge Sven Holmes of the Northern District of Oklahoma. He did his undergraduate work at Harvard, earned his J.D. from the other fine law school that I've been affiliated with, the University of Virginia Law School, and received his L.L.M. from Georgetown. He clerked for Judge Brett;[22] he was the administrative assistant to the Governor of Oklahoma, the staff director and general counsel for the Senate Intelligence Committee, and a partner at Williams & Connolly,[23] specializing in business law. One of the things that he has done that I found most interesting, and that I didn't know before, is that he's also been the vice president of the Baltimore Orioles.

So, we will talk a little bit about law and economics. Art's going to talk about it in the context of criminal law and criminal procedure. I'm going to focus on campaign finance, and then I'll discuss a case that's currently before the court, *Cook v. Gralike*,[24] which is a case dealing with ballot notations. Judge Holmes is going to conclude by applying law and economics to an area in which he works everyday, sexual harassment law.

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20. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 117-130 (2000).

21. Beloit, Wisconsin.

22. Honorable Thomas R. Brett, District Judge, United States District Court, Northern District of Oklahoma.

23. Washington, D.C.

24. Cook v. Gralike, 531 U.S. 510, 121 S. Ct. 1029 (2001). At the time of this panel discussion, the case had not yet been decided.

PROFESSOR LEFRANCOIS: We might think of economics as a way to predict human behavior. The more we know about individual and group preferences, the better we can predict what people and institutions are likely to do. Traditional economics assumes we are rational agents. And liberal traditions counsel that governments defer—as best they can—to the preferences of individuals. Current conservatism certainly counsels this deference relative to the marketplace.

But sometimes people seem not to do what traditional models, based on rational, self-interested actors, would suggest. I want to talk about these aberrations and their relevance to criminal law. I will do so by exploiting the work of one former and two current colleagues of Professor Garrett's: Dan Kahan, Tracey Meares, and Cass Sunstein.[25] Anything of value that I have to say is attributable to them.

I am going to talk about things called norms and what they have to tell us about criminal justice policy and questions they raise about the wisdom and propriety of certain kinds of governmental intervention in the affairs of people. This is relevant to us today because some of the things that norm-related scholarship has suggested—some policing techniques and criminalization efforts—are quite hotly contested in city councils, state houses, and courtrooms.

First, a bit about seemingly irrational, you might call it diseconomic, behavior. Ask yourself why you haven't robbed an individual or institution recently. Is it because you—even unconsciously—have calculated costs and benefits? Is it because you are risk-averse? How about a more likely case, then: simple larceny? You are visiting your addled older relative. You could use several hundred dollars to buy a nice gift for someone. Your relative has no chance of discovering your pilfering. And if he did, no one would believe him. And you don't like this relative, not even a little bit. And he doesn't need the money. Is it the law that stops you? More likely, it is your superego. I mean the one Freud talked about; I am not talking about the judges here. But maybe, as a group, we are different. Maybe we need the law to keep those other folks in line.

How about this one? There is a game with two players.[26] Player One is given a sum of money. If she gives any of the money to the other player, and the other player accepts it, they both get to keep their respective shares. On the other hand, they both lose their money if Player One offers none of it to Player Two, or if Player Two rejects the gift. We might have thought that rationally self-interested actors in the role of Player One would give a minimal amount to Player Two, who, as a similarly rational, self-interested actor, would accept. What happens instead is that—across many cultures and different stake levels—offers average between 30 to 40 percent of the total.

Two last examples. What happens when we offer a risk-neutral person an opportunity to trade a sum of money for a range of possible sums, the average of which is greater than the initial sum?[27] The answer is, probably nothing, if the trade

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25. Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); Cass R. Sunstein, *Social Norms and Social Roles*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 135 (Eric A. Posner, ed., 2000).

26. The example is from Sunstein, *supra* note 25, at 135.

27. The example is from Kahan, *supra* note 25, at 609-10.

looks like tax evasion. But if the trade looks like casino gambling, it will likely be made, even if the average value of the sums in the range of possibilities is *less* than the initial sum. I know this last part is true, having recently spent an afternoon with my wife in Atlantic City.

Finally, why do we have gang-ridden neighborhoods where juveniles do not think there is an intrinsic value to gang membership, and why do these same juveniles participate in street nightlife when they do not find it intrinsically valuable and may even fear it?[28] Increasingly, academics think the answers to these questions lie in the realm of norms—what anthropologists might call mores, parents might call peer pressure, and retailers might call fashion.

We might find here answers to other questions as well, like why nearly twenty-three percent of white teenagers smoke, compared to less than five percent of African-American teenagers.[29] The answers will not surprise any of you, but thinking about these issues more systematically than we usually do will raise some important questions regarding law enforcement strategies and criminalization.

The reason you have not stolen money, even from your addled relative, is that you would violate a deeply held convention if you did so. You would think less of yourself.[30] In the two-player game, Player One is concerned about being perceived as fair, as not greedy.[31] In our other exchange game, the reason the trade resembling gambling will occur is that it conjures up images of play and spiritedness, while the trade resembling tax evasion raises notions of cheating and dishonor.[32] We have gangs in neighborhoods where kids do not want them because the costs of acting like you do not want them are unacceptably high, and so there is a resulting perception that everyone wants them—because everyone is acting like they do.[33] Kids who do not admire gang members think others do. There is sometimes a disconnect between reality and perception, and it is sometimes exacerbated by a disconnect between what we believe and what we act like we believe.

The common element here is that people conduct themselves quite rationally, but only after one takes into account the background norms against which they operate. This is important for criminal justice. Traditionally, we have modeled criminal justice policy along deterrence lines. We care about swiftness, surety, and severity of punishment.[34] There is much to be said for this view. The problem is that it can lead to expensive, ineffective, morally obtuse, and counter-productive results.[35]

Standard deterrence analysis would not predict that increasing the cost of low-level crime would deter more serious crime.[36] But it seems to. When police impose low-tolerance or order-maintenance procedures, they aggressively respond to such

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28. These examples are from Meares & Kahan, *supra* note 25, at 819, 821.

29. Sunstein, *supra* note 25, at 136.

30. Current norm theory focuses on social meaning, the meanings others take from the ways we act. One of the points of this example is that social meaning and norms affect us even when no one is watching.

31. Sunstein, *supra* note 25, at 160.

32. Kahan, *supra* note 25, at 610.

33. Meares & Kahan, *supra* note 25, at 819.

34. *Id.* at 826.

35. *Cf.* Kahan, *supra* note 25, at 616 (criticizing as morally problematic and politically unworkable criminal law policy prescriptions that focus on deterrence-related cost-effectiveness at the expense of social meaning).

36. This point and the following discussion derive from Meares & Kahan, *supra* note 25, at 822-23.

non-serious offenses as panhandling, prostitution, property defacement, and public intoxication. The result is reducing more serious crimes like burglary, robbery, and theft. The reason, it is suggested, is that governmentally tolerated visible signs of unlawful disorder signal an invitation to more serious criminality, cause law-abiders to move away or stay off the street, and disrupt trust between neighbors and between neighbors and police. Taking seriously the lower-order disorders breaks this sequence. This is an example of a big bang for a small criminal justice buck, an all-too-rare occurrence in politically driven criminal justice policy. The incidence of serious crime decreases without the imposition of expensive costs in the form of draconian penalties for such serious criminality.

Making punishments more severe can actually increase the incidence of the penalized behavior. Take the case of juveniles with guns.[37] In some neighborhoods, it is a very bad idea not to have a gun, not so much for direct protection, although that is part of it, but because of what *not* carrying a weapon signifies. It signifies weakness and vulnerability and an unwillingness to defy authority. Standard deterrence theory tells us to heavily penalize those who fail to turn their guns in and to reward those who do. The problem is that this policy increases the value of gun possession, because it intensifies the social meaning of carrying a gun—it dramatizes the defiance and confidence of the gun possessor.

