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PRIVATE NORMS AND PUBLIC SPACES

Nicole Stelle Garnett*

For two semesters during law school, I worked as Bob Ellickson's research assistant. One day, he asked me if I had considered the legal academy. I said yes, although I chose not to disclose why: my soon-to-be husband very much wanted to teach, and I figured that, if we ended up in some obscure town like South Bend, Indiana, I would probably need a job. He then asked what I might like to teach. "I like Property," I replied. He probably thought I was being obsequious—I would have thought as much—but he nevertheless assured me of his support if I ever did decide to test the academic waters.

This exchange turned out to be a providential one. I realized as I left his office that, actually, the idea of teaching and writing about the law did appeal to me more than I had previously admitted to myself. And I realized that I was not being obsequious. I did like Property very much, thanks, of course, to Bob Ellickson, who all agree is an exceptionally gifted teacher. In his Property class, I had come to understand the problem of resource allocation as *the* problem in the law—the one problem that I would most want to ponder with students should the opportunity present itself someday. And so it was that three years later, when the appointments chair at Notre Dame Law School asked me what I would like to teach, I replied, "I like Property." And, as a law professor, I find myself trying to emulate Bob Ellickson as both a teacher and mentor. Of course, my intellectual pedigree is hardly unique. Undoubtedly, many law professors trace their scholarly interests back to their days in his Property class, and many more checked the "Property" box on the AALS form because they were inspired by his scholarship. Still, I am very grateful to Bob Ellickson for his encouragement, both in my law school days and many, many, times since I started teaching and writing about "his" subject. It is therefore a particular privilege to have been invited to this conference honoring his work as a scholar and a teacher.

It is a special privilege to comment on the role of social norms as rules of property allocation. After all, Ellickson's work on this subject revolutionized not only the field of property law but legal scholarship generally. As Richard McAdams has observed, "*Order Without Law* created, or at least anticipated, a burgeoning new subfield of legal studies."¹ Indeed, the subfield has so burgeoned that I am going to take

* Professor of Law, Notre Dame Law School. I received helpful comments on this essay from participants in the 2008 Brigham-Kanner Property Rights Conference, William & Mary Law School, and from Peg Brinig, Daniel Kelly and Rick Garnett. I thank Jaclyn Sexton for helpful research assistance.

¹ Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 344 (1997) (discussing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991)).

the liberty of focusing on one sub-subfield of it—the role social norms play in the allocation of public space such as city streets, sidewalks, and parks. I choose this sub-subfield for three related reasons. First, Bob Ellickson's 1996 article *Controlling Chronic Misconduct in City Spaces* is undoubtedly one of the most important scholarly treatments of the issue.² Second, I have written about the question, in part because of his encouragement: he suggested that I consider writing about public-space allocation when I began teaching, and the suggestion coincided with my own interest in the topic.³ Third, city governments have become increasingly interested in enforcing norms of decorum in public spaces and, in so doing, allocating a scarce and critically important resource to those citizens who choose to play by the rules.

My essay explores an important development arising out of the renewed focus in recent years on urban disorder: after several decades of relative inattention to rules of conduct in public spaces, city governments have become norm-entrepreneurs and norm-enforcers. This is, in one sense, nothing new. As Ellickson and others have shown, until the final decades of the last century, urban police officers maintained decorum in our public spaces primarily by enforcing informal norms of conduct.⁴ And even when official policies downplayed the enforcement of public-space rules of conduct, many police officers still found the role an impossible one to avoid.⁵ But modern order-maintenance policies differ in important respects from these antecedents. Significantly, cities have taken steps to formalize the development and enforcement of appropriate norms governing public-space allocation. I am particularly interested in the rise of policing practices, especially "community policing," that seek to change the prevailing norms of public-space allocation, in part by asking police officers to suppress "bad" norms and enforce "good" norms—in other words, to enforce norms as the law.

Efforts to formalize the enforcement of norms are intriguing for reasons that Ellickson's work makes clear: after all, Ellickson reminds us both of the power of norms as rules of conduct and resource allocation and of their limitations.⁶ Norms work best as governing rules in tight-knit, homogeneous communities;⁷ they also tend to benefit insiders at the expense of outsiders,⁸ suggesting that efforts to enforce

² Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

³ As it happens, Bob was working on *Controlling Chronic Misconduct* during the time I worked as his research assistant. So my initial introduction to the scholarly enterprise was focused on the subject, which has intrigued me ever since.

⁴ See, e.g., Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 702 (1967); Ellickson, *Controlling Chronic Misconduct*, *supra* note 2, at 1200–01, 1208–09.

⁵ See Ellickson, *Controlling Chronic Misconduct*, *supra* note 2, at 1223; see also JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* (1968); Bittner, *supra* note 4, at 699–715.

⁶ See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 177–83 (1991).

⁷ See *id.* at 173–83, 249–54.

