


Fall 2000

How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes

Lior Jacob Strahilevitz
U.S. Court of Appeals, Ninth Circuit

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Property Law and Real Estate Commons](#), [State and Local Government Law Commons](#), and the [Transportation Law Commons](#)

Recommended Citation

Strahilevitz, Lior Jacob (2000) "How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes," *Indiana Law Journal*: Vol. 75: Iss. 4, Article 4.
Available at: <http://www.repository.law.indiana.edu/ilj/vol75/iss4/4>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes

LIOR JACOB STRAHILEVITZ*

INTRODUCTION	1232
I. CARPOOLS AND CONGESTION: A THEORETICAL FRAMEWORK	1235
<i>A. Carpools</i>	1235
<i>B. Congestion-Pricing Theory</i>	1243
II. CONGESTION PRICING IN PRACTICE	1249
<i>A. Program Description</i>	1250
<i>B. FasTrak's** Effect on Traffic Patterns</i>	1252
<i>C. FasTrak's Effect on Compliance</i>	1256
III. FASTRAK'S EFFECT ON NORMS	1260
<i>A. Carpooling Norms</i>	1261
<i>B. Compliance Norms</i>	1264
<i>C. Road-Pricing Norms</i>	1267
IV. APPLYING THE SAN DIEGO CASE STUDY TO THE NORMS DEBATE	1272
<i>A. Interactions Between Norms and Laws</i>	1272
<i>B. FasTrak and the Tradable Permits Debate</i>	1284
V. CONCLUSION	1291
<i>A. Recap: FasTrak's Major Lessons</i>	1291
<i>B. Commodification Postscript: Some Food for Thought</i>	1293

* Law Clerk to the Honorable Cynthia Holcomb Hall, U.S. Court of Appeals, Ninth Circuit. J.D., 1999, Yale Law School; B.A., 1996, University of California—Berkeley. I wish to express particular thanks to Robert Ellickson, whose scholarship inspired this Article and whose diligent supervision improved it immensely, and to Carol Rose, who first got me thinking about environmental norms and whose many suggestions for the piece were right on target. In addition, the comments of Ian Ayres, Kenneth Heath, Carlton Larson, Sachin Pandya, Phil Spector, and Michal Strahilevitz contributed much to the development of this Article, as did the insights of Jay Gainer, Sharon Gordon, and Karyn Menpink, civil servants involved in the implementation of San Diego's FasTrak program. An earlier draft of this Article was awarded Yale Law School's John M. Olin Prize for scholarship on law, economics, and public policy. The views expressed herein, along with any errors, are mine alone.

** FasTrak is a trademarked program name.

INTRODUCTION

Over the past two decades a fierce debate has raged between proponents of tradable emission rights and advocates of command-and-control mechanisms for regulating pollution. To the extent that the two sides have confronted each other's arguments, the battleground has been distinctly utilitarian—each side argues that its favored method for controlling pollution entails lower transaction costs, relatively simple and vigilant enforcement, and superior control over the damage created by pollution.¹ But opponents of tradable emissions regimes have also marshaled a normative argument in attacking those regimes. They have suggested that emissions trading amounts to the government granting firms or individuals a “right to pollute.” These property regimes transform what was formerly a fine for noncompliance with the law into a simple charge for using a common resource. Many environmentalists and scholars find this outcome so perverse that they declare tradable emissions schemes to be morally objectionable.² Not surprisingly, proponents of emissions trading admit that creating a right to pollute is exactly what their schemes do, but they argue that such rhetoric is irrelevant; all that matters is that emissions trading constitutes the most efficient way to control pollution.³

A second group of emissions-trading skeptics has sought to use this norms-based critique to confront proponents of emissions trading on more utilitarian terms. These critics argue that the sale of pollution rights undermines the current social sanction that attaches to excessive emissions, thereby transforming pollution from a social evil into a neutral commodity.⁴ As a result, social norms against excess pollution—which currently help encourage voluntary compliance by firms with environmental requirements, environmental whistle-blowing, and private efforts to enforce laws and regulations governing pollution—will be weakened.⁵ Because of these developments, the cost of enforcing the anti-pollution laws would rise. Backers of emissions trading seem willing to concede that commodifying pollution rights has an adverse effect on norms, but argue that the efficiency advantages of transitioning to emissions trading will offset the increased compliance costs that result from the erosion of social sanctions against pollution.

This Article questions the notion that creating a right to pollute undermines anti-pollution norms. I argue for precisely the opposite proposition: Commodification of pollution rights through an emissions trading regime might well buttress norms against excess polluting, doing so in ways that will have lasting positive effects on the ecosystem. In order to make this case, I engage in a comprehensive case study of a jurisdiction that has, in the past few years, moved from a command-and-control system to a regime based on the tradable permits model. In this instance, however, the overburdened resource that is governed by the tradable credits regime is not the atmosphere, but a highway in a major metropolitan area.

1. See sources cited *infra* note 268.

2. See *infra* text accompanying note 273.

3. See *infra* text accompanying notes 283-84.

4. See *infra* text accompanying notes 276-78.

5. See *infra* text accompanying notes 279-82.

In 1988, prodded by its residents and EPA officials to do something about traffic congestion on I-15, the main artery connecting downtown to its northern inland suburbs, San Diego, California opened a series of Express Lanes for the exclusive use of carpools. The lanes were designed to give commuters incentives to pair up, so as to take advantage of the quicker, less congested commutes in those lanes. Unfortunately, few solo commuters changed their driving behavior as a result of the lanes' creation, and traffic conditions in the main lanes continued to worsen. Moreover, many solo commuters were so determined to avoid the congested main lanes that they regularly risked stiff fines by driving in the carpool lanes. By 1996 a desperate city launched a radical pilot program (dubbed "FasTrak") to help contain the traffic congestion problem. Access to the I-15 Express Lanes was made available to solo drivers willing to pay a fee.

In a 1997 article attacking a proposal to implement tradable emissions permits on the global level, Michael Sandel invoked the specter of this highway-pricing pilot program to illustrate the dangers of creating a right to pollute:

In effacing the distinction between a fine and a fee, emission trading is like a recent proposal to open carpool lanes on . . . freeways to drivers without passengers who are willing to pay a fee. Such drivers are now fined for slipping into carpool lanes; under the market proposal, they would enjoy a quicker commute without opprobrium.⁶

As Sandel's analysis implies, the San Diego FasTrak system presents an interesting opportunity to test the arguments against emissions trading. In San Diego, the government took an activity that was formerly discouraged—solo driving—and allowed solo drivers to avoid the penalty of having to wait in rush hour traffic in exchange for a price.⁷ It converted an activity that was formerly forbidden (solo drivers using the Express Lanes) and made it permissible for those willing to pay a fee that roughly corresponded to the market price of using the relevant resource.⁸

Sandel's analogy notwithstanding, doesn't it make more sense to study the effects of emissions trading itself on environmental norms, rather than analogizing to commodification of the highways? Not really. The FasTrak program represents a superior case study to test the effects of commodification on norms in that public awareness of the program is very high.⁹ The FasTrak program is quite visible and, within its first year of operation, had become well-engrained in the psyches of San Diego commuters.¹⁰ By contrast, the fact that the American government has begun

6. Michael J. Sandel, Editorial, *It's Immoral To Buy the Right To Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23. Sandel is the only scholar other than I to note in print the connection between emissions trading and selling access to carpool lanes, and his treatment of the subject is entirely encapsulated in the paragraph reproduced in the text.

7. This is the flip side of saying that the government favored carpoolers by allowing them speedier commutes than solo drivers.

8. In this instance the market price was mediated by the government. Note, however, that the price of accessing the Express Lanes increased as more drivers sought to do likewise—just as market prices for any commodity should increase when the number of buyers rises and the quantity of the product remains constant. See *infra* note 111.

9. See *infra* text accompanying note 289.

10. See *infra* text accompanying note 113.

to use a tradable emissions scheme to govern SO₂ emissions has yet to register with the public. Thus, a major impediment to studying the effect of law on social norms—lack of awareness of the law’s provisions—does not arise in the San Diego case study. Moreover, by focusing on a discrete set of norms within a single community, it is much easier to isolate the influence of a government program on norms governing a single activity—driving. In a larger community—such as the nation as a whole—there are likely to be a number of confounding variables that will influence environmental norms that operate independently of any government program.

Sandel invoked the example of selling access to the carpool lanes to make a particular point. He thought it intuitive that the FasTrak approach would undermine the effectiveness of San Diego’s efforts to encourage carpooling. His prediction may have been intuitive, but it was dead wrong. Much to the delight of San Diego city planners, *the number of carpoolers on I-15 increased significantly after FasTrak was implemented*. Two other results of the San Diego experiment should surprise Sandel and the opponents of commodification: First, *the percentage of unauthorized users in the Express Lanes dropped noticeably*. Second, *the equity critique of commodifying roadway access—that it unfairly advantages the wealthy—did not resonate within the community*. This Article’s ambition is to explain these three surprising findings and apply the lessons learned to the larger legal question of how changes in the law influence social norms, with a particular emphasis on the norms governing pollution.¹¹

11. In this Article I define norms as patterns of behavior that are widely adhered to by some group of individuals, at least in part because of social pressures to conform to that norm. Taboos against adultery, smoking in a no-smoking area, the use of profanity when children are present, and failing to wash one’s hands after using a restroom are examples of norms. So are affirmative practices such as the American practice of shaking hands, the Japanese practice of bowing, the exchanging of pleasantries at the start of a job interview, and the reliance of American lawyers on Latin phraseology. Norms can be distinguished from other forms of human behavior that are widely adhered to for reasons having nothing to do with social pressures. For example, everyone squints when exposed to bright sunlight, and many people snore while sleeping, but these practices are due to biological pressures, as opposed to social ones. Note that with the ultimate example, as various technological gizmos designed to control snoring are developed and marketed, a social norm *against* snoring by those who do not sleep alone may gradually emerge.

Of course, norms have two components: Norms both describe how people *do* behave and dictate how, according to the relevant community’s standards, they *should* behave. In this Article some of the phenomena I have described as being norm-driven will perhaps cause some readers to bristle. For example, I refer to a “norm” of solo commuting, even though most solo commuters understand that society would be better off if they instead adhered to a carpooling norm. But the decision to drive solo is largely dictated by social pressures, such as the arrangement of work schedules, notions about the value of privacy and solitude, decisions about where to live, and automobile advertising, to give a few examples. Consumer preferences for certain types of products and behaviors can become norms precisely because those preferences are heavily shaped by factors exogenous to the individual consumer. And there is nothing contradictory about pointing to conflicts among norms governing how people should behave and do behave or recognizing that powerful, contradictory norms often send individuals mixed messages about how they should behave. Nor does it stretch the concept of norms too

Part I introduces the theoretical framework for the two approaches to traffic management combined by the FasTrak program. It explores why American drivers are attached to solo commuting, and ways in which cities have tried to encourage motorists to consider carpooling. Part I then briefly discusses congestion pricing, an approach that seeks to decrease congestion by charging motorists tolls that vary based on the levels of traffic congestion at a given time. Part II examines the factors leading San Diego to adopt its pilot program and reviews the initial data on the program's success in decreasing traffic congestion and violations of the laws against unauthorized use of the Express Lanes. Part III discusses how the program's implementation affected norms on I-15. Specifically, the effect on norms governing which types of commuting behavior are most appropriate, the effect on norms concerning the acceptability of breaking the law, and the effect on egalitarian norms regarding roadway access are examined. Part IV highlights the general legal literature on norm creation, with an emphasis on how legal changes prompt changes in popular norms. It then uses the lessons learned from the San Diego case study to help address fundamental questions about what effect a shift to emissions trading regimes in the pollution-regulation context is likely to have on pollution-related norms. A brief conclusion in Part V summarizes the Article's more interesting findings and points out how the lessons of San Diego apply to current debates over commodification in property law, environmental law, and bioethics.

I. CARPOOLS AND CONGESTION: A THEORETICAL FRAMEWORK

A. Carpools

Robert Putnam is the leading modern theorist of social capital in the United States. In comparing America of the 1950s to today's society, Putnam notes the extent to which people who bowl have, over the past few decades, ceased participating in bowling leagues, preferring to bowl in smaller groups or even by themselves.¹² He sees this dynamic as symptomatic of a trend away from community organizations as Americans become increasingly withdrawn and uses the bowling dynamic as the title for his article on the broader phenomenon entitled *Bowling Alone*.

During the same period of time, American drivers have been taking a cue from their bowling counterparts. Americans are now *driving alone* at unprecedented levels.¹³ As middle-class families have come to own two, three, or even more cars,¹⁴

far to say that norms are behavioral patterns that influence decisional matrices as seemingly different as how ranchers resolve cattle disputes and how parents decide to meet their families' transportation needs.

12. See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995). Putnam recently released a book with the same title. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

13. See Craig N. Oren, *Getting Commuters out of Their Cars: What Went Wrong?*, 17 STAN. ENVTL. L.J. 141, 163-64 (1998) (noting that vehicle occupancy dropped from 1.3 passengers per vehicle in 1977 and 1983 to 1.1 in 1990, and that "four million fewer workers carpooled in 1990 than in 1980"); U.S. Census Bureau, *Means of Transportation to Work for the U.S.* (visited May 23, 2000) <<http://www.census.gov/population/socdemo/journey/mode67>

driving has become an increasingly solitary experience. The early 1980s saw a particularly sharp increase in the percentage of Americans who drive to work alone.¹⁵ By 1990, the average car commuting to or from work in the United States contained only 1.09 occupants.¹⁶

The solo driver in his car has become an expression of American individualism, a symbol of freedom and liberation.¹⁷ Peter Freund and George Martin's work aptly characterizes the current popular psyche:

Ironically, it has also been argued that in a society in which self-control is so pervasively necessary, the auto may function as one of the last "free spaces," a means of freedom and refuge from civilization. Resistance to mass transit or to car pooling may come partly from the fact that "car time" for many people is one of the only occasions that they can be alone for an appreciable length of time.¹⁸

Driving has become less of an opportunity for interactions with family members, co-workers, and neighbors, and more of a space for an individual to collect his thoughts, and escape from his family members, co-workers, and neighbors.¹⁹

From an environmentalist perspective, as well as a city planning perspective, the growth of single occupant vehicles ("SOVs") is certainly harmful. The prevalence of SOVs on American roads, especially during rush-hour commutes, has contributed

90.txt> (noting that the percentage of workers carpooling to work declined from 19.7% in 1980 to 13.4% in 1990).

14. See generally JOHN F. KAIN, *THE IMPACTS OF CONGESTION PRICING ON TRANSIT AND CARPOOL DEMAND AND SUPPLY* 29 tbl.7 (Harvard Inst. of Econ. Research Discussion Paper No. 1643, 1993) (collecting data showing that in 1990 the majority of households in heavily congested major metropolitan areas owned two or more cars). There are a number of other reasons explaining the rise in solo driving. For a full exploration, see Oren, *supra* note 13, at 160-74.

15. See PETER FREUND & GEORGE MARTIN, *THE ECOLOGY OF THE AUTOMOBILE* 9 (1993).

16. See U.S. Census Bureau, *supra* note 13; see also CHARLES L. WRIGHT, *FAST WHEELS, SLOW TRAFFIC: URBAN TRANSPORT CHOICES* 37-38 (1992) (quoting an earlier figure of 1.15). See generally KAIN, *supra* note 14, at 29 tbl.7 (noting that in the nation's most congested urban areas [excluding New York City] almost 73% of all trips to work are in single occupant vehicles, versus 11% in carpools, and less than 9% on mass transit).

17. See FREUND & MARTIN, *supra* note 15, at 82, 86; see also Len Holden, *More Than a Marque. The Car as Symbol: Aspects of Culture in the 20th Century*, in *THE MOTOR CAR AND POPULAR CULTURE IN THE 20TH CENTURY* 28, 29 (David Thoms et al. eds., 1998) (noting that the car's "widespread use in film and literature as a metaphor for freedom, of 'moving on' and starting over is reflective of individualism and the need for control over one's destiny, concepts powerful in the West especially in the USA").

18. FREUND & MARTIN, *supra* note 15, at 99.

19. This interest in escaping helps explain why so many Americans are resistant to using mass transit. As Charles Wright has observed, "few people are attracted to transit for the opportunity it affords them to meet strangers." WRIGHT, *supra* note 16, at 116.

From a communitarian point of view, it is debatable whether the atomization of driving experiences is a good or a bad thing. The community-building possibilities for carpooling should not be discounted. See Richard Simon & Geoff Boucher, *Foes of Carpool Lanes Get New Ammunition*, L.A. TIMES, Nov. 29, 1998, at A1 ("There also are stories about how carpooling led to romances and even the reunion of two long-lost sisters.").

significantly to the traffic congestion that plagues many urban neighborhoods.²⁰ "Some 70 percent of all urban interstates are congested during rush hours."²¹ By some estimates, traffic congestion results in a drain on the American economy equal to \$168 billion 1990 dollars.²² These costs largely result from delays in people and goods reaching their intended destinations. More congested roads also increase the frequency of vehicular collisions.²³ The environmental effects of congestion on the roadways are significant as well. Idling in traffic results in significant emissions of greenhouse gasses and other forms of pollution.²⁴

At the risk of stating the obvious, congestion is a significant cause of citizen frustration. While solo drivers are often supportive of increased spending for mass transit programs as a means of easing congestion,²⁵ they resist using mass transit and participating in carpools themselves. For many people, the costs of organizing and participating in carpools are prohibitive: It is often difficult for commuters to find workers with similar routes, coordinate work schedules, agree on travel routes and times, and arrange for backup transportation in the event of unanticipated events at work.²⁶ As a result of these costs, the average driver is very supportive of efforts to

20. Cf. KENNETH A. SMALL, *URBAN TRANSPORTATION ECONOMICS* 151 (1992) ("Carpooling provides flexible service with far less use of highway infrastructure and parking facilities than solo driver [sic].").

21. Robert W. Poole, Jr., *Private Toll Roads*, in *PRIVATIZING TRANSPORTATION SYSTEMS* 165, 166 (Simon Hakim et al. eds., 1996); see also KENNETH A. SMALL ET AL., *ROAD WORK: A NEW HIGHWAY PRICING AND INVESTMENT POLICY* 80-81 (1989) (providing additional data on increasing levels of metropolitan road congestion).

22. See Charles Komanoff, *Pollution Taxes for Roadway Transportation*, 12 *PACE ENVTL. L. REV.* 121, 129 (1994).

23. See *id.* at 133. Of course, when cars moving slowly in bumper to bumper traffic collide, the damage is less likely to be severe (and costly) than when cars moving at high speeds collide.

24. See Thomas O. McGarity, *Regulating Commuters To Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 *PAC. L.J.* 1521, 1526-28 (1996); Tirza S. Wahrman, *Breaking the Logjam: The Peak Pricing of Congested Urban Roadways Under the Clean Air Act To Improve Air Quality and Reduce Vehicle Miles Traveled*, 8 *DUKE ENVTL. L. & POL'Y F.* 181, 196 (1998).

25. See, e.g., Cheryl Crabb, *Poll Respondents Cite Mass Transit, Road Widening and Building Ban as Solutions*, *ATLANTA J. & CONST.*, Jan. 21, 1999, at 04JH (reporting that 67% of north Atlanta suburban residents support increased spending on mass transit, as opposed to 31% preferring road widening as a means of combating traffic congestion, despite the fact that 90% of the residents commute to work alone); Erik Kriss, *Public: Term Limits, No Parole: New York Voters Send a Message in the Latest Statewide Poll*, *POST-STANDARD* (Syracuse), June 30, 1998, at A1 (reporting that New York residents support increased spending on mass transit), available in 1998 WL 4365086; see also PETER D. HART RESEARCH ASSOCS., U.S. DEP'T OF TRANSP., *A SURVEY OF AMERICAN ATTITUDES TOWARD TRANSPORTATION* 35 (1978) (noting that over 70% of those in major metropolitan areas favored increased spending on mass transit); Komanoff, *supra* note 22, at 134 (providing similar data from the UK).

26. See PETER SAMUEL, *HOW TO "BUILD OUR WAY OUT OF CONGESTION": INNOVATIVE APPROACHES TO EXPANDING URBAN HIGHWAY CAPACITY* 4 (Reason Pub. Pol'y Inst. No. 250, 1999); Craig N. Oren, *How a Mandate Came from Hell: The Making of the Federal Employee Trip Reduction Program*, 28 *ENVTL. L.* 267, 297 (1998); see also FREUND & MARTIN, *supra*

get *other people* out of *their* SOVs. This somewhat hypocritical stance is partially explained by the fact that "most drivers see themselves as victims of congestion, not contributors to it."²⁷ As with many environmental goods, there is a divergence between expressed citizen preferences (in support of carpooling) and actual consumer behavior.²⁸ Drivers *qua* citizens prefer that carpooling and mass transit be much more popular, while drivers *qua* consumers refuse to cooperate by relying on these methods of transportation in their own lives. Or perhaps the explanation is even simpler: Solo drivers are willing to finance programs that encourage carpooling and mass transit as a way of inducing other drivers to leave the roads so that the remaining solo drivers will have quicker commutes.

In recent years, city governments have turned to one such program with increasing frequency: High Occupancy Vehicle ("HOV") lanes. HOV lanes are highway lanes that are restricted to vehicles carrying more than one passenger. The minimum number of passengers required to permit a driver to legally drive in an HOV lane varies from road to road, but is usually either two or three, including the driver.²⁹ Because of these restrictions, HOV lanes are less congested than their open-access counterparts. This lack of congestion is intended to encourage those drivers who might not otherwise carpool to do so in order to save time and fuel.³⁰ HOV lanes became a popular planning tool during the 1970s as a means of encouraging motorists to conserve fuel during that decade's oil crisis, but their use expanded in the era of cheaper gasoline as well.³¹ The federal government also played a major role in prompting cities to construct carpool lanes through the use of fiscal incentives and penalties.³² Today, the nation's cities have devoted 800 miles of roadway to carpool

note 15, at 90-91 (noting that men are particularly reluctant to give up their cars).

27. Peter Jones, *Urban Road Pricing: Public Acceptability and Barriers to Implementation*, in ROAD PRICING, TRAFFIC CONGESTION AND THE ENVIRONMENT: ISSUES OF EFFICIENCY AND SOCIAL FEASIBILITY 263, 265 (Kenneth J. Button & Erik T. Verhoef eds., 1998) [hereinafter ROAD PRICING]; see also Wahrman, *supra* note 24, at 196 ("Congestion is a classic negative externality. As additional road users occupy the road, the quality of service provided to all users declines.").

28. See generally Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J. 377, 378 (1998) (summarizing the literature on the consumer preferences/citizen preferences split). Lewinsohn-Zamir uses the example of litterers who nevertheless demand increased funding for environmental protection programs. See *id.* at 382.

29. See generally Robert Preer, *Commuters Adjusting to Life in the Zipper Lane*, BOSTON GLOBE, Nov. 22, 1998 (South Weekly), at 1 (discussing the controversy in Boston over whether two-passenger vehicles should be allowed to use the carpool lanes).

30. See Komanoff, *supra* note 22, at 135; Editorial, *HOVs and Traffic Jams*, COMMERCIAL APPEAL (Memphis), Dec. 1, 1998, at A8.

31. See Matthew K. Gagelin, *Employer Trip Reduction—Who Is Responsible for Organizing the Carpool?*, 1 ENVTL. LAW. 203 (1994); Carol J. Castaneda, *Fear of 'Lexus Lanes' Unfounded: Fast-Lane for a Fee Has a Broad Appeal*, USA TODAY, Mar. 3, 1997, at 4A.

32. See SAMUEL, *supra* note 26, at 4; John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1204 (1995); Gagelin, *supra* note 31, at 210-11; Laura Rapacioli, Note & Comment, *Be Careful What You Ask for: Attacking the Constitutionality of the Clean Air Act Operating Permit Program*, 14 PACE ENVTL. L. REV.

lanes.³³

Unfortunately, in many areas of the country, HOV lanes have done little to encourage carpooling.³⁴ Even though solo commuters can usually glance at the HOV lanes and see how much faster they might be driving if they picked up another passenger or two,³⁵ many are unwilling to change their driving behavior.³⁶ Commuters who resent the “special treatment” that carpoolers receive often fail to recognize that they themselves could receive such treatment by becoming carpoolers.³⁷ In other words, the thought of carpooling never occurs to these drivers. And with an increasing percentage of commuters driving from their residence in one suburb to their place of employment in another suburb, it is becoming more difficult for would-be carpoolers to locate individuals with compatible commuting routes.³⁸ Further, in the words of one commentator, “HOV lanes have proven to be stalking

323, 334-36 (1996).

33. See Debra J. Saunders, Editorial, *Gridlock Will Set You Free?*, S.F. CHRON., Mar. 23, 1999, at A19, available in 1999 WL 2682878.

