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Cass R. Sunstein

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THE AUTONOMY OF LAW IN LAW AND ECONOMICS

CASS R. SUNSTEIN*

I provide these remarks in the context of two personal observations. As you may know, at the University of Chicago, the economists and the lawyers interact frequently. I have noted that these highly intelligent economists contribute much in their field, but when they talk about law it is apparent that something has gone wrong. They do not clearly understand the legal field, and there is even a question of what it is about the field that they do not understand.

The second observation occurred longer ago, when I was a law student in contracts class. I had a very dazzling socratic teacher who exposed us to a lot of analogical reasoning. As he went from case to case, we students were confused and amazed. We did not think that we understood anything, but nonetheless we thought it was really fantastic. But shortly thereafter we discovered that we really could not recover much that we had learned from the class. It was, in its way, a dazzling class, but there were no criteria by which we could decide whether our judgments were right or wrong. The instructor had not introduced any, and we never learned any. What was there that we could use?

My claims here are three, and they are simple.

The first is that the enormous contribution of the economic analysis of law is that it orders debates about law by simply asking how we can minimize the costs of decision and the costs of error. My simple suggestion is that many legal debates turn on the issue of minimizing the costs of decision and the costs of error. With that simple insight we can bring order and structure to debates whose content may be otherwise mysterious.

My second and third points describe ways in which law has a claim to autonomy.

* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago Law School.

The second claim focuses on incompletely theorized arguments. Law often tries to get agreement on particulars from people who disagree about abstractions. The autonomy of law often lies in incompletely theorized agreements on particular points amidst diversity of opinion on abstract concepts. In a family, a workplace, a court, or a nation, people often disagree on first principles, whether they are utilitarians or Kantians or democrats. Though they may disagree very sharply, they might still be able to agree that a speed limit law makes perfect sense, or that the basic rules of negligence are quite plausible. Take another example. There is a law school in the United States that was doing quite well in hiring new faculty. By and large, it handled each particular case well. But then there came a decision in which issues of diversity had to be brought out for theoretical agreement. At that point, the law school stopped working well. People who had agreed on particulars could not agree on the abstractions underlying those particulars. My submission is that the autonomy of law often lies in simultaneous agreement on particulars amidst disagreement about abstractions.

My third claim is that sometimes cost-benefit analysis itself may fail cost-benefit analysis because it does not minimize the sum of decision costs and error costs. Often law makes a kind of second order, or meta-decision, to truncate the sorts of considerations to which participants in law may look. The autonomy of law is best understood as reflecting the second-order decision that particular people occupying certain institutional roles should look at some select considerations and not at others. For example, judges, in deciding what the Occupational Safety and Health Act means, are not to make a decision about what the Occupational Safety and Health Act ought to mean.¹ Often in ordinary life and in law there is a second-order decision to say that certain considerations are blocked—they are just not admissible on the agenda. You might think, for example, that you are not allowed to gossip about

1. See, e.g., *Lynch v. Overholser*, 369 U.S. 705, 720 (1962) (Clark, J., dissenting) ("Our province is to decide what the law is, not to declare what it should be If the law is wrong, it ought to be changed; but the power for that is not with us.") (omission in original) (quoting *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1875)); *Taylor v. Foremost-McKesson, Inc.*, 656 F.2d 1029 (5th Cir. 1981) (stating that, in a diversity suit, the Court of Appeals' inquiry is not what the state law ought to be, but rather what it is).

some secret that a close friend told you just because it would be fun—the second-order consideration blocks that means of having fun. Law works similarly. The second-order decision itself has to be justified, but it results in a degree of legal autonomy.

More concretely, consider a case called *Chevron*.² To introduce the case, I have done a little empirical study of citations to famous cases. *Marbury v. Madison*³ has been cited in federal cases 1,066 times. *Brown v. Board of Education*⁴ has been cited 1,468 times. *Roe v. Wade*,⁵ the key case in a lot of substantive due process decisions, and the hero and villain in a lot of litigation, recently surpassed *Brown*: *Roe* has been cited 1,476 times—at last count eight more times than *Brown*. *Chevron*, decided in 1984, has had a significantly shorter amount of time to accumulate citations, yet it has been cited 3,627 times, and before long it may exceed *Marbury*, *Brown*, and *Roe* combined.

Chevron basically holds that when a statute is ambiguous, the court ought to accept the agency's interpretation so long as it is reasonable.⁶ *Chevron* holds that a court ought not to ask if the agency's interpretation is correct (as *Marbury* might suggest the court should do⁷), but instead the court should ask if the agency's interpretation of law is reasonable (so long as the statute has ambiguity in it).⁸ *Chevron* is a kind of counter-*Marbury* for the regulatory state.