⁸ See *id.* at 169.

norms as *legal* rules, perhaps especially rules of resource allocation, raise distributional fairness questions.⁹ (And, with respect to the allocation of *public* space, constitutional ones as well.) These limitations led Ellickson to caution that no one should read his work as reflecting “a blanket normative recommendation that social controllers use norms as rules.”¹⁰

Especially because we live in conditions of numerosity and diversity, policymakers must take these words of caution seriously. This essay examines community policing efforts in light of them and concludes that their apparent success—at least with respect to the allocation of public spaces—paints a relatively hopeful picture. These efforts suggest that government intervention can effect positive changes in the norms governing public-space allocation, even in diverse urban communities where healthy norms have unraveled. The essay questions, however, whether these programs actually represent an example of successful norm entrepreneurship, as their proponents frequently claim. Rather, it might be that the norm-enforcement aspect of community policing is doing much of the work. The police, directed in part by the input of law-abiding citizens, have chosen to suppress socially deviant norms, embraced by lawless occupiers of public spaces, in order to allow normatively superior ones, embraced by a majority of residents, to flourish. While the insider-outsider problem identified by Ellickson suggests that policy makers must be vigilant in ensuring that police do not enforce norms in a way that raises distributional fairness and civil liberties concerns, it does not preclude community-directed, police-enforced decisions that social deviants should not be permitted to continue their occupation of public spaces.

I. FENCING IN AND SMOKING OUT

Ellickson’s work on social norms reminds us of a commonsensical proposition: most of the time, the law is irrelevant. That is, the daily negotiations of our lives are conducted not “*in* ‘the shadow of the law’” but beyond it.¹¹ In Shasta County, California, ranchers hold each other responsible for the damage caused by straying cattle regardless of whether the formal legal rule (fencing in/fencing out) mandates compensation.¹² And in South Bend, Indiana, I clear snow, recycling bins, and

⁹ *Id.* at 249–58 (discussing relative merits of law versus norms as rules of resource allocation); see also Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 739–49 (1986) (discussing judicial hostility to “customary” property rights); Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRES IN L. 5, 24–30 (2009) (discussing the transformation of customs into legal rules and suggesting that courts may be less resistant to this transformation in “less high-stakes cases”). On the constitutionalization of public-space allocation see Ellickson, *Controlling Chronic Misconduct*, *supra* note 2, at 1209–13.

¹⁰ ELLICKSON, *supra* note 6, at 169.

¹¹ *Id.* at 52 (emphasis in original).

¹² See *id.* at 52–53, 72–76.

children's toys off my sidewalk not because the law obligates me to do so (as I assume it does), but because my failure to do so causes my neighbors to joke that my yard is looking rather shabby and to express surprise that two law professors would not be more concerned about the liability risks of unshoveled snow. In other words, I keep the sidewalk clear because this is what the norms in my neighborhood require me to do. As Ellickson reminds us, the Harter Heights neighborhood in South Bend, Indiana is hardly unique. Under many circumstances, informal social norms, rather than legal rules, govern behavior and the allocation of resources.¹³ And while sociologists and people who have not had common sense beaten out of them in law school or graduate seminars in economics have known this forever, Ellickson was able to infuse law and economics with "human frailty"¹⁴ and law and society with "theory."¹⁵ In so doing, he established a baseline theoretical understanding of the development, potential, and limitation of informal norms that set the stage for an explosion in law-and-social-norms scholarship.

By way of introduction to the substance of my inquiry, it is useful to turn to the *limits* of social norms as a system of governance identified by Ellickson. Ellickson hypothesized that "*members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another.*"¹⁶ He also took care to articulate the limits of his hypothesis. First, he observed that "many social environments are not close-knit" and expressed agnosticism about whether welfare-maximizing norms could arise in other social settings.¹⁷ Second, he also observed that "norms that add to the welfare of the members of a certain group commonly impoverish, to a greater extent, outsiders to that group."¹⁸ By way of illustration of these two points, consider the California Supreme Court's description of how members of a street gang known as Varrio Sureo Locos (VSL) control public spaces in San Jose's Rocksprings neighborhood:

Rocksprings is an urban war zone. The four-square-block neighborhood . . . is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk,

¹³ See, e.g., *id.* at 1, 141.

¹⁴ See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).

¹⁵ See ELLICKSON, *supra* note 6, at 6–7.

¹⁶ *Id.* at 167 (emphasis in original).

¹⁷ *Id.* at 169.

¹⁸ *Id.*

loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. . . . Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. . . . Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks and even their vehicles turned into a sullen canvas of gang graffiti. The people of this community are prisoners in their own homes. Violence and the threat of violence are constant.¹⁹

For present purposes, assume that gang members engage in these behaviors in order to enforce welfare-maximizing norms. This is not an unreasonable assumption. Not only does the VSL benefit from establishing control over the neighborhood, but, as Ellickson and others have observed, violence and threats of violence frequently serve as norm-enforcement mechanisms.²⁰