34. See, e.g., Oren, *supra* note 13, at 147; Simon & Boucher, *supra* note 19, at A1 (“One carpool lane [in New Jersey] carried as few as 32 vehicles per hour; at times there were as many law-breaking solo commuters in the lane as carpoolers.”); *id.* (“Gov. Christine Todd Whitman wrote in a letter to federal officials [that] New Jersey was unable to change the driving patterns of motorists using the roads.”). *But see id.* (“Caltrans also contends that high occupancy lanes have encouraged carpooling, noting that Southern California’s ride-share rate has held steady, even as the population has increased and as carpooling has declined nationally.”); *id.* (“The Foothill Freeway carries up to 1,800 vehicles per hour in the carpool lane during the peak period—so many that carpoolers often slow to about 45 mph during rush hour. Each of the two elevated carpool lanes on the Harbor Freeway, opened last year, carry up to 1,400 vehicles per hour during peak periods.”).

35. See Angela Paik, *Life in the Fast Lane*, NEWS & OBSERVER (Raleigh, NC), Oct. 25, 1998, at A1, available in 1998 WL 6160794 (“If you drive this every day, you have to see the people whizzing by you in these [HOV] lanes, and I’d imagine that’d be a pretty big selling point to go and get a partner to ride to work with.”) (alteration in original) (quoting State Trooper Tim Confroy).

36. See *From the Drivers’ Point of View*, STAR-LEDGER (Newark), June 24, 1998, at 12, available in 1998 WL 3425505 (reprinting comments from motorists who are furious about the underutilization of New Jersey’s HOV lanes and congestion of the general purpose lanes); Preer, *supra* note 29, at 1 (quoting a state representative who reports that he has “heard from a number of people who experience frustration when they are in the other lanes and they look over and see it empty”). *But see* Paik, *supra* note 35, at A1.

These new HOV lanes probably will lead to more “slugging,” a bizarre hybrid of car-pooling that accounts for about 10 percent of all trips on I-95’s HOV lanes. Every afternoon, commuters in suits line up in the shadow of the Washington Monument to catch free rides home. Solo drivers stop to fill up their cars with these “slugs” so they can get access to uncongested HOV lanes.

Id.

37. See generally GODBE RESEARCH & ANALYSIS, FOCUS GROUP RESEARCH FOR I-15 COMMUTERS (1998), available in (visited May 23, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/report2.pdf> (collecting comments from motorists who are infuriated by the underutilization of New Jersey’s HOV lanes, which they perceive as a waste of scarce highway space).

38. See Simon & Boucher, *supra* note 19, at A1.

horses for highway expansion."³⁹ Particularly where the lanes go underutilized, the environmental harms of constructing these new lanes⁴⁰ often exceed their benefits. While it is difficult to deny that HOV lanes do encourage some motorists to carpool, especially in congested corridors, the question of whether dollars spent on HOV lanes would be better spent on other efforts to reduce congestion is far from settled.⁴¹ That said, a large number of American city governments remain committed to increasing carpooling, and view the use of carpool lanes as the best way of doing so. This Article assumes that this goal is a worthy one and analyzes under what circumstances it might be achieved most effectively.

Given this information, how can one characterize the social norms of commuting? Any accurate description must account for significant nuance. First, there is a powerful, dominant⁴² norm in most American cities that individuals commute to work in SOVs. I will refer to this pattern of behavior as the solo-commuting norm. This norm is reinforced by both popular culture (e.g., movie portrayals of the rugged individualist solo driver)⁴³ and government policy (e.g., gasoline taxes that are much lower than those prevalent in other developed nations). Second, there is an intensely held minority norm among many environmentalists and carpoolers holding that carpooling is morally superior to solo driving,⁴⁴ and that carpoolers are therefore entitled to receive preferential treatment on the roads in the form of HOV lanes. I will call this minority norm the carpool missionary norm. Third, there seems to be an aspirational norm⁴⁵ among the majority of solo drivers that merges some aspects of

39. Komanoff, *supra* note 22, at 135; *see also* Oren, *supra* note 13, at 218-19 (noting the reasons why some environmental groups oppose HOV lanes).

40. At least one account suggests that in urban areas the cost of constructing wider freeways rises exponentially. Thus, an eight-lane highway costs more than twice as much as a four-lane highway. *See* A.A. WALTERS, *THE ECONOMICS OF ROAD USER CHARGES* 184 (1968). *But cf.* David M. Levinson, *Road Pricing in Practice*, in *ROAD PRICING*, *supra* note 27, at 14, 61.

Hence for . . . the existence of large fixed costs in the presence of indivisibilities, the technology of road capacity, and the earth moving costs, we can claim that there are economies of scale associated with the expansion from a two-lane to a four-lane road. Nevertheless . . . it is not clear that economies of scale in urban highway construction exist.

Id.

41. *See, e.g.*, Oren, *supra* note 13, at 218 ("One study suggests that a network of 344 miles of HOV lanes in the Washington, D.C. area would reduce trips to work by 2.3%, and that the modest air quality impact might be offset by the driving required to assemble the carpool.").

42. For a discussion of how different subgroups within a single community can adhere to competing norms, *see infra* text accompanying notes 256-59.

43. Indeed, to the extent that these portrayals romanticize the activity of driving alone, they may push the norm of solo driving in the direction of becoming a solo-commuting norm. But few, if any, romantic portrayals of the solo driver lionize the solo commuter. Rather, it is the solo-driving beatnik, adventurer, or traveler who is portrayed flatteringly.

44. *See* Gagelin, *supra* note 31, at 246 n.278.

45. My use of the term "aspirational norm" is similar to Howard Margolis's use of the same phrase. *See* Howard Margolis, *Equilibrium Norms*, 100 *ETHICS* 821, 833 (1990) ("In their most fundamental significance, aspirational norms are rules of thumb about what everybody knows would be socially best . . .").

these first two patterns of behavior: Many solo drivers are unwilling or feel unable to abandon solo commuting but recognize that if everyone drives solo, traffic congestion is likely to become untenable. Therefore, they may support the creation of HOV lanes even though they doubt that they will derive much benefit from their creation. This sentiment helps explain why, with the notable exceptions of New Jersey and Los Angeles, movements to do away with carpool lanes have generally failed.⁴⁶ I will refer to this aspirational norm as the "I'd rather be carpooling" norm.

This tripartite system of behaviors has interesting implications. First, because of the prevalence of the "I'd rather be carpooling" norm and a general uneasiness about breaking the law,⁴⁷ many solo drivers who use the HOV lanes illegally will be subjected to some internal feelings of guilt, and some level of social peer pressure (dirty looks, honks from carpoolers, etc.). The people most likely to enforce these norms vigilantly, however, will be adherents to the carpool missionary norm,⁴⁸ who see themselves as the sole intended beneficiaries of the HOV lanes. Of course, the fact that drivers on urban freeways are rarely repeat players with nearby automobiles will lessen social pressure for enforcement.⁴⁹ As a means of counteracting this anonymity problem, some transit authorities have begun to provide phone numbers that cellular-phone wielding motorists can call to snitch on solo drivers using the carpool lanes.⁵⁰ In the Washington, D.C. area, for example, these phone numbers are accompanied by a catchy slogan encouraging motorists to "Be an HOV Hero."⁵¹

46. See generally Oren, *supra* note 13, at 218-19 (discussing the serious backlash that occurred when, in the 1970s, the EPA tried to force carpool lanes upon Los Angeles by converting existing general purpose lanes into carpool lanes); Steve Carney, *Car-pool Lane Rage*, L.A. DAILY NEWS, Dec. 13, 1999, at 1 (discussing recent opposition to HOV lanes in California and New Jersey); Paik, *supra* note 35, at A1 ("HOV lanes recently bombed in New Jersey but are being expanded in Atlanta, Seattle, Dallas and elsewhere.").

47. See *infra* text accompanying note 238.

48. Cf. FRANK WILSON & ASSOCS., EXPRESSPASS PHASE II MARKETING PLAN 7 (1999), available in (visited May 12, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/mktp1n3.pdf>; Paik, *supra* note 35, at A1.

For patrol officers, the only comic relief comes when commuters try to pass off mannequins and blow-up dolls as passengers. . . . "It's fun when you run into that. You can take the mannequin out and put it on top of the car while you're writing the ticket. You'll get a lot of people honking and cheering you on that way."

Id. (quoting State Trooper Tim Confroy).

49. Cf. GODBERESEARCH & ANALYSIS, *supra* note 37, at 11 ("Respondents in the part-time user group said, 'I think the stiffness of the fine mitigates against (violation)' and '\$271.00 [the amount of the fine for violation] is the only thing that keeps me from cheating.'")

50. In a survey of San Diego commuters, fully 6 out of 10 owned cellular telephones, pagers, or both. See WILBURSMITH ASSOCS., BASELINE MARKET SURVEY 12 (1996), available in (visited May 13, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/task-3a.pdf>.

51. Seattle, Washington, has a similar tattle-tale program, but signs along that city's freeways lack the panache of their D.C. counterparts: Seattle's signs drably read "Report HOV Violators." An interesting alternative would be to pay whistleblowers a bounty when their tips to law enforcement result in the issuance of a ticket. As Dan Kahan observes, a similar strategy has been employed in some public schools where guns are rampant. See Dan M. Kahan, *Social*

Second, to the extent that the solo-commuting norm is stronger than the “I’d rather be carpooling” norm, which it certainly is, social norm enforcement will not be sufficient to deter most individuals from violating the law. The fact that these social norms against HOV-cheating are not particularly strong requires law enforcement to take active measures in order to prevent violations.⁵² Where those efforts are nonexistent, the social norm supporting carpooling as a beneficial activity warranting quicker commutes will erode gradually. That said, the existence of a baseline “I’d rather be carpooling” norm differentiates HOV lane enforcement from, say, enforcement of speed limits. With speed limits, few motorists are likely to adhere to the equivalent of a carpool missionary norm (i.e., speeding is immoral, those who drive the speed limit are morally entitled to special preferences from the government),⁵³ and the equivalent “I’d rather be carpooling” norm is particularly

Influence, Social Meaning, and Deterrence, 83 VA. L. REV. 349, 364 (1997). Students receive cash rewards if they provide school officials with information that results in the apprehension of a gun-toting classmate. *See id.* Kahan astutely sees this program as an effort not only to boost compliance with rules against bringing guns to schools, but also to change social norms concerning gun ownership by students. *See id.* Whereas machismo norms previously prompted students to “show off” their guns, the program is designed to make gun ownership more secretive, and thus less “cool.” *Id.*

52. As Peter Samuel wrote in a recent exchange on the University of Minnesota’s Congestion Pricing List Server:

On the Virginia Beach HOV in the Tidewater VA region some recent official data showed more SOVs in the HOV lane in rush hour than HOVs ie a violation rate over 50 percent. From memory one count was 57 pc violators. The locals have simply given up on HOV. Top officials there told me they’d tried everything for 5 years and the numbers carpooling just keep dropping and the HOV lanes not only have fewer vehicles but also fewer passengers than unrestricted lanes and that is despite almost no enforcement. I guess if they started enforcement now it would probably kill HOV because of the outcry and because it would reveal the collapse of real HOV.

Email from Peter Samuel to Con-Price List Serve (Jan. 6, 1999) (on file with author); *see also* Carney, *supra* note 46, at 10 (noting that in New Jersey, prior to the elimination of carpool lanes along some sections of interstate highways, as many as half the lanes’ users were solo drivers flouting the law); Paik, *supra* note 35, at A1 (“Virginia authorities estimate that 9 percent to 20 percent of all vehicles on HOV lanes don’t have the required number of passengers. Troopers say that—with their other duties—they can’t spend much time looking for violators.”).

53. *Cf.* Geoffrey C. Hazard, Jr., *Laws, Morals, and Ethics*, 19 S. ILL. U. L.J. 447, 456 (1995).

[T]hose who disobey the speeding laws . . . do not consider themselves oblivious to community norms. Rather, they believe that the community in practice recognizes that some ethical norm has “trumped” the legal norm. Most drivers would say, for example, that driving over the posted speed limit is only technically wrongful. But they would also say that driving 85 miles an hour violates the ethics of driving.

Id.; *see also* Margolis, *supra* note 45, at 822 (noting that drivers would not be subjected to scowls from other motorists for driving ten miles over the speed limit when everyone else is doing the same thing); Michael W. Carroll, Note, *When Congress Just Says No: Deterrence Theory and the Inadequate Enforcement of the Federal Election Campaign Act*, 84 GEO. L.J.

weak (while most motorists recognize that higher speeds result in greater loss of life,⁵⁴ the majority of drivers speed at least occasionally, and hardly anyone feels guilty about violating the speed limit),⁵⁵ so the need for enforcement of the law by police officers is paramount.⁵⁶

B. Congestion-Pricing Theory

The late William Vickrey, a Nobel Laureate in Economics, once wrote that "in no other major area are pricing practices so irrational, so out of date, and so conducive to waste as in urban transportation. Two aspects are particularly deficient: the absence of adequate off-peak differentials and the gross underpricing of some modes relative to others."⁵⁷ Vickrey argued that current transportation policy could be improved by giving drivers greater incentives to drive during hours less prone to congestion and encouraging those modes of transport that were relatively unlikely to prompt congestion. In later work Vickrey added a third inefficiency: Current policy made no distinction between those who valued their time very highly and those with lower valuations—traffic congestion affected all commuters on a road equally, regardless of differentials in how desperately they needed to reach their destinations.⁵⁸ Congestion pricing was a scheme developed by Vickrey and others to help correct

551, 568 n.131 (1996) ("Although speeding currently is punishable by a monetary fine as a criminal misdemeanor, I assert that the vast majority of Americans would not consider a person driving 60 miles per hour in a 55-mile-per-hour zone to be morally blameworthy. Thus, the sanction is monetary only because those caught for speeding are not stigmatized.").

54. See, e.g., Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L.J. 691, 704 (1996) ("Speed kills: the probability of a pedestrian being killed is 3.5% when a vehicle is traveling at 15 miles per hour, but increases more than ten-fold to 37% at 31 miles per hour and increases to 83% at 44 miles per hour.").

55. See U.S. DEP'T OF TRANSP., NATIONAL MAXIMUM SPEED LIMIT—FISCAL YEAR 1993: TRAVEL SPEEDS, ENFORCEMENT EFFORTS, AND SPEED-RELATED HIGHWAY SAFETY STATISTICS tbl.1 (1995); Nikolaus F. Schandlbauer, Comment, *Busting the "Fuzzbuster": Rethinking Bans on Radar Detectors*, 94 DICK. L. REV. 783, 783-84 (1990).

56. See, e.g., Ronald J. Krotoszynski, Jr., *Building Bridges and Overcoming Barricades: Exploring the Limits of Law as an Agent of Transformational Social Change*, 47 CASE W. RES. L. REV. 423, 424 n.3 (1997).

Lowering the speed limit to 55 miles per hour . . . did not alter the usual driving habits of most motorists. Moreover, many state highway patrol officers did not strictly enforce the speed limit, generally affording motorists a zone of administrative grace of between five and nine miles per hour. Thus, Congress' attempt to alter the driving habits of the American public failed, both as a matter of changing the behavior of individual citizens and as an enforcement priority by law enforcement officers.

Id.

57. William S. Vickrey, *Pricing in Urban and Suburban Transport*, in READINGS IN URBAN TRANSPORTATION 120, 120 (George M. Smerk ed., 1968).

58. See William S. Vickrey, *Privatization and Marketization of Transportation*, in PRIVATIZING TRANSPORTATION SYSTEMS, *supra* note 21, at 221, 226.

these inefficiencies.⁵⁹

The basic theory behind congestion pricing should be clear to anyone who has ever visited a seasonal resort or paid a long distance telephone bill. During the peak season, where demand for hotel and restaurant services is high, prices at these establishments are relatively high. During the off-season, where demand drops precipitously, hotels and restaurants are willing to cut rates sharply so as to attract bargain-hunting consumers. Similarly, many long distance telephone companies charge much more for telephone calls made during business hours, when the stress on long distance networks is relatively high, than for the same calls made at night, when long distance lines carry excess capacity.⁶⁰ These pricing strategies succeed in shifting some visits and calls from peak periods to off-peak periods. As a result, system capacity is strained less frequently.

As applied to urban expressways, congestion-pricing schemes would charge motorists extra fees when they drive on congested roads. The theory is that a driver on a congested road should be charged for the significant negative externalities she imposes upon society in the form of slowing down other motorists, poorer air quality, added noise, and wasted fuel resulting from idling.⁶¹ Because roads are particularly likely to become congested during the evening and morning commutes, congestion-pricing schemes often wind up charging the most from those who commute from suburbs into urban cores during the traditional morning and evening hours. These added fees will make it worthwhile for some of these motorists to alter their behavior so as to avoid paying the congestion fees.⁶² For example, motorists may switch to mass transit,⁶³ carpooling,⁶⁴ or try to travel during nonpeak hours. In the long run,

59. Other advocates of congestion pricing have pointed to ways in which it might correct for other inefficiencies. For example, John Kain argues that congestion pricing would create a market test that could help the government determine which roads (and potential roads) will produce the greatest economic benefits:

Since the prices charged vehicle users for the use of streets and highways in the U.S. currently bear little or no relationship to these long run costs [of providing additional capacity], however, it is likely that the capacities of these facilities are far from optimal. My hunch is that the full scale implementation of congestion pricing would demonstrate that existing highway networks are generally overbuilt, but that some segments, particularly relatively cheap roads in rapidly growing areas, are underbuilt. . . . In these cases congestion tolls would provide clear evidence that more capacity should be provided.

KAIN, *supra* note 14, at 6.

60. See Komanoff, *supra* note 22, at 132.

61. See Wahrman, *supra* note 24, at 182, 196.

62. See FEDERAL HIGHWAY ADMIN., U.S. DEP'T OF TRANSP., CONGESTION PRICING NOTES 8 (1998).

63. John Kain argues that congestion pricing would make many motorists see transit or carpooling as more attractive alternatives to SOV driving:

[T]wo changes in supply characteristics will make carpooling and transit more attractive. First, the relative money cost of both carpools and transit will decline as the money cost of SOV trips increases. Second, the service quality, trips times and reliability, of both transit and carpools will improve relative to the pre-pricing SOV alternative, although, of course, not relative to post-congestion-pricing SOVs. The most obvious way in which congestion pricing would improve the

they may attempt to live closer to their places of work, so as to avoid freeway charges altogether. In any event, there is little doubt that congestion-pricing schemes would reduce freeway congestion.⁶⁵ The only questions concern whether congestion pricing is an appropriate, cost-effective, and politically palatable way of doing so.

Obviously, there will be a wealth effect to congestion pricing.⁶⁶ If all vehicles of the same type are charged the same tolls during the same periods,⁶⁷ these tolls will constitute a more significant impediment to travel for those who have less income to spare.⁶⁸ The question, as posed by Peter Jones, is whether those peak-hour trips that

service quality of both carpools and buses is by increasing vehicle speeds and reliability (reducing the variance of travel times). . . . In the case of carpools, for example, the implementation of congestion pricing would tend to increase the supply of potential carpool matches for O&D pairs that experience large increases in money costs and large decreases in carpool travel times.

The supply effects of congestion pricing are likely to be even larger for bus transit. To the extent that congestion pricing increases the number of transit users, this increased demand, depending on how the transit operator responds, may lead to increased frequencies (reduced headways) on existing routes. Mode choice studies have shown that tripmakers have a much greater disutility for time spent walking to/from and waiting for transit vehicles. . . . [relative to] in-vehicle transit times

KAIN, *supra* note 14, at 34-35.

64. Empirical evidence from congestion-pricing experiments in Singapore and Stuttgart, Germany, shows that congestion pricing there prompted noticeable increases in carpooling. *See* Kenneth A. Small & Jose A. Gomez-Ibanez, *Road Pricing for Congestion Management: The Transition from Theory to Policy*, in ROAD PRICING, *supra* note 27, at 213, 216, 238. Even if carpools are not exempted from having to pay the congestion prices, there will still be an incentive to carpool as long as the charge is assessed per-vehicle. Multiple passengers can divide up the charge amongst themselves.

65. *See, e.g.*, Wahrman, *supra* note 24, at 198 (“[T]he available data suggests that congestion pricing with moderate toll increases during peak usage would have substantial impacts on reducing congestion.”); *see also* Komanoff, *supra* note 22, at 132 (“[C]ongestion pricing of roads would be expected to reduce peak usage of roadways via modal shifts to other forms of travel (e.g., train, bus, bicycle, ridesharing) or shifts in time of travel.”).

66. In this Article, I am not interested in taking a position one way or another on the justice of congestion pricing as applied to roads. I therefore focus on whether the FasTrak program is perceived as just, not whether it actually is just—however justice might be measured.

67. Administrative concerns currently caution against any effort to differentiate among road users on the basis of income. *But see* Wahrman, *supra* note 24, at 206 (“Assuming a distributional impact is found among lower-income motorists, the electronic toll system with individual user accounts does permit for income-based rebates. Accordingly, motorists who earn below a certain income level could be eligible for rebates based on their annual usage.”).

68. *See, e.g.*, LEE W. MUNNICH, JR., ET AL., INSTITUTIONAL AND POLITICAL ISSUES IN CONGESTION PRICING: NEW MODELS FOR FEDERAL, STATE, AND LOCAL COOPERATION IN INFRASTRUCTURE INVESTMENT 6 (1995), available in (visited May 9, 2000) <<http://www.hhh.umn.edu/centers/slp/conpric/cpits.htm>>; SMALLET AL., *supra* note 21, at 87; FEDERAL HIGHWAY ADMIN., U.S. DEP’T OF TRANSP., REPORT ON THE CONGESTION PRICING PILOT PROGRAM, A REPORT TO THE SENATE COMM. ON ENV. & PUB. WORKS & HOUSE COMM. ON TRANSPORTATION & INFRASTRUCTURE 14 (1996) (“Key concerns . . . included the view that low-income persons would be adversely affected by congestion pricing because they have

will be prevented are those that contribute the least to societal welfare:

The aim of congestion pricing is explicitly to take some traffic off the road network. The question is whether those least able to pay the charges represent the types of traffic that in social terms are regarded as the least essential. In the minds of many, ability to pay and the importance of the trip are not synonymous.⁶⁹

In addressing these equity concerns, proponents of congestion pricing make several responses. First, the revenues generated by congestion-pricing tolls can be, and often are, used to pay for services that disproportionately benefit low-income commuters.⁷⁰ At least when analyzed according to the simplistic method of cash-flow, this looks like a progressive tax: High income motorists pay fees in support of low-income mass transit programs.⁷¹ Unlike other progressive redistribution schemes, this one will remain popular with high-income individuals, since they are getting something of great value to them in return.⁷² Indeed, if current estimates are correct, a national shift to congestion pricing would generate societal benefits of \$5 to \$11 billion annually;⁷³ this surplus could be redistributed in a way that improved the welfare of all groups. Second, proponents point out that poorer citizens are disproportionately burdened by the negative consequences of congestion, such as air pollution and freeway noise.⁷⁴ Thus, if congestion pricing works to improve those problems, the poor will benefit in significant ways. Finally, many have advocated an impure but more politically

fewer opportunities to change time-of-travel or mode of travel due to inflexibility of work schedules, lack of service by alternative modes, or the need to use an automobile to meet several trip purposes in a single trip (e.g., work, child care, shopping.); Komanoff, *supra* note 22, at 154; Wahrman, *supra* note 24, at 205 ("If one assumes that lower-income users are more sensitive to price increases than higher-income users, the concern would be that lower-income users would bear the brunt of higher peak prices and 'only Lexus owners' would be cruising through a peak-priced roadway."); Dave Addis, Commentary, *Rush-Hour Roulette: This Lane for the Affluent, That Lane for the Working Stiffs*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), Aug. 16, 1998, at J1, available in 1998 WL 15060622; Alice Reid, *A HOT Alternative to the Slow Lane?*, WASH. POST, Mar. 19, 1998, at B1 ("[C]ritics said HOT lanes would be 'Lexus Lanes,' used only by those who could afford them. Statistics collected on road use . . . show that commuters making more than \$60,000 a year are twice as likely to use HOT lanes as those who make less than \$40,000 a year."); Ed Vulliamy, *Private View: First-Class Lane for Fat Cats Makes an Ass of LA Law*, GUARDIAN (London), Dec. 6, 1997, at 20, available in 1997 WL 14745391.

69. Jones, *supra* note 27, at 269.

70. See KAIN, *supra* note 14, at 7; SMALL ET AL., *supra* note 21, at 96-97.

71. Of course, the high-income toll payers are perhaps better thought of as beneficiaries of the program, since they are presumably receiving a benefit in the form of time savings that exceeds the toll amounts they must pay.

72. Cf. MUNNICH ET AL., *supra* note 68, at 16 ("The driver is much more likely to be supportive if the toll is seen as buying a quicker trip, better transit or other alternatives, a better environment[,] better neighborhoods.").

73. See *id.* at 2; see also FEDERAL HIGHWAY ADMIN., *supra* note 68, at 25 ("If adopted in congested metropolitan areas nationwide, congestion pricing could result in net economic savings in terms of time savings and reduced demand for new capacity totaling \$5 billion to \$11 billion annually.").

