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Bentham at the OMB: A Response to Professor Rowell

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RESPONSE

BENTHAM AT THE OMB: A RESPONSE TO PROFESSOR ROWELL

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INTRODUCTION

In her September 2012 article, *Partial Valuation in Cost–Benefit Analysis (Partial Valuation)*,¹ and in a related May 2012 essay for RegBlog,² Arden Rowell argues that regulators should stop “refusing”³ to place dollar figures on some goods, like “emotional goods,”⁴ that are incommensurable with money; if people are willing to pay *anything* for such goods, then before agencies propose major new regulations, a dollar figure should be generated to express these goods’ monetary values for use in regulatory cost–benefit analyses (CBAs).⁵ She argues that, in its analysis of a pending regulation that would make rearview cameras standard auto safety equipment, the National Highway Traffic Safety Administration (NHTSA) should have monetized the value of the unique trauma experienced by parents who back over and kill their own children.⁶ This emotional harm may be technically incommensurable with money, but if people are willing to pay something to avoid it then it is not totally non-monetizable, and so, she argues, it must be possible to express some portion of its total holistic

1. Arden Rowell, *Partial Valuation in Cost–Benefit Analysis*, 64 ADMIN. L. REV. 723 (2012).

2. Arden Rowell, *Valuing the Rear-view Camera Rule*, REGBLOG (May 30, 2012), <http://www.law.upenn.edu/blogs/regblog/2012/05/30-rowell-camera.html>.

3. Rowell, *supra* note 1, at 724; *see also* Rowell, *supra* note 2.

4. Rowell, *supra* note 1, at 724.

5. *Id.*

6. *Id.* at 737, 742; Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585). A 2008 law directed the National Highway Traffic Safety Administration (NHTSA) to establish improved rearview standards to protect bicyclists and pedestrians from being struck by reversing vehicles. *See* Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110–189, 122 Stat. 639–642 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)). As of October 6, 2012, a proposed final rule that would require automakers to phase in rearview cameras for all passenger vehicles is currently under review at the Office of Management and Budget (OMB), where it has been “under review” since November 16, 2011. *See* OFFICE OF INFO. & REGULATORY AFFAIRS, Federal Motor Vehicle Safety Standard No. 111, Rearview Mirrors, REGINFO, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=2127-AK43> (last visited on Nov. 30, 2012); *infra* Part V. The agency has stated that it plans to finalize a rule by the end of 2012. Peter Valdes-Dapena, *Rearview Car Camera Rules Delayed by U.S.*, CNNMONEY, Feb. 29, 2012, http://money.cnn.com/2012/02/29/autos/rearview_cameras_postponed/index.htm.

value in dollar terms.⁷ She argues that the regulation should be blocked by the Office of Management and Budget (OMB) until “the agency completes an adequate analysis.”⁸

But NHTSA cannot pull a defensible monetary value for this highly specific trauma out of thin air. The proposed expanded monetization process would require agencies to acquire ad hoc valuation estimates for any regulatory goods that are incommensurable with money, but for which there exists some “willingness to pay,” goods that often could not be even partially monetized without significant new research. This “partial valuation” process would attempt to disaggregate the incommensurable good’s holistic value by separating out the estimated monetizable portion of the good from its non-monetized “remainder,”⁹ which risks being forgotten in the analysis once a monetary value is assigned.

Partial valuation is already contained in the regulatory economist’s toolbox: few would contend that the dollar values commonly assigned to human lives for the purpose of regulatory analyses represent complete accountings of those lives’ holistic values, yet human lives are already regularly included in CBAs. At issue is the extent to which this incomplete monetization of incommensurables should be understood to be mandatory.

Any expanded partial valuation requirement would inevitably delay many vital lifesaving and environmental regulations and would commandeer scarce agency resources that might be better used in other ways by regulatory agencies. And it seems unlikely that policymakers will make better choices if incommensurable benefits are always broken apart into the proposed components instead of being described narratively and holistically in at least some analyses.

Thus, it is critical to examine the reasons Professor Rowell offers for arguing that agency CBAs should monetize all regulatory goods for which any willingness to pay exists, including goods that are currently expressed in nonmonetized, narrative form in agency regulatory analyses.

Professor Rowell contends in *Partial Valuation* that the executive orders governing regulatory review might not permit any consideration of non-monetized benefits when agencies are deciding whether the benefits of proposed regulations justify their costs—a threshold determination agencies are directed to make before regulating (unless exempted by law).¹⁰ If this

7. Rowell, *supra* note 1, at 737, 742.

8. Rowell, *supra* note 2.

9. Rowell, *supra* note 1, at 734, 739.

10. *See id.* at 725 (“If an agency is considering a rule for which the monetized costs exceed the monetized benefits, can the consideration of non-quantifiable benefits tip the balance?”); *id.* at 731 (describing “the question of whether non-monetizable benefits should affect the result of a cost-benefit analysis” as a “dilemma”); *see also infra* Part IV.

were the case, then regulators seeking to protect health, safety, or the environment would have a strong incentive to find dollar values for any non-monetized but partially monetizable benefits, perhaps even when this process would delay the effective date of a regulation in a way that will cost lives, as with NHTSA's backover regulation.

However, no executive order prohibits agencies from considering and narratively describing non-monetized benefits in CBA, and the OMB's guidelines on completing regulatory CBA actually encourage this practice.¹¹ Professor Rowell's assertion that it is an open question whether regulators determining if a rule's benefits justify its costs can even look at non-monetized benefits is alarming, because—if accepted—it could ratchet down the optimal level of stringency for many regulations with valuable benefits that are incommensurable with money.

The rationale for adopting partial monetization that Professor Rowell provides in her related RegBlog essay is even more alarming for its potential to ratchet down the stringency of regulations.¹² There, she attempts to establish, via a sort of logical proof, that when choosing which regulations to block and which to release, policymakers at the OMB's Office of Information and Regulatory Affairs (OIRA) should adhere to the principle that a regulation should never cost more, in money, than "people are willing to pay," in money.¹³ Thus, even if some regulatory goods are wholly or partially incommensurable with money, and even if it is impossible to express all the benefits of a regulation in dollars, as a matter of public policy OIRA should block any regulations whose monetary costs are projected to exceed the estimated amount of money that "people are willing to pay."¹⁴

The policy implications of this analysis are dramatic, as it would defend the way regulators and OIRA actually treat non-monetizable goods in real-world regulatory decisionmaking,¹⁵ a practice that, until now, had enjoyed

11. OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 (2003), 10, *available at* <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf> [hereinafter OMB, CIRCULAR A-4]; *see also infra* Part IV.

