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A HAPPINESS APPROACH TO COST-BENEFIT ANALYSIS

Foreword

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Sometimes happiness is as simple as seeing what is in front of our faces. Though the *Duke Law Journal* has hosted an administrative law symposium for the past forty-three years, there are few guidelines for the symposium's design. The executive board of Volume 62 knew that we would be responsible for organizing a symposium, but we had little notion of how we would carry out that responsibility. We need not have worried.

In February of 2012, months before we planned to discuss our symposium, *Well-Being Analysis vs. Cost-Benefit Analysis*¹ landed in front of our article selection committee. Professors John Bronsteen, Christopher Buccafusco, and Jonathan Masur's article captured the committee's attention with its strong claim, accessible use of data, and good humor. Multiple committee members pointed to the rise of hedonic psychology in the past two decades² and voiced enthusiasm

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1. John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603 (2013).

2. See Daniel Kahneman, Ed Diener & Norbert Schwarz, *Preface* to WELL-BEING: FOUNDATIONS OF HEDONIC PSYCHOLOGY, at ix, ix (Daniel Kahneman, Ed Diener & Norbert Schwarz eds., 1999) (characterizing hedonic psychology as a distinctly new field of psychology); see also Jim Holt, *Two Brains Running*, N.Y. TIMES BOOK REV., Nov. 27, 2011, at 16 (reviewing Daniel Kahneman's THINKING, FAST AND SLOW (2011), and praising the author's innovations in hedonic psychology).

for an article that grappled seriously with the possibility of applying new interdisciplinary findings to law. Consensus quickly developed to make *Well-Being Analysis* the first article we would offer to publish in Volume 62.

Once we had decided to offer, however, a second question arose: would we make the article part of our administrative law symposium? On this question the committee was more hesitant. One prophetic editor warned that if we put *Well-Being Analysis* in the symposium, we had better be ready for it to be the subject of the symposium, because everyone would want to talk about it. We decided to defer the symposium question. We had months to think about it, after all, and we could always issue a call for papers in the fall.

Five weeks later, we still had not discussed plans for the symposium, and Professor Matthew Adler's article came before the article selection committee. *Happiness Surveys and Public Policy: What's the Use?*³ was rich in philosophical argument and exhaustive in attention to fine distinctions. Even so, the committee was reluctant to publish two pieces on well-being analysis (WBA) in the same volume until one editor suggested what now seems obvious: our administrative law symposium was staring us in the face. Professor Adler's article spoke directly to the proposals raised by Professors Bronsteen, Buccafusco, and Masur, and even in that early draft Professor Adler cited a previous work by the trio. Why wait until the fall to solicit papers when we could build our symposium around two articles we already loved? In the two articles we had an opportunity not only to set a broad topic for the symposium, but also to promote a specific conversation among distinguished scholars—a conversation that crossed disciplines from law and economics to philosophy and neurobiology. It was a conversation that interested us, and we hoped it would interest others too.

Happily for us, the authors accepted our offer. The symposium, which occurred on February 15, 2013, featured impassioned exchanges on the merits of WBA and revealed a generational divide between scholars that we had not expected back in March of 2012. Faculty members have asked the *Duke Law Journal* why it continues to host an administrative law symposium—surely more than forty years of administrative law is enough? This year's symposium was a reminder of how broad conversations in culture and science can

3. Matthew D. Adler, *Happiness Surveys and Public Policy: What's the Use?*, 62 DUKE L.J. 1509 (2013).

inform administrative law, and a small conversation about administrative law can portend large things for the way our government works. We could not be prouder to publish the pillars of that conversation, and supporting commentaries, here in the *Duke Law Journal*.

This symposium is a forward-looking consideration of WBA, crystalizing the criticisms and limitations of cost-benefit analysis (CBA) circa 2013. Perhaps most importantly, it contributes new considerations to an old field⁴ that has seen rapid academic and policy expansion since the 1970s. Hedonics became an applied discipline with the rise of the role—and idea—of CBA in the American regulatory state.⁵ In its essence, hedonics examines revealed preferences in order to price amenities that lack transparent or explicit markets. The monetary price of a bond, or a loaf of bread, has long been scrutinized by economists.⁶ But CBA, as a hedonic methodology, has tackled the harder task of valuing far more ephemeral goods, such as the value of clean air or the statistical risk of disease.⁷ Since the administration of President Jimmy Carter, the use of those valuations has been enshrined in executive orders and statutes as driving justifications for regulatory rulemaking and policy.⁸

