

2005

# A New Progressivism

Cass R. Sunstein

Follow this and additional works at: [https://chicagounbound.uchicago.edu/law\\_and\\_economics](https://chicagounbound.uchicago.edu/law_and_economics)



Part of the [Law Commons](#)

---

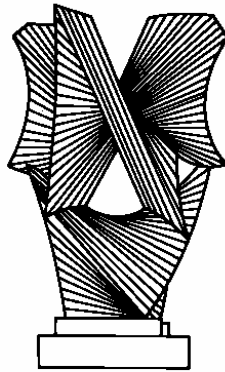
## Recommended Citation

Cass R. Sunstein, "A New Progressivism" (John M. Olin Program in Law and Economics Working Paper No. 245, 2005).

This Working Paper is brought to you for free and open access by the Coase-Sandor Institute for Law and Economics at Chicago Unbound. It has been accepted for inclusion in Coase-Sandor Working Paper Series in Law and Economics by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 245  
(2D SERIES)



## A New Progressivism

*Cass R. Sunstein*

**THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO**

May 2005

This paper can be downloaded without charge at:  
The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html>  
and at the Social Science Research Network Electronic Paper Collection:  
[http://ssrn.com/abstract\\_id=726443](http://ssrn.com/abstract_id=726443)

# A New Progressivism

Cass R. Sunstein\*

## Abstract

Based on an address for a conference on Law and Transformation in South Africa, this paper explores problems with two twentieth-century approaches to government: the way of markets and the way of planning. It urges that the New Progressivism simultaneously offers (1) a distinctive conception of government's appropriate *means*, an outgrowth of the late-twentieth-century critique of economic planning, and (2) a distinctive understanding of government's appropriate *ends*, an outgrowth of evident failures with market arrangements and largely a product of the mid-twentieth-century critique of *laissez faire*. It emphasizes the need to replace bans and commands with appropriate incentives, and to attend to social norms and social meanings in leading human behavior in welfare-promoting directions. The ultimate goal is to promote some of the goals associated with America's New Deal and Europe's social democracy, but without using the crude, inflexible, and often counterproductive methods associated with those approaches. Some attention is devoted to the effects of globalization, the AIDS crisis, crime prevention, and the role of economic growth.

## Introduction: Means and Ends

The German psychologist Dietrich Dorner has done some fascinating experiments designed to see whether people can engage in successful social engineering.<sup>1</sup> Dorner's experiments are run via computer. Participants are asked to solve problems faced by the inhabitants of some region of the world; the problems may involve poverty, poor medical care, inadequate fertilization of crops, sick cattle, insufficient water, or excessive hunting and fishing. Through the magic of the computer, many policy initiatives are available (improved care of cattle, childhood immunization, drilling more wells), and participants can choose among them. Once particular initiatives are chosen, the computer projects, over short periods and then over decades, what is likely to happen in the region.

In these experiments, success is entirely possible; some initiatives will actually make for effective and enduring improvements. But most of the participants—even the most educated and professional ones—produce calamities. They do so because

---

\* This paper is based on a keynote address on a conference on Law and Transformation in South Africa; readers are asked to make allowances for a paper originally intended for oral presentation. I am grateful to Lesley Wexler for superb research assistance and to Martha Nussbaum and Theunis Roux for many helpful comments and discussions.

<sup>1</sup> Dietrich Dorner, *The Logic of Failure* (1997).

they do not see the complex, system-wide effects of particular interventions. For example, they may see the importance of increasing the number of cattle, but once they do that, they create a serious risk of overgrazing, and they fail to anticipate that problem. They may understand full well the value of drilling more wells to provide water, but they do not anticipate the energy and environmental effects of the drilling, which then endangers the food supply. Only the rare participant is able to see a number of steps down the road—to understand the multiple effects of one-shot interventions into the system.

## NOT A MIDPOINT

Since the 1980s, many nations have been concerned to make three transitions. The first involves the shift from an authoritarian system to some kind of democracy. The second involves the creation of a secure system of individual rights. The third involves the introduction of reforms that will promote economic growth. The relationships among the three transitions are complex and contested. Are rights necessary for democratic self-government, or antithetical to it? Might democracy undermine economic growth, at least if people are demanding measures that will make prosperity less likely? Will a stable system of rights weaken, or strengthen, the prospects for economic development?

My goal in this essay is to elaborate an understanding of government's role that promises, at once, to strengthen individual rights, to promote democratic self-rule, and to increase economic growth. With some trepidation, I will use describe this understanding as a New Progressivism. New Progressivists attempt to combine an appreciation of a great lesson of the first half of the twentieth century, the failure of markets, with an appreciation of the great lesson of the second half of the twentieth century, the failure of planning. New Progressivists offer a certain conception of both rights and democracy. They understand rights to include freedom from desperate conditions; they understand democracy to require a certain measure of deliberation and reflection, rather than automatic responses to what the public currently wants. Because freedom from desperate conditions is a right, they are concerned that total reliance on is connected with a failure to protect individual rights. They also think that a deliberative democracy will supplement markets, and hence that a system of market

ordering alone does not allow a proper domain for democratic self-rule. The failure of planning is simultaneously a failure in terms of economics, democracy, and rights.

I urge that the New Progressivism simultaneously offers (1) a distinctive conception of government's appropriate *means*, an outgrowth of the late-twentieth-century critique of economic planning, and (2) a distinctive understanding of government's appropriate *ends*, an outgrowth of evident failures with market arrangements and largely a product of the mid-twentieth-century critique of *laissez faire*. For this reason the New Progressivism should not be seen as a compromise between right and left, or as an effort to seek some midpoint between those who believe in markets and those who reject them. Far from being a compromise or a midpoint, the New Progressivism offers both means and ends of its own.

With respect to means, the New Progressivism rejects approaches prominently associated with both social democracy and the New Deal, on the ground that they are frequently ineffective or even counterproductive, especially from the economic point of view. To the New Progressivists, social democrats are too often like participants in Dorner's experiments, compromising economic and other goals without much sense of what they are doing. Those who endorse the New Progressivism are insistently focused on *consequences*, and they know that initiatives designed to help people who need help might backfire in practice—and that good intentions are no excuse for bad consequences. Above all, those who endorse the New Progressivism have learned from the past fifty years of experience with markets and with efforts to discipline and constrain markets. They are alert to side effects and unintended harmful consequences. Wherever possible, they attempt to use market-oriented strategies, enlisting markets on behalf of human interests—not because those strategies are morally superior, and not because markets have special moral claims (they do not), but because such strategies are likely to work. New Progressivists believe that if economic growth is a goal, markets should be enlisted far more often than they now are.

It follows that New Progressivists are alert to the central role of civil society, and especially to the importance of *social norms*, which often drive private behaviour and which can change, for better or worse, over time. They are also skeptical, on both economic and democratic grounds, of command-and-control regulation and of aggressive interference with the labour market. They want to supplement markets, not

to displace them. They favour such initiatives as the Earned Income Tax Credit (EITC) and housing subsidies for the poor, and they are cautious about a high minimum wage and rent control legislation. They believe that environmental problems should be handled through economic incentives, not through centralized mandates, which invite protectionism and interest-group maneuvering. Thus, for example, the New Progressivism

- attempts to control problems associated with social norms, such as crime, unsafe sex, and other risk-taking behavior, through democratic efforts at *norm management*, often involving public-private partnerships;
- places the highest possible premium on education and training;
- rejects economic protectionism;
- favors incentives rather than centralized governmental commands;
- attempts to ensure flexibility in the labour market if and on the ground that it helps low-income workers as well as others;
- sees economic growth as a central (though far from exclusive) part of antipoverty policy.

So much for means—what of ends? Those who endorse the New Progressivism seek initially to achieve an *incompletely theorized agreement*<sup>2</sup>—an agreement on various practices and initiatives capable of attracting support from a wide range of theoretical perspectives. Utilitarians, Kantians, those who begin from diverse theological positions, and numerous others can support the approach urged here. But to the extent that theoretical depth is required, New Progressivists will insist that markets should be identified with neither justice nor liberty. They do not think that markets will inevitably protect individual rights, especially because they believe that the right to be free from discrimination counts as a right, one that markets can promote. They see markets as operating against a background that includes considerable injustice, and also limited liberty. They think that to a large degree, market ordering will merely build on that unacceptable background.

At the same time, New Progressivists have considerable sympathy for some of the rights emphasized by social democrats in Europe and New Dealers in the United States: decent life prospects for all, a social safety net, a safe environment, genuine equality of opportunity. But they believe that these rights have often been quite murky

and ill defined—and also that they have been confused, too often, with a kind of freestanding egalitarianism, concerned to ensure equal economic outcomes as such. Those who believe in a New Progressivism insist on an acceptable floor for everyone. But they are not much concerned with large disparities in wealth, not because these are fair, but because the much more important goal is to ensure decent outcomes for all, and because allowing such disparities may well be necessary to provide appropriate incentives.

To those who believe in a New Progressivism, what is most necessary is to ensure that basic *human capabilities* do not fall below a certain, reasonably generous threshold.<sup>3</sup> To this New Progressivists add a distinctive conception of equality, one that forbids second-class citizenship, or lower caste status, for members of any group. This *anticaste principle* makes sex equality a singularly high priority, as a means for economic development and an end in itself. The rights embodied in the anticast principle are indispensable to growth. They promote democracy as well. For these reasons, the New Progressivists hope to offer a conception of government that simultaneously promote democratic and economic goals, and that does so without compromising individual rights, properly conceived. Of course these various ideas can be specified in ways that will lead to intense conflicts among them. New Progressivists attempt a specification that will reduce the conflicts, seeing rights, for example, as a precondition for democracy and growth, and seeing growth as an (imperfect) ally of rights.

## OF MESS AND MENACE

There has of course been a great deal of recent discussion, both supportive and critical, of what a ‘Third Way’ might involve. What I am calling the New Progressivism has an obvious relationship to the idea of a Third Way, especially insofar as those who endorse Third Way thinking tend to be receptive to markets and growth at the same time that they are committed to improving the rights of disadvantaged people. I do not intend here to summarize that discussion, or to endorse

---

<sup>2</sup> See Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996).

<sup>3</sup> See Amartya Sen, *Development As Freedom* (1999); Martha Nussbaum, *Women and Human Development* (1999); Anthony Giddens, *The Third Way and its Critics* (2000).

the Third Way programme.<sup>4</sup> What I mean to do instead is to develop a freestanding account of what a New Progressivism might be understood to entail.

The American law professor Karl Llewellyn is said to have said, ‘Technique without morals is a menace; but morals without technique is a mess.’ This is a fitting criticism of some of the experiments in social democracy of the last several decades; it is a shorthand description of the failures of many participants in Dorner’s experiments, failures with parallels in the economic and democratic disasters brought about by twentieth-century ‘planners’ of various stripes. But Llewellyn is also said to have said: ‘Morals without technique is a mess; but technique without morals is a menace.’ This is a fitting criticism of many twentieth-century experiments in social engineering, but it is a criticism too of excessive reliance on free markets. The real task, for those interested in a New Progressivism, involves development of approaches and methods that are neither menace nor mess.

Recent debates, including debates over the Third Way, have drawn attention to two possible strategies for dealing with markets: to leave them alone or to displace them. But the dichotomy is much too simple; in fact it is damagingly simple. It is too simple, first, because the idea of ‘displacing’ markets conceals a range of options, from nationalizing industries, to blocking certain deals, to limiting waivers, to providing information. It is too simple, second, because it is possible to complement rather than to displace markets—to provide institutions that do what markets do not do, and to help people who are failed by markets, an emphatically human institution. As Amartya Sen has written, very much in the spirit of the New Progressivism, ‘it is possible to argue at the same time both (1) for more market institutions, and (2) for going more beyond the market.’<sup>5</sup>

With respect to methods and strategies, that is what I will be suggesting here. Throughout I will paint with an extremely broad brush, discussing many issues that could easily be treated in a short book, or even a long one. My hope is that the brisk and sometimes reckless treatment of many issues might make up for its otherwise unpardonable neglect of the trees, by providing a decent perspective on the forest, a

---

<sup>4</sup> Two prominent discussions are Anthony Giddens, *The Third Way* (1998), and Giddens, *ibid.* In my view, Giddens offers too large a collection of ideas, a pastiche in fact, and too much of his discussion is platitudinous. Amartya Sen and Jean Dreze, *India* (1997), does not bill itself in these terms, but it seems to me the best presentation of what a New Progressivism might actually look like. Cass R. Sunstein, *Free Markets and Social Justice* (1997), is also intended to set out ideas in this direction.

<sup>5</sup> Sen and Dreze, *ibid.* at 28.



perspective that perhaps continues to be absent from existing treatments of possible twenty-first century ‘ways’.