12. *See* Rowell, *supra* note 2. The contentions made in Professor Rowell's RegBlog essay have enormous policy implications for the stringency of future public health and environmental safeguards, and are thus well worth addressing on their individual merits, as well as in conjunction with the related arguments made in *Partial Valuation*.

13. *Id.*

14. *Id.* The troubling position that the OMB's Office of Information and Regulatory Affairs (OIRA), acting under the authority of executive orders, can and should have the amount of influence Professor Rowell advocates over executive agency regulators is addressed at *infra* note 89 and the accompanying text.

15. *See* Melissa J. Luttrell, *The Case for Differential Discounting: How a Small Rate Change Could Help Agencies Save More Lives and Make More Sense*, 3 WM. & MARY POL'Y REV. 80, 108–

almost no support in the literature.¹⁶ This rationale for a wholly monetary CBA-based decision criterion is particularly interesting, as it purports to depend on neither utilitarianism nor welfarism¹⁷ for its validity.¹⁸

If Professor Rowell's analysis here were correct, it would arguably provide a compelling policy reason for regulators to attempt to monetize benefits in the manner she proposes. However, to reach her conclusion, Professor Rowell implicitly depends on a false assumption that there is an identity of interests between regulatory winners and losers; without this identity of interests, it is simply utilitarianism recast.¹⁹ Professor Rowell also incorrectly assumes that economic valuations based on estimated willingness to pay, as this figure is assessed in CBA, will fully reflect larger, societal preferences.²⁰ Without these assumptions, which are necessary to support her logical argument, Professor Rowell's claim resolves to a highly controversial normative assertion, one that requires a normative defense she does not provide.

In short, the very thorough monetization of benefits envisioned by Professor Rowell will often be impracticable, or, in the case of some risks and harms, impossible. While some of the benefits agencies deem non-monetizable could, theoretically, be monetized, commissioning the requisite studies will often be unacceptably time consuming and expensive.²¹ This is not to say that agencies should not strive to more completely monetize regulatory benefits, which agencies often grossly underestimate in CBAs. However, a directive to monetize every benefit for which there exists any willingness to pay would too often paralyze regulators. It is preferable for regulators to continue to have the option of providing a narrative list of those benefits that they cannot practicably monetize, and for decisionmakers to retain the ability to take these unmonetized benefits into

10, 110 n.93 (2011).

16. See MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 4 (2006) [hereinafter, ADLER & POSNER, *NEW FOUNDATIONS*]; see also Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 *YALE L.J.* 165, 167 (1999). Thank you to David Driesen for raising this point in his very helpful comments.

17. For the best known and most complete welfarist justification for the current role of cost-benefit analysis (CBA) in the regulatory state, see generally ADLER & POSNER, *NEW FOUNDATIONS*, *supra* note 16.

18. See Rowell, *supra* note 1, at 741 n.70.

19. See discussion *infra* Part II.

20. See discussion *infra* Part II.

21. In at least one rulemaking, OIRA demanded the Environmental Protection Agency (EPA) do a better job of monetizing regulatory benefits, even though EPA was unable to secure funding from the OMB for original valuation studies needed to estimate the value of these benefits. See Amy Sinden, Douglas A. Kysar, & David M. Driesen, *Cost-Benefit Analysis: New Foundations on Shifting Sand*, 3 *REG. & GOVERNANCE* 48, 54 (2009).

account when evaluating regulations.

This response further argues that, despite methodological imperfections in NHTSA's CBA of its rearview camera rule, a CBA that likely underestimates benefits and overestimates costs, OIRA should not attempt to block the regulation while it waits for a CBA that presents monetized benefits in excess of the rule's monetized costs. NHTSA has already established that its proposed rearview camera rule is the most cost-effective alternative that can actually accomplish the objectives of the relevant statute.²² Given this now overdue statutory mandate,²³ OIRA simply lacks the authority to stop the rearview camera rule from moving forward. OIRA's regulatory review authority here derives from executive orders; neither OIRA nor any other executive actor can, by fiat, overrule the mandates of an act of Congress.

I. REQUIRING AGENCIES TO OBTAIN AD HOC ESTIMATES FOR
"PARTIALLY MONETIZABLE" GOODS WOULD UNACCEPTABLY SLOW
DOWN REGULATION FOR THE SAKE OF OBTAINING VALUATION
ESTIMATES OF LIMITED UTILITY

Professor Rowell is right that many goods classified as non-monetizable in CBAs are goods for which there does exist some willingness to pay.²⁴ She is similarly right that parents must be willing to pay some amount of money to avoid the devastation of killing their own children in backover accidents.²⁵ However, the value of acquiring ad hoc valuation estimates for all such partially monetizable goods that cannot be monetized without significant new research would not justify the delay and expense this extreme monetization process would require.

There are a number of benefits that agency economists deem non-monetizable, but for which there surely exists some willingness to pay (WTP), and with more research and study, *some* of these WTP figures could be added to the benefits side of agencies' CBAs, improving the accuracy of these analyses. However, there are some goods that agencies classify as non-monetizable for very good reasons. In the case of a known or

22. Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186, 76,189 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585) ("Less expensive countermeasures . . . would not satisfy Congress's mandate for improving safety.").

23. Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, § 2(b), 122 Stat. 639, 640 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)) ("The Secretary shall prescribe final standards pursuant to this subsection [Rearward Visibility] not later than 36 months after the date of enactment of this Act.").

24. See Rowell, *supra* note 1, at 724.

25. *Id.* at 742.

suspected toxin, one reason might be that the risk of harm at the relevant exposure level is simply unknown. Another might be that the number of people who would be exposed to toxic levels of the substance in the absence of regulation is unknown. The tactic of making estimates based on what is known does not necessarily help:

[E]stimates of exposure risks produced by cancer risk assessment models can vary by five to ten orders of magnitude, depending on the models selected and the exposure assumptions that are plugged into those models. Translated into economic terms, differences of this magnitude are analogous to the difference between the price of a cup of coffee and the size of the national debt at its peak.²⁶

Our level of certainty of the scope and magnitude of ecological benefits may be even lower.²⁷ Because “many human and environmental risks are not very well understood,” economists “lack empirical estimates of them.”²⁸ These gaps in understanding are not a result of lack of effort; such risks have been the subject of extensive research in universities around the world for decades. We cannot press pause on agencies’ implementation of statutes while we wait for defensible estimates of all regulatory benefits for which *some* willingness to pay exists, but where analysts confront unknowns that thwart monetization.

