

Senseless Kindness: The Politics of Cost-Benefit Analysis

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Abstract

This essay dwells on a social phenomenon that the Russian-Jewish novelist and war correspondent Vasily Grossman calls “senseless kindness.”¹ Emerging without prior warning from certain face-to-face encounters between human beings, the striking reversal of preferences that characterizes this phenomenon can be used to cast a critical light on the practices of Cost-Benefit Analysis (“CBA”). Not only does senseless kindness highlight the troubling theoretical problem of determining the “correct” *ex ante*—the point in time at which CBA measures people’s preferences—it also suggests a more general critique of CBA’s indifference to *how* preferences are formed and expressed. This essay shows that CBA ignores the concrete experiences of everyday human sociality and communicative action by modeling them in all instances as “transaction costs” to be reduced or avoided rather than celebrated, or at least studied for their meaning. Missing from CBA is any sense that the face-to-face encounter between human beings is, or can be, a moment of both individuation of the participants and transformation of their preferences, in which genuine freedom and politics, in the largest senses of these words, are first made possible. Obsessed with *what* preferences are, CBA ignores the question of *how* they emerge. The result is not just a partial and partisan view of the possibilities for human decision making, but also a technique that puts the validity of individual preferences beyond all question and rational deliberation. Skeptical or afraid of government’s ability to change culture, certain scientistically-minded decision makers are happy to rely on a technique that purports merely to reflect information about “what the people want.” How-

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1. VASILY GROSSMAN, *LIFE AND FATE* 409 (Robert Chandler trans., Harper & Row 1985) (1980).

ever, CBA does not in fact mirror preferences as they are; instead, it constructs them as they would be if the entire meaning and value of human reason were reduced to purely instrumental (means-ends) calculations on the basis of correct technique, and if (*per impossible*) all context of people's concrete life histories were somehow removed. Purporting to be a descriptive science of what people just happen to prefer, CBA's theoretical model actually often produces a peculiarly asocial account of what their preferences ought to be.

I. Knowledge and Opinion

Distilled to its essence, philosophy's most valuable contribution to social science is constantly to remind it that what is unquestioned is not necessarily unquestionable. In the West, this passionate willingness to question began when the Greeks, from whom we have inherited most of our philosophical and scientific traditions, drew a fundamental distinction between knowledge (*epistēmē*) and opinion (*doxa*).² The distinction was fundamental for them because almost all Greek thinkers starting with Parmenides ranked theoretical knowledge of that which is (*ousias*, or being) above the unquestioned and "obvious" truths of common sense.³ Classifying the attainment of pure knowledge and wisdom (*sophia*) as an end in itself, they also ranked it above mere know-how (*phronēsis*).⁴ *Phronēsis* is practical and consists in the use of instrumental reason as a means for achieving particular ends in politics, material production, and daily life. While the Greeks did not deny that *phronēsis* possesses its own kind of truth—the kind that pertains to effective action (*praxis*) in the sphere of production (*technē*)—they also believed that *phronēsis* takes far too much for granted about the world to be able to penetrate beneath the outward appearance (*eidos*) of things and, in a moment of pure viewing (*theoria*), reveal them as they really are.⁵ Although *doxa* is always content to take what "they" say about a thing for granted, those who pursue the hard path of *epistēmē* know that "a thing's real constitution has a tendency to conceal itself."⁶ Hence

2. The meanings of, and interrelations among, the various Greek terms that are mentioned in the text receive a much more detailed and subtle treatment in MARTIN HEIDEGGER, *PLATO'S SOPHIST passim* (Richard Rojcewicz & André Schuwer trans., Ind. Univ. Press 1997) (1992).

3. *Id.*

4. *Id.*

5. *Id.*

6. HERACLITUS, FRAGMENTS 71 (T.M. Robinson trans., 1987).

truth, for Greek philosophers, was not an idea or a statement in accord with some already visible "fact"; rather, their word for truth, *alētheia*, signifies un-concealment,⁷ and therefore is tied to the arduous effort of uncovering something in its truth—something that would have remained hidden and obscure but for the event of un-concealment.⁸

These ancient distinctions cast an interesting light on the modern social scientific practice of CBA.⁹ Standing on the *theoria* side of the opposition between knowledge and opinion, CBA finds itself in the unusual position of seeking theoretical knowledge about mere opinions, as opposed to theoretical knowledge about some underlying reality or truth that commonsensical attitudes may have distorted. As the Greeks would have said, probably with a certain degree of contempt, CBA seeks *epistēmē* about *doxa*: that is, it acquires theoretical knowledge concerning human opinions—in the form of individual preferences—most of which are themselves pre- or un-theoretical. What is more, CBA is a positive social science in the modern sense of the word—that is, a fact-oriented technique for producing useful results—and therefore is generally disinclined to question its own grounds.¹⁰ For example, although it is well known that a person's revealed preferences are in part a function of her existing level of wealth,¹¹ CBA accepts the existing legal distribution of entitlements in society as a pre-given "fact."¹² Given CBA's uncritical attitude about questions of distributive justice, the legitimacy of its policy or welfare recommendations necessarily depends on the unquestioned legitimacy of the particular property rights that underlie the relevant supply and

7. For a general discussion of the relationship between the Greek notion of truth (*alētheia*) and its subsequent Latin incarnation as *veritas*, which ultimately came to signify mere "correctness," see MARTIN HEIDEGGER, *BASIC QUESTIONS OF PHILOSOPHY: SELECTED "PROBLEMS" OF "LOGIC"* 95-108 (Richard Rojcewicz & André Schuwer trans., Ind. Univ. Press 1994) (1984).

8. See *id.* at 88-93.

9. See generally MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 9-24 (2006) (explaining the theoretical basis for CBA).

10. Cf. RICHARD ZERBE, *ECONOMIC EFFICIENCY IN LAW AND ECONOMICS* 16 (2001) (arguing that CBA should provide useful information and be widely accepted, and that the rule chosen through CBA should be superior to all other rules).

11. See ADLER & POSNER, *supra* note 9 at 130-31 (noting that textbook CBA does not adjust for preference distortions caused by wealth).

12. See Paul Heyne, *The Foundations of Law and Economics: Can the Blind Lead the Blind?*, 11 RES. L. & ECON. 53, 56 (1988) ("Economic theory takes for granted, far more extensively than economists seem generally to recognize, the normative force of established rights and obligations."). See also ZERBE, *supra* note 10, at 27.

demand functions,¹³ and that co-determine the “psychological reference point” for people’s subjective beliefs about ownership.¹⁴

Putting all questions of legitimacy aside for the moment, it must also be said that CBA shows little, if any, intellectual interest in the question of *why* people have the preferences they have, or *why* their willingness to pay (“WTP”) to achieve gains and their willingness to accept (“WTA”) to compensate for losses are what they are at any given point in time. It is true, of course, that rational choice theory has always been aware, at least at some level of consciousness, that people’s preferences are affected by the opportunities afforded them by their individual experiences and by prevailing social and institutional arrangements—in short, by history in the largest sense of the word.¹⁵ From the small (what we eat and wear) to the large (our various political and cultural institutions), different epochs and cultures produce different “opportunity sets” from which individuals are required to choose.¹⁶ Given this existential truth, a few rational choice theorists have called for CBA to take the “why”-question more seriously, perhaps by making it into an object of analysis, or, better still, a formal variable in the theory. Robert Higgs, for example, alleges that rational choice theory ought to take account of the powerful influence of ideology on preference formation,¹⁷ while Michael Hechter observes (and bemoans) economists’ relatively low level of theoretical sophistication about what he calls the “micro-macro link” connecting individual preferences to their social conditions.¹⁸ Despite these and other calls for CBA to broaden its scope of inquiry, however, its mainstream practitioners by and large remain uninterested in the question of why people have the preferences they have; indeed, some of these practitioners even go so far as to display their indifference in this respect as if it were an intellectual

13. Heyne, *supra* note 12, at 53-71.

14. See ZERBE, *supra* note 10, at 83 (discussing the psychological reference point).

15. See generally Peter Abell, *Sociological Theory and Rational Choice Theory*, in THE BLACKWELL COMPANION TO SOCIAL THEORY 223, 223-44 (Bryan S. Turner ed., 2d ed. 2000) (discussing rational choice theory and preference formation).

16. See Nicolas Gravel, *Can a Ranking of Opportunity Sets Attach an Intrinsic Importance to Freedom of Choice?*, AM. ECON. REV., May 1994, at 454 (defining “opportunity sets”).

17. ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 35-56 (1987).

18. See Michael Hechter, *The Micro-Macro Link in Rational Choice Theory*, PERSP.: THEORY SECTION NEWSL. (AM. SOC. ASS’N), July 1992, at 1, 1-2.

badge of honor.¹⁹ For CBA, it is enough that people simply appear with measurable WTPs and WTAs that can be summed up and then brought into a quantitative relationship that determines whether a given project is or is not efficient.

In thinking about CBA's theoretical and practical indifference to "Why?," it is important to remember that this question, though exceedingly common in everyday speech, is nonetheless ambiguous in the present context. The question "Why?" can seek factual information about the *causes and conditions* of a preference, or it can inquire after the preference's *grounds*. The first kind of inquiry aims at a historical explanation; the second seeks a normative reason or justification. To illustrate: a person who says she wants to keep the Arctic National Wildlife Refuge ("ANWR") free from all oil exploration may explain her preference by appealing to the fact that her parents raised her to love nature (a causal answer to "Why?") or by saying that drilling in ANWR is the environmentally and morally wrong thing to do (a normative answer to "Why?"). Although CBA's indifference to the purely historical explanation of preferences can perhaps be defended on the basis of an academic division of labor that assigns causal questions to disciplines like history, sociology, and psychology, reserving so-called "economic" and "policymaking" questions to CBA, the roots of its indifference to the normative grounds of preferences lie much deeper. Whether consciously or unconsciously, CBA, like many modern social scientific disciplines, has wholeheartedly appropriated Max Weber's central thesis that the enviroing world—the human world in both its natural and social dimensions—has become disenchanted.²⁰

Beginning with the Enlightenment, human reason in the form of science and technology has been achieving an ever-increasing mastery of natural and social processes.²¹ And while this mastery has delivered many material benefits to human beings, it is also true, as Western thinkers from Plato²² to Weber²³

19. See, e.g., Heyne, *supra* note 12, at 57 ("It is quite true that economists take the existing system for granted in their work; it would make no sense to do anything else.")

20. 1 MAX WEBER, *ECONOMY AND SOCIETY* 506 (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1968).

21. See generally M.J. Inwood, *Enlightenment*, in *THE OXFORD COMPANION TO PHILOSOPHY* 236, 236-37 (Ted Honderich ed., 1995) (describing the Enlightenment and criticism of its doctrines).

22. PLATO, *Charmides*, in *THE COLLECTED DIALOGUES OF PLATO* 99, 119 (Edith Hamilton & Huntington Cairns eds., 1961).

23. MAX WEBER, *Science as a Vocation*, in *FROM MAX WEBER: ESSAYS IN*

have rightly reminded us, that science as such can give no answer to the question of how we *should* live or what we *should* do. Moreover, one need not be a Luddite to notice that there can be troubling byproducts of scientific and technological mastery, including especially losses at the emotional and psychological level. For by gradually dissolving the irrational elements and effects of superstitions, prejudices, errors, and religious orthodoxies in society, instrumental reason has also undermined people's faith that there is a stable and agreed-upon *ultimate meaning* of the world.²⁴ To put this in terms that are familiar to CBA, there are important existential costs that people might have been willing to pay to avoid—and that many indeed *did* pay to avoid, both in treasure and in blood—on account of the very historical changes that made the discipline of CBA imaginable in the first place.²⁵

An ultimate meaning is not the same as an end in the sense of the means-ends relationship: ends are what means aim at, whereas meaning shows itself within the very historical process of using means to accomplish ends. For example, the relentless pursuit of consumer goods by earning as much money as possible to pay for them can be explained as the rational use of means to accomplish material ends, but the ultimate meaning of consumerism as a way of life cannot be so easily explained.²⁶ In short, our gain of technological control over the world (as a means) has produced the loss of any stable sense that the world (as an end) possesses a universal rational meaning. The converse is also true, of course, since experience teaches that the scientific spirit's degree of vigor is inversely proportional to the number of sacred cows that stand in its way. While the empirical result of this dialectical process of

SOCIOLOGY 129, 143 (H.H. Gerth & C. Wright Mills eds. & trans., 1958).

24. See *id.* at 142 ("If these natural sciences lead to anything in this way, they are apt to make the belief that there is such a thing as 'meaning' of the universe die out at its very roots.")

25. See, e.g., William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 8-51 (2005) (describing "brutal reality of invasion, slavery, forced relocation, genocide, land theft, ethnocide, and forcible denial of the right to self-determination" that defines the United States' historical treatment of American Indians); see also *id.* at 20 n.104 (citing the United States Supreme Court's discussion in *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877), that American Indians, "largely influenced by superstition and fetishism, . . . are essentially a simple, uninformed, and inferior people . . . [A]s a superior and civilized nation [the United States has] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders.")

26. This is more or less what Heidegger meant when he declared that "the essence of technology is nothing technological." MARTIN HEIDEGGER, *The Question Concerning Technology*, in *THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS* 3, 35 (William Lovitt trans., 1977).

gain and loss is a formally rationalized social system—one that maximizes the ability of individuals to calculate the consequences of their actions—the resulting content of social life can nonetheless be seen as *substantively* irrational from the standpoint of ultimate values such as brotherliness, social justice, or even the attainment of individual happiness.²⁷ Weber's metaphor of the "iron cage" of rationality shows that a social system can become instrumentally rational to the highest degree without necessarily affording the people within it the chance to imagine and pursue a substantively rational way of life.²⁸ Witness the familiar phenomena in fully industrialized societies such as the United States and Japan of "living to work" (instead of the other way around), "the rat race," and the consumerist imperative of "keeping up with the Joneses."²⁹

Thus it has come to pass that post-Enlightenment world history, in the form of what Nietzsche calls the "advent of nihilism,"³⁰ has brought forth a scientific discipline, CBA, that interprets the world as a kind of warehouse or store that is full of material fit only for the purposive, rational pursuit of individual interests, *whatever* they may be. CBA is nihilistic in the precise Nietzschean sense that its highest value—respect for individual choices—has devalued itself by removing any objective criterion of the rightness or reasonableness of choices.³¹ According to Weber, the rationality that predominates in, and even defines, modernity is an instrumental, or means-end, kind of rationality (*Zweckrationalität*).³² Instrumental reason is purposive: it aims to harness the object world and other human beings in the service of particular interests. In place of a universal morality predicated on tradition-based consensus, social life thus shows itself to CBA as a plu-

27. See ROGERS BRUBAKER, *THE LIMITS OF RATIONALITY: AN ESSAY ON THE SOCIAL AND MORAL THOUGHT OF MAX WEBER* 61-87 (Routledge 1991) (1984).

28. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 123-25 (Talcott Parsons trans., Routledge Classics 2001) (1930). We actually owe the phrase "iron cage" to Talcott Parsons, who translated Weber's German expression, *ein stahlhartes Gehäuse*. The expression can also be translated as "a casing, or housing, as hard as steel." DEREK SAYER, *CAPITALISM AND MODERNITY: AN EXCURSUS ON MARX AND WEBER* 144 (1991).