The plan of the essay is as follows. The second part offers a brief discussion of two familiar ‘ways’ and of what is wrong with them. Here globalization is seen to be a process that intensifies problems with *both* markets and planning, in a way that jeopardizes economic growth and also certain individual rights. The third part deals with social norms, especially in the context of crime prevention, HIV/AIDS, and related problems. The fourth part deals with employment policy and poverty. The fifth part explores command-and-control regulation and some alternatives, especially in the context of environmental protection. The sixth part investigates the importance and limits of economic growth, with particular stress on the need to attend to human capabilities and sex equality. The seventh part is a brief conclusion.

## **Two ‘Ways’—and Globalization**

### THE WAY OF MARKETS AND THE WAY OF PLANNING

If there is a New Progressivism, what is it opposing? There are two candidates. Let us understand the first to be a version of the Reagan-Thatcher programme, routed above all in the work of Nobel Prize winner Friedrich Hayek. Call this ‘the way of markets’.

On this view, free markets are indispensable to liberty, rights, and economic growth. The role of the state is to create the preconditions for well-functioning markets, by establishing rights of private property and freedom of contract, by ensuring competition rather than monopoly, and by preventing force and fraud. Perhaps the government should also provide a social safety net, though a relatively weak one (to ensure proper work incentives). But according to those who endorse the way of markets, government should not interfere with the labour market through, for example, high minimum wage requirements or through special protections for labour unions. And those who endorse the way of markets place the highest possible premium on economic growth, on a particular, market-based conception of liberty, and on social ordering through market ordering, which they see as essential to growth and liberty alike. Of course there is a spectrum of possible approaches here, from those who reject a social safety net to those willing to accept an ample set of

protections for those at the bottom. What I mean to emphasize, sometimes captured in the idea of ‘neo-liberalism’, or ‘liberalization’, is the idea of placing primary emphasis on free markets and economic productivity.

Like the way of markets, the way of planning is actually a spectrum of ‘ways’, ranging from Soviet-style centralized planning to those forms of social democracy (not excluding America’s) that are comfortable, in some areas, with nationalized industries, aggressive regulation of markets, price and wage controls, and most generally ‘planning’ of various kinds. As random examples, consider the following:

- laws that make it difficult for employers to discharge employees;
- laws that make it hard for landlords to evict tenants;
- environmental regulation that specifies the technology that must be used by industry;
- high minimum wage requirements;
- tariffs;
- public ownership of industry;
- ceilings and floors on prices as a whole.

Of course it is possible for a nation to adopt narrow or broad plans, or to be a planner in only a few small domains. A government that is generally skeptical of planning might conclude, for example, that it makes sense to have tariffs in some areas, or that agriculture should be protected with price supports, or that workers should be protected from discharge, or that technological requirements are properly placed on new cars, to reduce levels of air pollution.

## PROBLEMS AND STRESSES

Let us now briefly explore some of the problems in both of these ‘ways’. For those who seek the way of markets, the initial difficulty is that markets should not be identified with liberty or with rights properly conceived. Markets operate against the backdrop set by existing distributions of resources, opportunities, and talents. When an employee is able to attract only a small amount of money for an hour’s work, it is surely wrong to say that liberty is respected if we simply respect the deal. To the extent that existing distributions are a product of a lack of liberty, market ordering is a problem, not the solution. Whether the deal should be disrupted is another question.

But what markets generate does not come, from the standpoint of liberty, with a stamp of approval.

An equally fundamental problem is that the consequences of market ordering may not be so wonderful for many people, who will be left with bad opportunities and few resources. It should not be necessary to belabour this point. In any large nation, respect for market ordering will predictably produce a situation in which millions of people end up with low wages, long hours, and bad working conditions—if they end up with work at all. Of course a social safety net can help. But even if it is generous, it is not going to do all of what must be done. It will not, for example, protect people against unsafe working conditions, sexual harassment, pollution, or unfair discrimination. To the extent that the category of rights includes protection against some or all of these injuries, markets will compromise rights. Indeed we have every reason to believe that in some circumstances, markets will promote discrimination—as, for example, when customers or coworkers would prefer someone of a certain race or gender.

At the same time, democratic values are compromised by any effort to treat “the market” as sacrosanct. Put to one side the evident point that markets must be created by government, willing and able to protect private property and freedom of contract. A real problem is that a democratic citizenry will often want to supplement or displace markets, simply to protect the interests of some, many, or all. A commitment to market ordering will sharply diminish the terrain by which people make choices about the kind of society in which they will live.

But planning faces difficulties of its own. One problem is that it is exceedingly likely to be vulnerable to pressures from self-interested private groups with stakes in a particular outcome. If so, democracy is jeopardized. It is very common, for example, to observe environmental regulation being turned into a mechanism for the distribution of benefits to groups whose interests have precious little to do with environmental protection.<sup>6</sup> An even more fundamental problem has to do with the unintended bad consequences of the most well-motivated plans. ‘Planners’ are constantly surprised. To take just two examples, a law that makes it hard for employers to discharge employees is likely to make employers reluctant to hire people

---

<sup>6</sup> In the United States, a classic discussion is Bruce Ackerman and William Hassler, *Clean Coal/Dirty Air* (1983).

in the first instance; a high minimum wage is likely to decrease employment. The problem is pervasive, and it can lead to unfortunate consequences, especially for the disadvantaged. We can understand the problem a bit better in light of Dorner's work, showing the unfortunate systemic effects of one-shot interventions. Economic and social orders are *systems*, and the difficulty with plans is that their architects are infrequently able to foresee the consequences of their actions.

Planners frequently refer to the unfairness of markets, and they are often right to do so. But a reference to unfairness should not be allowed to support laws that actually do no good. In Sen's words, "The rhetoric of 'equity' has often been invoked to justify governmental interventions without any scrutinized political assessment of how these powers will be exercised and what actual effects they will have. In practice, these ill-directed regulations have not only interfered often enough with the efficiency of economic operations (especially of modern industries), they have also failed fairly comprehensively to promote any kind of real equity in distributional matters."<sup>7</sup> The point does not show that all plans are bad. But an overriding problem with the way of planning is simply that the consequences of plans are often bad from the perspective of well-meaning planners themselves. Plans may well violate rights, as has often been seen in Communist nations. But plans are often ineffectual too, and the result can be economic disaster. A low GDP is no ally of individual rights, especially if we understand poverty as a rights violation.

## THE ROLE OF GLOBALIZATION

Thus far I have said nothing about globalization. (By the term I mean to refer, very simply, to the increasing mobility of persons, information, and products from one area of the globe to another.) What is the effect of globalization on the way of planning and the way of markets?

The most important point is that with respect to markets and planning, global pressures produce a difference not of kind but of degree. We best think of a situation of globalization as 'like ordinary domestic markets—only more so'. The major effect of global pressures is to intensify competition, so that stringent national regulation might well leave companies within the nation at a disadvantage both abroad and at

home. The resulting disadvantage might be reduced through protectionist measures, but these create familiar problems of their own, because they hurt local consumers (by increasing prices) and are likely, generally speaking, to harm the national economy.

In fact globalization increases the problems associated with both of the two 'ways'. Insofar as markets produce rights violations of certain kinds, and bad results for millions of people, global pressures increase the difficulty. (Of course such markets also carry many benefits as well, for poor people as well as everyone else, especially insofar as the consequence is to cut prices.) If workers within the nation have to compete with everyone in the world, or in any case with a larger class of people, those without training and skills are going to be left further behind. At the same time, global pressures will inevitably confound ill-considered 'plans'. Because markets are frequently global, the effects of plans will often be very different from what was sought and anticipated. This is a particular problem if, for example, an effect of stringent regulation of the labor market is to reduce the demand for domestic labour, thus hurting workers themselves.

This is hardly a claim that states are incapable of governing in a global era. There is a great deal that they can do. Evidence simply does not support the claim that the increased mobility of capital has disabled national regulation. But it is a claim that the problems with the two ways are simultaneously compounded by the existence of global markets.

#### THE ROLE OF COSTS: THE INEVITABLY CLOSE RELATIONSHIP BETWEEN RIGHTS AND MONEY

Those who favour markets and those who favour planning often make a sharp distinction between 'negative rights' and 'positive rights'. The former are said to be barriers to government action, and to that extent costless. The second are said to be entitlements to government protection, and to that extent costly. Market enthusiasts argue for the former and against the latter. Planners tend to argue for both.

---

<sup>7</sup> Sen and Dreze, n. 4 above, at 186.

From the standpoint of the New Progressivism (as well as from the standpoint of the Constitutional Court of South Africa<sup>8</sup>), both views suffer from a problem that is both conceptual and practical: along the relevant dimension, there is no difference between negative and positive rights. *Both* consist of entitlements to government action, and to that extent, both are costly. In a poor nation, both sorts of rights are at risk. Compare, for example, the right to free speech with the right to a minimum income. In a state of effective anarchy, or in a state without funds, neither right can exist. Of course the minimum income guarantee will lack taxpayer support. But the same is true for the right to free speech. Without a judiciary willing to protect people from public (as well as private) intrusions on freedom of speech, that freedom cannot exist. Without a state willing and able to prevent public marauders from silencing opposition, free speech is a chimera. Without public protection against private acts of violence against controversial statements, free speech is plainly absent.

What is true for free speech is true for the whole universe of negative rights.<sup>9</sup> Consider, for example, two of the most quintessential liberal rights: the right to private property and the right to freedom of contract. Both of these depend not incidentally but essentially on government protection. Private property does not exist in the state of nature. It is a taxpayer-subsidized right, justified on the ground that it benefits individuals and society as a whole. People can make contracts without a strong state; but unless a legal system, subsidized by taxpayers, stands ready and able to ensure that contracts are enforced, what force are mere words likely to have?

Those who believe in a New Progressivism know that all rights are costly and that a poor state cannot protect rights. One of the reasons why they favour a strong economy, and economic growth, is that these are important preconditions for ample rights protection. And in a rich or poor state, it follows that a central task for democratic self-government is to obtain the necessary funds and to ensure that they are allocated in a way that reflects sensible priority setting. The field of public finance is not separable from the field of democratic theory.

---

<sup>8</sup> See *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) S.A. 744 (CC) para 77.

<sup>9</sup> For detailed discussion, see Stephen Holmes and Cass R. Sunstein, *The Cost of Rights* (1998).

## **Social Meaning and Social Norms (with Particular Reference to HIV/AIDS, Crime, Discrimination, and Environmental Protection)**

Those who endorse the way of markets have little to say about the relationship between government and civil society. Civil society is defined as equivalent to economic society. Thus market enthusiasts tend to rely on existing norms and preferences; this is part of their conception of *laissez faire*. Those who endorse the way of planning also have little to say about civil society, sometimes treating it as a domain that must be enlisted in the interest of social goals. But there is a better approach, one that promises to do what governments often seek to do, but at lower cost. Such an approach would emphasize several points: (1) the crucial importance of social norms in producing both desirable and undesirable behaviour; (2) the inevitable role of government in helping to constitute such norms; (3) the dependence of social norms on current information; (4) the often-rapid change in social norms over time; (5) the extent to which highly visible, or cognitively ‘available,’ examples and events can alter norms and behaviour; and (5) the possible use of government power to move norms in desirable directions.

As we will see, these points help suggest such promising possibilities for controlling many social problems, including crime, HIV/AIDS, discrimination, and environmental protection. What I will be emphasizing here is the significance of *social cascades*, including *norm cascades*, in which social interactions can lead behaviour in dramatic directions. Sometimes such cascades are induced by new beliefs; sometimes they are induced by new understandings of the meaning of certain actions. Since people take their cues from the actions of others, and since they care about their reputations, certain policies can backfire, and certain others can have large and desirable effects.

### **PROBLEMS WITH BANS, ECONOMIC AND OTHERWISE**

When government seeks to discourage certain conduct, what should it do? Those committed to planning generally have a simple answer: Forbid it. Those committed to markets provide the same answer, though they are reluctant to ask government to discourage private behaviour falling outside the basic categories of force and fraud. Those who believe in a New Progressivism think that the shared answer—‘forbid

it’—is much too simple, and in important ways misleading and even damaging, both to rights and to the economy. I am speaking here, then, of a promising but often overlooked means for promoting a range of social goals.

New Progressivists do believe that incentives are important, and for anyone who believes that, it seems natural to think that if conduct is banned, there will be less of it. But bans create problems of their own. In some circumstances they can be self-defeating, producing more of the behaviour that they seek to reduce. The reason is that behaviour is often driven by social norms, and hence by the signal that the behaviour carries; a ban can amplify the signal and increase the conduct. Suppose, for example, that people are engaging in certain harmful conduct precisely because the conduct is a way of defying authority and offering certain signals to relevant people. You might smoke, for example, precisely because smoking is, in some places, a dissident act; so too with a decision to engage in unsafe sex; so too for a decision to commit a crime. In short, actions have meanings, and the *social meaning* of action is an important determinant of what people will do and when they will do it. (In the United States, some increases in risky sex have come from deliberate efforts at defying efforts to convince people to use condoms.)