In the Environmental Protection Agency’s (EPA’s) CBA for a proposed regulation of emissions from sewage sludge incinerators, it identified the following environmental benefits not monetized and not accounted for in the “net benefits” figures:

- 26,000 tons of carbon monoxide
- 96 tons of HCl
- 5,500 pounds of mercury
- 1.6 tons of cadmium
- 3 tons of lead
- 90 grams of dioxins/furans
- Health effects from reduced NO₂ and SO₂ exposure²⁹

How might EPA have monetized the value of the three tons of annual lead pollution the regulation will prevent? First, it would need to investigate

26. SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, *RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH* 94 (2003) (footnote omitted).

27. *Id.* (stating that very “little is understood about the relationship between human activity and environmental outcomes”).

28. *Id.* at 103.

29. RTI INT’L, *REGULATORY IMPACT ANALYSIS: STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES AND EMISSION GUIDELINES FOR EXISTING SOURCES: SEWAGE SLUDGE INCINERATION UNITS 1–3* (2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0559-0042>.

dispersal patterns of lead for each incinerator. Does particulate lead fall on crops or farmland? To what extent does lead fall onto playgrounds, backyards, or other areas where children—who are particularly sensitive to lead in small amounts³⁰—may be exposed? Is the lead deposited in, for example, public park sandboxes where children would be especially likely to get lead on their hands—hands that may enter their mouths or may touch the food they eat? The EPA must determine not just where the lead will be dispersed in the absence of regulation, but how much will actually end up in people's bodies. And, for the entire exposed population, the EPA will want to know the amount of lead exposure from other sources, since the health effects of lowering lead exposure vary depending on the quantity of lead exposure from other sources.³¹

When the EPA has a handle on how many people at what ages and at which baseline levels of lead exposure will be affected by the rule, it can start to monetize the health and other benefits of avoided lead exposures. One problem with lead pollution is that exposure to even minute quantities can lower the IQs of children.³² So, the EPA will need to select a strategy for monetizing lost IQ points. In the past, it has extrapolated the value of IQ points from expected reductions in lifetime earnings; however, this is an incomplete valuation, as it fails to account for potentially diminished quality of life and for impacts on affected children's parents.³³

Once the EPA has completed this monetization exercise, it still must identify and monetize other benefits that will result from diminished lead exposure, such as other health benefits (besides retained IQ points), and the reduced crime that may occur if exposure to this powerful neurotoxin is reduced.³⁴ Then, the EPA must complete the challenging exercise of monetizing ecological harms avoided by the reduction in lead pollution.

And then the EPA would have to complete a similar exercise for all the other unmonetized benefits on its list, a project that would likely require it to commission expensive and time-consuming new research. While the results of such an undertaking may have some value—even though the risk-

30. Richard L. Canfield et al., *Intellectual Impairment in Children with Blood Lead Concentrations Below 10 µg per Deciliter*, 348 NEW ENG. J. MED. 1517, 1518, 1525 (2003).

31. *See id.* at 1522–23 (noting that previous research has shown that effects of lead on IQ are proportionally greater at a lower lead concentration).

32. *See id.* at 1525 (stating that “there may be no threshold for the adverse consequences of lead exposure” that are both persistent and irreversible).

33. FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 103–04 (2004).

34. *See* Steven D. Levitt, *Lead and Crime*, FREAKONOMICS (July 9, 2007, 10:04 AM), <http://www.freakonomics.com/2007/07/09/lead-and-crime/> (stating that evidence shows that “high exposure to lead is harmful to both IQ and the ability to delay gratification, two traits that could enhance the attractiveness of crime”).

analysis-and-monetization exercise will undoubtedly produce indeterminate values for many benefits—if the agency thinks it is important to regulate expeditiously to prevent additional harms from accruing, then it may not be feasible for the EPA to monetize every regulatory benefit for which any significant partially monetizable value may exist.

II. PROFESSOR ROWELL'S LOGICAL ARGUMENT FOR A MONETARY COST-BENEFIT ANALYSIS DECISION CRITERION RELIES ON TWO INVALID ASSUMPTIONS

According to Professor Rowell:

When monetized costs exceed monetized benefits, the costs of a regulation exceed what people are willing to pay for the effects of that regulation. Such a regulation should be barred by Executive Order 13,563, which requires that the benefits of a regulation “justify” its costs.

The agency cannot sidestep this conclusion by reference to nonmonetizable benefits. Nonmonetizable benefits have a monetary value of \$0—not because they are necessarily worthless in some larger sense, but because, by definition, any value they may have cannot be expressed in monetary terms. In other words, people are willing to pay \$0 to secure a nonmonetizable benefit—otherwise the benefit would be monetizable.³⁵

Here, Professor Rowell claims to present a justification for a utilitarian

35. Rowell, *supra* note 2. To my knowledge, Professor Rowell has not disavowed the contentions made in this RegBlog essay, and so—given what is at stake—these arguments are well worth addressing. Early versions of *Partial Valuation* expanded and elaborated on these arguments, which played a large role in prompting this Response, although the final version of *Partial Valuation* boiled it down to only the following brief language, where Professor Rowell continues to suggest that the CBA valuation process implies that regulators should not regulate when monetized costs exceed monetized benefits:

As we have seen, the nonmonetary effects of regulations are monetized on the basis of people's willingness to pay for those effects. If we take this practice seriously, it points to a reason not to regulate when costs exceed benefits: because in those cases, the costs of the regulation exceed what people are willing to pay for it. Regulating where costs exceed willingness to pay may implicate autonomy concerns about respecting people's preferences, and it may also implicate democratic concerns about the appropriate role of agencies as agents for the public. These concerns may be separable from the typical welfarist arguments offered in favor of cost-benefit analysis as a decision tool. If they are, this would be a reason to refuse to regulate when costs exceed willingness to pay, even if willingness to pay operates as a poor proxy for welfare, as many analysts have argued it does.

Rowell, *supra* note 1, at 741 n.70. Given that agencies implement statutes enacted via a democratic process, and given that economic values of lives and other intangible regulatory goods are developed, not by popular votes, but by extrapolation from emerging, imperfect academic studies and surveys, it is difficult to see how giving greater weight to CBAs would make rulemaking either more respectful of people's known preferences or more democratic.

decision criterion that works whether or not one subscribes to utilitarianism. Instead of providing any explicitly philosophical grounding for her proposal, she establishes its validity via a sort of logical proof. Even assuming, *arguendo*, that economists are able to monetize every significant regulatory benefit for which there exists any willingness to pay (a heroic assumption taken up in Part I), the logical argument would still fail. This is because the argument depends on an implicit assumption that a budgeting principle that is self-evident in the context of individuals and individual households applies equally to diverse societies where individuals may have very conflicting interests and vastly different resource constraints. The argument also, fatally, conflates two distinct meanings of the phrase “willingness to pay.”

