

# Quality Control: A Reply to Professor Sunstein

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*Unless cost-benefit analysis finds room for the nonquantifiable and nonmonetizable benefits of regulation, it will skew systematically against government action to address social problems that have significant nonquantifiable and nonmonetizable dimensions. In The Limits of Quantification—drawn from the 2013 Brennan Center Jorde Symposium at Berkeley Law—Professor Cass R. Sunstein looks for a way out of this quandary.<sup>1</sup> But the solutions he explicitly or implicitly embraces—a meaningful recognition of qualitative benefits like human dignity, a redoubled effort to quantify and monetize regulatory benefits, and breakeven analysis—fall short. Breakeven analysis is too selectively deployed to be the neutral tool Sunstein seeks. Fitting qualitative values, like dignity, into the cost-benefit mold can be both legally gratuitous and conceptually confused. Monetizing heretofore nonmonetized regulatory benefits—like preventing prison rape—entails a complete redefinition of the problem at hand. The limits of quantification remain severe, undermining claims that cost-benefit analysis can play an evenhanded role in the evaluation of agency rules.*

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1. Professor Sunstein is publishing his Jorde lecture, *Nonquantifiable*, as a chapter in a forthcoming book, VALUING LIFE. A revised version of his Jorde lecture is being published in this issue under the title *The Limits of Quantification*.

## INTRODUCTION

For more than three decades, executive orders governing White House regulatory review have specified cost-benefit analysis as the normative framework for evaluating agency rules.<sup>2</sup> One of the problems with cost-benefit analysis, however, is that so many regulatory consequences are difficult or impossible to quantify, to monetize, or both. Usually, it is the benefits that pose this challenge; most costs are naturally quantified and stated in monetary terms.<sup>3</sup> Where government action must pass a cost-benefit test, nonquantifiability threatens to tilt cost-benefit analysis against government action because it makes costs appear high and benefits low. In current practice, a government action that fails cost-benefit analysis stands a good chance of failing the White House process of regulatory review.<sup>4</sup>

I applaud Professor Sunstein for seeking a way out of this dilemma—for recognizing, as critics of cost-benefit analysis have long observed, that nonquantifiability presents a real problem for cost-benefit analysis, and for trying to address this problem. Professor Sunstein focuses primarily on breakeven analysis as a way out of the dilemma posed by nonquantifiability. From Sunstein’s discussion of the problem of nonquantifiability, however, one can also discern an implicit embrace of two additional possible approaches to nonquantifiability: a meaningful recognition of qualitative benefits and a redoubled effort to quantify and monetize regulatory benefits.<sup>5</sup> Any one of these approaches could, in principle, ameliorate the problem posed by nonquantifiability.

Unfortunately, however, I think each of these approaches falls short. Thus, we still face the reality that cost-benefit analysis inadequately captures the beneficial consequences of regulation. Breakeven analysis is deployed so selectively—used frequently for some types of rules, used barely at all for others—that we must ask whether a policy needs to be favored on other grounds, outside cost-benefit analysis, to take advantage of this more forgiving analysis. Moreover, trying to recognize the qualitative benefits of regulation by forcing them into the cost-benefit mold can render those benefits unrecognizable. Finally, doubling down on efforts to monetize regulatory consequences can entail complete redefinition of the nature of those

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2. Lisa Heinzerling, *Inside EPA: A Former Insider’s Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 327, 330, 341 (2014).

3. FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 37–40 (2004).

4. CASS R. SUNSTEIN, SIMPLER: THE FUTURE OF GOVERNMENT 161 (2013) (“In the Obama administration . . . [a]gencies could not go forward if the benefits did not justify the costs, unless the law required them to do so.”).

5. See Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1375–79 (2014) (describing several ways in which benefits might be unquantifiable, and implying that more careful attention to qualitative values and redoubled efforts to quantify and monetize benefits would be useful in addressing the problem of nonquantifiability).

consequences. I will explain and illustrate these critiques of Professor Sunstein's proposal with reference to rules addressing three very different social problems: water pollution and other environmental challenges, the rights of the disabled, and rape and sexual abuse.