Better policy seems to suggest we reward juveniles who rat out their gun possessing peers. Why? The communicative value—the social meaning—of gun possession is reduced when kids fear that if they display their weapons, they may be turned in. And the thought that peers might snitch on gun possessors conflicts with the idea that peers naturally confer high status on gun possessors. Again, note the efficiencies for criminal justice. Paying informants works more deterrence than rewarding cooperators (those who turn in their weapons) and punishing non-cooperators.

Another anti-gun policy that works is the low tolerance or order-maintenance crackdown.[38] Here, members of violent gangs are the targets of crackdowns relating to low-order crimes such as public intoxication and unregistered vehicles. They are told such crackdowns will continue as long as gang violence does. Kids who are willing to risk severe gun-related penalties are unwilling to live under the crackdown regime. Why? In part, it seems to be that only a small number of kids are strongly committed to gang violence and, just as importantly, house arrest for a silly offense simply does not have the cachet of a prison term. Finally, kids can exit potentially violent scenarios without losing face. It is more honorable to seek to avoid an order maintenance crackdown and to treat its subsequent trivial penalties as a mere hassle, than to act as though one fears prison. There are other examples of similarly effective enforcement strategies—loitering and curfew laws among them.[39]

Now, let me make two points about the law. The first is general. What business is it of the government, through legislation, enforcement, and adjudication, to seek

37. See *id.* at 824-25 for the analysis from which the following discussion is drawn.
38. See *id.* at 825-27 for the analysis from which the following discussion is drawn.
39. *See id.* at 819-22; Kahan, *supra* note 25, at 614-15.

to change the rational preferences of individuals?[40] Is it proper for the law to seek to influence or abolish certain norms, or to create different norms that will guide behavior more effectively and directly than the law itself can? The argument for intervention is that while society produces norms, individuals often can do little to change them.[41] An example is organized hockey.[42] What is a player signaling if he wears a helmet, or says he wants to? Whatever he is signaling, it is not going to help him much on the ice, is it? So what will he say when he is asked if he would like to wear a helmet? He will say no. There is a disconnect between his actions, including his public speech, and his real desire. If the league mandates helmets, all the players have a graceful way out. It is a bit like the boys' gym class being rained out the day they were going to throw the shot put.

It is the same with curfews.[43] Kids want them, but they cannot say so or unilaterally exit nighttime street-life. The social meaning cost of so doing is unacceptably high. It is a collective action problem. We get trapped in webs of norms that we cannot individually change. Government can solve the collective action problem by seeking to alter the norms that limit autonomy.

This is the second point about law: We need to be a little careful here. Can we target members of violent gangs for order maintenance crackdowns without violating, say, the Fourth Amendment, due process, or equal protection? Can we do so without engaging or reinforcing ethnic or racial stereotypes? In an era of racial profiling and metropolitan police shooting unarmed minorities, how comfortable are we with some of the strategies suggested by norm theory?[44]

The case of *Chicago v. Morales*[45] involved Chicago's Gang Congregation Ordinance, which sought to prohibit gang members from loitering. The Illinois Supreme Court held that the ordinance was impermissibly vague and so violated due process.[46] The Supreme Court of the United States agreed. Justice Stevens, writing for the majority, said that the ordinance failed to "establish minimal guidelines to govern law enforcement."[47] Justices Scalia and Thomas and Chief Justice Rehnquist dissented. Justices O'Connor and Breyer, concurring, noted,[48] as did Justice Stevens's opinion for the majority,[49] that a similar ordinance might be salvageable. Perhaps it could target only those reasonably believed to be gang members, require the loitering to have a harmful purpose, or have area and manner restrictions.[50]

Norm theorists had hoped that such an ordinance would exploit the fact that teenagers in high-crime neighborhoods find neither gangs nor being on the streets

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40. See Sunstein, *supra* note 25, at 161-73 for a discussion of the propriety of changing norms through governmental intervention.

41. *Id.* at 162, 169, 173.

42. *Id.* at 162.

43. *See* Meares & Kahan, *supra* note 25, at 821.

44. In this connection, assurances that racially disparate police brutalization is on the wane are likely to be hotly contested or treated as beside the point. See *id.* at 831 for an example of such an assurance.

45. City of Chicago v. Morales, 527 U.S. 41 (1999).

46. City of Chicago v. Morales, 687 N.E.2d 53, 59 (Ill.), *aff'd by* 527 U.S. 41 (1999).

47. *Morales*, 530 U.S. at 61 (quoting Kolender v. Lawson, 461 U.S. 352, 358 (1983) and Smith v. Goguen, 415 U.S. 566, 574 (1974)).

48. *Id.* at 66 (O'Connor, J., concurring).

49. *Id.* at 63.

50. *Id.*

at night intrinsically valuable, and would have an excuse for exiting.[51] Severely penalizing gang activity increases its value through its enhanced social meanings of defiance and courage.[52] Anti-loitering statutes, however, like the crackdown strategies I mentioned earlier, work to diffuse perceptions of the high status of gang activity.[53] But the Court disallowed the Chicago ordinance. As Professors Kahan and Meares point out, inner-city residents help put in place such ordinances, while suburbanites help undo them. It is a case, they suggest, of civil rights theory undoing civil rights.[54]

Finally, think for a moment about the costs we impose on neighborhoods when we remove large numbers of the young adult male population.[55] We can do this, if we want, using current drug laws. Despite the fact that there is not a significant black/white differential in overall illicit drug use rates (although it is true, for example, that LSD and methamphetamine tend to be "white" drugs), we generally enforce many drug laws disproportionately in African-American neighborhoods, against African Americans. We tear neighborhoods apart and put disproportionate numbers of young African-American males in prison.

What if we focused on buyers, instead?[56] Buyers, even in black, inner-city neighborhoods, are ethnically diverse. Policing programs launched against them would not devastate single neighborhoods, but would have minimal impact on a multiplicity of neighborhoods. Deterrence would occur, and the costs to neighborhood social organization would be reduced. As neighborhoods disintegrate, crime gets worse. As more sons and fathers (and daughters and mothers) are hauled off to prison, neighborhoods disintegrate. And so it goes.

So, norm theorists suggest that we keep in mind that enforcement and criminalization strategies can have unintended effects, that we can affect behavior and reduce unintended and counterproductive consequences by attending to and changing norms. They also suggest that people, like teenagers in gang-infested, high-crime neighborhoods, rationally carry guns and act aggressively, while being otherwise disposed not to. A wise and efficient criminal justice policy would seek to reduce the social meaning costs of violating certain community norms and thus ultimately change those norms themselves. Norm theory gives us ways to do this that are politically marketable (we are not talking about community service or paying fines for serious crime)[57] and morally tolerable,[58] and that will strengthen neighborhood organization and so reduce crime.[59]

GARRETT: Thank you. I think those examples show the future of law and economics. We're using more evidence of behavioral norms based on empirical

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51. *See* Meares & Kahan, *supra* note 25, at 830.
52. Kahan, *supra* note 21, at 614.
53. *Id.*
54. Meares & Kahan, *supra* note 25, at 830-32.
55. See *id.* at 816-19 for a discussion of this problem.
56. See *id.* for a discussion of "reverse stings," where law enforcement officers pose as drug dealers and arrest those who seek to purchase narcotics.
57. *See* Kahan, *supra* note 25, at 616 (noting legally and morally obtuse messages sent by community service sentences and fines).
58. *See* Sunstein, *supra* note 25, at 162-73 (considering objections to paternalism). Not all intervention in the name of norm theory is morally appropriate, but some norm-based interventionist strategies clearly are.
59. Meares & Kahan, *supra* note 25, at 832.

studies and relying less on unrealistic assumptions that all people act rationally at all times. I just want to talk briefly about two areas where insights about the political marketplace may be important. My focus is on two cases, one that just came down and one that the Court is going to be considering next term.[60]

The first is the area of campaign finance reform. Law and economics is useful for those of us trying to write campaign finance laws and those of us trying to decide whether those laws are constitutional or wise policy. I would suggest three ways in which law and economics can help campaign finance reform efforts and our analysis of those efforts.