74. See FREUND & MARTIN, *supra* note 15, at 49; Komanoff, *supra* note 22, at 154.

palatable form of congestion pricing that minimizes these equity concerns—charging motorists to drive in restricted access, uncongested express lanes, while allowing free access to more heavily congested, general purpose lanes.⁷⁵ Low-income drivers will never face excess cost constraints in getting from point *A* to point *B*, but they will have to face time constraints not faced by those willing to pay the toll. At the same time, because toll-paying commuters will be siphoned away from the general purpose lanes, these lanes will become less congested in the short run, thereby providing low-income drivers with time savings.⁷⁶

In addition, whenever the government begins to charge user fees for a good that was previously available to all free of charge, there will often be opposition. Congestion pricing “is seen as another form of taxation,” and takes away “what was previously considered free as a matter of right.”⁷⁷ Even though congestion-pricing schemes can be designed to be revenue-neutral, such that fee from tolls replaces tax revenue, drivers will still feel that they are being deprived of something they formerly owned. Loss-aversion theory tells us that these types of changes are likely to spark strong opposition.⁷⁸ Over the years, commuters will increasingly see themselves as entitled to use the roadways that their tax dollars helped build and maintain.⁷⁹ Notably, however, congestion pricing for newly constructed toll roads garners significantly higher public support.⁸⁰

75. See WALTERS, *supra* note 40, at 218 (“The combination of tollway and free road therefore provides a superior ‘mix’ of road services than simply one type of road service on one highway. Each motorist can choose the service appropriate to his circumstances.”).

76. The short-run/long-run distinction is particularly appropriate whenever free roadway lanes are discussed because of the “law of highway congestion,” which holds that latent demand for congested roads always exists among motorists who would drive but for the inhibiting effects of congestion. SMALL, *supra* note 20, at 113. Thus, in the long run, building more roads will often simply bring more cars to use the roads, resulting in no net decrease in congestion. For a more detailed discussion of this phenomenon, see generally ANTHONY DOWNS, *STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION* (1992).

77. Wahrman, *supra* note 24, at 204; see MUNNICH ET AL., *supra* note 68, at 6 (“In Houston many participants felt that Houstonians . . . have already paid for the roads, making new tolls unpopular.”); SMALL ET AL., *supra* note 21, at 87 (“Travel is widely regarded as a basic right. People who mistrust governments may regard congestion pricing as a sinister form of tax increase.”); Jones, *supra* note 27, at 269 (“The urban road network (unlike motorways) is implicitly viewed as a general purpose public space, which all are free to share. With the encroachment of the market on other areas that were previously in the public domain . . . it represents one of a diminishing number of situations where people are treated equally.”).

78. See generally Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPS. 193 (1991) (reviewing the loss aversion literature).

79. See Carl B. Williams, *Lessons from Road Privatization Experience*, in *PRIVATIZING TRANSPORTATION SYSTEMS*, *supra* note 21, at 249, 254 (“In the United States, a new toll highway presents no such problem, but establishing tolls to recover the cost of resurfacing a previously untolled highway will engender considerable resentment.”).

80. See Robert Krol, *When Freeways Take Their Toll: Low Prices and High Demand Equal a Shortage, Gridlock in the Case of Roads*, L.A. TIMES, Mar. 21, 1999, at B17 (noting a 17-point rise, from 38% to 55%, when Angelinos are polled with respect to charging tolls for existing roads versus new roads as a means of easing congestion); cf. Oren, *supra* note 26, at 307-08 (noting that the political difficulties involved in converting general purpose lanes into

Another potential problem that has been raised concerning congestion pricing is the administrative and traffic burdens that might result from fee collection. It is commonly understood that toll collection booths invariably result in long queues of motorists waiting to pay the toll. New technologies, which utilize car-based transponders and sensors that can make electronic deductions from prepaid accounts, allow for fully automated toll collection,⁸¹ thereby eliminating annoying queues.⁸² Drivers need not even slow down: When they drive underneath an automatic sensor, the appropriate amount is deducted from their account. Indeed, within a few years, toll enforcement may join fee collection as a fully automated process.⁸³ When a vehicle lacking a transponder drives through an express lane, it would be photographed by surveillance cameras. Even if HOVs are exempted from the toll, automated enforcement can still work. If an inspection revealed that the vehicle contained fewer occupants than those required to qualify it as an HOV, the license number will be recorded, and the driver will be sent a fine notice in the mail.⁸⁴ The ease of using these systems promises to boost popular support for congestion pricing in the future.⁸⁵

The flip side of electronic toll collection concerns some civil libertarians. They have expressed a fear that government access to information about where people are traveling amounts to an invasion of privacy.⁸⁶ Of course, this type of privacy invasion may well prove harmless or even desirable. For instance, transponder information might prove extremely useful to law enforcement officials who could check a criminal suspect's transponder information to see if her travel patterns match her purported alibi. Even more beneficially, this information would be of great assistance to police officers in pinpointing the likely locations of stolen vehicles, provided that the transponder could be fixed in a difficult-to-find-and-access portion of the car.⁸⁷ The transponders could thus function as a poor man's LoJack, an anti-theft device

carpool lanes are lessened when new carpool lanes are built).

81. See SAMUEL, *supra* note 26, at 29 (noting that fully automated toll collection has been implemented successfully in Toronto); SMALL, *supra* note 20, at 111 ("Hong Kong conducted an elaborate and highly successful field test of electronic technology for collecting congestion fees.").

82. See J.R. MEYER ET AL., THE URBAN TRANSPORTATION PROBLEM 325 (1966).

83. See *infra* note 186.

84. See generally WILBUR SMITH ASSOCS., PROJECT CONCEPT PLAN-B: FULL OPERATIONS IMPLEMENTATION 3-9 (1997), available in (visited May 16, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/task-1a.pdf> (describing the potential effectiveness of such a system in San Diego).

85. See SMALL ET AL., *supra* note 21, at 89; see also Small & Gomez-Ibañez, *supra* note 64, at 216 (noting that collection costs from the Singapore congestion-pricing experiment amounted to 11% of the revenue collected).

86. See, e.g., SMALL ET AL., *supra* note 21, at 87-88; Wahrman, *supra* note 24, at 204. The metaphor used by privacy advocates is the cheating husband whose adultery is discovered by a spouse who sees his monthly toll road bill.

87. In theory, the system could even be set up so that whenever a car that had been reported stolen passed underneath a highway sensor, local law-enforcement officials would be alerted immediately.

available free of charge.⁸⁸ But even if a large number of citizens were worried about the prospects that their travel routes, currently kept private, might become public, there are a number of technological alternatives for laying these concerns to rest. As William Vickery suggests, the privacy concern is something of a red herring:

A simple system could allow individuals to opt for a class of identifying codes that would erase information regarding place and possibly time from the record as soon as the appropriate charge has been computed. It would then be virtually impossible for even a skillful programmer to recover the sensitive information.⁸⁹

Thus, if the law enforcement benefits trump privacy concerns, then congestion pricing utilizing electronic transponders claims another benefit relative to the status quo. Alternatively, if public concern with privacy issues trumps law enforcement benefits, technology can easily solve the privacy problems that technology helped create.

Having introduced the literature on HOV lanes and congestion pricing, I will now explore in detail an innovative effort by one jurisdiction, San Diego, to put both principles into practice.

II. CONGESTION PRICING IN PRACTICE

Although congestion pricing for urban expressways has had many eloquent supporters in the economic and city-planning academies for decades—William Vickery first testified before Congress in support of the policy in 1958—congestion pricing was resisted for many years in the United States. All the same, policy planners in this country were able to monitor the results of Singapore's innovative experiment with congestion pricing on its urban roads, a program that was launched in 1975.⁹⁰ That program was generally viewed as a successful and efficient way to control traffic congestion,⁹¹ which helped boost the prospects for an American pilot program. In 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act ("ISTEA").⁹² Among its many provisions, the Act encouraged metropolitan planning authorities to implement congestion pricing as part of their long-term traffic management plans.⁹³ The Act made tens of millions of dollars available for a number of pilot programs to test the viability of congestion pricing.⁹⁴ The largest share of

88. For a thorough discussion of LoJack and its impressive theft-reducing effects for car owners, see Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43 (1998). LoJack is a registered trademark of the LoJack Corporation.

89. Vickrey, *supra* note 58, at 233.

90. See SMALL ET AL., *supra* note 21, at 87-88.

91. See Timothy D. Hall, *Congestion Pricing and Road Investment*, in ROAD PRICING, *supra* note 27, at 39, 40-41.

92. 23 U.S.C. §§ 100-501 (1994).

93. See, e.g., *id.* § 134(g)(2)(B), amended by Pub. L. No. 105-178 § 1203(g)(3) (codified as amended at 23 U.S.C.A. § 134(g)(2)(B) (West 1998)) (removing the explicit reference to congestion pricing).

94. See Wahrman, *supra* note 24, at 188 (noting that \$31 million had been spent on such programs as of 1998); see also FEDERAL HIGHWAY ADMIN., *supra* note 62, at 8 ("[C]ongestion

these funds, just under \$8 million, went to the San Diego Association of Governments ("SANDAG").⁹⁵ This federal grant was the dominant funding source relied upon by SANDAG in launching its congestion-pricing program, which it named FasTrak.⁹⁶

A. Program Description

San Diego, California is one of the nation's most congested metropolitan areas.⁹⁷ The congestion on the city's freeways is largely a result of rapid growth in traffic during the 1980s.⁹⁸ Interstate 15 (I-15) is the main commuter artery connecting the city's northern inland suburbs with the southern downtown core. Like many cities trying to deal with congested freeways and the significant projected population growth, San Diego began experimenting with HOV lanes, opening up the first ones along the I-15 corridor in 1988.⁹⁹ These lanes were added as part of a freeway expansion. Although a vehicle needed only two occupants in order to constitute a carpool,¹⁰⁰ the HOV lanes tended to be underutilized.¹⁰¹ As HOV lane traffic zoomed through uncongested lanes, speeds in the general purpose lanes became slower each year. In the years that followed, carpooling increased significantly.¹⁰² Still, even after carpool traffic began to increase, the HOV lanes remained underutilized.¹⁰³

As a result of this underutilization of the HOV lanes and the worsening congestion

pricing has received serious consideration by transportation policy makers in at least 17 states over the past 6 years [since the ISTEA's enactment].").

95. See JANUSZ SUPERNAK ET AL., I-15 CONGESTION PRICING PROJECT MONITORING AND EVALUATION SERVICES, PHASE I OVERALL REPORT 6 (1999), available in (visited May 16, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/i-15.pdf>.

96. See ERIC N. SCHREFFLER ET AL., PHASE I IMPLEMENTATION PROCEDURES, POLICIES, AGREEMENTS, AND BARRIERS 2 (1998), available in (visited May 16, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/task-3.3.1.pdf>.

97. See MUNNICH ET AL., *supra* note 68, at 18 tbl.7.

98. Among major metropolitan areas in the United States experiencing significant traffic congestion, San Diego easily posted the highest increases in congestion during the 1982-1988 period. In that brief time span, congestion in San Diego increased by 45%. The next highest increase experienced by a metropolitan area during the same period was in the San Francisco Bay region, which experienced a 32% increase. See KAIN, *supra* note 14, at 24 tbl.4.

99. See SUPERNAK ET AL., *supra* note 95, at 5.

100. See Wahrman, *supra* note 24, at 201.

101. See *id.* According to 1990 Census data, 12.8% of San Diego's drivers carpooled to work, while 70.7% drove to work alone. See U.S. Census Bureau, *Travel to Work Characteristics for the 50 Largest Cities by Population in the United States* (visited May 11, 2000) <<http://www.census.gov/population/socdemo/journey/city.txt>>.

102. See Wahrman, *supra* note 24, at 10. A recent report prepared for SANDAG presents the data:

Over the last 10 years, the total number of *persons* travelling in the I-15 corridor during the a.m. peak period increased by 31 percent from 32,860 in 1988 to 42,977 in 1997. This increase in persons carried through the I-15 corridor is due to the significant increase in the HOV population in the corridor as well as improved utilization of the I-15 Express Lanes.

SUPERNAK ET AL., *supra* note 95, at 13.

103. See Small & Gomez-Ibañez, *supra* note 64, at 230-31.

in the general purpose lanes, several of San Diego's government officials took an interest in congestion pricing. In particular, Jan Goldsmith, who was a state assemblyman from San Diego at the time, and had previously been a popular mayor of a San Diego suburb, energetically championed congestion pricing on I-15.¹⁰⁴ The plan he proposed was simple but revolutionary: HOVs could continue to use the I-15 Express Lanes for free, but SOVs would be given the option of buying their way into the Express Lanes as well. Never before had any American city created a hybrid carpool/toll lane of this kind. While San Diego's citizens initially responded with great skepticism to the proposal,¹⁰⁵ its boldness, the tenacity of its chief patron, and the grim outlook for congestion along the corridor succeeded in convincing the city's political institutions that the novel idea was worth trying.

In December of 1996 the FasTrak program was formally launched. For fifty dollars per month, solo drivers could purchase decals that would allow them to ride in the Express (HOV) Lanes. The initial allotment of 500 passes was quickly exhausted.¹⁰⁶ Gradually, the number of passes available to the public increased, as did the price at which they were being sold. At this stage, the program was a far-from-perfect congestion-pricing scheme. After all, the purchaser of a monthly permit was allowed unlimited¹⁰⁷ use of the "HOT" lanes.¹⁰⁸

After six months of charging a fixed monthly fee, SANDAG moved to a per-use charge system.¹⁰⁹ When a driver approaches an entrance to the Express Lanes, he sees an illuminated sign specifying a certain toll for using the Express Lanes. The more traffic is in the Express Lanes, the higher the toll will be. Not surprisingly, the Express Lanes tend to be most crowded when the general lanes are most crowded, so there is a strong correlation between the toll charged and the congestion in the main lanes on I-15. When the solo driver uses the Express Lanes he must pass through a certain lane, a transponder mounted inside the car signals a ground-based sensor, and a deduction in the amount of the posted toll is automatically made from the FasTrak user's pre-paid account. (Carpools have their own specially-marked lane, and no deduction is made from a FasTrak user who drives through this lane).¹¹⁰ In 1998, the average tolls ranged from \$1.95 to \$2.26 per trip.¹¹¹ At present, more than 13,000

104. See SCHREFFLER ET AL., *supra* note 96, at 4, 9.

105. See GODBE RESEARCH & ANALYSIS, FOCUS GROUPS OF I-15 COMMUTERS 5 (1997), available in (visited May 16, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/godbe.pdf>.

106. See JACQUELINE GOLOB ASSOCS., PHASE I ACCEPTANCE OF THE PROJECT AND THE PRICING CONCEPT 4 (1998), available in (visited May 16, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/acceptance.pdf>.

107. Actually, the lanes are only open during the commute hours on weekdays, so "unlimited" use is perhaps something of a misnomer. See I-15 FasTrak Online, *Frequently Asked Questions* (visited May 10, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/faq.html>.

108. Transportation planners refer to toll lanes where HOVs are exempted from the toll as HOT lanes, which presumably stands for "High Occupancy Toll" lanes.

109. See WILBUR SMITH ASSOCS., *supra* note 84, at 2-3.

110. Telephone Interview with Sharon Gordon, SANDAG Asst. Project Manager, FasTrak Program (Feb. 11, 1999).

111. See I-15 EXPRESS NEWS (SANDAG), Summer 1998, at 3, available in (visited May 17,

drivers have obtained transponders.¹¹² The program has had high visibility since its inception, as eighty-seven percent of all I-15 users were aware of FasTrak's existence in 1997.¹¹³

B. FasTrak's Effect on Traffic Patterns

The immediate effect of the FasTrak program was to shift traffic from the I-15 main lanes to the Express Lanes. During the first year of the program's operation, the volume of traffic in the Express Lanes increased by twenty percent in the morning peak periods, and by twelve percent in the afternoon peak periods.¹¹⁴ At the same time, traffic volumes in the main lanes decreased by approximately two to three percent.¹¹⁵ Not surprisingly, this decrease in traffic in the main lanes was accompanied by an increase in average vehicular speeds.¹¹⁶ Those solo drivers who could now afford to buy their way into the Express Lanes reported average time savings of ten to forty minutes over a ten-mile stretch of road,¹¹⁷ although SANDAG's data suggests that drivers have tended to overestimate their daily time savings.¹¹⁸

The initial assessments of FasTrak suggest that the program has prompted much more efficient uses of the San Diego highways. Significant capacity was added to the Express Lanes without noticeably slowing average speeds there. The diversion of traffic to the Express Lanes did speed up traffic in the main lanes. As a result, the economic costs of I-15 congestion to the San Diego region dropped by eighteen percent between fall 1996 (pre-FasTrak) and fall 1997.¹¹⁹ Indeed, that figure may underestimate, in economic terms, the true value of FasTrak to the region. After all, it does not account for the fact that much of the SOV traffic realizing the greatest time

2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/sum98.pdf>. The tolls range between \$0.50 and \$8.00 per use, but will only exceed \$4.00 in the event of "severe traffic congestion." I-15 FasTrak Online, *Toll Schedule and Information* (visited May 10, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/schedule.html>.

112. See I-15 FasTrak Online, *What's New* (visited May 10, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/press.html>.

113. See JACQUELINE GOLOB ASSOCS., *supra* note 106, at 7.

114. See SUPERNAK ET AL., *supra* note 95, at 12.

115. See *id.*

116. See *id.* at 14-15.

117. See GODBE RESEARCH & ANALYSIS, *supra* note 37, at 9; see also Federal Highway Admin., U.S. Dep't of Transp., *Regional Congestion Pricing Workshop* (visited May 10, 2000) <<http://www.hhh.umn.edu/centers/slp/conpric/tampa.htm>> (reporting an average time savings of 10 to 20 minutes).

118. See JACQUELINE GOLOB ET AL., PHASE I ATTITUDINAL PANEL STUDY 94 (1998), available in (visited May 17, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/task-3.2.3.pdf>.

119. See SUPERNAK ET AL., *supra* note 95, at 15.

Annual estimated delay costs for the I-15 corridor was \$4.2 million for fall 1997, which is 18 percent less than delay costs for fall 1996 (\$5.20 million). The reduction in I-15 costs of delay was caused by a slight reduction in traffic volumes and by an increase in average speed traveled in the I-15 main lanes.

Id.

savings from the program (ExpressPass users) are those whose time is most valuable. Nor does it account for the slight increase in business patronage that apparently resulted from the program.¹²⁰

But the most interesting changes that resulted from FasTrak's implementation had less to do with the *amount* of traffic using the I-15 corridor, and more to do with the *type* of traffic using the corridor. One of the harshest criticisms leveled against the program from its inception was that by selling spots in an HOV lane to SOV drivers, the FasTrak program would discourage carpooling.¹²¹ Several related arguments were made by those who anticipated such an effect. Some felt that allowing SOV drivers into the lanes would cause many current carpoolers to opt for FasTrak passes instead of carpooling,¹²² thereby increasing the number of cars on the road. Others suggested that by selling spots in the HOV lanes, the program would increase congestion in those lanes, thereby prompting some carpoolers—who currently carpool so as to secure the time and safety benefits of driving in extremely uncongested lanes—to cease viewing carpooling as worth the effort.¹²³ Finally, some felt that selling access to the HOV lanes undermined the purpose of the HOV lane program, which was to reward those whose decisions to carpool produced positive externalities relating to air quality and decreased traffic.¹²⁴ By establishing a kind of moral equivalency among those who had paid to use the Express Lanes and those whose decisions to carpool were making other motorists better off, some environmentalists felt that the law's expressive statement of approval for carpooling would be eroded.¹²⁵ For these reasons, carpoolers were the most vocal critics of allowing solo drivers to use the HOV lanes in exchange for a fee.¹²⁶

120. See GOLOB ET AL., *supra* note 118, at 54.

121. See, e.g., Small & Gomez-Ibañez, *supra* note 64, at 231 (“Environmentalists sometimes oppose HOT lanes on the grounds that they might dilute the incentive to carpool.”).

122. See GOLOB ET AL., *supra* note 118, at 46.

123. See GODBE RESEARCH & ANALYSIS, *supra* note 37, at 13. *But cf.* JACQUELINE GOLOB ASSOCS., *supra* note 106, at 10.

Most importantly, there is no evidence of perceived negative impacts of the program on carpoolers, which is contrary to the fears expressed by I-15 Express Lanes users in the pre-project period. Free-flow conditions were maintained in the Express Lanes during Phase I, which likely resulted in the less negative views by carpoolers.

Id.

124. See, e.g., JANUSZ SUPERNAK ET AL., PHASE I MEDIA RELATIONS AND COVERAGE 5 (1998), available in (visited May 23, 2000) <http://www.sandag.cog.ca.us/data_services/fast_rak/pdfs/media.pdf> (“[S]ome carpool users on I-15 . . . felt disappointed that officials have abandoned the original idea to allow only carpoolers on the Express Lanes. One such carpooler asked: ‘What happened to the goal of reduced pollution and conserving energy?’”); WILBUR SMITH ASSOCS., *supra* note 50, at 8 (“Carpoolers may feel entitled to the exclusive use of the Express Lanes and resent their use by others who have not adjusted their lifestyles or made the decision and switched to rideshare.”); Richard Simon, *As Toll Roads Gain Toehold in Southland, Critics Fear “Highway Robbery”*, L.A. TIMES, Sept. 15, 1995, at B2. (“If you allow people to buy into the [high-occupancy-vehicle] lane, you defeat the purpose of having HOV lanes,” which is to reduce smog”) (quoting State Sen. Tom Hayden).

125. For a more detailed discussion of this point, see *infra* text accompanying notes 276-82.

126. See GOLOB ET AL., *supra* note 118, at 60; CAMILLA KAZIMI ET AL., PHASE I

On the other hand, FasTrak advocates pitched the program as a means of increasing carpooling.¹²⁷ They suggested that using the FasTrak lanes would whet the appetites of motorists for the quicker commutes that Express Lanes travel could provide. Among those who had experienced the swifter commutes, some would continue to pay for the privilege, but others would find it more worth their while to carpool and obtain the advantages of HOT commuting for “free.”¹²⁸ Additionally, they argued that providing carpoolers with a tangible monetary benefit from carpooling actually attached a greater stamp of approval than the existence of an HOV lane alone.¹²⁹ Of course, prior to the initiation of FasTrak, carpoolers could use the HOV lanes for free, and the program did not alter that. But relative to paying solo drivers, carpoolers might still have felt that they were getting a new financial benefit from carpooling, which they did not receive when access to the lanes was not commodified. Thus, to oversimplify matters somewhat, carpoolers felt richer precisely because solo drivers became slightly poorer.¹³⁰

MARKETING AND PROMOTIONAL EFFORTS 3 (1998), *available in* (visited May 17, 2000) <www.sandag.cog.ca.us/data_services/fastrak/pdfs/marketing.pdf> (noting that, originally, 70% of carpoolers and transit users were either very opposed or somewhat opposed to the buy-in program). *But see* WILBUR SMITH ASSOCS., *supra* note 50, at 8 (“In the telephone survey, carpool drivers were not opposed to the buy-in program.”). Data released as this Article went to press showed that individual commuters began using the Express Lanes for an increasing proportion of their commutes during the life of the program. This data supports the hypothesis that motorists would develop an increasingly powerful taste for quick commutes. *See* JANUSZ SUPERNAK ET AL., PHASE TWO YEAR TWO OVERALL REPORT 33 (2000), *available in* (visited May 26, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/yr2-overall.pdf>.

127. Telephone interview with Sharon Gordon, *supra* note 110.

128. Simon, *supra* note 124, at B2 (“We think that once people try it and enjoy the [average 20-minute time] savings, that in the American way, they’ll try to figure out a way to avoid the cost. One way to do that is to get another person in their car.”) (alteration in original) (quoting John Duve, SANDAG Project Mgr. for Advanced Transportation Systems).

129. *Cf.* SUPERNAK ET AL., *supra* note 95, at 29 (“A possible reason for the increase in HOVs could be that carpoolers obtained a more tangible sense of substantial cost savings by carpooling; they could travel for free while solo drivers paid to use the Express Lanes.”).

130. Ian Ayres has pointed out to me that this conclusion runs directly opposite to what economic theory would suggest. A classical economist would argue that FasTrak should make solo drivers feel richer because it gives them a new option of riding in the carpool lanes, and this addition to their opportunity set is valuable in economic terms. The carpoolers should feel simultaneously poorer, because they now have to share the Express Lanes, and richer, because they now have the option of jettisoning the extra passengers in their vehicles without having to give up the perk of a quicker commute. In order to gauge whether carpoolers would feel a net economic gain or loss from the program, an economist would compare the magnitude of the benefit and detriment. Ignoring for a moment the program’s effect on cheating by nonpaying solo commuters, if there is significant excess capacity in the lanes even after solo motorists are allowed in, one would expect that carpoolers would feel richer. If not, then they would probably feel poorer.