4. The public-welfare analysis underlying CBA was first proposed as a principle of engineering by Jules Dupuit. See E.J. MISHAN & EUSTON QUAH, *COST-BENEFIT ANALYSIS* 243 (5th ed. 2007) (noting that Dupuit introduced the concept of consumer surplus in 1844). The analysis was grafted into the welfare economics of Alfred Marshall. See ALFRED MARSHALL, *ELEMENTS OF ECONOMICS OF INDUSTRY* 79 (3d ed. 1899) (“We may now turn to consider how far the price, which is actually paid for a thing, represents the satisfaction that arises from its possession. This is a subject on which economic science has very little to say, but that little is of some importance.”).

5. See generally Raymond B. Palmquist, *Hedonic Models*, in *HANDBOOK OF ENVIRONMENTAL AND RESOURCE ECONOMICS* 765 (Jeroen C.J.M. van den Bergh ed., 1999) (describing how hedonic models apply to environmental economics).

6. See JOHN MAYNARD KEYNES, *A TREATISE ON MONEY: THE PURE THEORY OF MONEY* 200–09 (1930) (conducting an early and foundational analysis of financial interest rates); see also DAVID McNALLY, *POLITICAL ECONOMY AND THE RISE OF CAPITALISM: A REINTERPRETATION* 93–94 (1990) (attributing the rise of the Physiocrats—a school of proto-economists in eighteenth-century France—in part to the study of the grain trade).

7. For numerous examples and real-world applications of CBA, see generally EUSTON QUAH & RAYMOND TOH, *COST-BENEFIT ANALYSIS: CASES AND MATERIALS* (2012).

8. See Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979) (requiring that agencies consider alternative means for achieving regulatory goals and that they choose “the least burdensome of the acceptable alternatives”). This mandate for cost-effectiveness was modified by President Reagan’s Executive Order 12,291, 3 C.F.R. 127, 128 (1982), which required that the benefits of a regulation exceed its costs; by President Clinton’s Executive Order 12,866, 3 C.F.R. 638, 644–48 (1994), *reprinted as amended in* 5 U.S.C. § 601 note at 745, 747–49 (2006), and 5 U.S.C. § 601 note at 126, 128–29 (Supp. V 2012), which required that all regulations be submitted for CBA by

Unsurprisingly, CBA faced attack from the get-go because it works to ascribe monetary-denominated prices to goods and amenities many may regard—either morally or intrinsically—as “priceless.”⁹ Such analysis, critics have contended, is “value laden” in that it ignores the distribution of individual price preferences for amenities.¹⁰ To some extent, this judgment was conceded early on. Otto Eckstein, a CBA pioneer and member of the president’s Council of Economic Advisers, noted in 1958 that “[t]here is no logical way of incorporating distributive effects into the benefit-cost analysis, which must confine itself to the one dimension of benefit for the country as a whole.”¹¹ Still, CBA’s defenders have rightly contended that imperfect—even morally uncomfortable—measures are better than leaving regulation to agencies’ untutored, unfalsifiable hunches and assumptions.¹² After all, the person on the street might insist that a human life is infinitely valuable, or that a price tag cannot be placed on clean water.¹³ But the preferences revealed by that person’s

the Office of Information and Regulatory Affairs (OIRA); by President Bush’s Executive Order 13,422, 3 C.F.R. 191, 191 (2008), which stressed the importance of new regulations being justified by “market failure”; and by President Obama’s Executive Order 13,563, 3 C.F.R. 215, 216–17 (2012), which encourages retrospective review of existing regulations and directs that CBA should consider “equity, human dignity, fairness, and distributive impacts.”

9. See generally FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004) (taking a critical approach to CBA’s focus on pricing amenities without taking into account the intrinsic values of those amenities); see also ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 206 (1993) (“Consider the difficulties encountered in attempting to force all our valuations of environmental goods into the instrumental mold. People appreciate many environmental goods for their beauty. Appreciation is a mode of intrinsic valuation.”).

10. Joseph Persky, *Retrospectives: Cost-Benefit Analysis and the Classical Creed*, J. ECON. PERSP., Fall 2001, 199, 201. The origins of CBA were rooted in Marshallian notions of welfare economics and the marginal utility of income. In 1932, economist Lionel Robbins articulated the criticisms of this Marshallian approach by arguing that “economists, as scientists, could say nothing about the relative pleasures of a Brahmin and an untouchable.” *Id.* (summarizing LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE (1932)).