First, we might look at many campaign finance rules as further examples of partisan lock-ups. Most of the rules regulating the electoral marketplace are passed by incumbents, and it shouldn't surprise us that it appears as though some laws favor incumbents and make it more difficult for challengers to mount effective challenges.[61] *Buckley v. Valeo*, the very controversial opinion decided in 1976, was a case brought mainly by challengers, not incumbents.[62] These were outsiders arguing that the Federal Election Campaign Act made it more difficult for them to win against incumbents. For example, the presidential financing system ruled constitutional by *Buckley v. Valeo* gives public money to major parties, but makes it very difficult for minor parties and new parties to participate in a strong and robust electoral competition.

If we think about these laws in terms of their potential to contribute to partisan lock-up, we have to view them with some skepticism. Having said that, one of the interesting recent developments is that several campaign finance reform laws, which have been adopted primarily on the state level,[63] have come about as a result of direct democracy. So here you have campaign finance reform coming from groups other than the entrenched players. Often these state efforts are threatening to the entrenched players. So perhaps courts ought to consider looking at the product of direct democracy and the product of representative democracy in different ways. Courts occasionally do that, but tend to discount the result of direct democracy as uninformed and unruly. That's not the case in all contexts.

The second insight from law and economics about campaign finance reform is that we should be very careful about unintended consequences.[64] I think you see this concern expressed in some of the recent opinions from the Supreme Court, most notably in *Shrink Missouri Government PAC*,[65] the case that upheld the Missouri law that imposed very strict contribution limits on Missouri state campaigns. Justice Kennedy wrote an important dissent in which he said he was concerned because

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60. This panel discussion was given on July 1, 2000, just after the conclusion of the October 1999 term.

61. *See* Lillian R. Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258 (1994).

62. The plaintiffs in that case included a candidate for the presidency of the United States, a United States senator who was a candidate for re-election, a potential contributor, the Committee for a Constitutional Presidency McCarthy '76, the Conservative Party of the State of New York, the Mississippi Republican Party, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, the Conservative Victory Fund, and Human Events, Inc. Buckley v. Valeo, 424 U.S. 1, 8 (1976).

63. At the time of these remarks, federal reform efforts were stalled.

64. *See* STEVEN M. GILLON, "THAT'S NOT WHAT WE INTENDED TO DO": REFORM AND ITS UNINTENDED CONSEQUENCES IN TWENTIETH CENTURY AMERICA (2000).

65. Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000).

courts consider these laws case by case, and judges don't think about how everything interacts.[66] We get this kind of crazy campaign finance system that is full of gaps and loopholes in part because judges have to proceed case by case.

So, for example, in *Buckley v. Valeo*, the Court said that Congress can limit contributions, but can't limit independent expenditures.[67] What happens next? Everybody shifts money into independent expenditures. That's the hydraulic quality of political money.[68] Or, as I say in my classes, that's the jello-like quality of political money. You tamp it down one place; it just springs up in another. If you try to tamp down issue ads or independent expenditures, interest groups, parties, and candidates will figure out another way to spend money. The money is going to be spent if it's in the interest of people to influence political outcomes. The lesson: Be very careful how you regulate, and be very careful as judges about what you allow and what you don't allow because behavior will shift in response, often in unforeseeable ways.

In *Shrink Missouri*, Justice Kennedy warned that we should be careful about how cases dealing with political parties interact with cases dealing with independent expenditures.[69] His overall observation—that we should beware of unintended consequences—is one that would be supported by law and economics.

My third point is that applying law and economics to campaign finance reform underscores the importance of disclosure. I would like to see the Court adopt as a compelling state interest[70] in these cases the need to facilitate voter competence—to provide voters with the information they need in order to vote with limited information the same way they would if they had full information.[71] The state has a compelling interest in ensuring that voters choose candidates who will vote in ways that are consistent with the voters' ideology. In that effort, the state has to take into account the fact that we are all busy people. We're not going to spend a great deal of time learning everything relevant about each and every candidate. So reformers should figure out ways to give voters the information they need to cast competent votes, but not expect them to spend twenty-four hours a day getting that information.

What information is helpful? Party cue is helpful. It's also helpful to know the identity of big donors in campaigns. I can look at a campaign and say, "Oh, Kerr-

66. *Id.* at 408.

67. *Buckley*, 424 U.S. at 20-21.

68. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

69. *Shrink Missouri*, 528 U.S. at 406-07.

70. Because campaign finance regulations implicate the First Amendment, states must provide a compelling interest for imposing such regulations. *See Buckley*, 424 U.S. at 16 (requiring exacting scrutiny of campaign finance regulations); *see also Shrink Missouri*, 528 U.S. at 386-87 (discussing appropriate level of scrutiny for campaign finance regulations).

71. *See* Elizabeth R. Gerber & Arthur Lupia, *Voter Competence in Direct Elections*, *in* CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 147, 149 (1999).

McGee[72] gave money to that candidate," or "Greenpeace[73] gave money to that candidate." That signal informs me whether the candidate is more, or less, likely to vote the way I want her to. So I think it's very important that Congress pass the pending disclosure statute with respect to Section 527 organizations, the so-called "Stealth PACs."[74]

It's also important to use the Internet to disseminate as much information as quickly as possible about sources of money in campaigns. Ironically, that may mean we *don't* want to enact limits on contributions. It's actually helpful to know that Greenpeace or Kerr-McGee spent substantial amounts of money on a candidate. It's important to provide that information in a way that's transparent to voters. So a law-and-economics perspective may move us to a system of aggressive disclosure, justified on the typical ground of unearthing corruption, and also on the ground of improving voter competence. Law and economics may not support many other campaign finance regulations.

The second case I want to focus on briefly is a case that will be before the Supreme Court in the next term, *Cook v. Gralike*.[75] That case deals with the constitutionality of what many call "informed voter ballot notations,"[76] or what those people who don't like them call "scarlet letter notations."[77] The notations in this case concern previous term limits. This is the way that the U.S. Term Limits group responded to the term limits case, where the Court held that states cannot impose term limits on federal lawmakers.[78] In response, U.S. Term Limits and other interest groups decided to use the ballot to put pressure on federal lawmakers to pass term limits. In a number of states, including Missouri, they told candidates that they had to decide whether or not they were going to pledge to support term limits. If they didn't, then on the ballot, next to their names in all capital letters, would appear the words, "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS."[79] For

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72. The Kerr-McGee Corporation is an energy and chemical company engaged in oil and gas exploration and production, titanium dioxide pigment manufacturing and marketing, and minerals mining and marketing. Based in Oklahoma City, it has assets of more than $7.7 billion. *See* http://www.kerr-mcgee.com (last visited March 28, 2001).

73. Greenpeace is an international organization devoted to environmental activism. *See* http://www.greenpeaceusa.org (last visited March 28, 2001).