The relative-deprivation story that I am telling in the text diverges from this classical economic analysis. My research leads me to believe that the primary reason carpoolers feel richer has to do with their status relative to solo commuters. Thus looking only at absolute wealth, as opposed to an individual’s wealth relative to her peers, obscures the way that people really conceive of their economic circumstances. “Keeping up with the Joneses” is more than

Somewhat surprisingly, experience has supported the claim that FasTrak increases carpooling. An analysis of carpool volumes revealed statistically significant increases in carpooling almost across the board:

Carpool volumes on the I-15 Express Lanes increased substantially since the program started in December 1996. Based on WSA data, total carpools increased from 8,572 per day in January 1997 to 9,971 per day in December 1997. The increased carpools consisted of a 10 percent increase for the a.m. peak period that was not statistically significant and a 21 percent statistically significant increase for the p.m. peak period. . . . Another data source . . . also shows an increase in carpools, 25 percent for the a.m. peak period (3,013 to 3,759) and a 15 percent for the p.m. peak period (4,797 to 5,537 from October 1996 to October 1997.¹³¹

The implications of this data were not lost on those who have studied the program, who hailed it as "one of the most important observations during Phase I."¹³² Data collected for SANDAG also revealed that very few former carpoolers were becoming SOV Express Lanes users. Ninety-five percent of ExpressPass users had previously commuted alone.¹³³ Moreover, a higher percentage of carpoolers perceived their commutes as having gotten quicker after the FasTrak program was initiated.¹³⁴

Data collected by SANDAG suggests that relatively few FasTrak users developed a "taste" for riding in the Express Lanes that prompted them to switch from solo driving to carpooling. Only four percent of those motorists who dropped out of the FasTrak program during its initial stages did so because of a switch to carpooling.¹³⁵

just an American motto: It's a socio-psychological axiom. *See generally* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992) (marshalling an impressive quantum of social science evidence to argue that people's welfare often depends on their perceived wealth/status relative to neighbors and peers).

131. SUPERNAK ET AL., *supra* note 95, at 13; *see also* Federal Highway Admin., *supra* note 117 (reporting a 21% increase in the number of carpools using the lanes).

132. SUPERNAK ET AL., *supra* note 95, at 29; *see also id.* at 32 ("Congestion pricing does not appear to be a policy that adversely impacts HOV use in the corridor. On the contrary, it may have the potential to increase travelers' interest in carpooling, if it remains a non-fee travel option."). Of course, it is possible that, contrary to SANDAG's conclusions, the increase in HOV traffic since the program's initiation may have had more to do with external factors such as changing commercial development and work patterns. Telephone Interview with Jay Gainer, Manager, FasTrak Customer Service Center (Apr. 12, 1999).

133. *See* GOLOB ET AL., *supra* note 118, at 45-46.

134. *See id.* at 82 ("Only five percent of I-15 carpoolers responded that the program resulted in a slightly longer or significantly longer travel time. Surprisingly, a slightly larger percentage of I-15 carpoolers (8%) think that the ExpressPass program resulted in their travel time being shorter or significantly shorter.") This perception is probably counterfactual, since the number of vehicles using the lanes did increase during the program's first year. *See* SUPERNAK ET AL., *supra* note 95, at 17. Nevertheless, a combination of two factors might explain it. First, carpoolers may have perceived that the drop in SOV violators using the lanes more than offset the increase in traffic by transponder-using SOV motorists. Second, carpoolers may have noticed that the scrutiny to which the pilot program was subjected resulted in increased responsiveness to motorists' concerns about maintaining the free flow of traffic in the lanes.

135. *See* GOLOB ET AL., *supra* note 118, at 45 tbl.28. At the same time, it would be premature to dismiss the "acquired taste" theory out of hand. Anecdotal evidence reveals that

This percentage is almost equal to the percentage of former carpoolers who joined the FasTrak program, suggesting a basic equilibrium between these two groups,¹³⁶ at least in the short term.¹³⁷ Thus, the new carpools consisted mostly of drivers who had neither used an ExpressPass nor participated in a carpool during the previous year. Generalizing from this data, it appears that the most likely explanation for the significant increase in carpooling rates that coincided with the implementation of the FasTrak program is as follows: By supplementing the time savings that HOV users obtain by riding in HOV lanes with a quantifiable monetary saving that they get relative to solo drivers, carpooling became a more attractive option. The interesting question of whether this trend is actually more likely than the existence of HOV lanes alone to support a "norm of carpooling" will be addressed in the next Part of the Article.

C. FasTrak's Effect on Compliance

Another important behavioral change occurred during FasTrak's first year. The percentage of motorists in the Express Lanes who were unauthorized to be there dropped precipitously. In October of 1996, two months before the start of the FasTrak program, approximately fifteen percent of the vehicles using the carpool-only HOV lanes were SOV drivers violating the law.¹³⁸ During the first month of the program, the violation rate fell to between three percent and five percent.¹³⁹ The average violation rate was approximately three percent during the program's first year and three-and-a-half percent during its second year.¹⁴⁰ Eric N. Schreffler, who was commissioned by SANDAG to study enforcement of the I-15 program, concluded

a large number of carpoolers will solo commute and use their ExpressPasses one day a week because they simply cannot imagine driving in stop-and-go traffic after having become accustomed to the rapid pace of traffic in the Express Lanes. Telephone Interview with Jay Gainer, *supra* note 132. This suggests that FasTrak customers may well become accustomed to quick commutes, such that if the I-15 tolls were to become too high or their incomes were to fall, these FasTrak users would consider carpooling.

136. *See also* GODBE RESEARCH & ANALYSIS, *supra* note 105, at 12 ("No respondents in the HOV group revealed an increase or decrease in carpool, vanpool or bus usage as a result of the Express Pass program.").

137. Undoubtedly, a number of individuals in both groups became occasional carpoolers or ExpressPass users, but, unfortunately, SANDAG's data was not broken down in any great detail. As it is currently structured, there is little incentive for motorists to leave the FasTrak program, since all charges are assessed on a per-use basis.

138. *See* ERIC N. SCHREFFLER, PHASE I ENFORCEMENT EFFECTIVENESS AND VIOLATION ASSESSMENT app. A at 7 (1998), available in (visited May 17, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/enforcement.pdf>. Some caution is in order here. Scattered data collected by SANDAG and Caltrans from single days in 1995 and 1996 reveals much lower violation rates. *See id.* at 4. However, the methodological credibility of this data is questionable. *See id.* The data quoted in the text was collected by the same independent transportation consultants, using the same methodology during all periods studied. *See id.*

139. *See id.* app. A at 7.

140. *See* JANUSZ SUPERNAK & CHRISTINE KASCHADE, PHASE II YEAR TWO ENFORCEMENT EFFECTIVENESS AND VIOLATION ASSESSMENT 7 (1999), available in (visited May 17, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/599_enforce.pdf>.

that “[t]he significant decrease in violators since the start of the ExpressPass program may be due to increased CHP presence on the Express Lanes and the conversion of prior SOV violators to ExpressPass Customers.”¹⁴¹ Schreffler’s analysis seems persuasive. It is certainly the case that the law against unlawful use of the lanes was enforced much more vigorously after the program was launched.¹⁴² SANDAG contracted with the California Highway Patrol (CHP) to ensure that an officer was frequently monitoring the lanes during the commuting hours.¹⁴³ This heightened enforcement undoubtedly boosted compliance levels significantly, and may well account for some of the apparent drop in violations.

Under FasTrak and similar congestion-pricing programs, the governmental or private authority operating the road will have a strong incentive to monitor cheating vigorously. A study prepared for SANDAG correctly notes that two groups will be particularly vocal in their desire for enforcement:

Express Pass users, carpoolers and transit users alike will continue to want vigorous enforcement on the Express Lanes to ensure that only qualified users are allowed in the lanes. The Express Pass users will want enforcement because they are paying for the privilege, and carpoolers do not want any unauthorized solo drivers using the lanes.¹⁴⁴

The obvious underlying analysis is that if ExpressPass users and carpoolers see that unauthorized motorists are driving in the Express Lanes and getting away with it, they will be less likely to pay a fee or carpool in the future. As a result, the operating agency or firm would lose toll revenue and face increased congestion—unattractive prospects for transit officials. Indeed, part of the reason for the popularity of the FasTrak program¹⁴⁵ probably has to do with the perception that enforcement efforts have been effective.¹⁴⁶

FasTrak has also created the potential for significant private enforcement of the rules against SOV cheating in the Express Lanes. It appears that ExpressPass users feel more strongly than any other group about the need for enforcement of the law against cheating. ExpressPass users, not carpoolers, are most likely to complain to law enforcement officials when they see a number of unauthorized vehicles driving

141. SCHREFFLER, *supra* note 138, at 4. The size of the fine for using the lanes unlawfully remained stable at \$271 throughout the first year of the program. *See id.* at 3.

142. *See* SUPERNAK & KASCHADE, *supra* note 140, at 5-6.

143. Telephone Interview with Karyn Menpink, California Highway Patrol Officer (Mar. 26, 1999); *see also* GOLOB ET AL., *supra* note 118, at 85 (“By way of background, prior to the start of the ExpressPass program, the California Highway Patrol dedicated vehicles and/or motorcycles to specifically enforce of [sic] the I-15 Express Lanes approximately one day per month. Since the start of the program, dedicated enforcement of the Express Lanes has increased to approximately three days per week.”).

144. FRANK WILSON & ASSOCS., *supra* note 48, at 7.

145. *See* JACQUELINE GOLOB ASSOCS., *supra* note 106, at 8, 10; SUPERNAK ET AL., *supra* note 95, at 21, 26-27.

146. *See* GOLOB ET AL., *supra* note 118, at 83 (“At least 61 percent of I-15 respondents believe that the current level of enforcement of the Express Lanes is about right, between 20 and 37 percent believe it is insufficient, and less than five percent believe it is excessive.”).

in the Express Lanes.¹⁴⁷ Thus, enforcement of the FasTrak program may be buttressed by the presence of a second group that has a strong interest in maintaining adherence to the law. Recall that in traditional HOV lanes, by contrast, carpoolers are the only group of motorists adhering to the carpool missionary norm, that is, those who are intensely interested in preventing violations.¹⁴⁸ Although cellular phone wielding San Diego motorists are potentially excellent sources of violation reports,¹⁴⁹ SANDAG does not have any program that encourages them to assist the CHP in enforcing the law.¹⁵⁰ Nevertheless, a small, but ever-increasing number of motorists do use their cellular phones to report to SANDAG or the CHP that individual vehicles are unlawfully using the Express Lanes.¹⁵¹ At the very least, however, the existence of two groups who support strict adherence to the law will likely prompt greater political pressures for resources to be devoted to enforcing the law on the Express Lanes.

Although beefed-up enforcement may well account for some of the apparent drop in violations, other explanations also help explain the change. After all, violation rates from San Diego did not rise and fall in tandem with police monitoring of the lanes. The lowest recorded violation levels occurred in November of 1998, when only 0.7% of Express Lane users were unauthorized.¹⁵² That month, however, CHP enforcement

147. Telephone Interview with Jay Gainer, *supra* note 132; Telephone Interview with Karyn Menpink, *supra* note 143. Gainer provides two reasons for this propensity to complain. First, ExpressPass users must pay higher tolls when there are more vehicles using the Express Lanes. Thus, violators impose a real financial cost on ExpressPass users. Second, ExpressPass users do not want to feel like “suckers” who pay for the privilege of riding in the Express Lanes while others abuse the system and ride for free. Gainer also reports that ExpressPass users are usually delighted to see CHP officers pull violators over for the purpose of ticketing them.

148. *See supra* text accompanying note 48.

149. ExpressPass users own cellular phones at much higher rates than typical San Diego residents. *See* GOLOB ET AL., *supra* note 118, at 14; *see also supra* note 50.

150. Telephone Interview with Karyn Menpink, *supra* note 143. Officer Menpink offers a rather compelling reason for this reluctance. She suggests that drivers often get into accidents or dangerous confrontations when they try to rat on fellow motorists. For example, she told of a motorist calling from his cellular phone to report that he was right behind another motorist who was driving in excess of 100 miles per hour, prompting a query from the dispatcher as to why the telephoning motorist was *also* driving 100 miles per hour so as to keep pace. Among the nation’s 37 largest cities, San Diego has the 16th most instances of accidents resulting from aggressive driving. *See* Larry Lange, *Here in Seattle, The Road is Less Raged over Even in That Awful Traffic, We’re a Bit More Civil, Data Indicate*, SEATTLE POST-INTELLIGENCER, Mar. 9, 1999, at B1, *available in* 1999 WL 6584069 (ranking the cities based on data from a recent study). For an interesting discussion of the related phenomenon of “road rage,” see generally Jason Vest et al., *Road Rage: Tailgating, Giving the Finger, Outright Violence—Americans Grow More Likely To Take out Their Frustrations on Other Drivers*, U.S. NEWS & WORLD REP., June 2, 1997, at 23.

151. Telephone Interview with Jay Gainer, *supra* note 132; *see also* CHRISTINE KASCHADE ET AL., PHASE II YEAR TWO MEDIA RELATIONS AND COVERAGE, MARKETING, AND PUBLIC RESPONSE 38-46 (1999), *available in* (visited May 23, 2000) <http://www.sandag.cog.ca.us/data_services/fastrak/pdfs/599_media.pdf> (logging such complaints received by FasTrak customer service representatives).

152. *See* SUPERNAK & KASCHADE, *supra* note 140, at 6, 13 (author’s calculations are based on the data provided therein).

was relatively low. By contrast, in April of 1998, CHP's presence was much greater, but 4.7% of cars in the lanes were using them unlawfully.¹⁵³

Schreffler's second explanation¹⁵⁴ for the significant drop in violations—that former HOV violators are being converted into ExpressPass users—is particularly noteworthy. A number of former violators who previously would run a small risk of paying a large fine have now decided that paying a regular fee for lawful use of the Express Lanes is preferable.¹⁵⁵ In all likelihood, these individuals are making rational calculations about how to maximize their own welfare.¹⁵⁶ Even if the average monthly payments of an ExpressPass user are higher than the average monthly fines paid by an HOV violator who used the lanes an equal number of times, the reduced stress levels (that is, no concerns over being caught) and lack of guilt associated with lawful behavior may well suffice to tip the balance in favor of compliance. Finally, motorists who violate the law not only risk a fine, but also risk suffering a delay when they are pulled over by CHP officials and ticketed. For motorists who are using the Express Lanes because they are in a hurry, this cost will be a significant deterrent to cheating.¹⁵⁷ It thus appears that relative to HOV-only lanes, HOT lanes make it rational for more motorists to comply with the law.¹⁵⁸ This compliance with the law helps convince other law-abiding Express Lanes motorists that they are not being duped for paying the tolls or carpooling, thereby increasing compliance all-around, and helping to reinforce the social norm against cheating. FasTrak has successfully turned the criminals into cops.

The ExpressPass program may influence perceptions of adherence to the law in other ways as well. When the I-15 Express Lanes were designated as HOV-only lanes, it was obvious to all observant motorists that solo drivers in the Express Lanes were violating the law. Now that these lanes have been modified to combination HOV and toll-paying SOV lanes, motorists are likely to assume that those solo drivers in the Express Lanes are ExpressPass users, rather than violators. While a

153. *See id.*

154. *See supra* text accompanying note 141.

155. Telephone Interview with Jay Gainer, *supra* note 132. Gainer reports that a significant number of people who come into the FasTrak offices to purchase transponders admit to having formerly been HOV cheaters.

156. *Cf. GODBE RESEARCH & ANALYSIS, supra* note 37, at 7 (noting that FasTrak users report that one reason they use the program is that they make more than enough money for getting to work earlier to offset the tolls). Of course, the fact that most individuals are generally risk-averse, *see, e.g.,* Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1496 n.16 (1999), suggests that many people would prefer small, regular toll payments to large, rare tickets, even if the annual cost of the two approaches were identical.

157. Telephone Interview with Jay Gainer, *supra* note 132. Gainer relays the story of a hospital employee who would often illegally use the Express Lanes when she had to reach the emergency room on short notice. She eventually purchased an ExpressPass because she grew wary of having to spend fifteen minutes arguing with CHP officers trying to convince them that she really did need to use the lanes because of a medical emergency. Even in such circumstances, CHP officers would usually write the ticket anyway, preferring to "let the courts sort it out." *Id.*

158. I do not believe that this suggestion ends the inquiry. As I point out throughout the Article, there are numerous instances in which drivers do not appear to be behaving rationally.

motorist can, upon careful inspection, see whether a solo driver in the Express Lanes is a violator (the ExpressPass Transponders usually hang from the automobile's rear view mirror), it requires substantially more effort to determine whether someone has an ExpressPass than it does to determine whether someone is driving alone.¹⁵⁹ Thus, even if the program did not affect actual rates of compliance with the law, it might well affect perceived compliance, simply by making violations more discrete. As long as motorists know that solo drivers can legally use the Express Lanes in exchange for a fee, as is the case in San Diego,¹⁶⁰ this perceived compliance is likely to bring about greater actual compliance.¹⁶¹

To sum up this Part, FasTrak accomplished in its first few years much of what its proponents had hoped it would: Some SOV traffic shifted into the Express Lanes; carpooling rates increased measurably; and the percentage of individuals using the Express Lanes without authorization appears to have dropped precipitously. Undoubtedly, the program has changed the traffic patterns on the San Diego highways, almost certainly for the better. But has the program also affected the way that residents think about commuting, their contributions to roadway congestion, and the nature of their community? I will consider those questions in the Part that follows.

III. FASTRAK'S EFFECT ON NORMS

Americans' love affair with their cars is legendary.¹⁶² Perhaps more than any other area in the country, Southern California symbolizes the American car culture and car

159. Express Lanes cheaters are less obvious under FasTrak than they were under the standard HOV lane system. Notably, however, this greater anonymity does not seem to have increased noncompliance with the law, or at least if it has, this increased noncompliance has been offset through other aspects of the program's enforcement.

160. Eighty-seven percent of I-15 users are aware of the ExpressPass program. See JACQUELINE GOLOB ASSOCS., *supra* note 106, at 7.

161. Cf. Graeme S. Cooper, *Analyzing Corporate Tax Evasion*, 50 TAX L. REV. 33, 65 (1994) (discussing empirical studies showing "that favorable attitudes to taxpaying, which are believed to be manifest in actual behavior, apparently are associated with the belief that others are paying their share," and correlate with higher levels of taxpayer compliance); Kahan, *supra* note 51, at 354 (noting the "strong correlation between a person's obedience and her perception of other's behavior and attitudes toward the law"); Carlisle Ford Runge, *Institutions and the Free Rider: The Assurance Problem in Collective Action*, 46 J. POL. 154, 160-61 (1984) (arguing that perceptions of unfairness discourage individuals from contributing to the public good when they perceive free-riding by other actors).

162. See, e.g., David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 576-77 (1998) (providing statistical quantification of the American "love affair" with automobiles); David B. Rivkin, Jr., *The U.S. "Clean" Fuels Program: Imperatives and Prospects*, 28 CAL. W. L. REV. 95, 95 (1991-92) (taking the unique American love affair with cars as a given).

dependency.¹⁶³ As discussed earlier,¹⁶⁴ that car culture has increasingly come to view solo commuting as both a norm and an entitlement. While a loosely organized subculture of carpoolers who question this dominant norm exists, subverting—or even softening—the dominant norm of solo commuting is an extremely daunting prospect. Yet that is precisely what San Diego's government has decided it must do if it is to prevent its traffic congestion problem from reaching intolerable levels. This Part explores the ways in which the San Diego program might successfully alter existing norms about driving there, and how such an alteration might strengthen the program's goals of decreasing congestion on the city's highways. It then situates the observations about San Diego within the theoretical literature on the interplay between norms and the law, and, more specifically, the literature on how norms change in response to changing laws.

A. Carpooling Norms

San Diego cannot be characterized as a city of carpoolers. Although there have been significant increases in levels of roadway congestion during the past several decades, most motorists' preferences for solo commuting seem to trump their preferences for shorter commutes. The average San Diego I-15 commuter spent, in 1996, one hour and eight minutes per day commuting to and from work.¹⁶⁵ Although a carpooler using the HOV lanes might have expected to shave such a commute by more than fifty percent, few motorists opted to carpool between 1988 and 1996.

The comments of San Diego focus group participants help emphasize the prevalence of the solo-commuting norm:

While one respondent in the SOV group said the FasTrak program was designed to encourage carpooling by making people pay for the privilege of not sitting in traffic, another respondent said, "people just aren't going to carpool."¹⁶⁶

Other respondents in [the SOV] group described FasTrak as a "failed attempt to get carpooling to happen," saying "they should just admit it's not going to work and open it up."¹⁶⁷

Yet another respondent in the part-time user group said she felt "resentful" because she feels there are really no alternatives to FasTrak for commuters who would like to get to work faster.¹⁶⁸

The first two responses suggest deep skepticism toward the possibilities for

163. See Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 710-11 (1995); Keith Stone, *Breaking Driving Habits Costways Could Be Gridlock Remedy*, L.A. DAILY NEWS, Aug. 4, 1996, at N1 (noting that Los Angeles motorists have "shown they would rather be disemboweled than take the bus") (quoting Kenneth Green, Reason Found., Envtl Studies Dir.).

164. See *supra* text accompanying notes 13-19.

165. See WILBUR SMITH ASSOCS., *supra* note 50, at 10.

166. GODBE RESEARCH & ANALYSIS, *supra* note 37, at 10.

167. *Id.* at 20.

168. *Id.* at 8.

inculcating a carpooling norm in the populace. These respondents see solo commuting as a practice that is so deeply ingrained in people's behavioral patterns that efforts to affect those norms via the content of the law are doomed. The response from the "resentful" motorist suggests a related but different reaction to the programmer. Her response belies some level of cognitive dissonance. The motorist believes that there are no alternatives to paying the toll if one wishes to reach work more quickly, forgetting the obvious alternative of carpool formation. Indeed, at least in the mind of this motorist, although I-15 has provided carpoolers with quicker commutes for over a decade and the respondent herself sometimes uses the Express Lanes and is mostly surrounded by carpoolers when she does so, the carpooling option fails to register on her radar screen.

In establishing carpool lanes along I-15 in 1988, the San Diego local government was trying to undermine the norm of solo driving. The program set aside a segregated lane offering a superior service to those few individuals who were willing to break with the dominant solo-commuting norm. The message of the lane from a public norms perspective was very clear—every carpool potentially takes at least one car off the roads, and as a reward for this socially beneficial decision the carpooler will enjoy a quicker commute than the solo driver. As the general purpose lanes became more and more congested, the incentive for individuals to carpool grew stronger and stronger. Nevertheless, the norm of solo commuting was not undermined.¹⁶⁹ People were willing to drive solo even if it meant longer commutes. Automobile seats became more comfortable; cellular telephones became ubiquitous; people adhered to their solo-commuting norms. The HOV lanes remained underutilized. The percentage of motorists who carpooled never reached the critical mass that might be necessary to provoke members of the solo-commuting majority to question their practices.¹⁷⁰

The initial data collected by SANDAG, demonstrating a measurable increase in carpooling following the FasTrak program's implementation, suggests the possibility of some shifts in San Diego's carpooling norms. First, the program has likely increased the extent to which carpooling is seen as a socially useful activity. By shifting to congestion pricing, the program has reinforced the view (already created by the presence of carpool lanes) that carpoolers are helping society by easing congestion on the roadway. In the minds of some, the size of the toll not charged to carpoolers may correlate with the amount of money the carpoolers' choices are saving the community when they decide to carpool instead of driving solo.¹⁷¹ Again, although carpoolers are no better off financially than they were before the program

169. *Cf.* Oren, *supra* note 13, at 147 ("Carpool lanes might encourage trip reduction, but . . . the success of trip reduction is dependent on the occurrence of the culture change that the program was designed to effectuate.").

170. Craig Oren notes:

[T]here are many areas of life in which the surrounding culture leads us to prefer something other than the cheapest alternative. If I saw others successfully carpooling or using transit to get to work, I might well be influenced to do the same, just as my choice of car is affected by the preferences of my colleagues and neighbors.

Id. at 198.

171. In actuality, the San Diego program is designed to raise revenues for the city, rather than simply break even. *See* SCHREFFLER ET AL., *supra* note 96, at 4-5.

was implemented, they are likely to feel better off relative to other motorists, who must now pay a toll in order to obtain the time savings that carpoolers get for "free."

Second, the fact that individuals may now pony up several dollars in order to use the Express Lanes does not appear to have led to any demoralization problems among carpoolers. Carpoolers on the I-15 are now generally supportive of the program.¹⁷² Surprisingly, I-15 carpoolers have even articulated the view that the price solo drivers must pay in order to access the Express Lanes is too *high*.¹⁷³ There was some concern prior to the program's implementation that the ExpressPass program would eliminate the law's apparent mark of approval for carpooling and, by allowing paying solo drivers to use the Express Lanes, blur the law's approval for carpooling.¹⁷⁴ But the increase in carpooling, combined with carpoolers' approval for the program and their sentiment that solo drivers are being overcharged for the right to drive in the carpool lanes, suggests just the opposite. The status of carpoolers relative to other drivers appears, if anything, to have increased as a result of the program.

