California Law Review Circuit

VOL. 5 DECEMBER 2014

Virtue Analysis: A Replay to Professor Sunstein

Jason Marisam*

INTRODUCTION

The rise of cost-benefit analysis (CBA) in the administrative state has been one of the most important administrative developments over the past few decades.[1] Today, regulatory agencies proposing significant new rules must perform a CBA for review by the White House's Office of Information and Regulatory Affairs (OIRA).[2] This institutionalization of CBA can enhance the legitimacy of agency actions by forestalling arbitrary outcomes that have no technocratic rationales and eradicating cognitive errors from the decision-making process. But agencies' heavy reliance on CBA comes with a cost. CBA is a cold tool that has trouble making room for the virtues and values that tend to inform the public's discourse on risks. The administrative state has not yet resolved problems associated with incorporating these virtues into agency decision making without sacrificing the legitimizing effects of CBA.

Professor Cass Sunstein's thought-provoking article *The Limits of Quantification* represents one of the most important steps yet taken to help resolve this problem.[3] Sunstein shows how a technocratic method known as breakeven analysis enables agencies to build virtues such as dignity and environmental aesthetics into their CBA without abandoning the tenets of

* Assistant Professor, Hamline University School of Law.

1. *See, e.g.*, Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999).

2. Exec. Order No. 12, 866, 58 Fed. Reg. 51735§(6)(a)(3)(C) (1993).

3. Cass R. Sunstein, *The Limits of Quantification*, 102 CAL. L. REV. 1369 (2014).

conventional CBA. For shorthand, I will refer to the weighing of these virtues as "virtue analysis."

Virtue analysis is still in its infancy. Despite Sunstein's contributions, several issues must be resolved before virtue analysis can become a stable, legitimizing feature of agency decision making. One issue is whether virtue analysis applies to cost in addition to benefits. Sunstein only shows how it can be used to increase the assessed benefits. Treating harms to virtues as costs raises the related issue of how to handle what I call virtue-virtue tradeoffs—that is, regulatory problems involving virtues on both the benefit and cost sides of the equation. Finally, perhaps the most important issue to resolve is which virtues agencies are allowed to count in their CBA.

Without satisfactory resolutions to these issues, administrations could use virtue analysis as an arbitrary tool and manipulate its features to serve political ends. Democratic administrations could insist on giving great weight to the virtues that bolster regulations, while Republican administrations could downplay such virtues and emphasize harms to a different set of virtues in order to quash otherwise cost-effective regulations.[4]

This reply proceeds as follows. Part I describes the existing debate over traditional CBA's inadequate treatment of virtues. It then summarizes Sunstein's relevant suggestions and situates them within this debate. Part II discusses the important, unresolved issues raised by Sunstein's article and points the way for future work on virtue analysis. Part III concludes.

I.
SITUATING SUNSTEIN'S SUGGESTIONS IN THE LARGER DEBATE OVER CBA

A. The Debate Over CBA and Virtue

Ever since CBA became a mainstay of agency decision making, critics have characterized it as a cold, technocratic instrument that does not capture the public values and ethics that can and should inform risk regulation.[5] Conventional CBA easily captures concrete benefits and costs that are easily quantifiable and monetizable, such as how many lives a regulation will save or how much it will cost companies to adopt a new technology, but struggles to assess more amorphous notions of virtue and justice, such as how a regulation will affect personal dignity or ecological aesthetics.[6]

4. *Cf.* Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609 (2014) (showing that regularization of cost-benefit methods can protect agencies from White House interference).

5. *See, e.g.*, Daniel A. Farber, *Environmentalism, Economics, and the Public Interest*, 41 STAN. L. REV. 1021 (1989).

6. *See, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless*: *Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1579-80 (2002).

What should be done about this flaw in conventional CBA? One school of thought argues that risk regulation should be shaped more by lay people and less by insulated technocratic experts. This view stresses how public citizens inherently incorporate into their judgments virtues and values that technocrats strip out of their CBA. As Professor Dan Kahan and his co-authors have put it: "Reliance on expert cost-benefit analysis . . . [is] a device for strategically avoiding political disputes over individual virtue and collective justice."[7]

Defenders of technocratic, CBA-based risk regulation respond by pointing to the cognitive limits of lay judgments about risks. If we rely on the public instead of technocrats to make determinations about risk regulation, the cognitive limits and misperceptions of lay people will produce wasteful and distorted policies.[8] Because agency decision making relies on technocratic CBA, it is more sober and rational and thus is more likely to produce sound risk regulation.

But this response is not wholly satisfying. It suggests that there is a tradeoff between rationality and notions of virtue. We must choose an institution that maximizes one or the other, but we cannot have an institution that effectively relies on both.

