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## Response: Between Economics and Sociology: The New Path of Deterrence

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# BETWEEN ECONOMICS AND SOCIOLOGY: THE NEW PATH OF DETERRENCE

Dan M. Kahan\*

The explosive collision of economics and sociology has long illuminated the landscape of deterrence theory. It is a debate as hopeless as it is spectacular.

Economics is practical but thin. Starting from the simple premise that individuals rationally maximize their utility, economics generates a robust schedule of prescriptions — from the appropriate size of criminal penalties,<sup>1</sup> to the optimal form of criminal punishments,<sup>2</sup> to the most efficient mix of private and public investments in deterrence.<sup>3</sup> Yet it is the very economy of economics that ultimately subverts it: its account of human motivations is too simplistic to be believable, and it generates policies too severe to be just.

Sociology is rich but impractical. Absorbing all the complexity of the world as it is, it supplies breathtakingly elaborate accounts of why individuals turn to crime — from the criminogenic properties of poverty to the self-reinforcing culture of criminality.<sup>4</sup> But this elaborate account yields little usable policy guidance; by now it's clear that our society has neither the political will nor the social-scientific know-how to eradicate the "root causes" of crime.

What's needed is a third way, one that combines the virtues of both economics and sociology without succumbing to the vices of either. If such an approach cannot be fashioned, the idea of deterrence might continue to function as a politically charged creed or as an absorbing focus for abstract formal models, but it will cease to

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1. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 191-93 (1968); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 530-31 (1970).

2. See, e.g., John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQUIRY 583 (1992); Joel Waldfogel, *Are Fines and Prison Terms Used Efficiently? Evidence on Federal Fraud Offenders*, 38 J.L. & ECON. 107 (1995).

3. See, e.g., Omri Ben-Shahar & Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions Against Crime*, 11 J.L. ECON. & ORG. 434 (1995); Keith N. Hylton, *Optimal Law Enforcement and Victim Precaution*, 27 RAND J. ECON. 197 (1996).

4. See generally RUTH ROSNER KORNHAUSER, SOCIAL SOURCES OF DELINQUENCY: AN APPRAISAL OF ANALYTIC MODELS 21-50 (1978) (surveying the sociological theories of delinquency).

furnish a practical framework for solving America's crime problem on morally acceptable terms.

My goal in this essay is to call attention to an emerging body of criminal-law scholarship that I believe has the potential to chart a new course between sociology and economics. These works seek to enrich the standard economic conception of deterrence through attention to social norms, a concept that has figured prominently in other fields of law.<sup>5</sup> Although they employ a diverse array of terms — from “social organization,”<sup>6</sup> to “moral credibility,”<sup>7</sup> to “social meaning,”<sup>8</sup> to “social influence”<sup>9</sup> — these works all stress the influence between law and shared values as an important explanation for the extent of crime.

My primary motive for grouping these works together, however, is political, not conceptual. By focusing on how law can be used to regulate norms, the new deterrence scholarship can be used to identify morally acceptable and politically feasible alternatives to the severe punishments that dominate contemporary criminal law. The public demand for such punishments stems from deep-seated political, ideological, and even psychological dynamics.<sup>10</sup> Merely criticizing the economic theory of crime does nothing to satisfy the public-opinion forces that generate that conception's “get tough” brand of deterrence.<sup>11</sup> Thus, unlike critiques that are content merely to show that severe penalties *won't* work, the new deterrence scholarship aims to identify policies that *will*, because of their positive effect on the social conditions that cause crime. Between

5. The emergence of interest in social norms within the legal academy can be traced to Ellickson. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Indeed, Ellickson himself examines the connection between norms of order and crime in Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Off-Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

6. *E.g.*, Tracey L. Meares, *Social Organization and Drug Law Enforcement passim* (July 29, 1997) (unpublished manuscript, on file with author).

7. *E.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 201-02* (1995) [hereinafter ROBINSON & DARLEY, *JUSTICE, LIABILITY, AND BLAME*]; Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 N.W. U. L. REV. 453, 457-58, 477-88, 494-99 (1997) [hereinafter Robinson & Darley, *The Utility of Desert*].

8. *E.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594, 606-30, 650, 653 (1996); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 *passim* (1995).

9. *E.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 *passim* (1997); see also Edward L. Glaeser et al., *Crime and Social Interactions*, 111 Q.J. ECON. 507 (1996).

10. See generally Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (developing a theory to explain public demand for excessive severity in criminal law).

11. See generally Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 CRIM. L. BULL. 305 (1995) (criticizing criminal-justice experts for failing to take account of public sensibilities).

sociology and economics lies a set of policies — from curfews, to gang-loitering laws, to order-maintenance policing, to reverse stings, to shaming penalties — that deter as well as or better than severe prison terms and that cost much less.

It is against this background that we should understand Neal Katyal's important article.<sup>12</sup> Katyal's insightful account of how the phenomenon of substitution can confound conventional deterrence prescriptions employs a host of innovative concepts — including Giffen goods, income effects, and extremeness aversion — that the new deterrence scholarship should aspire to appropriate.

But before Katyal's works can be appropriated in this way, his account must be extended. Katyal's argument is cast primarily in critical terms; he shows, convincingly, how attempts to obliterate crime through severe sentences can backfire as offenders substitute even more harmful offenses. What's missing, however, is a detailed and believable exposition of how the same dynamic can be used in reverse to induce offenders to substitute less harmful for more harmful crimes. Unless they tell us what *to* do and not just what *not* to do, Katyal's arguments will founder on the shoals of political unacceptability.

The remainder of this essay elaborates on the new path of deterrence and Katyal's significance to it. Part I catalogues the techniques and policies that the new deterrence theorists use to negotiate the space between economics and sociology. Part II examines Katyal's efforts to traverse that space and speculates about how his core ideas can be used to generate politically feasible policy prescriptions.

## I. THE NEW PATH: A PRIMER

The new deterrence scholarship aims to enrich economics by identifying social phenomena important enough to be worth regulating but malleable enough to be regulated efficiently. In this Part, I'll describe four such phenomena: social organization, moral credibility, social meaning, and social influence.