On the other hand, non-gang members obviously do not benefit from VSL norms. The VSL norms have the intended and predictable effect of rendering nonmembers “prisoners in their own homes.”²¹ Moreover, and importantly, it also is reasonable to assume that the law-abiding Rocksprings residents do not comprise a “close-knit group.” People who are “prisoners in their own homes” find it difficult to get to know their neighbors, even when they want to do so, which they frequently do not because people who are fearful usually do not trust their neighbors. As a result, the law-abiding residents of Rocksprings will find it exceedingly difficult to develop and enforce the kinds of social norms that might effectively check the deviant norms of the VSL gang. It is hardly surprising, therefore, that numerous studies have documented that crime, and fear of crime, undermine social capital and impede the development of what sociologists and social psychologists call “collective efficacy”²²—that is, the “ability of neighborhoods to realize the common values of residents and maintain effective social controls.”²³

Since the publication of James Q. Wilson and George L. Kelling’s influential *Broken Windows* essay in 1982,²⁴ police departments across the country have prioritized

¹⁹ *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 601–02 (Cal. 1997), *cert. denied*, 521 U.S. 1121 (1997).

²⁰ See ELICKSON, *supra* note 6, at 213 (citing Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34 (1983)) (proposing that “a good portion of crime is actually undertaken to exercise social control”).

²¹ *Acuna*, 929 P.2d at 601.

²² Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1604 (2002).

²³ Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918 (1997).

²⁴ James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC, Mar. 1982, at 29.

efforts to curb urban disorder, from the shocking social deviancy in Rocksprings to more minor irritants like squeegeemen, graffiti, and panhandlers.²⁵ In the *Broken Windows* essay, Wilson and Kelling first articulated the social-norms justification for curbing disorder. “[D]isorder and crime,” they argued, “are usually inextricably linked, in a kind of developmental sequence.”²⁶ Wilson and Kelling reasoned that “one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.”²⁷ The logic, in other words, is that a single broken window has a multiplier effect: “[I]f a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken.”²⁸ Similarly, “‘untended’ behavior also leads to the breakdown of community controls.”²⁹ Communities that fail to curb physical and social disorder, they reasoned, become vulnerable to serious crime.³⁰ Disorder sends signals to would-be offenders that communities plagued by disorder are “safe” places to commit crimes: the community’s failure to check disorder suggests that residents cannot—or choose not to—control socially detrimental behaviors and conditions.³¹ Disorder also impedes the development of the social norms necessary for healthy urban community life.³² As Dan Kahan has argued, it “erode[s] deterrence by emboldening law-breakers and demoralizing law-abiders.”³³

Broken Windows represented more than a rallying cry for residents of struggling neighborhoods to “take back” their communities by controlling disorder. At its heart, the essay challenged nearly a century of thinking about the role of police in urban communities. Wilson and Kelling argued, contrary to police reformers’ long-standing assumptions, that officers should integrate themselves into the social fabric of the communities that they protect and that they should prioritize efforts to control disorder.³⁴ Police intervention to enforce the kinds of anti-disorder norms that operate naturally in healthy communities would both check the spiral of urban decay and reduce serious crime.³⁵ By intervening to check disorder, officers could help communities send the right signals—that residents here do not tolerate social deviancy. They could also kick-start the informal social norms needed to check deviancy—norms that had been crippled by the disorder plaguing all too many urban neighborhoods.

²⁵ See Debra Ann Livingston, *Brutality in Blue: Community, Authority, and the Elusive Promise of Police Reform*, 92 MICH. L. REV. 1556, 1557–58 (1994) (reviewing JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993)).

²⁶ Wilson & Kelling, *supra* note 24, at 31.

²⁷ *Id.*

²⁸ *Id.* (emphasis in original).

²⁹ *Id.*

³⁰ *See id.* at 32.

³¹ *See id.* at 31–32.

³² See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367–73 (1997).

³³ *Id.* at 387.

³⁴ See Wilson & Kelling, *supra* note 24, at 38.

³⁵ *See id.*

This was not the first time that James Q. Wilson had posited a link between a breakdown in social norms and urban decline. In his 1968 essay *The Urban Unease*, Wilson diagnosed fear (or unease) brought about by the failure of community as lying at the root of the “urban crisis.”³⁶ In *The Urban Unease*, however, Wilson expressed pessimism about the extent to which police officers could act as norm entrepreneurs. “[T]he collapse of informal social controls,” he observed, “leads to demands for the imposition of formal or institutional controls. . . . The difficulty, however, is that there is relatively little government can do to maintain a neighborhood community.”³⁷ But it was the optimistic Wilson, rather than the pessimistic one, who captured the attention of police reformers during the 1980s and 1990s.³⁸ Today, almost all major police forces have implemented some version of “community policing” to solicit information about neighborhood problems and to use that information to establish policing priorities.³⁹ Community policing efforts seek to accomplish the goals set out in *Broken Windows*—that is, to better integrate officers into the communities that they are charged with protecting, to enable residents to participate in the setting of policing priorities (especially with respect to disorder suppression), and to suppress bad norms and bolster good ones, thereby fostering the social capital and collective efficacy that exists organically in healthy neighborhoods.⁴⁰

Community policing programs are not the *Broken Windows* essay’s only policy progeny: many cities have reoriented policing techniques to directly target disorder. New York City’s “quality of life” policing is perhaps the best known example.⁴¹ Others prioritize the elimination of “problem properties,” using tools like code enforcement “sweeps” and “public nuisance task forces.”⁴² San Jose, California, took the unusual step of responding to the situation in Rocksprings by seeking to enjoin the gang as a public nuisance.⁴³ Community policing policies are, however, particularly intriguing because they formalize the role of city officials, especially police

³⁶ James Q. Wilson, *The Urban Unease: Community vs. City*, 12 THE PUB. INT. 25, 25 (1968).