## I.

### BREAKING EVEN, SELECTIVELY

Professor Sunstein offers breakeven analysis, in which agencies "explore how high the nonquantifiable benefits would have to be in order for the benefits to justify the costs," as at least a partial solution to the dilemma of nonquantifiability.<sup>6</sup>

One way to understand breakeven analysis of agency policies is to think of it as a lifeline for rules that fare poorly in standard cost-benefit analysis: even if their quantified benefits do not match up to their costs, they can still survive White House review under breakeven analysis. The substantive standard for agency policies remains the cost-benefit standard: if the benefits of a policy do not justify its costs, then the policy fails this substantive test. But it is often difficult, as Professor Sunstein explains, to quantify the relevant variables for purposes of cost-benefit analysis. It is often particularly difficult, he acknowledges, to quantify the benefits of regulatory policy and to translate them into monetary terms. In that case, especially where the costs are readily quantifiable and monetizable, an agency policy could fail the cost-benefit standard simply due to a lack of available information and not due to the inherent merits of the policy. In this setting, breakeven analysis becomes a way to relax the evidentiary requirements of the cost-benefit test. It allows a policy to pass the cost-benefit test even if some benefits remain unquantified and even if, in the quantitative analysis that is available, the policy's costs outweigh its benefits.

If breakeven analysis were, as Professor Sunstein suggests, a way "to avoid the risk that judgments will be based on anecdotes, intuitions, dogmas, impressions, or the power of self-interested private groups,"<sup>7</sup> one would predict that agencies would deploy it across the full range of rules with costs or benefits that are difficult to quantify or monetize. If agencies do not do this, then one must ask whether breakeven analysis is being selectively deployed to rescue only those rules that are already deemed worthy on some basis other than cost-benefit analysis. If there is such selective deployment of breakeven analysis, then it is possible that the use of breakeven analysis itself may reflect "anecdotes, intuitions, dogmas, impressions, or the power of self-interested private groups." That would be a problem for Professor Sunstein's account of the utility of breakeven analysis.

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6. *Id.* at 102.

7. Sunstein, *supra* note 5, at 1403.

Based on the examples of breakeven analysis that Sunstein lists, it is apparent that breakeven analysis has only been applied in limited situations. In a chart in his article, Professor Sunstein offers “selected examples of breakeven analysis.”<sup>8</sup> The examples include twenty-six rules proposed or issued in recent years. There is no reason to believe that Sunstein’s examples are *selective* and not just “selected,” and so it is reasonable to assume that these twenty-six rules offer a fair representation of recent uses of breakeven analysis in evaluating rules.

The rules are remarkably limited in the substantive areas they cover and the regulatory strategies they reflect. Terrorism-related rules account for eight of Sunstein’s examples.<sup>9</sup> Rules on transportation safety account for another nine.<sup>10</sup> More than half of the rules, in other words, relate to just two areas: terrorism and transportation safety. Five of the remaining rules use disclosure as their regulatory technique<sup>11</sup>—which happens to be a favorite regulatory technique of Professor Sunstein himself.<sup>12</sup>

There are no environmental rules in this chart—no rules either governing pollution or protecting ecosystems and biodiversity, which means no rules on climate change or water pollution or endangered species or toxic chemicals. Yet these are perhaps the best exemplars of the types of rules that would justify—indeed, cry out for—breakeven analysis. Their benefits are hard to quantify and even harder to monetize.<sup>13</sup> They tend to impose costs in the near future but produce benefits extending over decades or even centuries.<sup>14</sup> They are the very kinds of rules that often need the lifeline that breakeven analysis provides. In fact, Professor Sunstein offers these kinds of rules as hypothetical illustrations of points he makes throughout his discussion.<sup>15</sup> But *actual* environmental rules are nowhere to be found in Sunstein’s chart of rules or in his broader discussion. Moreover, a search of the government database on

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8. *Id.* at 20–26.

9. *Id.* (terrorism-related rules: Terrorism—Coast Guard; Terrorism—Freight Trains; Terrorism—Aviation; Terrorism—Highway Rail Crossings; Airlines—Cargo Screening; Terrorism—Ammonium Sale Restrictions; Airline Security—Security of Aircraft Repair Stations; Airlines—Baggage Screening).

10. *Id.* (transportation safety rules: Emergency Preparedness—Trains; Fire Suppression—Coast Guard; Rail Employee Safety—Employee Training; Rail-Emergency Systems; Commercial Motor Vehicles—Restrictions on Cell Phone Use; Hazardous Materials Risk Assessment; Expanded Field of View for Vehicles; Commercial Motor Vehicles—Rule Disqualifying Those with Traffic Offenses; Airline Crew Standards).