11. OTTO ECKSTEIN, WATER-RESOURCE DEVELOPMENT: THE ECONOMICS OF PROJECT EVALUATION 36 (3d prtg. 1965).

12. See John D. Graham, *Making Sense of Risk: An Agenda for Congress*, in RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION 183, 189 (Robert W. Hahn ed., 1996) (“When potential dangers are brought to the attention of federal agencies, agencies need to assess those dangers in a responsible manner. Congress can work to inculcate a strong sense of responsibility by requiring agencies to follow several basic principles of sound risk assessment practice.”).

13. John Graham suggests that the public is no better than administrative agencies at intuitive valuations of costs and benefits, arguing that “[w]e are paranoid in the sense that we

economic behavior, hedonics scholars point out, indicate otherwise: our daily behavior reveals that we do in fact price the “priceless.”¹⁴

At first glance, WBA is merely a contribution to the hedonics literature. But its appeal for this symposium extends beyond simply pushing the boundaries of hedonic methodology. Rather, WBA proposes to refocus hedonics away conceptually from monetary-denominated regression analysis to a psychological unit of perceived well-being. In a sense, WBA connects the econometric and psychometric sides of hedonics into policy-exploitable research. And it does so in a way that satisfies the moral and intuitive difficulties that inhere in traditional CBA. The social scientist, the politician, the regulator, the ethicist, and the person on the street might all agree that empirically informed regulation is preferable to the hunch-based approach of a pre-CBA era. Yet, hereto, that agreement might very well have been one of principle only, breaking down with the problems associated with CBA methodology.¹⁵ In this symposium, Professors Bronsteen, Buccafusco, and Masur have introduced a methodology that erects a bridge between these constituents’ empirical, policy, and moral concerns. In other words, they may have suggested a way to make hedonics work for all the consumers (and critics) of CBA.

Nevertheless, Professors Bronsteen, Buccafusco, and Masur acknowledge that this is only a beginning framework. Doing empirical hedonics is difficult enough when talking dollars and euros. Quantifying well-being units perhaps requires a totally different experimental apparatus. Indeed, the call for WBA requires a quantitative instrument for happiness. Professor Adler, this symposium’s counterpoint to Professors Bronsteen, Buccafusco, and Masur, criticizes existing happiness studies in economics as lacking

devote large amounts of resources and attention to alleged dangers that are speculative (at best) and probably small (or even nonexistent).” *Id.* at 184.

14. In a seminal article that gave birth to contemporary hedonic economics, Sherwin Rosen argued that hedonics is a process of individuals sorting between monetary (for example, housing) and non-monetary (for example, weather) considerations. See Sherwin Rosen, *Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition*, 82 J. POL. ECON. 34, 35 (1974) (“[P]rice . . . guides both consumer and producer locational choices regarding packages of characteristics bought and sold. . . . As usual, market clearing prices . . . fundamentally are determined by the distributions of consumer tastes and producer costs.”).

15. See, e.g., Graham, *supra* note 12, at 199 (“Many human health and environmental benefits remain difficult to quantify (for example, the monetary value of slightly improved visibility on summer days).”).

econometric rigor. If Professor Adler's criticism hits the mark, then the path toward a rigorous and useful happiness or well-being instrument may stretch many miles past the current state of the field. But Professors Bronsteen, Buccafusco, and Masur have started down that path, providing an intellectual framework for making happiness a quantifiably actionable consideration. If CBA is gauche for ascribing monetary-denominated prices to hedonic goods and amenities, WBA provides both rigor and also a measure of price more in tune with our intuitions about the intrinsic value of things like clean air, safe cities, unadulterated food, or even our own statistical mortality.

We consider ourselves fortunate to have received two outstanding contributions to the role of hedonics in administrative law in the same submissions season. Our symposium, *A Happiness Approach to Cost-Benefit Analysis*, represents the *Duke Law Journal's* commitment to a discussion of happiness and policy that will continue at all levels of government. It is a topic that implicates important values of daily life, and each article and commentary speaks thoughtfully to the promises and limitations of well-being analysis. Whatever the future of well-being and cost-benefit analyses, the *Duke Law Journal* is excited to present some of the best work in the field in 2013.