Many people will engage in conduct that they do not otherwise enjoy or value, because of the social meaning of engaging in it; many people will fail to engage in activity that they would enjoy or value, for exactly the same reason. If the social meaning of harm-avoiding activity is cowardice or capitulation, people are likely to refuse harm-avoiding activity. If the social meaning of harm-producing activity is boldness and independence, people are more likely to impose harms. In these circumstances any governmental effort to ‘forbid’ certain conduct might be futile or even counterproductive. If what is driving behaviour is its social meaning, the effect of a ban could be to increase it, by increasing the strength of the signal that is the motivation after all. Compare the finding that when people are paid to engage in certain desirable activity (cleaning up, for example, or arriving on time to pick up children from school), they will sometimes actually engage in that behaviour less rather than more, because the payment reduces the effect of the norm, which would otherwise have the effect of the payment.

DOING WHAT OTHERS DO



Those who seek a New Progressivism are especially interested in enlisting an understanding of social norms and social meanings in the service of improved policies, involving both rights and growth. They emphasize that in many domains, people frequently think and do what they think and do because of what they think (relevant) others think and do. Thus, for example, employees are more likely to file suit if members of the same workgroup have also done so<sup>10</sup>; teenage girls who see that other teenagers are having babies are more likely to become pregnant themselves<sup>11</sup>; littering and non-littering behavior appears to be contagious<sup>12</sup>; the same is true of violent crime<sup>13</sup>; those who know other people who are on welfare are more likely to go on welfare themselves<sup>14</sup>; the behaviour of proximate others affects the decision whether to recycle<sup>15</sup>; a good way to increase the incidence of tax compliance is to inform people of high levels of voluntary tax compliance<sup>16</sup>; and students are less likely to engage in binge drinking if they think that most of their fellow students do not engage in binge drinking, so much so that disclosure of this fact is one of the few successful methods of reducing binge drinking on university campuses in the United States.<sup>17</sup>

Social influences affect behaviour via two different mechanisms. The first is informational. If many other people support a particular candidate, or refuse to use drugs, or carry guns, observers, and particularly observers within a common group, are given a signal about what it makes sense to do. The second mechanism is reputational, as group members impose sanctions on perceived deviants, and would-

<sup>10</sup> See Harold H. Gardner, Nathan L. Kleinman, and Richard J. Butler, 'Workers' Compensation and Family and Medical Leave Act Claim Contagion', (2000) 20 *Journal of Risk and Uncertainty* 89, 101-10.

<sup>11</sup> See, e.g., George A. Akerlof, Janet L. Yellen and Michael L. Katz, 'An Analysis of Out-of-Wedlock Childbearing in the United States', (1996) 111 *Quarterly Journal of Economics* 277.

<sup>12</sup> See R. Cialdini *et al.*, 'A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places', (1990) 58 *Journal of Personality and Social Psychology* 1015.

<sup>13</sup> See *Washington Post* (December 1999). [Exact date? Query author]

<sup>14</sup> See Marianne Bertrand, Erzo F.P. Luttmer and Sendhil Millainathan, *Network Effects and Welfare Cultures* (unpublished manuscript, April 9, 1998).

<sup>15</sup> See Ardith Spence, *Wants for Waste* (unpublished Ph.D. dissertation, University of Chicago, 1999).

<sup>16</sup> See Stephen Coleman, *The Minnesota Income Tax Compliance Experiment State Tax Results* (Minnesota Department of Revenue, April 1996).

<sup>17</sup> See H. Wesley Perkins, 'College Student Misperceptions of Alcohol and Other Drug Norms Among Peers', in *Designing Alcohol and Other Drug Prevention Programs in Higher Education* (US Department of Education ed., 1997) 177-206; Timur Kuran and Cass R. Sunstein, 'Availability Cascades and Risk Regulation', (1999) 51 *Stanford Law Review* 683, 767. A good outline of contagion effects can be found in Gardner, Kleinman and Butler, n. 9 above, at 91-4.

be deviants anticipate the sanctions in advance.<sup>18</sup> Even when people do not believe that what other people do provides information about what actually should be done, they may think that the actions of others provide information about what other people *think* should be done. People care about their reputations, and hence they have an incentive to do what (they think) other group members think they should do. Reputational considerations may, for example, lead people to obey or not to obey the law, urge a certain view in group discussions, drive while drunk, help others, or talk about political issues in a certain way.

The central question is how an understanding of these points might lead policies in better directions. What is especially promising is the possibility of achieving a ‘tipping point’, in which large numbers of people end up moving in novel directions.<sup>19</sup> People typically have different ‘thresholds’ for choosing to believe or do something new or different. As those with low thresholds come to a certain belief or action, people with somewhat higher thresholds join them, possibly to a point where a critical mass is reached, making groups, possibly even nations ‘tip’.<sup>20</sup> The result of this process can be to produce snowball or cascade effects, as small or even large groups of people end up believing something—even if that something is false—simply because other people seem to believe that it is true. Real world phenomena also seem to have a great deal to do with cascade effects.<sup>21</sup> Consider, for example, smoking, participating in protests, striking, recycling, using birth control, rioting, choosing what to put on television,<sup>22</sup> even leaving bad dinner parties.<sup>23</sup> We can understand certain people, in the private and public sectors, as ‘norm entrepreneurs’, seeking to give certain signals to many people, and in the process helping to shift norms in a desirable direction.

With respect to policy tools, of special note is the *availability heuristic*: people tend to think that an event is more likely if an incident of its occurrence can readily be

---

<sup>18</sup> See George Akerlof, ‘A Theory of Social Custom, of which Unemployment May Be One Consequence’, in George Akerlof, *An Economic Theorist’s Book of Tales* (1984) 69.

<sup>19</sup> See Malcolm Gladwell, *The Tipping Point* (2000), for a popular overview.

<sup>20</sup> See Mark Granovetter, ‘Threshold Models of Collective Behavior’, (1978) 83 *American Journal of Sociology* 1420; for a recent popular treatment, see *ibid.* at 5-22.

<sup>21</sup> See Sushil Bikhchandani *et al.*, ‘A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades’, (1992) 100 *Journal of Political Economy* 992; Kuran and Sunstein, n. 16 above, at 715-35.

<sup>22</sup> See Kennedy, *supra* note. [Query author]

<sup>23</sup> Several of these examples are discussed in Kuran and Sunstein, n. 16 above, at 725-35, and in Granovetter, n. 19 above, at 1422-24,

brought to mind. It is for this reason that a single, highly publicized event can have important behavioural consequences, as when disclosure that a famous athlete or actor is HIV-positive can make thousands or even millions of people change their behavior. The single incident makes the risk seem both higher and more salient. It can even change the meaning of action. ‘Availability entrepreneurs’ can draw public attention to individual persons and cases, with the self-conscious goal of producing ‘availability cascades’, with which perceptions, by millions of people, can simultaneously shift. In the United States, this has happened with fear of abandoned hazardous waste dumps and nuclear power, as well as HIV/AIDS; Thailand used the strategy successfully in the later context.<sup>24</sup>

There is a closely related phenomenon: *group polarization*. It has been shown that any group of like-minded people, after deliberating with one another, tends to end up believing a more extreme version of what they thought before they spoke together. Consider some examples of the basic phenomenon, known as group polarization, which has been found in over a dozen nations.<sup>25</sup> (a) A group of moderately profeminist women will become more strongly profeminist after discussion.<sup>26</sup> (b) After discussion, citizens of France become more critical of the United States and its intentions with respect to economic aid.<sup>27</sup> (c) After discussion, whites predisposed to show racial prejudice offer more negative responses to the question whether white racism is responsible for conditions faced by African-Americans in American cities.<sup>28</sup> (d) After discussion, whites predisposed not to show racial prejudice offer more positive responses to the same question.<sup>29</sup>

As statistical regularities, it should follow, for example, that those moderately critical of an ongoing war effort will, after discussion, sharply oppose the war; that those who believe that global warming is a serious problem are likely, after

<sup>24</sup> See Kuran and Sunstein, n. 16 above.

<sup>25</sup> See Cass R. Sunstein, ‘Deliberative Trouble? Why Groups Go To Extremes’, 110 *Yale Law Journal* 171 (2000). These include the United States, Canada, New Zealand, Germany, and France. See, e.g., Johannes Zuber *et al.*, ‘Choice Shift and Group Polarization’, (1992) 62 *Journal of Personality and Social Psychology* 50 (Germany); Dominic Abrams *et al.*, ‘Knowing What To Think By Knowing Who You Are’, (1990) 29 *British Journal of Social Psychology* 97, 112 (New Zealand). Of course it is possible that some cultures would show a greater or lesser tendency toward polarization; this would be an extremely interesting area for empirical study.

<sup>26</sup> See D.G. Myers, ‘Discussion-Induced Attitude Polarization’, (1975) 28 *Human Relations* 699.

<sup>27</sup> Brown, *supra* note, at 224. [Query author]

<sup>28</sup> D.G. Myers and G.D. Bishop, ‘The Enhancement of Dominant Attitudes in Group Discussion’, (1976) 20 *Journal of Personality and Social Psychology* 286.

<sup>29</sup> See *ibid.*

discussion, to hold that belief with considerable confidence; that people tending to believe in the inferiority of a certain racial group will become more entrenched in this belief as a result of discussion. For present purposes, group polarization is important because it shows how groups tend to move. If some members of a group can be convinced to shift their position, the group's middle will shift as well, and quite large changes can be anticipated.

All this is quite abstract. The central question remains: How might government, seeking to promote its goals at low cost, induce tipping, or social cascades?

## EDUCATION AND INFORMATION

Suppose that people are engaging in activity that involves harm to self or to others; for simplicity, assume that the activity is not itself criminal. From the standpoint of the New Progressivism, hoping not to intrude on rights and to respect democratic ideals, the first prescription is simple: Inform people. With respect to cigarette smoking and unsafe sex, for example, a great deal of risky behaviour comes simply from a lack of information. Evidence shows that by itself, information, if it can be made salient and vivid, produces substantial changes in behaviour. In Thailand, a revelation that 44 per cent of sex workers in Chiang Mai were infected with HIV appears to have contributed to a substantial increase in the use of condoms. Growth in condom use in the United States in the 1980s was driven largely by information. Public information campaigns, use of the mass media, and face-to-face education and training programmes are all able to help.<sup>30</sup>

This should hardly be surprising. But there is a somewhat more subtle point. It is possible to produce *information-induced norm cascades*, in which social norms, and social meanings, change dramatically as a result of changes in beliefs. In the United States, this has happened with large-scale shifts in judgments about cigarette smoking and, in the early 1990s, with large-scale shifts in judgments about both sexual

---

<sup>30</sup> See World Bank, *Efficient and Effective Strategies for Preventing HIV/AIDS*, available at [www.worldbank.org/HIV/AIDS-econ/confront/confrontfull/chapter3/chap3.html](http://www.worldbank.org/HIV/AIDS-econ/confront/confrontfull/chapter3/chap3.html).

harassment and risky sex. One of the causes and consequences of these shifts has been a change in the relevant social meaning. Consider smoking: Whereas smokers were once thought to be doing something entirely normal, so that objecting nonsmokers were prissy intermeddlers, now smokers are thought to be doing something aggressive and possibly injurious, so that they are expected to apologize and to ask permission. The same has happened in many domains for sexual harassment and risky sex. What once seemed normal and even bold now seems abnormal and objectionable. A key question is whether dissemination of more information about harm-producing activity can produce large-scale changes in behavior. Often it seems to do precisely that.

### COSTS AND NORMS

Of course information is unlikely to do enough. People who engage in risky behaviour sometimes know that their behaviour is risky. People who fail to recycle, or who otherwise create environmental harm, often know what they are doing. People who engage in discrimination often mistake no facts. New Progressivists seek, in such circumstances, to produce initiatives that will increase the benefits or decrease the (pecuniary or non-pecuniary) costs of desirable behaviour, and decrease the benefits or increase the (pecuniary or non-pecuniary) costs of undesirable behaviour. Efforts to change norms might play a role in these efforts.

In the context of risk-creating behaviour, it is often easy to think of methods in this vein. People might, for example, be required to wear seatbelts, or to use helmets when riding motorcycles. Such programmes impose sanctions on violators. Sometimes subsidies are better than sanctions. In the context of the HIV/AIDS crisis, condom-marketing programmes have often been demonstrably successful. Such programmes involve public subsidization of condoms, and also make condoms easily available by selling them at a wide range of places. Part of the goal of such programmes is to ‘show condom use as normal, healthy, and even fun’.<sup>31</sup> Especially when targeted at high-risk areas and poor households, such programmes have been exceedingly beneficial, producing significant increases in condom sales and use—in Thailand, for example, a 90 per cent level of condom use in commercial sex.