### A. *Social Organization*

Social organization theory posits a relationship between crime and the strength of social and civic associations.<sup>13</sup> Intact families transmit law-abiding values (primarily through their contribution to neighborhood life) and instill the discipline that individuals need to acquire marketable education and experience; broken families pro-

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12. See Neal Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997).

13. See Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579 (1997); Meares, *supra* note 6.

duce impulsive, antisocial individuals. Vital friendship networks multiply the opportunities individuals have to find lawful employment; enfeebled networks foreclose such opportunities. Active civic associations promote trust and a disposition on the part of neighbors to watch out for one another's interests; an atomized community life erodes trust and enervates the power of citizens to protect themselves from predation.<sup>14</sup>

The criminologists who pioneered this theory viewed social disorganization as a "root cause" of criminality. Fostering vital social networks mattered more for combating crime, in their view, than did fashioning appropriate law-enforcement polices.<sup>15</sup>

The recent work of Tracey Meares, however, shows that the allocation of law enforcement resources can determine whether a community's social organization stock is large or small.<sup>16</sup> The result is a more practical appropriation of this concept for deterrence theory.

For example, Meares defends curfews and so-called gang-loitering laws based on their contribution to social organization.<sup>17</sup> These policies, she argues, increase the relative supervisory authority of parents and other adults, who are more likely to transmit law-abiding values and dispositions to juveniles than are other juveniles. In addition, these policies (in conjunction with more generalized order-maintenance policing) reduce community residents' fear of crime, which in turn increases their willingness to join leagues with others in combating it.

Meares also examines the complex interaction between drug-law enforcement and social organization.<sup>18</sup> Drug use diminishes social organization in various ways, from the debilitation of parents to the production of community fear and distrust. But so do severe criminal punishments for drug distribution. The staggeringly high percentage of African-American men who are in penal custody entails a staggeringly high percentage of broken families. It also means the disenfranchisement of a sizable portion of the inner-city population and a resulting withering of civic life. Finally, it means the stigmatization of African-American men generally, a social condition that diminishes their opportunities to form associations with law-abiders. In effect, the "get tough" policies used to fight drug

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14. See CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (rev. ed. 1969). My account of Shaw and McKay's work is based on Meares's description of it. See Meares, *supra* note 13, at 580; Meares, *supra* note 6.

15. See SHAW & MCKAY, *supra* note 14, at 170-89.

16. See Meares, *supra* note 13, at 589-93; Meares, *supra* note 6, at 43-48.

17. See Meares, *supra* note 13, at 591-93; Meares, *supra* note 6, at 53-57.

18. See Meares, *supra* note 13, at 586-91; Meares, *supra* note 6.

use undermine themselves by enfeebling the social structures that guide individuals away from crime.

Meares's ingenious solution is the "reverse sting."<sup>19</sup> Under this law-enforcement technique, undercover officers pose not as drug buyers — the usual tactic — but rather as drug sellers. Reverse stings redirect the social-disorganizing effects of drug-law enforcement from the poor, mainly African-American inner-city communities in which dealers reside to the more heterogeneous, often suburban ones in which buyers reside.<sup>20</sup> The latter, because they are more organized to begin with, suffer relatively little disruption when certain of their members receive severe punishments. In this way, society gets the social-organization benefits of drug-law enforcement without the high social-disorganization costs that usually attend it.

### B. *Moral Credibility*

The power of the law to guide conduct turns at least in part on its moral credibility. Individuals are more inclined to obey particular laws when they believe that the criminal justice system as a whole accords with their values.<sup>21</sup> This insight is at the core of the work of law professor Paul Robinson and social psychologist John Darley. Because moral credibility influences compliance, substantive law, they argue, ought to conform to the greatest extent possible with the community's moral sensibilities; where there is such convergence as a general matter, the law will have the goodwill necessary to win citizens' obedience in the inevitable cases where the law diverges from those sensibilities. Robinson and Darley use this concept, which they call the "utility of desert," to criticize various policies, including strict liability, regulatory crimes, and disproportionately severe punishments for minor offenses, that seem justifiable in economic terms but that risk undermining deterrence by squandering the law's reputation for justice.<sup>22</sup>

Robinson and Darley's sophisticated empirical work also suggests numerous other reforms that can be expected to enhance the law's moral credibility.<sup>23</sup> Their study shows, for example, that members of the public generally disapprove of grading unintended homicides that occur in the course of a felony as severely as intentional murder; reducing the grade of such homicides to manslaughter, they conclude, would bring the law more in line with

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19. See Meares, *supra* note 13, at 593; Meares, *supra* note 6, at 48-52.

20. See Meares, *supra* note 6, at 48-49.

21. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 40-68 (1990).

22. See Robinson & Darley, *The Utility of Desert*, *supra* note 7, at 480-82.

23. See ROBINSON & DARLEY, *JUSTICE, LIABILITY, AND BLAME*, *supra* note 7.

community moral sensibilities.<sup>24</sup> Likewise, members of the public generally oppose punishing attempted offenses as severely as completed ones, a finding at odds with the modern trend reflected in the Model Penal Code.<sup>25</sup> Their work also supports reform in the definition and grading of statutory rape. In all of these ways and in others, Robinson and Darley's work shows how less severity can enhance deterrence once the standard economic view is supplemented with the concept of moral credibility.

But like the other works that negotiate the space between economics and sociology, Robinson and Darley's work does more than criticize excessively severe criminal punishments; it also points the way to cost-effective and politically feasible alternatives. The perception that the law excludes relevant evidence of guilt, Robinson argues, needlessly compromises the credibility of the law.<sup>26</sup> So, too, do judicial decisions that overturn popular law-enforcement techniques — such as public-housing building searches, curfews, and gang-loitering laws — on the ground that these laws supposedly invite harassment of the very citizens who support them;<sup>27</sup> although couched in the rhetoric of civil liberties, decisions such as these amount to telling residents of the inner city that they don't know enough or don't care enough about liberty to judge for themselves what the best trade-off is between liberty and order.<sup>28</sup> Constitutional doctrine doesn't have to be understood to compel these results; changing it so that it wouldn't, Robinson and Darley's account implies, would enhance deterrence not just by making the law tougher on law-breakers, but also by raising the confidence of law-abiders, who would then be more inclined to cooperate with one another and with authorities to rid their communities of crime.