³⁷ *Id.* at 34.

³⁸ See, e.g., James Q. Wilson, *Crime and Public Policy*, in CRIME AND PUBLIC POLICY 273, 274 (James Q. Wilson ed., 1983).

³⁹ See Wilson & Kelling, *supra* note 24, at 38.

⁴⁰ See *id.*

⁴¹ See generally GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 108–09, 143–51 (1996) (describing New York’s “quality of life” program).

⁴² For example, Philadelphia has a “Public Nuisance Task Force,” the mission of which is to help “residents and community groups combat drug and alcohol-related nuisance problems in their neighborhoods.” City of Philadelphia District Attorney’s Office: Public Nuisance Task Force, <http://www.phila.gov/DistrictAttorney/communityrelations/publicnuisance.html> (last visited Oct. 2, 2009).

⁴³ See *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 601 (Cal. 1997) (rejecting challenge to practice).

officers, as both norm-entrepreneurs and norm-enforcers. These policies therefore require policy-makers to consider the benefits and potential, as well as the costs and limitations, of norms as a system of social control.

Consider, by way of example, the Chicago Alternative Policing Strategy program (CAPS).⁴⁴ CAPS is a comprehensive community policing effort which began in a few high-crime police districts in 1993 and later expanded to cover the entire city.⁴⁵ The CAPS program focuses on problem-solving at the community level. In order to maximize the “turf orientation” of police officers, individual officers are given fairly long-term assignments to one of 279 beats in the city and are primarily responsible for responding to calls in their beat.⁴⁶ All CAPS officers receive training in a five-step problem-solving process, which is supplemented by coordination with other city agencies to provide services effectively.⁴⁷ Officers hold monthly beat community meetings,⁴⁸ and District Advisory Committees, made up of residents, community leaders, business owners, and other stakeholders, meet regularly with police leaders to discuss district affairs.⁴⁹

Through these meetings, police officers come to act as both norm-entrepreneurs and norm-enforcers. Norm-entrepreneurship is most commonly reflected in what Chicago calls “assertive vigilance.”⁵⁰ Police officers work with local community leaders to organize marches in high crime areas, prayer vigils at the site of gang- or drug-related shootings, “smoke-outs”—barbeque picnics—in drug-market areas, and “positive loitering” campaigns to harass prostitutes and their customers.⁵¹ In one neighborhood that had become plagued with prostitution, a police officer described the evolution of a successful positive loitering campaign as follows:

[T]he problem was brought up at the beat meeting [The officer] proposed positive-loitering, and they agreed to give it a try They started out with 30 people and were escorted by a police car. They began to alternate days and times so the prostitutes would never know when they’d be there. Soon the prostitutes ran when they saw the group coming, while the police would stop them and check for warrants, arresting them if there were any outstanding. . . . When a community member complained of

⁴⁴ CHICAGO CMTY POLICING EVALUATION CONSORTIUM, COMMUNITY POLICING IN CHICAGO, YEAR TEN: AN EVALUATION OF CHICAGO’S ALTERNATIVE POLICING STRATEGY (2004) [hereinafter CAPS EVALUATION].

⁴⁵ *See id.* at 1.

⁴⁶ *Id.*

⁴⁷ *See id.*

⁴⁸ *See id.* at 6–8.

⁴⁹ *See id.* at 35.

⁵⁰ *Id.* at 91.

⁵¹ *Id.*

seeing prostitutes from 9 pm to 11 pm, positive loiterers came during those times.⁵²

In other cases, officers have taken on an even more entrepreneurial role. About ten years ago, for example, an innovative police commander named Claudell Ervin took it upon himself to organize a massive anticrime prayer vigil on Chicago's impoverished West Side.⁵³ Ervin invited hundreds of church leaders to attend a meeting at the police district headquarters; at this meeting, the group planned the vigil.⁵⁴ Participants stood and prayed in groups of ten on street corners usually occupied by drug dealers; following the vigil, the participants were joined by thousands of other residents in a large park for a "praise celebration" featuring food, speeches, and a 400-member gospel choir.⁵⁵ Variations of this prayer vigil have since become a standard community policing practice in Chicago.⁵⁶ The motivations of leaders like Ervin are obvious: low levels of social capital deprive these communities of the ability to organize informally. Order-maintenance efforts like prayer vigils and "positive loitering," taking their cues from the *Broken Windows* hypotheses, reflect a belief that when neighborhood self-governance disappears, public intervention can change the norms of public-space allocation, in part by physically displacing the individuals who currently are enforcing socially detrimental ones.