A. Professor Rowell Implicitly Assumes an Identity of Interests Between Winners and Losers

According to Professor Rowell:

At first blush, NHTSA’s argument that nonquantifiable benefits can justify monetized costs may seem plausible. But if we take seriously the claim that these benefits cannot be monetized, the agency’s argument cannot stand.

To see this, consider how regulators monetize benefits. The benefits in a regulatory cost–benefit analysis are calculated by reference to people’s willingness to pay money to secure those benefits. When monetized costs exceed monetized benefits, the costs of a regulation exceed what people are willing to pay for the effects of that regulation. Such a regulation should be barred by Executive Order 13,563, which requires that the benefits of a regulation “justify” its costs.³⁶

Professor Rowell’s argument would be on sounder footing if there were a single, unitary purchaser and beneficiary of regulatory goods. This hypothetical purchaser and beneficiary would wisely avoid irrational regulatory expenditures. But this reasoning only works when there is a complete identity of interests between regulatory winners and losers. Assuming nothing constrains an individual from spending her money however she likes, it is perfectly logical to say it makes no sense for her to spend more on something than she is willing to pay for it. However, the same logic that holds for individuals does not hold at the societal level. This becomes clearer when moving from a generic proposition like “society should not spend more than it is willing to pay for mine safety” to a concrete application like “federal regulators should not require Massey

36. Rowell, *supra* note 2; *see also* Rowell, *supra* note 1, at 741 n.70.

Energy to spend more to prevent deadly coal mine accidents than whatever amount coal miners, and other beneficiaries, are willing to pay for that safety.” Our “society” is composed of individuals. Under almost any regulation, some will win and some will lose.

“Sadie should not voluntarily pay more for any good than the amount she is willing to pay” is true as a matter of logic. However, “society should not voluntarily pay more for regulatory benefits than the amount society is willing to pay, where the amount society is willing to pay is defined to mean the monetized value of the regulatory benefit to the regulatory beneficiaries, as derived via willingness-to-pay studies” is a normative statement, and one that requires defense. To the extent the normative justification for Professor Rowell’s neo-Benthamite decision criterion lies in utilitarianism—or some other variety of consequentialism such as welfarism—this should be made explicit.

For example, consider the family in *Partial Valuation*’s “science fair” example.³⁷ There, parents are not willing to pay more than \$25 to enter their child into a science fair, and so it makes no sense for that family to pay more money for the science fair than the \$25 it is willing to pay.³⁸ Does it similarly never make sense for federal regulators to establish national public health, safety, or environmental standards with monetized costs that exceed the monetized value of the benefits?

A family is different, not just quantitatively, but also qualitatively, from the aggregate population of the United States. Even if this hypothetical family should not pay more than \$25 for the science fair, it simply does not follow that a similar logic applies to society at large. For example, assume that the average family entering a child in that science fair is willing to pay a maximum of \$25 in admission fees, and that this \$25 happens to be the actual fee for admission. Assume that the state provides a partial subsidy of the fair, at a cost of \$5 per child, to cover the extra cost of keeping the facility open and staffing the event, so that the total social cost of each child’s participation is \$30: the \$25 entry fee plus the \$5 subsidy. If the only monetizable benefits are represented by the families’ willingness to pay entry fees, would it be irrational for the state to subsidize this science fair, given that the monetized costs exceed the monetized benefits by \$5 per child?³⁹

In truth, we do not yet have enough information to determine whether

37. See Rowell, *supra* note 1, at 739–41.

38. *Id.* at 739–40.

39. While it may appear that the state offering the subsidy had a sort of “willingness to pay” (WTP) that should be counted, CBA only counts monetized benefits to regulatory beneficiaries as benefits. See *infra* Part II.B.

this subsidy would be a good or bad investment of government funds. We need to know more about the students, their families' resource constraints, the science fair itself, and how it compares to other projects that are *actually* competing with the science fair for the relevant funds. Someone needs to make a decision that considers qualitative factors, and not just the monetized values of costs and benefits. Perhaps the students live in an economically depressed area and their parents have a below-average ability to pay for such educational "extras." If we imagine that families with average incomes in that state would have been willing to pay entry fees of \$50, on average, for the exact same experience, then it may not be unreasonable for a decisionmaker to conclude that the state's subsidy of the facially cost-ineffective science fair is a good thing.

B. Professor Rowell Assumes that Economic Estimates of Beneficiaries' Willingness to Pay Accurately Represent Larger Societal Preferences

The phrase "willingness to pay" can mean two things. It can be used in a general sense to refer to the willingness of a person, entity, or society to expend resources on some thing. And so, when legislation directing NHTSA to improve vehicle rearview visibility to reduce backover accidents sailed through both houses of Congress and was signed into law by President Bush in 2008,⁴⁰ this offered strong evidence of a societal willingness to pay the costs of such a rule.

In the field of welfare economics, "willingness to pay" ("WTP," in the jargon of CBA) is also a term of art that refers specifically to the highest price a recipient is willing to pay for a good.⁴¹ One way regulators monetize the value of the lives saved by regulations is through the use of survey data; people are asked how much they would be willing to pay to eliminate small risks of premature death and, from their responses, economists attempt to monetize the "value of a statistical life" (VSL).⁴²

40. Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, 122 Stat. 639 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)).

41. See generally W. Michael Hanemann, *Willingness to Pay and Willingness to Accept: How Much Can They Differ?*, 81 AM. ECON. REV. 635 (1991).