### C. Social Meaning

Actions have *meanings* as well as *consequences*. We interpret behavior (as well as institutions and laws) against a background of social norms that define how persons who value particular goods — whether the welfare of other persons, their own honor or dignity, or the beauty of the natural environment — should behave.<sup>29</sup> Selecting actions that effectively express commitment to the goods we

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24. See *id.* at 169-81.

25. See *id.* at 14-28.

26. See Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 76.

27. See *id.*

28. See Tracey Meares & Dan M. Kahan, *When Rights Are Wrong* (June 1, 1997) (unpublished manuscript, on file with author).

29. See Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996).

value is part of being rational.<sup>30</sup> A theory of rational choice that abstracts from meaning — by, say, reducing the value of actions solely to their production of utility or dollars or, in the case of regulatory law, lives saved — will generate unreliable predictions and unconvincing prescriptions.<sup>31</sup>

Punishment is meaningful. By selecting an affliction of the appropriate form and severity, the community expresses condemnation of the wrongdoer and reaffirms its commitment to the values that the wrongdoer's own act denies.<sup>32</sup> Because we understand punishment this way, an insufficiently severe punishment is likely to be seen as tacitly endorsing the criminal's behavior and devaluing his or her victim.<sup>33</sup> A theory of criminal-law policy that abstracts from this expressive dimension — by, say, reducing the value of all punishments solely to their effectiveness in deterring crime or inflicting deserved suffering — is bound to mislead.

This is the problem with the conventional defense of alternative sanctions. This account defends the use of fines and community service for serious but nonviolent crimes on the ground that these punishments supply essentially the same amount of deterrence as imprisonment at a substantially smaller cost.<sup>34</sup> What this argument ignores, however, is the varying expressive significances of these punishments. Imprisonment unmistakably expresses moral indignation because of the sacred place of liberty in our culture. The conventional alternatives, in contrast, send a much more ambiguous signal. To the ears of the public, fines seem to say that offenders may buy the privilege of breaking the law; and we can't very well

30. See generally ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993).

31. See Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936 (1991); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 820-24 (1994).

32. See Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111 (Jeffrie G. Murphy & Jean Hampton eds., 1988).

33. See, e.g., Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1441 (1988) (concluding that race-of-victim disparities in the frequency of the death sentence show that "in Georgia's marketplace of emotion the lives of blacks simply count for less than the lives of whites" (emphasis omitted)); Scott Armstrong, *Case Against Simpson Intensifies Death-Penalty Debate in US*, CHRISTIAN SCI. MONITOR, Sept. 6, 1994, at 2 (reporting the comment of a feminist activist that the prosecutor's decision on whether to seek the death penalty for O.J. Simpson "raises the issue of whether a battered woman's life is as important as a celebrated man's life"); *Judge Draws Protests After Cutting Sentence of Gay Man's Killer*, N.Y. TIMES, Aug. 17, 1994, at A15 (reporting the comment of a gay activist that the light sentence of a man convicted of manslaughter for the intentional killing of a homosexual sends the message "[. . .] that it's O.K. to kill faggots"). For an extended account of the stake that victims and those who identify with them have in criminal trials, see GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995).

34. See, e.g., NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 90 (1990); Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410-11 (1980).



condemn someone for purchasing what we are willing to sell.<sup>35</sup> Community service also sends a confusing message: we don't condemn persons who educate the retarded, install smoke detectors in nursing homes, restore dilapidated low income housing, and the like; we admire them.<sup>36</sup> What's more, saying that such services are fit punishments for criminals insults both those who perform such services voluntarily and those whom the services are supposed to benefit.<sup>37</sup> These recurring expressive objections have rendered the movement for alternative sanctions politically stillborn.<sup>38</sup>

But social meaning analysis can enable us to identify not only which cost-effective alternative sanctions won't be politically acceptable but also which ones will. Shaming punishments — from bumper stickers for drunk drivers, to publicity for toxic waste dumpers, to signs or distinctive clothing for sex offenders — unambiguously express moral disapprobation.<sup>39</sup> Accordingly, substituting shaming for imprisonment is unlikely to offend the public expressive sensibilities that have blocked the conventional alternatives. Indeed, the political acceptability of shaming penalties — which should be as cost-effective as the conventional alternatives — is close to an established fact.<sup>40</sup>

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35. See, e.g., Editorial, *Instead of Jail: 'Welcome, Reptile!'*, N.Y. TIMES, Feb. 17, 1988, at A22 (“[The] impression [of a large fine in lieu of imprisonment for a wealthy tax evader] is that if you have enough money, you can buy your way out of prison, much as Civil War conscripts could buy a replacement. Money really counts, the sentence seems to say . . .”); *Md. Wetlands Conviction Stirring Heated Debate*, WASH. POST, Feb. 20, 1993, at F6 (quoting prosecutor of environmental crimes stating that “[p]rison is entirely appropriate in these cases[.] . . . if we just handed out fines it would be regarded simply as a cost of doing business”).

36. See, e.g., Jack W. Germond & Jules Witcover, *Sentencing of North Takes the Easy Way Out*, ST. PETERSBURG TIMES, July 7, 1989, at 20A (“[Oliver North's community service sentence] provides ammunition to those who contend North didn't do much, or even anything, wrong.”); David A. Kaplan & Clara Bingham, *A New Era of Punishment*, NEWSWEEK, May 14, 1990, at 50, 51 (quoting the president of Mothers Against Drunk Driving stating that “By only giving [a drunk driver convicted of manslaughter] community service, the judge did not send the right message that this is a violent crime similar to rape and murder”); cf. *United States v. Bergman*, 416 F. Supp. 496, 501 (S.D.N.Y. 1976) (rejecting honorific community service as a sentence on the ground that “[i]t is difficult to conceive of the[se] as ‘punishments’ at all”).