Some aggressive action would involve efforts to alter the social meaning of risk-producing activity, partly through creative private-public partnerships. In many

places in the world, use of a condom is an accusation or a confession. But in others, the failure to use a condom reflects a kind of irresponsibility, a willingness to risk the life of another person. The most promising policies make condom use appear routine and responsible, and hardly an act of cowardice, or a violation of the goals of the underlying activity.

There is a particularly important point here: Norms are most easily changed when the relevant population is young. With respect to HIV/AIDS, environmental harm, and crime, many members of the target group are in the process of developing their own norms. To the extent that government can work with that population, helping to create norms that produce benefit rather than harm, there is much to be gained. *For HIV/AIDS in particular, an absolutely central goal in this regard should be to ensure equality on the basis of gender with respect to sexual relations*—an idea that calls for prohibitions, through law and norms, on sexual coercion of all kinds, principally via rape, but through other forms of force as well. ‘No’ should be understood to mean ‘no’; ‘only with a condom’ should be understood to mean exactly that. In fact a democracy is especially well situated to make progress here, because under good conditions, there is no sharp separation between the citizenry and the government.

## CRIME: ORDER MAINTENANCE AND CONTAGION

Crimes are violations of people’s rights. But why do people commit crimes? No simple answer would make sense. Undoubtedly poverty and desperation are much of the answer, But part of the answer also lies in people’s perceptions of what other people do. With respect to crime, people often do not know what, exactly, they should do, and what they do depends crucially on what they see other people doing. Criminality, and law-abiding behavior, appear to be contagious.

If most people think that many people are engaging in crime, crime will increase. If most people think that few people are criminals, criminal activity will be less likely. The bad news is that all societies are vulnerable to ‘crime cascades’, as people take their cues from others. The good news is that this fact can be enlisted in the service of crime prevention. In both the United States and England, efforts have

---

<sup>31</sup> Ibid. at 3. [Query author]

been made, with considerable success, to use order maintenance and community policing in the interest of ‘legality cascades’. In various contexts, an understanding of group polarization can help explain the underlying social dynamics.

In the 1990s, for example, New York saw a dramatic decrease in crime—not merely in murder (40 per cent), but also in burglary (over 25 per cent) and robbery (over 30 per cent). A significant contributing factor stems from the ‘fixing broken windows’ approach to crime prevention. The basic idea is that both law-abiding citizens and potential law-breakers learn a great deal from the presence of order or disorder; people who obey the law are less likely to use the streets in the presence of disorder, and prospective criminals are more likely to engage in criminal activity, taking disorder as a signal about what is possible. But if minor problems—such as begging, graffiti, prostitution, loitering, littering, and broken windows are sharply reduced—the signals will be very different, and more serious crimes will decline too. On this view, efforts to stop or reverse a crime epidemic at the very start, through seemingly small changes in context, can have large beneficial consequences.

This is the core of the ‘order maintenance’ approach to crime. In 1993, New York started to attempt to maintain social order and to give new signals to prospective criminals—by focusing on seemingly small criminal actions, such as aggressive begging, public drunkenness, prostitution, and vandalism. In the view of some observers, the lesson of New York’s successful attack on crime is that a crime epidemic can be reversed by altering relatively small details of the immediate environment. Whether or not this experience can be replicated in other nations in this precise form, the general lesson remains. Prospective criminals, and prospective victims, act on the basis of their perceptions of what other people are going to do. When people think that crime is increasing, cascade effects are possible, as prospective victims refuse to use common areas, which become dominated by criminals, and people unsure whether to be criminals, taking their signals from others, often choose the socially undesirable course. Happily, the opposite can happen when people are given signals that crime is decreasing. Policy initiatives that alter signals on this count can make a great deal of difference.

## NO PANACEAS, BUT CLUES

There are no panaceas in the ideas outlined here. The most basic suggestion is that individuals act in accordance with prevailing norms, and hence it is possible to induce large behavioural shifts. Social cascades are common, and they are often produced by the availability heuristic, acting in combination with social influences and group polarization. With respect to harm-producing conduct, these phenomena hold out a great deal of hope. The best approach is to be simultaneously experimental and optimistic. Initiatives should be monitored, and if one initiative fails, another might succeed—an evident conclusion of the most successful participants in Dorner's experiments.

### **Employment and Poverty: Supplementing, Not Displacing, Markets**

In this section I turn from social norms to issues of deprivation and poverty. I do so principally by comparing three ways of responding to deprivation in the employment market, deprivation that usually produces poverty, through joblessness or low wages. These ways are associated respectively with markets, planning, and the New Progressivism. My general suggestion is that a New Progressivist government should generally refuse to block exchanges between contracting parties. It should respond instead by providing *economic help directly to those who need help*. These 'market supplementing' approaches are to be preferred to 'market displacing' approaches characteristic of the way of planning. Market supplementing approaches do not intrude on liberty or rights; they are less likely to reduce economic growth; they are also more likely to be successful.

Those who favour the way of markets tend to respond to poverty either with nothing or with a social safety net, and not a very generous one at that. For many people, these weak responses amount to a rights violation. Those who favour the way of planning respond with high minimum wages, aggressive regulation of the labour market and the housing market, and a generous social safety net. Those who endorse the New Progressivism reject both approaches. They place the highest premium on three strategies: (1) education and training; (2) taxpayer-supported wage and housing subsidies; and (3) incentives to companies to increase the likelihood that they will



locate in poor areas and hire people who would otherwise lack work ('empowerment zones' and 'enterprise zones'). Above all, they believe that no citizen should be poor if she is willing and able to work, that everyone should be *able* to work, and that in the absence of special circumstances (disability, obligations to others), almost everyone should be *willing* to work. This is the sense in which New Progressivists endorse the Third Way idea that there should be 'no rights without responsibilities'.

## BLOCKED EXCHANGES AS MESS

Well-motivated planners often try to protect people by 'blocking exchanges', through, for example, minimal rights that employees, consumers, and tenants must enjoy, and may not waive, even through voluntary agreements. In the market, and particularly in the labour market, a common justification for this form of regulation is *redistribution*, in particular redistribution to those who need help. Strategies of this kind are often thought to protect basic rights.

National legislatures often impose controls on the market to prevent what it sees as exploitation or unfair dealing by employers, who seem to have a competitive advantage over workers, especially poor workers. Those who favour a New Progressivism sympathize with the goals here, but they believe that this approach suffers from many of the problems faced by Dorner's planners. New Progressivists thus have a presumption against this approach, because they do not believe that it is, in general, a good way to help people who need help. The presumption is certainly rebuttable; sometimes blocked exchanges can do some good. But New Progressivists generally seek to help workers through other means—through, for example, earned income tax credits, income supplements, subsidized housing, and education and training.

To be sure, many agreements between employers and employees seem and are harsh, and the claim for redistribution is often a powerful one as a matter of basic principle. Workers often enter into unjust deals, simply because their options are so few. In fact market wages and prices depend on a wide range of factors that are morally irrelevant: historical injustice; supply and demand curves at any particular point; variations in family structure and opportunities for education and employment; existing tastes; and perhaps even differences in initial endowments, including talents,

intelligence, or physical strength. If the regulation could be made effective and does not produce high ancillary costs (an important qualification), government should not always take these factors as ‘natural’, or let them be turned into social disadvantages. The inspiration for minimum wage legislation, for example, is easy to identify. So too, rent control legislation prevents tenants from being subject to unanticipated price increases and perhaps thrown into significantly inferior housing; and implied warranties of habitability protect tenants from living in disgraceful and indeed dangerous apartments.

In all these cases, however, regulation may well be a poor mechanism for redistributing resources, precisely because it is often self-defeating. The problem is that if everything else is held constant, *the market will frequently adjust to the imposition of regulation in a way that will harm many people, including the least well-off*. This is not a claim that markets have any moral status; it is a claim that blocking exchanges is often a doomed way of doing what well-motivated planners are seeking to do, that is, to help poor people.

Hence, for example, it is a mistake—we might even call it the defining mistake of planners—to assume that regulation will directly transfer resources or create only after-the-fact winners and losers (an idea exemplified by the assumption that the only effect of the minimum wage is to raise wages for those currently working, or that the only effect of protecting tenants against eviction is to allow poor tenants to retain housing). In ordinary circumstances, an important consequence of a high minimum wage is to increase unemployment by raising the price of marginal labour. Those at the bottom of the ladder—the most vulnerable members of society—are the victims. In a rich nation with a growing economy and a low unemployment rate, a high minimum wage law might not do much harm, and might well do enough good to be justified on balance. But in a country that is not rich, and that has a high unemployment rate, there is reason to be doubtful of high minimum wage requirements, simply because they impair economic development, and further do not redistribute resources from employers to poor workers (which would be good), but end up hurting the poorest people of all, who are less likely to be able to obtain jobs.

In fact—and this is a separate problem with blocking exchanges as a method of redistribution—a minimum wage is not directly targeted at poor people at all. In many nations, those who benefit from the minimum wage have other sources of

income. In the United States, for example, an increase in the minimum wage goes largely to middle-income (39.5 per cent) and upper-income (34.7 per cent) citizens, and only about 25 per cent goes to the poor (13.1 per cent) and near-poor (12.7 per cent).<sup>32</sup> Of course minimum wage workers are usually far from wealthy. But the problem with regulations blocking exchanges is that they are not specifically targeted at the poor. They help those who do not need help, or who do not have the strongest claim to help, and thus waste resources that might be better used elsewhere.

In the same vein, rent control legislation and implied warranties of habitability create incentives for producers (landlords) to leave the housing market, and disincentives for people to enter that market. This has perverse redistributive consequences and especially harsh results for the poor, who may be left without housing at all. It should be obvious that the beneficiaries of rent control legislation need not be poor and often are not poor. In the United States, it should not be surprising to find that Cambridge, Massachusetts has experienced a dramatic growth in new housing since rent control was eliminated by state referendum.

I have said that blocking exchanges is not always a bad idea. Minimum wage legislation does, after all, raise the wages of the working poor, and in some circumstances—especially but not only those of sustained economic growth—the disemployment effects will be small or nonexistent. But there can be little doubt that interference with the labour market will produce losers as well as winners. Efforts to redistribute resources through regulation can therefore have serious perverse results.<sup>33</sup> The point bears on regulation of the labour market, the housing market, and the market for ordinary goods and services. It counsels against anything that looks like ‘price fixing’ as a redistributive strategy.

---

<sup>32</sup> See Daniel Shaviro, ‘The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy’, (1997) 64 *University of Chicago Law Review* 405, 435.

<sup>33</sup> Two qualifications are necessary here. First, the redistributive regulation, though in some ways perverse, might be part of a system of redistribution that is effective overall. A minimum wage law might be justified as a means of protecting the working poor if it is accompanied by a welfare system to take care of those who cannot work at all. For this reason, plausible arguments can be made for the minimum wage. The only point is that if it is too costly to employers, substantial disemployment effects are inevitable.

The second qualification is that some laws that seem to be justified on redistributive grounds are best understood as a response to inadequate information. Occupational safety and health legislation does not transfer resources from employers to employees; but it may be justified as a response to the fact that workers lack information about workplace risks. In the face of inadequate information, a regulatory response may well make sense. But an analysis based on inadequate information will be very different from one based on redistribution. If the problem is inadequate information, the first step should be to try to inform people.

## ALTERNATIVES

Thus far I have been discussing what the New Progressivism opposes. What does it support instead? The answer is not reliance on markets alone. New Progressivists firmly believe that simple and even effective redistribution, such as cash grants to the poor from taxpayer funds, are justified in principle. They believe in a social safety net; in this way they accept the South African approach, which understands the category of rights to include gross deprivation of basic needs. But they do not believe that planners offer promising responses to poverty, unemployment, and general deprivation. Instead New Progressivists emphasize approaches that will give people an ability to help themselves, through education, training, and job opportunities, fuelled by economic incentives in the form (for example) of tax credits to employers and employees alike. They seek to supplement rather than to displace markets.

In case there was any doubt, a recent study of South Africa, based on 1996 data, shows the enormous importance of education to employment prospects.<sup>34</sup> The study shows that high ratios of teachers to students dramatically increase the likelihood of employment—with a statistically significant effect for males, and a very large effect for females. The authors conclude that the apartheid ‘system continues to profoundly influence the life chances of many Black Africans, through its long lasting effects on the country’s education system. Many Black Africans currently in the labor force attended schools with inadequately trained teachers, insufficient textbooks, and pupil-teacher ratios above 80 children per class.’ The result of all this is to decrease both years in school and employment prospects. Better education and training is the most direct and effective way of helping people to obtain jobs and decent wages.