74. Section 527 organizations are those political groups organized under section 527 of the Internal Revenue Code, 26 U.S.C. § 527. Section 527 defines a political organization as "a party committee, association, fund or other organization...organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures or both...[for the purpose of] influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state or local public office or office in a political organization." 26 U.S.C. § 527(e)(1). Under Section 527, candidate committees, party committees, and political action committees (PACs) receive preferential tax treatment that recognizes their special status. The code states that contributions these committees raise are not considered taxable income. Those groups were exempt from federal disclosure requirements until the passage of a bill sponsored by Rep. Amo Houghton. *See* Act of July 1, 2000, Pub. L. No. 106-230 (amending the Internal Revenue Service code of 1986 to require 527 organizations to disclose their political activities).

75. That case was decided on February 28, 2001. Cook v. Gralike, 531 U.S. 510, 121 S. Ct. 1029 (invalidating Missouri law requiring that the failure of any senator or representative to use their authority to amend the Constitution to impose term limits would be noted on the ballot).

76. *Id.* at ____, 121 S. Ct. at 1033-34.

77. *See* Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533 (1999).

78. United States Term Limits v. Thornton, 514 U.S. 779, 783 (1995).

79. *Gralike*, 531 U.S. at _____, 121 S. Ct. at 1033-34.

lawmakers who didn't vote in favor of term limits in the U.S. Congress, next to their names would appear the words, "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS."[80] In other words, the voters would use notations to hold lawmakers accountable for this vote.

These ballot notations were immediately attacked, and in every state where constitutional challenges were brought they were struck down as unconstitutional.[81] There are, of course, a variety of constitutional reasons for those decisions. But I think most people just looked at this innovation and thought, "Oh, that's wrong. There is just something repugnant about putting such information on the ballot. It doesn't belong on the ballot." You can figure out constitutional reasons for the decisions, but I think much of it stems from a quick reaction of repulsion.

Law and economics would suggest that this reaction might have been too quick, because the ballot already contains information. It's not a question, as Justice Rehnquist has argued in some other opinions, of making the ballot an advertising document or keeping it pristine.[82] It's not pristine now. It has information on it. It identifies the candidate's party affiliation. That's important information for voter competence. In many cases, voters can tell from the name of the candidate what ethnicity he or she is, and that is a very strong voting cue for many voters. Gender is a voting cue, and that information is often apparent. Some ballots indicate who's an incumbent, another voting cue. So the question is not whether we ought to put information on the ballot, the question really is, what information ought to go on the ballot, and is there something wrong about this particular kind of information?

I find ballot notations are an interesting way to get new voices into the political process. They are also a way to provide better information to voters. It might be very helpful for a voter to know that a Democrat favors term limits. That tells the voter more about that person's ideology, not with respect to term limits necessarily, but just generally with respect to the issues that are going to be in front of her as she votes during her term of office.

The problem is that these particular notations seem loaded. "DISREGARDED VOTERS' WISHES ON TERM LIMITS." Even if you don't like term limits, that notation signals that the candidate is a person of bad character, because this person acted contrary to the wishes of the voters. It shouldn't surprise you that the group that wrote these ballot notations, U.S. Term Limits, worked to figure out what words

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80. *Id.*

81. *See* Miller v. Moore, 169 F.3d 1119 (8th Cir. 1999) (invalidating Nebraska initiative on the grounds that it violated Article V of the Constitution and the right to vote); Barker v. Hazeltine, 3 F.Supp.2d 1088 (D.S.D. 1998) (invalidating South Dakota initiative on Article V, First Amendment, and due process grounds); League of Women Voters v. Gwadosky, 966 F.Supp. 52 (D.Me. 1997) (invalidating Maine initiative on Article V grounds); Bramberg v. Jones, 978 P.2d 1240 (Cal. 1999) (invalidating California initiative on Article V grounds); Morrissey v. State, 951 P.2d 911 (Colo. 1998) (invalidating Colorado initiative on Article V and Guarantee Clause grounds); Simpson v. Cenarrusa, 944 P.2d 1372 (Idaho 1997) (invalidating Idaho initiative on First Amendment Speech and Debate Clause and state constitutional grounds but finding that initiative did not violate Article V); Donavan v. Priest, 931 S.W.2d 119 (Ark. 1996) (invalidating Arkansas initiative on Article V grounds); *In re* Initiative Petition No. 364, 930 P.2d 186 (Okla. 1996) (invalidating Oklahoma initiative on Article V and state constitutional grounds).

82. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 365 (upholding Minnesota law that prohibited multi-party, "fusion," candidates from adding descriptive labels to their party name because such labels "would undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising").

evoked the strongest response on the part of voters, whether or not the voters were in favor of term limits. Again, law and economics tells us that the kind of information given and the frame for that information are extraordinarily important. The words that appear on the ballot at the crucial moment of voters' decisions are going to have significant, perhaps determinative, influence on the outcome of the election.

You can even argue that this kind of binary description—this on/off switch that says a candidate is either for or against term limits—is a confusing way to present information. You can be for term limits but uncomfortable with particularly short term limits, or you can be uncomfortable with particularly long term limits. These notations don't give a voter that more nuanced information.

I'll leave you with one thought before we turn to Judge Holmes. If ballot notations sound weird to you, understand that this is not the first time ballot notations have been used. The Seventeenth Amendment was passed in part because of ballot notations. The Seventeenth Amendment provides for the direct election of senators. In the West, people who wanted to take the election of senators away from legislatures and put the election into the popular realm decided to use ballot notations in their effort. State lawmakers had to pledge to elect to the Senate the person who won a popular vote in the state. If they didn't take the pledge, then the ballot would indicate that fact. The ballot would indicate that the lawmaker wasn't going to honor the people's choice in a popular vote. If the candidate did pledge to support popular election of senators, the state would put that information on the ballot. So by the time the Seventeenth Amendment was ratified and adopted, in many states senators were essentially elected directly because of the ballot notation process.

We certainly are seeing more and more discussion of ballot notations. In Arizona, a ballot notation that would have required people to pledge to replace the current income tax with the consumption tax was just recently defeated.[83] The notation would have read, "Signed the IRS Elimination Pledge." These proposals are surfacing more and more.

HOLMES: Prof. Garrett asked me to join the panel to discuss whether, and to what extent, law and economics has an effect on what federal judges do. In considering this question, I went back and reviewed the kinds of things that we trial judges do for a living—that is, the matters that are on our docket. I found that certain types of cases have a very clear law-and-economics component, and in others the law-and-economics component is more subtle.

First, cases dealing with breach of contract, which present predominantly business issues, necessarily implicate law and economics. If we focus on Judge Posner's formulation of man as a rational maximizer of self interest,[84] then when a contract has a gap of some kind, or fails to cover the instant case, we can assume the cost of providing for or foreseeing the missing term, as judged by the parties, was too high. At the same time, the rest of the document is meant to be more than a

83. *See* Steve Yozwaik and Dennis Wagner, *Voters Choose Amendments for Changing System*, ARIZONA REPUBLIC, November 4, 1998, at A1; Michael Murphy, *Prop. 202 a Shot Over Bow of IRS: Hopefuls Would Vow to Kill Taxing Agency*, ARIZONA REPUBLIC, October 25, 1998, at B4.

84. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1998).

guidepost on how to interpret the contract. It's meant to tell you, in fact, what was the articulated self-interest of this particular economic transaction.

So, as you try to divine the intent of the parties, you are necessarily trying to determine what economic incentives each party had in mind when entering the transaction. This in turn helps guide how you would allocate the benefits, burdens, risks, and responsibilities, when something happens that was not specifically covered by the contract, which happens all the time.

When that occurs, we look to the language of the contract. And as we're looking to the language, we are actually looking to the underlying transaction to understand where the parties are going and where they thought they would go. So the question becomes, if the parties could step back in time to the point at which they were developing this contract, how would they likely allocate the risks of this particular event?