37. See, e.g., Robert J. Matthews, Letter to the Editor, S.F. EXAMINER, Mar. 30, 1995, at A20 (“As a teacher, I find it insulting to my profession that this person, after pleading guilty to a felony, is going to perform in the capacity of an educator as punishment for his offense.”); Robert A. Westerberg, Letter to the Editor, *Community Service*, U.S. NEWS & WORLD REP., July 22, 1985, at 4 (“Many of us noncriminals perform community service not to avoid jail but because we want to. Perhaps the bench thinks the inconvenience of not being able to go after big bucks for a while is fitting punishment for corporate wrongdoers. I consider community service an honor that should not be tainted by judicial wrist slapping.”).

38. See Kahan, *supra* note 8, at 617-30.

39. See *id.*

40. See generally Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, at A1 (reporting on the growing use of shaming punishments in American criminal law).

Social meaning can also enrich the standard economic view of deterrence by supplying us with a fuller specification of what motivates people to obey or break the law. Imagine we offer an individual an opportunity to exchange a sum of money for a range of possible sums, some of which are larger and some of which are smaller than the original sum, but which on average exceed it. If his goal is to maximize his wealth, we should expect him to accept the exchange. Whether he will or not, however, will depend on the *form* of the exchange: if we structure the transaction to resemble a wager in a casino game, he is likely to accept it, but if we structure it to resemble a decision to conceal taxable income, he probably won't. The *meaning* of accepting the exchange — that he is a smart gambler in the one case, a calculating cheater in the other — can either increase or diminish the value of that behavior.<sup>41</sup> The differing significations of tax evasion across cultures can help to explain why the tax-compliance rate is relatively high in the United States, where paying one's tax is viewed as an important civic duty, and relatively low in Europe, where it is not.<sup>42</sup>

For a practical application, consider the problem of guns in schools. Authorities often try to discourage this conduct by rewarding students who voluntarily turn in their guns and by severely punishing those who don't. This carrot-and-stick approach seems to make economic sense in theory, but is notoriously ineffective in practice.<sup>43</sup>

The reason is that it ignores social meaning. Juveniles carry guns to school because doing so expresses willingness to defy authority, a signal that they believe their peers value.<sup>44</sup> Far from counteracting this signal, the carrot-and-stick policy amplifies it: by demonstrating just how much authorities resent guns, this strategy reinforces the message of defiance associated with possessing them, and thus increases the reputational returns from engaging in that activity.<sup>45</sup>

A more effective strategy is to pay rewards to students who turn in gun possessors.<sup>46</sup> The fear that their peers will report them makes students less willing to display their guns; that makes guns less valuable for conveying information about one's attitude and intentions. In addition, the belief that onlookers are willing to sell

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41. The results of such an experiment are reported in J.C. Baldry, *Tax Evasion Is Not a Gamble*, 22 *ECON. LETTERS* 333 (1986).

42. See Kahan, *supra* note 9, at 358.

43. See *id.* at 363-64.

44. See Deanna L. Wilkinson & Jeffrey Fagan, *The Role of Firearms in Violence "Scripts": The Dynamics of Gun Events Among Adolescent Males*, *LAW AND CONTEMP. PROBS.*, Winter 1996, at 55, 77-84.

45. See *id.*

46. See *id.* at 364-65.

out possessors counteracts the inference that possessors enjoy high status among their peers.<sup>47</sup>

#### D. Social Influence

"Social influence" is the term that social psychologists use to describe the propensity of individuals to conform to the behavior and expectations of others. It's a pervasive phenomenon in social, economic, and political life.<sup>48</sup> Diners prefer to patronize the restaurants that they think other diners are patronizing.<sup>49</sup> Citizens choose to vote for candidates for whom they know others are voting.<sup>50</sup> Teenage girls are more likely to become pregnant when they see that others are having babies,<sup>51</sup> and adults more likely to commit suicide when they learn that others have taken their own lives.<sup>52</sup> There are many other examples.<sup>53</sup>

Social influence also fuels the decision to commit crimes. Evidence of this is plentiful. Juveniles, it has been shown, are much more likely to commit crimes in groups than individually.<sup>54</sup> Past neighborhood crime rates explain more of the geographical variance in crime rates than do demographic and law enforcement variables.<sup>55</sup> Those arrested for looting and rioting tend to have arrest records no different from persons in the general population.<sup>56</sup> Peo-

47. See Fox Butterfield, *Police Chiefs' Success in Charleston, S.C., Is What's Raising Eyebrows Now*, N.Y. TIMES, Apr. 28, 1996, § 1, at 16 (reporting the success of such a policy in Charleston, South Carolina: "The program has . . . reversed the psychology of having a gun . . . 'Before, the more people who knew you had a gun, the greater your prestige . . . [Now] [t]he more people who know, the more likely you are to get turned in.'" (quoting Reuben Greenfield chief of police)).

48. See, e.g., Kahan, *supra* note 9, at 352-53.

49. See Gary S. Becker, *A Note on Restaurant Pricing and Other Examples of Social Influences on Price*, 99 J. POL. ECON. 1109 (1991), reprinted in GARY S. BECKER, ACCOUNTING FOR TASTES 195-97 (1996).

50. See, e.g., Larry M. Bartels, *Expectations and Preferences in Presidential Nominating Campaigns*, 79 AM. POL. SCI. REV. 804 (1985).

51. See George A. Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277 (1996).

52. See, e.g., David P. Phillips, *The Influence of Suggestion on Suicide: Substantive and Theoretical Implications of the Werther Effect*, 39 AM. SOC. REV. 340 (1974).

53. See generally ELLIOT ARONSON, *THE SOCIAL ANIMAL* 13-55 (7th ed. 1995).

54. See Maynard L. Erickson & Gary F. Jensen, "Delinquency Is Still Group Behavior!": *Toward Revitalizing the Group Premise in the Sociology of Deviance*, 68 J. CRIM. L. & CRIMINOLOGY 262, 264-65 (1977); see also Fox Butterfield, *A Team's Shoplifting Spree Shocks Quiet Boston Suburb*, N.Y. TIMES, May 5, 1996, § 1, at 14 ("[The principal] added that after carefully questioning all of the students, he had come to believe they really did not understand why they had taken part in the [shoplifting spree], except that they were in a group.").

