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Cass R. Sunstein

FROM CONSUMER SOVEREIGNTY TO COST-BENEFIT ANALYSIS: AN INCOMPLETELY THEORIZED AGREEMENT?

CASS R. SUNSTEIN*

For far too long, American debates about regulatory policy have been caught between two unproductive poles. On the one side are the defenders of regulatory policies characteristic of the early 1970s—favoring a kind of absolutism with respect to safety, skeptical about tradeoffs, dismissive of claims made by "business." On the other side are the "consumer sovereignty" voices of the early 1980s, claiming that consumers generally "know best," and that market arrangements are sufficient for purposes of promoting citizen welfare. The debate between the two sides often seems blocked, not least in Congress, which has had an extremely difficult time in directing agencies to pursue any particular course and which often shuttles back and forth between absolutism and an open-ended plea for "balancing."[1]

The problem with the absolutist regulatory approach should be obvious: it makes no sense to spend a great deal of money when the benefits of expenditures are very low, especially in light of the fact that regulatory expenditures are often borne not by "business," but by employees and consumers. But there are problems with the ideal of "consumer sovereignty" as well. Frequently consumers lack relevant information, and even when they have the facts, they may display bounded rationality.[2] In any case, the American tradition is one of

* Karl N. Llewellyn Distinguished Service Professor, University of Chicago Law School. This essay draws on a more detailed discussion found in Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. (forthcoming 2000). This essay is a revised version of oral remarks presented at the Federalist Society Eighteenth Annual Student Symposium at The University of Chicago Law School on April 9-10, 1999.

1. I explore the evolution of this debate in CASS R. SUNSTEIN, *Congress, Constitutional Moments, and the Cost-Benefit State*, *in* FREE MARKETS AND SOCIAL JUSTICE 348-83 (1997).

2. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) ("Bounded rationality . . . refers to the obvious fact that human cognitive abilities are not infinite. We have limited computational skills and seriously

popular sovereignty, not "consumer sovereignty." Despite its appeal in some contexts, the latter ideal is a distortion, almost a parody, of founding ideals, and it involves deliberative self-government, not consumer choices.[3]

In this essay I suggest that the debate over regulatory policy is most sensibly treated as a debate over the nature of cost-benefit analysis. We should be able to make a great deal of progress if we shift from the contested and often implausible idea of consumer sovereignty and agree that some form of cost-benefit analysis is the appropriate basis for regulatory policy. We may accept this proposition without necessarily agreeing with the most controversial economic claims about the nature of valuation or "willingness to pay." The best argument for cost-benefit analysis is offered not on the ground that government should be seen as a kind of machine for aggregating private preferences, but with the thought that some form of cost-benefit balancing is both inevitable and desirable. It is possible to debate how relevant values should be quantified, and I offer some brief suggestions on that topic here. My basic submission, for present purposes, is only that a great deal of progress can come from a shift away from the deep theoretical waters to more confined debates about how—not whether—to undertake cost-benefit balancing.

I. INCOMPLETE THEORIZATION

Often it is possible to resolve hard questions of law and policy without resolving deeply contested issues about justice, democracy, or the appropriate aims of the state.[4] Often it is possible to obtain an incompletely theorized agreement on a social practice and even on the social or legal specification of the practice. In many areas of law and public policy, people can reach closure about what to do despite their disagreement or

flawed memories."). This notion originates in Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 99-101 (1955).

3. *See* THE FEDERALIST NO. 10 (James Madison). *See generally* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994) (arguing that the Framers sought to produce a system of republican self-government partly because of a judgment that political deliberation can be best promoted through a representative system).

4. *See generally* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (1996); CASS R. SUNSTEIN, ONE CASE AT A TIME (1999).

uncertainty about why, exactly, they ought to do it. Whether they are utilitarians or retributivists, people who disagree about the purposes of the criminal law can agree that rape and murder should be punished and punished more severely than theft and trespass. People can support an Endangered Species Act amidst disagreement about whether the protection of endangered species is desirable for theological reasons, or because of the rights of animals, plants, and species, or because of the value of animals, plants, and species for human beings. A great advantage of incompletely theorized agreements is that they allow people of diverse views to live together on mutually advantageous terms. A greater advantage is that they allow people of diverse views to show one another a high degree of both humility and mutual respect.