Law and economics also comes into play in federal anti-discrimination statutes. That's an area that I focused upon, in part, because it's an area of real significance to federal judges' dockets. At least this is true in my district. Some ten percent of all cases filed deal with some federal anti-discrimination statute, whether it's the ADA[85] or ADEA[86] or Title VII.[87] These statutes give rise to an enormous part of what we do as federal judges. More than twenty percent of actual trials arise under these statutes, because they're very difficult, fact-based cases that often can't be addressed on summary judgment.

So I went back and looked at an issue that had vexed the courts of appeals and the district courts for a number of years before the Supreme Court addressed it in 1998 in *Faragher v. City of Boca Raton*[88] and *Burlington Industries v. Ellerth.*[89] And that is the question of employer liability for a supervisor's sexual harassment in the workplace. I went back to examine this particular issue for two reasons. First, as I mentioned, it's a matter that is on our dockets routinely. Second, it's an area where the law aims to recognize the economic implications of the workplace and tries in some way to allocate the benefits and burdens of workplace conduct.

Keep in mind that law and economics contemplates that people will respond favorably to incentives and unfavorably to disincentives. Accordingly, I went back and looked at two opinions that, in my judgment, were significant in this area. The first is the 1998 opinion *Harrison v. Eddy Potash,*[90] which was decided by Judge Briscoe of the Tenth Circuit before the Supreme Court resolved these issues in the

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85. Americans with Disabilities Act, 42 U.S.C. § 12101 (1994).

86. Age Discrimination in Employment Act, 29 U.S.C. 621 (Supp. II 1994).

87. Civil Rights Act of 1964, Subchapter VII, 42 U.S.C. 2000e (1994).

88. Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding that an employer is subject to vicarious liability under Title VII to a victimized employee for actionable discrimination caused by a supervisor, but employer may raise an affirmative defense that looks to the reasonableness of employer's conduct in seeking to prevent and correct harassing conduct and to the reasonableness of employee's conduct in seeking to avoid harm).

89. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742(1998) (holding that in those cases in which employee has suffered no tangible job consequences as a result of supervisor's actions, employer may raise an affirmative defense to liability or damages showing that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided).

90. Harrison v. Eddy Potash, Inc., 112 F.3d 1437(10th Cir. 1997), *vacated by* 524 U.S. 947, *remanded to* 158 F.3d 1371 (10th Cir. 1998).

cases I mentioned earlier. *Harrison* was her effort to try to explain and apply legal principles to the question of supervisor liability for sexual harassment in the workplace. I consider this one of the great, well meaning, and truly unworkable opinions of all time. It is great because it's exhaustive. In an effort to determine when an employer should be responsible for an offending supervisor, it dealt with every possible application of the principles of agency. It extended agency principles through the notions of apparent authority and delegated authority, and articulated a series of bases upon which the employer could be held responsible for supervisor conduct.[91] In the end, Judge Briscoe's guiding principle was that it was absolutely necessary to impose some form of strict liability on employers for supervisor misconduct.[92] She also determined that that could be done through principles of agency.[93]

I can tell you—having had a jury trial in which we undertook to apply and develop instructions based on *Eddy Potash*, and after a two-and-a-half hour discussion with the jury after the verdict was rendered—that *Eddy Potash* was absolutely unworkable. Not because the effort wasn't properly placed—indeed I think her focus on strict liability was entirely correct—but rather because the principles of agency didn't reach the workplace conduct that was involved.

The Seventh Circuit took a completely different approach from *Eddy Potash* when it considered *Burlington Industries v. Ellerth*,[94] before it went up to the Supreme Court, and *Jansen*,[95] a companion case. Judge Posner issued a particularly interesting opinion in *Jansen*, concurring in part and dissenting in part, in which he discussed both cases. Notwithstanding his strong law-and-economics pedigree, Judge Posner declined to get too deeply into the economic aspect of the issue, and he, like Judge Briscoe, tried to stretch the application of legal principles to workplace conduct. Judge Posner, however, expressly rejected any application of agency law, declaring it entirely inapposite, and chose instead to formulate a theory of negligence in the workplace.[96] In his view, everybody should be subject to a negligence standard.[97] He rejected the argument that escalating from negligence to strict liability would in any way affect primary conduct in the workplace.[98]

So Judge Posner wanted to impose a negligence standard. But how does that work? The answer, again, is that in this case legal doctrine alone doesn't work. So that's what the Supreme Court was left with. It wasn't just these two opinions. In fact, every circuit had been trying to come up with some way to deal with this problem,[99] and unsuccessfully so, in part because lower courts are limited by

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91. *See id.* at 1444-46.
92. *Id.* at 1447.
93. *See id.* at 1444-47.
94. Ellerth v. Burlington Industries, Inc., 102 F.3d 848 (7th Cir. 1997), *rev'd by* 524 U.S. 742 (1998).
95. Jansen v. Packaging Corp. of America, 123 F.3d 490 (7th Cir. 1997).
96. *Id.* at 507-10.
97. *Id.*
98. *Id.* at 511-12.
99. *See* Adler v. Wal-Mart Stores, Inc., 144 F.3d 664 (10th Cir. 1998) (employee's reporting of alleged sexual harassment to maintenance manager and her immediate supervisor put employer on actual notice of alleged harassment); Bales v. Wal-Mart Stores, Inc., 143 F.3d 1103 (8th Cir. 1998) (finding that employer knew or should have known of supervisor's sexually harassing behavior and failed to take proper remedial action was supported by sufficient evidence); Harris v. L&L Wings, Inc., 132 F.3d 978 (4th Cir. 1997) (employees' repeated, specific

existing legal principles. It is not for us to decide that we're going to bring to the analysis pure law-and-economics principles, because we trial judges are limited by precedent.

Judge Briscoe was certainly correct that strict liability was necessary, but I think she was incorrect that agency principles could get you where you wanted to go to affect primary conduct. Conversely, Judge Posner was correct that agency principles didn't work, but I think incorrect in the notion that negligence, as opposed to strict liability, would meet the requirements.

This is the context in which the Supreme Court considered these various cases. But instead of trying to figure out how the current legal doctrines worked, it seems to me that the Supreme Court properly took a step back and recognized the inadequacy of those legal principles. The Court also understood the economic principles that were guiding workplace behavior.

Now a lot of economic modeling has been done about discrimination in the workplace, and what the economic theorists tell us is that discrimination in the workplace, particularly co-worker discrimination, creates an enormous force to develop two separate, segregated workplaces. That is an all-male workplace in one shop, and an all-female workplace in another shop. This is because there are costs imposed by somebody who has a taste for discrimination and therefore doesn't want to work next to a woman. There are also costs created by workers who engage in harassing behavior, in that either that employee, or the woman who's the object of his harassment, will become less productive. All of these are costs that are incurred by employers, so there's a force to create segregated workplaces. As a result, those people who may have a taste for discrimination won't come in contact with the object of their discrimination, and vice versa.

Of course, the fundamental principle that even starts the analysis for the Supreme Court is that you can't have segregated workplaces, because employers would then impose discriminatory criteria as the primary decision of hiring. So you've got this enormous force pushing outward, and yet, at the same time, the one thing we know with certainty is that we're going to have an integrated work force. So now what happens? How do you now recognize the goals of the statute, which are to affect primary conduct, and develop appropriate incentives so that this force can operate in furtherance of the goal of the law?