55. See Glaeser et al., *supra* note 9; Albert J. Reiss, Jr. & Albert Lewis Rhodes, *The Distribution of Juvenile Delinquency in the Social Class Structure*, 26 AM. SOC. REV. 720, 727-29 (1961).

56. See ROBERT CURVIN & BRUCE PORTER, *BLACKOUT LOOTING!* 6-7 (1979); E.L. Quarantelli & Russell Dynes, *Looting in Civil Disorders: An Index of Social Change*, in *Ri-*

ple are much more likely to cheat on their taxes when they think that other individuals are cheating.<sup>57</sup>

Like those that abstract from social meaning, theories of deterrence that abstract from social influence are likely to go wrong, both descriptively and normatively. The standard economic account, for example, predicts that making the expected penalty more severe — by increasing either the severity of punishment or the likelihood of conviction — reduces the level of crime. But the phenomenon of social influence reveals that individuals commit crimes not just because they think crime is a bargain at a particular price, but also because they think other individuals are committing them. Consequently, a policy that creates the impression that crime is widespread can actually increase law breaking, even if that policy efficiently maintains or even raises the expected penalty for crime.

This conclusion subverts a number of the policy prescriptions associated with the standard economic view of deterrence. Under the standard view, for example, it may sometimes seem efficient to rely more heavily on a severe penalty than on a high probability of conviction, which requires large investments in law enforcement.<sup>58</sup> But because a low probability of apprehension is likely to create the perception that crime is rampant, social influence effects could more than offset any efficiency gains from this trade-off.<sup>59</sup> The standard economic view is also sometimes thought to favor policies that shift the onus of deterrence from the state to potential victims, who might be in a position to reduce crime through relatively cheap precautions.<sup>60</sup> But barred windows, community watch programs, and other conspicuous efforts by private citizens to protect themselves from crime can also convey the message of rampant criminality.<sup>61</sup> To avoid this effect, it might make sense for the government to assume a greater share of the burden in preventing crime than the standard view suggests is optimal.

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OTS AND REBELLION: CIVIL VIOLENCE IN THE URBAN COMMUNITY 131, 136-37 (Louis H. Masotti & Don R. Bowen eds., 1968).

57. See FRANK A. COWELL, CHEATING THE GOVERNMENT: THE ECONOMICS OF EVASION 102-03 (1990); Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, in WHY PEOPLE PAY TAXES 193, 212-13 (Joel Slemrod ed., 1992).

58. See Becker, *supra* note 1, at 183-84; Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1206-07 (1985).

59. See Kahan, *supra* note 9, at 377-79.

60. See Ben-Shahar & Harel, *supra* note 3; Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1193-97 (1994); Hylton, *supra* note 3; Tomas J. Philipson & Richard A. Posner, *The Economic Epidemiology of Crime*, 39 J.L. & ECON. 405, 415 (1996); Jan J.M. van Dijk, *Understanding Crime Rates: On the Interactions Between the Rational Choices of Victims and Offenders*, 34 BRIT. J. CRIMINOLOGY DELINQ. & DEVIANT SOC. BEHAV. 105, 114-15 (1994).

61. See Kahan, *supra* note 9, at 387-89.

The implications of social influence, however, are not purely negative; like social organization, moral credibility, and social meaning, social influence can generate affirmative deterrence strategies that are both politically acceptable and morally appealing. For example, once social influence is taken into account, it becomes clear that society needn't necessarily raise the price of crime to deter it; it can also adopt policies that counteract the perception that crime is widespread, a strategy that will often be more efficient and more just than simply raising the severity of punishment.

One such policy is order-maintenance policing. According to criminologists, the primary cue that crime is tolerated or expected is visible public disorder.<sup>62</sup> When people see aggressive panhandling, prostitution, public drunkenness, petty drug dealing, and the like, they think they are in a community that has a crime problem. When members of the community think they have a crime problem, they are much more likely to end up with one in fact, because of the phenomenon of social influence.<sup>63</sup> Order-maintenance policing reverses these effects. When citizens obey norms of orderliness — and when authorities visibly respond to those who don't — onlookers see that the community is intolerant of criminality. This message counteracts the inferences that point social influence in the direction of crime. It also reassures law-abiders, inducing them to engage in patterns of behavior — including taking to the street at night — that themselves discourage crime.<sup>64</sup> This strategy has been used with startlingly successful results in New York City.<sup>65</sup>

Another policy that has shown similar successes is the suppression of open gang activity.<sup>66</sup> Gang criminality is driven by social influence. When juveniles see others openly associating for the purpose of committing crimes, they understandably perceive that that's a way of life their peers respect. That perception can make joining a gang seem worthwhile even to juveniles who are otherwise only weakly committed or even opposed to gangs. Notwithstanding their private reservations, moreover, the decision of such individuals to join gangs conveys publicly that they, too, value gang mem-

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62. WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 65-84 (1990).

63. See James Q. Wilson & George L. Kelling, *Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29, 31-32.

64. See Kahan, *supra* note 9, at 367-73.

65. See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 108-56 (1996); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *COLUM. L. REV.* 551, 590, 640, 661 (1997).

66. See Kahan, *supra* note 9, at 377.

bership, a signal that reinforces the pressure on other teens to do the same.<sup>67</sup>

One way to turn social influence around, then, is to suppress open gang activity. Some cities, like Chicago, do that with gang-loitering ordinances that specifically authorize the police to break up public congregations of known gang members.<sup>68</sup> Other cities have achieved the same effect with civil injunctions or with general youth curfews that they enforce specifically against gang members.<sup>69</sup> By preventing gang members from openly displaying their authority, these laws counteract the perception that gang members enjoy a high status in the community. As that perception recedes, so does the perceived reputational pressure to join gangs. And all of this happens without the need to resort to severe penalties for gang-related crime, a tactic that is costly for society, has a dismal track record, and destroys the communities from which gang members come.<sup>70</sup>

## II. KATYAL: MAKING THE VICIOUS LESS SO

Katyal's approach is of a piece with the new deterrence theorizing I've described. His distinctive understanding of substitution uses complex sociological phenomena to enrich the economic view of crime, while employing the rigor of economics to tame sociology.