For many people, of course, other steps are required. A central New Progressivist approach is to develop systems to supplement low wages. A key here is to generate a strategy that will neither (a) discourage employers from hiring people nor (b) discourage prospective workers from seeking employment. Many countries have experimented with some variation on the Earned Income Tax Credit (EITC). Under this approach, working people (the programme may or may not be limited to

people with children) who earn low wages obtain a tax credit from the government, sufficient to raise their total compensation to a decent level. The tax credit is phased out once workers receive money above a certain level. In the United States, for example, someone who earns an income of about \$10,000 will receive about \$3800 at tax time; a mother and father who earn \$25,000 will receive about \$1200 at tax time. In the United States alone, the EITC has been a terrific success, lifting millions of people from poverty. In 1996 alone, the effect of the EITC was to take 4.6 million people, including 2.4 million children, out of poverty.<sup>35</sup>

Compared to planning-type initiatives, there are three large advantages to the EITC approach. The first is that unlike the minimum wage, it does not make labour more costly for employers, and thus does not decrease employers' desire to hire people. The second is that it increases people's incentives to work, by making work more remunerative. The third is that unlike the minimum wage, the EITC is genuinely and specifically targeted at people who are poor. In the United States, for example, nearly three-quarters of those who benefit from the EITC are poor or near-poor.<sup>36</sup> The EITC is the model of a New Progressivism antipoverty programme.

Creative policymakers could easily build on this model—and use it as an alternative to well-motivated but crude plans. Planners interested in protecting tenants might, for example, impose ceilings on rent increases. Those interested in protecting those dependent on certain important commodities might impose price ceilings. If the government is interested in ensuring that tenants cannot be evicted for nonpayment of rent, it might impose large procedural hurdles to eviction. If decent housing is unavailable, government might build housing on its own. These strategies are all associated with planning, and they might do some good. But New Progressivists would look for alternatives. They might seek, for example, to provide housing vouchers to poor people, or to provide food stamps to those who are unable to buy enough to eat.

More generally, New Progressivists would urge government to build 'empowerment zones' or 'enterprise zones' in poor communities, by giving

---

<sup>34</sup> Anne Case and Motohiro Yogo, *Does School Quality Matter? Returns to Education and Characteristics of Schools in South Africa* [1999 draft, available on the Social Science Research Network (SSRN)].

<sup>35</sup> Benjamin Aldrich-Moodie, 'The Earned Income Tax Credit', Issue Brief No. 1., *The Century Foundation* (September 1999).

<sup>36</sup> Shaviro, n. 31 above, at 435.

businesses a tax credit, or direct subsidies, to the extent that they are willing to locate in areas that need help, and to employ people who need jobs. These are market-oriented strategies that do not make a fetish of market ordering. They deploy markets in the interest of human goals. Learning from the failures and half-successes of planning, those who use such strategies attempt to be like the successful participants in Dorner's experiments, whose interventions are alert to the potentially harmful side-effects of intrusions into systems.

### **Command and Control Regulation: A Presumption Against**

In controlling pollution and other social harms, a number of states, including some of the most proudly capitalist, have engaged in a modest form of 'planning', through command-and-control regulation. Such regulation involves centralized regulatory requirements imposed on dozens, hundreds, thousands, or even millions of producers. As examples, consider air pollution control requirements, imposed on new cars and trucks; 'best available technology' (BAT) requirements, imposed on polluting firms; and specified levels of mandatory pollution reductions, imposed on companies of various kinds. Similar approaches can be found in the area of occupational safety, where national authorities sometimes specify the safety technologies and approaches that must be used by all or most firms.

It is important to acknowledge that in many states, command-and-control regulation has accomplished significant good. Planning of this form has hardly been a complete failure. In the United States, it has helped produce dramatic reductions in levels of air and water pollution. Reliance on markets alone would have been far worse. In this domain, the way of planning is far better than the way of markets. But for several reasons, the New Progressivism rejects the basic approach. They are concerned that command-and-control approaches will compromise economic development and also undermine democracy.

The first problem is that it is usually unnecessarily expensive, even wasteful for government to prescribe the means for achieving social objectives. At least as a general rule, it is especially inefficient for government to dictate technology. One of the many problems with BAT strategies, for example, is that they ignore the enormous differences among plants and industries and among geographical areas. It is not

sensible to impose the same technology on industries in diverse areas—regardless of whether they are polluted or clean, populated or empty, or expensive or cheap to clean up. BAT strategies also require all new industries to adopt costly technology, and allow more lenient standards to be imposed on existing plants and industries. Through this route BAT strategies actually penalize new products, thus discouraging investment and perpetuating old, dirty technology. The result is inefficiency in investment strategies, in innovation, and even in environmental protection. Such strategies also fail to encourage new pollution control technology and indeed serve to discourage it by requiring its adoption for no financial gain. In general, governmental specification of the ‘means’ of achieving desired ends is a good way of producing unnecessarily high costs. Instead of permitting industry and consumers to choose the ‘means’—and thus to impose a form of market discipline on that question—government often selects the means in advance. The governmentally-prescribed means are often the most inefficient.

More fundamentally, command-and-control approaches are severely deficient from the standpoint of democracy. The focus on the question of ‘means’ tends to increase the power of well-organized private groups, by allowing them to press environmental and regulatory law in the service of their own parochial ends. The BAT approach, for example, ensures that citizens and representatives will be focusing their attention not on what levels of reduction are appropriate, but instead on the largely incidental and nearly impenetrable question of what technologies are now available. Because of its sheer complexity, this issue is not easily subject to democratic resolution. Moreover, the issue is not the relevant one for democratic politics, which is the appropriate degree and nature of environmental protection—an issue to which the BAT question is only incidental.

The approach favoured by the New Progressivism is much simpler: (1) begin by informing people about risks, including environmental risks, and (2) where this is inadequate, impose a tax on harmful behaviour, and let market forces determine the response to the increased cost. Thus governments might adopt a simple, two-step reform policy in the area of social risks and social harms. First, those who impose harm must pay for it—by purchasing permission to do so, perhaps through a licensing procedure. Second, those who obtain the resulting permission should be able to trade their ‘licenses’ with other people. In the pollution context, this would mean that

people who reduce their pollution below a specified level could trade their 'pollution rights' for cash. In one stroke, such a system would create market-based disincentives to pollute and market-based incentives for pollution control. Such a system would also reward rather than punish technological innovation in pollution control, and do so with the aid of private markets. An idea of this kind might be made part and parcel of a system of 'green taxes'. With such a system, nations might impose taxes on people who impose harms on others—users of dirty automobiles, farmers who employ pesticides, coal-fired power plants, gasoline that produces air pollution, products that contribute to destruction of the ozone layer or the greenhouse effect.

Economic incentives could be applied in other areas as well. Workers' compensation plans, for example, operate as effective guarantees of workplace safety. According to a careful study, '[i]f the safety incentives of workers' compensation were removed, fatality rates in the United States economy would increase by almost 30 percent. Over 1200 more workers would die from job injuries every year in the absence of the safety incentives provided by workers' compensation.'<sup>37</sup> This contrasts with a mere 2-4 per cent reduction in injuries from the Occupational Safety and Health Act (OSHA), an amount that links up well with the fact that annual workers' compensation premiums are more than 1000 times as large as total annual OSHA penalties. The tax system could be used to provide better incentives to employers who furnish dangerous workplaces. The consumer product safety commission might experiment with a system in which producers of harm-producing products must pay a fee into the federal treasury. Ultimately, we might hope for a coordinated system of risk regulation, one that imposed specified fees for harm-producing activities.

For democracy, such an approach would have significant consequences, and these consequences would be extremely beneficial. The large question—how much environmental protection at what cost—does not easily permit legislators to favor a well-organized, narrow group, such as the agricultural lobby, or the coal lobby. Special favours cannot readily be provided through a system of economic incentives. The very generality of the question will work against narrow favouritism.

The international movement toward economic incentives, a central part of the New Progressivism, is preliminary but real. Thus far, it has occurred mostly in the environmental area. An important series of administrative initiatives have brought



about ‘emissions trading’, especially under the American Clean Air Act.<sup>38</sup> Under the Environmental Protection Agency’s policy, a firm that reduces its emissions below legal requirements may obtain ‘credits’ that can be used against higher emissions elsewhere. Overall, the programme has produced savings of between \$525 million and \$12 billion.<sup>39</sup> By any measure, this is an enormous gain. On balance, moreover, the environmental consequences have been beneficial. Offsets must, by definition, produce environmental gains. The preliminary evidence shows favourable effects from bubbles as well. There may be modest beneficial effects from banking and modest adverse effects from netting. The overall environmental effect is therefore good, cost entirely to one side.

As part of the process for eliminating lead from gasoline—a decision that was, not incidentally, strongly supported by a cost-benefit study—the EPA also permitted emissions trading. Under this policy, a refinery that produced gasoline with lower than required lead levels could earn credits. These could be traded with other refineries or banked for future use. Until the termination of the programme in 1987, when the phase-down of lead ended, emissions credits for lead were widely traded. EPA concluded that there had been cost savings of about 20 per cent over alternative systems, marking total savings in the hundreds of million of dollars. There have been similar efforts with water pollution and ozone depletion.<sup>40</sup>

Perhaps the most dramatic programme of economic incentives can be found in the 1990 amendments to the Clean Air Act. The Act now explicitly creates an emissions trading system for the control of acid deposition. In these amendments, Congress has made an explicit decision about aggregate emission levels for a pollutant. Whether the particular decision is the correct one may be disputed. But surely there are large democratic benefits from ensuring that public attention is focused on that issue. There are palpable economic benefits as well. The system for controlling acid deposition is billions of dollars less expensive than the command-and-control alternatives.

---

<sup>37</sup> W. Kip Viscusi, *Reforming Products Liability*, (1991) 178.

<sup>38</sup> See Environment Protection Agency, ‘Emissions Trading Policy Statement: General Principles for Creation, Banking, and Use of Emission Reduction Credits’, (1986) 51 *Federal Regulations* 43,814.

<sup>39</sup> See Hahn & Hester, ‘Marketable Permits: Lessons for Theory and Practice’, (1989) 16 *Ecology Law Quarterly* 361, 374 table 2. [Query author – names or initials?]

<sup>40</sup> On ozone depletion, see 53 *Federal Regulations* 30,566 (August 11, 1988); on water pollution, see Hahn & Stavns, ‘Incentive-Based Environmental Regulation: A New Era From An Old Idea’, (1991) 18 *Ecology Law Quarterly* 1, 18-19. [Query author – names or initials?]

The idea can be adapted to many domains. Consider, for example, the African Elephant Conservation Act, which created a two-prong strategy to combat species loss. These included cooperative conservation projects and strict import controls for countries with endangered elephant populations. The United States would not import from any such country; but once a nation was able to stabilize its elephant population and to receive a new listing, it would be permitted to engage in the trade of ivory. In a way this policy might seem worse than a flat ban on ivory trade. But in practice, it has worked far better, because it creates an incentive to have sizeable herds. In many cases, elephants were ‘owned’ and protected by the relevant communities, increasing efforts to quash poaching in the knowledge that they would be economically better off if they were able to be listed as having stabilized their elephant population. The Act has been extremely successful, and served as the model for the subsequent Rhinoceros and Tiger Act and the Asian Elephant Act. Nations interested in preserving their own environmental goods, including endangered species, might well build on this idea.

### **Economic Growth, Capabilities, and Sex Equality**

#### **GROWTH AND ITS LIMITS**

Thus far I have dealt with New Progressivist means—stressing the need to attend to both incentives and norms, and to avoid the crudeness associated with many plans. It is now time to turn to the question of ends. That question cannot be answered without saying something about the relationship between economic growth, social welfare, and individual rights.

For the last decades, many people have evaluated national well-being in terms of economic growth alone. Indeed, this approach has been characteristic of those who emphasize the way of markets; and much of the time, it has been adopted by those who attempt the way of planning as well. On this view, a nation’s performance is assessed by asking about Gross Domestic Product, and by seeing its movement over time.

Certainly GDP is a useful figure, for it bears a relationship to important social goals. If we think of income as an all-purpose means—as something that people want regardless of what else they want—we might well attend to GDP. Though its

importance is merely instrumental, growth does matter for a wide range of important goals. Thus a recent study of anti-poverty measures in the United States, by someone well-disposed to government programmes and unenthusiastic about the way of markets, announces as Lesson 1, 'A strong macroeconomy matters more than anything else.'<sup>41</sup> Well-protected property rights and freedom of contract, protected by state institutions, are quite central to economic growth.<sup>42</sup> They are at least as important in poor countries as in rich ones.