29. See Paul Krugman, *Money Can't Buy Happiness. Er, Can It?*, N.Y. TIMES, June 1, 1999, at A23; James Sterngold, *Life in a Box: Japanese Question Fruits of Success*, N.Y. TIMES, Jan. 2, 1994, at A1.

30. FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 3 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Random House 1967) (1901).

31. *Id.* at 9 (defining nihilism in terms of a society's ultimate values devaluing themselves).

32. BRUBAKER, *supra* note 27, at 51-53.

ality of competing “values” encoded in “interests.”

From the standpoint of the neo-Kantian metaphysics of subjectivity that explicitly informs Weberian thought and implicitly informs CBA, values cannot be rationally grounded, only chosen.³³ CBA performs the alchemy of transforming these admittedly incommensurable values into commensurable preferences only by counting people’s ability to back their values up with cash in the form of WTPs and WTAs.³⁴ But of course the result of a purely arithmetical balance between cash bids and counter-bids cannot make a project right or reasonable if the individual values that motivate the bids are themselves immune to all rational criticism. If it is true that some CBA practitioners personally prefer a politics that is committed to creating ever greater individual “freedom” in the world, then it is also true that CBA itself gives them no criterion to distinguish between mindless licentiousness and the rational exercise of freedom. The dominant tradition of political liberalism defines freedom negatively, as the mere absence of certain government constraints on choice.³⁵ If one is “free” by this definition, how is one supposed to rationally choose one’s values in a disenchanted world, a world in which all traditional modes of grounding values have lost their binding force? This is a question that CBA does not and will not answer. Although someone like Kant might define genuine freedom as self-legislation according to the universal moral law within,³⁶ in today’s completely disenchanted age there are many competing and plausible claims about what the moral law is and what it requires.³⁷ It would therefore seem that CBA cannot espouse Kant’s or anyone else’s positive definition of freedom without running the risk of losing its “objectivity,” and thereby becoming political instead of scientific.

33. I am referring to so-called “Marburg neo-Kantianism,” according to which science, ethics, and law are said to exist solely as cultural products, and instead of there being a thing-in-itself there exist only competing constructions of the world. See Lewis Beck, *Neo-Kantianism*, in *THE OXFORD COMPANION TO PHILOSOPHY*, *supra* note 21, at 611, 611-12.

34. See ANTHONY E. BOARDMAN ET AL., *COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* 33-36 (3d ed. 2006) (discussing the theoretical limitations of using WTP as the basis for social ordering).

35. See Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 *COLUM. J. TRANSNAT’L L.* 515, 555 (2000).

36. See IMMANUEL KANT, *The Metaphysics of Morals*, in *THE PHILOSOPHY OF KANT* 154 (Carl Friedrich ed., 1993).

37. See generally Nicholas Dent, *Moral Law*, in *THE OXFORD COMPANION TO PHILOSOPHY*, *supra* note 21, at 586, 586; Richard Norman, *History of Moral Philosophy*, in *THE OXFORD COMPANION TO PHILOSOPHY*, *supra*, at 586, 586-91.

When it still thought of itself as political economy,³⁸ the discipline of economics actually cared about the problem of how the economic system (the *material* reproduction of society) affects and interacts with the various normative systems that integrate individuals into the social order (the *symbolic* reproduction of society). For instance, the late John Kenneth Galbraith, who made a point of describing himself as a *political* economist, once quoted with approval a colleague's opinion that the "the economist, like everyone else, must concern himself with the ultimate aims of man."³⁹ But today, as Jürgen Habermas has noted, economics as a specialized science has broken off the relation between material reproduction and symbolic reproduction and has absolved itself of any questions about the legitimacy of the social order, including its possible pathologies.⁴⁰ Today's economists construe rationality in purely functional terms—as a means to economic equilibrium and rational choice—and economics as a discipline loses its historical connection to the rational study and evaluation of the sociopolitical structures within which all equilibriums and choice occur. In particular, CBA becomes a kind of semi-autonomous administrative system, and its connection to the life-world is maintained at only one discrete point: the point at which CBA intervenes to *measure* preferences. The forces that shape preferences go unexamined, with the result that CBA can contribute nothing to the study and development of the public sphere where preferences are continuously being formed and reformed within the "Bacchanalian whirl" of their sheer becoming-in-time.⁴¹

It is therefore unsurprising that CBA fails to address the question of whether individual preferences are well-grounded in ethics, morality, or some other normative system: as an empirical social science, CBA is configured in such a way that it lacks any mechanism for adjudicating the validity of people's preferences. One might even go so far as to say that the very existence of CBA as a well-respected discipline tends to prove Nietzsche's thesis

38. Weber, for example, styled himself a "political economist." WEBER, *supra* note 23, at 129.

39. *John Kenneth Galbraith*, THE NATION, May 22, 2006, at 4-5.

40. 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 4 (Thomas McCarthy trans., 1984).

41. GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S PREFACE TO THE PHENOMENOLOGY OF SPIRIT 153 (Yirmiyahu Yovel trans., Princeton Univ. Press 2005) (1807) ("Appearance [the phenomenon] is the generation and passing away which itself is neither generated nor passes away, but is in itself and constitutes the actuality of truth and the movement of its life. The true is thus the Bacchanalian whirl . . .").

that in today's world "the highest values devalue themselves. The aim is lacking; 'why?' finds no answer."⁴² Instead of *why*, we find the mere *what* of WTPs and WTAs—entities crafted in advance as pristine numerical quantities supremely suited for the task of scientific management and control. Habermas describes the situation of CBA perfectly when he says that "the situation to be regulated [or analyzed], which is embedded in the context of a life-history and a concrete form of life, has to be subjected to violent abstraction, not only because it has to be subsumed under a law but also in order that it can be dealt with administratively."⁴³ The radical abstraction of reality that is performed by modern social science, including especially CBA, underscores the fact that there is an intimate connection between CBA's methods and purely administrative modes of decision making. Once its numerical data on preferences is collected, CBA's calculations lead directly to administration, bypassing the processes that are constantly socializing and individuating the people whose lives will be affected by the decisions that administration makes. Perhaps this explains why certain CBA practitioners admit that their criterion of economic efficiency "does not tell us 'the right thing to do' in a transcendent moral or spiritual sense."⁴⁴ Implicit in this way of thinking about values is a contestable, albeit historically understandable, view about the nature of morality: namely, that moral actions are always deduced once and for all by individuals from personally chosen criteria that are immune both to rational criticism and to the messy historical processes in which individual preferences—including moral preferences—are formed and expressed.

II. Why and How

Although CBA's indifference to the question "Why?" in both its causal and normative senses is understandable, given CBA's history, the same cannot be said about its equally profound indifference to the question of *how* preferences are formed. The questions "Why?" and "How?" do not seek the same kind of knowledge. *Why* a thing is pertains to its antecedents or its grounds—its historical causes or normative reasons—but *how* a thing is always co-determines *what* it is. The causal why of a thing is usually inves-

42. NIETZSCHE, *supra* note 30, at 9.

43. 1 HABERMAS, *supra* note 40, at xxxiv.

44. ZERBE, *supra* note 10, at 29.

tigated by those who are concerned with general laws of human action and the useful explanations they afford, whereas the normative why is usually investigated by those who care about its legitimacy. In contrast, determining the unified *what and how* of a thing requires ontological investigation and aims toward a description rather than an explanation or a justification. That these different ways of making sense of the world sometimes find themselves in tension, or even at cross-purposes, is indicated by a remark of Wittgenstein's: "People who are constantly asking 'why' are like tourists who stand in front of a building reading Baedeker and are so busy reading the history of its construction, etc., that they are prevented from *seeing* the building."⁴⁵ Putting *why* aside for a moment, one could say that *what* and *how* are opposite sides of the same coin. To borrow a distinction from the medieval Scholastics, the what-being (*essentia*) of an individual preference is its determination as a present entity possessing certain attributes, whereas its how-being (*existentia*) consists in its having a certain mode of existence—a manner or style of persisting, and perhaps changing, through time.⁴⁶

It is tempting to think that CBA is a perfect example of what Edmund Husserl describes as "the positivistic reduction of the idea of science to mere factual science"—the kind of science that turns away from the enigma of subjectivity to mere calculation based on what is taken for granted about individual preferences.⁴⁷ Despite Husserl's unflattering hypothesis that "merely fact-minded sciences make for merely fact-minded people,"⁴⁸ one would like to think that the formation and expression of preferences as *lived phenomena* would be of great interest to CBA, especially if it could be demonstrated that the scientific truth of a preference's *what-being* cannot be thought independently of its *how-being*. To borrow one of the earlier-noted distinctions drawn by the Greeks, the difficult task of un-concealing knowledge (*epistēmē*) about the nature of preferences is not the same as taking one's unreflective

45. LUDWIG WITTGENSTEIN, *CULTURE AND VALUE* 40e (G.H. Von Wright ed., Peter Winch trans., Basil Blackwell Oxford 1980) (1977).

46. On the distinction between *essentia* and *existentia*, see MARTIN HEIDEGGER, *THE METAPHYSICAL FOUNDATIONS OF LOGIC* 177-178 (Michael Heim trans., Ind. Univ. Press 1984) (1978).

47. EDMUND HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* 5-7 (David Carr trans., Nw. Univ. Press 1970) (1954).

48. *Id.* at 6.

opinion (*doxa*) about preferences for granted.⁴⁹ And indeed it is true: the proposition that the *what* and the *how* of preferences are inextricably linked has been demonstrated by behavioral economists.⁵⁰

Once considered marginal and exotic by mainstream economists, the academic discipline of behavioral economics has shown experimentally that phenomena such as “framing” can vitally affect the outcomes that people choose, even when all available choices are mathematically equivalent. For example, in an important 1981 paper, Tversky and Kahneman described an experiment with subjects who were presented with a hypothetical scenario in which the United States is preparing for an outbreak of an unusual disease that is expected to kill 600 people.⁵¹ First asked to choose between Program A that would save a projected 200 people and Program B that carries a one-third probability that 600 people will be saved and a two-thirds probability that no one will be saved, 72% of the subjects in the experiment chose Program A, even though the expected outcomes of the two programs are identical.⁵² Then the experimenters restated the problem, presenting subjects with a choice between Program C, in which 400 people will die, and Program D, in which there is a one-third probability that no one will die and a two-thirds probability that 600 will die.⁵³ This time 78% chose Program D, despite the fact that it is mathematically equivalent to Program C.⁵⁴ The difference between the two experiments consists solely in the manner in which the choices were expressed: lives “saved” versus lives “lost.”⁵⁵ It appears that people are risk-averse when it comes to saving lives, but risk takers when it comes to lives being lost, despite the fact that “saving” and “losing” are strictly correlative terms in the overall context of the two opportunity sets. The paper thus provides a classic example of what the authors aptly call a “framing effect” within the phenomenon of choice.⁵⁶

Experiments like this show that by manipulating the environment in which preferences are expressed—that is, manipulat-

49. See *supra* notes 2-8.

50. See *infra* text accompanying notes 51-56.

51. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

ing the *how* of preference formation—behavioral economists can observe measurable differences in *what* those preferences are. While the insight of behavioral economists into the constitutive relation between *how* and *what* is unquestionably an improvement over the aprioristic deduction of preferences from a purely mathematical model of rational choice, behavioral economics is still at bottom a causal science. That is, it conceives of social mechanisms such as framing as mere variables that *produce* measurable outcomes in people's choices. It subordinates or ignores what goes on as preferences are formed in order to determine what the preferences ultimately "are" in relation to the different modes of framing that precede them. In other words, what goes on while people are forming their preferences in an experiment such as Tversky's and Kahneman's is of interest to behavioral economics only insofar as it can be correlated with a difference in the outcomes people choose. That the event of preference-formation as such might be worthy of investigation does not occur to behavioral economists any more than it does to the practitioners of CBA.

Thus, behavioral economics remains just as indifferent as CBA is to the phenomenological dimension of human preferences: their *how* as seen from within, namely, as lived phenomena. At one level this is understandable: no science can proceed without constructing its objects in a manner that allows them to be measured. But when one considers that CBA's entire *raison d'être* is to assist government in deciding whether and how to proceed with projects that will affect people's lives for better or worse, then the directly political application of CBA makes its methodological decisions all the more significant.⁵⁷ I will argue in what follows that by recognizing preferences only insofar as they fit into pre-established functional units that are fit for measurement, CBA creates a kind of bureaucratic blindness to the spontaneous processes of opinion- and will-formation. And this blindness, in turn, makes it easier for decision makers to decouple their political decisions from the concrete, identity-forming contexts in which people's preferences actually arise, as well as to avoid investing in public institutions that would make widespread popular deliberation and discussion of competing political preferences possible.

57. See CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* ix (2002).

III. Senseless Kindness

This essay's primary goal is to bring the phenomenological dimension of preference formation and expression to light as part of a critical assessment of CBA's purely theoretical structure. Since this leads inevitably to a demonstration of CBA's ideological effects, I will leave for another day the difficult question of whether and how CBA's model can be applied in the real world to yield information about preferences that could reasonably be called reliable by CBA's own criteria. Economists are able to measure *revealed* preferences because WTPs and WTAs appear in observable market transactions where people put their money where their mouths are, so to speak. But CBA considers itself relevant to government decision making precisely because the market has *not* provided a solution to the problems of public policy that it analyzes. The difficult task of developing a method for researching people's WTPs and WTAs in the absence of actual transactions where all relevant preferences are revealed thus becomes particularly important for CBA. Nevertheless, in this essay I will bracket and ignore this problem of application, not because I think it is uninteresting, but because I want to focus on CBA's theoretical model itself, as that model stands in relation both to what it purports to model and to its implications for the possibility of a genuinely democratic form of politics.

The term "senseless kindness" in this essay's title comes from a scene in *Life and Fate*, an epic novel about Stalinist repression and the Nazi invasion of the Soviet Union during the Second World War.⁵⁸ Its author, Vasily Grossman, was a Russian-Jewish novelist and war correspondent for *Krasnaya Zvezda*, or *Red Star*, the official newspaper of the Red Army.⁵⁹ Although the manuscript was actively suppressed by the authorities,⁶⁰ Vladimir Voinovich, one of the principal Soviet dissidents of the mid-1970s, managed to smuggle a microfilm copy abroad,⁶¹ and the novel was eventually published in 1980, sixteen years after the author's death.⁶² The recent discovery and publication of Grossman's war-

58. GROSSMAN, *supra* note 1, at 409.

59. VASILY GROSSMAN, *A WRITER AT WAR: VASILY GROSSMAN WITH THE RED ARMY 1941-45*, at vii (Anthony Beevor & Luba Vinogradova eds. & trans., 2005).

60. After the KGB seized what it thought were all existing copies of the manuscript, a Communist Party official told Grossman that there could be no question of *Life and Fate* being published for another 200 years. GROSSMAN, *supra* note 1, at 9.

61. *Id.* at 15.