Much of Katyal's account is critical. He convincingly demonstrates how severe punishments can interact with diverse social phenomena — from stigma to adaptive preferences — in a manner that confounds the prescriptions of the standard economic theory of deterrence.<sup>71</sup> These lessons are well worth learning.

I am more interested, however, in mining Katyal's work for positive applications. Unless it can be made to generate politically appealing alternatives to the severe penalties that it criticizes, Katyal's conception of substitution will be politically inert.

Can Katyal's theory be used to construct a politically feasible set of alternative deterrence strategies? I think it can; the key lies in the way in which Katyal's view of substitution constructively reins in the ambitions of deterrence theory. Deterrence theorists usually think in binary terms: individuals can behave either viciously or virtuously, and the point of the law is to make it worth their while

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67. See DAVID MATZA, *DELINQUENCY AND DRIFT* 50-54 (1964); JAMES F. SHORT, JR. & FRED L. STRODTBECK, *GROUP PROCESS AND GANG DELINQUENCY* 75-76 (1965); Gary F. Jensen, *Parents, Peers, and Delinquent Action: A Test of the Differential Association Perspective*, 78 *AM. J. SOC.* 562, 565 (1972).

68. See CHICAGO, ILL., *MUN. CODE* § 8-4-015 (1990 & Supp. 1992).

69. See Livingston, *supra* note 65, at 641-42.

70. See Kahan, *supra* note 9, at 373-77.

71. See Katyal, *supra* note 12, at 2442-69.

to opt for the latter. Katyal's account of substitution makes us see why this might often, in practice, be an unrealistic goal; attempts to coerce people to obey the law can backfire, inducing them to engage in even more pernicious forms of criminality.<sup>72</sup> We are more likely to succeed, however, if we set our sights on making criminal offenders choose less, rather than more, harmful species of wrongdoing.<sup>73</sup> Once we master the intricacies of Katyal's account, we'll be able to make the vicious less so even if we can't make them substitute virtue for vice.

Or at least that is the promise of Katyal's theorizing. In the remainder of this essay, I will try to give a sense of the potential utility of Katyal's understanding of substitution by speculating about a number of positive applications of it. Nevertheless, as Katyal himself recognizes, the main project of translating Katyal's insights into usable policies remains to be done.

#### A. *Income Effects: Pornography and Rape*

For starters, Katyal's attention to income effects suggests a counterintuitive justification for raising the severity of punishments for pornography: namely, that doing so might diminish the income of men who would consume *as much* or even *more* of it as before but who would as a result be *less* inclined to engage in rape.

If we want to reduce the incidence of rape, the standard economic theory of deterrence suggests that we should raise the expected punishment for it. But this approach faces practical difficulties. Rape is already punished with fairly lengthy prison terms. Making the punishment for rape even more severe might thus be difficult and would certainly be costly.<sup>74</sup> Moreover, to the extent that we are able and willing to make prison sentences for rape substantially more severe, doing so undermines marginal deterrence: if the punishment for rape were life imprisonment, for example, then a rapist might be more likely to kill his victim and any other witnesses, since doing so would expose him to relatively little additional punishment (particularly in states without the death penalty) while reducing the likelihood that he would be convicted of the rape.

If we accept Katyal's account of income effects, however, then an alternative to increasing the penalty for rape would be to raise the expected punishment for possession of hard-core pornography, conduct that is substantially underregulated under existing obscen-

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72. *See id.* at 2389-401.

73. *See id.* at 2429-30, 2463.

74. Punishing rape with the death penalty is foreclosed by the Supreme Court's current Eighth Amendment jurisprudence. *See Coker v. Georgia*, 433 U.S. 584 (1977).

ity laws.<sup>75</sup> Assume, as seems to be the case, that men who rape are likely to be avid consumers of pornography.<sup>76</sup> Assume further, as also seems to be the case, that for many men pornography is addictive<sup>77</sup> — that is that the demand for pornography is relatively inelastic relative to its price (including the expected punishment for possessing it). If this is so, then we might expect increasing the expected punishment for pornography to reduce the incidence of rape through what Katyal calls a “Y-optimality” effect: as the expected penalty for pornography goes up, consumption of it diminishes pornography addicts’ “income” (i.e., the tolerance for risk of criminal punishment); those of them who happen to be rapists have less income (in that sense) to expend on the even-more-costly offense of rape and thus commit that crime less frequently. Indeed, it’s even possible, under these circumstances, that pornography addicts will plow the “income” saved from forgone rapes back into the consumption of pornography, in which case pornography would, for these men, exhibit the characteristics of a Giffen good. Thus, raising the price of pornography won’t make the consumers of it virtuous — on the contrary, they consume just as much and possibly even more of it; but it will make them less vicious, insofar as they will rape less frequently.

This account confounds the conventional arguments about the wisdom of punishing the use of pornography. To the extent that pornography and rape are substitutes for each other, the standard economic view counsels against raising the expected punishment for use of pornography. As the expected punishment for using pornography increases, the marginal punishment for rape goes down, which we should expect to increase the incidence of rape to some

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75. See 1 ATTORNEY GENERAL’S COMM. ON PORNOGRAPHY, FINAL REPORT 366-72 (1986) [hereinafter FINAL REPORT] (noting the underenforcement of existing obscenity laws, which would apply to most hard-core pornography). The mere possession of obscene matter in the home is, of course, constitutionally protected. See *Stanley v. Georgia*, 394 U.S. 557 (1969). However, obtaining obscenity — even through mail order placed from the home or through a home modem, not to mention through a commercial transaction outside the home — is not constitutionally protected. See *United States v. Thomas*, 74 F.3d 701, 710 (6th Cir.), cert. denied, 117 S. Ct. 74 (1996); see also *United States v. Orito*, 413 U.S. 139, 141 (1973) (holding that the constitutional right to home possession of obscenity does not entail “a correlative right to receive it, transport it, or distribute it”). Consequently, strictly enforcing existing laws against the distribution of obscene materials would expose the vast majority of hard-core pornography consumers (i.e., all of those who obtain their pornography from others rather than making it themselves) to criminal penalties.