There are, however, a number of problems with relying on GDP as a measure of well-being.

The most obvious problem involves distributional considerations. If income is unequally distributed, a high GDP may disguise the fact that many people are living bad or even desperate lives. For example, the United States has the highest per capita real GDP in the world. But it also has a higher rate of children living in poverty—about one in five—than does any other wealthy country in the world. The rate of children living in poverty is double that of the industrialized nations taken as a whole and four times that of Western Europe. Nearly half of all black children in the United States live in poverty. While white Americans, if taken separately, would rank first on the United Nations Development Programme's Human Development Index, African-Americans, if taken separately, would rank somewhere in the thirties. These crucial economic facts are undisclosed by GDP. And if deprivation is seen as a rights violation, economic growth can conceal substantial rights violations.

GDP sometimes seems to be a general placeholder for a number of diverse indicators of social and economic well-being. But in fact, it may not be closely correlated with some important indicators. Consider two major social goals: reduction of poverty and reduction of unemployment. Of course GDP growth can be an important factor in counteracting both unemployment and poverty. But it is also possible for GDP increases to be accompanied by increases in unemployment and hence poverty (which is closely correlated with unemployment); indeed, this phenomenon has often occurred. Or consider the likelihood of subjection to violent crime. Physical security is surely an important ingredient in well-being, but it is at best indirectly reflected in GDP. Consider also the fact that there is no inevitable

---

<sup>41</sup> Rebecca Black, 'Fighting Poverty: Lessons from Recent US History', (2000) 14 *Journal of Economic Perspectives* 3, 6.

connection between GDP and life expectancy. Some countries have a relatively low GDP but long life expectancy and low rates of infant mortality. Many countries have a high GDP but do poorly in promoting longevity. Education is an important part of a good life, whether or not educated people accumulate wealth; but the association between education and GDP, while real, is extremely crude.

GDP also fails to account for goods and services that are free, including some that are closely connected with economic well-being. For example, unpaid domestic labour is not a part of GDP. Many environmental amenities, such as clean air and water, are not reflected in GDP. The GDP figure thus fails adequately to measure either the benefits of a healthy environment or the costs of its degradation. There are other gaps in what GDP measures. It does not, for example, reflect changes in leisure time; but it is clear that any increase in leisure is a gain even in economic terms, since leisure is something for which people are willing to pay, sometimes a great deal. Most generally, a serious problem with GDP is that the figure excludes all social costs and benefits that do not have prices.

The most general point is that GDP does not adequately capture what a good society is concerned to ensure. Responding to these points, many people have attempted to come up with other measures of national well-being. Of these the UNDP's effort is the best known. The UNDP uses an index of well-being based on per capita income, educational attainment, and longevity. In 1999, South Africa was ranked 101 on the list, below China, Turkey, Georgia, and Albania. Some of the key numbers include a life expectancy at birth of 54.7 years, an adult literacy rate of 84 per cent, and real GDP per capita of \$7,380. The most striking number here is the low life expectancy number—below, for example, that of Bangladesh, Nepal, India, and Pakistan.

Of course any 'index' is bound to have a degree of arbitrariness. What is important is that a nation with a low GDP can also give its citizens long lives and a good education—and that a nation with a high GDP can give its citizens a poor education and relatively low life expectancies. (On the latter point, the United States is an unfortunate case, with an extremely high per capita income but one of the lowest life expectancies among comparable countries.) The theoretical roots of these efforts to go beyond GDP lie in the 'capabilities approach', which attempts to assess 'what

---

<sup>42</sup> See Mancur Olson, *Power and Prosperity* (1999).

people are actually able to do and to be'.<sup>43</sup> (We can view the capabilities approach as an effort, within both economics and philosophy, to give some concrete detail to the aspects of human rights and 'basic needs'.)

The central idea, rooted in a notion of human dignity, is that a nation should ensure not 'satisfaction of preferences', and not a certain level of resources, but instead an ability to choose what kind of life to have. Of course preferences and beliefs may well adapt to existing deprivation—a common phenomenon, and one that creates serious problems for the way of markets insofar as that way makes 'preferences' determinative of social policy. Nor should it be contentious to urge that certain capabilities are necessary to a decent human life. These include the ability to live a decently long life, to have good health, to participate in political choices that affect one's life, to be educated, to hold property.<sup>44</sup> When people lack one or more of these abilities, they suffer from 'capability failure', and this is the problem to which government should respond. The minimal responsibility of a New Progressivist government is to ensure that all citizens are able to come above a certain threshold. The less minimal obligation is to ensure that all citizens have more than minimal capabilities on all of these dimensions.

This general idea cannot without arbitrariness be turned into a formula or index. But insofar as the Human Development Index, and related efforts, go beyond GDP to provide a simple, salient, easily understood figure by which to facilitate international comparisons and changes over time, they are a good place to start. They also provide a great deal of help with priority-setting. In the United States, Finland, Botswana and South Africa, for example, it is clear that a large premium should be placed on improving longevity; the citizens of these nations can expect relatively short lives, undoubtedly in part as a result of high levels of crime and low levels of health care. By contrast, Sweden, New Zealand, Cuba and Georgia should concentrate on increasing economic growth; all of these nations provide decent education, and relatively long lives, but keep their citizens relatively poor.

### **The Anticaste Principle—and the Centrality of Sex Equality**

---

<sup>43</sup> See Nussbaum, n. 3 above, at 5.

<sup>44</sup> See *ibid.* at 78-80.

## CASTE AND ANTICASTE

The capabilities approach gives a sense of the New Progressivist account of liberty; but it says little about equality. For New Progressivists, I have suggested it is important to ensure that everyone has decent life prospects, and also that everyone comes over a ‘capability threshold’. But a separate and equally central equality goal is the attack on any situation in which some people, defined in terms of a morally irrelevant characteristic, are treated as second-class citizens, or turned into members of a lower caste. Thus an *anticaste principle*, undergirding a constitutional equality norm, plays a large role in New Progressivist thinking.

The anticast principle is not a thoroughly egalitarian goal. It is compatible with large disparities in wealth and resources. But it insists that morally irrelevant characteristics, such as race, religion, and gender, should not be turned into a basis for second-class citizenship. Thus New Progressivists see one of the most serious inequality problems of the twentieth century in the pervasive practice of seizing on a characteristic lacking moral relevance, and using it as the basis for the systematic subordination of members of certain social groups. This conception of equality is opposed to several others, including the ‘formal equality’ principle, which does not focus attention on systematic subordination, and indeed which sees efforts to counteract such subordination as a form of discrimination. Commitment to the anticast principle hardly exhausts the domain of rights. But it is an important component of a rights-respecting society.

## SEX EQUALITY AS A CENTRAL GOAL, AS A MEANS AND AN END

For developing and wealthy countries alike, an end to sexual hierarchy is an especially high priority—as both a means and an end. With respect to many problems—HIV/AIDS, crime, economic growth and overpopulation—there are few higher priorities. Indeed any generalized attack on poverty must be combined with an attack on sexual hierarchy. The two are closely intermingled problems.

Note first that sex equality is an important *means* to human development, as Amartya Sen and others have shown, with their particular emphasis on ‘women’s agency’.<sup>45</sup> A nation in which girls and women have a chance to do and to be what they want to do and to be is much likelier to develop and to develop well. A nation with sexual hierarchy is far more likely to suffer economically and in other ways. In fact a system of equality on the basis of sex is likely to redress many problems not normally thought to be associated with it, such as overpopulation and the individual and social drains that come from unwanted children. When women have a range of opportunities, and when their choices are not a product of deprivation, these problems are sharply diminished. If women are able to decide whether to have children, unwanted children are less likely, and children who are unwanted are far more likely to suffer and to make society suffer in response, sometimes through criminal behaviour. If women have agency, many crimes will be reduced as a result, emphatically including sex crimes. If women have agency, the economy will do better, simply because there will be more people willing and able to do good work. If women have agency, there will be an immediate and substantial reduction in the AIDS crisis, simply because women will be able to engage in sexual relations only when they want, and on the terms that they choose. This is a potentially enormous benefit for men and women alike, and for adults and children alike as well.

This idea has many implications. It means that education and training for girls are crucial. It also means that by both law and norms, girls and women should be allowed to decide when and whether to become mothers—which means, among other things, that sexual relations should always be a choice, not a requirement. Here there is an evident link to the earlier discussion of norms and norm cascades, and a particular link to the problems of crime and HIV/AIDS. In fact a social policy directed against sexual subordination in multiple spheres is highly likely to combat both problems.

## Conclusion

I have attempted in this essay to clarify the relationships among rights, democracy, and economic growth, endorsing in the process a New Progressivism. Of course it is

---

<sup>45</sup> See Sen and Dreze, n. 4 above.

possible to conceive of rights, and of democracy, in a way that leads to great tension with economic growth. But we can also understand democracy in deliberative terms, in a way that reduces the tension with both rights and growth. We can also understand rights in a way that makes economic growth their ally rather than their adversary. Rights in general depend on a certain degree of economy development, simply because rights cost money. And if rights include freedom from desperate conditions, economic growth is extremely important.

But it is not sufficient. Markets must be supplemented by additional efforts, supported by a democratic society. Too much of the time, markets do little to help people who face circumstances of deprivation. From the standpoint of freedom and justice, they are nothing to celebrate. From the standpoint of economics, this was the great lesson of the first half of the twentieth century. We have seen that markets are emphatically human products, not natural but conventional, created by law and to be evaluated in terms of their consequences. The question is what they do to and for the people who are subject to them.

At the same time, economic planning, in its many diverse forms, is often futile and counterproductive, partly because of the difficulty of foreseeing the systemic effects of one-shot interventions. In its various guises, planning often invites interest group manoeuvring, thus damaging democracy, and produces unintended harmful consequences, notwithstanding the good intentions of many planners. This has been the great lesson of the second half of the twentieth century.

In these circumstances, any New Progressivism, to be worthy of use, should not be understood as a compromise measure, or as steering ‘between’ two poles. It is insistently and unapologetically committed to a certain understanding of the goals associated with social democracy in Europe and the New Deal in the United States. These do not include egalitarianism, understood as equal or roughly equal economic outcomes. But they do include decent life prospects for all, a social safety net in the form of adequate floors, political equality, and an anticaste principle, in the form of opposition to second-class citizenship for members of any social group. Attempting to understand social democratic goals in a coherent way, those who believe in a New Progressivism insist on a self-conscious effort to promote the fundamental capabilities of all citizens, by ensuring that everyone falls above a certain generous threshold. Those who endorse a New Progressivism therefore reject the idea that markets should



be identified with liberty at the same time that they seek to go beyond the sometimes sloppy and diffuse set of goals associated with the way of planning. Those who endorse a New Progressivism also put the highest premium on the achievement of an end to sexual hierarchy.

With respect to means, New Progressivists seek a government that acts as catalyst; the basic goal is to create incentives that will move behaviour in desirable directions. New Progressivists see much planning as analogous to the hapless participants in Dietrich Dorner's experiments—as ill-conceived interventions into systems that confound the goals of the interveners. To avoid the problem of 'mess', New Progressivism programmes are based on a presumption against blocked exchanges and command-and-control regulation. There is an effort to complement rather than to displace markets. Antipoverty programmes take the form of incentives to work, designed to ensure that everyone who works is able to live decently, that everyone has a chance to work, and that those who choose not to work have a good reason for not doing so. Regulatory programmes are based on a presumption in favour of informing people and providing economic incentives for desirable conduct.

Finally, New Progressivists insist on the importance of civil society and above all of the norms that often drive behaviour. Alert to the possibility of social cascades, those who seek a New Progressivism insist on the provision of information, and also on seemingly small steps that can, under favorable conditions, have large effects on behaviour.

There is no policy blueprint here. Of courlicy on a more secure sense of gose no country is exactly like any other. No one can design a set of policy initiatives that will work well, or at all, in every nation on the globe. But the problems with the way of markets and the way of planning are pervasive. In many nations, an alternative that attempts to promote human capabilities, in a way that is alert to the nature of incentives and the role of social norms, promises to draw on both of the great lessons of the twentieth century, and to build povernment's appropriate ends, and of the means that are most likely to promote those ends.

