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PANEL I: VICTIMOLOGY, REGULATION, AND THE TRANSFORMATION OF THE COMMON LAW

USING COMMON LAW PRINCIPLES IN REGULATORY SCHEMES (WITH A NOTE ON VICTIMOLOGY)

CASS R. SUNSTEIN*

In this Article, I will discuss two different things. First, I will explore strategies that might synthesize some of the virtues of the common law with the potential virtues of modern regulation to produce outcomes that would save both lives and money. Second, I will address problems of the rhetoric of victimization in this setting and maybe in other settings, too.

If economic analysis of law has shown anything, it has shown that the common law was a regulatory system, and that as a regulatory system the common law had many virtues.¹ It was, and is, highly decentralized; it is extremely flexible; and it is market oriented. Nonetheless, as a complete solution in an industrialized society, the common law is an inadequate remedy, and this for three different reasons.²

First, there is a widespread lack of information. Courts do not have the information that would enable them to make sensible decisions about the destruction of the ozone layer, about air pollution of the sort that one encounters in cities, or about occupational safety and health. Judges often lack the information, and litigants lack the information too.

The second problem involves not information, but externalities or transaction costs. Contracts are an inadequate solution in cases in which harms are felt by people who are not parties. The

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1. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

2. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* ch. 3 (1990).

tort system is an inadequate solution in situations in which the people who are not parties, but who are affected, are numerous, hurt just a little bit, and poorly organized. No modern nation runs a system of air pollution on the common law model, and that is good. A common law model would make no sense for air pollution.

Not only is there a problem of externalities and lack of information, there also is a democratic problem. The common law, for all its virtues, is not a democratic system. It is not a system in which representatives and the people make decisions about the basic terms of social life. In the system that aspires to be democratic, there has to be much room for politically accountable bodies making regulatory choices.

For these reasons, the common law has to be supplemented and, in some cases, supplanted by modern regulation. Now, I will address the problems in our system—the system we have chosen in the last twenty-five years. But let there be no mistaking the fact that the air is much cleaner and the water less dirty than it would have been had we continued to rely on the common law.³

This is an unremarked success story—the fact that the Environmental Protection Agency, although usually at excessive cost, has often reduced risk with respect to air and water. There is a political science story behind the fact that the success story is unremarked. It has to do with an odd coalition supporting silence on the part of critics of regulation and enthusiasts for regulation, neither of whom has a terribly great stake in describing success stories. Nonetheless, well over 100 million Americans once lived in areas that were dirty in terms of national health standards with respect to air. Now the number is much, much smaller and it continues to decrease. With respect to all of the conventional air pollutants, both ambient air quality levels and emission levels have gone way, way down—a terrific success story.⁴

Nonetheless, there are two big problems in the system of regulation, both of them stemming from the fact that we have cho-

3. See *id.* at 77-80.

4. See *id.* at 77; GREGG EASTERBROOK, *A MOMENT ON THE EARTH: THE COMING AGE OF ENVIRONMENTAL OPTIMISM* (1995).

sen a system of Soviet style centralized command and control.⁵ The first problem is one of poor priority setting. There is no systemic mechanism to ensure that we are going after real problems and not tiny problems. In fact, there tends to be a pollutant-of-the-month syndrome by which *USA Today* spurs regulatory initiatives, to which Congress and agencies react without getting a systematic sense of where that particular pollutant fits in our system.⁶ Command and control produces not only poor priority setting, but also a second problem—what Justice Breyer has described as mismatch:⁷ a poor fit between the problem that calls for regulation and the solution that government chooses.

Recall here two problems in the common law: lack of information and externalities (or transaction costs). If people lack information, the first thing to do is to provide them with exactly that. Too infrequently, however, does the national government acquire information and let markets and local government do their work once the information is furnished. Would it not be wonderful if workers equipped with information about the risks they face, or consumers equipped with information about the risks of goods, found out the relevant facts and then made their own decisions? Too frequently, government has displaced markets by commanding a particular outcome instead of reinforcing markets by letting people know the actual facts. And when externalities do exist, the appropriate response is usually not a rigid mandate from the Environmental Protection Agency, but some sort of economic incentive instrument—one that will ensure that the government is allowing companies that inflict harm on others to reflect in their prices the costs of the harms they are producing. Rigid federal mandates do not do that—they do not let markets do what markets are good at doing. A federal mandate system will produce all sorts of pathologies: regulations that accomplish very little good, some regulations that produce harm, and poor priority setting.⁸

I will now discuss some nonsolutions and then some solutions.

5. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993).

6. See AARON B. WILDAVSKY, *BUT IS IT TRUE?: A CITIZEN'S GUIDE TO ENVIRONMENTAL HEALTH AND SAFETY ISSUES* (1995).

7. See STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

8. See Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. (forthcoming Fall 1996); Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996) [hereinafter *Constitutional Moments*].

Three things, which I think are not terribly sound as solutions, are quite popular with the current Congress. These things in decreasing order of senselessness are moratoria,⁹ procedural barriers, and cost-benefit requirements.¹⁰ Moratoria on regulation are just too crude. They prevent things that might make a great deal of sense. "Super mandates" in the form of exhaustive paperwork requirements are a way of stultifying agencies in cases in which they might be doing good things. They are a way of ensuring the perpetuation of the status quo.