76. See, e.g., DENNIS HOWITT & GUY CUMBERBATCH, PORNOGRAPHY: IMPACTS AND INFLUENCES 43 (1990) (reviewing social science evidence that sex offenders display greater use of pornography than do nonoffenders); W.L. Marshall, *The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders*, 25 J. SEX RES. 267, 279 tbl. 2 (1988) (finding that 83% of rapists as opposed to 29% of nonoffenders consume hard-core pornography).

77. See, e.g., FINAL REPORT, supra note 75, at 77 (comments of Commissioner Dobson); David Mura, *A Male Grief: Notes on Pornography and Addiction*, in MEN CONFRONT PORNOGRAPHY 123 (Michael S. Kimmel ed., 1990).



degree. Indeed, if we wish to reduce the incidence of rape, we should make the price of (including the expected punishment for) using pornography lower, which should induce at least some potential rapists to substitute pornography (along with activities such as masturbation) for rape.<sup>78</sup> What this account overlooks, Katyal's theory implies, is how the potential income effects associated with changing the price of pornography might well dominate the hypothesized substitution effects.

According to the feminist critique of pornography, the standard economic view overlooks something else: the preference-shaping effects of pornography. This account holds that exposure to pornography creates an appetite for rape (or, to the same effect, reduces inhibitions against it).<sup>79</sup> If that's so, then the preference-shaping effect might dominate the substitution effect when we lower the price of (including, again, punishment for) pornography relative to rape, and thus still produce a net increase in rapes. On this account, it makes sense to raise the price of pornography in order to reduce consumption of it and thereby dampen the appetite for rape.

Katyal's theory, as I've adapted it, takes issue with the feminist position as well. The income-effects argument supports raising the price of pornography *not* because doing so will reduce consumption of pornography — indeed, it could even increase it — but because doing so will reduce the inclination of those consuming pornography to hazard the penalty for rape. Because they end up in the same place — increased penalties for pornography — it might not seem to matter which mechanism — Katyal's or the feminists' — explains the reduced incidence of rape. But insofar as there is reason to doubt the preference-shaping mechanism as an empirical matter, Katyal's income-effects argument strengthens the case for regulating pornography as a means of reducing sexual violence. For Katyal's income-effects argument works even if, as many have speculated,<sup>80</sup> the correlation between consumption of pornography and commission of rape is the product of some unidentified third cause.<sup>81</sup>

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78. See generally RICHARD A. POSNER, *SEX AND REASON* 366-67 (1992) (hypothesizing this and other possible effects).

79. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 138-45 (1989). See generally Diana E.H. Russell, *Pornography and Rape: A Causal Model*, 9 *POL. PSYCHOL.* 41 (1988) (surveying empirical and experimental research on this effect).

80. See POSNER, *supra* note 78, at 367-71.

81. Another possibility is that the preference-shaping mechanism and the income-effects mechanism will reinforce each other as the expected punishment for using pornography increases: men who aren't addicted to pornography will consume less and thus be less stimulated to rape by exposure to pornography; men who are addicted to pornography will consume as much or more of it but be discouraged from raping by reduced "income."

Of course, this adaptation of Katyal's position remains subject to significant empirical questions. It assumes, for one thing, that potential rapists' demand for pornography exhibits less elasticity (and thus less responsiveness to increased punishment) than does their demand for rape. If we believe that men are more likely to be addicted to pornography than to rape, then that's a plausible assumption, but it's still no more than that.

Katyal's account of "Y-optimality" and Giffen goods also assumes something a good deal less intuitive, namely, that income effects will constrain the commission of diverse nonmarket crimes. It's pretty easy to see how raising the market price of a commodity — whether an automobile or an illicit drug — reduces the power of a person who buys it to purchase other commodities: after paying the higher price for one commodity, the individual has less money to buy others. But it's less easy to see how income effects constrain the commission of nonmarket crimes — for example, rape, arson, robbery, and other offenses that don't involve cash transactions — once the expected punishment of one goes up; for that to be so, we have to imagine that the willingness of individuals to commit crimes is constrained by a generic tolerance for expected punishment, such that if we raise the expected punishment for one crime, an individual offender will have less of that tolerance available to expend on other crimes. Maybe criminals behave as if they were buying crimes on a fixed punishment-risk budget, but it's not obvious that they do.

Nevertheless, I don't regard these sorts of empirical doubts as decisive. Given the potential returns from Katyal's ingenious adaptation of "income effects" to criminal-law policy, his account is at least plausible enough to justify further study and experimentation.

### B. *Extremeness Aversion: Guns in Schools and Alternative Sanctions*

One of the most intriguing but also least developed proposals in Katyal's article is that the law should exploit the phenomenon of extremeness aversion.<sup>82</sup> In many real-world settings, society has a decided preference between two forms of misconduct that seem to compete with each other on more-or-less even terms in the minds of criminals. The way to influence criminals to choose the less harmful crime, Katyal argues, is to "construct" third options that are preferable to neither form of misconduct but that nevertheless induce criminals to revise upward their valuation of the socially preferred form, which now strikes them as a sensible "middle ground" between extremes.

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82. See Katyal, *supra* note 12, at 2463.

The question, though, is whether we are sufficiently sophisticated about how to construct these magic third options. Reconsider the case of guns in schools. Students might view knives and guns as relatively clear substitutes: knives have less panache, but guns are more expensive and subject their possessors to bigger penalties. Society, of course, strongly prefers that students arm themselves with knives. Can society construct a third option that induces students to view knives as a sensible “middle option”? Could we induce students to frame their options this way by reducing, or even eliminating, the punishment for possession of brass knuckles, box cutters, or mace? I doubt it. Maybe other plausible third-option candidates exist, but identifying them in this context, and in others, calls for close collaboration between law enforcement officials and street-wise administrators.