I believe that an incompletely theorized agreement is possible here; at least achieving such an agreement should be the goal of those attempting to improve the operation of the system of regulatory protection and to understand the uses of cost-benefit analysis in regulatory policy. To be sure, it would be difficult to obtain agreement on the view (which seems implausible to me) that all questions of regulatory policy should be resolved by asking how much people are willing to pay for various social goods. Often people lack important information; sometimes they are quasi-rational.[5] There is also a difference between the judgments people make as consumers and those that they make as citizens, and sometimes the latter deserve to prevail.[6]

But my basic claims here are (1) that whatever their theoretical disagreements, it should be possible for diverse, reasonable people to agree on presumptive floors and ceilings for regulatory expenditures and (2) that the presumptions can do a great deal of useful work for policymaking and for law. In short, a great deal can be done without confronting the hardest theoretical questions raised by contentious specifications of cost-benefit analysis.

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5. *See generally* RICHARD H. THALER, QUASI-RATIONAL ECONOMICS (1991). The term "quasi-rational" refers to the fact that people's actual behavior departs from that of the "rational actor" posited by many economic models.

6. *See* SUNSTEIN, *supra* note 1, at 13-69.

An obvious question here is: Who could join this incompletely theorized agreement? My principal claim is that the agreement can be joined by most of those who accept and those who doubt the idea that private willingness to pay is the appropriate foundation for regulatory policy. Thus, there is room here for deliberative democrats who emphasize the need for government to reflect on private preferences, rather than simply to translate them into law.[7] A prime purpose of the approach is to ensure more in the way of reflection; cost-benefit analysis, as understood here, is a guarantee of greater deliberation, not an obstacle to it. Nor is the approach rigid. Under the proposed approach, agencies have the authority to abandon the floors and ceilings if there is reason for them to do so. If, for example, agencies want to spend a great deal to protect African-American children from a risk disproportionately faced by them, they are entitled to do so, as long as they explain that this is what they are doing.

II. EIGHT PROPOSITIONS

Here, then, are eight brief propositions, offered in the hope that they might attract support from diverse theoretical standpoints. I offer these as a tentative starting point for the effort to anchor cost-benefit analysis in an incompletely theorized agreement about regulatory policies.[8]

1. *Agencies should identify the advantages and disadvantages of proposed courses of action and also attempt to quantify the relevant effects to the extent that this is possible.* When quantification is not possible, agencies should discuss the relevant effects in qualitative terms and also specify a range of plausible outcomes (*e.g.*, annual savings of between 150 and 300 lives or savings of between $100 million and $300 million, depending on the rate of technological change). The very decision to specify effects should improve the decisionmaking process and

7. *See* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); Herman B. Leonard & Richard J. Zeckhauser, *Cost-Benefit Analysis Applied to Risks: Its Philosophy and Legitimacy*, *in* VALUES AT RISK 31-45 (Douglas Maclean ed., 1986).

8. More detailed discussion can be found in Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. (forthcoming 2000).

also make the democratic process work better by giving the public a sense of the stakes.

2. *The quantitative description should supplement rather than displace a qualitative description of relevant effects.* Both qualitative and quantitative analyses should be provided. The qualitative description should give a concrete sense of who is helped and who is hurt—for example, whether the regulation will lead to lost jobs, higher prices, more poverty, and so forth. Where the only possible information is speculative, this should be noted, along with the most reasonable speculations. Here, too, the goal is to improve the democratic process by giving people, in government and outside of it, a chance to understand the likely effects of regulation and nonregulation.

3. *Agencies should attempt to convert nonmonetary values (including, for example, lives saved, health gains, and aesthetic values) into dollar equivalents.* This point does not suggest that a statistical life and $5 million, for example, are the same thing, but it aims to promote coherence and uniformity and to ensure the sensible setting of priorities. There is nothing magical or rigid about any particular dollar equivalents; the conversion is simply a pragmatic tool to guide analysis and to allow informed comparisons. Economists have attempted to estimate the amount that people are "willing to pay" to save a statistical life, with a range of between $3 million and $10 million.[9] These studies are controversial, but at least they provide a start. In addition, the same range of numbers seems to be the median on the government's cost-per-life-saved charts.[10]

If $5 million seems too high, or too low, the question should be the following: on what basis might an alternative number be chosen? Note here that any monetary values are intended as presumptive, not conclusive (see proposition 5 below).