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complaints to several managers about coworkers' sexual harassment gave employer sufficient notice to impute liability to employer for hostile environment); Pfau v. Reed, 125 F.3d 927 (5th Cir. 1997), *vacated on other grounds by* 525 U.S. 801, (supervisor was not employer's "agent" within meaning of Title VII's definition of employer); Blankenship v. Parke Care Centers, Inc., 123 F.3d 868 (6th Cir. 1997) (employer responded appropriately to employee's complaints by investigating matter and threatening co-worker with termination); Torres v. Pisano, 116 F.3d 625 (2nd Cir. 1997) (plaintiff failed to establish university's liability on ground that manager used his authority to further the harassment or that he was aided in accomplishing the harassment by existence of agency relationship, but knowledge of the harassment could be imputed to university based on knowledge obtained by associate director of maintenance facilities who was harasser's supervisor); Farley v. American Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. 1997) (employee's failure to avail herself of employer's grievance procedure precluded finding that employer had constructive knowledge of supervisor's harassment of employee); Wathen v. General Electric Co., 115 F.3d 400 (6th Cir. 1997) (because employer took prompt and effective action after employee complained to employer, it could not be held liable for sexual harassment); Gary v. Long, 59 F.3d 1391 (D.C.Cir. 1995) (employee could not reasonably have believed that supervisor had authority, apparent or otherwise, to sexually harass her and, therefore, employer could not be held liable for supervisor's hostile work environment harassment of employee).

The answer the Supreme Court came up with was not expressly set forth in the statute. The Supreme Court created an affirmative defense.[100] They recognized the need for strict liability, but then created exceptions. The Court determined that employers would not be held strictly liable for supervisor misconduct if (1) the employer creates effective procedures to deal with sexual harassment in the workplace, and (2) the employer can demonstrate that this particular employee failed to adequately avail herself of those procedures.[101]

Now, as a matter of economic modeling, this creates a very clear incentive on the part of the employer to eradicate the taste for discrimination in the workplace. As a result, the pressure that was otherwise pushing out into separate workplaces is now pushing in to create a change in the environment in the workplace. Ultimately, this decision uses economic forces to further the goals of the law—and it has done exactly that. Employers are now actively involved in creating the required procedures. They are mandating that there be full compliance with those procedures, and now this internal pressure has had the effect of ejecting from the workplace those who will not give up their taste for discrimination. People are either not being hired because of a taste for discrimination or being fired pursuant to the operation of the procedures.

So, the Supreme Court captured forces that were outside of legal doctrine to some degree, but were more appropriate to deal with what was economically occurring in the workplace. And I can tell you as a judge—although other judges may have had different experiences—I think you can feel the way that harassment cases have now taken on an entirely different shape than even three years ago. Employer conduct is to a much greater degree lined up with what they expect and demand in the workplace. People are, in fact, being terminated or they're ending their taste for discrimination. So it really has the effect of doing exactly what the statute sought to achieve—either get over it, or get out.

GARRETT: Those remarks demonstrate why law and economics have enjoyed such a harmonious marriage. Law is at its base about regulating behavior and structuring behavior through institutions, and economic analysis concerns these issues as well. That is not to say that's all law does. There's an aspirational element to law. But it would be absurd to look only at the aspirational elements and not also look at the sort of behavior modification, control, and channeling function of the law.

Let's open this up and hear your views, discussions, questions, etc.

BRENT MANNING:[102] I'd like to comment on Judge Holmes' analysis of the harassment situation. I guess I don't see that the prior legal theories weren't any more suitable to achieve the desired result than the decision that ultimately came down or that they are really any different either in the law and economics. It seems to me that one can apply the negligence principles, for instance, and say all the Supreme Court did is establish a bright line for what constitutes employer negligence. If an employer is negligent in that he did not have an adequate system

100. *Burlington Industries*, 524 U.S. at 765.

101. *Id.*

102. Attorney at Law, Manning, Curtis, Bradshaw & Bednar, P.C., Salt Lake City, Utah.

to address workplace harassment, then, using agency principles, the employer is liable for the conduct of his employees. Similarly, one can say agency principles are sufficient because you are liable for any conduct of the employee that is within the scope of their employment or in furtherance of one of the employer's goals.[103] So I think both get you to the same result, and that what the Supreme Court did is really not very different from what Judge Posner or Judge Briscoe did.

HOLMES: Well, let me respond to that, taking the latter point first. I don't think that agency principles adequately address the issue, in part because an employer is only going to be responsible for the acts of an agent so long as the agent's actions are within the scope of employment. But, as Judge Briscoe points out, it's rarely within the scope of any employee's employment function to harass women in the workplace.[104]

MANNING: The employer has in effect condoned such behavior.

HOLMES: Well, whether or not the employer condoned such conduct goes to the question of whether that should be addressed as a negligence issue. That's what Judge Posner said.[105] He effectively took your position, which is that negligence will capture all of this conduct, but it is a form of moving negligence. That is to say there's a moving standard of care. If you don't have a procedure effective enough to stop this kind of behavior, which by definition you won't, then you are going to be deemed to have violated the standard of care and therefore have committed negligence.

Now practitioners tell me that the creation of the affirmative defense with the concomitant strict liability has been the strongest tool that they have to make it clear to employers that they have the responsibility to regulate employee conduct—that it's not just the kinds of loose responsibility that come with the negligence standard or what historically was described as the "knew of/should have known" portion of the liability. Now they are able to tell the employers, "You will be responsible for this. You have a proactive role to play. Otherwise, you have an economic cost if you do not play it." And as a result, you have created an enormous and direct incentive that employers can understand.

You can say that ultimately you might be able to reach the same result with an overlay of negligence. But what do we really want done here? The anti-discrimination statutes are unique. The goal of the statutes is to eradicate discrimination—to see it decline on a year-by-year basis. So if that is your real goal, to effect primary conduct, then it's not helpful to go to an employer and say, "You might be held liable; you might not be held liable." If you really want to achieve the goal of the statute, you need to create an incentive for the most responsible actor who's in the position to affect that goal, and they become the moving force.

That's what I mean by capturing that pressure and making the employer the focal point. That will ultimately eject offending employees from the workplace. If you lessen the employers' responsibility, then the likelihood of them taking the primary role in achieving the goals of the statute goes down.

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103. *See* RESTATEMENT (SECOND) OF AGENCY, §§ 219, 228, 230 (1958).

104. Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1444 (10th Cir. 1997), *vacated by* 524 U.S. 947 (1998), *remanded to* 158 F.3d 1371 (10th Cir.).

105. Jansen v. Packaging Corp. of America, 123 F.3d 491, 507-10 (7th Cir. 1997).

JUDGE PAUL KELLY:[106] I think there are problems with the two decisions you discussed and the *Harrison* case. Even if you have an employer who's done everything you've said, and puts into place the most stringent set of rules in an attempt to avert risk, they can still have a supervisor who actually has an adverse impact on an employee. In that scenario, the employee is excused from any requirement to follow through, and there's absolute liability.

I think that policy will have a detrimental effect on the manner in which an employer may respond down the road. As long as you put people together you're going to have grabbers, harassers, and discriminators. But, then when we say to employers that we don't really care what they've done, if there were an adverse impact on that employee who was discriminated against, they are absolutely liable.[107] No matter how proactive the employers are—they could be policing up and down the assembly line—once the adverse impact has occurred, there is no affirmative defense.

HOLMES: Under *Eddy Potash* or under the Supreme Court cases?

KELLY: Under the Supreme Court cases. Although really under *Eddy Potash* that's the rule, because the potash company had in place a very elaborate system of procedures, which the employee did not avail herself of, supposedly because of fear.[108] Ultimately that was not allowed as an affirmative defense because there was some kind of adverse effect on the employee.[109] As I understand it, if there were an adverse effect, then your affirmative defense is out the window.[110] I think that's counterproductive economically.