In a 2001 essay, Professor Jerry Mashaw muses about this conundrum.[9] It is "dangerous," he says, "to bracket the questions of social justice and individual authenticity, to treat them as pressing concerns, but as outside the purview of reason-giving in the administrate state."[10] At the same time, it would be a "tragedy" if incorporating such virtues into administrative law meant abandoning administrative rationality.[11] We must, Mashaw suggests, find a way to have them both. But how?

B. Sunstein's Recent Contribution to the Debate

Although Sunstein's *The Limits of Quantification* does not purport to enter this debate directly, its suggestions can be accurately read as an attempt to solve the problem posed by Mashaw. This section briefly summarizes the relevant parts of Sunstein's article and shows how his suggestions provide an important step to resolving this problem.

Sunstein argues that CBA should incorporate virtues like dignity and ecological aesthetics through a technique known as breakeven analysis.[12] Under breakeven analysis, as Sunstein explains, an agency first quantifies and monetizes the costs and benefits of a regulation. If there is a factor that is difficult

---

7. Dan Kahan et al., Book Review, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1073 (2006).

8. *See, e.g.*, Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

9. Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 18 (2001).

10. *Id.* at 35.

11. *Id.*

12. Sunstein, *supra* note 3.

to quantify and monetize, the analyst then asks how much benefit that factor must provide before the regulation becomes cost-effective.[13] For example, assume an agency calculates that the costs of a regulation are $200 million and its benefits are $150 million. As is, the regulation appears inefficient because the costs outweigh the benefits significantly. However, assume the agency identifies dignity as a virtue of the regulation. Although dignity cannot be easily quantified, the agency can assess whether the dignity stakes involved are low, and thus unlikely to make up for the gap between monetized costs and benefits, or significant enough to justify enacting the regulation.

The genius of Sunstein's suggestion is that it combines rationality and virtue without abandoning the constraints that technocratic CBA places on agency decision making. Imagine that agencies could point to virtues like dignity to trump the results of a CBA without any attempt at explaining the relative magnitude of the benefits from dignity. Such discretion would make it easy for an agency to offer a specious reason for ignoring the results of a cost-benefit analysis. But, by forcing agencies to consider and discuss the magnitude of hard-to-quantify factors like virtues, breakeven analysis makes it more difficult for agencies to justify any outcome they like because they will be held responsible for exaggerating the stated magnitude of the virtues involved.

In other words, Sunstein is searching for, and may have hit on, a way to incorporate virtue into CBA without giving agencies discretion to justify any result they want.

II.
THREE UNRESOLVED ISSUES ABOUT VIRTUE ANALYSIS

Despite Sunstein's contribution, there are at least three issues that must be resolved before virtue analysis can become a legitimizing force in administrative law. These issues are: (1) whether costs as well benefits should be considered under virtue analysis; (2) how agencies should handle virtue-virtue tradeoffs; and (3) which virtues agencies should be allowed to consider in their CBA. This Part discusses each of these questions in turn.

A. Virtues as Costs?

Sunstein's examples of virtue analysis all involve virtues being used to increase calculated benefits. For example, in discussing a regulation that promotes wheelchair access to restrooms, he shows how avoiding stigma and humiliation for wheelchair-bound people can be calculated as a benefit.[14] Sunstein probably uses an exclusive focus on benefits because it accurately reflects current agency practice. As Rachel Bayefsky has observed, "dignity is

13. *Id.*
14. *Id.*

treated as a benefit [and not a cost] in all existing agency CBAs discussing dignity."[15]

But surely regulations can have negative impacts on virtues too. Should these costs be taken into account? The answer to this question has political implications for who is likely to support agencies' use of virtue analysis and whether it will be viewed as a legitimate expansion of conventional CBA.

One option would be to only use virtues as part of a breakeven analysis that asks how much more benefits a regulation would have to deliver in order to reach the point at which it becomes cost-effective. Some progressives may support this approach as a legitimate corrective for the well-documented anti-regulatory bias in how CBA has been institutionalized in the executive branch.[16] However, if agencies use virtue analysis as a one-way ratchet to boost benefits but not costs, this pro-regulatory bias could delegitimize agency analysis in the eyes of conservatives. Allowing agencies to consider harm to virtues as a cost would position virtue analysis as a more neutral tool.

In this reply, I will remain agnostic as to how to resolve this issue. My point here is that whether virtue analysis is institutionalized as a pro-regulatory or more neutral analytical tool has political and democratic implications that could affect its perceived legitimacy with different groups.

B. Virtue-Virtue Tradeoffs

If virtues are be counted as costs, this raises a related issue: what to do with virtue-virtue tradeoffs that occur when a regulation promotes some virtues but also harms other virtues. To illustrate, consider a hypothetical that juxtaposes two different virtues identified by Sunstein. Imagine a proposal to make an environmentally sublime area more accessible to persons in wheelchairs through new construction. Improving accessibility for people in wheelchairs is virtuous. After all, people deserve access to environmental beauty, regardless of whether they rely on wheelchairs. But, according to Sunstein, preserving the aesthetics of such sublime environments is also virtuous. The construction necessary to improve access to these areas would diminish the aesthetic value of the environment, creating a virtue-virtue tradeoff.