62. *Id.* at 10.

time notebooks has made it clear that many, if not most, of the war scenes in the novel are based on actual incidents that Grossman heard about or observed as a correspondent.⁶³ Grossman was embedded with Soviet forces as they retreated in panic following Germany's invasion of the Soviet Union in June of 1941,⁶⁴ as they fought from near-disaster to victory during the nightmarish battle of Stalingrad in 1942-43,⁶⁵ and as the Red Army made its slow but relentless advance from central Russia all the way to Berlin and the end of the war in May of 1945.⁶⁶

The phrase "senseless kindness" appears in the context of Grossman's description of a punitive action aimed at a Russian village by a German military unit bent on "exact[ing] vengeance for the murder of two soldiers."⁶⁷ An *Aktion* like countless others perpetrated throughout the Soviet Union by the S.S. and the Wehrmacht, this particular event contains a small but striking detail that underscores the bewildering complexity of human nature.⁶⁸ The operation began late in the afternoon.⁶⁹ The Germans entered the village, ordered its women to dig a large pit at the edge of the forest, and rounded up and held twenty male peasants for execution at daybreak the following morning.⁷⁰ One of the women whose husband had been seized was also forced to quarter several German soldiers overnight in her hut.⁷¹ The next morning, as the Germans were checking their machine-guns, the eldest of them somehow pulled his trigger by mistake and shot himself in the stomach.⁷² His compatriots bandaged his wound as best they could, laid him on a cot in the woman's hut, and went outside to begin shooting the captives.⁷³ They left the woman alone in charge of the wounded soldier and motioned for her to watch over him.⁷⁴ Grossman describes what happened next:

63. GROSSMAN, *supra* note 59, at xvii.

64. *Id.* at xi.

65. *Id.* at xiv.

66. *Id.* at xvii. See also Verlyn Klinkenborg, *Westward into War with the Soviet Novelist and Reporter Vasily Grossman*, N.Y. TIMES, Feb. 1, 2006, at A28 ("What the war gave Grossman were the materials and the mind to write 'Life and Fate,' arguably the greatest Russian novel of the 20th century.").

67. GROSSMAN, *supra* note 1, at 408-409.

68. See *id.* at 408.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

The woman thought to herself how simple it would be to strangle him. There he was, muttering away, his eyes closed, weeping, sucking his lips. . . . Suddenly he opened his eyes and said in very clear Russian: 'Water, Mother.' 'Damn you,' said the woman. 'What I should do is strangle you.' Instead she gave him some water. He grabbed her by the hand and signed to her to help him sit up: he couldn't breathe because of the bleeding. She pulled him up and he clasped his arms round her neck. Suddenly there was a volley of shots outside and the woman began to tremble. Afterwards she told people what she had done. No one could understand; nor could she explain it herself. This senseless kindness is condemned in the fable about the pilgrim who warmed a snake in his bosom. It is the kindness that has mercy on a tarantula that has bitten a child. A mad, blind kindness. People enjoy looking in stories and fables for examples of the danger of this senseless kindness. But one shouldn't be afraid of it. One might just as well be afraid of a freshwater fish carried out by chance into the salty ocean. The harm from time to time occasioned a society, class, race or State by this senseless kindness fades away in the light that emanates from those who are endowed with it. This kindness, this stupid kindness, is what is most truly human in a human being. It is what sets man apart, the highest achievement of his soul. No, it says, life is not evil!⁷⁵

Many other gratuitous and unforeseen acts of kindness appear in this book, and, in a good illustration of form following content, they seem to occur almost randomly during the course of the narrative. To mention but one other example, there is a scene in which a captured German officer and his men are removing decomposing bodies from a basement in Stalingrad at the end of the battle in the winter of 1943.⁷⁶ A woman in a crowd of Russian onlookers takes great delight in witnessing the obvious misery and suffering of the Germans, who have been forced by Russian troops to perform this heinous task.⁷⁷ At one point the Germans bring out the corpse of an adolescent girl on a stretcher, and the woman collapses and wails in grief when she sees that it is the body of her daughter.⁷⁸ Getting to her feet, the woman begins to stride angrily toward the captive officer, and a Russian guard lets her pass.⁷⁹ Sensing that she is about to take vengeance, the crowd cannot take their eyes off her.⁸⁰ The narrative continues:

75. *Id.* at 408-09.

76. *Id.* at 803.

77. *Id.* at 804.

78. *Id.* at 805.

79. *Id.*

80. *Id.*

The woman could no longer see anything at all except the face of the German with the handkerchief round his mouth. Not understanding what was happening to her, governed by a power she had just now seemed to control, she felt in the pocket of her jacket for a piece of bread that had been given to her the evening before by a soldier. She held it out to the German officer and said: 'There, have something to eat.' Afterwards, she was unable to understand what had happened to her, why she had done this.⁸¹

Much later still, lying on her bed, the woman remembered what she had done outside the cellar in Stalingrad, and she thought to herself, "I was a fool then, and I'm still a fool now."⁸²

The philosopher Emmanuel Levinas was greatly impressed with *Life and Fate*, and not just because of its plot or its excellent writing.⁸³ He was affected most of all by the many scenes and stories in the book depicting unaccountable acts of kindness passing from one person to another, most of which were performed under circumstances in which one might expect the twin impulses of self-regard and self-preservation to be at their strongest.⁸⁴ Indeed, Levinas went so far as to interpret the novel as a quasi-philosophical text full of meaning about the essential nature of human goodness.⁸⁵ To distill a rich and variegated body of philosophical work to its essence, Levinas (and probably Grossman, too) believed that human goodness as such cannot be reduced to or explained by a person's compliance with ethical or legal norms, nor can it be equated with an individual "preference" for goodness that could be quantified and compared with other individual preferences according to some sort of politico-scientific calculus.⁸⁶ As I have said elsewhere, Levinas fixates on "the phenomenal irrationality of the ubiquitous small kindnesses that pass between strangers before reason has 'explained' them by reducing them to calculations based on short- or long-term reciprocity."⁸⁷

The difficulty of understanding these small kindnesses lies much deeper than the familiar question of whether it is legitimate for economists to make interpersonal comparisons of utility by

81. *Id.* at 805-06.

82. *Id.* at 806.

83. EMMANUEL LEVINAS, IS IT RIGHTEOUS TO BE?: INTERVIEWS WITH EMMANUEL LEVINAS 80 (Jill Robbins ed., 2001).

84. *Id.* at 81.

85. *Id.*

86. *Id.*

87. LOUIS E. WOLCHER, BEYOND TRANSCENDENCE IN LAW AND PHILOSOPHY 142 (2005).

transforming ordinal values into cardinal ones.⁸⁸ Rather, the real difficulty posed by the phenomenon of senseless kindness has to do with the very possibility of rational explanation itself: if human kindness arises from the particularities of each case rather than from the generality of a norm or preference that aspires to control or at least explain all of the cases that fall under it, then it follows that the faculty of reason can neither control nor properly account for primordial kindness as a phenomenon. Senseless kindness reminds us of the fundamental *uncertainty* of human action; it tends to confirm Hannah Arendt's observation "that we never quite know what we are doing when we begin to act into the web of interrelationships and mutual dependencies that constitute the field of action."⁸⁹ Despite, or perhaps because of, the ubiquity of this kind of uncertainty, responsible decision-oriented technologies such as CBA are always seeking to achieve the most efficient technical solution to difficult social problems. As a result, such technologies by their very nature cannot see the point or value of studying any human behaviors that do not generate "data" that might contribute to a definitive solution. From this point of view, if the possibility of an unintended negative consequence can be foreseen, then its value can be calculated and incorporated into the analysis. And if it cannot be foreseen, well, then the most that one can do is gamely follow the advice in one of Wittgenstein's pithiest aphorisms: "What the eye doesn't see the heart doesn't grieve over."⁹⁰

Richard Zerbe has expressed CBA's attitude toward any information that does not contribute to an efficient public policy solution by putting what is at stake in terms of a kind of competition between different methods of decision making: "If the government uses [the] KH or KHZ [criteria of efficiency] for evaluating all of its decisions *instead of using some other criteria*[,] it has the best

88. In the present context, "ordinal" means a definite ranking of goods (1st, 2nd, 3rd, etc.) within a set of available goods whose order is determined by a *single actor's* particular utility function. "Cardinal" refers to an absolute ranking of goods (1, 2, 3, etc.) on the basis of some criterion other than a particular actor's utility function. Thus, the proposition "If they all cost the same, A prefers ice cream to broccoli, and broccoli to gruel" expresses something about A's ordinal utility, whereas "Ice cream is better than broccoli, and broccoli is better than gruel" is a proposition of cardinal utility that purports to be valid for all actors.

89. HANNAH ARENDT, *THE PROMISE OF POLITICS* 56 (Jerome Kohn ed., 2005) (noting that this uncertainty "was considered by ancient philosophy to be the one supreme argument against the seriousness of human affairs").

90. LUDWIG WITTGENSTEIN, *REMARKS ON THE FOUNDATIONS OF MATHEMATICS* 101e (G.H. Von Wright et al. eds., G.E.M. Anscombe trans., M.I.T. Press 1967) (1956).

chance of making *all* of the people in a society better off 'at the end of the day.'⁹¹ However honestly and fervently held this opinion may be, its very mode of expression confirms Bernard Stiegler's description of the modern "technocratic state"—a state that "no longer has as its aim either the encouragement of communicative action or the achievement of a critical distance toward purposive-rational action."⁹² Instead, the technocratic state's "activity consists in finding solutions to questions of a technical nature, those that escape public discussion."⁹³ By characterizing policymaking as a purely technical problem, thinkers such as Zerbe overlook the possibility that other "methods" of policymaking might actually be ends rather than means—that they might express the kind of rationality that Weber calls *Wertrationalität*: behavior that is believed to possess intrinsic value or inherent rightness, even if it does not lead to policy outcomes that are efficient when measured by the sum of people's pre-behavior preferences.⁹⁴ In short, CBA fails to consider the possibility that the coming-and-being-together of political discussion and mutual learning about a policy problem might be part of the good life itself, if not also a catalyst that can reshape the terms of the problem and people's feelings about it. Zerbe's remark shows that CBA instead conceives of decision making methods in terms of costs that regrettably must be borne in the pursuit of solutions to problems the contents of which remain unaffected by the way in which they are decided.

Likewise, defining policymaking solely in terms of competing methods for making the mass of people in general better off in the future cannot explain a fact that is well known to any law professor who has ever tried, to teach the insights of law and economics in the classroom: namely, that many law students seem viscerally averse to reducing problems of decision making—legal or otherwise—to the *ex ante* calculation of costs and benefits according to the criterion of efficiency.⁹⁵ What can or should CBA do with a preference to avoid CBA itself in favor of, say, deontological modes

91. ZERBE, *supra* note 10, at 28. The particular criteria animating the forms of efficiency that are mentioned in text will be discussed later.

92. BERNARD STIEGLER, *TECHNICS AND TIME*, 1, at 12 (Richard Beardsworth & George Collins trans., Stan. Univ. Press 1998) (1994).

93. *Id.*

94. BRUBAKER, *supra* note 27, at 51-53.

95. Here I can cite only a quarter-century of my own experience in teaching contracts and torts to first-year law students, as well as hearsay evidence about colleagues witnessing the same kind of reluctance in their students.

of decision making such as Kant's Categorical Imperative,⁹⁶ or even just asking decision makers to obey the ancient maxim *fiat justitia pereat mundis*?⁹⁷ As Lon Fuller's well-developed procedural theory of natural law shows, people can have moral preferences for the way decisions are made that are at least as strong as their preferences for the contents of those decisions.⁹⁸ And since there is no reason in principle why CBA ought not apply to procedures as well as to substance, the worrying possibility that this presents for the continued existence of CBA as a discipline is obvious. This possibility can be metaphorically illustrated by the tale of the Cheshire Cat in *Alice's Adventures in Wonderland*: this remarkable cat proceeded to vanish, bit by bit, in response to Alice's persistent questioning, leaving only a faint grin to bear witness to the fact that it had ever existed at all.⁹⁹ To put the matter at stake more directly, and in CBA's own terms: *if* the preference for exclusively deontological modes of decision making and against teleological methods such as CBA is or becomes sufficiently widespread in society, and *if* the preference is backed up by a large enough aggregate WTP, then it would seem to follow from CBA's own methods and criteria that it ought to willingly choose to go out of business, or at least to cease offering any more policy advice to government decision makers.

Levinas astutely observes that the numerous acts of senseless kindness described in *Life and Fate* do not call for any political action, just as they do not preach anything that could be called an ethical doctrine.¹⁰⁰ On the contrary, "the scenes of goodness in an inhuman world are disseminated throughout the book, without transforming it into a virtuous book for virtuous readers."¹⁰¹ The many simple acts of kindness that appear in the course of the novel are "exterior to all system," Levinas claims, and they leave the mind to grasp a kind of "ethics without ethical system" in which "the only thing that remains is individual goodness, from

96. Kant eschewed all forms of consequentialism in matters of ethics in favor of a mode of decision making that focuses on the intrinsic rightness of the action that is willed. See KANT, *supra* note 36, at 155 ("A good will is good not because of what it performs or effects, nor by its aptness for attaining some proposed end, but simply by virtue of the volition.").

97. "Let justice be done even if the world should perish."

98. See LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

99. See LEWIS CARROLL, *ALICE IN WONDERLAND AND THROUGH THE LOOKING GLASS* 63-67 (Grosset & Dunlap 1946) (1865).

100. LEVINAS, *supra* note 83, at 89-90.

101. *Id.* at 81.

man to man.”¹⁰² Levinas even interprets *Life and Fate* as a kind of argument against all efforts to rationalize or systematize the kind of behavior that the book celebrates:

[Grossman] thinks that the “small goodness” from one person to his fellowman is lost and deformed as soon as it seeks organization and universality and system, as soon as it opts for doctrine, a treatise of politics and theology, a party, a state, and even a church. Yet it remains the sole refuge of the good in being. Unbeaten, it undergoes the violence of evil, which, as small goodness, it can neither vanquish nor drive out. A little kindness going only from man to man, not crossing distances to get to the places where events and forces unfold! A remarkable utopia of the good or the secret of its beyond.¹⁰³

As this passage suggests, Levinas undoubtedly would have been horrified at the prospect of any social scientific effort to account for the phenomenon of senseless kindness by reducing it to a political factoid the numerical value of which could then be compared with the numerical values of other political factoids: horrified, in other words, by CBA. This is in part because CBA concerns itself with the formal and static structure of “things” rather than with the fluidity of phenomena as they show themselves through time.¹⁰⁴ Seen from the latter point of view, an “event” is always singular and never universal. It is always open to—indeed nurtured by—what Alain Badiou calls the “surprise of the unexpected.”¹⁰⁵ CBA attempts to smother the unexpected with an intervention that violently abstracts preferences from the unpredictable context of their formation. And there is no better example of this than CBA’s interpretation of the phenomenon of senseless kindness as the mere expression of a well-formed “preference for altruism.”

IV. The “Preference for Altruism”

Recent CBA scholarship has made a determined effort to transform the so-called preference for altruism into a monetary value that can be measured in terms of the market-oriented categories of WTP and WTA. Zerbe, for instance, argues that CBA should henceforth define as a “good” *any* value or good for which

102. *Id.*

103. EMMANUEL LEVINAS, *ENTRE NOUS: ON THINKING-OF-THE-OTHER* 230 (Michael B. Smith & Barbara Harshav trans., 1998) (1991).