Readers with comments should address them to:

Professor Cass Sunstein  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
[csunstei@uchicago.edu](mailto:csunstei@uchicago.edu)

Chicago Working Papers in Law and Economics  
(Second Series)

1. William M. Landes, Copyright Protection of Letters, Diaries and Other Unpublished Works: An Economic Approach (July 1991)
2. Richard A. Epstein, The Path to *The T.J. Hooper*: The Theory and History of Custom in the Law of Tort (August 1991)
3. Cass R. Sunstein, On Property and Constitutionalism (September 1991)
4. Richard A. Posner, Blackmail, Privacy, and Freedom of Contract (February 1992)
5. Randal C. Picker, Security Interests, Misbehavior, and Common Pools (February 1992)
6. Tomas J. Philipson & Richard A. Posner, Optimal Regulation of AIDS (April 1992)
7. Douglas G. Baird, Revisiting Auctions in Chapter 11 (April 1992)
8. William M. Landes, Sequential versus Unitary Trials: An Economic Analysis (July 1992)
9. William M. Landes & Richard A. Posner, The Influence of Economics on Law: A Quantitative Study (August 1992)
10. Alan O. Sykes, The Welfare Economics of Immigration Law: A Theoretical Survey With An Analysis of U.S. Policy (September 1992)
11. Douglas G. Baird, 1992 Katz Lecture: Reconstructing Contracts (November 1992)
12. Gary S. Becker, The Economic Way of Looking at Life (January 1993)
13. J. Mark Ramseyer, Credibly Committing to Efficiency Wages: Cotton Spinning Cartels in Imperial Japan (March 1993)
14. Cass R. Sunstein, Endogenous Preferences, Environmental Law (April 1993)
15. Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does) (April 1993)
16. Lucian Arye Bebchuk and Randal C. Picker, Bankruptcy Rules, Managerial Entrenchment, and Firm-Specific Human Capital (August 1993)
17. J. Mark Ramseyer, Explicit Reasons for Implicit Contracts: The Legal Logic to the Japanese Main Bank System (August 1993)
18. William M. Landes and Richard A. Posner, The Economics of Anticipatory Adjudication (September 1993)
19. Kenneth W. Dam, The Economic Underpinnings of Patent Law (September 1993)
20. Alan O. Sykes, An Introduction to Regression Analysis (October 1993)
21. Richard A. Epstein, The Ubiquity of the Benefit Principle (March 1994)
22. Randal C. Picker, An Introduction to Game Theory and the Law (June 1994)
23. William M. Landes, Counterclaims: An Economic Analysis (June 1994)
24. J. Mark Ramseyer, The Market for Children: Evidence from Early Modern Japan (August 1994)
25. Robert H. Gertner and Geoffrey P. Miller, Settlement Escrows (August 1994)
26. Kenneth W. Dam, Some Economic Considerations in the Intellectual Property Protection of Software (August 1994)
27. Cass R. Sunstein, Rules and Rulelessness, (October 1994)
28. David Friedman, More Justice for Less Money: A Step Beyond *Cimino* (December 1994)
29. Daniel Shaviro, Budget Deficits and the Intergenerational Distribution of Lifetime Consumption (January 1995)
30. Douglas G. Baird, The Law and Economics of Contract Damages (February 1995)
31. Daniel Kessler, Thomas Meites, and Geoffrey P. Miller, Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation (March 1995)
32. Geoffrey P. Miller, Das Kapital: Solvency Regulation of the American Business Enterprise (April 1995)
33. Richard Craswell, Freedom of Contract (August 1995)
34. J. Mark Ramseyer, Public Choice (November 1995)
35. Kenneth W. Dam, Intellectual Property in an Age of Software and Biotechnology (November 1995)
36. Cass R. Sunstein, Social Norms and Social Roles (January 1996)
37. J. Mark Ramseyer and Eric B. Rasmusen, Judicial Independence in Civil Law Regimes: Econometrics from Japan (January 1996)

38. Richard A. Epstein, Transaction Costs and Property Rights: Or Do Good Fences Make Good Neighbors? (March 1996)
39. Cass R. Sunstein, The Cost-Benefit State (May 1996)
40. William M. Landes and Richard A. Posner, The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles (July 1996)
41. John R. Lott, Jr. and David B. Mustard, Crime, Deterrence, and Right-to-Carry Concealed Handguns (August 1996)
42. Cass R. Sunstein, Health-Health Tradeoffs (September 1996)
43. G. Baird, The Hidden Virtues of Chapter 11: An Overview of the Law and Economics of Financially Distressed Firms (March 1997)
44. Richard A. Posner, Community, Wealth, and Equality (March 1997)
45. William M. Landes, The Art of Law and Economics: An Autobiographical Essay (March 1997)
46. Cass R. Sunstein, Behavioral Analysis of Law (April 1997)
47. John R. Lott, Jr. and Kermit Daniel, Term Limits and Electoral Competitiveness: Evidence from California's State Legislative Races (May 1997)
48. Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms (June 1997)
49. Richard A. Epstein, Contracts Small and Contracts Large: Contract Law through the Lens of Laissez-Faire (August 1997)
50. Cass R. Sunstein, Daniel Kahneman, and David Schkade, Assessing Punitive Damages (with Notes on Cognition and Valuation in Law) (December 1997)
51. William M. Landes, Lawrence Lessig, and Michael E. Solimine, Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges (January 1998)
52. John R. Lott, Jr., A Simple Explanation for Why Campaign Expenditures are Increasing: The Government is Getting Bigger (February 1998)
53. Richard A. Posner, Values and Consequences: An Introduction to Economic Analysis of Law (March 1998)
54. Denise DiPasquale and Edward L. Glaeser, Incentives and Social Capital: Are Homeowners Better Citizens? (April 1998)
55. Christine Jolls, Cass R. Sunstein, and Richard Thaler, A Behavioral Approach to Law and Economics (May 1998)
56. John R. Lott, Jr., Does a Helping Hand Put Others At Risk?: Affirmative Action, Police Departments, and Crime (May 1998)
57. Cass R. Sunstein and Edna Ullmann-Margalit, Second-Order Decisions (June 1998)
58. Jonathan M. Karpoff and John R. Lott, Jr., Punitive Damages: Their Determinants, Effects on Firm Value, and the Impact of Supreme Court and Congressional Attempts to Limit Awards (July 1998)
59. Kenneth W. Dam, Self-Help in the Digital Jungle (August 1998)
60. John R. Lott, Jr., How Dramatically Did Women's Suffrage Change the Size and Scope of Government? (September 1998)
61. Kevin A. Kordana and Eric A. Posner, A Positive Theory of Chapter 11 (October 1998)
62. David A. Weisbach, Line Drawing, Doctrine, and Efficiency in the Tax Law (November 1998)
63. Jack L. Goldsmith and Eric A. Posner, A Theory of Customary International Law (November 1998)
64. John R. Lott, Jr., Public Schooling, Indoctrination, and Totalitarianism (December 1998)
65. Cass R. Sunstein, Private Broadcasters and the Public Interest: Notes Toward A "Third Way" (January 1999)
66. Richard A. Posner, An Economic Approach to the Law of Evidence (February 1999)
67. Yannis Bakos, Erik Brynjolfsson, Douglas Lichtman, Shared Information Goods (February 1999)
68. Kenneth W. Dam, Intellectual Property and the Academic Enterprise (February 1999)
69. Gertrud M. Fremling and Richard A. Posner, Status Signaling and the Law, with Particular Application to Sexual Harassment (March 1999)
70. Cass R. Sunstein, Must Formalism Be Defended Empirically? (March 1999)
71. Jonathan M. Karpoff, John R. Lott, Jr., and Graeme Rankine, Environmental Violations, Legal Penalties, and Reputation Costs (March 1999)
72. Matthew D. Adler and Eric A. Posner, Rethinking Cost-Benefit Analysis (April 1999)

73. John R. Lott, Jr. and William M. Landes, Multiple Victim Public Shooting, Bombings, and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement (April 1999)
74. Lisa Bernstein, The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study (May 1999)
75. Richard A. Epstein, Deconstructing Privacy: and Putting It Back Together Again (May 1999)
76. William M. Landes, Winning the Art Lottery: The Economic Returns to the Ganz Collection (May 1999)
77. Cass R. Sunstein, David Schkade, and Daniel Kahneman, Do People Want Optimal Deterrence? (June 1999)
78. Tomas J. Philipson and Richard A. Posner, The Long-Run Growth in Obesity as a Function of Technological Change (June 1999)
79. David A. Weisbach, Ironing Out the Flat Tax (August 1999)
80. Eric A. Posner, A Theory of Contract Law under Conditions of Radical Judicial Error (August 1999)
81. David Schkade, Cass R. Sunstein, and Daniel Kahneman, Are Juries Less Erratic than Individuals? Deliberation, Polarization, and Punitive Damages (September 1999)
82. Cass R. Sunstein, Nondelegation Canons (September 1999)
83. Richard A. Posner, The Theory and Practice of Citations Analysis, with Special Reference to Law and Economics (September 1999)
84. Randal C. Picker, Regulating Network Industries: A Look at *Intel* (October 1999)
85. Cass R. Sunstein, Cognition and Cost-Benefit Analysis (October 1999)
86. Douglas G. Baird and Edward R. Morrison, Optimal Timing and Legal Decisionmaking: The Case of the Liquidation Decision in Bankruptcy (October 1999)
87. Gertrud M. Fremling and Richard A. Posner, Market Signaling of Personal Characteristics (November 1999)
88. Matthew D. Adler and Eric A. Posner, Implementing Cost-Benefit Analysis When Preferences Are Distorted (November 1999)
89. Richard A. Posner, Orwell versus Huxley: Economics, Technology, Privacy, and Satire (November 1999)
90. David A. Weisbach, Should the Tax Law Require Current Accrual of Interest on Derivative Financial Instruments? (December 1999)
91. Cass R. Sunstein, The Law of Group Polarization (December 1999)
92. Eric A. Posner, Agency Models in Law and Economics (January 2000)
93. Karen Eggleston, Eric A. Posner, and Richard Zeckhauser, Simplicity and Complexity in Contracts (January 2000)
94. Douglas G. Baird and Robert K. Rasmussen, Boyd's Legacy and Blackstone's Ghost (February 2000)
95. David Schkade, Cass R. Sunstein, Daniel Kahneman, Deliberating about Dollars: The Severity Shift (February 2000)
96. Richard A. Posner and Eric B. Rasmusen, Creating and Enforcing Norms, with Special Reference to Sanctions (March 2000)
97. Douglas Lichtman, Property Rights in Emerging Platform Technologies (April 2000)
98. Cass R. Sunstein and Edna Ullmann-Margalit, Solidarity in Consumption (May 2000)
99. David A. Weisbach, An Economic Analysis of Anti-Tax Avoidance Laws (May 2000, revised May 2002)
100. Cass R. Sunstein, Human Behavior and the Law of Work (June 2000)
101. William M. Landes and Richard A. Posner, Harmless Error (June 2000)
102. Robert H. Frank and Cass R. Sunstein, Cost-Benefit Analysis and Relative Position (August 2000)
103. Eric A. Posner, Law and the Emotions (September 2000)
104. Cass R. Sunstein, Cost-Benefit Default Principles (October 2000)
105. Jack Goldsmith and Alan Sykes, The Dormant Commerce Clause and the Internet (November 2000)
106. Richard A. Posner, Antitrust in the New Economy (November 2000)