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9. *See* W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 34-74 (1992); W. Kip Viscusi, *Regulating the Regulators*, 63 U. CHI. L. REV. 1423, 1430-36 (1996).

10. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 24-27 (1993).

4. *Agencies entrusted with valuing life and health should be controlled, by statute or Executive order, via presumptive floors and ceilings.* For example, a statute might say that a statistical life will ordinarily be valued at no less than $2 million and no more than $10 million. Evidence of worker and consumer behavior, suggesting a valuation of between $5 million and $7 million per statistical life saved, is relevant here. The Office of Management and Budget should move in the direction of establishing presumptive floors and ceilings for various regulatory benefits. If an agency is going to spend, for example, no more than $500,000 per life saved, or more than $20 million, it should have to explain its decision.

5. *Agencies should be permitted to adjust the ceilings and floors, or to choose a low or high end of the range, on the basis of a publicly articulated and reasonable judgment that such an adjustment or such a choice is desirable.* To avoid unnecessary controversy, and what would reasonably be seen as injustice, there should be no adjustments downwards for poor people. In other words, the fact that poor people are willing to spend less to protect their own lives (because they are poor) should not call for a correspondingly lower expenditure by the government.

6. *Agencies should be permitted to make adjustments on the basis of a reasonable assessment of various qualitative factors, such as whether the risk is faced voluntarily, is controllable, is dreaded, is potentially catastrophic, and is equitably distributed.*[11] For example, they might add a pain and suffering annual premium or increase the level of expenditure because children are disproportionately affected or because the victims are members of a disadvantaged group. To the extent possible, they should

11. To understand why these factors, in particular, matter to consumers, see HOWARD MARGOLIS, DEALING WITH RISK (1996); Paul Slovic et al., *Regulation of Risk: A Psychological Perspective, in* REGULATORY POLICY AND THE SOCIAL SCIENCES 241 (Roger G. Noll, ed., 1985). *See also* Robin Gregory & Robert Mendelsohn, *Perceived Risk, Dread and Benefits*, 13 RISK ANALYSIS 259 (1993) (using regression techniques to identify the major explanatory variables for lay people's risk perceptions and finding, among other things that people care about whether the risk has immediate or latent effects, whether it will affect future generations, and whether its effects are catastrophic or diffuse).

be precise about the nature of, and grounds for, the relevant adjustments.

7. *The appropriate response to excessive social fears not based on evidence and to related ripple effects, is education and reassurance rather than increased regulation.* Sometimes public concern about certain risks is general and intense, even though the concern is not merited by the facts.[12] The best response is educational, but if education and reassurance fail, increased regulation may be defensible as a way of providing a kind of reassurance.

8. *Unless the statute requires otherwise, judicial review of risk regulation should require a general showing that regulation has produced more good than harm on a reasonable view about valuation of both benefits and costs.* On this view, courts should generally require agencies to generate and to adhere to ceilings and floors, but they should also allow agencies to depart from conventional numbers (by, for example, valuing a life at less than $1 million or more than $10 million) if and only if the agency has given a reasonable explanation of why it has done so.

III. CONCLUSION

For the last thirty years, debates over regulatory policy, and protection of consumers, have been blocked unnecessarily by intransigence, sloganeering, and conflict. "Absolutism" makes no sense; the question is always what will be gained and what will be lost (though of course we might disagree about how to answer that question). The idea of "consumer sovereignty" is too contestable and too vulnerable to be challenged by those who stress limited information, bounded rationality, and the difference between the decisions people make as citizens and those they make as consumers.

12. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 691-703 (1999) (discussing examples of widespread and intense, but ultimately unwarranted, public concern over events such as Love Canal and the use of the pesticide Alar on apples).

I have suggested that it should ultimately be possible, first, to obtain an incompletely theorized agreement on the need for cost-benefit analysis and, second, to obtain incompletely theorized agreements on certain understandings of what cost-benefit analysis entails. I have briefly suggested the possible nature of such understandings. Perhaps some of the eight propositions are wrong or misdirected; perhaps some of them ignore relevant arguments. The task for the future is not to press implausible arguments about consumer sovereignty but to see how cost-benefit analysis might be refined so as to attract, and to deserve, broad support.