104. SUNSTEIN, *supra* note 57, at 20.

105. ALAIN BADIOU, *INFINITE THOUGHT* 56 (Oliver Feltham & Justin Clemens eds. & trans., 2003).

there is a WTP, and he criticizes the traditional economic literature for its arbitrary tendency to ignore and exclude from its calculations many people's obvious WTP for the values of fairness and kindness toward others.¹⁰⁶ On this question he is right: any economic analysis that ignores "soft" goods like fairness that people are actually willing to pay for risks being accused of overt political bias. But note: the "regard for others" that Zerbe identifies as a good must be capable of showing itself as a preference *before* the project whose net social value it is the job of the economist to ascertain. Margaret Spillane tells a story about Samuel Beckett that nicely illustrates the category of such a well-defined *ex ante* preference for altruism:

Beckett was well-known among Paris street people as an easy touch. Once while on a stroll with a friend, a beggar offered his tale of misfortune, and the playwright produced a generous offering. Shouldn't you consider the possibility, the friend asked, that the beggar was taking advantage of you? Replied Beckett: "I just couldn't take the chance."¹⁰⁷

This amusing story is consistent with the commonly held view that some people are by nature more kindly than others, while some are inclined more toward what Hobbes calls "our naturall Passions, that carry us to Partiality, Pride, Revenge, and the like."¹⁰⁸ But conceiving of an act of altruism as the consequence of a constant character trait or disposition is pre-critical, and fails to account for the phenomenon of senseless kindness. In contrast to the well-bounded, conscious, and even calculating preference for altruism displayed in the foregoing story about Beckett and the beggar, the sort of kindness that Grossman describes in *Life and Fate* cannot show itself before the deed. It cannot, by its very nature or definition, fall within what CBA would call an *ex ante* set of preferences or utility function. This is because senseless kindness displays a peculiar property in the way it comes into being: it does not implement an earlier preference for altruism, but rather *erupts* with no prior warning, in a way that squarely contradicts the actor's previous preference for the very opposite of altruism.¹⁰⁹ This kind of behavior is "senseless" in the very precise

106. ZERBE, *supra* note 10, at 24-26.

107. Margaret Spillane, *Beckett at 100*, THE NATION, May 15, 2006, at 22.

108. THOMAS HOBBS, LEVIATHAN 87 (Ernest Rhys ed., E. P. Dutton & Co. 1914) (1651).

109. See LEVINAS, *supra* note 83, at 89 (describing senseless kindness as an unforeseen act of goodness that occurs despite the fact that the actor actually hates the beneficiary of his or her kindness).

sense that it contradicts the claims of instrumental reason, which argue against it on the basis of what is known about the actor's pre-behavior preferences.

Of course, if cases of senseless kindness exist, then cases of "senseless cruelty," in which an actor's *ex ante* preference for altruism suddenly becomes its opposite, probably also exist.¹¹⁰ But we are not concerned here with deciding which of these two phenomena is more common. Instead, we should consider the categories of senseless kindness and senseless cruelty together, and from the vantage point of what unites them. It then becomes possible to recognize that these two phenomena are opposite extremes that mark the boundaries of a general principle of relative social inconstancy in the formation and expression of human preferences. The point is not just that people often change their minds about what they want. The point is that they can, and do, change their minds and their behaviors as a consequence of being with others in particular ways. To express the principle of relative social inconstancy formally: whenever human beings actually get together in face-to-face encounters, it is always possible that something unexpected will happen between them to alter their preferences, either completely (the preference for X becomes a preference for its opposite, as in senseless kindness) or partially (an actor's WTP or WTA changes, or his preference for X becomes a preference for something that is merely *like* X). For the sake of simplicity, I will continue to use the phenomenon of senseless kindness as the essay's primary example of the principle of relative social inconstancy. The time has come to describe the phenomenological structure of this sort of human interaction more closely.

Senseless kindness is the product of a concrete encounter between human beings who, suddenly and perhaps even unwillingly, find themselves standing face-to-face with one another. To use a powerful image drawn from the work of Levinas,¹¹¹ in the literal nakedness of the other's face can be glimpsed the phenomena of distress and mortality, for every face-to-face encounter between

110. Imagine an actor who genuinely wants to help people in the abstract, but who winds up actually hurting them (and wanting to hurt them) as a sudden consequence of having concrete dealings with them: this would be a case of "senseless cruelty." (I am tempted to cite the federal government's ongoing reaction to the African-American victims of Hurricane Katrina as an example, but I will leave the regrettably easy task of supplying actual examples of senseless cruelty to the reader's own memory and imagination.)

111. EMMANUEL LEVINAS, *Meaning and Sense*, in BASIC PHILOSOPHICAL WRITINGS 33, 54 (Adriaan Peperzak et al. eds., 1996).

two people—and not just friends—is haunted by the certainty that one of them will outlive the other.¹¹² I say “can be glimpsed” to indicate that the inevitable death of the other is not necessarily encountered as a theme, but that the primordial experience of this truth shows itself as an existential *possibility* in every face-to-face relationship. Levinas describes the phenomenal structure of this kind of encounter in vivid, almost lyrical terms:

But that face facing me, in its expression—in its mortality—summons me, demands me, requires me: as if the invisible death faced by the face of the other—pure alterity, separate, somehow, from any whole—were ‘my business.’ As if, unknown by the other whom already, in the nakedness of his face, it concerns, it ‘regarded me’ before its confrontation with me, before being the death that stares me, myself, in the face. The death of the other man puts me on the spot, calls me into question, as if I, by my possible indifference, became the accomplice of that death, invisible to the other who is exposed to it; and as if, even before being condemned to it myself, I had to answer for that death of the other, and not leave the other alone to his deathly solitude. It is precisely in that recalling of me to my responsibility by the face that summons me, that demands me, that requires me—it is in that calling into question—that the other is my neighbour.¹¹³

It is important to understand that Levinas’s description of the ethical encounter that leads to senseless kindness is not an argument *for* senseless kindness, as if there were too little of it in the world and he wanted to encourage people to be nicer to one another. This way of putting it wrongly imagines that senseless kindness is an event that one can plan for or take aim at on the basis of an ethical norm or individual preference that could be taught, as it were, in Sunday school. The phenomenal facts of the case are otherwise: the essence of senseless kindness consists in the fact that it stealthily comes upon or surprises the one who, all of a sudden, finds herself inexplicably exhibiting kindness toward another human being. In short, Levinas attempts to give a rigorous phenomenological description of what *is* rather than a normative lecture about what *ought to be*. He wants to describe something that just happens in daily life—albeit usually in small ways

112. Derrida speaks of this certainty in terms of the relationship between friends, both of whom know that one of them will outlive the other; on account of this mutual knowledge of mortality, the friends become what Derrida calls “virtual survivors” in life. JACQUES DERRIDA, *THE WORK OF MOURNING* 171 (Pascale-Anne Brault & Michael Naas eds., 2001).

113. EMMANUEL LEVINAS, *ALTERITY AND TRANSCENDENCE* 24-25 (Michael Smith trans., 1999).

that fly under the radar of political and social theory—even if it is also true that the counter-phenomena of cruelty, greed, and selfishness are often more visible to us.

From the “*ex ante* point of view” that informs the modern quest for economic rationality, the possibility that this kind of unpredictable encounter might pop up to disturb an actor’s well-thought-out plans and projects involves what CBA would classify as a “transaction cost.” In other words, mainstream economic theory interprets an unwanted face-to-face encounter between people as a burden rather than a benefit, and it counts the reduction of transaction costs as an *a priori* gain rather than the loss of an opportunity for something new and unexpected to emerge. As this attitude toward transaction costs suggests, mainstream economic theory nurtures a general political preference for market solutions to individual and social problems.¹¹⁴ While the origin of this preference for markets is a normative commitment to efficiency, the preferred *means*—the market as such—consists in people *coming together* in real or virtual face-to-face encounters.¹¹⁵ Indeed, the very existence of the discipline of CBA is based on the recognition that there can be significant barriers (transaction costs) that prevent otherwise willing people from coming together to achieve efficiencies.¹¹⁶ The idea that the law should mimic hypothetical market solutions when transaction costs prevent real market solutions is simply a corollary of economists’ general preference for markets.¹¹⁷ Since it generally considers the pursuit of government “projects” to be a second-best solution, CBA argues that public policy ought to be guided, or at least informed, by an analysis of the hypothetical things that people would willingly do with, and to, one another if there were no transaction costs.¹¹⁸

The phenomenon of senseless kindness and the general principle of the relative social inconstancy of preferences that it illustrates pose an acute challenge to this way of thinking, for they imply that the coming-together process is not just a “cost.” If we take this phenomenon as a symbol for the general thesis that something unexpected yet desirable can arise whenever human beings interact, it means that coming together can be a transformative event. Indeed, thinkers such as Habermas have even argued that

114. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 16 (2003).

115. See 1 WEBER, *supra* note 20, at 635 (describing “the market”).

116. See SUNSTEIN, *supra* note 57, at 9.

117. POSNER, *supra* note 114, at 251.

118. ZERBE, *supra* note 10, at 14-33.

there is an intimate connection between coming together in discussion and the concept of rationality itself.¹¹⁹ In earnest discussion about what is to be done, the participants make claims that they attempt to vindicate and criticize through arguments.¹²⁰ As Habermas says, “[i]n virtue of their criticizability, rational expressions also admit of improvement,” which implies that to be closed to argument—to be “deaf” to it—is to be irrational.¹²¹ In attempting to ground our own claims we learn from others, and in learning from others we expose ourselves to the possibility of change. Thus, “[w]e call a person rational who interprets the nature of his desires and feelings . . . in the light of culturally established standards of value, but especially if he can adopt a reflective attitude to the very value standards through which desires and feelings are interpreted.”¹²² By bringing us to see certain aspects of a problem that we did not see before, the “coming together” of discussion changes us, and thus can change what we prefer.

Of course, not all instances of people coming together involve the prospect of rational and open-minded argumentation. In many routine economic transactions an increase in transaction costs would admittedly burden the parties without any realistic chance of significantly changing them or their preferences: one thinks of such simple examples as paying bridge tolls, buying bread, and reconciling bank statements. If CBA limited the range of application of its theory to these kinds of human interactions, however, it would be of limited utility to policymakers trying to decide questions of a distinctly political nature, such as whether abortion should be made more or less available to women, whether the law should allow or disallow the cloning of human beings, and whether there should be more or less offshore drilling for oil. In situations like these, one could argue that what we need is *more* discussion (more “transaction costs”), not less—more opportunity for people to test their preferences, and possibly change them, as a consequence of their interactions with others. To walk a mile in the other’s shoes, as the saying goes, is not the expression of an *ex ante* preference for altruism. Rather, it is a necessary precondition for any deliberation in the political sphere that aspires to become rational in the largest and most important sense of the word: namely, the rational evaluation of one’s own ultimate ends in light

119. 1 HABERMAS, *supra* note 40, at 17.

120. 1 *id.* at 18.

121. 1 *id.*

122. 1 *id.* at 20.

of knowledge about the ultimate ends of others. Socrates famously said that the unexamined life is not worth living.¹²³ But one need not go as far as he does to conclude that at least an unexamined *preference* is not worth having.

If open discussion of the sort Habermas envisages is the quintessence of rationality, then the preferences of those who exhibit senseless kindness in *Life and Fate* undergo the kind of metamorphosis that is, if you will, *pre-rational*, and that is triggered by what CBA would call the "transaction cost" of a face-to-face encounter. All of a sudden there appears, out of nowhere, what CBA would undoubtedly recognize as a brand new set of preferences or utility function. Before the Germans entered her hut, the peasant woman would probably have been "willing to pay" for all the enemy soldiers in her village, wounded and unwounded alike, to be strangled; indeed, she says as much herself, the very instant before she finds herself giving water and comfort to the gut-shot German who is lying on her cot.¹²⁴ An intended course of action that threatens to become its own negation once the transaction costs of its implementation are incurred is, to say the least, a very curious kind of revealed preference. Although economists sometimes say that inefficiency arises only in dynamic societies,¹²⁵ the emergence of unexpected choices as a consequence of interpersonal contact seems to show that certain kinds of *efficiencies* can arise only when dynamic conditions change people's preferences. One way or another, one feels entitled to ask what the prospect of this kind of plasticity in preferences and behavior means for the very concept of economic rationality.

V. Economic Rationality

As we have seen, economists normally interpret transaction costs as something negative or bad—as barriers obstructing the consummation of otherwise efficient transactions.¹²⁶ To illustrate: if A's WTP for a good owned by B is \$100, and B's WTA for this good is \$90, then in a world without transaction costs A will acquire the good from B at some price between \$90 and \$100, and, in the absence of any negative externalities,¹²⁷ the resulting state of

123. PLATO, *Socrates' Defense (Apology)*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 22, at 3, 23.

124. GROSSMAN, *supra* note 1, at 409.

125. See, e.g., ZERBE, *supra* note 10, at 66.

126. *Id.* at 22.

127. A "negative externality" is a cost that the parties to a transaction do not

affairs will be a Pareto improvement on its predecessor.¹²⁸ But if it would cost the parties jointly at least \$11 in transaction costs (travel costs, negotiation costs, etc.) to complete this transaction, then economic theory predicts that A and B will not bother to do it, since no price between \$90 and \$100 would defray the joint transaction costs that are necessary to effectuate the exchange.¹²⁹ Presumably the opportunity cost¹³⁰ of spending the \$11 to consummate this transaction consists of a set of other, more highly valued, uses of the parties' time and resources. This being so, the theory predicts that they will not choose to spend the \$11 here, despite the fact that both of them would be better off if the underlying substantive exchange were to occur.

Predictably, matters are not quite as simple and straightforward as this example indicates when it comes to cases in which the principle of the relative social inconstancy of preferences holds sway. The previous analysis of senseless kindness shows that there are situations in which the cost-prohibitive circumstance of incurring certain transaction costs somehow transforms the very opposite of an actor's original preference into the good that she now desires. It is as if a person's WTA of a million dollars for her last piece of bread suddenly and unaccountably became her WTP for that bread to be transferred to another. One could even generalize and reformulate this example as a formal paradox: there is a class of cases such that the circumstance of incurring the inefficiency of excessive transaction costs—owing to a prior miscalculation or to compulsion—leads to a transaction that nonetheless *becomes* efficient solely because the costs of engaging in it have produced a transformation of the parties' preferences. Even more generally, one could say that the possibility of the socially determined unexpected puts into question the very nature of economic rationality. One need not be a sociologist to recognize that sense-

bear, but that the transaction itself imposes on one or more other people who, in principle, would be willing to pay to avoid it. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 40 (1988) (defining "externalities").

128. Zerbe defines the Pareto criterion as follows:

A Pareto optimum is a state of affairs such that no one can be made better off without making someone else worse off. A change in the economy is said to represent a Pareto improvement if at least one person is made better off as a result of the change and no person is made worse off.