One setting in which I can more readily imagine Katyal’s insights on extremeness aversion having some application, however, is that of alternative sanctions. Fines, as I’ve emphasized, are a politically unacceptable alternative to imprisonment for expressive reasons: they seem to say that society is pricing rather than condemning the wrongdoer’s conduct.<sup>83</sup> The social meaning of fines, however, is constructed at least in part by the availability of imprisonment itself: fines seem to express moral ambivalence precisely because imprisonment condemns so unequivocally. Katyal’s emphasis on extremeness aversion suggests that if we alter the frame of reference by adding a third sanction that condemns *even less* forcefully we might be able to induce the public to view criminal fines as sufficiently expressive to be acceptable.

*Prosecutorial diversion* might work for this purpose. Under this practice, the prosecutor agrees to dismiss or to refrain from filing criminal charges in exchange for a monetary payment.<sup>84</sup> Since the whole point of diversion is to give the offender a chance to buy his way out of the stigma associated with a criminal conviction, this disposition seems even more vulnerable than an ordinary fine to being interpreted as a mere “pricing” mechanism. It seems clear for this reason that prosecutorial diversion — which is in fact quite common in Europe<sup>85</sup> — wouldn’t be politically acceptable as an alternative to imprisonment in America. But Katyal’s argument suggests that diversion needn’t be politically acceptable on its own in order to be a useful addition to the inventory of alternative sanctions. For even if it were almost never employed, the existence of the diversion option might enhance the political acceptability of or-

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83. See *supra* text accompanying note 35.

84. See Michael Tonry & Mary Lynch, *Intermediate Sanctions*, in 20 CRIME & JUSTICE: A REVIEW OF RESEARCH 99, 128 (Michael Tonry ed., 1996).

85. See *id.* at 128-29.

dinary fines: when framed only with imprisonment, fines seem expressively ambiguous; but when framed with imprisonment *and* diversion, they might appear at least moderately condemnatory. And moderation might be enough to satisfy the public appetite for condemnation given the phenomenon of extremeness aversion.

In any event, seeing whether diversion would have this effect on the political acceptability of fines seems like a worthwhile experiment. Whether politically self-interested legislators and prosecutors can be persuaded to set the experiment up, of course, is another question.

### C. *Income Effects: Heroin vs. Crack*

A final example of how Katyal's insights can be used to generate affirmative prescriptions is one that he himself would reject: the substitution of heroin for crack. While Katyal suggests that it's worse for drug users to consume heroin,<sup>86</sup> many would dispute this characterization. Among them would be most African-American residents of the inner city, who view crack as uniquely destructive of their communities.<sup>87</sup> Most law-enforcement officials would likewise disagree with the proposition that society is better off when drug users take crack; indeed, some attribute part of New York City's recent crime drop to the resurgent popularity of heroin, which, unlike crack, is alleged to dissipate aggression and hence lessen addicts' criminal propensities.<sup>88</sup>

So what Katyal describes as an unintended policy misfire — namely, greater consumption of heroin in the wake of dramatically increased penalties for crack — might be better described as a fortuitous policy success. Could the same result have been achieved in a less costly or severe manner? Katyal's reasoning suggests that merely lowering the price of heroin — by, say, reducing the expected penalty for distributing it — would likely have induced some crack users to substitute heroin. But such a policy presumably also would have had the undesirable consequence of increasing demand for heroin among noncrack users. Raising the price of heroin (by increasing the expected penalty) presumably wouldn't have done that, but it still might have stimulated substitution of heroin for crack, Katyal's account implies,<sup>89</sup> because of a Giffen goods effect. If so, and if that result could have been achieved by raising the penalty for heroin only a modest amount, then perhaps that policy

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86. See Katyal, *supra* note 12, at 2406, 2462.

87. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination*, 107 HARV. L. REV. 1255 (1994).

88. See, e.g., Clifford Krauss, *Mystery of New York, the Suddenly Safer City*, N.Y. TIMES, July 23, 1995, § 4, at 1.

89. See Katyal, *supra* note 12, at 2435-38.

would have been better — from both an economic perspective and a moral one — than was the policy of increasing crack penalties so dramatically.

Assuming these speculations are grounded in empirical fact, the substitution of heroin for crack — by whatever mechanism — dramatically illustrates the moral consequences of Katyal's general way of thinking. The object of the substitution strategy isn't to win the war on drugs but only to contain the enemy within territory that we are willing to cede. Indeed, there's something almost demoralizing about saying that the object of our anticrack policy is to increase heroin addiction. But if that's the most effective way to limit the scourge of crack, then maybe we should be willing to settle — as Katyal implies we should — for making the vicious less so.

### CONCLUSION

The concept of deterrence means different things to different people. To some, including many politicians, it is essentially a buzzword: by advocating it, one signals one's commitment to a certain style of response to the frightening needs and demands of the impoverished. To others, including many academics, it is an intellectual abstraction: deterrence is a puzzle to be solved by formal modeling, or a foil to be battered to prove that some other abstract "theory" supplies the "truth" about criminal law. For still others, including many ordinary citizens, deterrence is a disguise to obscure — from others and even from themselves — the contentious evaluative judgments that underlie their positions on issues like the death penalty and gun control.

The question that I've tried to address in this essay is whether deterrence can also be a practical framework for those who want to solve America's crime problems on morally acceptable terms. It certainly ought to be. Crime threatens the welfare not only of those who are victimized by it, but of whole communities, whose members' life prospects are foreshortened by the destructive impact of crime on the institutions that instill the capacities of productive citizenship. Deterring crime should therefore be regarded as a primary aim of social welfare policy.

But it can't be so conceived against the background of the prevailing economic and sociological understandings of crime control. The former's strategies for "raising the price" of crime are far too costly, both morally and economically. The latter's focus on ending inequality is so politically infeasible that advocating it is tantamount to withdrawing entirely from public deliberations on crime.

The task for the next generation of deterrence theorists is to identify morally and politically acceptable law-enforcement strategies that themselves ameliorate the social conditions that cause

crime. The works I've discussed in this essay, including the extremely important article of Neal Katyal, represent the first conceptual steps in that direction. But many more such steps must be taken before deterrence theory arrives at a viable middle ground between economics and sociology.