Cost-benefit analysis is a lot better than absolutism of the sort that some statutes require, and to engraft it on the current regulatory structure might well make things better. But imagine if the Soviet Union, in its dying gasps, had decided that it would have a new kind of five-year plan: a five-year plan based not on absolutes, but on cost-benefit analysis. Would that be a whole lot better than the Soviet style five-year plans that did not do cost-benefit balancing? If the EPA is told to do cost-benefit balancing, it will probably do better than it sometimes does. But it would be much better to have a more creative and imaginative solution, one that enlists the incentives and the information of the private sector rather than the lack of information and sometimes poor incentives of the public sector.

What would make better sense? Well, the government ought to be doing much more experimentation with informational strategies for controlling risk. In this way, it ought to improve and then rely on markets, private forces, and local governments by letting people know relevant facts—something the Center for Disease Control frequently does do. People ought to know what the risks are and act in their private capacity or in their local capacity. We ought to have much less in the way of mandates, much more in the way of disclosure strategies. This is an experimental approach that is in its incipient stages.

Instead of cost-benefit analysis, it would also be a really good idea to make those who inflict harm pay through economic incentives. We could even, as the Federal Water Pollution Act draft

9. See Cindy Skrzycki, *Slowing the Flow of Federal Rules; New Conservative Climate Chills Agencies' Activism*, WASH. POST, Feb. 18, 1996, at A1 (reporting that the Regulatory Transition Act would impose a one-year moratorium on federal regulations).

10. See Clyde W. Crews Jr., *Ending Regulation Without Representation*, WASH. TIMES, Feb. 28, 1996, at A19 (reporting that many Congressional reformers support cost-benefit requirements).

that the Republicans have proposed does, allow private contracting in the sense of private initiatives that develop alternative means of satisfying regulatory goals—that do so as well but much cheaper.¹¹ This proposal represents a potentially wonderful step that should maintain the current environmental benefits at a lower cost than the current programs.¹² The Democrats ought not be opposing it. What I am suggesting is an effort to integrate the virtues of the common law—its flexible, decentralized, and market-oriented character—in a way that responds to the vices of the common law: the lack of information, the fact that externalities are inflicted, and the fact that decisions are made by unelected judges rather than by people who actually are accountable to the public. These changes would include informational strategies and economic incentives.

Now, I will comment on the general rhetoric of victimization, which you will notice I have not used. My puzzle is that the common law, as a regulatory system, recognized a lot of rights and gave people causes of action. But that was part of people's agency; in fact, it was a big part of their agency. It is not thought that when people at common law have rights and wield them, they are thereby converted into victims.

I am about 400 pages into Mr. D'Souza's book.¹³ He is a real fan of Martin Luther King, Jr. Martin Luther King, Jr. and Justice Thurgood Marshall, my old boss, sought legal remedies for harms, sometimes self-consciously building on the common law. For those who deplore the call to victimization, Martin Luther King, Jr. certainly is not a villain of the piece. King and Justice Marshall do not appear as pitiful victims. And the Contract with America is not charged with turning people into victims or with partaking of the culture of victimology. It urges legal rights in the form of property rights and legal protection for people who are subject to overzealous regulation.¹⁴

This is the puzzle: when does the fact that the legal system

11. See Larry Wheeler, *Dire Consequences Forecast in Rewriting Clean Water Act*, GANNETT NEWS SERV., May 10, 1995 (reporting that the Federal Water Pollution Act will shift power over water pollution regulation to localities).

12. See *Constitutional Moments*, *supra* note 8.

13. DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTICULTURAL SOCIETY* (1995).

14. See Mary Deibel & Scripps Howard, *Senators Back Legislation for Landowners' Rights*, THE PLAIN DEALER, Oct. 1995, at 18A (reporting that the House approved a property rights protection bill).

recognizes a right stigmatize someone as a victim? My hypothesis is that it does so when the relevant right seems not to deserve to qualify as such. That is the question we ought to be addressing; it is a substantive question. My concern is that the use of the term "victimology" bypasses the substantive question of which rights ought to be recognized. It does so through a kind of rhetorical flourish that is, I fear, starting to become a substitute for thought. I am proud to say that the Federalist Society was founded in part at the University of Chicago, and one of its best characteristics has been an attack on liberal shibboleths by looking at real consequences and specific problems and by asking what law actually does, not by throwing around rhetoric as liberal thought often did in the 1960s and '70s. My concern is that it would be unfortunate if the term victimology became a new question-begging shibboleth—one that was not an invitation to concrete thought about real problems, but that operated to truncate thought in the form of an accusation.

In sum, I have not used the word victimology; I do not think it is a very helpful concept in this context. It might not be very helpful elsewhere. With respect to substance, it would be very good if we did not ask, as *The New York Times* is asking today, whether we are going to "roll back" environmental regulation or not.¹⁵ It would be good if we did not debate, as Congress is now debating, whether we are going to have "more" or "less" regulation. Such questions can be answered, but in a way that is too crude to help. It would be much better if we could synthesize the virtues of private law—its market-oriented, efficient mechanisms—with the virtues of regulation, and if we could do that by relying far more than we have previously on informational approaches, market fortifications, and economic incentives that improve but do not bypass markets.

15. See John H. Cushman Jr., *Opponents Nervous as a Democrat Tries Regulatory Overhaul*, N.Y. TIMES, Mar. 12, 1996, at A13.