ZERBE, *supra* note 10, at 3. The Pareto criterion is more rigorous than others, such as KH, because of its requirement that a change "have no losers." *Id.*

129. COOTER & ULEN, *supra* note 127, at 85.

130. The "opportunity cost" of a chosen course of action is all the other courses of action that the actor could have chosen, but that are now foreclosed to him on account of the course he did choose. *Id.* at 101.

less kindness, coming as it does to disrupt prior preferences and redirect action away from their realization, makes visible the challenge that the interconnected phenomena of temporality and human sociality pose to the definition of the "*ex ante*" in CBA.

Richard Posner correctly observes that "to an economist people who will not make exchanges that improve their net welfare are irrational."¹³¹ But it is also true that today's economic theorists do not assess an individual's net welfare in terms of universal criteria, or cardinal utility: it is for the individual herself to decide which goods, or bundle of goods, will make her best off relative to her preferences.¹³² As I have noted already, recent economic theory has introduced the altruistic regard for others into CBA—a theoretical move that thankfully dispels the widely-held misconception that the criterion of economic rationality is satisfied only by choices that maximize an individual's selfish material interests.¹³³ After all, if I would be willing to pay for a more equal distribution of resources in society, despite the fact that my own monetary income might decline as a consequence, there is no non-dogmatic (or at least non-normative) point of view that can reproach my choice as irrational.¹³⁴ Notice that this relatively modest theoretical concession to the possibility of a WTP for altruistic ends is not the same as claiming, as John Rawls does, that the concept of rational self-regard logically entails that social institutions be arranged so as to maximize the portion of the least well-off in society.¹³⁵ As we have seen, microeconomic theory makes no claims about universal rational values. Rather, its procedures correspond to Weber's well-known schema of rational action: (1) an action is regarded as *subjectively rational* if it is directed toward a goal that the actor values, whatever that goal may be; and (2) the action is taken to be *objectively irrational* only if the actor adopts means to achieve his selected goal that are less well-suited than other available means.¹³⁶ In other words, "subjective rationality" is a purely descriptive category—the actor just has whatever pref-

131. POSNER, *supra* note 114, at 51.

132. See COOTER & ULEN, *supra* note 127, at 17-20.

133. See *supra* text accompanying notes 106-07.

134. Although nothing of importance depends on it here, it should be noted that one consequence of including the preference for altruism in efficiency calculations is that a state of affairs can arise in which aggregate WTPs outweigh aggregate WTAs without the potential compensation test being satisfied. ZERBE, *supra* note 10, at 19.

135. JOHN RAWLS, A THEORY OF JUSTICE 151 (1971).

136. BRUBAKER, *supra* note 27, at 53-55.

erences she has, for whatever reason—whereas the category of “objective rationality,” although unquestionably normative, is limited to assessing the effectiveness of the *technique* the actor has adopted to achieve her particular end.¹³⁷

Put another way, CBA believes it is required to accept individual preferences as primordial givens for purposes of its analyses of net social welfare. That is, as a matter of principle, WTPs and WTAs are supposed to be functions of what people just happen to prefer at any given point in time, and never functions of what a CBA analyst thinks they must or ought to prefer. In theory, the decision of a monk who has taken a vow of poverty to get rid of all his money and possessions is just as economically rational as the average person’s decision to work overtime in order to earn more of what the monk is trying to give away. However, the stipulation that all preferences are radically subjective in this way underscores how important it is for CBA to select the “right” point in time to sum them up, for people’s preferences can and often do change. If I am willing to pay \$1 for an apple instead of a candy bar at t_1 , and this point in time is the taken to be the relevant *ex ante*, then my subsequent behavior of buying a candy bar at t_2 appears irrational. On the other hand, if we take t_2 as the relevant *ex ante*, then my new preference for a candy bar over an apple makes my act of purchasing it look rational. It all depends on which “when” the analyst selects.

The problem of selecting the right *ex ante* is even more difficult in the context of trying to give a theoretical account of the phenomenon of senseless kindness. Consider, for instance, the two examples from *Life and Fate*. As of which *ex ante* are the Russian women’s preferences to be determined: the *ex ante* that *precedes* the moment of facing the hated German soldiers toward whom the women will subsequently act “irrationally” by displaying senseless kindness, or the *ex ante* that all of a sudden bursts forth to reflect their new desire to be kind to the needy human beings whom they face, and that therefore shows their behavior to be “rational”? And if, as Zerbe maintains emphatically, the proper purpose of CBA is “to provide useful information to the decision maker, and not to furnish the decision itself,”¹³⁸ then what information should the decision maker get if the possibility of an unpredictable social transformation of an individual’s preferences lurks just around the temporal corner of any given analysis of *ex ante* WTPs and WTAs?

137. *Id.*

138. ZERBE, *supra* note 10, at 16.

Among other things, these questions show that method matters. The way we approach any subject determines not just *how* we proceed but also *what* we look for and find. Einstein stressed this dialectical relationship between the *how* of method and the *what* of facts when he said, "How a magnitude is measured is what it is."¹³⁹ CBA is no exception to Einstein's rule. What CBA looks for and finds is a mathematical relationship between WTPs and WTAs. Calling these phenomena themselves manifestations of individual preferences, CBA proceeds to sum them up and then recommend, or at least provide information about, hypothetical end-states according to a test that most mainstream economists and lawyers accept as the definition of "economic efficiency": the Kaldor-Hicks (KH) efficiency criterion.¹⁴⁰ While KH can be expressed in a variety of ways, for purposes of this essay I will adopt the definition given by Boadway and Bruce: "[S]tate *a* is preferable to another state if, in the *other* state, it is *not* possible, hypothetically, to carry out lump-sum redistribution so that everyone could be made as well off as in state *a*."¹⁴¹

The questions posed above show that a tool or criterion of public policy that asks what individuals would be willing to pay or accept for something is useless without a temporal reference-point—a determination of *when* they would be willing to open their wallets. This observation about method makes it possible to recognize that there is an entire philosophy of time and history implicit in Boadway's and Bruce's definition of economic efficiency. Not only does the notion of a "state" in which people "have" prefer-

139. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL REMARKS* 200 (Raymond Haregreaves & Roger White eds. & trans., 1975).

140. Also known as the "potential compensation" and "wealth maximization" test, KH arose in response to the impracticability of using the Pareto criterion of efficiency as a tool of public policy. ZERBE, *supra* note 10, at 4. The latter requires *both* that at least one person will be made better off by the move from the status quo to the proposed new state, *and* that no one will be made worse off. *Id.* at 3. "Potential compensation" assures that the winners in the new state are able, in theory, to compensate the losers for their losses, with net gains remaining that improve the winners' welfare relative to their previous positions. In other words, KH is aimed at increasing net *social* welfare, which is why Richard Posner has called it the "wealth maximization" test. *Id.* at 5. The redistribution actually occurring is not a requirement of the KH test as such, although Zerbe has called for actual compensation to be included in CBA calculations to the extent that there is any willingness to pay for it. *Id.* at 18. Zerbe's modification of KH, primarily through his inclusion of the preference for altruistic goods within CBA, has led him and other economists to change the test's name to "KHM," for Kaldor-Hicks-Moral. See Richard O. Zerbe, Yoram Bauman & Aaron Finkle, *An Aggregate Measure for Benefit-Cost Analysis*, 58 *ECOLOGICAL ECON.* 449 (2006).

141. NORMAN BOADWAY & NEIL BRUCE, *WELFARE ECONOMICS* 97 (1984).

ences presuppose a discrete point in time at which their WTPs to change this state to another state and WTAs to let the change occur can be measured, but also this notion interprets time itself as a mere sequence of "states," each of which, when viewed in isolation, is static and fully determinable. CBA refers to the original state-in-time of a given series of states as the "*ex ante* perspective" (literally "from [or out of] before," in Latin).¹⁴² Since the problem that CBA wants to solve is whether a move from one state to another state is efficient, CBA answers the question, "Before what?" with the concept of the "project."¹⁴³ From a purely logical point of view, a project consists in the means that would have to be adopted to achieve the purely hypothetical end-state under review—an idealized new state that may or may not be more efficient than the *ex ante* state. This shows how CBA conceives of legitimate public policymaking in democratic societies: namely, in terms of a self-conscious movement from a static and real present "state" to a static and hypothetical future "state" on the basis of people's preferences as measured before progress toward the second state begins.

Well-established scientific methods tend to assert their hegemony over every problem that falls within their domain, including new problems that seem to question the accuracy of their findings or the legitimacy of their conclusions.¹⁴⁴ Perhaps this is inevitable, for as Arendt correctly observes, in the act of judgment "[o]nly the individual case is judged, not the standard [of judgment] itself or whether it is an appropriate measure of what it is used to measure."¹⁴⁵ Hence, given CBA's presuppositions about time and history, it would be understandable if its practitioners preferred to achieve a technical economic solution to the "problem" of senseless kindness. One possible solution would be to evade the problem altogether by asserting that any given value of WTP or WTA already includes the subjectively liquidated possibility that its bearer will subsequently and unexpectedly change her mind. The difficulty with this solution is obvious: how is the actor supposed to know what discount rate to pick if the possibility of change is truly *unexpected* to her? A more plausible alternative would be to attempt to account objectively for the possibility of

142. BLACK'S LAW DICTIONARY 601 (8th ed. 1999).

143. See, e.g., ZERBE, *supra* note 10, at 16.

144. See THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

145. ARENDT, *supra* note 89, at 102.

preference reversal by incorporating it into the model on the basis of empirical evidence that would not necessarily be available to the actor. In the case of senseless kindness, one could discount the present value of an actor's *ex ante* preference for the very opposite of kindness by the general probability that an actor like her might choose to be kind as a consequence of a subsequent social interaction.¹⁴⁶ To illustrate: if the peasant woman in *Life and Fate* would have been willing to pay something to have the wounded soldier in her cottage strangled *before* he asked her for some water, then we could reduce the value of her WTP for this "project" by the *ex ante* probability that she might subsequently change her mind and feel kindly toward him. Only by this means could CBA begin to conform its calculations to an existential truth that ought to be visible to any rational adult who has ever tried to accomplish something in the world: namely, that much of history is "made by men who never know what they are doing and always arrive at letting loose, as it were, something different from what they [originally] intended and wanted to happen."¹⁴⁷ Accounting for senseless kindness in this way would then seem to be a simple matter computing the overall empirical frequency of its occurrence. And in principle one could perform the same kind of operation to account for the possibility of senseless cruelty.

However attractive or plausible this theoretical solution may appear, there are two reasons why it will not suffice. The first is merely technical. It will be recalled that senseless kindness and senseless cruelty are limiting cases of a much larger category—the principle of the relative social inconstancy of preferences. If one takes as one's object of analysis the more general phenomenon of *an unexpected change in preferences as a consequence of human interaction*, then it is difficult to see how a reliable discount factor could ever be ascertained, since the set of possible outcomes is well-nigh infinite. In other words, senseless kindness and senseless cruelty tend to exhibit a binary structure: we know what the actor's initial preference is, and we need only consider the possibility that the very antithesis of this outcome will be the one that she winds up preferring. The case is otherwise for situations that fall between these two extremes: who knows all of the novel solutions or strange new worlds that might be imagined if the people who

146. Of course, in a world without transaction costs this information would also be available to the actor, who could then discount her own WTP or WTA in the same way that an economic observer could.

147. ARENDT, *supra* note 89, at 16.

would be affected by a proposed project had ample opportunity to discuss and debate it, face to face?

Despite the cogency of this rhetorical question, its claim of epistemological difficulty or uncertainty hardly furnishes a fully satisfying theoretical answer to CBA in this context. The second objection to any attempt to hastily enact a merely technical solution to the present problem is quite different. This objection is far more radical and will lead us into a decisive confrontation with the very essence of CBA as a socio-political institution. In brief, even if CBA were to discover an adequate actuarial solution to all of the technical problems that are raised by the principle of the relative social inconstancy of preferences, such a solution would suffer from the absence of any critical reflection on the *ultimate meaning* of senseless kindness for humans as social and political beings. At present, the practitioners of CBA take the meaning of their factual findings to be self-evident: if the sum of all the WTPs for a proposed project exceeds the sum of all its WTAs, then society in general would be better off than it is at present, relative to the bankable preferences of its members, if the project were to proceed. But there is something important that is missing from this commonsensical interpretation of CBA's findings: namely, serious reflection about the difference between a *fact* and the *meaning of a fact*.

VI. Facts and Meaning

Understanding the difference between a fact and its meaning is absolutely essential to any thinking that aspires to be non-dogmatic. At one level the difference is obvious: the sheer physical fact that a particular traffic light is colored red, for example, is obviously not the same as what its redness *signifies* to drivers. Much less obvious is the distinction between the purely factual vignettes that Grossman calls "senseless kindness,"¹⁴⁸ each of which is a one-of-a-kind event that will never happen again, and what these stories signify about possibilities for democratic politics that go beyond those envisioned or presupposed by CBA. Given CBA's relentlessly mathematical interpretation of human preferences, it is useful to illustrate the fact/meaning dichotomy here by drawing an analogy to Husserl's meditations on modern mathematics.¹⁴⁹

148. GROSSMAN, *supra* note 1, at 409.

149. HUSSERL, *supra* note 47, at 21-100. For a respectful but relentless deconstruction of Husserl's most important text on mathematics, see JACQUES DERRIDA, EDMUND HUSSERL'S *ORIGIN OF GEOMETRY*: AN INTRODUCTION (John Leavey trans.,

Husserl, who was the founder of phenomenology as a self-conscious philosophical movement, became interested in the historical fact that modern algebra had seemingly reduced geometrical thought from the origin of significant descriptions of spatio-temporal idealities to a mere calculating machine.¹⁵⁰ To illustrate: modern algebra replaces the evocative *idea* of a circle as an area that is inscribed by a straight line of determinate length as it rotates 360 degrees around a single point in two-dimensional space with the more rigorous and useful *formula* for a circle, $x^2 + y^2 = r^2$.¹⁵¹ Husserl concedes that this kind of methodological change in the way geometry is practiced constitutes a clear advancement in mathematical technique, but he nonetheless goes on to observe that the change brought with it a major transformation in the *meaning* of mathematics.¹⁵²

Kant had attempted to demonstrate that the proofs of classical Euclidean geometry more or less correspond to, or mirror, our concrete intuitions of space.¹⁵³ Algebraic geometry radically transforms the relationship between proof and intuition by making the former into a set of pure numerical configurations.¹⁵⁴ It is worth quoting at some length Husserl's interpretation of the significance of this ultimately technological shift in the nature of mathematical phenomena:

In algebraic calculation, one lets the geometric signification recede into the background as a matter of course, indeed one drops it altogether; one calculates, remembering only at the end that the numbers signify magnitudes. Of course one does not calculate "mechanically," as in ordinary numerical calculation; one thinks, one invents, one makes discoveries—but they have acquired, unnoticed, a displaced, "symbolic" meaning. . . . Like arithmetic itself, in technically developing its methodology [algebraic geometry] is drawn into a process of transformation, through which it becomes a sort of *technique*; that is, it becomes a mere art of achieving, through a calculating technique according to technical rules, results the genuine sense of whose truth can be attained only by concretely intuitive thinking actually directed at the subject matter itself. But now [only] those modes of thought, those types of clarity which are

Univ. of Neb. Press 1989) (1962).