Third, the program is likely to enhance the degree to which commuters feel they have choices in their commuting patterns.¹⁷⁵ When an ExpressPass motorist decides to pay the toll and ride in the Express Lanes, she will probably understand the toll charged in one of two ways: (1) the price she has to pay for a quicker commute; and (2) the price she has to pay for not carpooling. When faced with a monetary charge for engaging in an activity, a consumer is likely to consider whether there are alternative behaviors that can decrease or eliminate the charge.¹⁷⁶ Thus, if the commuter sees the toll as the price of a quick commute, she will consider toll-avoidance options such as (a) riding in the slower, general purpose lanes; (b) arranging her employment schedule so that she is not driving during the peak hours, when tolls are most expensive; and (c) seeking housing that is closer to her place of work or vice versa. If she sees the toll as the price of not carpooling, she will consider: (d) carpooling; and (e) mass transit alternatives, which would also provide

172. See GOLOB ET AL., *supra* note 118, at 62.

173. See *id.* at 69 (noting that when access to the lanes was based on a monthly charge, most carpoolers felt the \$70 monthly fee was too high).

174. By blurring I mean to say that formerly the law said "carpoolers are making a special contribution to reducing traffic congestion and they therefore deserve special treatment," and no longer sends that message so clearly. Obviously, setting aside the possibilities that tolls would be used to improve congestion, solo drivers using the carpool lanes are contributing to traffic congestion to the same degree as solo drivers in the general purpose lanes. Thus, allowing some solo drivers into the Express Lanes can be said to blur the law's statement that carpoolers are worthy of special praise. For a discussion of blurring in the context of governmental efforts to influence social norms, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1010-12 (1995).

175. See SUPERNAK ET AL., *supra* note 95, at 26 ("Congestion pricing creates an identifiable new travel option, which is highly valued by the participants and can be designed in a way that protects the interest of carpoolers and keeps them satisfied."); see also Lange, *supra* note 150, at B1 ("[G]iving commuters more options reduces stress, making them less likely to become frustrated or violent.").

176. While it is certainly not the case that every commuter will become a rational actor through such a process (recall the frustrated commuter quoted above), the FasTrak program does seem to be encouraging some of that behavior. See, e.g., *supra* note 155.

access to the ExpressPass Lanes. Any of these alternatives mitigate the problems associated with freeway congestion. The first three do so by decreasing the consumer's expectation that she ought to be able to travel from point *A* to point *B* quickly and easily. The second set of alternatives soften the commuter's expectation that she has a right to commute alone. Over time, then, the availability (and use) of these alternatives resulting from the FasTrak program is likely to decrease the power of commuting-on-demand expectations and solo-commuting norms. Of course, this discussion has left out alternative (f) cheating—an option that is likely to weigh heavily on some people's minds if commutes become too slow or expensive.

B. Compliance Norms

There is some reason to believe that FasTrak will increase social sanctions against cheating. The increase in Express Lanes traffic may discourage unauthorized use of the lanes. As many people have observed, motorists stuck in traffic become quite frustrated when they see nearly empty HOV lanes.¹⁷⁷ It is plausible that this frustration and an associated belief that HOV-dedicated lanes constitute a waste of freeway space¹⁷⁸ encourages solo motorists to break the law by riding in HOV lanes. By increasing the amount of traffic in the ExpressPass lanes, FasTrak is likely to diminish the frequency with which motorists feel such frustration. FasTrak is a reasonably popular government program,¹⁷⁹ and it is a local program with local roots,¹⁸⁰ hence the norm against undermining it is likely to be rather strong.¹⁸¹ This heightened respect for the purpose of the lanes could eventually translate into a heightened acceptance of the fact that carpoolers (as the main beneficiaries of the lane) are justified in receiving favorable treatment.¹⁸² Moreover, as cheating becomes

177. See, e.g., *supra* note 36.

178. See, e.g., *supra* text accompanying note 167.

179. See SUPERNAK ET AL., *supra* note 95, at 28 (“Forty-seven percent of I-15 commuters responding to the Attitudinal Panel Survey thought the program was a success while 27 percent did not think the program was a success.”).

180. Because the program's origins (if not its funding) are distinctly local in nature, FasTrak's has avoided the political pitfalls that might be associated with such a program if it were perceived to have been foisted upon San Diego by officials in Washington or Sacramento. Such was not the case with the Los Angeles “diamond lanes,” where the perception that the program was imposed upon the city by federal bureaucrats helped prompt a firestorm of opposition. See *supra* note 46.

181. Of course, were the public to begin believing that charging some motorists for access to the Express Lanes is unjust, attempts to undermine the charging aspect of the program by riding in the Express Lanes without authorization might become more frequent. However, at present this aspect of the program is actually quite popular. See GOLOB ET AL., *supra* note 118, at 63 (“Ninety percent of current ExpressPass users think ExpressPass is fair to travelers on the regular lanes of I-15, while . . . 70 percent of other I-15 users . . . think it is fair.”); JACQUELINE GOLOB ASSOCS., *supra* note 106, at 9. The program's popularity increased among both users and nonusers during the life of the program. See SUPERNAK ET AL., *supra* note 95, at 36.

182. SANDAG has not collected data that would measure the prevalence of this response. However, one piece of polling data supports the inference that carpoolers are perceived as the most deserving users of the Express Lanes. When polled about what the government should do if the lanes become too crowded, respondents were given the options of raising ExpressPass

decreasingly common, the social sanctions against cheaters and the feelings of shame that violators experience will become more pronounced.¹⁸³ Thus, even if heightened enforcement is the only reason for decreased cheating on the Express Lanes, there is reason to believe that the norm against cheating will still become stronger, since heightened enforcement will be necessary if any government is to make congestion pricing work.¹⁸⁴

A second effect on enforcement norms may result from FasTrak. When the I-15 Express Lanes were dedicated to carpools and carpools alone, a solo motorist had to incur a small risk of being assessed a \$271 fine if he wished to use the Express Lanes. The choice was binary: Reach one's destination slowly or risk a large fine. Under FasTrak, the impatient motorist for whom riding in the slow lanes is unacceptable has two options: Pay a fee of approximately \$2 or pay nothing and risk a \$271 fine. In such circumstances, a motorist's calculus may be as follows: "If I am caught and have to pay the \$271 fine, I will feel quite foolish because I could have gotten to my destination just as quickly had I paid the \$2 charge." FasTrak cheaters who do get caught will likely experience a level of regret not experienced by one whose choice was binary. In other words, the HOV cheater who is caught will rationalize his decision in the following manner: "I really had *no choice* but to break the law, since I had to make it to that meeting on time." In contrast, a FasTrak cheater will think: "I was really stupid. I should have played it safe and paid the toll." Assuming motorists want to avoid these feelings of regret and the disutility that can be expected to accompany them, we might expect the development of a norm that holds FasTrak cheating to be an instance not only of lawbreaking, but of foolishness.¹⁸⁵ As long as

fees or increasing the number of people who would need to occupy a vehicle in order for it to qualify as a carpool from two to three, 56% of I-15 commuter respondents said fees should be raised while only 28% said carpool occupancy requirements should be increased. See GOLOB ET AL., *supra* note 118, at 78. In contrast, San Diego commuters who drive the I-8 corridor, which only has carpool lanes, were asked the same questions about the I-15 lanes and congestion. By a 46% to 42% margin, these commuters favored increasing the occupancy requirement. See *id.* Although there may be differences among I-8 and I-15 commuters that help explain these different attitudes, one interpretation of this data is that exposure to the ExpressPass program increases solo drivers' political support/empathy for carpools.

183. Richard McAdams proposes this connection, with fear of losing status providing the internal linkages:

Because esteem is relative, the intensity of disesteem directed at those who engage in a disapproved behavior is partly a function of the total number of people who are thought to engage in that behavior. If twenty percent of the population is thought to violate the initial norm against smoking or fur, then violating [the] norm will place one in the bottom quintile of the group with respect to that criterion of esteem. But if only two percent are believed to be smokers or fur wearers, then one falls to the bottom two percent for that criteria. Other things being equal, the latter represents a greater esteem cost than the former; the more deviant the violation, the more it appalls group sentiment.

Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 366-67 (1997) (footnotes omitted).

184. See *supra* text accompanying notes 144-46.

185. Indeed, the same framing effect is likely to affect the perceptions of motorists who observe FasTrak violators pulled over by the side of the road. They may well think to

enforcement involves a singling out of violating motorists, this anticipated shift in enforcement norms can be expected to produce heightened compliance.¹⁸⁶

FasTrak may also influence social norms in a third, related way. Breaking the law is sometimes lionized, or at least tolerated, as an act of defiance against an unpopular rule.¹⁸⁷ In violating an unpopular law, criminals can sometimes tap into a wellspring of social forgiveness, especially where many in society perceive that, had they been in the criminal's shoes, they too would have broken the law.¹⁸⁸ When the option set of an individual is constrained in a manner that seems to place him between a rock and a hard place, there may be sympathy for his decision to violate the law.¹⁸⁹

themselves, "Just think, he risked a \$271 fine in order to avoid a \$2 toll. How silly." On the other hand, it is plausible to think that if the lane were reserved for HOV lanes only, other motorists will look at the pulled over violator and think "Well, someone must have been in a big hurry."

186. Note that this mechanism throws into sharp relief one potential drawback to fully automated enforcement, which SANDAG is currently testing. Under the current partially automated system of enforcement, visual inspections by law enforcement personnel are combined with inspections by toll managers. When toll managers observe a motorist driving in an unauthorized lane, they have the capacity to signal CHP patrol vehicles, which will then track down and ticket the offending motorist. If all enforcement is done through surveillance cameras and tickets are served upon violators via U.S. mail, then the shame associated with being pulled over will be a nonfactor. As a result, one might anticipate a marginally weaker social sanction against cheating. Because of technical glitches in the various automated enforcement systems that SANDAG is testing, it is not anticipated that fully automated enforcement will be a reality for at least three to five years. Telephone Interview with Jay Gainer, *supra* note 132.

It is also worth noting that totally automated enforcement would save violators time. Currently, the time required to deal with law enforcement personnel if one is caught cheating helps deter would-be cheating motorists who are, after all, considering illegally using the Express Lanes because they feel pressed for time. Automating the delivery of tickets thus decreases the cost of punishment to the hurried motorist. *See supra* text accompanying note 157.

187. Cf. Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1863-64 (1999).

Decades of abuse and neglect have created deep-seated distrust of the police in inner cities. Severe penalties, which decimate both the lives of individual offenders and the communities from which they come, have bred even more resentment. Against the background of these sensibilities, cooperating with police in their fight against gangs becomes freighted with connotations of collaboration and betrayal. So citizens refuse to cooperate.

Id.; see also Margolis, *supra* note 45, at 829 ("[T]here is ordinarily a spectrum, not a dichotomy between compliance and noncompliance. . . . [T]here are at least two dimensions—(1) partial compliance and (2) good, or at least not obviously bad, excuses for noncompliance—which blur the line between socially acceptable and socially perverse behavior and allow the gradual erosion of a norm.").

188. For an interesting discussion of this phenomenon, and its effects within African American communities, see generally Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1777-81 (1992).

189. Perhaps the highest profile example of this phenomenon is Dr. Jack Kevorkian, whose illegal efforts to help terminally ill patients end their lives received a great deal of support from

FasTrak provides the hurried driver with a commuting option that will allow him to reach his destination on time without breaking the law. By expanding the option set in this manner, the program may cast cheating as a less legitimate form of defiance. Accordingly, FasTrak may diminish the legitimacy of defying the law, and may thus increase the social opprobrium directed at lawbreakers.¹⁹⁰ In short, by allowing motorists to buy into the HOV lanes, FasTrak gives people a more attractive alternative to breaking the law. The San Diego government alters motorists' incentives, and does so in a way that strengthens norms against lawbreaking. The program's goals and its effect on norms reinforce each other—a recipe for a highly successful government program.

C. Road-Pricing Norms

Prior to the beginning of the FasTrak program, city residents had become attached to the notion that freeways were to be free. As one report described it, FasTrak would fly “in the face of a public which fosters mores that argue against the pricing of highways and the selling of limited highway space to a select group.”¹⁹¹ Although in some areas of the country, particularly the New England and Mid-Atlantic states, traditional reliance on turnpikes has helped weaken resistance to the introduction of new toll lanes, in areas of the country such as San Diego, where residents have little experience with toll roads, planners seeking to introduce them are likely to encounter stiff opposition.¹⁹²

At the same time, this baseline opposition to the concept of toll roads did not soften the interest of solo drivers in being able to buy their way into the carpool lanes. Prior to the initiation of the FasTrak advertising campaign, San Diego city planners were heartened to learn that “[f]requent commuters were extremely enthusiastic about being allowed access to the HOV lanes during peak travel times. Seven in ten

those who felt the law left those who wished to avoid long, painful deaths little choice but to turn to Kevorkian.

190. Robert Ellickson has suggested to me that a parallel dynamic surrounded social norms in the wake of the Eighteenth Amendment's enactment and repeal. In many quarters, Prohibition's unpopularity made it socially acceptable for an individual to keep an illegal liquor still in his backyard; many Americans replaced store-bought alcohol with home-brewed varieties. However, once Prohibition ended, meaning that people could again buy alcohol in liquor stores and at bars, owning a liquor still—which remained contraband even after the end of Prohibition—became much less socially acceptable behavior. As the law became less rigid, defiance of it was perceived to be less justified.

191. GODBE RESEARCH & ANALYSIS, *supra* note 105, at 5.

192. *Cf.* Federal Highway Admin., *supra* note 117, at 8 (“Gaining public support for congestion pricing in Portland is particularly challenging given the absence of any toll facilities or HOV lanes . . .”). To some extent, congestion-pricing schemes may be able to piggyback on consumers' familiarity with congestion-pricing schemes in other contexts. For example, a Florida community that is considering implementing a congestion-pricing scheme on a well-used bridge is banking on such behavior translation. *See id.* at 6 (“Lee County hopes to encourage the large senior citizen population (25 percent of the area's population), which is familiar with ‘early bird’ specials in purchasing other services, to take advantage of the off-peak [driving] discounts.”).

participants expressed a 'very' or 'somewhat' favorable impression of the buy-in program."¹⁹³ By the end of the program's first year, the concept of charging Express Lanes users had won the support of most I-15 commuters. Ninety percent of ExpressPass users and seventy percent of other I-15 users felt that the program was fair to those who used the general purpose (free) lanes of I-15.¹⁹⁴

At first glance, these two sets of views—that the freeways should be free, and that allowing some motorists to buy into the HOV lanes is fair—would seem to be contradictory, and one might begin to ask difficult questions about polling methodology and question phrasing. However, upon close examination, the positions prove reconcilable. In San Diego the freeway capacity devoted to SOV traffic was not diminished by the FasTrak program. The initial HOV lanes were constructed as additions to the preexisting I-15 highway. Single-occupant vehicles were never allowed to use the lanes prior to 1996. Thus, no one who had previously gotten a privilege for free was ever deprived of something by the FasTrak program. Admittedly, FasTrak may prevent the conversion of the Express Lanes into general purpose (free) lanes, but this potential harm to SOV motorists is probably too attenuated to spark any perceived welfare loss. However, were the FasTrak program to be extended to the general purpose lanes, or were carpoolers to be charged or required to carry additional occupants,¹⁹⁵ then fierce opposition to the program might well coalesce.¹⁹⁶

Some opponents of congestion-pricing schemes argue that the program disproportionately benefits the wealthy at the expense of the poor.¹⁹⁷ Even though it appears that wealthier commuters are indeed the primary ExpressPass users,¹⁹⁸ San Diego's residents have not been terribly receptive to the critique. The print news media in San Diego by-and-large did not pursue the elitism angle on the program, although this criticism was the most common basis for the rare negative television or radio story.¹⁹⁹ This lack of attention to the equity concerns suggests the absence of a

193. WILBUR SMITH ASSOCS., *supra* note 50, at 7.

194. *See supra* note 181.

195. By this I mean that three passengers or two drivers might be required in order for a carpool to continue obtaining free access to the Express Lanes. Anecdotal evidence suggests that a large number of I-15 carpools consist of parents driving their school-aged children. Telephone Interview with Karyn Menpink, *supra* note 143; *see also* SAMUEL, *supra* note 26, at 4 (noting that, nationally, "[o]ver half of carpoolers now seem to be family members"). Rewarding these vehicles with speedier commutes seems defensible as a pro-family or pro-education measure, but it is hard to justify as an anti-congestion policy, since the children are ineligible to drive.

196. *See supra* text accompanying notes 78-79.

197. *See supra* text accompanying notes 67-69.

198. *See, e.g.*, GOLOB ET AL., *supra* note 118, at 15 (noting that 50% of ExpressPass users versus 20% of all I-15 motorists have household incomes in excess of \$100,000).

199. *See* SUPERNAK ET AL., *supra* note 124, at 6-8. The one time-period during which the equity critique did acquire some salience with the public occurred when SANDAG attempted to raise the price of the monthly passes from \$70 to \$80. *See* JACQUELINE GOLOB ASSOCS., *supra* note 106, at 11. This increase followed shortly on the heels of an increase from \$50 to \$70. However, the move to variable (per use) charging seems to have softened this criticism, since middle-class drivers can easily afford to use the Lanes at least occasionally.

strong egalitarian norm when it comes to roadway use.²⁰⁰ Indeed, the discourse on the equity issue in San Diego was surprisingly muted and shallow. For example, no one ever questioned the equity of allowing drivers to buy their way into lanes that are much safer than the general purpose I-15 lanes, which the Express Lanes almost certainly are.²⁰¹ Admittedly, roadway safety is something of a luxury good in that newer, higher-priced vehicles generally come with special safety features such as antilock brakes and side-impact airbags. Nevertheless, one suspects that had the promotional effort for FasTrak emphasized the lives saved, rather than the time saved, by those paying the Express Lanes toll, such a campaign could have offended existing norms.²⁰² Moreover, there may be significant interjurisdictional variations in the degree to which consumers respond to the equity-oriented critique of congestion pricing. For example, in Minneapolis-St. Paul, local officials pulled the plug on a HOT lane demonstration project after a gubernatorial candidate railed against the "Lexus Lane" approach to congestion management.²⁰³

That this "Lexus Lane" moniker has had a bit of saliency in public discourse suggests that the egalitarian critique does tap into some level of public uneasiness about FasTrak and similar programs.²⁰⁴ By selling preferential treatment to some

200. Cf. Ward Elliot, Editorial, *Toll Lanes Aren't Elitist; They're Smooth Riding for All*, L.A. TIMES, Dec. 8, 1995, at B9 ("Nobody gripes about express mail or faxes or tries to ban them as 'Lexus mail' that 'prices the poor out of the fast lane.' HOT lanes are the same: They get everyone where they want to go faster and they slow no one down."). Elliot's editorial raises an interesting question concerning how roadways are perceived. For some public goods, strong egalitarian norms urge against giving to those, who are willing to pay, a more superior product. An interesting illustration involves public education. In many states, public education funding comes largely from local property taxes, and significant variations among school district resources result. In recent years, the supreme courts of several states have struck down these disparities as violating their respective state constitutions. *See, e.g.*, *Helena Elementary School Dist. v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). In other states, these disparities have withstood constitutional challenges. *See, e.g.*, *DeRolph v. State*, 677 N.E.2d 733, 746 (Ohio 1997). At its core, this dispute over school funding is about whether parents should be able to buy into districts that will provide their children with superior public educational institutions, or whether students of all backgrounds must receive equal public education resources.

201. A California Highway Patrol officer reports that she is only aware of one collision in the Express Lanes since the initiation of the program. Telephone Interview with Karyn Menpink, *supra* note 143. Police officers are not the only ones who perceive that the Express Lanes are much safer than the general purpose lanes. Eighty-three percent of ExpressPass users say that those lanes are safer than the main lanes. *See SUPERNAK ET AL.*, *supra* note 95, at 22.

202. *See infra* text accompanying notes 313-16.

203. *See* FEDERAL HIGHWAY ADMIN., *supra* note 62, at 4.

204. Indeed, whenever the government imposes new user fees or raises existing ones there will be some chance that the egalitarian argument will be aired. *See generally* Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 814-18 (1987). In some instances, government concerns about deterring lower-income citizens from using the resource may convince the government to rely on another means of allocating access to the resource. *See id.* For example, the government might feel that inner-city youths would benefit the most from visiting national parks, and this concern might prevent it from raising entry fees—even though those who save on their entry fees as a result

motorists the FasTrak program has the potential to heighten class stratification on the roadway.²⁰⁵ Whereas formerly every solo driver was in the “same boat” in dealing with roadway congestion, those who value their time the most and have the resources to purchase a ticket in the fast lane now have the ability to do so. Whereas it formerly seemed strange to see solo drivers mired in gridlock while carpoolers zipped alongside them, it rarely seemed unjust. In the minds of some, the same cannot be said when the relevant difference between the stalled motorist and the speeding motorist is a resource constraint. Indeed, resentment of the have-nots is not the only factor at play here. When San Diego created a focus group of motorists whose income exceeded \$50,000, its members expressed a common concern about “what other motorists might think of them driving on the toll road.”²⁰⁶ These motorists were concerned that using the ExpressPass was a potentially ostentatious display of wealth—a signal to the world that they saw themselves as better than the gridlocked rabble.

Based on the limited notes from the focus group it is difficult to determine whether these motorists were likely to be deterred from using the ExpressPasses because of a sense of guilt or because of a fear that using the lanes might cause people who know the driver to see him as a snob or a wastrel. While these sentiments were undoubtedly heartfelt, it is important not to read too much into this singular display of focus-group angst. Similar expressions did not appear in either the private or public discourse concerning the FasTrak program. Moreover, it seems plausible that some number of people would be attracted to using the lanes precisely *because* doing so represents conspicuous consumption. This possible counter-effect underscores the oddity that “Lexus Lanes” is meant to conjure up indignation. The epithet has rhetorical force only because the association between a Lexus automobile and wealth is clear in the public mind. It suggests that automobiles are already used by some people to distinguish themselves from their fellow motorists.²⁰⁷ Buying a Lexus is an expressive

of this decision will primarily be the middle and upper class families who are the parks’ primary users. In such instances, a more sensible strategy might be to raise user fees on everyone and utilize these revenues to fund a program that busses inner-city youths to the parks and pays for their entire entry fees.

205. Cf. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2037-38 (1996) (“There is often a connection between norms that block exchanges and ideas about equal citizenship. The exchange can be barred by social norms because of a perception that, while there may be disparities in social wealth, the spheres in which people are very unequal ought not to invade realms of social life in which equality is a social norm or goal.”).

206. Harry W. Richardson & Chang-Hee Christine Bae, *The Equity Impacts of Road Congestion Pricing*, in ROAD PRICING, *supra* note 27, at 247, 257.

207. See David Thoms, *Motor Car Ownership in Twentieth-Century Britain: A Matter of Convenience or a Marquee of Status?*, in THE MOTOR CAR AND POPULAR CULTURE IN THE 20TH CENTURY, *supra* note 17, at 41, 47.

Most importantly, however, the motor car differentiates on a personal basis; through their particular characteristics cars interact with the individual, perhaps in terms of a status (or inverted status) relationship with the external world, or merely through internalised self-identification. How else does one explain the purchase of high-powered cars with the capacity to far exceed the maximum legal speed? Similarly, why are 4 x 4 vehicles in such demand when so many of them

act, and part of its expressive content is a statement that the driver is well-off.²⁰⁸ This analysis suggests that the content of the "Lexus Lanes" objection probably has more to do with concerns about equity than concerns about status.

A final observation on this subject is worth mentioning briefly. It is notable that the San Diego project does not go "all the way" toward commodifying access to the Express Lanes. One variation on the program would allow all spaces in the Express Lanes to be fully alienable. In an ideal system, carpoolers could pass through a gate that provided them with one permit to use the Express Lanes, which could then be sold to another motorist for a mutually agreeable price. The carpooler could then dart into the general purpose lanes a couple of dollars richer. Obviously, the transaction costs of such an approach would be prohibitive, as uncongested highway conditions are not conducive to this kind of haggling. But such a trading system could be accomplished more effectively in one of three ways: Carpoolers would receive a voucher, which could then be sold to a motorist for use during a subsequent trip.²⁰⁹ Alternatively, and preferably, the carpooler could receive a payment or tax credit from the government for each trip made in the general purpose lanes equivalent to the amount of the toll (or some percentage thereof). This would allow carpoolers who value money more than the benefits of the Express Lanes to maximize their utility.²¹⁰ Such a program could conceivably even increase revenue to the government.²¹¹ Still, the fact that policymakers in San Diego have not given consideration to such a system has less to do with the policy challenges inherent in such an approach,²¹² and more to do with their reluctance to commodify carpooling behavior completely.²¹³

hardly ever forsake the tarmac? Cars are more than simply a means of transport since for many people they represent an extension of personality.