HOLMES: You're talking about when someone is fired?

KELLY: Or when they don't get a promotion. Some adverse impact.

HOLMES: The cases describe this as a "company act."[111] I don't believe that's necessarily counter-productive economically, because you have in fact imposed a cost, an adverse cost, on that employee as a result of the sexual harassment. Previously I was talking about the situation where there's not a company act, but where there's workplace harassment, which is the hostile work environment case. Once you have an adverse act, as you said, the law imposes liability.

But why is that? Judge Posner would say, and he did say in his concurrence in *Jansen*, that even though he thinks negligence is the appropriate analysis, he would accept strict liability if there is a "company act."[112] And that is precisely the adverse effect that you're describing. In that situation, you have imposed an economically adverse effect directly on somebody, as opposed to interfering with the terms and conditions of employment in a hostile work environment.

KELLY: I would just suggest if the adverse effect is remediable, if the employee could have availed herself of the procedures in place and gone beyond that particular manager without any problem, then the fact that the person is a nominal supervisor,

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106. Circuit Judge, United States Court of Appeals, Tenth Circuit.

107. *See e.g.*, Pierce v. Comm. Life Ins., 40 F.3d 796 (6th Cir. 1994); Karibian v. Columbia Univ., 14 F.3d 773 (2nd Cir. 1994).

108. *Harrison*, 112 F.3d at 1441.

109. *See id.* at 1451.

110. *See supra* text accompanying note 99.

111. *Jansen*, 123 F.3d at 506, 512.

112. *Id.*

or is in a position of management, shouldn't matter. I see no purpose, from an economic standpoint, to punish an employer because one employee acted contrary to all the rules and regulations in place that were enforceable, but the other failed to avail herself of the system in place for dealing with such violations. So, I don't see the result of those decisions as economically based. I understand that the cases you've mentioned dealt with a different scenario, where there is no adverse impact and the focus is on the offending employee, and I agree the Court adopted a rational approach for those cases.

GARRETT: One of the larger economic questions that these discussions raised, and that you all must deal with constantly, is the choice between rules and standards in setting forth the law. The Civil Rights Act and Title VII created standards, not rules. That is, they set out a general objective—to root out discrimination. But they are not very specific about what discrimination is and what's expected of people. Such a standard imposes significant costs on employers, the people whose conduct has to change to meet that standard. It imposes costs on judges, who then have to figure out what the standard means and apply it to particular cases. Judge Posner in this case is still grappling with the standard of negligence. Then the Supreme Court finally provides a more bright line rule: do X and Y and you'll be fine; don't do X and Y and you're not going to be fine. That rule-like approach shifted the costs away from some of the district courts and fact finders, maybe away from some of the employers, but onto different people.

One of the things we learn from law and economics is to think about the difference between rules and standards, to think about the costs institutionally, and to think about the difficulties in setting forth behavioral rules ex post and ex ante.

DEAN MARTY BELSKY:[113] Professor Garrett, you talked about the economic efficiency of disclosure laws. You thought that would probably be a better way to go than mandates. But the clear example of disclosure laws is the Security and Exchange Commission (SEC) regulations. And SEC regulations have led to a messy bureaucracy. Why wouldn't that exact same thing happen if you have to require campaign managers, politicians, and others to monitor all of the information? You're going to have an agency, the Federal Election Commission (FEC) probably, that's going to need an enforcement division. Is that really more economically efficient than saying no?

GARRETT: That's a great question for the following reason. All of the people who talk about campaign finance, from Libertarians to the Brennan Center at New York University, agree that disclosure is relatively unproblematic. These groups are dealing with the further question of whether the law can limit contributions or expenditures. No one is arguing about disclosure. They assume that disclosure is unproblematic.

That viewpoint overlooks the question you raised. There is a cost to disclosure. The current disclosure rules can be extremely difficult to comply with. Established candidates keep lawyers busy helping them negotiate through the disclosure requirements. The cost of disclosure falls most heavily on the groups that I'm concerned about—grass roots groups, voices we don't already hear, challengers who

113. Dean, University of Tulsa School of Law.

don't have much money. Thus, we ought to be as interested in justifying disclosure rules as we are with contribution limits, expenditure limits, and the like. I think the SEC example is an apt example; any regulatory scheme emphasizing disclosure is costly and difficult.

What does that mean? It means you have to balance the need for information with the awareness that there are costs to information. The more you require in terms of disclosure, the more difficult it is going to be for smaller groups to comply with the rules, and the more you're going to have to worry about enforcement issues.

Let me make a few observations, though. First, the fact that disclosure is costly doesn't mean it may not, on the whole, be a good thing under some circumstances. Second, the new technology is reducing the costs of disclosure and enforcement. We ought to think about trying to structure the laws to be as transparent and easy to comply with as possible, and we ought to take advantage of all the new technology—the Internet—to think about how we require people to report, how we post that reporting, etc.

Third, we ought to think about the sanctions. For example, the lobbying rules in effect since 1946, and until the recent lobbying act was passed,[114] could be enforced only through extremely stringent criminal penalties. Very few lobbyists disclosed, but they were never prosecuted because if a court found someone guilty of failing to disclose, the judge had to send him to prison. Well, that seemed disproportionate. So any disclosure system should rely on civil remedies that can be easily calibrated to the level of the offense and that allow people opportunity to remedy violations to show their good faith.

Fourth, you'd want to have a legitimate entity to regulate. The FEC is probably not that legitimate entity. You would have to rethink the administrative agency. The SEC may be problematic, but it's one of the best agencies out there. The FEC is not even in their league.

I have one final point about transactions across the Internet. Some people are claiming that the Internet is going to transform our country into a direct democracy. As we think about reducing costs of disclosure, we're also reducing transactions costs involved in having all of us participate as lawmakers in decisions. There's a new book by Dick Morris in which he argues that in the next few years we will move to a direct democracy where we're all voting all the time on every issue that comes up.[115] He also concludes—and this hasn't gotten a lot of press—that we're going to be so repulsed by this outcome that we will return to a representative democracy.[116]

BELSKY: What do you think about a simple straightforward rule that says you cannot do it?

GARRETT: That you can't spend money?

BELSKY: Right. Leaving aside the interpretation of the First Amendment by a different court,[117] it seems to me the most economically efficient rule.

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114. *See* Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 (Supp. IV 1998).

115. DICK MORRIS, VOTE.COM: HOW BIG MONEY LOBBYISTS AND THE MEDIA ARE LOSING THEIR INFLUENCE, AND THE INTERNET IS GIVING POWER BACK TO THE PEOPLE (2000).

116. *Id.*

117. *See* Buckley v. Valeo, 424 U.S. 1 (1974).

GARRETT: I don't believe that it would work. I think that the hydraulic quality of money means that it will pop up someplace else. You cannot have a comprehensive enough system to work, so all you've done is force money into less transparent vehicles.

JUDGE JIM STARZYNSKI:[118] I was struck yesterday when Professor Chemerinsky pointed out that Justice Kennedy, in the recent sovereign immunity cases, said we should feel comfortable relying on the states to do the right thing.[119] He pointed out nobody on the Supreme Court would have said that in 1960 in the civil rights cases.[120] Here today, for example, is the suggestion that we should require more disclosure. What if I point back to the 1960s again and pose the issues in *NAACP v. Button*, which basically said we're not going to let the state of Alabama require the NAACP to inquire who all its members were.[121]

I'm not quite confident enough that we've reached the stage in this democracy that there might not still be some opprobrium that would follow some political groups, whether you're talking potentially the Democrats, Republicans, American Nazi Party, whoever.