One approach would be to mirror what agencies must do for risk-risk tradeoffs, which occur when a regulation minimizes one risk but exacerbates another. The White House's Office of Management and Budget requires

15. Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1748 (2014). Arguably, agencies are authorized to consider some virtues as costs because Executive Order 13,563 allows for the consideration of equity, fairness, and distributive impacts. Exec Order No. 13,563, 76 FED. REG. 3821 (2011). But, even if authorized to do so, as a practice, the evidence suggests that agencies only consider virtue as a cost.

16. *See* Jason Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821, 851-53 (2013).

agencies to assess both sets of risks.[17] For example, if a regulation mandates an increase in the fuel efficiency of cars, the agency must assess the benefits to the environment from the regulation but also any costs due to safety risks that could be created if the fuel efficiency gains are achieved by changing vehicle safety features.

This approach makes sense when the risks on both sides of the equation are easily quantifiable, but breaks down when amorphous, unquantifiable virtues are being evaluated. It is hard enough to build virtues into one side of the equation. When virtues are on both sides, CBA involves comparing two sets of fuzzy numbers. It would be easy for the executive to massage the assessment of these fuzzy values to justify any result it wanted.

Another approach would be to establish a presumption that, when there are virtues on both the cost and benefit sides, the virtues cancel each other out and should not be considered in the regulatory analysis. This approach would make it harder for the executive to game the regulatory outcome through its assessment of virtues. The problem with this approach is that it returns agencies to their original reliance on a technocratic analysis that overlooks virtues the public may think are important to understanding the relevant risks.

I remain agnostic about which approach is better. But for virtue analysis to become a routine, reliable method of agency analysis, OIRA must develop standardized procedures for virtue-virtue tradeoff analysis.

C. Which Virtues Count?

Perhaps the biggest problem for virtue analysis is figuring out which virtues are allowed to count. In Executive Order 13,563, President Obama authorized agencies to consider hard-to-quantify virtues, including "equity, human dignity, [and] fairness."[18] Should this list of possible virtues be limited to those specifically listed or left open ended? If the set of possible virtues is left open ended, then the executive could justify or reject a regulation by arbitrarily appealing to any plausible virtue that leans in favor of its preferred outcome. A pro-regulatory administration might pluck a virtue like "magnanimity" out of the air in order to support a new regulation that hurts a few but helps many, while a deregulatory administration might point to "temperance" or self-control in order to reject an otherwise cost-effective attempt by an agency to regulate private behavior.

To constrain the agencies' choices, one approach would be for OIRA to develop a list of permissible virtues.[19] However, at this point, policy analysts

17. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS 23 (2003).

18. Exec. Order No. 13,563, 76 Fed. Reg. 3821 §2(c) (2011).

19. Courts consider an agency's cost-benefit analysis presumptively valid if it follows OIRA guidance. *See* Gillian Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1369 (2012).

probably do not know enough about virtue analysis to put together such a list. Creating such a list ex ante could prevent needed experimentation in how agencies approach this developing area of regulation.

Another possibility would be to allow agencies to experiment with building different virtues into their analyses. In screening agencies' analyses, OIRA would reject some virtues and accept others. Over time, this common law-like approach would produce a law of best practices. However, this approach would inevitably involve some growing pains and wasted resources as agency analyses were rejected by OIRA because impermissible virtues were considered.

Regardless of what approach OIRA takes, it must attempt to limit the virtues that agencies may consider in their analyses. Otherwise, executive officials might start throwing around seemingly virtuous traits to justify whatever regulatory outcome they want.

CONCLUSION

I am quite sympathetic to Sunstein's effort to incorporate virtues into agency CBA. CBA methods that include virtues are likely to better reflect public values because the public often views risks with such virtues in mind. Mirroring this tendency is consistent with a principal-agent theory of democracy in which the regulatory agency (the agent) is supposed to fulfill the wishes of the principal (the public). Moreover, because the lay public lacks technocratic expertise, they are often unable to submit informed comments in response to agencies' proposed rules under the current approach. However, if agencies consider virtues in their analyses, then non-technocrats will have an easier time contributing to the rulemaking process because they will understand part of the agency analysis. This greater public participation might also be desirable.

But despite these potential advantages, we must be wary of embracing a form of virtue analysis that ends up stripping agency CBA of the features that currently constrain the executive and promote legitimacy. In this reply, I have raised three issues that must be adequately resolved before virtue analysis can become a legitimate mainstay of agency decision making.