Id. at 46-47.

208. See Holden, *supra* note 17, at 33 ("In other countries social divisions such as class can be symbolised by car and models In Italy for example, 'Fiats are for the masses, Lancias for the professional classes, Alfa Romeos for the trendies and Ferraris for the rich.'") (quoting Stuart Marshall, *The Best of Both Worlds: Stuart Marshall on Why Jaguar and Ford Need One Another*, FIN. TIMES, Nov. 11, 1989, at Weekend FT, 9).

209. In order to meet programmatic objectives, the voucher would have to be good for some amount of toll, rather than one free trip on the lanes. Recall that the tolls on I-15 are set according to the level of congestion in the Express Lanes at any given moment. Thus a voucher earned by a 5:30 P.M. weekday carpooler should typically be worth more than a voucher earned by a 4:00 P.M. weekday carpooler.

210. Of course, the fee and bonus structure would have to be arranged such that it would not actually encourage socially inefficient carpooling. For example, one can imagine entrepreneurial duos of teenagers driving fuel-efficient cars between downtown and the suburbs during rush hours in order to collect these carpooling bonuses. Obviously, encouraging such trips would be counterproductive.

211. The dynamic effect of the program would be as follows: The exodus of some carpoolers would decrease traffic and lower tolls in the Express Lanes, thereby prompting new motorists to enter the toll lanes. Eventually, the expected equilibrium would involve a higher percentage of solo motorists in the Express Lanes. The revenue from these paying customers could be used to offset the bonuses flowing to carpoolers using the general purpose lanes.

212. See *supra* text accompanying notes 209-10.

213. One scholar has advocated the use of tradable driving permits to relieve traffic congestion, but the idea has not caught on, presumably because of concerns about the

IV. APPLYING THE SAN DIEGO CASE STUDY TO THE NORMS DEBATE

The San Diego I-15 experiment is a rich resource for researchers interested in matters of transportation policy, the effects of user fees, the role of technology in law enforcement, and a number of other topics. My primary interest in the FasTrak program, however, concerns the way in which it influences social norms among San Diego's commuters. Specifically, this Part will focus on how the transition from HOV lanes to HOT lanes influenced three kinds of norms: (1) norms governing mode of commuting (solo commuting versus carpooling); (2) norms relating to compliance with the law and the social acceptability of cheating; and (3) norms governing equitable access to roadways. The Part then proceeds to a discussion of what the FasTrak case study teaches us about the emissions trading debate. If the FasTrak results are indicative, it suggests that the commodification of a right to pollute will have much more positive consequences for social norms relating to pollution than most scholars currently believe.

A. Interactions Between Norms and Laws

During this decade the academic debate on norm creation, norms as agents of social control, and interactions between norms and laws has burgeoned. However, following in the footsteps of Robert Ellickson's foundational work on cattle ranching in Shasta County,²¹⁴ much of the recent academic discussion on social norms has focused on close-knit communities of repeat players.²¹⁵ Indeed, there are excellent reasons to

transaction costs involved. See H.C. Goddard, *Optimal Restrictions on Vehicle Use for Urban Sustainability for Mexico City*, 7 INT'L J. ENV'T & POLLUTION 357 (1997).

214. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 177 (1991) ("The hypothesis predicts that welfare-maximizing norms emerge in close-knit settings but is agnostic about whether such norms can emerge in other social settings."); see also Lewis A. Kornhauser, *Are There Cracks in the Foundations of Spontaneous Order?*, 67 N.Y.U. L. REV. 647, 652 (1992) (reviewing ELICKSON, *supra*) ("Ellickson['s] . . . claim primarily applies to the substantive norms of closely knit groups."); Mark A. Lemley, *Shrinkwraps in Cyberspace*, 35 JURIMETRICS J. 311, 314 (1995) ("It is no accident that Ellickson's examples of private ordering tend to occur in small, close-knit, insular communities. For example, no one would argue that New York City could be governed without laws."); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 157 (1998) ("In most contexts, norms are associated with relatively small communities—'close-knit groups,' as they are called by Robert Ellickson . . ."). For an analysis of the influence of Ellickson's work on legal scholarship, see generally R. Brent Walton, *Ellickson's Paradox: It's Suicide To Maximize Welfare*, 7 N.Y.U. ENVTL. L.J. 153, 156 (1999) ("Ellickson's hypothesis has been very influential as norms and human practices become the focus of legal theory. It has begun to take hold as a building block beside Coase's theorem in the 'law and economics' movement of today.").

215. See, for example, Fikret Berkes, *Success and Failure in Marine Coastal Fisheries of Turkey*, in *MAKING THE COMMONS WORK* 161 (Daniel W. Bromley et al. eds., 1992), which

begin with the norms of close-knit groups: Relatively speaking, these groups can be studied easily and exhaustively. Moreover, the effects of norms are most likely to be visible in communities where everyone knows everyone else. Thus, it makes sense to study social norms where they are likely to be most prominent.

Unfortunately, little work appears to have been done with respect to social norms among anonymous individuals who have little expectation of being repeat players.²¹⁶ Yet these kinds of environments are precisely the ones in which many of us spend much of our time, many of our social ills are most likely to arise, and in which government efforts to inculcate norms are potentially the most effective. This case study of the San Diego highways represents an effort to study norm formation and norm transformation in a loose-knit environment.

The highways of an urban metropolis are perhaps the antithesis of Shasta County's ranches. A repeat player on a San Diego freeway is someone who tailgates you for more than two minutes. Drivers rarely communicate with each other except to indicate a lane change. Vehicles provide protective casings that seal off the

focuses on social norms within small, close-knit Turkish communities. Lisa Bernstein's work on the commercial norms governing the grain and feed industry seems to focus mostly on communities of repeat players. Even her discussion of "end-game" situations, in which the parties have resolved not to deal with each other again, mentions a number of reputational concerns that come into play because of the parties' concerns about future contracts with third parties. See Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1788 (1996). Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996), is perhaps most symptomatic of the tendency to focus on close-knit groups while ostensibly referencing the influence of norms in societies more generally. References to "village gossips" occur throughout Posner's text. See *id.*

216. A notable exception is in the area of norms governing the Internet, which has sparked a great deal of interesting scholarship. See, e.g., Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 519-21 (1997); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1388-91 (1996); Lemley, *supra* note 214, at 313-14. However, within this literature, there seems to be significant disagreement over whether the Internet can be perceived as a close-knit group in which social sanctions will be effective. See Gibbons, *supra*, at 521 ("There is some question about the extent to which individuals establish continuing relationships in cyberspace."); see also Lemley, *supra* note 214, at 313 ("Informal social norms worked fairly well when the Internet community was small and relatively insular. As a result of the explosive growth of the Net in the last ten years, however, the established social order of the Internet is breaking down.") (footnote omitted).

Outside of the Internet context, the literature on norms among non-close-knit groups is rather sparse. Chapter 15 of *Order Without Law* discusses the functioning of norms in urban areas where "the neighborhood gossip channels that are an important element of informal-control systems" are relatively weak. ELLICKSON, *supra* note 214, at 270 n.13. Quite self-consciously, however, the focus there is on neighbors within an urban setting, not strangers in an urban setting, where the control of norms is likely to be at its weakest. Lawrence Lessig's discussion of norms surrounding the use of motorcycle helmets in Soviet Russia is a notable example, in that it discusses a national norm and the government's varying efforts to manipulate it. See, e.g., Lessig, *supra* note 174, at 964.

occupants. With the aid of tinted windows, drivers can make themselves virtually anonymous to other motorists.²¹⁷ Except upon close inspection it is virtually impossible to see the face of the driver of an offending vehicle. Even motorists who commute via roughly the same route to work every day are unlikely to encounter the same drivers during subsequent trips. Moreover, the sheer number of vehicles on the roads during commuting hours and the popularity of some models of cars makes it unlikely that one will recognize a motorist who egregiously violated driving norms during a subsequent encounter. This anonymity helps account for the random nature of many acts of "road rage." Typically, these violent acts are provoked by relatively normal driving behavior. But to motorists who feel they have endured years of rudeness on the roads, these acts are the straws that break the camel's back and lead to extreme violence directed against the hapless victims.²¹⁸

Despite the lack of repeat players, there are strongly embedded norms of highway behavior that seem to be universal, at least within the United States. For example, slower traffic typically travels in the right lanes on almost any multilane road. Cutting another motorist off, especially without the use of a turn signal, is always considered rude. And of course, solo commuting to work via automobile is very much the norm in every major city save New York. These norms are reinforced by government policies and difficult to alter.

Lawrence Lessig has observed that one of the ways in which the government can help influence norms is by casting an activity that was formerly viewed as an individual choice with individual consequences as one that creates negative externalities. This strategy has enjoyed considerable success in the context of government efforts to influence smoking norms:

The views about second-hand smoke "turned the distaste of smoke into a positive source of exclusion. The smoker [became] on the defens[e] as the act of smoking [was] increasingly banished from many social circles and the smoker so frequently admonished not to smoke." Together, these two changes have resulted in a "dramatic change in the social acceptability of tobacco smoking. Smokers feel condemned, isolated, disenfranchised, alienated."²¹⁹

217. License plates do allow for offending motorists to be identified, but only with the assistance of the state. The state makes license plate ownership information available only for certain purposes, largely related to law enforcement. At the present, a request to learn the identity of a rude driver will not be granted by state governments, perhaps for fear of sparking violent self-help. Interestingly, the use of customized/vanity license plates can be seen as an effort by some drivers to decrease their own anonymity on the roads.

218. See Vest et al., *supra* note 150, at 23.

219. Lessig, *supra* note 174, at 1029 (alterations in original) (first internal quotation quoting Joseph R. Gusfield, *The Social Symbolism of Smoking and Health*, in *SMOKING POLICY: LAWS, POLITICS, AND CULTURE* 49, 60 (Robert L. Rabin & Stephen D. Sugarman eds., Oxford 1993)) (second internal quotation quoting Robert A. Kagan & Jerome H. Skolnick, *Banning Smoking: Compliance Without Enforcement*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE*, *supra*, at 69, 79); see also Edna Ullmann-Margalit, *Revision of Norms*, 100 *ETHICS* 756, 762 (1990) ("Also, consider the norms governing smoking in public places. It is still the case in many countries in the world, perhaps in most, that smoking in public places is presumed permitted unless otherwise indicated. But there are now several states in the United States, and many [other] institutions, where the situation has been reversed, whether formally or informally.

When smoking had been simply a matter of “his preference for smoking versus her preference for a smoke-free environment,” it became difficult to ostracize the smoker for his behavior. But when the smoker was seen as imposing a higher risk of disease upon nonsmokers in public spaces, the smoker became the antagonist, and anti-smoking norms evolved.²²⁰

The San Diego FasTrak program can be seen as a way of casting solo commuting in terms similar to smoking, albeit in a more subtle way. Solo commuting is an activity that contributes to roadway congestion and increases air pollution. But the problem is that the norm of solo commuting is so firmly engrained in the minds of the public that they do not perceive themselves as part of the problem.²²¹ Indeed, they perceive congestion as a problem, but view solo commuting as an individual choice with individual consequences. The establishment of separate HOV lanes did little to undermine this norm. It simply established the principle that, in the government’s eyes, carpooling was superior to solo commuting, and carpoolers would therefore be rewarded with time savings. FasTrak arguably has attacked the solo-commuting norm more clearly. How so? One way it does this is through the pricing mechanism—ExpressPass holders learn quickly that each additional car on the Express Lanes raises the chance that the toll will rise incrementally. Commuters’ tolls rise whenever a fellow commuter joins the commuting fray. Thus, the contribution of each driver to increased traffic congestion is monetized, and the contribution of each driver to congestion is reinforced. A second way the program expresses an anti solo-commuting norm is that for those drivers in the general purpose lanes, FasTrak makes carpooling appear relatively more attractive in that carpoolers now earn monetary benefits and time savings relative to solo commuters in the general purpose lanes. This dynamic is the flip side of the perceived welfare gains enjoyed by carpoolers relative to everyone else.²²²

One reason that FasTrak is unlikely to be able to transform commuting norms

Smoking in what is considered public space is presumed forbidden, unless explicitly designated as smoking areas (or when explicit permission is given).”) Of course, with the smoking example, the government was an important, but by no means the only, entity that helped shape norms. Nongovernment organizations and anti-smoking activists laid the groundwork for the norm shift and ultimately brought the political force to bear that swayed the government to act. Indeed, in any representative democracy, the instances in which government is truly in the forefront of shaping norms will be rare. Unless there is a political constituency urging government to shape norms in a certain direction, government actors will rarely try to alter an existing popular norm, no matter how inefficient that norm might be. But before they successfully enlist the government, these constituencies will almost certainly have engaged in some private efforts to influence norms. By contrast, in a more autocratic government, such as Singapore, the government can and does lead in shaping norms by, for example, attaching huge economic and social sanctions to littering.

220. Similar efforts to focus on the externalities involved with smoking—such as an emphasis on the health harms suffered by the children of parents who smoke at home, and the recent lawsuits against tobacco companies to recover state Medicaid expenditures resulting from smoking—can be seen as the continuation of this assault on the view of smoking as an individual choice with individual consequences.

221. See *supra* text accompanying note 27.

222. See *supra* text accompanying notes 129-30.

completely is that solo commuting is still so pervasive. Here again, the comparison with smoking is instructive. Levels of smoking in the United States reached 40% in 1965,²²³ but it has never been the case that a majority of Americans were smokers. On the other hand, the overwhelming majority of employed San Diego residents are solo commuters.²²⁴ FasTrak may prompt some solo commuters to recognize the costs they impose on their fellow motorists. But as long as they continue to see the vast majority of their fellow drivers engaging in solo commuting, the primary sanction for solo commuting will be governmental (via a charge), rather than social.²²⁵

A second reason helps explain why commuting norm transformation is an uphill battle. Although the costs of roadway congestion are significant, it may well be that carpooling is not the most efficient solution for many motorists. For example, it will be inefficient for some workers, especially those with extremely variable hours or idiosyncratic commute routes, to carpool or take mass transit to reach work. The same may be true for workers who need to drive during work hours or who derive significant utility gains from spending time alone in their cars.²²⁶ A large number of motorists may see themselves as falling into one of these categories. Accordingly, they simply will not respond to the government's statements that the solo-commuting norm is undesirable, and can be expected to resist efforts to undermine the dominant norm.²²⁷

For these reasons, the FasTrak program, which penalizes solo commuting, but gives solo drivers an alternative as to how they wish to pay the penalty (time or money), may be an effective first or second step in the effort to inculcate carpooling norms. Heavy handed mechanisms—such as large tolls charged to all solo commuters, or public campaigns labeling solo commuters as environmental criminals—would certainly spur a backlash.²²⁸ As Lessig notes in the smoking context:

What is required for the inducements not to backfire is that punishments be proportional and that there be alternatives or accommodations for smokers. This reduces the cost of the emerging norm, and hence makes it easier for the nonsmoker to feel justified in enforcing the nonsmoking norm. To make the transition smoothly, both the enforcers and the deviants must be able to treat each other less as "criminals," and more "as errant family members."²²⁹

223. See Joshua A. Lerner, Comment, *Snuffing out a National Symbol What the United States Can Learn from France's New No-Smoking Law*, 4 IND. INT'L & COMP. L. REV. 165, 173 (1993).

224. See *supra* note 101.

225. See *supra* note 170.

226. See, e.g., *supra* text accompanying note 18.

227. See generally Lessig, *supra* note 174, at 1030 ("Like surfers, legislators . . . who wish to change everyday social norms must wait for signs of a rising wave of cultural support, catching it at just the right time.") (quoting Kagan & Skolnick, *supra* note 219, at 69, 79).

228. A modest law will often be more effective at altering social norms and hence will further the law's objective more than a sweeping law that seeks to transform norms entirely. This point is perhaps best illustrated by America's catastrophic experience with the prohibition of alcohol. By contrast, less drastic laws aimed at regulating norms, such as restrictions on Sunday purchases or advertising restrictions, may actually be more successful at curbing the consumption of alcohol.

229. Lessig, *supra* note 174, at 1030-31 (citations omitted).

In order to strengthen carpooling norms it may make more sense to label solo driving a financially wasteful activity, rather than an environmentally insensitive activity, at least for the time being.

In any event, many federal and local government officials have pushed for HOV and HOT lanes out of a belief that a significant number of motorists would be made better off by carpooling, and yet refuse to do so. These motorists may be adhering to what Eric Posner might describe as an "inefficient norm."²³⁰ Indeed, even among carpoolers, inefficiencies abound. For example, San Diego's Ride-Link program, which seeks to assist drivers wishing to form carpools, has not been terribly successful.²³¹

An even clearer inefficiency is brought to light by contrasting San Diego's carpooling norms with the norms that prevail in the suburbs around Washington D.C. For many years, solo motorists commuting to or from Virginia and Maryland have utilized carpool lanes by picking up fellow commuters, dubbed "slugs," who park their cars and wait for rides at pre-designated spots along the interstate.²³² Slugs and drivers alike benefit from a quicker commute, and slugs save on gasoline and automobile depreciation costs. Perhaps most importantly, the significant transaction costs of organizing a carpool²³³ are reduced: Carpools need not be planned ahead of time and motorists need not spend time searching for suitable carpool matches. By comparison, a vibrant network of "slugs" has not emerged in San Diego²³⁴ despite the significant cost savings that ExpressPass users could realize by engaging in informal ride sharing. In Washington D.C., slugging has arisen naturally, without government intervention. But a slugging norm could also arise as a result of governmental efforts to encourage it: San Diego might set up designated parking lots and pick-up spots, and engage in direct advertising to encourage slugging. It might give municipal employees cash incentives to become the "slug vanguard," so that other motorists see how much time and/or money they are saving, and gradually warm to the idea of slugging. While San Diego might well realize more success in encouraging these ventures as a supplement to FasTrak, the ExpressPass program still can be seen as a more subtle effort to "diminish the influence of inefficient [solo-commuting] norms

230. Posner, *supra* note 215, at 1697; *see also* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1684 (1996) ("Sometimes, however, social norms fail to emerge where needed, or the wrong norms emerge relative to the standards of efficiency and fairness."); Jon Elster, *Norms of Revenge*, 100 ETHICS 862 (1990) (noting that norms relating to pride and shame can spark socially destructive feuding); Robert Sugden, *Contractarianism and Norms*, 100 ETHICS 768, 779-82 (1990) (using the example of nonegalitarian gender norms to show that inefficient norms can persist). *But cf.* Ullmann-Margalit, *supra* note 219, at 765 ("When a social institution or norm is perceived to be less rational than some feasible alternative, pressures for alteration may be expected to develop.").

231. Telephone Interview with Jay Gainer, *supra* note 132.

232. *See* Paik, *supra* note 35 (explaining the slugging process). Conversations with Kenneth Heath, a former Pentagon employee, greatly contributed to my understanding of slugging.

233. *See supra* text accompanying note 26.

234. Telephone Interview with Jay Gainer, *supra* note 132.

by enacting laws that give parties incentives to violate them."²³⁵

FasTrak has been designed to affect norms in another way as well. The idea is not simply to undermine the norm of solo commuting, but also to attach a greater social sanction to unauthorized uses of the Express Lanes. Earlier I discussed ways in which FasTrak may be doing just that.²³⁶ That analysis concluded that Express Lanes cheating had become less socially acceptable because (1) it was seen as undermining a popular program, (2) the cheaters themselves appeared to be making foolish decisions, and (3) FasTrak created lawful alternatives to cheating or getting stuck in traffic. It also suggested that the fact that cheating had become less frequent made it less acceptable, and therefore less frequent still. The norms literature suggests that the solidification of the anti-cheating norm might ultimately engender still higher levels of compliance with the law even if law enforcement scales back the resources it currently devotes to policing the Express Lanes.²³⁷

As a threshold matter, it is very important to emphasize that many people will instinctively prefer complying with a new law over breaking it, provided they are informed of its provisions.²³⁸ In this instance, San Diego's roadway signage makes drivers aware of the amount of the fine for violating the law. However, even among laws regulating behavior by motorists, compliance levels vary greatly. At one extreme is the speed limit, which is often flouted by the majority of motorists (assuming road congestion does not constrain speeding).²³⁹ At the other extreme are extremely high levels of compliance with foundational driving norms,²⁴⁰ such as the requirement that motorists drive on the right side of the road.²⁴¹ Somewhere in between these two poles are mandatory seat-belt laws. In 1983, only fourteen percent of drivers and less than nine percent of front seat passengers in major urban areas were wearing seat belts.²⁴² During the 1980s and 1990s a number of states enacted

235. Posner, *supra* note 215, at 1728.

236. *See supra* Part III.B.

237. *See infra* text accompanying notes 249-53.

238. *See* Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2D 265, 272 (1998) ("[M]ost people tend to regard law as having moral force, rather than solely as a cost that they must take into account in weighing the benefits and disadvantages of alternative courses of action . . ."). As a general rule, it appears that most San Diego drivers clearly do wish to "do the right thing" by complying with the law. Telephone Interview with Karyn Menpink, *supra* note 143.

239. *See supra* text accompanying notes 54-56.

240. Carol Rose's study of nineteenth-century American roadways reveals that customs, rather than statutes, were frequently the basis for the most widely followed "rules of the road." Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 105, 125-27 (1994).

241. Indeed, the widespread adherence to this norm is part of what makes lapses in it so unnerving and riveting to watch. The 1972 movie *The French Connection* was apparently the first to show a high speed car chase with vehicles travelling directly into oncoming traffic, a scene that was extremely memorable for those who saw it at the time. In recent years, this kind of vehicle chase has become rather standard fare in action movies.

242. *See* Robert F. Cochran, Jr., *New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense and the Basis of Damage Reduction Under the Seat Belt Defense*, 73 MINN. L. REV. 1369, 1387-88 (1989).

laws providing that motorists who did not wear seat belts would be fined. As a result, compliance rose dramatically, such that a scholar writing just a decade and a half later could confidently refer to the use of seat belts as a widespread social norm.²⁴³

The apparent result of the San Diego program has been to increase compliance with the law against lane-cheating, from high to extremely high levels. Prior to the implementation of FasTrak, San Diego's solo motorists complied with the legal prohibition on traveling in the HOV lanes at a rate of approximately eighty-five percent.²⁴⁴ Within months, compliance rates rose to ninety-seven percent.²⁴⁵ But it is not only significant that the compliance rates have reached these impressive levels; it is also notable that the levels of compliance have remained high throughout the life of the program.²⁴⁶ By contrast, empirical work on the use of law enforcement measures to combat drunken driving shows that a sudden, highly publicized increase in enforcement activity deterred a great deal of drunken driving in the early days of the crackdown, but that the rates of violation subsequently increased after publicity attached to the crackdowns waned, despite the fact that the level of enforcement remained constant.²⁴⁷ In San Diego, the maintenance of a relatively strong police presence on the Express Lanes has hardly grabbed headlines as the program has matured, but compliance levels have remained very high nevertheless. Thus, it appears that the rule against Express Lanes cheating is coming to look more like the norm against driving on the left side of the road, and less like the law against speeding.²⁴⁸

Cass Sunstein has argued that norms may be a more efficient means than actual law enforcement of prompting individuals to behave in socially desirable ways:

243. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 628 (1998) ("As one moves from grudging, one-time acceptance to habitual obedience, the rule transforms from external sanction to internal imperative. We repeatedly observe this evolutionary process in everyday life—whenever we put on bicycle helmets, snap seat belts, recycle cans, or refrain from smoking."); see also Cheryl Lynn Daniels, Note, *The Seat Belt Defense and North Carolina's New Mandatory Usage Law*, 64 N.C. L. REV. 1127, 1138-39 (1986) (noting that the predicted compliance rates resulting from mandatory seat belt laws would equal roughly 80% in the United States; that similar laws in other countries, such as the United Kingdom and Australia, have boosted seat belt use to 90%; and that in the immediate aftermath of the passage of such acts, seat belt usage increased by 200 to 300%).

244. See *supra* text accompanying note 138.

245. See *supra* text accompanying note 139.

246. The one half of one percent drop in compliance reported by SANDAG during the program's second year is not statistically significant. See KASCHADE & SUPERNAK, *supra* note 140, at 9.

247. See Richard Lempert, *A Resource Theory of the Criminal Law: Exploring When It Matters*, in HOW DOES LAW MATTER? 227, 228 (Bryant G. Garth & Austin Sarat eds., 1998).

248. Jay Gainer notes that people who are caught using the Express Lanes illegally are likely to rationalize their behavior as being akin to violating the speed limit. They will tell themselves that they were running late to an appointment, that they got tied up unexpectedly at work, etc., just as they would justify their speeding behavior. Telephone Interview with Jay Gainer, *supra* note 132. In a world of congested roadways, Express Lanes cheating may be the equivalent of speeding. Note, however, that there is no equivalent program for motorists who are willing to pay a charge in order to violate the speed limit. Should there be one?

