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## Dignity as a Value in Agency Cost-Benefit Analysis

**ABSTRACT.** President Obama's 2011 Executive Order 13,563 on cost-benefit analysis (CBA) authorizes agencies to consider "human dignity" in identifying the costs and benefits of proposed regulation. The notion of incorporating dignity into CBA, this Note points out, highlights the importance of choosing between different conceptions of CBA: one that aims to derive a monetary figure for dignity, and one that seeks to take dignity into account in unmonetized form. This Note illuminates the stakes of the choice between monetized and unmonetized CBA by drawing attention to various ways in which dignity might be incorporated into CBA.

The Note then argues that CBA can and must include dignity in *unmonetized* form. In doing so, agencies should embrace "qualitative specificity," which involves elucidating in qualitative terms the nature and gravity of dignitary considerations in a particular regulatory context. Qualitative specificity, the Note indicates, enables agencies more transparently to assess the positive and negative consequences of government regulation, and it facilitates public participation in the process of defining the nature of dignity in the senses relevant to the effects of government regulation. In response to the critique that qualitative specificity is indeterminate and fails to constrain administrative discretion, the Note contends that qualitative specificity provides only as much determinacy as is actually available; this approach is preferable to monetization that emerges with a determinate number but fails to accommodate the complex and malleable nature of dignity.

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## INTRODUCTION

On January 18, 2011, President Obama issued Executive Order 13,563, titled “Improving Regulation and Regulatory Review.”<sup>1</sup> In this Order, the President affirmed cost-benefit analysis (CBA) as the appropriate method of determining the suitability of regulation by executive agencies. At the same time, President Obama’s Order indicated that agencies, in conducting CBA, “may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”<sup>2</sup> Of these benefits, “human dignity” is the major addition to previous Executive Orders.<sup>3</sup>

The inclusion of human dignity among the factors that agencies are authorized to consider in CBA leads to difficult questions. CBA frequently features strenuous attempts to attach dollar values to the advantages and disadvantages of regulation.<sup>4</sup> Yet dignity is often viewed as a quintessential example of a value impervious to monetization.<sup>5</sup> How, then, could dignity possibly be incorporated into CBA?

In fact, the mention of dignity in E.O. 13,563 received a fair amount of skepticism. Some proponents of CBA criticized the addition of “human dignity” to E.O. 13,563 on the basis that incorporating dignity into CBA would permit agencies to pursue costly regulations simply because they advanced the “fudge factor” of dignity.<sup>6</sup> The *Wall Street Journal* editorialized that “a rule

1. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).
2. *Id.* at 216.
3. Compare *id.*, with Exec. Order No. 12,866, 3 C.F.R. 638, 639 (1994) (mentioning as applicable benefits “potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity”). “Fairness” is also new in the 2011 Executive Order, although “equity” was previously mentioned.
4. See DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* 94-95 (1996).
5. See Arden Rowell, *Partial Valuation in Cost-Benefit Analysis*, 64 ADMIN. L. REV. 723, 734 n.45 (2012) (noting that dignity “could arguably lose its value if it is exchanged for money”). A prominent philosophical account of dignity conceives of dignity, in contrast to price, as worth that cannot be exchanged. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 102-03 (H.J. Paton trans., 1964) (1785). However, the conception of dignity as absolute worth appears in legal as well as philosophical contexts. For example, a German case in 2006 prohibited the state from shooting down hijacked passenger airplanes on the grounds that the dignity of each individual is inviolable. See MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 105-07 (2012).
6. See *Obama Review of Regulatory Burden to Be Weighed in Cost-Benefit Analysis*, SIDLEY AUSTIN LLP 3 (Feb. 24, 2011), <http://www.sidley.com/Obama-Review-of-Regulatory-Burden-to>

might pass Mr. Obama's cost-benefit test if it imposes \$999 billion in hard costs but supposedly results in a \$1 trillion increase in human dignity, whatever that means in bureaucratic practice.<sup>77</sup> On this view, introducing dignity into CBA weakens CBA's capacity to assess accurately the positive and negative aspects of regulation—and, in particular, to constrain government to regulate only when doing so would produce net social gain.

Individuals opposed to CBA, for their part, have long contended that CBA is doomed to failure by its inability to take proper account of dignity and other “unmonetizable” values. CBA critic Frank Ackerman, for instance, writes that “[c]ost-benefit analysis fails because it assigns prices to the dignity of human life and the natural world.”<sup>78</sup> According to this perspective, CBA cannot present an accurate portrait of the advantages and disadvantages of regulation precisely because it attempts to monetize values that cannot be priced, including dignity.

Both supporters and opponents of CBA have thus expressed the view that dignity and CBA fundamentally do not mix. Yet American agencies are now authorized to embark on the project of mixing them. Looming large are the questions of whether this project is justified and, if so, how it should be implemented and which values are at stake in its implementation.

This Note tackles these questions regarding the relationship between dignity and CBA as follows. The Note emphasizes the importance of taking dignity into consideration as part of an assessment of the positive and negative consequences of regulation. Given that agencies are evaluating the costs and benefits of regulation, they should include dignity in this evaluation at least in certain contexts (below I discuss the contexts of prison rape, disability, and age discrimination, among others). However, incorporating dignity into CBA requires a particular conception of CBA. Traditionally, CBA has been presented as a mechanism for the conversion of regulatory effects into monetary values. However, alternative models of CBA exist. For example, Richard Hahn and Cass Sunstein have proposed a version of CBA that does not require monetization.<sup>9</sup> I argue that their model moves in the right direction, although

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-Be-Weighed-in-Cost-Benefit-Analysis-02-24-2011.