150. HUSSERL, *supra* note 47, at 44-46.

151. See DOUGLAS DOWNING, *DICTIONARY OF MATHEMATICS TERMS* 41-42 (2d ed. 1995).

152. HUSSERL, *supra* note 47, at 46-48.

153. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 158 (Paul Guyer & Allen Wood eds. & trans., Cambridge Univ. Press 1998) (1781).

154. HUSSERL, *supra* note 47, at 43-46.

indispensable for a technique as such, are in action. One operates with letters and with signs for connections and relations (+, X, =, etc.), according to *rules of the game* for arranging them together in a way essentially not different, in fact, from a game of cards or chess. Here the *original* thinking that genuinely gives meaning to this technical process and truth to the correct results . . . is excluded.¹⁵⁵

In this passage Husserl makes a very specific philosophical point that echoes a similar one made by Spinoza more than 200 years earlier,¹⁵⁶ and that foreshadows some of the ideas that would appear decades later in Wittgenstein's mature philosophy of mathematics.¹⁵⁷ The point is quite simple: the *truth* of mathematical propositions (what we call mathematical knowledge) depends upon more than just a correct series of calculations. A mathematical proposition may be proved, but it is not *understood* unless and until it can be viewed with perspicuity—until a concrete image gives meaning to the symbols in the proof.¹⁵⁸ As Wittgenstein puts it:

Perspicuity is part of proof. If the process by means of which I get a result were not surveyable, I might indeed make a note that this number is what comes out—but what fact is this supposed to confirm for me? I don't know "what is *supposed* to come out."¹⁵⁹

While much more could be said, both pro and con, about the ultimate significance of imaginability and perspicuity in mathematics, for present purposes it is sufficient to notice a more general aspect of Husserl's analysis: namely, his recognition that, when it comes to scientific techniques, there is a fundamental conceptual distinction between *facts* and the *meaning* of facts.

Taking Husserl's distinction between facts and meaning as our clue, it becomes possible to interpret CBA as a quintessential manifestation of what Husserl's most famous student, Martin Heidegger, would come to call "the framework" (*Ge-stell*).¹⁶⁰ According to Heidegger, the framework is none other than an entire orienta-

155. *Id.* at 44-46.

156. See BENEDICT DE SPINOZA, *On the Improvement of the Understanding*, in *ON THE IMPROVEMENT OF THE UNDERSTANDING; THE ETHICS; CORRESPONDENCE 1*, 24-27 (R.H.M. Elwes ed. & trans., Dover Publ'ns 1955) (arguing that well-formed conceptions are the test of the truth or falsity of mathematical ideas).

157. See S.G. SHANKER, *WITTGENSTEIN AND THE TURNING-POINT IN THE PHILOSOPHY OF MATHEMATICS* 120-60 (1987) (stating that proofs must be "surveyable").

158. HUSSERL, *supra* note 47, at 40-45.

159. WITTGENSTEIN, *supra* note 90, at 45e.

160. HEIDEGGER, *supra* note 26, at 19.

tion to being-in-the-world: it subjects the natural and social worlds to the imperatives of mastery and possession according to correct procedure.¹⁶¹ Of course, it goes without saying that pre-modern humans also desired to master and possess their environment. But only modern humans seek to master and control everything *on the basis of correct procedure*. Caught in the web of the framework, modern human beings devote themselves to the planning and calculating of *everything*, to such a degree that reality itself is allowed to appear only within the horizon of what can be calculated.¹⁶² As a spawn of the metaphysical tradition of subjectivity that began in earnest with Descartes, CBA projects a *mathēsis universalis* over human relationships, and it identifies the essence of human reason with calculation.¹⁶³ In practicing CBA, the “I think” of the Cartesian *cogito, ergo sum*¹⁶⁴ finds objectivity in purely arithmetical relations, in the summing-up of relevant numerical data. Objectivity (as thus determined) permits conclusions to be drawn and political action to be oriented on the basis of criteria that present themselves as apolitical, if not anti-political.

Among other things, this means that CBA does not conceive of a political project as the ongoing product of the complex give-and-take of interpersonal dialogue and persuasion among equals, as it may have been in the *polis* of ancient Athenian democracy during its golden age.¹⁶⁵ The hypothetical project about which people are supposed to have measurable WTPs and WTAs does not have to be made up by them, and indeed it almost never is. On the contrary, it is an idealized conception of a state of affairs that does not in fact exist, and whose contents are usually determined by politicians or interest groups eager to “sell” it to the public. CBA therefore interprets the project as a hypothesis whose ideality is firmly secured in advance by some human agency or other so that it may then be sold to the highest bidders in a “market” that determines what is and is not efficient. As the quotation marks around the word “market” indicate, however, this market is virtual rather than real, just as the project itself is merely hypotheti-

161. For a general discussion of Heidegger’s critique of modern technology and “technological thinking,” see WOLCHER, *supra* note 87, at 65-120.

162. MARTIN HEIDEGGER, *IDENTITY AND DIFFERENCE* 35 (J. Glenn Gray ed., Joan Stambaugh trans., Harper & Row 1969) (1957).

163. 1 RENÉ DESCARTES, *Meditations on First Philosophy*, in *THE PHILOSOPHICAL WRITINGS OF DESCARTES* 1, 17 (John Cottingham et al. trans., 1985).

164. 1 *id.*

165. ARENDT, *supra* note 89, at 117.

cal. This is because the whole point of CBA is to gather information about the idea of projects for which existing, real markets do not provide solutions. CBA's virtual market, governed by a rigorously mathematical conception of efficiency, becomes the framework that decision makers feel they should impose on the concrete flow of historical time. It follows that CBA cannot be adequately understood if it is conceived of as merely a means—a mere “practical measure” for “practical people,” as Zerbe puts it.¹⁶⁶ It must also be understood as a *way of revealing what is real*—a way of being and thinking that does not simply apply a neutral method to pre-methodological “facts,” but rather determines in advance what counts as a fact.

At this point, I do not think it would be unfair to mention my rather unscientific impression, based on my countless conversations with CBA aficionados, of CBA's generally baleful attitude toward politics. In a nutshell, it seems to me that many or most of those who are drawn to CBA as a policymaking tool construe politics as a slimy if not dangerous practice. If this is so, then CBA shares in the deeply embedded intellectual antipathy to politics that Arendt traces to a fundamental conflict between philosophy and politics in Western thought—a conflict which began with the trial of Socrates and was thereafter nurtured by the powerful influence of Plato's political philosophy.¹⁶⁷ In any case, when politics is seen from a jaundiced and mistrustful point of view, it can always appear as a mere means in the service of the well-formed selfish ends of interested persons and groups.¹⁶⁸ Political interventions are thus burdened with the suspicion that they will make most people worse off at the end of the day with reference to individual preferences that are themselves regarded as pre- or a-political. President Reagan distilled this suspicion to its essence when he uttered the following infamous remark in 1988: “There seems to be an increasing awareness of something we Americans have known for some time: that the ten most dangerous words in the English language are, ‘Hi, I’m from the Government, and I’m here to help.’”¹⁶⁹ For those who harbor such sentiments, politics

166. ZERBE, *supra* note 10, at 1.

167. ARENDT, *supra* note 89, at 5-39.

168. For a useful analysis of the social-theoretical aspects of this “conflict” model of politics, which is embraced by many people on both sides of the political spectrum, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 247-49 (1987).

169. President Ronald Reagan, Remarks to Representatives of the Future Farmers of America (July 28, 1988) (transcript available at <http://www.reagan.utexas.edu/archives/speeches/1988/072888.c.htm>).

must truly seem to be “the continuation of war by other means.”¹⁷⁰

Arendt’s idea that politics, in the largest sense of the word, is an end in itself—that it is the neverending endeavor of human beings to live together and share the earth—is completely foreign to this way of thinking.¹⁷¹ The so-called “transaction costs” of political interaction in *her* sense are not deadweight losses imposed from without on preferences that would otherwise exist without politics. On the contrary, political interaction constitutes the very actuality of what are called individual preferences about public matters, at least when the phenomenon of having preferences is considered as a concrete, rather than an abstract, manifestation of human life. To be sure, it is always possible to dip one’s net into the river of time at this or that arbitrary moment, and to bring up a pallid and one-time expression of the balance between WTPs and WTAs in relation to a hypothetical project the prospect of which is more or less given to people on a “take it or leave it” basis. Indeed, the democratic institution of popular voting in referenda follows just this model of decision making. But any strong comparison between CBA and the referendum process would be inapt, for CBA is definitely *not* a popularly authorized voting apparatus, nor are the projects it analyzes decided by counting official ballots on the democratic principle of “one man, one vote.”¹⁷² On the contrary, CBA is unabashedly and explicitly plutocratic in its methods, inasmuch as the very concept of willingness to pay presupposes that the political process has already distributed a set of entitlements with which preference holders *could* pay.¹⁷³ Moreover, as a matter of principle, CBA can have nothing to say about the legitimacy, or even the efficiency, of any given distribution of entitlements, since the normative concept of efficiency presupposes that entitlements have already been distributed.¹⁷⁴

170. MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED” 15 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., Picador 2003) (1997). Foucault strikingly inverted the famous epigram derived from Clausewitz, who said (in translation), “War is not merely a political act, but also a political instrument, a continuation of political relations, a carrying out of the same by other means.” JOHN BARTLETT, *FAMILIAR QUOTATIONS* 544 (15th ed., Emily Morison Beck ed., 1980).

171. ARENDT, *supra* note 89 *passim*.

172. See Walter M. Frank, *Help Wanted: The Constitutional Case Against Gerymandering to Protect Constitutional Incumbents*, 32 OHIO N.U. L. REV. 227, 235 (2006).

173. KELMAN, *supra* note 168, at 74-76.

174. Kelman’s way of expressing this point is typical:

[T]he theory that rights might mirror the outcome of transactionally costless bargains is inexorably indeterminate in that there is no way to deter-

If the ultimate foundation of politics should consist in the individual and her choices, as democratic liberalism maintains, then it is also true that “[c]hoices are manifest at particular points in time, but individuals have ongoing identities.”¹⁷⁵ To express this point more precisely, in Hegelian terms: the truth of a person’s political preferences is not what her WTPs or WTAs are at any particular moment in time, but rather what her preferences are constantly *becoming* as a concrete result of her ongoing interactions and experiences with others.¹⁷⁶ Although Hegel developed a political theory of his own on the basis of this insight, it was Arendt, as we shall see in the next two sections, who transformed the dialectics of human existence into a particularly attractive positive vision of political becoming on the basis of individual freedom and democratic principles.¹⁷⁷ Always a melancholy realist, she acknowledged that there is an “extraordinarily narrow horizon of experience left open to us for politics commensurate with the experiences of our century.”¹⁷⁸ She even admitted that “[p]olitics as such has existed so rarely and in so few places that, historically speaking, only a few great epochs have known it and turned it into a reality.”¹⁷⁹ Nevertheless, her extraordinary idea that genuine deliberative democracy can be an *end in itself*, rather than just another “method” of decision making, gamely attempts to re-conceive our relationships with others from a model of strife and competition to a model of discussion and cooperation among free people sharing the earth as members of a political community.¹⁸⁰ This thesis, however idealistic and utopian it may appear from the jaded standpoint of twenty-first century American political experience, stands in the sharpest possible contrast to the presuppositions and tendencies of CBA. And this very contrast reveals a schism that is inherently political rather than scientific.

mine which rights people possess when they enter this universal bargain to determine rights, and no way of determining how much market power each person has *unless* one has already determined those rights.

Id. at 75.

175. *Id.* at 130.

176. See generally HEGEL, *PHILOSOPHY OF RIGHT* 105-223 (T.M. Knox trans., Oxford Univ. Press 1967) (1821) (discussing the dialectical unfolding of “Ethical Life,” or *Sittlichkeit*, within the context of the state).

177. See generally ARENDT, *supra* note 89, at 70-200.

178. *Id.* at 197.

179. *Id.* at 119.

180. See generally *id.* at 115-53.

VII. CBA's Anti-Politics

While disclaiming in advance any intention to fawn on the ancients, I will begin our investigation of this political schism by citing Aristotle, who wrote that "man is by nature a political animal [*zōon politikon*]."181 This implies that anyone who dwells outside the political community lives a kind of mutilated or non-human existence, which Aristotle compares to that of "an isolated piece at draughts."182 "Political animal" in Aristotle's sense does not just mean that human beings join political parties or like to read newspapers. It means that by their very nature people tend to form and sustain communities in which the genuine conduct of public and private affairs is first made possible.183 "Politics" derives from the Greek word *polis*, meaning "city-state," which constituted the Greeks' primary form of political community.184 Indeed, in Periclean Athens at the height of its glory it was felt that the entire life of the state was contained in its *politeia*.185 A cognate of the word "*polis*," *politeia* signifies the *unity* of culture and politics, as well as of private and public life, within the confines of the *polis*.186 To this end, the dominant cultural ideal of Athenian democracy required all freeborn male citizens to discharge their public duties through mutual interaction and the discussion of public affairs187 in the *agora* (literally, "marketplace"), the central space for the exercise of freedom in the city, where it was believed that men could move around and speak freely with their equals.188

These days it is quite common for people in democratic societies to view civic responsibility as a burden or hassle.189 But it would appear that the Greeks saw the matter differently. Far from being thought of as a curse or burden, the "bond of friendship and union" between men that Socrates places at the very foundation of the *polis*190 indicates a thesis or attitude that may sound

181. 2 ARISTOTLE, *Politics*, in THE COMPLETE WORKS OF ARISTOTLE 1986, 1987 (Jonathan Barnes ed., 1984).

182. 2 *id.* at 1988.

183. 2 *id.* at 1986-88.

184. ARENDT, *supra* note 89, at 117.

185. 1 WERNER JAEGER, *PAIDEIA: THE IDEALS OF GREEK CULTURE* 409-10 (2d ed., Gilbert Highet trans., 1939).

186. 1 *id.* at 410.

187. 1 *id.*

188. ARENDT, *supra* note 89, at xxvi, 131.

189. See Bob Herbert, *Of Campaigns and Breakfast Cereals*, N.Y. TIMES, Aug. 30, 2004, at A19.

190. PLATO, *Protagoras*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 22, at 308, 319-20.

strange to modern ears—one that the formal structure of CBA cannot accommodate. The thesis in question is not nearly as broad as Marx's collectivistic conception of the "*species-life*" of human beings,¹⁹¹ but rather consists in the more modest claim that human interactions have a positive influence or value that goes far beyond whatever "projects" they may happen to ratify or initiate.¹⁹² For the Greeks, human interaction and discussion in the *agora* were not just means to establish previously determined public and private ends, because thinking about politics in this way would have impermissibly reduced free Athenian citizens to the unequal status of ruler and ruled.¹⁹³ As Arendt puts it, "[t]he Greeks understood the *polis* as the public-political realm in which men attain their full humanity, their full reality as men, not only because they *are* (as in the privacy of the household) but also because they *appear*."¹⁹⁴ According to this ancient Greek ideal of popular democracy, the dialogue of free citizens in the *agora* was a necessary step toward the formation of *wise* ends and *wise* citizens.¹⁹⁵

The funeral oration of Pericles, as recounted by Thucydides, makes this last point explicitly:

Our public men have, besides politics, their private affairs to attend to, and our ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters; for, unlike any other nation, regarding him who takes no part in these duties not as unambitious but as useless, we Athenians are able to judge at all events if we cannot originate, *and instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.*¹⁹⁶

The Athenian view that public and private discourse is a good thing—that it is not a "stumbling block in the way of action," but rather a necessary precondition for wise action—can be described in modern economic terms by the proposition that human interactions are *prima facie* net benefits rather than net costs. Whether or not Pericles accurately depicts political conditions in mid-fifth century Athens, it is clear that the general bias of

191. KARL MARX, *Bruno Bauer, Die Judenfrage*, in EARLY WRITINGS 3, 13 (T.B. Bottomore ed. & trans., 1964).

192. *Id.* at 172.