[S]uppose that a community is pervaded by a strong norm against littering. If the norm is truly pervasive, an important problem of environmental degradation can be solved without any need for legal intervention. The norm can do what the law would do at possibly much greater cost.²⁴⁹

In other words, if FasTrak were to help inculcate a norm of compliance with the laws governing lane eligibility, then compliance might reach nearly 100% even without the hawkish watch of the California Highway Patrol. Howard Margolis has argued that “[u]nder appropriate conditions norms and rules can interact such that the norm becomes stronger, which makes the rule easier to enforce,” eventually causing a decline in the costs of policing against violations of the rule.²⁵⁰ The initial data from San Diego indicates that FasTrak presents just such appropriate conditions for this kind of synergy.

Richard McAdams refers to the development of these pervasive norms as the process of norm internalization.²⁵¹ As a consensus develops within a group or community that a certain type of behavior is undesirable, the consensus begins to form a baseline level of expectation. People stop questioning whether and under what circumstances they should comply with the consensus view. Rather, individuals simply conform their behavior to the consensus without thinking about it. Eventually, it becomes clear that a consensus exists and that most members of the community are no longer questioning its sway.²⁵² At this point the norm has become internalized. Individuals who violate the norm will experience feelings of guilt—and these feelings will deter many from violating it in the first place.²⁵³ In the FasTrak context, it will

249. Sunstein, *supra* note 205, at 2030; *see also* Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2073 (1996) (noting that “norms can allow for widespread participation in enforcement”). Eric Posner articulates a similar point.

[U]nder the norm-transformation approach, the state does not have to continually expend resources to cause people to engage in the desired pattern of behavior. In contrast, under the norm-violation approach, the state must engage in constant rewarding and penalizing. The norm-transformation approach, however, in order to effect the transformation, may require a large initial investment that exceeds the continuing costs associated with norm-violation.

Posner, *supra* note 215, at 1733.

250. Margolis, *supra* note 45, at 832.

251. *See* McAdams, *supra* note 183, at 380-81.

252. *See id.* at 388. *But cf. id.* (“When the existence of the consensus or the risk of detection is less than obvious, even a strong consensus may never produce a norm. In particular, those who do not share the consensus may doubt its existence and thereby remain uninfluenced by the risk of societal disapproval.”).

253. *See id.* at 381 (“After internalization, there is[] another cost to violating a norm: guilt. The individual feels psychological discomfort whether or not others detect her violation.”); *see also* Elster, *supra* note 230, at 864 (“In addition to being supported by the attitudes of other people, norms are also sustained by the feelings of embarrassment, anxiety, guilt, and shame that a person suffers by the prospect of violating them.”); Lempert, *supra* note 247, at 228 (“Indeed, it may not be fear of the law’s penalty which mediates the criminal law’s impact. In many cases, particularly involving minor offenses, the implications for personal relations of being caught—including the anticipated embarrassment—may account for most of law’s

never occur to most solo drivers that they could use the Express Lanes without paying the toll.²⁵⁴ Many of those individuals to whom the idea of cheating does occur will be deterred by doing so because such behavior would simply be “wrong” in their community.²⁵⁵

McAdams points out another norms nuance. A norm need not be adhered to universally. There will always be some members of a community who reject the norm.²⁵⁶ Moreover, some subgroups in society will share norms that directly contradict dominant community norms. For example, McAdams discusses Christian Scientist norms that “oppose the use of medical technology that society obligates parents to use for their children.”²⁵⁷ In any heterogeneous society, one can expect to see subgroups that share inconsistent or diametrically opposed norms either agree to disagree²⁵⁸ or do battle to determine whose norms will prevail.²⁵⁹

impact. Thus, various researchers have reported that for minor crimes like shoplifting or smoking marijuana, anticipated peer sanctions are more important than legal sanctions as determinants of behavior.”); Lessig, *supra* note 174, at 997 (“[I]n a well-functioning community, cheating induces a certain kind of pain in individuals that often (but not always) suffices to remove the incentive to cheat.”); Posner, *supra* note 215, at 1709 (“We say about most norms that people bound by them feel an emotional or psychological compulsion to obey the norms; norms have moral force. The compulsion might be slight or overwhelming; it does not prevent people from violating a norm, necessarily, but violation does evoke feelings of shame or guilt.”). Of course, given the current anonymity of most Express Lanes violations, the chance that an offender’s apprehension will be observed by peers or superiors is remote.

254. See generally Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1260 (1999) (“[I]t seems likely that most actors who may have internalized an obligation norm will usually apply the norm [relatively] reflexively, as a natural expression of their moral and social character, rather than calculatingly, on the basis of a cost-benefit analysis. Even norms that an actor first adheres to through a self-conscious commitment to good action will often become habitual second nature through repetition.”).

255. Cf. *id.* at 1259 (“Moral norms, in particular, often operate by becoming part of an actor’s moral character, so that some things are ‘simply not done’—or simply done—as a result of the actor’s moral sympathies and commitments.”) (emphasis omitted).

256. See McAdams, *supra* note 183, at 379-80 (“Societal norms at least weakly condemn overt race discrimination, consumption of pornography, and use of marijuana; yet there have always been some who conspicuously defended these things. Their dissent did not prevent a norm from arising.”).

257. *Id.* at 386-87.

258. See *id.* at 388.

259. I was surprised to see that this pluralistic notion of a marketplace of norms has not been well-developed in the literature. Political scientists hold it to be nearly canonical that policies are made as a result of battles and compromises among particular subgroups of interests. See generally DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* (Alfred A. Knoph, 2d ed. 1971). Truman’s pluralist vision is rather sympathetic to narrow interest groups’ influence over policy. For a more hostile analysis of the role of interest groups at the national political level, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971). Thus, one would suspect that theorists seeking to determine how norms are developed would import a similar vision. It seems intuitive that most societal norms start out as subgroup norms, that the subgroup (consciously or subconsciously) asserts the attractiveness of its norm to other subgroups, and that eventually the strongest norms obtain consensus support. As best I can tell,

This pluralistic conception of norm internalization helps explain the differences among adherents of the solo-commuting norm, the carpool missionary, and the “I’d rather be carpooling” norms described earlier in this Article.²⁶⁰ It is not inconsistent to say that carpoolers already have internalized the norm against cheating²⁶¹ whereas some solo drivers have not yet done so. Seen in this light, it is accurate to say that there is a strong carpooling norm as well as a strong solo-commuting norm, but that the latter norm has many more adherents, and thus serves as the dominant driving behavior in San Diego. Through its policies during the last few decades SANDAG has sided with the minority carpooling norm in an effort to help it weaken the dominant solo-commuting norm. Similarly, the San Diego community of a few years ago had a relatively strong anti-cheating norm as applied to carpool lanes and a minority group whose norms viewed cheating as acceptable. However, because of the collective action problems that sometimes deterred majority norm adherents from taking costly steps to sanction those who rejected that norm,²⁶² it fell upon the state to enforce the norm via law enforcement. As a means of decreasing the need for formal law enforcement, the government created a new constituency of citizens who felt very strongly that the norm against cheating should not be violated (ExpressPass users). These users did not want to look like “suckers” who had paid to use the Express Lanes if other solo commuters were going to break the law and use these lanes at no cost.²⁶³ In so doing, the government drew upon people who had formerly adhered to the majority norm—those who complied with the law and rode in the slow lanes—and those who had formerly adhered to the minority norm—those who illegally used the HOV lanes, but preferred to avoid the cost and stress associated with breaking the law. The fact that the program “converted” this latter group may help explain the dramatic increase in compliance. This strategy of splintering the minority norm adherents may be a successful paradigm for governmental efforts to inculcate norms of legal compliance.

It remains to be seen to what extent these effects, which apparently do play out in some close-knit communities, will play out on the roads of San Diego. Has the norm of compliance become sufficiently internalized in the minds of motorists that a

the closest any scholar has come to presenting a pluralistic conception of norms is in Howard Margolis’s incisive scholarship. See, e.g., Margolis, *supra* note 45, at 830-31. Dan Kahan presents another perceptive account, which touches upon the striking differences between dominant societal norms and the norms prevalent in inner-city communities with respect to the legitimacy of the war on drugs. See Kahan, *supra* note 187, at 1861. Finally, implicit in the discussion of “tipping” and “critical mass” contained in Melvin Eisenberg’s recent article is an understanding that groups may adhere to conflicting norms, and that a sudden shift by a few important individuals can cause a cascade of others to follow suit, thereby altering the dominant norm. See Eisenberg, *supra* note 254, at 1264.

260. See *supra* text accompanying notes 42-56.

261. Cf. GODBE RESEARCH & ANALYSIS, *supra* note 37, at 12 (noting that HOV users of FasTrak, unlike other motorists, were generally unaware of the amount of the fine assessed against those who unlawfully use the Express Lanes).

262. Cf. McAdams, *supra* note 183, at 354 (“[W]hen an effective sanction requires the action of many individuals, each one reasons that her sanctioning[] will neither make nor break the norm, so she is better off not bearing sanctioning costs.”).

263. See *supra* note 147.

consistently diminished CHP presence in the lanes would make little difference for compliance rates? It seems that the answers might prove elusive, since the anticipated shift to fully automated enforcement may drastically alter both the likelihood of violators being caught and the level of social sanction applied to those who are apprehended. Will the same feelings of guilt spur compliance when anonymity is preserved? The San Diego data collected so far does not provide a definitive answer, but the outcome seems to depend on the perceived importance of the law's goals to those who violate it. Hence clearly defined goals and organized marketing campaigns may be crucial to governmental efforts to influence norms in loose-knit communities. Does conformist pressure operate to the same degree in a loose-knit community as in a close-knit community with respect to the snowballing effect of increased compliance? The San Diego study suggests a tentative affirmative answer, as evidenced by the high levels of compliance and increase in tattling behavior by ExpressPass holders through the life of the program. In any event, several of the normative insights developed with the paradigm of the close-knit community in mind do seem, at first glance, helpful in explaining driving behavior on urban roadways. But more research and theorizing is needed if these conclusions are to be solidified.

Norms theorists have also explored the function of aspirational laws and their symbolic effects on norms. Recall that an earlier discussion posited that many solo commuters who refuse to carpool nevertheless wish more people carpooled.²⁶⁴ Such behavior can be understood by reference to the symbolic function of the FasTrak law in representing what the community would like itself to be, as opposed to what the community actually is.²⁶⁵ FasTrak provides some support for the notion that the solo-commuting citizens of San Diego do hope to live in a community in which a higher percentage of motorists carpooled.²⁶⁶ Establishing HOV or HOT lanes is a relatively inexpensive way for residents to express their aspirations.

These issues properly flagged, this Part has so far neglected what is probably the most interesting aspect of the FasTrak program from a social norms perspective. The transition from HOV lanes to HOT lanes can be thought of as a shift from a regime of prohibitions and fines to a regime of choices and charges. How so? Recall that solo drivers have always had the option of using the Express Lanes. Under the old regime, exercising this option entailed breaking the law and risking a criminal fine. Under the new regime, exercising that option entails abiding by the law and paying a toll.²⁶⁷ What are the implications of this shift from fines to tolls? That issue will be

264. See *supra* text accompanying note 46.

265. See Regan, *supra* note 238, at 275 ("Law can provide . . . a vision that may be unrealizable, but which sets a direction and offers a basis for criticizing actual behavior. The fact that we cannot always live up to our aspirations does not mean that law should abandon the attempt to express them."); Sunstein, *supra* note 205, at 2026 ("[S]ometimes people support a law, not because of its effect[] on norms, but because they believe that it is intrinsically valuable for the relevant 'statement' to be made. And sometimes law will have little or no effect on social norms.").

266. For example, recall that those polled would prefer to see ExpressPass toll prices rise, as opposed to an increase in the number of passengers required for a vehicle to count as an HOV vehicle. See *supra* note 182.

267. Admittedly, some motorists under the new regime opt for the old regime system of lawbreaking. But that topic has received enough attention in the Article.

considered next.

B. FasTrak and the Tradable Permits Debate

Perhaps no policy design issue has captured as much attention from environmental policy scholars in recent years as the debate over tradable emissions credits.²⁶⁸ Under a tradable emissions permit scheme, the government ceases regulating how much pollution each firm can emit or what pollution-control technologies a firm must use. Instead, the government sets an aggregate limit to the amount of pollution that can be emitted, creates permits that allow the holders to emit some predetermined percentage of that total limit, distributes the permits, and then allows firms to trade permits. By this means the reductions in emissions will be made by those firms able to do so at the lowest cost.²⁶⁹

In recent years, emissions trading systems have been tried at the state level,²⁷⁰ and

268. See, e.g., BARRY C. FIELD, ENVIRONMENTAL ECONOMICS 253 (1994) ("In recent years the idea of transferable discharge permits has become quite popular among some environmental policy advocates, as well as among policy-makers themselves."); Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 27 ("The . . . pollution rights approach has now become quite *à la mode*, and it plays an increasing role in our environmental law."). A comprehensive string-cite would congest this footnote unduly. For the classic discussions, see J.H. DALES, POLLUTION, PROPERTY & PRICES 93-97 (1968), and Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985). More recent treatments include David M. Driesen, *Is Emissions Trading an Economic Incentive Program? Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289 (1998); Vivien Foster & Robert W. Hahn, *Designing More Efficient Markets: Lessons from Los Angeles Smog Control*, 38 J.L. & ECON. 19 (1995); Perry S. Goldscheim, *Going Mobile: Emissions Trading Gets a Boost from Mobile Source Emission Reduction Credits*, 13 UCLA J. ENVTL. L. & POL'Y 225 (1994-95); Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109 (1989); Lisa Heinzerling, *Selling Pollution, Forcing Democracy*, 14 STAN. ENVTL. L.J. 300 (1995); James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 MONT. L. REV. 425 (1994); James E. Krier, *Marketable Pollution Allowances*, 25 U. TOL. L. REV. 449 (1994); Daniel P. Selmi, *Experimentation and the "New" Environmental Law*, 27 LOY. L.A. L. REV. 1061 (1994); Jonathan Baert Weiner, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677 (1999). For efforts to extend the model beyond air pollution, see, for example, RIGHTS BASED FISHING (Philip A. Neher et al. eds., 1988); Robert I. Fassbender, *Reducing Great Lakes Toxics: Can We Do More for Less Through Wastewater Effluent Trading?*, 1 WIS. ENVTL. L.J. 57 (1994); Norman Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROBS. 372 (1971); David Sohn & Madeline Cohen, Note, *From Smokestacks to Species: Extending the Tradable Permit Approach from Air Pollution to Habitat Conservation*, 15 STAN. ENVTL. L.J. 405 (1996).

269. See Thomas C. Schelling, *Prices as Regulatory Instruments*, in PERSPECTIVES ON PROPERTY LAW 532, 542 (Robert C. Ellickson et al. eds., 2d ed. 1995).

270. See, e.g., South Coast Air Quality Mgmt. Dist., Rules and Regulations 2000-2015 (1993), available in (visited Feb. 8, 2000) <<http://www.aqmd.gov/rules/html/tofc20.html>> (rules implementing emissions trading for nitrogen oxides and sulfur oxides in southern California). For an analysis of the rules, see John P. Dwyer, *The Use of Market Incentives in Controlling Air Pollution: California's Marketable Permits Program*, 20 ECOLOGY L.Q. 103

the federal level,²⁷¹ and will soon be implemented at the global level.²⁷² But advocates of tradable permits have often encountered significant resistance based on fears about what creating a right to pollute would mean. This resistance has taken two forms. The first is a deontological argument that proceeds as follows: It is simply wrong to create a right to pollute. Pollution is a bad thing, and the government should not approve of anyone's efforts to produce it.²⁷³ This account of the anti-pollution norm is, however, too simplistic to be satisfying. Barring a governmental decision to make something a zero-threshold (prohibited) substance, some governmental signal of approval attaches to the emission of a given pollutant. Nor is it accurate to suggest that in the absence of a trading system, social norms will necessarily dictate that every pollutant be banned. Obviously, the public is willing to tolerate some level of pollution and is unwilling to tolerate a higher level. As Eric Posner writes: "[T]here is a general norm not to pollute 'too much.' Firms are entitled to pollute a bit, especially when they employ a lot of people and produce valuable goods. But if firms exceed a certain threshold of pollution, neighbors complain, consumers boycott, and so on."²⁷⁴ To the extent that there are variations in tolerance for marginal units of pollution, that will

(1993).

271. See Clean Air Act Amendments of 1990 § 401, 42 U.S.C. §§ 7651-7651o (1994). The Act set up a system of trading credits for sulfur dioxide emissions. See also James Dao, *Some Regions Fear the Price As Pollution Rights Are Sold*, N.Y. TIMES (late edition), Feb. 6, 1993, at A-1.

272. For an analysis of the Kyoto Protocol, which seeks to set up a global regime for the trading of greenhouse gas emissions permits, see Margaret Kriz, *Chilling out*, 29 NAT'L J. 866, 866 (1997).

273. See, e.g., STEVEN KELMAN, WHAT PRICE INCENTIVES? ECONOMISTS AND THE ENVIRONMENT 27-28 (1981); Dwyer, *supra* note 270, at 111 (stating that some environmental groups claim that "creating property rights in pollution is morally wrong."); Huffman, *supra* note 268, at 432 ("Most environmental groups have opposed the tradeable emissions approach, generally on the ground that no one should have a right to pollute."); Rose, *supra* note 268, at 29 ("The complaint is that [tradable permit] systems permit some people to pollute if they pay enough, whereas in principle, everyone should be doing all he can not to pollute. The argument seems to have a certain intuitive force . . ."); James T.B. Tripp & Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369, 370 (1989) ("[Many environmentalists] oppose credit exchange mechanisms, which implicitly recognize rights to release pollutants into the environment, based on a belief that harming the natural environment is wrong under any circumstances, and that putting a price on environmental issues cheapens them by making them matters of private interest and not matters of public-spirited societal consensus."); Norman W. Spaulding III, Note, *Commodification and Its Discontents: Environmentalism and the Promise of Market Incentives*, 16 STAN. ENVTL. L.J. 293, 322 (1997) ("The significance of the statement that no one ought to have a market-transferable right to pollute is simply that it attempts to draw a line between conduct properly relegated to the whims of the marketplace and conduct properly controlled by other means. The moral consequences of erasing this line is something environmentalists must consider.").

274. Posner, *supra* note 215, at 1735; see also Rose, *supra* note 268, at 7 ("Most people are willing to put up with some level of air pollution, because we think we need to do so for our transportation and electricity, among other things, which in themselves may be more important to our health and well-being than the next increment of clean air.").

depend on the aggregate level of emissions permitted by the government, and there is no reason to believe that aggregate levels will be higher under an emissions trading scheme than under a command-and-control or best-available-technology (“BAT”) system.²⁷⁵

A second argument against tradable emissions systems expresses misgivings about the effect that creating a right to pollute will have on anti-pollution norms. Cass Sunstein summarizes this view:

Critics claim that emissions trading has damaging effects on social norms by making environmental amenities seem like any other commodity: a good that has [a] price, to be set through market mechanisms. Thus they suggest that emissions trading systems may have damaging effects on social norms by making people see the environment as something without special claims to public protection.²⁷⁶

Pollution itself no longer becomes the bad act; it is only pollution without the requisite investment in pollution permits that prompts government punishment. The ability of a firm to emit pollutants is virtually unlimited, provided that the firm is willing to pay the costs of doing so.²⁷⁷ If the permits themselves succeed in removing the stigma from pollution, they may well succeed in removing the stigma from polluters.²⁷⁸ The state-created permit operates as the state’s stamp of approval for polluting and polluters.

This stamp of approval may erode the moral sanction that currently reduces pollution below the levels that would prevail in the absence of a sanction.²⁷⁹ According to that logic, slapping able-bodied individuals who park in spots reserved

275. BAT schemes require each firm to purchase and employ the best available pollution-control technologies. A BAT scheme is a type of command-and-control regime.

276. Sunstein, *supra* note 205, at 2045-46; *see also* Rose, *supra* note 268, at 34 (noting that the norm-based critique is the basis of BAT advocates’ “most fervent attack” on tradable emissions rights systems, and that tradable rights regimes lose BAT’s “moral thrust by surrounding pollution with rights-talk, by using a rhetoric of entitlement to pollute. When we reconceptualize the use of common resources as individual property rights, we attenuate the moral rhetoric of contribution and trying harder for the common good.”); Spaulding, *supra* note 273, at 323 (“Environmental values are subordinated to the marketplace in pollution trading, thus where compliance is not cost-effective, cheating may still occur.”). Of course, the ironic thing about Spaulding’s statement is that the pre-FasTrak HOV-only program, where fully 15% of all vehicles were cheating, demonstrates that a noncommodified regime may produce much lower compliance than a commodified one.

277. Of course, since the number of permits is limited, no firm (or collection of firms) can emit more than the aggregate emissions total set by the government.

278. *See* Tripp & Dudek, *supra* note 273, at 370 (“A less extreme variation on this theme is the view that polluters should be stigmatized and should not be given permits or licenses to discharge emissions.”).

279. Michael Sandel’s editorial articulates this point of view:

[T]urning pollution into a commodity to be bought and sold removes the moral stigma that is properly associated with it. If a company or a country is fined for spewing excessive pollutants into the air, the community conveys its judgment that the polluter has done something wrong. A fee, on the other hand, makes pollution just another cost of doing business, like wages, benefits, and rent.

Sandel, *supra* note 6, at A23.

for the disabled with a \$100 fine sends a very different symbolic message from a system where anyone can buy a premium parking spot for \$100, but disabled persons get free access to the premium spots.²⁸⁰ The former signals that parking by able-bodied people, in such spaces is stigmatized, whereas the latter casts it as a morally neutral activity. If pollution is not viewed as a “bad” act because of the creation of pollution permits, one could expect to see less whistle-blowing, less self-restraint exercised by polluting firms, and fewer private enforcement efforts.²⁸¹ As a result, one might expect to see pollution levels rise as a result of the erosion of an anti-pollution norm.²⁸²

By and large, the response of emissions trading advocates to this line of argument has been to ignore it. Where they do confront the norms-based critique, emissions trading advocates have preferred to argue that whatever effect emissions trading has on norms, its efficiency advantages still make it a superior method of controlling pollution to command-and-control regimes.²⁸³ In other words, the only moral

280. *See id.*

281. *See* PERSPECTIVES ON PROPERTY LAW, *supra* note 269, at 546 (“Schelling points out that much environmental protection arises informally, from social practices like good manners and civility. If pricing schemes—unlike fines or prohibitions—treat pollution as morally neutral, might they undermine the moral underpinnings of these social practices and hence end up costing more?”); Weiner, *supra* note 268, at 724 (“These critics worry that condoning the purchase and sale of the ‘right to pollute’ fails to condemn the actor who causes increased pollution and thereby undermines the ethical norms that motivate environmental protection and boost compliance with environmental laws and regulations.”). Carol Rose cogently ties together the utilitarian and deontological strains of this argument:

[T]he adoption of sophisticated [tradable permit] techniques, without attention to their rhetorical message, may come at the price of a diminution in a certain element of moral suasion. In turn, this moral diminution may work against the overall effectiveness of [the permit framework] by creating a cultural climate in which one is not expected to do the right thing unless it is in one’s direct interest to do so.

Rose, *supra* note 268, at 34.

282. Unfortunately, to my knowledge, no one has conducted an empirical test or even analyzed polling data in a way that would shed light on whether this predicted effect materializes when society adopts an emissions trading regime.

283. In his recent article, Jonathan Wiener devotes a few paragraphs to the norm-erosion thesis. *See* Weiner, *supra* note 268, at 724. He notes that a BAT regime grants an unlimited right to pollute once the firm has implemented the requisite technology, and that its claim to sending a clear message about pollution’s evils is thus dubious. *See id.* at 725. He also notes that a “source that emits in excess of its allowances . . . would not only have to pay financial penalties but would also be subject to public shame and moral stigma for its theft of the community’s shared environmental resource.” *Id.* at 725 n.182. But Wiener ultimately foregoes these interesting threads and falls back on the “emissions trading is more efficient and therefore better” mantra. He points out that eschewing a tradable permits regime as immoral is itself morally insensitive to the real economic concerns of those who would benefit from a more efficient approach to regulation. *See id.* at 725. He concludes by writing: “Whatever the resolution of this debate, the moral case against incentives is far from ironclad. Given the substantial advantages of incentives for global environmental protection on other grounds discussed above, it is difficult to see the hard-line moral case against incentives winning the day.” *Id.* at 726.

imperative is to ensure that society mitigates pollution in the most efficient means possible, so that resources spent on environmental (and other objectives) do not go to waste.²⁸⁴

As Michael Sandel correctly observed in a passage I quoted at the outset, regimes like FasTrak present an excellent opportunity to study the ways in which transitioning from command-and-control regimes to transferable permit regimes influence norms.²⁸⁵ Although there are some differences between emissions trading and selling access to the carpool lanes,²⁸⁶ there is little reason to think that these differences will alter the ways in which the respective programs influence social norms. Admittedly, the norm against solo commuting is weaker than the norm against polluting.²⁸⁷ That said, as with pollution, the public does not perceive there being a problem with solo-driving in moderation, or solo-driving by a moderate number of people. Rather, it is only when too much pollution/solo driving exists that engaging in the activity is contrary to social norms.²⁸⁸ Moreover, in contrast to the Clear Air Act's emissions trading provisions, and the emissions trading framework established by the Kyoto Protocol, the FasTrak program is highly visible and, within its first year of operation, had become well-known among San Diego commuters.²⁸⁹ A serious difficulty in studying the effect of law on social norms—ignorance of the law—is thus eliminated

284. See, e.g., Paul R. Portney, *Counting the Cost: The Growing Role of Economics in Environmental Decisionmaking*, ENV'T, Mar. 1998, at 14, 37.