Community policing efforts also work to formalize police officers' roles as norm-enforcers. As numerous scholars (including Ellickson) have observed, police officers have always, to a greater or lesser extent, enforced norms of decorum in public spaces.⁵⁷ Indeed, well into the second half of the twentieth century, this was probably officers' primary responsibility.⁵⁸ While the officers were armed with laws criminalizing vagrancy-type offenses, formal arrests were never the primary way that police officers "kept the peace."⁵⁹ Most peacekeeping/order-maintenance efforts were informal.⁶⁰ In his classic study, *Varieties of Police Behavior*, James Q. Wilson wrote—a decade and a half before penning *Broken Windows*—that a patrolman "approaches incidents that threaten order *not in terms of enforcing the law but in terms of 'handling the situation.'*"⁶¹ The availability of legal sanctions for breaches of the public order

⁵² *Id.* at 92.

⁵³ See Dave Newbart, *Residents take Faith to Streets for Vigil: Participants Pray for West Side Peace*, CHI. TRIB. May 4, 1997 at C1.

⁵⁴ See Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1334–35 (2007).

⁵⁵ See *id.*

⁵⁶ See, e.g., CAPS EVALUATION, *supra* note 44, at 91–93; *Cabrini-Green Residents, Police Rally Against Violence*, CHI. SUN-TIMES, Aug. 6, 2001 at 20.

⁵⁷ Wilson & Kelling, *supra* note 24, at 33.

⁵⁸ See *id.*

⁵⁹ See Bittner, *supra* note 4, at 702–03.

⁶⁰ See *id.*; Wilson & Kelling, *supra* note 24, at 34.

⁶¹ WILSON, *supra* note 5, at 31 (emphasis in original).

did, however, provide an important backup to these informal order-maintenance efforts. Vagrancy, loitering, and public drunkenness prohibitions gave police officers broad discretion to decide when to arrest an individual for a breach of the peace.⁶² Because vagrancy laws rendered people deemed a threat to public order perpetually subject to arrest, the threat of a formal arrest provided a powerful motivator for compliance with officers' informal order-maintenance requests.⁶³

Community policing, however, institutionalizes the norm-enforcement process. In the CAPS setting, for example, formal "beat meetings" offer opportunities for concerned citizens to meet with officers and establish policing priorities.⁶⁴ In the first eight years of the program, over 550,000 people attended thousands of beat meetings in the city.⁶⁵ The officers at the meetings seek to identify the problems facing the communities that they are charged with protecting.⁶⁶ These "community-nominated problems" (to borrow from Debra Livingston) form the basis of a decentralized police policy, which hopefully draws legitimacy from the consensual police-citizen decision making process.⁶⁷ The result of this process is that police officers solicit information about, and then enforce, informal norms of resource allocation. The ten-year evaluation of the CAPS program, for example, suggests that policing priorities have evolved as the priorities identified through community policing change.⁶⁸ Commonly identified problems fall along a continuum of severity, ranging from noise generated by sports teams in a public park to serious drug trafficking.⁶⁹ The outcomes of community policing discussions—for example, the citizen-influenced decisions of police to pay more attention to the noise levels at softball games or to take more steps to clear drug mules from street corners—establish the new ground rules of public-space allocation.⁷⁰

The enforcement of *private* property regulations sometimes also results from community policing activities. For example, Catherine Coles and George Kelling have described how community policing discussions led residents of Baltimore's struggling Boyd Booth neighborhood to ask police to prioritize the remediation of property decay and abandonment.⁷¹ As a result, local officials provided funds for

⁶² See William J. Stuntz, *Crime Talk and Law Talk*, 23 REV. AM. HIST. 53, 157 (1995) (reviewing LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* (1993)).

⁶³ See WILSON, *supra* note 5, at 31–33; Bittner, *supra* note 4, at 710 (noting that police treated "the lesser norms of the criminal law" as something entirely distinct from law-enforcement); Stuntz, *supra* note 62; Wilson & Kelling, *supra* note 24 at 35.

⁶⁴ See CAPS EVALUATION, *supra* note 44, at 6.

⁶⁵ See *id.* at 7–8.

⁶⁶ See *id.* at 6.

⁶⁷ Livingston, *supra* note 25, at 1558.

⁶⁸ See CAPS EVALUATION, *supra* note 44, at 148.

⁶⁹ See *id.* at 90.

⁷⁰ See *id.* at 87–93.

⁷¹ See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 197–98 (1996).

boarding up vacant houses and making cosmetic improvements in the neighborhood, and a local public interest group organized residents to file public nuisance actions against drug houses and negligent property owners.⁷²

II. NORM-ENTREPRENEURSHIP OR NORM-ENFORCEMENT?

All of these activities flow from three baseline assumptions: First, government officials—usually police officers—can, and should, intervene to enforce “good” norms of order and suppress bad ones. Second, residents should be involved in identifying and prioritizing which norms should be enforced and which should be suppressed. And, third, citizen-directed government intervention can, over time, *change* norms—that is, can cause good norms to dominate in communities where bad ones once did.