193. 2 ARISTOTLE, *supra* note 181, at 1986-2000.

194. ARENDT, *supra* note 89, at 21.

195. *Id.* at xxvi, 119.

196. THUCYDIDES, THE PELOPONNESIAN WAR 109-10 (Richard Crawley trans., Random House 1982) (n.d.) (emphasis added).

modern economists, including the practitioners of law and economics, on the subject of human interactions is the exact opposite of the one he expresses. Modern economic theory tends to interpret human discourse as a cost to be overcome or minimized, rather than celebrated.

According to the standard economic account of transaction costs, the burden of dealing with others, if incurred, will reduce the net value of any resulting transaction, and if not incurred, will be suspected of having prevented the consummation of a mutually beneficial exchange. Either way, transaction costs are said to be bad. The following passage, from a popular series of books describing various legal topics, is typical:

A problem, which Professor Coase readily recognized, is that virtually all exchanges have a cost. These costs are called transaction costs. It is important to note that a transaction cost is not the price of an item or a right. Instead, it is the cost of the transaction itself. These costs include search costs, information costs, the cost of meetings, negotiations, and any other costs incurred to make the primary exchange occur. If these costs exceed the gain from the exchange itself, the exchange will not take place.¹⁹⁷

The presumption that human interactions are “costs” is associated with Ronald Coase’s enormously influential article *The Problem of Social Cost*.¹⁹⁸ One of the primary implications of Coase’s work is that people often choose inefficient solutions to social problems “in order to avoid the cost of getting together,” as Mitchell Polinsky puts it (thereby making it appear that “getting together” is something humans generally would rather not do).¹⁹⁹ Law and economics scholars also subscribe to the normative idea that the law ought to facilitate private agreements by reducing transaction costs, including “the need . . . to communicate information,” as Douglas Baird says (thereby implying that human discourse is generally an unwanted burden).²⁰⁰ Finally, as noted earlier, many scholars believe that judges ought to decide difficult legal cases so that the result mimics the outcome that the parties would have

197. JEFFREY HARRISON, *LAW AND ECONOMICS IN A NUTSHELL* 72 (3d ed. 2003).

198. See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

199. A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 11-15 (3d ed. 2003).

200. Douglas Baird, *The Law and Economics of Contract Damages*, in *CHICAGO LECTURES IN LAW AND ECONOMICS* 49, 61 (Eric Posner ed., 2000); accord COOTER & ULEN, *supra* note 127, at 101 (interpreting communications costs as “obstacles to cooperation”).

achieved had there been no transaction costs.²⁰¹

As one of the principal applications of modern economic theory, CBA echoes the general antipathy to transaction costs in law and economics literature. Moreover, CBA practitioners imagine that we know our goals in advance, if given the right amount of "information," and that this knowledge automatically sanctions the use of the most efficient means for achieving them. CBA's calculations cannot accommodate the possibility that our political goals might actually be "up for grabs" so long as we act as social beings during the *polis*-like activity of thinking, talking and being with one another. While I do not mean to suggest that we need to return to the conditions of Athenian democracy, built as it was on the backs of slaves and the legal subordination of women,²⁰² I do want to criticize the idea that human interactions are first and foremost costs that should be avoided or minimized. I want to suggest that what economic theory calls the "transaction costs" of human discourse is actually what makes people into free and responsible agents in the first place. Habermas is right that there is an internal relation between the capacity for instrumental reason and the capacity for reaching inter-subjective understanding about things and events.²⁰³ This is because an actor's successful use of instrumental reason in a social context implies the ability to make his point of view understood by others whose cooperative actions are necessary to achieve his ends. Habermas calls the latter ability "communicative action," and his analysis suggests that empiricist research traditions such as CBA have put the idea of communicative, social rationality into a kind of intellectual quarantine, leaving only instances of pure instrumental rationality to be analyzed and measured.²⁰⁴

This quarantine allows CBA to conceive of human beings as vessels that at any given point in time are chock full of well-formed preferences. Since it is undeniable that conditions in the real world are always changing, however, this means that CBA must interpret inefficiencies as the product of *institutional failure*. That is, it must allege that legal rules have failed to keep pace with changes in sentiments, knowledge, or technology. Zerbe's

201. POSNER, *supra* note 114, at 251.

202. See, e.g., John R. Kroger, *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, 2004 WIS. L. REV. 905, 919-20 (discussing Aristotle's justification of slavery); *id.* at 919 n.68 (discussing status of women under classical Athenian law).

203. 1 HABERMAS, *supra* note 40, at 14.

204. See 1 *id.*

version of the argument is illustrative: "Inefficiency arises only in a nonstatic society—that is, a dynamic society. When conditions change a different, new rule may lower transaction costs or create new property for which rights need to be assigned, or a change in conditions may create an inefficient divergence between psychological and legal ownership."²⁰⁵ This way of thinking about the relationship between preferences and entitlements rests on the belief that these two spheres are functionally autonomous from one another. It supposes that public institutions such as law are merely the externally imposed mechanism within which bargaining in the private sphere transpires. There is no clearer example of this belief than CBA's concept of "tautological efficiency," the view that if the costs of changing legal rules are taken into account, then "every society is always completely efficient as a tautology."²⁰⁶ The idea seems to be that if the costs of a rule change were small enough, then the change, if it is efficient, would have already occurred; and if the change in rules has not occurred, this proves that it would not be cost-justified.

This way of thinking about the relation between social and legal change contains an inherent logical limitation. By interpreting time as a succession of static "states," each one of which is full of well-formed preferences, CBA leaves itself powerless to account for *how* preferences change, or even how they stay the same. At best it can only observe *that* preferences have changed or stayed the same, once they have been manifested. Nowhere in Zerbe's thesis of tautological efficiency does the possibility appear that legal rules and other public institutions are or could be an ongoing *project* and *product* of the kind of communicative action among individuals that thinkers such as Habermas and Arendt imagine they might be. Communicative action of this sort cannot know in advance exactly where it is going. Nor can it guarantee in advance that CBA will be able to bless its outcomes as efficient, since efficiency requires evaluation according to a prior "state" that, however recently it may have been measured, may no longer be relevant to what people have now talked themselves into wanting. This is exactly the problem that the phenomenon of senseless kindness creates for the concept of economic rationality.

To say that people can talk themselves into wanting something different than they did before they started talking with one another is obviously not the same as saying that this kind of be-

205. ZERBE, *supra* note 10, at 66.

206. *Id.* at 65.

havior is irrational. On the contrary, human interaction, even if it is sometimes undesired before the fact, allows people the space for what Kant called "spontaneity."²⁰⁷ In brief, spontaneity means the capacity to initiate *new* ideas, understandings, and preferences as a consequence of our interactions with others.²⁰⁸ This realm of spontaneity is the exact opposite of the realm of necessity that CBA constructs in determining the relation between individual ends and the means used for their accomplishment. For CBA, a person's preference for or against project X *automatically* links up with its means, either a measurable WTP to achieve X, or a measurable WTA to avoid it. Thus, all spontaneity is excluded from the calculus. But without spontaneity people could never commence anything new. They would remain perpetual slaves of their unchangeable wants, mere tools of previously articulated preferences that they are helpless to avoid or alter. This observation about the relationship between preferences and spontaneity suggests the truth of Arendt's surprising thesis that politics and freedom are actually the same:

Only in the freedom of our speaking with one another does the world, as that about which we speak, emerge in its objectivity and visibility from all sides. Living in a real world and speaking with one another about it are basically one and the same. . . . Freedom to depart and begin something new and unheard-of or . . . the freedom to interact in speech with many others and experience the diversity that the world always is in its totality—most certainly was and is not the end purpose of politics . . . something that can be achieved by political means. It is rather the substance and meaning of all things political. In this sense, politics and freedom are identical.²⁰⁹

Arendt's point is really quite simple: to be *completely* locked within oneself and one's desires (which in any case is metaphysically impossible) is to exist without freedom, in the precise sense of existing without any reason to imagine or begin something new. Never surprised, such a being would be perpetually enslaved to what is boringly familiar to it, like a zoo animal in a cage. It takes talking and being with others to imagine and create change—to disturb the given world and transform it into what it *can* become.²¹⁰ Even a solitary individual maintains a kind of virtual

207. KANT, *supra* note 153, at 193.

208. *Id.* at 193-95.

209. ARENDT, *supra* note 89, at xxx-xxxi.

210. This point is meant to be explicitly Hegelian in content and tone. See, e.g., G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 111-19 (A.V. Miller trans., 1977) (1807) (the famous "Lordship and Bondage" dialectic).

companionship in his thoughts, in the form of what Plato calls the *eme emautō*, or internal dialogue that one has with oneself,²¹¹ in which one prepares for the real dialogues with others that will come later. If we use the word *politics* as Arendt does—as a name for the basic human phenomenon of “venturing forth in speech and deed in the company of one’s peers, beginning something new whose end cannot be known in advance, founding a public realm (*res publica* or republic), promising and forgiving others”²¹²—then CBA’s preference (or prejudice) against politics becomes clear. *It is an implicit preference against freedom.* By reducing the concept “human being” to a preference-holding individual in the singular, and “humanity” to a mere multiple of this singularity, CBA renders itself incapable of accounting for or nurturing human freedom. What is more, CBA’s methods and presuppositions represent more than just a set of semi-arbitrary scientific stipulations—more than just a disposable yardstick, so to speak. Given its overtly political context and application, CBA also constitutes a powerful and widely-held *ideology* of human nature, one which pre-oriens how we go about (and should go about, if we are “rational”) forming preferences and making choices.

Of course, the word “ideology” does not define itself. In order to underscore what is at stake in our reflections on CBA, and for the sake of clarity, this essay will therefore appropriate Karl Mannheim’s classic definition of the term:

The concept “ideology” reflects the one discovery which emerged from political conflict, namely, that ruling groups can in their thinking become so intensively interest-bound to a situation that they are simply no longer able to see certain facts which would undermine their sense of domination. There is implicit in the word “ideology” the insight that in certain situations the collective unconscious of certain groups obscures the real condition of society both to itself and to others and thereby stabilizes it.²¹³

Our previous analyses of the phenomenon of senseless kindness, and of the Greek concept of politics, have already brought to light what CBA cannot (or will not) see about the nature of human preference-formation. In a nutshell: CBA’s methods, geared entirely to generating technocratic solutions to the problem of this or that political “project,” steer thought away from the truths of

211. ARENDT, *supra* note 89, at 19-21.

212. *Id.* at viii.

213. KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 40 (Louis Wirth & Edward Shils trans., Harvest Books 1936).

human freedom and desire. These truths lie in the social dimension of preferences—in the fact that preferences’ actual existence shows itself as a ceaseless *becoming* in the context of being with others. The time has now come to point out the distinctly political dimension, in the modern sense of the word “political,” of what CBA does not allow its followers and supporters to see.

VIII. The Politics of CBA

Even a preference against politics is a kind of politics in the sense that it is a value to which its supporters cling and for which they are prepared to struggle. To illustrate the importance of this point, we will analyze the iconic “world without transaction costs” that Coase constructs (and CBA constantly cites) to show why there is a divergence in the real world between private and social costs.²¹⁴ The main point of Coase’s project is to demonstrate that transaction costs actually are incredibly important barriers to efficiency in the real world,²¹⁵ and his genius was to do this by imagining a world in which no pesky transaction costs ever intervene between preferences and their efficient instantiation. This thought experiment shows that in an environment that is stipulated to have zero transaction costs, goods will inevitably wind up in the hands of those who value them most, and that this will happen regardless of how and to whom the law initially distributes the goods in question.²¹⁶ Although it has been shown that Coase’s conclusions do not hold in cases where a person’s WTA for a good that he owns exceeds his WTP for that good if he had to purchase it from another (the “offer-asking problem”),²¹⁷ the uses to which Coase and others have put his imaginary world are important enough to have earned him a Nobel Prize in economics in 1991.²¹⁸

Brilliant and path-breaking as it is, Coase’s thought experiment also proves something that is not listed on his prize citation:²¹⁹ namely, the observation that in an environment in which

214. Coase, *supra* note 198 *passim*.

215. RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* 174-79 (1988).

216. *Id.*

217. *See, e.g.*, KELMAN, *supra* note 168, at 145-48.

218. *See* Nobelprize.org, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1991, http://nobelprize.org/nobel_prizes/economics/laureates/1991/index.html (last visited Oct. 25, 2006).

219. *Id.* (announcing Coase’s award “for his discovery and clarification of the significance of transaction costs and property rights for the institutional structure

there are literally no transaction costs, people's preferences never change.²²⁰ This conclusion follows from the simple fact that no "costly" interactions with other beings could ever rise up to affect them.²²¹ A preference in Coase's world²²² is like an unimpeded body moving in a perfect vacuum: it goes on forever. "All things come to be through strife," says Heraclitus,²²³ reminding us that change *always* comes at a "cost," if only the cost of learning to appreciate or desire something new. Without the prospect of change, the people in Coase's world lack the capacity to initiate anything new. Lacking spontaneity, they also lack freedom. Knowing everything there is to be known, and requiring no costly human contact to realize their preferences, the denizens of Coase's world are like Leibniz's perfect monads, which "have no windows, by which anything could come in or go out."²²⁴ In brief, a world without transaction costs is a world without politics: the very idea of it represents a sort of apolitical heaven for the practitioners of CBA.

As I remarked earlier, CBA has inherited a general philosophical mistrust or contempt for politics that can be traced to Plato.²²⁵ Indeed, there are many striking parallels between the theory of CBA and Plato's metaphysical and political ideas. The eternal ideas that Plato put above the changeable world of appearances correspond to CBA's "preferences," which stand frozen in suspended animation at any given point in time.²²⁶ Just as Plato thought that the eternal ideas can be perceived by the philosopher in an act of pure beholding,²²⁷ so too CBA imagines that the ongoing metamorphosis of preferences in social life can somehow be arrested and measured by a technician who need not take

and functioning of the economy").

220. COASE, *supra* note 215, at 175.

221. *Id.*

222. Coase himself rejects this terminology and has written that far from being "his" world, the imaginary world without transaction costs "is the world of modern economic theory, one which I was hoping to persuade economists to leave." *Id.* at 174. This does not imply, however, that Coase interprets transaction costs as benign, for he sees them much as other economists do—namely, as "barriers" to efficient transactions.