We might ask, in thinking about the autonomy of law, what is the origin of the analysis in *Chevron*? I think the analysis proceeds relatively simply. The first question on which people have broad agreement is that the appropriate posture of a court reviewing an agency interpretation of law depends in the first instance on what Congress wants. That is, if Congress wants courts to defer to agency interpretations of law, then courts ought to defer to agency interpretations of law. If not, then courts ought not to defer to such interpretations.

2. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3. 5 U.S. 137 (1803).

4. 349 U.S. 294 (1955).

5. 410 U.S. 113 (1973).

6. See *Chevron*, 467 U.S. at 843-44.

7. See *Marbury*, 5 U.S. 137, 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

8. See *Chevron*, 467 U.S. at 843-44.

In the first instance, this is a question of congressional instructions. Note, interestingly, that the proposition itself is incompletely theorized. That is, people who agree that the question of whether agencies deserve deference in their interpretations of law is a question for Congress to answer hold that opinion for diverse reasons. Some would offer economic justifications pointing to *Marbury v. Madison*. Others would offer non-economic justifications also pointing to *Marbury v. Madison*. The proposition is, itself, incompletely theorized.

If we look at Congress's instructions on whether courts should defer to agency interpretations of law, we will find some ambiguity. Congress has not spoken with clarity to that general issue. In the most powerful justification for the *Chevron* decision, Justice Scalia has basically argued that if we want to minimize the costs of decision and the costs of error, *Chevron* does better than anything else.⁹ It introduces a high degree of simplicity and uniformity into the law. It produces a rule against which courts and Congress can act. It allows for congressional correction with relative clarity about the background against which corrections will take place.¹⁰ Overall, it reduces error as well as any alternative. Often the resolution of ambiguities calls for a policy judgment. Often Congress and courts are in a worse position than agencies in resolving those ambiguities. If we want to reduce mistakes, this is no worse than any other way, and if we want to reduce decision costs, it is better.

The debate over *Chevron* is very elaborate and extensive. There are many thousands of pages on the issue.¹¹ Despite the

9. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (noting that administrative errors in statutory interpretation can be more readily remedied than judicial errors).

10. See *Smiley v. Citibank*, 116 S. Ct. 1730, 1733 (1996) ("We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.").

11. For a sample of the scholarly discussion on *Chevron*, see T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 UCLA L. REV. 1193 (1992); Maureen B. Callahan, *Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council*, 1991 WIS. L. REV. 1275 (1991); Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646 (1988); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); John F. Manning, *Constitutional Structure and Judicial*

diversity of arguments for and against *Chevron*, they are debates on the grounds not far from those identified by Justice Scalia—what rule will most reduce the costs of decision and the costs of error? Current debates on the scope of *Chevron* focus on very similar issues. These are debates that have a degree of technicality, but they raise large questions about the nature of separation of powers and constitutional government. There are debates about the role of legislative history and of statutory text in statutory interpretation. Suppose an agency wants to go against the legislative history or wants to buck the statutory text. Debates in such a case are about the degree of decisional simplicity that can be produced by one rule or another and the best way to reduce error.

Let me conclude with just a few notations. Plainly Judge Easterbrook is correct in saying that law is not autonomous in the sense that any legal doctrine ultimately needs a defense in non-legal terms.¹² A defense of law in purely legal terms would be circular, and therefore we need to look outside of law for a defense. The kind of core, simple insight of the economic analysis of law—indispensable, I think, to the practice of law in the Twenty-first Century—is that we can organize a lot of our otherwise unruly debates by suggesting that they are really debates about how to minimize decision costs and error costs. However, it is not as if this were a magic algorithm that can solve our problems. The identification of what counts as an error may well become contentious, but a lot of debates become much simpler once we see them through the law and economics lens because we can identify our exact point of disagreement.

Sometimes the effort to reduce decision costs and error costs pushes courts toward a degree of autonomy for law. Sometimes the effort to reduce the sum of decision costs and error costs produces autonomous law embodied in the notion that cost-benefit analysis sometimes fails cost-benefit analysis. Consider analogical reasoning, principles of deference to other institutional actors, and principles excluding certain reasons for

Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612 (1996); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481 (1990); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (1985); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071 (1990).

12. Judge Easterbrook raised this point at The Sixteenth Annual National Student Federalist Society Symposium on Law and Public Policy (1997).

action that would be admissible in other circumstances.¹³ These various practices produce a degree of autonomy for law. They need a second order or meta-justification which may be either in economic or non-economic terms. It makes legal judgment independent of moral or political or economic judgment for moral, political, or economic reasons.

Finally, a clue to the autonomy of law lies in the fact that often people from diverse theoretical perspectives can converge in a kind of incompletely theorized way on particular agreements about what to do. People who often disagree about exactly what to say can often agree on what ought to be done. Let me conclude with the suggestion that a key to the autonomy of legal reasoning and a key to social stability in a pluralistic society lies in the phenomenon of incompletely theorized agreements.

13. One such principle is the idea that the offensiveness of ideas is never a legitimate reason to regulate speech.