A. Police as Norm-Entrepreneurs

There is ample evidence that government actors can engage in successful norm-entrepreneurship. Consider another personal example: When I was a child, my father smoked in the car, and he never wore a seat belt. Today, he always wears a seat belt, and he has quit smoking altogether. Neither behavioral change was motivated solely by concern for his health. Rather, he stopped smoking and buckled up primarily because of changes in societal norms, which were triggered in part by active government intervention in the “market for norms,” including the enactment of antismoking and seat belt laws that signaled disapproval of dominant norms.⁷³ (Changing racial attitudes, encouraged by the enactment of civil rights legislation in the 1960s represent another example of successful government-sponsored norm entrepreneurship.)⁷⁴ Still, as Richard McAdams has observed, echoing Ellickson, it is much more difficult to change *group norms* than *societal norms*.⁷⁵ Indeed, group norms can remain stable even when they conflict with societal norms.⁷⁶ For example, while antismoking norms may have taken hold in our society generally, some subgroups—for example, “bikers”—may continue to embrace smoking as socially acceptable, perhaps precisely because these groups prize deviant behavior.⁷⁷

⁷² See *id.*

⁷³ See, e.g., Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 27–28 (2001); McAdams, *supra* note 1, at 404–08; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

⁷⁴ See Ellickson, *supra* note 73, at 25; Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1081 (1995).

⁷⁵ See McAdams, *supra* note 1, at 388.

⁷⁶ See Ellickson, *supra* note 73, at 29; McAdams, *supra* note 1, at 388.

⁷⁷ See, e.g., Leigh Jones, *Smoking Ban Won't Hurt Biker Rally*, The Daily News, Aug. 12, 2009, available at <http://classifieds.galvnews.com/story.lasso?tool=print&ewcd=b354678fa5f0eb88>.

The social-norms proponents of order-maintenance policies, however, argue that community policing tactics like “assertive vigilance” can in fact change strong group norms, even in groups embracing socially deviant behavior.⁷⁸ This is possible. As Ellickson has observed, government policies “may provide the exogenous shock” that changes group norms—either by shifting a group’s “internal cost-benefit conditions” or by altering group composition.⁷⁹ Dan Kahan has made this claim about prayer vigils, arguing that the vigils “enervate the norms that fuel gang membership,” both by conveying to gang members that community members will not acquiesce to their efforts to dominate public spaces (for example, changing the cost-benefit conditions of gang behavior) and by signaling to would-be members that joining a gang may “diminish[] rather than enhance[] their status” (thereby altering gang composition).⁸⁰ Promisingly, a study conducted over the two years following the first prayer vigil in Chicago found that the vigils generated a number of important benefits.⁸¹ Religious leaders’ opinion of the police improved, and they became more interested in, and more likely to participate in, crime-prevention efforts.⁸² Since the initial vigil, churches and faith-based institutions also have come to play a prominent role in Chicago’s community policing efforts.⁸³ While this result might not please strict separationists, the improved relations allow police to enlist leaders of what are, in many inner city neighborhoods, *the* central community institutions.⁸⁴ Thus, it may be that, by enlisting these leaders—a group Ellickson would identify as likely “change agents”—the police can help change group norms, even of deviant groups like street gangs and even in a diverse and heterogeneous setting. Perhaps the intervention of African-American religious leaders, who command significant respect (even among deviant groups), represents a “tipping point” that triggers a reputational “norm cascade,” causing social deviants—for example, members of the VSL gang—to embrace mainstream norms.⁸⁵

B. The Police as Norm-Enforcers

On the other hand, it may be that social-norms scholars are overstating the norm-entrepreneurship potential of community policing programs. Instead of *changing* the

⁷⁸ See CAPS EVALUATION, *supra* note 44, at 91.

⁷⁹ See Ellickson, *supra* note 73, at 23–26.

⁸⁰ Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1865 (1999); see also Meares & Corkran, *supra* note 54.

⁸¹ See Meares & Corkran, *supra* note 54, at 1336–50.

⁸² See *id.* at 1345–46.

⁸³ See *id.* at 1347.

⁸⁴ See, e.g., *id.* at 1356–58 (discussing centrality of religion in African-American culture).

⁸⁵ On norm cascades, see, for example, Ellickson, *supra* note 73, at 26–27; Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685–87 (1999); McAdams, *supra* note 1, at 365–72.

norms governing public space allocation, police instead may be successfully *picking and choosing* between competing norms. Taking cues from the input provided at community policing meetings, officers may be suppressing the deviant group norms that have come to govern the allocation of public space in many urban communities and in turn enforcing normatively superior ones. While Ellickson, in *Controlling Chronic Misconduct*, advocated an active police role in the control of public spaces, he favored the informal allocation of public spaces—driven by police officers’ street-level norm-enforcement determinations—to the formalized mechanisms such as public space zoning.⁸⁶ While community policing activities do not institutionalize public-space allocation to the degree suggested in Ellickson’s “red-yellow-green” disorder-zone scheme,⁸⁷ they do formalize the norm-enforcement process to a much greater extent than the discretionary decision-making traditionally driving the actions of officers on the “beat.” Ellickson’s words of caution about the wisdom of enforcing group norms as a formal system of social control, therefore, apply.