11. *Id.* (rules using information disclosure as regulatory tool: Nutrition Labeling—Restaurants; Nutrition Labeling—Vending Machines; Nutrition Labeling—Meat and Poultry; Medication Labeling—Over the Counter Drugs; Medication Labeling—Over the Counter Drugs).

12. SUNSTEIN, *supra* note 4, at 78–81, 94–96.

13. ACKERMAN & HEINZERLING, *supra* note 3, at 120–21, 207–08.

14. Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025, 2027–28, 2065, 2077 (1999).

15. Sunstein, *supra* note 5, at 1387, 1395–97.

rules, Regulations.gov, reveals only two environmental rules in recent years in which breakeven analysis played a role.<sup>16</sup>

Certainly, the lifeline offered by breakeven analysis could have benefited additional environmental rules. Precisely because their benefits are difficult to quantify and monetize, rules on water pollution and toxic chemicals have notoriously poor outcomes in cost-benefit analysis. And, lo and behold, these are the very kinds of rules that have not fared well in the White House process of regulatory review.<sup>17</sup> A proposed rule on toxic water pollution from power plants was altered beyond recognition during this process.<sup>18</sup> The Environmental Protection Agency's (EPA) rule on coal ash—a hazardous waste rule in form, but a water pollution rule at its core—was likewise mangled in the process of regulatory review.<sup>19</sup> The EPA's "clean water protection" guidance, on the jurisdictional scope of the Clean Water Act, languished at the White House for over eighteen months<sup>20</sup> before the agency withdrew it in favor of offering a proposed rule instead.<sup>21</sup> Why weren't these actions thrown the breakeven lifeline? Why can terrorism-related rules and rules using disclosure as a regulatory technique sail through the White House process based on notably thin breakeven analysis, while environmental rules get stuck?

Is it possible that rules are thrown the lifeline only when they are *already preferred on other grounds*? Is it possible that rules related to terrorism are preferred on grounds other than cost-benefit analysis, while environmental rules are embraced only if they satisfy a strict cost-benefit test? If so, then

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16. I searched Regulations.gov for agency supporting documents containing terms "12866" and "breakeven," and I found only two environmental rules in which breakeven analysis played a role: EPA's revised total coliform rule, EPA, ECONOMIC ANALYSIS FOR THE FINAL REVISED TOTAL COLIFORM RULE (2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OW-2008-0878-0275>, and EPA's proposed revisions to the industrial recycling exclusions of its definition of solid waste for purposes of the Resource Conservation and Recovery Act, EPA, REGULATORY IMPACT ANALYSIS (2011), available at <http://www.epa.gov/wastes/hazard/dsw/downloads/2011-ria.pdf>.

17. Heinzerling, *supra* note 2, at 352 (noting that EPA "[r]ules on water pollution, toxics, and hazardous waste contamination . . . fare poorly" in the process of regulatory review).

18. David Roberts, *How the White House Watered Down Rules On Coal-Plant Water Pollution*, GRIST (July 24, 2013, 4:07 PM), <http://grist.org/politics/how-the-white-house-watered-down-rules-on-coal-plant-water-pollution/>.

19. Rena Steinzor, *Government Releases Before-and-After Docs on Coal Ash Rule*; Lisa Jackson, *Public Face of Environmental Protection, Meet Nameless White House Economist*, CPRBlog (May 7, 2010), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=7375DDF6-CD02-8E4D-36256EE9D5A6DB96>.

20. The website of the Office of Information and Regulatory Affairs shows that EPA's clean water protection guidance was submitted for review on February 21, 2012, and withdrawn on September 13, 2013. <http://www.reginfo.gov/public/do/eoHistReviewSearch>. On the search page, under the section "Economically Significant Reviews Completed," select "Environmental Protection Agency" as the agency and "2013" as the year in the two drop-down menus, and the search results will include the agency's guidance on clean water protection.

21. Jon Devine, *Senators Invent Clean Water Bogeyman, Then Demand EPA Prove There's No Bogeyman*, NRDC SWITCHBOARD (Oct. 3, 2013), [http://switchboard.nrdc.org/blogs/jdevine/senators\\_invent\\_clean\\_water\\_bo.html](http://switchboard.nrdc.org/blogs/jdevine/senators_invent_clean_water_bo.html).

breakeven analysis is being deployed to justify a decision already made on other grounds. It is being deployed to give a technical face to a political decision, or at least a decision likely partaking of “anecdotes, intuitions, dogmas, impressions, or the power of self-interested private groups.” If this is correct, then breakeven analysis *deepens* rather than softens the influence of dogma and intuition on regulatory policy.