223. HERACLITUS, *supra* note 6, at 49.

224. GOTTFRIED WILHELM LEIBNIZ, *The Monadology*, in PHILOSOPHICAL WRITINGS 3, 3 (Mary Morris trans., 1934).

225. See *supra* text accompanying notes 167-70.

226. Coase, *supra* note 198, at 176-78.

227. See PLATO, *Republic*, in THE COLLECTED DIALOGUES OF PLATO, *supra* note 22, at 575, 747-72 (discussing the allegory of the cave and the theory that knowledge consists in the pure seeing of eternal Ideas).

account of the vulgar phenomenon of their becoming-in-time.²²⁸ And as Plato's timeless ideas hold sway over what merely seems to be good,²²⁹ CBA's objective preferences at any given time likewise hold sway over what they are constantly becoming as a consequence of social interaction. Plato believed that the *truth of the ideas*, as interpreted by the philosopher-king, should inform politics.²³⁰ CBA recasts this theory into one in which the *truth of opinions*, as interpreted by the social scientist, should inform politics.²³¹ The truth of Plato's ideas and the truth of CBA's opinions both fulfill the role of an origin and measure—what the Greeks called an *archē*—for political action.²³² In each case the *archē* is imposed on the changing circumstances and unstable affairs of acting human beings and establishes what Arendt calls a kind of “tyranny of truth.”²³³ Experiences like senseless kindness, which do not fit into the framework of either truth-as-idea or truth-as-stable-opinion, are excluded as irrelevant by the authoritative interpreter of truth. In Plato's case this person is the philosopher-king; in CBA's case it is the social scientist. The homology is almost perfect.

The idea that truth can be tyrannical is one of the most important insights of postmodern social theory. It is a major corollary of a thesis of philosophical anthropology that maintains that human beings are essentially *hermeneutical* creatures.²³⁴ On the negative side, to be hermeneutical means never being able to know the world “directly,” in an unmediated burst of immaculate conceiving.²³⁵ On the positive side, it means that we always receive the world in a completely mediated way—that we interpret²³⁶ it by

228. Cf. FRIEDRICH NIETZSCHE, *Beyond Good and Evil*, in THE PHILOSOPHY OF NIETZSCHE 369, 395-96 (Helen Zimmern trans., 1927) (noting that “the Platonic mode of thought, which was an *aristocratic* mode, consisted precisely in *resistance to obvious sense-evidence*,” and which took the form of “pale, cold, grey conceptual networks which they threw over the motley whirl of the senses—the mob of the senses, as Plato said”).

229. PLATO, *supra* note 227, at 759 (defining pure knowledge as “the knowledge of that which always is, and not of a something which at some time comes into being and passes away”).

230. *Id.* at 752-58.

231. See generally SUNSTEIN, *supra* note 57, at 6-7 (discussing how opinions influence political choices under CBA).

232. See MICHAEL INWOOD, A HEIDEGGER DICTIONARY 83 (1999).

233. ARENDT, *supra* note 89, at 47.

234. See, e.g., HANS-GEORG GADAMER, TRUTH AND METHOD 254-71 (Joel Weinsheimer & Donald Marshall trans., 2d ed. Crossroad Publ'g Corp. 1989) (1960).

235. *Id.* at 265-71.

236. The dictionary defines “hermeneutic” as “the study of the methodological

means of what Heidegger calls our fore-conceptions (*Vorgriffen*), fore-having (*Vorhabe*), and fore-sight (*Vorsicht*).²³⁷ Without going too far afield into the intricacies of Heideggerian thought, suffice it to say that these concepts basically signify that whenever we encounter something as such—that is, explicitly as a “tree,” as a “preference,” or as whatever—the thing in question is already involved with us, in advance, in terms of our *pre*-understandings of the world and what is significant about it.²³⁸ Sociologists call this phenomenon the “social construction of reality.”²³⁹ And the great sociologist Mannheim shows how it pertains to our concepts of knowledge and truth: “[T]he notion of knowledge in general is dependent upon the concretely prevailing form of knowledge and the modes of knowing expressed therein and accepted as ideal, [and] the concept of truth itself is dependent upon the already existing types of knowledge.”²⁴⁰ Given this framework for thinking about knowledge, truth becomes tyrannical whenever people forget their own socially contingent relation to the forms of knowledge they employ and begin to insist, often forcibly, that their own point of view is what Catharine MacKinnon calls the standard for point-of-viewlessness.²⁴¹

To illustrate the idea of the tyranny of truth, consider the following rather chilling hypothetical example, drawn from the philosophical writings of Herbert Marcuse:

A man who travels by automobile to a distant place chooses his route from the highway maps. Towns, lakes and mountains appear as obstacles to be bypassed. The countryside is shaped and organized by the highway: what one finds en route is a byproduct or annex of the highway. Numerous signs and posters tell the traveler what to do and think; they even request his attention to the beauties of nature or the hallmarks of history. Others have done the thinking for him, and perhaps for the better. Convenient parking spaces have been constructed where the broadest and most surprising view is open. Giant advertisements tell him when to stop and find the

principles of interpretation.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 566 (1991). Although the word’s signification in philosophical thought is much broader than this, the definition helpfully maintains the all-important connection between “hermeneutic” and the idea that human beings *interpret* their world.

237. MARTIN HEIDEGGER, *BEING AND TIME* 150 (John Macquarrie & Edward Robinson trans., Harper 1962) (1927).

238. *Id.* at 190-91.

239. See generally PETER BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966).

240. MANNHEIM, *supra* note 213, at 292.

241. Catharine MacKinnon, *Feminism, Marxism, Method and State*, 8 SIGNS: J. WOMEN CULTURE & SOC’Y 635, 638-39 (1983).

pause that refreshes. And all of this is indeed for his benefit, safety and comfort; he receives what he wants. Business, technics, human needs and nature are welded together into one rational and expedient mechanism. He will fare best who follows its directions, subordinating his spontaneity to the anonymous wisdom which ordered everything for him.²⁴²

I call this example chilling because it so accurately reflects what sheep we have become. Its all too familiar particularities indicate, in a more general way, what actually goes on day in and day out in societies whose members have surrendered themselves completely to the imperatives of efficiency and instrumental rationality. Not only is the man's behavior in Marcuse's example perfectly "rational" in a technological sense, but the dissolution of all rationality into semi-spontaneous reactions to prescribed mechanical norms means that, from the standpoint of instrumental thinking, only a crank would insist on making journeys in some other, less efficient way. The cold, wet blanket of conformity to the "correct" thing to do makes any dissent that dares question its correctness from the standpoint of its ultimate meaning look like a symptom of mental illness, rather than the expression of an alternative vision of what being rational means. But the "obvious" *ex ante* efficiency of the journey the man takes comes at a cost: namely, the chance that a less efficient route that meanders through villages and past farms might actually be more rewarding to him—indeed, that it might change what he prefers, or even who he is, by virtue of the marginal increase in inter-human contact that it would require of him.

CBA is like the interstate highway system: no stoplights and no detours. By making human beings into the pawns of their own previous preferences, CBA treats them as passive agents on the highway. A passive agent is someone who is required to execute what does not necessarily reflect her own desires, as in the case of a legal agent's duty to implement her principal's lawful instructions, whatever they may be. CBA treats preference holders as passive agents because it conceives of them as having to stand by their previously measured WTPs and WTAs regardless of what happens, or might happen, after the measurement (unless, of course, another measurement is subsequently commissioned and performed). At one level this is understandable, for as Arendt correctly observes, modes of behavior can become objects of systematic research "only if one excludes man as an active agent, the au-

242. HERBERT MARCUSE, *TECHNOLOGY, WAR AND FASCISM* 46 (Douglas Kellner ed., 1998).

thor of demonstrable events in the world, and demotes him to a creature who merely behaves differently in different situations, on whom one can conduct experiments, and who, one may even hope, can ultimately be brought under control."²⁴³ Abstracting from the life-world in this way, CBA seeks to control or influence decision making by means of a theoretical move, the one-time measurement of WTPs and WTAs, that *seems* to encode people's well-formed desires, but that in fact leaves no institutional space for them to freely mold and remold their preferences in the course of political discussion.

The ideology that CBA is an objective, scientific assessment of people's preferences—as in the disarming hypothetical claim, "But I'm only trying to find out what people are willing to pay for!"—diminishes people's ability to recognize that, as things stand now (in the United States, at least), they utterly lack the institutional space for politics in Arendt's sense of the term. In its effects, it would not be inappropriate to compare CBA to those totalitarian modes of administration that impose solutions from above while advertising that they are merely doing the will of the people.²⁴⁴ If Arendt is right that the ultimate meaning of politics is freedom, then the meaning of CBA is the kind of politics that seeks to control or steer freedom into servitude to "data" about what "the people" on balance prefer about the political projects that will affect their lives. But as Fuller says, "the greatness of what we call democratic government does not lie in the mere fact that a numerical majority controls at election time, but at a point further removed from the ballot box, in the forces which are permitted to play upon the electorate."²⁴⁵ In other words, the real measure of a given society's level of democracy does not consist in the fact that individual preference holders have a one-off chance to say what they prefer from a slate of choices they had no role in shaping. Rather, the level of democracy in a society depends on whether its public and private institutions make communicative rationality in the political sphere easier or harder, more open or less open, more valued or less valued.

From a purely historical point of view, one could say that CBA's methods attempt to abolish what Weber calls "the knowl-

243. ARENDT, *supra* note 89, at 105.

244. See MICHAEL HALBERSTAM, *TOTALITARIANISM AND THE MODERN CONCEPTION OF POLITICS* 20-21 (1999) (discussing totalitarianism's effect on individual thought).

245. LON FULLER, *THE LAW IN QUEST OF ITSELF* 123 (1940).

edge of the tragedy with which all action, but especially political action, is truly interwoven."²⁴⁶ CBA does this by the simple expedient of ignoring or denying time's relentless destabilization of everything solid, including especially human opinions and desires. Of course, the law also attempts to abolish tragedy in this way: the enforcement of a legally binding contract despite the fact that one of the parties regrets having made it is a leading case in point. Defenders of the institution of contract sometimes legitimate this result by claiming that the law "must respect our capacity as free and rational persons to choose our own good, and that respect means allowing persons to take responsibility for the good they choose."²⁴⁷ In effect, CBA follows the law's lead by implicitly construing human preferences as if they were contractually binding promises that could not later be changed without incurring legal and perhaps moral responsibility. In contract law, what happens after a binding promise is made—including especially any regrets and changes in the preferences that led to the promise in the first place—are generally held to be immaterial as a consequence of the old Latin maxim and legal principle *pacta sunt servanda* ("promises must be kept").²⁴⁸ But the metaphor of promises exchanged in a market transaction is clearly inapt, because none of the WTPs and WTAs that CBA measures are legally binding. They are in principle, and in fact, socially conditioned works in progress. To put it another way: in the world of politics, unlike that of contracts, people are always free to change their minds in response to new information and new experiences with others.

In default of any sustained political discussion and interaction among those who will be affected by a given project, CBA's calculations lay down ends which CBA then offers to state officials to enact through law. The way CBA describes the nature of its relationship to decision makers—"to provide useful information to the decision maker, and not to furnish the decision itself"²⁴⁹—shows that it sees the state as the monolithic *proprietor* of force, rather than seeing public force as the possible consequence of freedom in the political realm. This way of thinking about political power is far too crude. To borrow an important distinction drawn by Arendt, the *ends* that the state pursues through the ap-

246. WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY, *supra* note 23, at 77, 117.

247. CHARLES FRIED, CONTRACT AS PROMISE 20 (1981).

248. See BLACK'S LAW DICTIONARY, *supra* note 142, at 1140.

249. ZERBE, *supra* note 10, at 16.

plication or threat of legal force are not the same as the *goals* of politics.²⁵⁰ The latter “are never anything more than the guidelines and directives by which we orient ourselves and which, as such, are never cast in stone, but whose concrete realizations are constantly changing because we are dealing with other people who have goals.”²⁵¹ Her extended discussion of the meaning of the distinction between ends and goals brings home what is at stake in our reflections about the ideological aspects of CBA:

Only when brute force with its arsenal of means is introduced into the space between people—where until that point nothing has passed back and forth except speech, which is devoid of tangible means—do the goals of politics become ends. . . . If a political action that does not stand under the sign of brute force does not achieve its goals . . . that does not render the political action either pointless or meaningless. It cannot be pointless because it never pursued a “point,” that is, an end, but has only been directed at goals, more or less successfully; and it is not meaningless because in the back-and-forth of exchanged speech—between individuals and peoples, between states and nations—that space in which everything else that takes place is first created and sustained. What in political language is called a “breakdown in relations” is the abandonment of that in-between space, which all violent action first destroys before it proceeds to annihilate those who live outside of it.²⁵²

As harsh as it may sound to say it, the institution of CBA is the harbinger of a fundamental breakdown in political relations in Arendt’s sense. It is the tip of the spear of state force, administered through law, which can use CBA’s findings to legitimate whatever projects the numbers happen to favor. But as it seeks to guarantee the ends (political projects) with the means (a static determination of individual preferences), CBA ignores or fails to notice the fact that its means do not correspond to human life as it is lived in history. To repeat one last time: real human preferences are never essentially private; individual intentions, interests and desires are tied to language and culture, and thus are inescapably social and susceptible to change. Pretending merely to describe individual preferences, CBA actually constructs them as they would be if people never interacted with one another. That the resulting “information” can be used and exploited politically is obvious. That it can seem democratic, inasmuch as it scrupulously

250. ARENDT, *supra* note 89, at 193.

251. *Id.* at 192-93.

252. *Id.*

counts everyone's "dollar votes" without seeming to impose a solution from the outside, is equally obvious.²⁵³ What is less obvious, but nonetheless true, is that the objective information that CBA provides to policymakers is cloaked in a very subjective and politically charged point of view on the true nature of human preferences.

Conclusion

If this essay has accomplished its purpose, it should be obvious by now that no conceivable improvement in the theory of CBA could ever bring it closer to the facts of the matter, for the politics of CBA as a method for gathering and evaluating what it calls "facts" is what has been most at stake in my meditations. CBA enacts a particular vision of what preference formation and decision making in economically advanced democratic societies can, and should, be. In its determination to freeze the evolution of preferences in the life-world into forms that can be counted and compared, CBA reflects both the hyper-technological world in which it appears and the atrophied political culture that it informs. This is hardly surprising, for history teaches us that an age usually gets the political institutions that it deserves. If bureaucratically managed decision making on the basis of numerated individual preferences that are modeled as being immune to change is what is wanted, then CBA is just the ticket. Indeed, since American society currently lacks the kind of vibrant public institutions that would allow for a fully adequate public discussion of political goals, perhaps CBA, like the ballot box and the opinion poll, is the best chance policymakers have for discerning the public "mood." On the other hand, if genuine democracy means more than the counting of dollar votes cast at a discrete and politically binding point in time—if it implies popular engagement in decision making processes that never guarantee the result in advance, but always leave room for something new and unforeseen to emerge from the messy dynamics of human interaction—then it seems to me that CBA is part of the problem rather than a contribution to the solution. For there is nothing more dangerous to any robust conception of popular democracy than the belief that the determination of "what the people want" is safely in the hands of experts.

253. See SUNSTEIN, *supra* note 57, at 27-28.