The insider-outsider dynamic identified by Ellickson in *Order Without Law* suggests that, before choosing to enforce one set of norms and suppress another, policy-makers must understand that group norms frequently maximize group welfare by impoverishing non-group members.⁸⁸ This is no less a problem in inner city Chicago than it was in Shasta County, California.⁸⁹ Indeed, awareness of this dynamic was one of the reasons that James Q. Wilson expressed skepticism about the value of government intervention to shore up local community life in *The Urban Unease*.⁹⁰ Wilson observed that “[m]anaging these kinds of public disorder is a common task for the police, but one that they can rarely manage to everyone’s satisfaction—precisely because the disorder arises out of a dispute among residents over what *ought* to be the standard of proper conduct.”⁹¹ Sudhir Venkatesh’s ethnographic account of the underground economy in one poor Chicago neighborhood provides a real world example of this kind of dispute.⁹² Venkatesh describes how, when law-abiding residents organized to expel a gang from the community’s small park, a dispute arose over the level

⁸⁶ Ellickson, *Controlling Chronic Misconduct*, *supra* note 2, at 1243–45.

⁸⁷ Ellickson proposed a hypothetical scheme, where the ambient disorder levels varied by designated zone. As I have written elsewhere, however, a number of local government entities—ranging from public housing authorities to major cities—have adopted formal public space zoning schemes that exclude certain categories of disorderly people from disorder-ravaged communities. *See id.* at 1219–26; Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1092–99 (2005).

⁸⁸ ELICKSON, *supra* note 6, at 169.

⁸⁹ *See generally, id.* In *ORDER WITHOUT LAW*, Ellickson uses Shasta County to portray the ability of a community to operate without formal law. Through this portrayal he also chronicles the problems that Shasta County faces when operating under group norms. *Id.*

⁹⁰ Wilson, *supra* note 36.

⁹¹ *Id.* at 34.

⁹² SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* (2006).

of illegal conduct that should be tolerated in this important public space.⁹³ While a majority of the group supported allowing certain underground activities—for example, food sales and hair styling—a vocal minority “felt that all moneymaking in the park was unacceptable.”⁹⁴ These disagreements generated tension among the group that had organized informally to address the gang problem.⁹⁵ Venkatesh describes how their “differing opinions about the appropriateness of shady behavior” generated enough tension that, ultimately, the group stopped meeting.⁹⁶ Venkatesh also describes how tensions arose between residents and police officers who resisted demands to clear street “hustlers” from public spaces.⁹⁷ The officers, who worked with the hustlers to solicit information about illegal activity in the community, preferred to regulate their activities—to “try and get them not to harass people”—rather than to banish them altogether.⁹⁸ A resident responded, in a community policing gathering: “Not to harass people? . . . Your job is not to help them do their business, but to get them out of there. This ain’t a shopping mall.”⁹⁹

The insider-outsider dynamic also fuels civil libertarian skepticism of community policing policies. Critics worry that order-maintenance policies present opportunities for police abuse of power, by increasing the frequency and intensity of police-citizen interactions and failing to constrain the discretion that officers necessarily exercise during them.¹⁰⁰ They also express concern that the emphasis on police-citizen interaction will politicize police practices, inviting corruption and causing officers to side with citizens that they know well or believe to be politically influential.¹⁰¹ If officers become too close to the citizens that they are assigned to protect, they might begin to enforce “vigilante values” rather than criminal laws.¹⁰² These are, of course, serious concerns. Whenever I think of community policing, I am reminded of a comment that a former student, who grew up in inner city Atlanta, made during a seminar conversation about the value of community input in policing policies. “Do you *know* what kind of people go to community meetings?” she exclaimed. “Old people with nothing better to do than meddle in other people’s business!”

My student’s comment likely overstates what is a real problem: The picture painted by the citizens who attend community policing meetings is an incomplete

⁹³ See *id.* at 80–81.

⁹⁴ *Id.*

⁹⁵ See *id.* at 82–83.

⁹⁶ *Id.* at 83–84.

⁹⁷ *Id.* at 201–02.

⁹⁸ *Id.* at 201.

⁹⁹ *Id.* at 201–02.

¹⁰⁰ See Livingston, *supra* note 25, at 1572–73.

¹⁰¹ See Mark H. Moore, *Problem-Solving and Community Policing*, 15 CRIME & JUST. 99, 139. (1992).