## II.

### QUANTITY OVER QUALITY

Although Professor Sunstein focuses here on breakeven analysis, implicit in his discussion is a second way to address the problem of nonquantifiability: the meaningful recognition of the qualitative benefits of government action. If qualitative benefits receive their due in cost-benefit analysis, then the problem of nonquantifiability becomes less severe.

In his discussion of breakeven analysis, Professor Sunstein emphasizes qualitative values that are especially tricky to think of in quantitative terms. In particular, he pays close attention to human dignity—a value that President Barack Obama added, in Executive Order 13563, to the list of qualitative interests that agencies may consider in conducting cost-benefit analyses of their regulatory policies.<sup>22</sup>

The recognition of human dignity in Executive Order 13563 could save some rules that would otherwise fail the cost-benefit test embraced by that same executive order. But here is the rub: without the order’s embrace of a cost-benefit test, the rules would not have faced an impediment to issuance. On this understanding, the Obama executive order on regulatory review merely saves rules protecting human dignity from its own, otherwise unforgiving, analytical framework. Even more troublingly, trying to fit human dignity into the cost-benefit mold turns it into something that does not look like dignity.

To understand these points, consider an example that runs throughout Professor Sunstein’s discussion: the Department of Justice’s (Department’s) rule aimed at improving the access of disabled persons to public and commercial spaces. The Americans with Disabilities Act requires public accommodations and commercial enterprises to configure their physical spaces in a way that allows people with disabilities to have ready access to them.<sup>23</sup> The statute permits consideration of costs in setting the specific requirements for access, but it provides that the costs of enhanced access are to be compared to an enterprise’s overall financial profile and other factors.<sup>24</sup> The statute does not provide for a weighing of costs against benefits. Nonetheless, the

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22. *Id.*

23. 42 U.S.C. § 12183(a) (2006).

24. *Id.* § 12183(a)(2).

Department of Justice was required to provide a cost-benefit analysis of its rule on access to satisfy the White House's requirements for significant rules.<sup>25</sup>

Most of the features of the Department's rule came out well in the cost-benefit analysis. Some did not. One of the Department's proposed requirements—that new bathrooms in public accommodations and commercial spaces have enough space next to the toilet to allow persons in wheelchairs to gain access to the toilet from the side—turned out to have a lousy cost-benefit profile. The Department estimated that, as applied to single-user bathrooms with out-swinging doors, the rule's monetized costs would exceed the monetized benefits by \$454 million.<sup>26</sup> As applied to bathrooms with in-swinging doors, the rule's costs would exceed its benefits by \$266 million.<sup>27</sup>

To bridge the gap, the Department conducted an elaborate breakeven analysis. The analysis attempted to determine how many trips to the bathroom the rule would make easier for people who use wheelchairs and how much the increased ease of each trip would have to be worth to them for the rule to pass the cost-benefit test.

To conduct this analysis, the Department needed to consider how people using wheelchairs would gain access to the toilets in question in the absence of its rule. Insufficient space in a bathroom can mean that a person in a wheelchair will not have room to transfer onto the toilet from the side. Requiring facilities to provide additional bathroom space, as this rule did, facilitates side transfers for people in wheelchairs. Transferring from a wheelchair to a toilet from the side of the toilet decreases the chance that the person using the wheelchair will need to ask for assistance from another person in getting onto the toilet.

Requiring assistance in this basic and intimate human function entails a loss of privacy and may even be humiliating and stigmatizing. Thus, the Department found itself asking how much the avoidance of humiliation, stigma, and loss of privacy would need to be worth, per trip to the toilet, in order to justify requiring new bathrooms to be configured to allow people who use wheelchairs to access toilets from the side.<sup>28</sup> The Department concluded that, for bathrooms with out-swinging doors, “for the costs and benefits to break even . . . , people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at just under five cents per use.”<sup>29</sup> For the rule to “break even” as applied to bathrooms with in-

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25. Exec. Order No. 12,866, 3 C.F.R. § 638 (1994); Exec. Order No. 13563: Improving Regulation and Regulatory Review, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

26. U.S. DEP'T OF JUSTICE, FINAL REGULATORY IMPACT ANALYSIS OF THE FINAL REVISED REGULATIONS IMPLEMENTING TITLES II AND III OF THE ADA, INCLUDING REVISED ADA STANDARDS FOR ACCESSIBLE DESIGN 111 (2010), available at [http://www.ada.gov/regs2010/RIA\\_2010regs/DOJ%20ADA%20Final%20RIA.pdf](http://www.ada.gov/regs2010/RIA_2010regs/DOJ%20ADA%20Final%20RIA.pdf) [hereinafter FINAL ADA RIA].