42. In addition, these "value of a statistical life" (VSL) figures are often derived from the "compensating wage premiums" workers receive in exchange for taking on risky work; this process has been criticized on numerous grounds as producing indefensibly low VSL figures. See *infra* note 51. See generally Anna Alberini, *What Is a Life Worth? Robustness of VSL Values from Contingent Valuation Surveys*, 25 RISK ANALYSIS 783 (2005). In theory, VSLs can also be derived via assessment of consumer expenditures made for the sake of safety. See generally W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World*, 27 J. RISK & UNCERTAINTY 5 (2003). Limitations of this approach include limitations on consumers' knowledge of risks and limitations on their

But another way to arrive at a VSL figure is by evaluating the results of surveys that ask, “How much would you have to be paid to voluntarily accept being subjected to an additional risk of premature death?” A thorny problem for CBA economists is that VSL figures derived from “willingness to accept” (WTA) survey data are higher than VSLs derived via WTP.⁴³ This is hardly surprising, since people have a demonstrated tendency to want to hang on to whatever health and environmental entitlements they “own,”⁴⁴ and since WTP figures are much more tightly constrained by the resources actually available to the research subjects. A person with no disposable income cannot realistically buy more safety, but can nevertheless refuse to sell off—or can set a very high price on—whatever protection he or she already owns.⁴⁵

Professor Rowell conflates two different meanings of willingness to pay when she argues from the premise that we, as a society, should not pay more for regulatory goods than the amount we are “willing to pay,” to the conclusion that determinations of which proposed regulations are sufficiently cost-justified to survive OIRA review should be made via economic analyses wherein any benefits incommensurable with money are monetized, to the extent possible, using WTP.⁴⁶ WTP, in the CBA context, is only one of several possible mechanisms economists may use when monetizing extra-market goods, and, despite its name, it is not intended to provide a complete measure of societal willingness to pay for those goods. WTP is only meant to reflect the amount the beneficiary would pay for the good if it were available for purchase on the market;⁴⁷ it does not completely account for human preferences from a broad, societal perspective.

Professor Rowell is incorrect when she states in *Partial Valuation* that “NHTSA determined that people’s willingness to pay for protection against

disposable income.

43. Richard O. Zerbe, Jr., *Is Cost-Benefit Analysis Legal? Three Rules*, 17 J. POL’Y ANALYSIS & MGMT. 419, 420–21, 449 (1998).

44. *See id.* at 434; *see also* Hanemann, *supra* note 41, at 646. *But see* Charles R. Plott & Kathryn Zeiler, *The Willingness to Pay–Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations*, 95 AM. ECON. REV. 530, 531–32 (2005) (arguing that WTP and “willingness to accept” (WTA) may converge when experimental subjects are better educated by testers; however, the goods at issue in this study were tangible goods with market values, and in that sense are different from extra-market health and environmental goods).

45. *See* Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 67–68 (1998).

46. Rowell, *supra* note 2.

47. OMB, CIRCULAR A-4, *supra* note 11, at 18–31; *see, e.g.*, CAROLINE DINWIDDY & FRANCIS TEAL, PRINCIPLES OF COST-BENEFIT ANALYSIS FOR DEVELOPING COUNTRIES 264 (1996).

mortality risks justifies an expenditure of \$6.1 million per life saved”⁴⁸ and that “NHTSA has told us that it believes society is willing to pay \$6.1 million per life saved by the rearview camera rule.”⁴⁹ When NHTSA used a VSL of \$6.1 million in its CBA of this rule, the agency did not thereby conclude that \$6.1 million represents the quantum of costs “justified” for this benefit; as is explained in Part IV, *infra*, the issue of what costs are justified is, at least in part, a normative question not conclusively answered by the monetized values of the benefits. And, again, the VSLs used in CBAs (such as NHTSA’s \$6.1 million figure) are not claimed by any agency actor to be comprehensive measures of what *society* is willing to pay to save a life. Such VSL estimates are based on the estimated value of a saved life *to a beneficiary*, and these figures may not even be WTP values; to the extent these values are based on premiums workers must be paid to accept riskier work, they are probably better described as incomplete WTA measures.⁵⁰

It is also noteworthy that WTP should not be the default CBA valuation methodology for extra-market goods, such as averted deaths. As a matter of both logic and fairness, the choice of whether to use WTP values or WTA values for such goods should be determined by who has the stronger rights interest in the goods in question—the intended beneficiaries or the entity being regulated.⁵¹ As Thomas McGarity explains:

A fundamental assumption underlying most health and environmental legislation is that each individual is entitled to some minimal level of security from risks posed by others, and that commonly held resources are likewise protected. Potentially affected individuals or their governmental representatives must be persuaded to accept additional risks; they cannot be imposed with impunity up to the point at which the potentially affected individuals are willing to pay to prevent the risk-producing conduct.⁵²

Returning to the proposed rearview camera rule, Congress created an

48. Rowell, *supra* note 1, at 728–29.

49. *Id.* at 740.

50. See *supra* note 42; *infra* note 51.

51. Richard O. Zerbe, Jr., *The Legal Foundation of Cost-Benefit Analysis*, 2 CHARLESTON L. REV. 93, 120–21 (2007). In addition to survey data, the “compensating wage premiums” workers must be paid to undertake additional increments of occupational risk are also used to establish VSL values; these VSL values arguably reflect WTA values, assuming workers are not constrained in their ability to decline the riskier work. But these VSL measures arguably reflect decisions made by people who are less risk averse than average, uninformed about the risks of their work, unable to freely choose safer work, or all three, and so the VSL figures derived using this method likely understate the average monetized value of a human life in the United States. See ACKERMAN & HEINZERLING, *supra* note 33, at 77–81.

52. McGarity, *supra* note 45, at 68 (footnote omitted); see Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 456 (2008).

entitlement in the intended beneficiaries when it directed NHTSA to promulgate regulations designed to protect pedestrians and cyclists from backover accidents by requiring the installation of cameras, or other equipment that would reduce backover accidents, in new passenger vehicles.⁵³ From this perspective, VSLs for the rule will be too low if they are based on WTP, as opposed to WTA.⁵⁴

III. SOME NORMATIVE OBJECTIONS TO A MONETIZED COST–BENEFIT DECISION CRITERION

Because the argument analyzed in Part II fails as a matter of logic, it is best understood as a normative assertion—one that requires a normative defense that Professor Rowell does not provide.

Because the proposal so closely resembles real-world regulatory review, which rarely takes unmonetized regulatory benefits seriously,⁵⁵ many objections to the proposal apply equally to most real-world regulatory review. CBA's defenders in the legal literature have provided thoughtful responses to such objections, but a key concession in these responses has been that incommensurable, non-monetizable policy goals and moral values—such as justice, equity, and the promotion of environmental values—should, in some cases, trump competing utilitarian concerns.⁵⁶

Since the decision criterion defended in Professor Rowell's RegBlog essay would completely omit non-monetizable concerns when determining whether a regulation is sufficiently cost-justified to proceed, it is missing key concessions of the existing normative defenses of CBA, which would allow for some consideration of important non-monetizable concerns when evaluating whether regulations are worth their monetized costs.