107. Douglas Lichtman, Scott Baker, and Kate Kraus, Strategic Disclosure in the Patent System (November 2000)
108. Jack L. Goldsmith and Eric A. Posner, Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective (November 2000)
109. William Meadow and Cass R. Sunstein, Statistics, Not Experts (December 2000)
110. Saul Levmore, Conjunction and Aggregation (December 2000)
111. Saul Levmore, Puzzling Stock Options and Compensation Norms (December 2000)
112. Richard A. Epstein and Alan O. Sykes, The Assault on Managed Care: Vicarious Liability, Class Actions and the Patient's Bill of Rights (December 2000)
113. William M. Landes, Copyright, Borrowed Images and Appropriation Art: An Economic Approach (December 2000)
114. Cass R. Sunstein, Switching the Default Rule (January 2001)
115. George G. Triantis, Financial Contract Design in the World of Venture Capital (January 2001)
116. Jack Goldsmith, Statutory Foreign Affairs Preemption (February 2001)
117. Richard Hynes and Eric A. Posner, The Law and Economics of Consumer Finance (February 2001)
118. Cass R. Sunstein, Academic Fads and Fashions (with Special Reference to Law) (March 2001)
119. Eric A. Posner, Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective (April 2001)
120. Douglas G. Baird, Does Bogart Still Get Scale? Rights of Publicity in the Digital Age (April 2001)
121. Douglas G. Baird and Robert K. Rasmussen, Control Rights, Priority Rights and the Conceptual Foundations of Corporate Reorganization (April 2001)
122. David A. Weisbach, Ten Truths about Tax Shelters (May 2001)
123. William M. Landes, What Has the Visual Arts Rights Act of 1990 Accomplished? (May 2001)
124. Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa (May 2001)
125. Christopher Avery, Christine Jolls, Richard A. Posner, and Alvin E. Roth, The Market for Federal Judicial Law Clerks (June 2001)
126. Douglas G. Baird and Edward R. Morrison, Bankruptcy Decision Making (June 2001)
127. Cass R. Sunstein, Regulating Risks after ATA (June 2001)
128. Cass R. Sunstein, The Laws of Fear (June 2001)
129. Richard A. Epstein, In and Out of Public Solution: The Hidden Perils of Property Transfer (July 2001)
130. Randal C. Picker, Pursuing a Remedy in *Microsoft*: The Declining Need for Centralized Coordination in a Networked World (July 2001)
131. Cass R. Sunstein, Daniel Kahneman, David Schkade, and Ilana Ritov, Predictably Incoherent Judgments (July 2001)
132. Eric A. Posner, Courts Should Not Enforce Government Contracts (August 2001)
133. Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions (August 2001)
134. Richard A. Epstein, The Allocation of the Commons: Parking and Stopping on the Commons (August 2001)
135. Cass R. Sunstein, The Arithmetic of Arsenic (September 2001)
136. Eric A. Posner, Richard Hynes, and Anup Malani, The Political Economy of Property Exemption Laws (September 2001)
137. Eric A. Posner and George G. Triantis, Covenants Not to Compete from an Incomplete Contracts Perspective (September 2001)
138. Cass R. Sunstein, Probability Neglect: Emotions, Worst Cases, and Law (November 2001)
139. Randall S. Kroszner and Philip E. Strahan, Throwing Good Money after Bad? Board Connections and Conflicts in Bank Lending (December 2001)
140. Alan O. Sykes, TRIPs, Pharmaceuticals, Developing Countries, and the Doha "Solution" (February 2002)
141. Edna Ullmann-Margalit and Cass R. Sunstein, Inequality and Indignation (February 2002)
142. Daniel N. Shaviro and David A. Weisbach, The Fifth Circuit Gets It Wrong in *Compaq v. Commissioner* (February 2002) (Published in *Tax Notes*, January 28, 2002)

143. Warren F. Schwartz and Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System (March 2002, *Journal of Legal Studies* 2002)
144. Richard A. Epstein, HIPAA on Privacy: Its Unintended and Intended Consequences (March 2002, forthcoming *Cato Journal*, summer 2002)
145. David A. Weisbach, Thinking Outside the Little Boxes (March 2002, *Texas Law Review*)
146. Eric A. Posner, Economic Analysis of Contract Law after Three Decades: Success or Failure (March 2002)
147. Randal C. Picker, Copyright as Entry Policy: The Case of Digital Distribution (April 2002, *The Antitrust Bulletin*)
148. David A. Weisbach, Taxes and Torts in the Redistribution of Income (April 2002, Coase Lecture February 2002)
149. Cass R. Sunstein, Beyond the Precautionary Principle (April 2002)
150. Robert W. Hahn and Cass R. Sunstein, A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis (April 2002)
151. Douglas Lichtman, Copyright as a Rule of Evidence (May 2002, updated January 2003)
152. Richard A. Epstein, Steady the Course: Property Rights in Genetic Material (May 2002; revised March 2003)
153. Jack Goldsmith and Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes (June 2002)
154. William M. Landes and Richard A. Posner, Indefinitely Renewable Copyright (July 2002)
155. Anne Gron and Alan O. Sykes, Terrorism and Insurance Markets: A Role for the Government as Insurer? (July 2002)
156. Cass R. Sunstein and Adrian Vermeule, Interpretation and Institutions (July 2002)
157. Cass R. Sunstein, The Rights of Animals: A Very Short Primer (August 2002)
158. Cass R. Sunstein, Avoiding Absurdity? A New Canon in Regulatory Law (with Notes on Interpretive Theory) (August 2002)
159. Randal C. Picker, From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright (September 2002)
160. Eric A. Posner, A Theory of the Laws of War (September 2002)
161. Eric A. Posner, Probability Errors: Some Positive and Normative Implications for Tort and Contract Law (September 2002)
162. Lior Jacob Strahilevitz, Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks (September 2002)
163. David A. Weisbach, Does the X-Tax Mark the Spot? (September 2002)
164. Cass R. Sunstein, Conformity and Dissent (September 2002)
165. Cass R. Sunstein, Hazardous Heuristics (October 2002)
166. Douglas Lichtman, Uncertainty and the Standard for Preliminary Relief (October 2002)
167. Edward T. Swaine, Rational Custom (November 2002)
168. Julie Roin, Truth in Government: Beyond the Tax Expenditure Budget (November 2002)
169. Avraham D. Tabbach, Criminal Behavior: Sanctions and Income Taxation: An Economic Analysis (November 2002)
170. Richard A. Epstein, In Defense of "Old" Public Health: The Legal Framework for the Regulation of Public Health (December 2002)
171. Richard A. Epstein, Animals as Objects, or Subjects, of Rights (December 2002)
172. David A. Weisbach, Taxation and Risk-Taking with Multiple Tax Rates (December 2002)
173. Douglas G. Baird and Robert K. Rasmussen, The End of Bankruptcy (December 2002)
174. Richard A. Epstein, Into the Frying Pan: Standing and Privity under the Telecommunications Act of 1996 and Beyond (December 2002)
175. Douglas G. Baird, In Coase's Footsteps (January 2003)
176. David A. Weisbach, Measurement and Tax Depreciation Policy: The Case of Short-Term Assets (January 2003)
177. Randal C. Picker, Understanding Statutory Bundles: Does the Sherman Act Come with the 1996 Telecommunications Act? (January 2003)
178. Douglas Lichtman and Randal C. Picker, Entry Policy in Local Telecommunications: *Iowa Utilities* and *Verizon* (January 2003)

179. William Landes and Douglas Lichtman, Indirect Liability for Copyright Infringement: An Economic Perspective (February 2003)
180. Cass R. Sunstein, Moral Heuristics (March 2003)
181. Amitai Aviram, Regulation by Networks (March 2003)
182. Richard A. Epstein, Class Actions: Aggregation, Amplification *and* Distortion (April 2003)
183. Richard A. Epstein, The “Necessary” History of Property and Liberty (April 2003)
184. Eric A. Posner, Transfer Regulations and Cost-Effectiveness Analysis (April 2003)
185. Cass R. Sunstein and Richard H. Thaler, Libertarian Paternalism Is Not an Oxymoron (May 2003)
186. Alan O. Sykes, The Economics of WTO Rules on Subsidies and Countervailing Measures (May 2003)
187. Alan O. Sykes, The Safeguards Mess: A Critique of WTO Jurisprudence (May 2003)
188. Alan O. Sykes, International Trade and Human Rights: An Economic Perspective (May 2003)
189. Saul Levmore and Kyle Logue, Insuring against Terrorism—and Crime (June 2003)
190. Richard A. Epstein, Trade Secrets as Private Property: Their Constitutional Protection (June 2003)
191. Cass R. Sunstein, Lives, Life-Years, and Willingness to Pay (June 2003)
192. Amitai Aviram, The Paradox of Spontaneous Formation of Private Legal Systems (July 2003)
193. Robert Cooter and Ariel Porat, Decreasing Liability Contracts (July 2003)
194. David A. Weisbach and Jacob Nussim, The Integration of Tax and Spending Programs (September 2003)
195. William L. Meadow, Anthony Bell, and Cass R. Sunstein, Statistics, Not Memories: What Was the Standard of Care for Administering Antenatal Steroids to Women in Preterm Labor between 1985 and 2000? (September 2003)
196. Cass R. Sunstein, What Did *Lawrence* Hold? Of Autonomy, Desuetude, Sexuality, and Marriage (September 2003)
197. Randal C. Picker, The Digital Video Recorder: Unbundling Advertising and Content (September 2003)
198. Cass R. Sunstein, David Schkade, and Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation (September 2003)
199. Avraham D. Tabbach, The Effects of Taxation on Income Producing Crimes with Variable Leisure Time (October 2003)
200. Douglas Lichtman, Rethinking Prosecution History Estoppel (October 2003)
201. Douglas G. Baird and Robert K. Rasmussen, Chapter 11 at Twilight (October 2003)
202. David A. Weisbach, Corporate Tax Avoidance (January 2004)
203. David A. Weisbach, The (Non)Taxation of Risk (January 2004)
204. Richard A. Epstein, Liberty versus Property? Cracks in the Foundations of Copyright Law (April 2004)
205. Lior Jacob Strahilevitz, The Right to Destroy (January 2004)
206. Eric A. Posner and John C. Yoo, A Theory of International Adjudication (February 2004)
207. Cass R. Sunstein, Are Poor People Worth Less Than Rich People? Disaggregating the Value of Statistical Lives (February 2004)
208. Richard A. Epstein, Disparities and Discrimination in Health Care Coverage; A Critique of the Institute of Medicine Study (March 2004)
209. Richard A. Epstein and Bruce N. Kuhlik, Navigating the Anticommons for Pharmaceutical Patents: Steady the Course on Hatch-Waxman (March 2004)
210. Richard A. Epstein, The Optimal Complexity of Legal Rules (April 2004)
211. Eric A. Posner and Alan O. Sykes, Optimal War and *Jus Ad Bellum* (April 2004)
212. Alan O. Sykes, The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute (May 2004)
213. Luis Garicano and Thomas N. Hubbard, Specialization, Firms, and Markets: The Division of Labor within and between Law Firms (April 2004)
214. Luis Garicano and Thomas N. Hubbard, Hierarchies, Specialization, and the Utilization of Knowledge: Theory and Evidence from the Legal Services Industry (April 2004)
215. James C. Spindler, Conflict or Credibility: Analyst Conflicts of Interest and the Market for Underwriting Business (July 2004)
216. Alan O. Sykes, The Economics of Public International Law (July 2004)



- 
- 217. Douglas Lichtman and Eric Posner, Holding Internet Service Providers Accountable (July 2004)
  - 218. Shlomo Benartzi, Richard H. Thaler, Stephen P. Utkus, and Cass R. Sunstein, Company Stock, Market Rationality, and Legal Reform (July 2004)
  - 219. Cass R. Sunstein, Group Judgments: Deliberation, Statistical Means, and Information Markets (August 2004, revised October 2004)
  - 220. Cass R. Sunstein, Precautions against What? The Availability Heuristic and Cross-Cultural Risk Perceptions (August 2004)
  - 221. M. Todd Henderson and James C. Spindler, Corporate Heroin: A Defense of Perks (August 2004)
  - 222. Eric A. Posner and Cass R. Sunstein, Dollars and Death (August 2004)
  - 223. Randal C. Picker, Cyber Security: Of Heterogeneity and Autarky (August 2004)
  - 224. Randal C. Picker, Unbundling Scope-of-Permission Goods: When Should We Invest in Reducing Entry Barriers? (September 2004)
  - 225. Christine Jolls and Cass R. Sunstein, Debiasing through Law (September 2004)
  - 226. Richard A. Posner, An Economic Analysis of the Use of Citations in the Law (2000)
  - 227. Cass R. Sunstein, Cost-Benefit Analysis and the Environment (October 2004)
  - 228. Kenneth W. Dam, Cordell Hull, the Reciprocal Trade Agreement Act, and the WTO (October 2004)
  - 229. Richard A. Posner, The Law and Economics of Contract Interpretation (November 2004)
  - 230. Lior Jacob Strahilevitz, A Social Networks Theory of Privacy (December 2004)
  - 231. Cass R. Sunstein, Minimalism at War (December 2004)
  - 232. Douglas Lichtman, How the Law Responds to Self-Help (December 2004)
  - 233. Eric A. Posner, The Decline of the International Court of Justice (December 2004)
  - 234. Eric A. Posner, Is the International Court of Justice Biased? (December 2004)
  - 235. Alan O. Sykes, Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy (February 2005)
  - 236. Douglas G. Baird and Edward R. Morrison, Serial Entrepreneurs and Small Business Bankruptcies (March 2005)
  - 237. Eric A. Posner, There Are No Penalty Default Rules in Contract Law (March 2005)
  - 238. Randal C. Picker, Copyright and the DMCA: Market Locks and Technological Contracts (March 2005)
  - 239. Cass R. Sunstein and Adrian Vermeule, Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs (March 2005)
  - 240. Alan O. Sykes, Trade Remedy Laws (March 2005)
  - 241. Randal C. Picker, Rewinding *Sony*: The Evolving Product, Phoning Home, and the Duty of Ongoing Design (March 2005)
  - 242. Cass R. Sunstein, Irreversible and Catastrophic (April 2005)
  - 243. James C. Spindler, IPO Liability and Entrepreneurial Response (May 2005)
  - 244. Douglas Lichtman, Substitutes for the Doctrine of Equivalents: A Response to Meurer and Nard (May 2005)
  - 245. Cass R. Sunstein, A New Progressivism (May 2005)