27. *Id.*

28. *Id.* at 142–46.

29. *Id.* at 143.

swinging doors, “people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at \$2.20 per use.”<sup>30</sup>

The Department of Justice’s final economic analysis of the rule on access, produced by a private contractor, runs to 455 pages and is filled with numbers and charts and explanations of why it might be worthwhile to enhance access to physical spaces for people with disabilities. But this analysis played no role in the Department’s final rule. In the Department’s own lengthy explanation of the choices it made, the economic analysis appears only in the discussion of the Department’s satisfaction of the White House’s requirements for significant rules.<sup>31</sup> Thus, the Department’s breakeven analysis, and the larger cost-benefit study in which it is embedded, apparently served only to help the rule survive the gauntlet of White House review. It did not play a role in helping the rule to meet the statutory requirements set by Congress.

In other words, the underlying law calling for this rule already gave a meaningful—indeed, primary—role to the qualitative benefit of human dignity; we did not need a new executive order for that. Instead, we needed the order only to save cost-benefit analysis from itself—to save economic analysis from the indignity (if I may say so) of flunking a rule aimed squarely at improving the lives of the disabled.

If it did anything, the analysis of dignity for purposes of satisfying the requirements of the executive order changed dignity into something almost unrecognizable. Recall the Department of Justice’s phraseology: that for some features of the rule, passing a cost-benefit test would require “people with the relevant disabilities . . . to value safety, independence, and the avoidance of stigma and humiliation” at a certain amount “per use” of a bathroom with improved access for the disabled. The problem with this sentence is not awkward English, as Professor Sunstein has suggested.<sup>32</sup> The problem is that the Department seems to have misunderstood what dignity is. Dignity doesn’t come in packages (this much for one trip to the bathroom without humiliation or stigma, that much for a different trip), and treating someone with dignity does not typically involve asking her how much she is willing to pay for the privilege. Subjecting rules that spring from statutes that are all about human dignity to cost-benefit analysis, with a dollop of dignity thrown into the mix, disrespects both the statutory scheme and dignity itself.

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30. *Id.*

31. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236 (Sept. 15, 2010), available at <http://www.gpo.gov/fdsys/pkg/FR-2010-09-15/pdf/2010-21824.pdf>.

32. SUNSTEIN, *supra* note 4, at 168 (“The Department’s response to [the cost-benefit] concern is not exactly written in the plainest of language, but it is important and worth quoting at length.”).

III.  
CHANGING THE SUBJECT

A third way to surmount the problem of nonquantifiability, implicit in Professor Sunstein's discussion, is to redouble efforts to quantify and monetize the benefits of regulation. The charge to agencies would not be to shrink at seemingly intractable challenges of quantification and monetization, but to confront head-on the situations that seem to defy attempts to quantify benefits or to translate benefits into monetary terms. This mindset is one way to understand the Department of Justice's cost-benefit analysis of another rule: a rule aiming to monitor, detect, and prevent rape and sexual abuse in prison.

The Prison Rape Elimination Act directed the Department to set national standards to prevent, detect, and respond to rape and other forms of sexual abuse in federal, state, and local confinement facilities. The only limit that Congress placed on these national standards was that they were not to impose "substantial additional costs" beyond the present expenditures of the covered facilities.<sup>33</sup> In its explanation of the final rule, the Department easily found that its standards complied with this statutory constraint. In three quick sentences, the Department found that even full compliance with its national standards would increase total expenditures by less than 1 percent and that this additional expenditure did not exceed the statutory limit of "substantial additional costs."<sup>34</sup>

Nevertheless, the Department produced a painstaking analysis of the costs and benefits of its rule as a way of meeting the White House's analytical requirements. On the benefits side, the Department was forced to grapple with the strange problem of placing a monetary value on avoiding rape and other forms of sexual abuse. The Department soldiered on, ultimately producing an exhaustive and highly particularized calculation of the monetary value of avoiding rape; the Department identified seventeen different categories of rape and sexual abuse and produced, in its own words, a "hierarchy" of the different ways of sexually violating prisoners.<sup>35</sup> Then, because the Department could not estimate exactly how many cases of rape and sexual abuse would be prevented by its rule, it instead applied breakeven analysis and estimated how many cases needed to be prevented for the rule to be justified under cost-benefit analysis. Using its principal figures on the monetary value of rape, the Department concluded that the rule would need to reduce the annual number of victims of rape and sexual abuse in prison by 1,671 in order to be cost-benefit justified.<sup>36</sup>

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33. 42 U.S.C. § 15607(a)(3) (2006).

34. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,189 (June 20, 2012) [hereinafter PREA Final Rule].

35. U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT REGULATORY IMPACT ASSESSMENT 24–27 (2012), available at [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_ria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf) [hereinafter PREA RIA].

36. *Id.* at 161 tbl.15.7.

However, as with the rules under the ADA, the statutory standard did not rely on cost-benefit analysis, and the Department's elaborate cost-benefit analysis of rape and sexual abuse played no part in the Department's explanation of its rule, save for filling out the section on the White House's review of the rule.<sup>37</sup>

One might have thought that, of all the harms the government might act to prevent, rape might be among the least susceptible to monetization. To understand why this is so, one needs to understand a bit about how monetization is accomplished in the regulatory setting. When applied to government actions aimed at reducing bad consequences, the technique of monetization entails exploring either how much the beneficiaries of regulation would be willing to pay to avoid the bad consequences or how much they would be willing to accept to suffer them. The technique depends utterly on an assumption of a free and informed exchange; without this, the technique is incoherent and does not measure the "willingness" to do anything.<sup>38</sup>

Here is the obvious problem in the context of the Department's rule on rape and sexual abuse in prisons: rape is, by definition, a crime of coercion, not consent, and thus the usual economic models that depend on asking what individuals would freely pay to avoid a particular consequence do not fit.<sup>39</sup> It is not even coherent to ask how much money a victim of rape would be willing to accept in order to accept the assault; if she accepts it, if she consents to it, it is not rape. To ask how much victims of rape would be willing to accept in order to accept rape is to misunderstand the very nature of the crime in question, and thus to misunderstand the nature of the benefits to reducing this category of crime.

This issue was exactly the challenge stared down by the Department of Justice. While the Department recognized that it was most difficult to place a monetary price on the avoidance of rape and sexual abuse,<sup>40</sup> the Department nevertheless forged ahead and placed a value on rape and sexual abuse in part based on victims' (purported) willingness to accept money to suffer them,<sup>41</sup> producing the seventeen-part "hierarchy" of rape and sexual abuse already mentioned. Professor Sunstein argues that even if such analysis is imperfect, it is at least edifying; it shows us why certain cases are hard and what information we would need to do a more precise cost-benefit analysis. But, looking at the Department of Justice's analysis of rape and sexual abuse in prisons, it seems that we *lost* rather than gained information in this process. We lost the sense of what rape and sexual abuse *are*: acts of violence and coercion, not consensual

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37. See PREA Final Rule, 77 Fed. Reg. at 37, 188–95.

38. ACKERMAN & HEINZERLING, *supra* note 3, at 77.

39. Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice's Economic Analysis of Prison Rape*, GEORGETOWN LAW FACULTY BLOG (June 13, 2012), available at [http://gulcfac.typepad.com/georgetown\\_university\\_law/2012/06/cost-benefit-jumps-the-shark.html](http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html).

40. PREA RIA, *supra* note 35, at 39.

41. *Id.* at 42–46.

acts and certainly not market transactions. Thus, not only was the Department's analysis, once again, legally gratuitous—as it played no role in the Department's analysis of how it met the statutory standard—but it misconstrued the nature of the harm at issue. We do not solve the problem of nonquantifiability by, essentially, changing the subject.

#### CONCLUSION

Unless room is made in cost-benefit analysis for the nonquantifiable consequences of regulation, cost-benefit analysis will skew systematically against government action to address social problems. Professor Sunstein is right to try to find a way out of this quandary. But the solutions he explicitly or implicitly recognizes—a meaningful recognition of qualitative consequences like human dignity, a redoubled effort to quantify and monetize regulatory benefits, and breakeven analysis—still fall short. Breakeven analysis is too selectively deployed to escape the dogma and intuition that Professor Sunstein seeks to avoid. Fitting qualitative values like dignity into the cost-benefit mold can be both legally gratuitous and conceptually confused. Monetizing events like rape entails a complete redefinition of the problem at hand. The limits of quantification remain severe, undermining claims that cost-benefit analysis can play an evenhanded role in the evaluation of agency rules.