53. See Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, 122 Stat. 639 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)). For the statistical lives that would be saved under the weakest possible regulation that the NHTSA has the discretion to implement, it is especially difficult to justify the use of WTP-derived VSLs.

54. See *supra* note 43 and accompanying text.

55. See Luttrell, *supra* note 15, at 109–10, 110 n.93.

56. John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 418–19 (2008); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 65–66 (1995); see ADLER & POSNER, *NEW FOUNDATIONS*, *supra* note 16, at 53; see also Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost–Benefit State*, 48 STAN. L. REV. 247, 293–94 (1996) (“The various consequences of regulation ought not to be thought commensurable along a single metric. Any cost–benefit analysis should be accompanied by a disaggregated, qualitative description of the consequences of government action, so that Congress and the public can obtain a fuller picture than the crude and misleadingly precise ‘bottom line’ of the cost–benefit analysis.” (footnote omitted)).

A. *A Monetary CBA Decision Criterion Would Fail to Account for the Rights of Regulatory Beneficiaries*

Many regulatory beneficiaries have a *right*, often a statutory right, to regulatory benefits that could appear to be bad investments under CBA. When we throw these rights and entitlements out the window—except to the extent there exists a willingness to pay for them, i.e., except for this partial, entirely instrumental value—and when we make decisions based solely on the Kaldor–Hicks criterion,⁵⁷ we have adopted a policy of strict utilitarianism. This policy is then vulnerable to all the objections that plague utilitarianism. For example, philosophies of ethics and justice that stand in opposition to utilitarianism can be found in the writings of Rawls and Kant, among numerous other philosophers.⁵⁸ Simply put, utilitarianism is controversial:

Like any comprehensive moral or religious doctrine, utilitarianism will inevitably be controversial. Many persons will reasonably reject it. . . . Basing state policy on utilitarianism or entrenching utilitarianism into the constitution of a democratic society as the foundational value would be akin to establishment of religion. No more than Buddhism, Roman Catholicism, or any other comprehensive doctrine should utilitarianism be advanced for the role of [public philosophy].⁵⁹

This is not to say that utilitarian, consequentialist concerns have no place at all in setting regulatory policy. But an adoption of a strict monetary CBA decision criterion would amount to a complete rejection of all other rights and values—except to the extent they have an instrumental value that can be monetized—for most rulemakings. Such an “efficiency über alles” policy would stand in tension with the policy goals of many, if not most, of the statutes that regulators are charged with implementing through their regulations, as numerous commentators have persuasively argued.⁶⁰

57. Under the Kaldor–Hicks criterion, a policy is socially beneficial if it has the effect of making one set of people better off and another set worse off, so long as what the winners gain has a higher value than what the losers lose. See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 491 (1980).

58. CARL L. BANKSTON III, *Nozick, Robert*, in 2 ETHICS 1053, 1054 (John K. Roth ed., rev. ed. 2005); see, e.g., RICHARD A. SPINELLO, *Deontological Ethics*, in 1 ETHICS 367, 368 (John K. Roth ed., rev. ed. 2005).

59. Richard J. Arneson, *Rawls Versus Utilitarianism in the Light of Political Liberalism*, in THE IDEA OF A POLITICAL LIBERALISM: ESSAYS ON RAWLS 231, 246–47 (Victoria Davion & Clark Wolf eds., 2000).

60. Shapiro & Schroeder, *supra* note 52, at 473 (“[T]o the extent that CBA is defended on normative grounds, it determines the value of proposed policy and regulatory options using just one factor—economic efficiency. This makes CBA unhelpful in implementing the other policy values that underlie most regulatory statutes. Moreover, because it is focused

B. Many Societal “Goods” Have More Than an Instrumental Value

A recent outraged blog post from Lisa Heinzerling highlights the clear, inherent tension between a completely monetary CBA decision criterion and the protection of rights in a civil society.⁶¹ When the Department of Justice (DOJ) issued regulations—mandated by statute—intended to control rampant rape and other sexual abuse of prisoners, DOJ was required to submit a CBA of the proposal to OIRA. And so, in a chilling report, DOJ dutifully attempted to provide the monetized value of rape and sexual abuse.⁶² A forcible rape of an adult prisoner was assigned a monetary value of -\$310,000 or -\$480,000, while “contacts with a staff member that only involved touching of the inmate’s buttocks, thigh, penis, breasts, or vagina in a sexual way” were assigned a value of -\$600 per incident.⁶³ Although this CBA apparently did not influence DOJ’s final rules,⁶⁴ in theory, we *could* use monetization to determine whether prevention of sexual assault is worth the expense; this appears to be how we would make such decisions under a strictly monetary CBA decision criterion.⁶⁵

on only one value, CBA does not generate any discussion of how to resolve conflicts between efficiency and other regulatory and policy goals to the extent that this conflict is relevant under a regulatory statute.”); see David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1, 92–93 (2005); see also Sinden, Kysar, & Driesen, *supra* note 21, at 56–57 (summarizing philosophical objections to CBA in the regulatory context). See generally Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1408–10 (2005).

61. Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice’s Economic Analysis of Prison Rape*, GEO. L. FAC. BLOG (June 13, 2012), http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html.

62. DEP’T OF JUSTICE, REGULATORY IMPACT ASSESSMENT: NOTICE OF FINAL RULE FOR PRISON RAPE ELIMINATION ACT (PREA) STANDARDS (May 17, 2012), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf.

63. *Id.* at 24, 64.

64. Heinzerling, *supra* note 61.

65. In a blog post responding to Professor Heinzerling, Rick Hills argues that the Department of Justice’s (DOJ’s) regulations might have prevented more assaults if DOJ had given more weight to the results of its CBA. Rick Hills, *In Defense of Cost-Benefit Analysis: Lessons from Recent Rules for Preventing Prison Rape*, PRAWFSBLAWG (June 16, 2012, 11:51 AM), <http://prawfsblawg.blogspot.com/2012/06/in-defense-of-cost-benefit-analysis-lessons-from-recent-rules-for-preventing-prison-rape.html>. Even if this is true, it is a consequentialist argument; CBA will point toward less protection of human rights in other cases. Professor Heinzerling argues that CBA is not the appropriate decision criterion for determinations of how much sexual assault of prisoners to prohibit, but she does not claim CBA will always result in less protection for prisoners.