¹⁰² See *id.* at 145; David Bayley, *Community Policing: A Report from the Devil’s Advocate*, in COMMUNITY POLICING: RHETORIC OR REALITY 225, 231–32 (Jack R. Green & Stephen D. Mastrofski eds., 1991); Livingston, *supra* note 25, at 1572–75.

one. There is a real danger that police actions, directed by this input, might disadvantage those who cannot, or choose not, to attend the meetings. For example, the ten-year evaluation of the CAPS program, discussed above, found that only about half of Chicago's Spanish speaking Latinos were aware that the program *existed* at all.¹⁰³ One could imagine, in a neighborhood facing immigration-driven demographic changes, and the evolution of the norms of public-space allocation that frequently accompany them, that community policing meetings might lead to policies that disadvantage newcomers. For example, tension between native-born shop owners and African immigrants was one subtext of past disputes about street vending in Harlem.¹⁰⁴

On the other hand, we should not lose sight of the fact that, in many urban communities, the "outsiders" impoverished by the dominant norms of public-space allocation are law-abiding citizens. In his plurality opinion in *City of Chicago v. Morales*, for example, Justice Stevens expressed concern that an officer might mistake a gang member innocently loitering outside Wrigley Field, "just to get a glimpse of Sammy Sosa leaving the ballpark," for one loitering "to rob an unsuspecting fan."¹⁰⁵ Yet, the citizens who testified in favor of the ordinance invalidated in *Morales* observed that gang members loiter to control public spaces by generating "terror" among other would-be public-space occupiers (that is, non-gang members).¹⁰⁶ Leaving to one side the constitutional issue presented in *Morales*—whether the antiloitering law posed a due process vagueness concern—surely it is acceptable for police to empower terrorized residents to reclaim public spaces through events like "smoke-outs."¹⁰⁷ As Ellickson himself observes, group welfare maximization "is a goal of limited normative appeal."¹⁰⁸ The fact that events like prayer vigils, "positive loitering," and smoke-outs limit the ability of gang members, johns, and drug dealers to enforce welfare-maximizing, but socially deviant, norms of public-space allocation is not a bad thing.

Of course, civil libertarians are correct that police enforcement of "mainstream" norms of public space allocation historically involved abuses of police authority and systematically disadvantaged the poor and racial minorities.¹⁰⁹ While this unfortunate history suggests that vigilance is in order, it does not necessarily suggest that police should avoid taking sides in disputes about the norms of public-space allocation. On the contrary, a strong case can be made that the suppression of deviant norms of

¹⁰³ See CAPS EVALUATION, *supra* note 44, at 3.

¹⁰⁴ See, e.g., Jonathan P. Hicks, *Many 125th Street Vendors Say They Will Resist Move*, N.Y. TIMES, Oct. 17, 1994 at B3; Robert McNatt, *Council Peddles Plans to Limit Vendors*, CRAIN'S N.Y. BUS., Feb. 1, 1993 at 12; *Peddlers Irk Stores in Harlem*, N.Y. TIMES, Sept. 24, 1990 at B3.

¹⁰⁵ 527 U.S. 41, 60 (1999).

¹⁰⁶ *Id.* at 100–01 (Thomas, J., dissenting) (quoting citizen testimony).

¹⁰⁷ See *supra* Part II.B.

¹⁰⁸ ELLICKSON, *supra* note 6, at 170.

¹⁰⁹ See, e.g., Ellickson, *supra* note 2, at 1209.

public-space allocation is morally required in a civilized society. As Randall Kennedy has argued, under-policing is arguably one of the most important civil rights issues facing many African-American communities.¹¹⁰ The only important question, in my view, is how the police will decide what norms to enforce. Ellickson's preference, made clear in *Controlling Misconduct*, is for informal, on-the-spot norm-enforcement decisions made by officers on the beat.¹¹¹ Others have argued that the decentralized nature of community policing policy, and the increased police-citizen interaction it entails, diminishes the risk of abuse and corruption by expanding the means by which police officers are held accountable for their decisions and behavior.¹¹² Clearly, police efforts to empower *private citizens* to enforce healthy norms of public-space allocation raise fewer civil liberties concerns than policies—such as the gang-loitering ordinance at issue in *Morales*—that require direct police intervention to suppress deviant ones.¹¹³

CONCLUSION

Informal norms, rather than legal rules, have long governed the allocation of urban public spaces. For many years, police officers melded law enforcement with norm-enforcement, with informal norm-enforcement ranking among officers' most important duties. After a period of relative inattention, police departments are again taking an interest in public-space norms of decorum, in part through community policing policies. Proponents argue that community policing efforts represent an example of successful government-sponsored norm-entrepreneurship. Perhaps. But they clearly represent a partial formalization of the norm-enforcement process. Ellickson's words of caution, and the concerns of civil libertarians, suggest that local officials must remain vigilant that community policing does not devolve into a fight among competing interest groups seeking to obtain government sanction for norms that maximize their access to public spaces. But neither the insider-outsider dynamic identified by Ellickson, nor legitimate civil liberties concerns about abuses of police discretion, should cause local governments to abandon the critical project of empowering law-abiding residents to intervene and regain access to our city streets, sidewalks, and parks.

¹¹⁰ RANDALL KENNEDY, *RACE CRIME & THE LAW* (1997).

¹¹¹ *See id.* at 1247.

¹¹² *See Livingston, supra* note 25, at 1559.

¹¹³ *See, e.g.,* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA* vii (1999); Richard E. Adams, et al., *Implementing Community-Oriented Policing: Organizational Change and Street Officer Attitudes*, 48 *CRIME & DELINQ.* 399 (2002); Matthew C. Scheider, et al., *The Impact of Citizen Perceptions of Community Policing on Fear of Crime: Findings from Twelve Cities*, 6 *POLICE Q.* 363 (2003).