GARRETT: That's an extraordinarily difficult issue. That's a part of disclosure that the *Buckley* court really just dismissed. The *Buckley* court mentioned *NAACP v. Button*[122] and noted that the challengers in *Buckley* argued that disclosure would reduce the quantity of political speech because those who have disfavored viewpoints wouldn't be willing to spend money in campaigns if their names would be disclosed. But the court said that it didn't have any examples of suppression of speech and that it would deal with that question on a case-by-case basis if those problems did arise. The Court dismissed the concern in a way I think is troubling. It's particularly troubling outside the context of candidate elections when we talk about disclosure in direct democracy, where people spending money are affiliating themselves with particular issues, and often those issues will be disfavored ones. Think about some of the issues of ballot questions recently—gay rights, bilingual education, affirmative action. Some of the voices that we've heard on these controversial issues might have been silenced if people's names had to be disclosed. So the more aggressive the disclosure statute, the more troubling the disclosure issue.

But again, we return to a balancing test. The less aggressive the statute, the less helpful it is for voter competence. How do you take account of that reality? Do you have some kind of structure where people can make the allegation that disclosure is particularly problematic for them in a very quick administrative proceeding? The potential contributor argues, "I can't disclose because I will suffer very negative consequences to disclosure." Can that be done in some kind of streamlined administrative proceeding, where the court or the administrative agency could say,

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118. Chief Judge, United States Bankruptcy Court, District of New Mexico.

119. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the states will refuse to honor the Constitution or obey the binding laws of the United States.").

120. Prof. Chemerinsky made his comments during this conference in a keynote presentation, *The Federalism Revolution*, reprinted in this volume.

121. NAACP v. Button, 371 U.S. 415, 437 (1963).

122. *Buckley*, 424 U.S. at 25.

"Okay, in this case you're right, and we'll exempt you from disclosure"? Or is that too burdensome? Those are questions policymakers have to grapple with. I wish I had better answers, but that's what I've been trying to work through since I decided to argue in favor of disclosure as the sole campaign finance regulation.

DAN WEBBER:[123] If I heard you right at lunch, I think you said that you had some law-and-economics-based ideas about how the Supreme Court might have differentiated between blanket primaries and open primaries, and you didn't get to elaborate on that.

GARRETT: I think that the answer would be that the open primary poses less of a threat to the political parties. Even though you can wait until the day before the election to say, "I'm a Democrat," the parties still have more control over who candidates are. Furthermore, there's a cost to the voter of picking one party. You don't then get to vote in any of the races in the Republican, Green, Libertarian, or Peace primaries. So while an open primary somewhat weakens political parties, it's not the same kind of weakening you get with blanket primaries.

Moreover, you find some open primaries being adopted by political parties. That happens less frequently with blanket primaries, although it occurs when parties want to select candidates that appeal to a more diverse range of voters. If empirically parties are willing to have open primaries, and are not intractably committed to closed primaries, that suggests that the open primary is less threatening than the blanket primary.

The analysis, however, should be different from Justice Scalia's approach, which focused on the associational rights of members of political parties[124] almost in the same terms as the court talked about the associational rights of the Boy Scouts in another case.[125] The opinions don't seem to differentiate between the associational rights of members of a political party and of a very private institution like the Boy Scouts.

AUDIENCE MEMBER: This is really a question for all three of you. It really seems to me as if there are two levels operating in each area you discussed. Prof. LeFrancois's idea is to get more bang for your buck on criminal action, that's the law-and-economics idea, but underlying that idea is a clear law-and-psychology, or law-and-anthropology, or law-and-sociology concept. It seems to me that underlies all of those areas.

LEFRANCOIS: It's true, and I think it's not surprising to the extent that we might think of economics as a way to both understand and predict human behavior. So it makes perfect sense that economics takes into account all kinds of social science in its modeling. We certainly see this in the intersection between social norms and criminal law and procedure. As I indicated, I think anthropologists would call them mores, Freudians would call them superegos, and parents would just say this is peer pressure. That's clearly not what we would have traditionally thought of as economics. But I think you're exactly right about that interplay of social science.

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123. United States Attorney, Oklahoma City.

124. California Democratic Party v. Jones, 530 U.S. 567, 574-76 (2000).

125. Boy Scouts of America v. Dale, 530 U.S. 640, 655-57 (2000) (holding that application of New Jersey public accommodations law, which prohibited discrimination based on sexual orientation, violated the Boy Scouts' right to free association).

GARRETT: A lot of the work being done now with behavioral psychologists and sociologists can be characterized either as economics, psychology, or sociology. Economics is becoming a bit more sophisticated by using such techniques.

HOLMES: I think throughout all the law-and-economics literature there is a rather defensive notion that these theories are at odds, or thought to be at odds in some way, with traditional notions of morality or traditional notions of what drives our legal traditions. The truth is, I think, that sometimes it *sounds like* they're unrelated. We talk about things that we think are philosophically important, and then we find that the economic model may be completely devoid of any of those guiding principles.

But sometimes law and economics interacts and intersects with established legal principles. I think that happens in business areas in particular, those cases that deal with workplaces and deal with actors who operate on incentives. And as Professor Garrett points out, if you look at voting as a market as well, then you have opportunities to see the interactions that are not necessarily immoral, they just simply happen to be driven by self-interest.

I think in most instances the law tries to do what's right. If you ask some people, they'll say the law doesn't make any sense. I don't believe that. Most times when you start working on a legal problem, you don't know a lot about it. You start out and you think, "Where should this turn out?" It's like Dr. Capra mentioned, you start with a working hypothesis.[126] How's it supposed to work?

The answer most times is exactly what you think it should be. The law intends to do what is right. It really does mean to work out what's right, whether in contract transactions, tort cases, or whatever. More often than not, economic theory also deals with those competing self-interests and sees those individual choices and comes to fundamentally the same result. So you have a great deal of correlation. In business areas, we're trying to make a transaction work. That's why the two parties got into it. Why shouldn't the legal principles correspond generally with economic principles?

On the other hand, sometimes economic theory may depart from those things that we think are right, but only for reasons that are starkly self-interested, as opposed to superimposed moral decisions that we make as a society that we think are important but that may not be economic at all. Prof. LeFrancois talked about criminal concepts that you may view separate and apart from any economic theory, but they are moral judgments that we make. They may be inefficient, but that's different. Then we'll have divergence.

GARRETT: One final question before we disperse?

BELSKY: Professor Garrett, when I learned about law and economics, before Noah and the Ark, law and economics was pure, hard cost-benefit analysis. Are you saying that the whole school of law and economics is moving to a more touchy-feely, soft attitude?

GARRETT: There is now what's called The New Chicago School of Law and Economics. The people who are associated with that movement are the people that

126. Dr. Capra made his remarks in a speech during the lunch given immediately before this session. His comments were not included in this volume.

Art talked about—Cass Sunstein, Dan Kahan, Tracey Meares, and Eric Posner, Judge Posner's son. The group also includes scholars working at places other than Chicago, such as Larry Lessig.[127] They are saying that it was great to have these law-and-economics ideas at the outset, but they were simplistic. They didn't capture reality. They helped us identify important issues, but they were not complete. So what many of us are trying to do—and I hope I'm part of that effort—is to use those same tools, but also use other tools from other disciplines to reach more sophisticated conclusions. And at certain times we have to say that even when we try to explain things the best we can, in the end we can't explain everything. And, in the end, even if we could explain everything, we might decide for other reasons, aspirational or moral reasons, to diverge from the economically efficient answer. So we're really trying to make law and economics a more sophisticated, nuanced version of what you and I learned when we were in law school.

Thank you very much.

127. Professor Lessig joined the faculty of Stanford Law School in the fall of 2000.