IV. EXECUTIVE ORDER 12,866 AND EXECUTIVE ORDER 13,563 ARE UNAMBIGUOUS IN THAT NEITHER REQUIRES REGULATIONS TO PASS A “MONETARY CBA”

Professor Rowell writes that President Obama’s Executive Order on regulatory review, Executive Order 13,563,⁶⁶ is ambiguous in that it is not clear whether agencies can rely on non-monetized benefits in determining that benefits justify costs for a rule whose monetized benefits exceed its monetized costs.⁶⁷

But there is no ambiguity there. The language in Executive Order 13,563 to the effect that benefits must justify costs is taken directly from Executive Order 12,866,⁶⁸ a Clinton-era order on regulatory review that Executive Order 13,563 explicitly reaffirms and does not amend.⁶⁹ Executive Order 12,866 provides that, to the extent permitted by law, “[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”⁷⁰ Nothing at all in either Executive Order requires *monetization* of any costs or benefits, and certainly neither requires that monetized costs must exceed monetized benefits.

In 1981, Ronald Reagan issued Executive Order 12,291,⁷¹ which was replaced in 1993 by Executive Order 12,866. Executive Order 12,291 provided that “[r]egulatory action shall not be undertaken unless the potential benefits to society for the regulation *outweigh* the potential costs to society.”⁷²

“Justify” means “to prove or show to be just, right, or reasonable.”⁷³ “Outweigh” means “to exceed in weight, value, or importance.”⁷⁴ By changing this word, and by explicitly recognizing concerns like equity and distributional fairness,⁷⁵ Clinton softened the CBA requirements that had earlier existed under Executive Order 12,291.

The OMB’s 2003 guidelines to agencies conducting CBA under

66. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

67. Rowell, *supra* note 1, at 725, 730–31.

68. Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (reprinted as amended in 5 U.S.C. § 601 (1994)).

69. Exec. Order No. 13,563, 3 C.F.R. at 215.

70. Exec. Order No. 12,866, 3 C.F.R. at 639.

71. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

72. *Id.* at 128 (emphasis added).

73. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 680 (11th ed. 2003).

74. *Id.* at 882.

75. Exec. Order No. 12,866, 3 C.F.R. at 639.

Executive Order 12,866, which were issued under George W. Bush's Administration and which remain active, support this construction. The guidelines provide: "When important benefits and costs cannot be expressed in monetary units, [CBA] is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs."⁷⁶ Moreover, the guidelines explicitly recognize that nonmonetized benefits can influence policy outcomes: "For cases in which the unquantified benefits or costs affect a policy choice, you should provide a clear explanation of the rationale behind the choice."⁷⁷

In sum, nothing in the plain language of the executive orders requires that all regulations subject to regulatory review be evaluated under a formal, completely quantitative, and fully monetized analysis. There is nothing in the text of the currently operative executive orders on regulatory review that would prohibit an analysis that monetizes some goods, describes others qualitatively, and then assesses whether the regulatory benefits of a rule are reasonable, given its costs. Professor Rowell's conclusion that there is no place for consideration of non-monetized goods in a "monetary cost-benefit analysis"⁷⁸ is irrelevant to actual regulatory policy because there is simply no requirement that the CBA completed by agencies during the regulatory review process be fully monetary.

V. DESPITE METHODOLOGICAL IMPERFECTIONS IN NHTSA'S CBA, OIRA SHOULD NOT BLOCK THE PENDING BACKOVER RULE

For the reasons explained above, to the extent the monetized values of the deaths and injuries to be prevented by the NHTSA regulation were calculated using WTP estimates—as opposed to WTA estimates—they are likely to be too low. And there are a host of other reasons the prospective monetized benefits of the rule were arguably understated by NHTSA; Professor Rowell identifies many of these. For example, in theory, regulators could find creative ways to partially monetize difficult-to-value goods like avoiding the horrific experience of having run over one's own child, especially if the agency's failure to monetize this good may be what causes OIRA to kick the regulation back to the agency.⁷⁹

In this way, *Partial Valuation* builds on Professor Rowell's earlier work describing the systematic understatement of regulatory benefits in agency CBAs. For example, she has argued convincingly that agencies relying on

76. OMB, CIRCULAR A-4, *supra* note 11, at 10.

77. *Id.* at 27.

78. Rowell, *supra* note 1, at 741.

79. *See id.* at 737.

existing WTP survey data to calculate the value of averted deaths are likely engaging in a form of “double discounting,” thereby improperly reducing the monetized value of lives to be saved by regulation.⁸⁰ Professor Rowell has also advocated use of VSL multipliers for lives to be saved in the future⁸¹—another step that would increase projected regulatory benefits. Although, if regulators *must* evaluate health and environmental standards using CBA, I would go further than the VSL multiplier approach, and would reduce discount rates for all regulatory health and environmental benefits.⁸² Another problem with NHTSA’s CBA of its backover rule is that the 7% discount rate is indefensibly high.⁸³ Also, if history is any guide, the rule’s costs have most likely been overstated.⁸⁴

By proposing ways CBAs could be modified to provide more complete accountings of costs and benefits, Professor Rowell follows in the steps of Jeremy Bentham, who was not as cold-hearted in his utilitarianism as many commentators assume.⁸⁵ For example, while modern-day agency CBA would favor an act that reduces the value of a poor person’s home by \$1,000, if that act would create at least \$1,001 in immediate new wealth for a very rich person, Bentham believed that utilitarian decisionmaking should reflect the greater utility that goods, like money, have for people who lack them (“diminishing marginal utility,” in the language of economics).⁸⁶

Professor Rowell is right that many CBA methodologies are in need of reform, and she is right that the benefits side of the ledger is systematically diminished when certain goods that could have been at least partially monetized are omitted from the net benefits analysis altogether. However,

80. Arden Rowell, *The Cost of Time: Haphazard Discounting and the Undervaluation of Regulatory Benefits*, 85 NOTRE DAME L. REV. 1505, 1525–34 (2010).

81. Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. CHI. L. REV. 171, 183–84 (2007).

82. See Luttrell, *supra* note 15, at 122 (arguing for the discount rate for health and environmental goods to be lower than the rate for compliance costs).

83. Graham, *supra* note 56, at 504 (“[W]e now realize [a 7% discount rate is] too high.”); see also Sunstein & Rowell, *supra* note 81, at 206 n.126 (7% rate “seems badly outmoded”).

84. See generally David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335 (2006); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997 (2002).