285. See *supra* text accompanying note 6.

286. One distinction worth particular attention is the potential for behavioral differences among different types of actors. For example, emissions trading schemes generally involve firms as the primary actors. But Sandel is discussing the Kyoto Protocol, where the primary actors are nations. See *supra* text accompanying note 6. In FasTrak, the relevant actors are all individuals. There will be some obvious differences in the ways that norms affect these different types of actors. But a few similarities are also worth bearing in mind. All three types of actors will be concerned about their reputations. Individuals want status, firms want investment capital, and nations want political capital in the world community. Similarly, in the pollution context, even though the nations and firms are repeat players, some of the anonymity problems that arise on the San Diego highways loom large. It is often difficult to track the source of illegal pollution to its source facility or even source nation shortly after it has been emitted.

An important distinction concerns the fact that the right for solo drivers to use the Express Lanes is not, at present, alienable. The analysis herein, however, suggests that this lack of alienability makes little difference with respect to norms. Indeed, if anything, making access to the Express Lanes alienable might make carpoolers feel that their activities are valued by the state to an even greater degree, since they could then opt for either time or monetary savings as a result of their carpooling choice.

287. *But cf.* Posner, *supra* note 215, at 1734-35.

There seems to be a weak norm against polluting the air—weak in the sense that most people think that air pollution is undesirable, but nonlegal sanctions do not suffice to deter it. . . . Norm-transformation in this context seems unlikely to be effective. No amount of education and government-sponsored television commercials are going to prevent paper mills from spewing forth pollution.

Id.

288. See *supra* text accompanying note 274.

289. See *supra* text accompanying note 113.

in this case study.

San Diego's experience under FasTrak shows that emissions trading advocates can make far more persuasive responses to the normative critique than those that have been offered so far. The FasTrak experience does not support the argument that a move from a legal regime prohibiting an undesirable activity to one that commodifies the activity will undermine the norm against that behavior. San Diego's increase in carpooling during the life of the program suggests that, if anything, the norm against solo commuting has become somewhat stronger. Carpoolers have not felt that by commodifying their contribution to diminished roadway congestion FasTrak has trivialized their activities. To the contrary, it appears that those drivers who carpooled before the FasTrak program began to feel that society was providing them with a greater reward than it did beforehand. Similarly, one might expect that firms that had voluntarily adopted low-emissions production techniques would become more likely to pursue further improvements after a financial incentive (via the competitiveness benefits of not having to purchase permits) is factored into the equation.

The San Diego experience with dramatically lowered violation rates is also instructive. Recall that FasTrak opened up new options for commuters, thereby making defiance of the law seem less noble.²⁹⁰ Similarly, polluters who violate the law of a command-and-control regime would be able to tap into a well of popular sentiment against the bureaucratic complexity entailed in compliance with environmental regulations. When a polluting firm can credibly claim that the governing rules are so confusing as to preclude compliance with them, behavior that would otherwise be viewed as socially offensive might well be excused, or at least tolerated, by the public.²⁹¹ On the other hand, if emissions are governed by a relatively straightforward market, then when a firm emits more pollution than it has purchased the rights to emit, the popular norm against cheating might prompt the kind of widespread disapproval likely to lead to whistle-blowing and private enforcement.²⁹²

Advocates of emissions trading have argued that a tradable permit scheme will prompt greater enforcement on the part of permit holders. These permit owners would have a strong incentive to support vigorous enforcement by the state "in order to ensure that cheating by others does not depreciate the value of the permit holders' investments."²⁹³ Indeed, those firms planning to sell emissions trading credits will be

290. See *supra* text accompanying note 190.

291. Cf. Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1579 (1983) (discussing the unpopularity of certain command-and-control provisions of the Clean Air Act).

292. To some extent this argument assumes a rather transparent trading system where firm employees and members of the public can become aware of both the firm's emissions and the number of permits the firm holds at a relatively small cost. If these numbers are not easily available, then the norm against theft will be less valuable *ex ante* because the public will not perceive theft as occurring. On the other hand, when the government does catch a firm emitting too much, law enforcement efforts to publicize the "theft" will presumably strike a nerve with the public. The fear of this possibility may well deter firms from exceeding their permitted emission levels. See Weiner, *supra* note 268, at 725 n.182.

293. Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 13 COLUM. J. ENVTL L. 171, 183 (1988); see also FIELD, *supra* note 268, at 258.

particularly likely to press for strict enforcement, lest the market for their credits (and hence the firm's profits) be diminished. Advocates of emissions trading believe that this private enforcement will supplement governmental enforcement of the permit system, leading to higher overall rates of compliance.²⁹⁴

San Diego's experience under FasTrak has demonstrated that a similar phenomenon has occurred there. The motorists most likely to engage in private enforcement efforts are not carpoolers, but ExpressPass users.²⁹⁵ Although the San Diego government has not taken steps to encourage private enforcement,²⁹⁶ voluntary enforcement of this type has been helpful, and potentially could be of significant assistance to the program in deterring noncompliance and apprehending Express Lanes cheaters.

Sandel has put forth a final norm-related argument against using tradable permit schemes to control emissions. He asserts that emissions trading may undermine the ability of the relevant community to deal with common problems through a regime of shared sacrifice.²⁹⁷ Instead of forcing all members of a community, firms, or nations to sacrifice in order to reduce pollution, emissions trading allows relatively wealthy actors to forego making reductions if they are willing to pay the less wealthy actors to make reductions for them.²⁹⁸ Of course, richer actors are sacrificing some of their wealth in order to avoid having to make reductions, but Sandel sees this monetary sacrifice as somehow insufficient to prevent those who are making the sacrifices themselves from resenting their wealthier counterparts. Eventually, this resentment will undermine the citizenry's commitment to pursuing the goal that the shared sacrifice furthers.²⁹⁹ What's more, the fact that these wealthy actors can afford to

When, and if, some sources emit more than they have permits for, they are essentially cheating by not buying sufficient permits to cover all of their emissions. In effect this reduces the demand for permits below what it otherwise would be. And this had the effect of lowering the market price of permits. This clearly works against the interest of any firm holding large numbers of permits, which gives it an incentive to see that other firms don't cheat on emissions.

Id.

294. See, e.g., Ackerman & Stewart, *supra* note 293, at 183.

295. See *supra* text accompanying note 147.

296. See *supra* text accompanying note 150.

297. See Sandel, *supra* note 6, at A23; see also L.D. Danny Harvey & Elizabeth J. Bush, *Joint Implementation: An Effective Strategy for Global Warming?*, ENV'T, Oct. 8, 1997, at 14, 39 (discussing the same point).

298. See Sandel, *supra* note 6, at A23 ("[T]he United States would have more [moral] suasion if these developing countries could not rightly complain that trading in emissions allows wealthy nations to buy their way out of global obligations."). This theme of shared sacrifice appears throughout the work of other communitarians. See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE* 168 (1983) (noting that a strong community requires that "all of us, in different ways and on different occasions, have to be available" to perform unpleasant work for the benefit of the public).

299. It is worth noting that the early evidence from the Kyoto Protocol, the emissions trading scheme that Sandel is criticizing, does not lend support to his hypothesis. In fact, the opposite appears to be occurring. After initial skepticism, the developing nations are embracing emissions permit trading as a means of bringing badly needed capital to the developing world.

continue emitting becomes a status symbol in and of itself—the smokestack is transformed from a nuisance into an emblem of power and wealth.

Data from the ExpressPass program seems to undermine this shared-sacrifice critique of tradable permit systems. The egalitarian critique of the program has not been salient, and expressions of resentment by lower-income residents have been limited.³⁰⁰ The consensus among San Diego's population that the program treats the city's commuters fairly suggests that residents believe the regime is one of shared sacrifice—motorists can just choose whether they would prefer to sacrifice money or time. Nor has driving in the Express Lanes become a clear “vehicle” for the arrogant flaunting of wealth—as demonstrated by the sense of embarrassment expressed by some motorists using the lanes.³⁰¹ Finally, there is the rather obvious point that, as with emissions reductions, the pre-FasTrak status quo was not characterized by a strong sense of collective responsibility among San Diego's drivers to reduce traffic congestion. Rather, the typical driver wanted traffic congestion to be addressed in a way that would involve minimal disruption of her own solo-commuting patterns. In short, the diminution of social capital predicted by Sandel has failed to materialize in San Diego. As a result, skepticism about Sandel's assessment of emissions trading's effect on norms of shared sacrifice in dealing with pollution is certainly warranted.

V. CONCLUSION

A. Recap: FasTrak's Major Lessons

San Diego's FasTrak program has provided an interesting case study in a number of ways. The program was the first of its kind to merge the carpool lane and congestion-pricing concepts, and it demonstrated the underlying compatibility of these two congestion-management schemes. The program's initiation correlated with increased traffic in the Express Lanes, decreased traffic in the main lanes, and a significant increase in carpooling levels. The most likely explanation for this increase in HOVs is that new drivers were attracted to carpooling by a relative monetary benefit that supplemented preexisting time savings. This point is worth stressing. Even though carpoolers were not *actually* better off as a result of the program—just as before they rode in the Express Lanes for free and got the benefit of a relatively quick commute—they apparently *felt* better off, because other drivers were now paying a fee to do what carpoolers were doing for free. In other words, taking money out of *A*'s pocket while leaving *B* alone made *B* feel richer. As a result, being a *B* became a more attractive option, and so a number of *As* decided to become *Bs*. In the

See Margaret Kriz, *After Argentina*, 49 NAT'L J. 2848, 2849 (1998) (“[A]n increasing number of developing countries are looking at the . . . emissions-trading proposal[] as a way to solve their environmental problems while attracting new high-technology investment.”).

300. See *supra* notes 197-200. A word of caution is warranted here. The wealth disparities among San Diego residents are less severe than those that separate the developed world from the developing world. Cf. Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 VA. L. REV. 1331, 1341 (1997) (noting that the wealth differences among American states are less dramatic than the differences among nations).

301. See *supra* text accompanying note 206.

process, the norm of behavior to which the *Bs* adhered became more firmly entrenched. The lesson here is that well-publicized usage fees have real symbolic significance, both for those who pay them and for those who do not.

The initial San Diego data also shows that the program increased compliance rates significantly. Unfortunately, enforcement efforts increased noticeably when the program was initiated, so it is impossible to isolate the enforcement effects of the program in a vacuum. At the same time, there is rather strong evidence from people on the ground in San Diego that the program did successfully convert large numbers of former violators into ExpressPass holders. In the process, the program transformed a group of former cheaters into individuals most likely to be bothered by cheating. Moreover, there is some reason to believe that the dramatic observed increase in compliance levels has helped to create a norm of compliance that will maintain high levels of lawful use even if police resources are diminished. Finally, the staying power of the increased compliance levels is particularly noteworthy. Increased enforcement of traffic laws usually does not lead to sustained increases in compliance. But in San Diego it has, suggesting that driving norms have been altered.

FasTrak also provides a case study in how legal changes affect norms in a loose-knit community of nonrepeat players. In such an environment, the program can be perceived as a subtle governmental effort to show how individual driving decisions can create negative externalities for the communities. In the long run, FasTrak might be an effective first step in undermining dominant solo-driving norms. It also presents a case study in competing norms, and shows how minority and majority behaviors can interact and respond to government efforts to endorse the norms adhered to by the minority.

Another interesting finding of the case study is the limited resonance of equity-based challenges to the quasi-privatization of what had formerly been a common public resource. This lack of resonance, in an area of the country where toll roads are uncommon, suggests that in a transportation framework already permeated with inequality (i.e., the presence of Lexuses), the marginal increase in stratification that will result when that inequality is expanded will go practically unnoticed.

From a social norms perspective, one of the most interesting aspects of the program was the way in which it appeared to have successfully changed the social meaning of driving in the Express Lanes without authorization. FasTrak helps make such behavior appear to be not just wrong, but stupid. The commodification of the road makes other drivers less sympathetic to cheaters. The Express Lanes violator is transformed from a rebel into a scofflaw. The potential for the program to boost compliance by successfully tying programmatic norms to strong existing norms is significant.

The application of the FasTrak case study to the emissions trading debate has been fruitful. The case study provides evidence to discount the argument that commodification of a public good undermines the beneficial social norms that help protect the good from overexploitation. Indeed, the opposite appears to be true. The case study also supports the argument that holders of tradable permits will help ensure greater enforcement of the law than would otherwise be the case. Lastly, the case study casts some doubt on the communitarian story of public goods provision. When wealthier members of a community sacrifice dollars and others sacrifice goods and services, the latter group will not come to resent their sacrifices as somehow greater than those of the wealthier community members. Rather, the contributions of

all toward the common problem will be recognized, with each member sacrificing what she can most easily afford to do without.

*B. Commodification Postscript:
Some Food for Thought*

This Article began with a brief exploration of the dispute over tradable emissions permits and highlighted the centrality of that controversy in environmental law and policy. But the underlying issue there, the question of under what circumstances it is advisable to commodify a public good, is a flashpoint in a number of current controversies: Should there be a market for human organs?³⁰² For blood?³⁰³ For babies?³⁰⁴ For sexual services?³⁰⁵ Similarly, intellectual property scholars are now struggling with difficult issues about whether certain forms of public property should be commodified: Should we allow people to patent newly discovered human genes?³⁰⁶ What about cDNA sequences?³⁰⁷ Manmade transgenic species?³⁰⁸ Naturally

302. See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 161 (1996); Ann Alpers & Bernard Lo, *Commodification and Commercialization in Human Embryo Research*, 6 *STAN. L. & POL'Y REV.* 39 (1995); Mark F. Anderson, *The Future of Organ Transplantation: From Where Will New Donors Come, To Whom Will Their Organs Go?*, 5 *HEALTH MATRIX* 249 (1995).

303. See, e.g., RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970); Steven R. Salbu, *AIDS and the Blood Supply: An Analysis of Law, Regulation, and Public Policy*, 74 *WASH. U. L.Q.* 913, 940-46 (1996); Hamish Stewart, *Rationality and the Market for Human Blood*, 19 *J. ECON. BEHAV. & ORG.* 125 (1992); Lisa M. Korsten, Note, *The Global Market for Blood: A Proposal for Expansion and a Consistent System of International Regulation*, 11 *B.U. INT'L L.J.* 227, 232-39 (1993).

304. See, e.g., RADIN, *supra* note 302, at 137-40; Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 *J. LEGAL STUD.* 323 (1978); J. Robert S. Prichard, *A Market for Babies?*, 34 *U. TORONTO L.J.* 341 (1984).

305. See, e.g., DAVID A. J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW* 84-127 (1982); Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 *ETHICS* 335 (1980); Carole Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 *ETHICS* 561 (1983).

306. See, e.g., Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 *IOWA L. REV.* 1331, 1348-49 (1996); Andrew Trew, *Regulating Life and Death: The Modification and Commodification of Nature*, 29 *U. TOL. L. REV.* 271 (1998); Kara H. Ching, Note, *Indigenous Self-Determination in an Age of Genetic Patenting: Recognizing an Emerging Human Rights Norm*, 66 *FORDHAM L. REV.* 687 (1997).

307. See, e.g., JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 8-9 (1996); Rebecca S. Eisenberg, *Intellectual Property at the Public-Private Divide: The Case of Large-Scale cDNA Sequencing*, 3 *U. CHI. L. SCH. ROUNDTABLE* 557 (1996); Richard A. Epstein, *Property Rights in cDNA Sequences: A New Resident for the Public Domain*, 3 *U. CHI. L. SCH. ROUNDTABLE* 575 (1996).

308. See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); Elizabeth Joy Hecht, Note, *Beyond Animal Legal Defense Fund v. Quigg: The Controversy over Transgenic Animal Patents Continues*, 41 *AM. U. L. REV.* 1023 (1992); Reagan Anne Kulseth, Note, *Biotechnology and Animal Patents: When Someone Builds a Better Mouse*, 32 *ARIZ. L. REV.* 691 (1990).

occurring substances in the rainforest that may have therapeutic properties?³⁰⁹ Much excellent theorizing, but precious little empirical work, has been done to explore the ramification of commodification on social norms generally. Advocates of commodification generally may therefore be tempted to extend my findings to these other areas and the dissimilar public goods involved.

But this Article should not be read as an across-the-board endorsement of commodification of all public goods. To the contrary, I will close by pointing to one area where, unlike with San Diego's freeways, commodification appears to have engendered perverse, socially harmful norms. I will use that example to emphasize that commodification is a poor tool to create certain kinds of norms in certain kinds of contexts.

During the Civil War years, conscripts on both the Northern and Southern sides were permitted to avoid military service by paying a "bounty" to able-bodied replacement soldiers, who would then take their places on the front lines.³¹⁰ From an economics perspective, such a system has intuitive appeal: "[A]rguably those more able or committed to serving will end up doing so; those to whom the value of pursuing other ends or obligations is highest, such as heads of families, will remain available for those pursuits."³¹¹ And the initial months of the war saw the burgeoning of a robust market for replacement soldiers: Prices reached \$1500 in some places, an enormous sum at the time.³¹² But the commodification of military service was quickly met with a backlash: The public was outraged by the perceived inequities of these bounties, and voluntary enlistment virtually ceased. Within a few months, both the North and South revoked the practice of allowing able-bodied men to buy their way out of military service.

In contemporary America, the practice of people buying their way out of military service during wartime still strikes most as profoundly immoral. Recall the negative publicity encountered by vice-presidential candidate Dan Quayle when the public learned that he had apparently used family connections to avoid combat service in the Vietnam War.³¹³ The historical prevalence of this norm suggests that, whatever efficiency advantages might accrue to a society that commodifies military service in wartime, social norms will not bend in response to such a program. Moreover, many of the affluent men who violated this egalitarian norm and bought their way out of

309. See, e.g., David R. Downes, *New Diplomacy for the Biodiversity Trade: Biodiversity, Biotechnology, and Intellectual Property in the Convention on Biological Diversity*, 4 *TOURO J. TRANSNAT'L L.* 1 (1993); Laurie Anne Whitt, *Indigenous Peoples, Intellectual Property & the New Imperial Science*, 23 *OKLA. CITY U.L. REV.* 211 (1998); R. David Simpson & Roger A. Sedjo, *Contracts for Transferring Rights to Indigenous Genetic Resources*, *RESOURCES*, Fall 1992, at 1.

310. See EUGENE C. MURDOCK, *PATRIOTISM LIMITED 1862-1865: THE CIVIL WAR DRAFT AND THE BOUNTY SYSTEM* 2 (1967); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 *COLUM. L. REV.* 931, 967-68 (1985).

311. Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 *MICH. L. REV.* 936, 944-45 (1991).

312. See *id.*

313. See Judith Crown, *Quayle Tells Vets Openings Existed in Guard Unit*, *HOUS. CHRON.*, Aug. 23, 1988, at 1. See generally WALZER, *supra* note 298, at 169 (arguing that military service obligations must be spread among the populace on an egalitarian basis).

military service felt shame and suffered social sanctions as a result. What is it, then, that separates the draft from the express lanes?

My intuition is that the primary difference between the draft and the highways is that, in a very visible way, the former involves risk of life and limb in a way that the latter does not.³¹⁴ Conveniences and time savings may be easily commodified.³¹⁵ Life and death may not.³¹⁶ Imagine the furor that would erupt in response to a proposal

314. For some readers, another potentially relevant difference may spring to mind: In our republic, military service is inextricably bound up with democratic values, which are themselves highly egalitarian. But during peacetime, those on the lower end of the socio-economic spectrum are much more likely to serve, largely as a result of the movement to an all volunteer force. Yet this status quo does not seem to offend popular norms. It is only when soldiers begin dying in combat that the tough questions about equality and military service are asked. Moreover, as the Supreme Court's right-to-travel jurisprudence makes clear, the ability to travel on the nation's highways has also long been deemed fundamental to a democratic regime, so I am not convinced that the grafting of democratic norms onto military service or freeways cuts one way or the other. On the other hand, the receptiveness of San Diego's population to commodification of the open road may indicate that the free and open road is no longer as central to our democratic ideals as it was in an earlier era.

315. An interesting counter-example springs to mind: the practice of tipping the *mâitre d'* at a crowded restaurant in order to obtain a table more quickly. Although such behavior is apparently widespread and usually successful, a significant social sanction appears to attach to it. When one tips the *mâitre d'*, one should evidently do so surreptitiously, so as not to provoke the ire of other customers who are also waiting for tables. Indeed, some restaurants, such as New York's trendy "44," prohibit tipping the *mâitre d'* because, in the owner's words, "otherwise you'd have the *mâitre d'* selling tables." *Ask Esqy*, *ESQUIRE*, Oct. 1996, at 40.

Custom indeed precludes the auctioning of tables to the highest bidder, but I suspect that such a custom may soon fall by the wayside. The reason tipping of that sort is still subject to a social sanction has to do with the unfair nature of the bidding. Most people follow the unwritten rule and do not tip, and then become aggravated when they see another diner jump the queue by breaking the rule. If more restaurants were forthright about their table allocation policies, I suspect that the social sanction against tipping the *maitre d'* would evaporate. It is not the concept of paying for a table that we find offensive—everyone recognizes that long-time customers, celebrities, and beautiful people always get better service at restaurants, and many restaurants are appealing precisely because their exorbitant menu prices successfully keep out the "riff-raff." Rather, it is the concept of unfair competition, which disadvantages those who adhere to the dominant norm, that forces the practice of tipping the *mâitre d'* underground. Furthermore, the tippers must confront (face to face) the nontippers while they wait for tables. Forcing tippers to endure these uncomfortably guilty moments in the company of nontippers, however brief, probably discourages tipping. *Cf. supra* text accompanying note 206. By contrast, at an auction, where the rules and norms of bidding are clear, proximity does not breed discomfort and restraint. To the contrary, it may well prompt the kind of fierce, personalized competition that causes bids to escalate higher than they would if the bidders were not all brought face-to-face.

316. Readers may perceive a similarity between my analysis here and Margaret Jane Radin's property-and-personhood hypothesis, which is articulated in Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987). Radin argues that commodification is most tolerable when applied to those forms of property that are least bound up with a person's sense of self and individual dignity. Indeed, Radin suggests that people's automobiles are weakly related to their personhood, *see id.* at 1926, so one could argue that she correctly predicts the

requiring ambulances or fire-engines to pay a fee in order to ride in the Express Lanes.³¹⁷ To take a less extreme example, remember that the FasTrak program could have been marketed as a program that would not only save commuters time, but also reduce their risk of being involved in a serious traffic accident. Yet the safety benefits of the program were not featured in FasTrak's marketing materials.³¹⁸ Thus, even where life and death is at issue, rhetorical approaches that deemphasize this aspect of a commodification program may prevent a backlash. But where, as with wartime military service, the good is so clearly intertwined with survival that even a clever rhetorical approach cannot obscure the entry of market forces into life and death decisions, commodification may well run counter to prevalent social norms. If this hunch is correct, then it suggests that the trend towards commodification of environmental resources, public utilities, and the Internet may be aided by receptive social norms. At the same time, this hypothesis would also help explain the current popular backlash against the intrusion of market forces into the doctor-patient relationship, as well as the public's lasting revulsion against the commodification of babies, human organs, and the biological building blocks of life itself.

Commodification unquestionably has its place: For solo driving and SO₂ emissions, attaching a dollar value to the good or activity is an excellent way of prompting people to take nonmarket activities seriously and to consume in more efficient ways. But people already take "goods" such as wartime military service and life itself quite seriously, so commodifying these types of "goods" may well prove to be an unnecessary, even counterproductive, attention-getting device.

success of San Diego's roadway commodification scheme. As an aside, I take issue with her characterization—my impression from having lived in Southern California is that here especially, automobiles are closely wrapped up in the "personhood" of their drivers. *See also supra* note 207.

317. Currently, such vehicles have public-safety easements to use whatever roads their drivers please. Of course, at least in theory, ambulances and fire engines would always qualify as carpools because they never should be driven solo.

318. *See supra* text accompanying notes 201-02.