85. See Uwe E. Reinhardt, *How Economists Bastardized Benthamite Utilitarianism*, (unpublished manuscript) http://www.princeton.edu/~reinhard/pdfs/100-NEXT_HOW_ECONOMISTS_BASTARDIZED_BENTHAMITE_UTILITARIANISM.pdf (last visited Nov. 30, 2012) [hereinafter Reinhardt, *Utilitarianism*], cited with approval in Uwe E. Reinhardt, *When Value Judgments Masquerade as Science*, N.Y. TIMES ECONOMIX (Aug. 27, 2010 6:00 AM), <http://economix.blogs.nytimes.com/2010/08/27/when-value-judgments-masquerade-as-science/>.

86. Reinhardt, *Utilitarianism*, *supra* note 85.

many of the much-needed CBA methodological reforms, including Professor Rowell's recommendations regarding the problem of "double discounting,"⁸⁷ are unlikely to be operationalized by agency analysts until after time-consuming new studies have been commissioned and completed. In the meantime, OIRA should not block NHTSA's backover rule.⁸⁸ The executive orders that empower OIRA regulatory review are only effective "to the extent permitted by law."⁸⁹ When a statute directs an agency to act, the administration cannot overrule the statute by fiat. NHTSA's final rule is mandated by statute, and is now overdue.⁹⁰ While—to meet the Act's requirement that NHTSA enable drivers to detect children behind the vehicle—NHTSA was permitted to consider technology, including sensors, cameras, and mirror systems,⁹¹ in field tests, only the video cameras were effective.⁹² NHTSA found that "[l]ess expensive countermeasures, i.e., mirrors and sensors, have thus far shown very limited effectiveness and thus would not satisfy Congress's mandate for improving safety."⁹³

While stalling the rule may have saved automakers some compliance costs in the short run, it is highly unlikely that automakers would actually prefer a switch from safety equipment consumers like, such as back-up cameras, which are already standard equipment in 45% of 2012 model cars,⁹⁴ to something less effective that will likely be unpopular with consumers, such as unsightly "cross-view" side mirrors that extend much

87. See generally Rowell, *supra* note 80.

88. See Rowell, *supra* note 2 ("OIRA should refuse to let the regulation through until the agency completes an adequate analysis.").

89. Exec. Order No. 13,563, 3 C.F.R. 215, 217 (2012) ("Nothing in this order shall be construed to impair or otherwise affect . . . authority granted by law to a department or agency, or the head thereof"); Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994) (reprinted as amended in 5 U.S.C. § 601 (1994) ("Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.")).

90. See Cameron Gulbransen Kids Transportation Safety Act of 2007, Pub. L. No. 110-189, §2(b), 122 Stat. 639, 639-42 (2008) (codified as amended at 49 U.S.C. § 30111 (Supp. 2011)).

91. *Id.*

92. Federal Motor Vehicle Safety Standard, Low-Speed Vehicles Phase-In Reporting Requirements, 75 Fed. Reg. 76,186, 76,189 (proposed Dec. 7, 2010) (to be codified at 49 C.F.R. pts. 571, 585); see also NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., VEHICLE BACKOVER AVOIDANCE TECHNOLOGY STUDY 3-5 (Nov. 2006) (while sensors and mirrors were also statutory options, they were highly unsuccessful at preventing backover accidents in NHTSA field tests) [hereinafter VBATS].

93. 75 Fed. Reg. at 76,189.

94. Nick Bunkley, *U.S. Rule Set for Cameras at Cars' Rear*, N.Y. TIMES, Feb. 27, 2012, at A3. Smaller, convex "look-down" mirrors—which can only be mounted on a subset of passenger vehicles—were also studied by NHTSA, and—like cross-view mirrors—were effective at preventing backover accidents in 0% of trials. VBATS, *supra* note 92, at 3.

further out to the sides of vehicles, as on a school bus.⁹⁵

Mandatory back-up camera systems may cost some consumers an extra \$58 to \$203 per vehicle,⁹⁶ a significant extra cost. But there are currently no regulations governing rearview visibility⁹⁷ and, in vehicles without back-up cameras, the rearview blind spot—the area that cannot be seen even when one uses side and rearview mirrors and also looks over one’s shoulder—can extend up to 101 feet behind the vehicle.⁹⁸ To demonstrate the need for rearview cameras, one advocacy group managed to fit sixty-two children in the blind spot behind a single large SUV; the driver, despite using all mirrors and looking over her shoulder, could see none of these children.⁹⁹

When CBA proponents argue against intuitively appealing, but allegedly “cost-ineffective,” regulations, they often note that every dollar spent as a result of such regulations is a dollar that cannot be spent on goods like “housing, education, transportation, [and] national security.”¹⁰⁰ While this is true, because there is no mechanism that will cause the averted regulatory costs to be diverted into such projects, it is equally true that this is money that cannot be spent on chrome rims, plasma televisions, spa treatments, or top-shelf vodka. Forgone national security, for example, is only an opportunity cost of the NHTSA regulation to the extent the NHTSA regulation actually diverts resources away from national security.

Even if, by preventing NHTSA from issuing this regulation, OIRA could somehow cause the averted regulatory costs to be used in a more cost-beneficial way (from a broad, societal perspective), OIRA is simply not empowered to override any allegedly poor social welfare choices embodied in acts of Congress. NHTSA was supposed to finalize its backover rule last year, but missed its deadline. According to NHTSA’s estimates, for every year of regulatory delay, there will be approximately 7,000–8,000 additional injuries due to backover accidents, and about 100 extra deaths.¹⁰¹

And that is a shame.

95. See Brian Naylor, *Government Backs Up On Rearview Car Cameras*, NAT’L PUB. RADIO (Mar. 02, 2012), <http://m.npr.org/news/Politics/147742760?singlePage=true>.

96. 75 Fed. Reg. at 76,236.

97. Bunkley, *supra* note 94, at A1, A3.

98. *Id.* at A3; see also *The Danger of Blind Zones: the Area Behind Your Vehicle Can Be a Killing Zone*, CONSUMER REP., <http://www.consumerreports.org/cro/2012/03/the-danger-of-blind-zones/index.htm> (last updated March 2012) (reporting that rear blind spots were as far as fifty-one feet for pickup trucks).

99. Bunkley, *supra* note 94, at A3; see KidsandCarsUSA, *KidsandCars 62 Children*, YOUTUBE, (Feb. 22, 2011) <http://www.youtube.com/watch?v=fn0RocUSLmk>.

100. Graham, *supra* note 56, at 412.

101. 75 Fed. Reg. at 76,189.



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American University Washington College of Law
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All footnote citations should follow the Nineteenth Edition of *The Bluebook*.