7. Editorial, *Obama's Rule-Making Loophole*, WALL ST. J., Jan. 24, 2011, <http://online.wsj.com/article/SB10001424052748704881304576094132896862582.html>.
8. Frank Ackerman, *What Should OIRA Do? Comments on the Role of Cost-Benefit Analysis in Regulatory Review*, OFF. INFO. & REG. AFF. 3 (Feb. 24, 2009), [http://www.reginfo.gov/public/jsp/EO/fedRegReview/Dr\\_Frank\\_Ackerman.pdf](http://www.reginfo.gov/public/jsp/EO/fedRegReview/Dr_Frank_Ackerman.pdf).
9. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis* 7-8 (U. Chi. L. & Econ. Working Paper,

it contains tension between the drive to monetize and the recognition of monetization's limits. The same uneasy coexistence of accommodation for unmonetized values and emphasis on monetization is found in official government guidance on CBA.

The Note builds on alternative conceptions of CBA and urges agencies to adopt a model I call *qualitative specificity*. According to the Note, regulators should not try to monetize dignity or provide an approximate monetary measure of dignity.<sup>10</sup> Instead, they should clarify, in qualitative terms, the nature and gravity of the dignitary values at stake in a particular regulatory context. I contend that qualitative specificity represents an improvement on existing agency CBAs. Qualitative specificity enables agency transparency about the features of dignitary value and their significance, and it facilitates broader participation in the decision-making process regarding regulation affecting dignity.

Part I characterizes divergent theoretical and historical conceptions of CBA. Parts II and III explore the relationship between dignity and CBA—from both a theoretical and a practical standpoint—at a level of detail not generally found in current literature.<sup>11</sup> Part II clarifies the relationship between dignity and CBA

John M. Olin L. & Econ. Working Paper No. 150 (2d Series), 2002), <http://ssrn.com/abstract=309754>.

10. I use the term “monetize” and not “quantify” to describe the effort to derive a monetary value (or an approximate monetary value) for dignity. In doing so, I follow OMB guidance on CBA, which sometimes separates “monetization” and “quantification.” See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, at 27 (Sept. 17, 2003), <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/ao04/a-4.pdf> [hereinafter CIRCULAR A-4]. The distinction is that monetization results in a monetary value, while quantification results in a numerical but *non*-monetary assessment of the magnitude of benefits or costs (for instance, the number of people who would be benefited by a rule). See also Cass R. Sunstein, Nonquantifiable 8 (June 13, 2013) (unpublished manuscript), <http://ssrn.com/abstract=2259279> (describing the distinction between monetization and quantification).
11. Current work includes a couple of very brief references to the inclusion of dignity in E.O. 13,563 without analyzing the implications of this move or comprehensively examining the use of dignity in actual CBAs. See Michael A. Livermore, *A Brief Comment on “Humanizing Cost-Benefit Analysis,”* 2011 EUR. J. RISK REG. 13, 14; Neomi Rao, *American Dignity and Healthcare Reform*, 35 HARV. J.L. & PUB. POL’Y 171, 178-79 (2012). Cass Sunstein deals more extensively with the question of how agencies can take unmonetized values into account, and his work includes discussion of dignity as such a value. See Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, 114 COLUM. L. REV. 167, 194-97 (2014) [hereinafter Sunstein, *The Real World*]; Sunstein, Nonquantifiable, *supra* note 10, at 4-6, 12. Although this Note builds on Sunstein’s work, I depart from Sunstein in avoiding the suggestion that agencies reach towards monetary

by providing a framework of options for incorporating dignity into various types of assessment of the positive and negative aspects of regulation. Whether these types of assessment count as CBA depends on the conception of CBA at issue. In clarifying the relationship between dignity and CBA, Part II elucidates possible choices that government regulators can make in response to E.O. 13,563, thereby facilitating more self-conscious decisions about the incorporation of dignity into CBA. Drawing on the framework provided in Part II, Part III reviews agency references to dignity in existing CBAs. I note that existing agency references to dignity diverge in the extent to which they monetize dignity. I argue for the importance of greater self-consciousness about the choice whether to monetize dignity, in addition to further specificity about the dignitary effects of regulation.

One response to the problem of incorporating dignity into CBA is to monetize dignity, or to approximate monetization to the greatest extent possible. In Part IV, however, I argue against monetization. One of the reasons is that the attempt to monetize dignity, or to provide an approximate monetary measure of dignity, fails to reflect dignity's incommensurability with money.<sup>12</sup> Second, the complexity and malleability of dignity place serious roadblocks in

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approximations of dignity wherever possible, and in avoiding ambivalence about whether to recommend the monetization of dignity. My argument is that agencies should not attempt to provide an approximate monetary measure of dignity, but should rather seek qualitatively specific understandings of dignity.

12. For examples of the general claim that CBA illegitimately attempts to “price the priceless”—that is, to assign dollar values to goods (such as human life, health, and the natural environment) that cannot genuinely be monetized—see ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 210–12 (1993); and Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002). See also Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, in *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES* 77, 77–78 (Matthew D. Adler & Eric A. Posner eds., 2001) (describing the “incommensurability problem” with cost-benefit analysis). There are a few references to dignity as a good that cannot be monetized, and they largely criticize CBA for its inability to take adequate account of unmonetized values. See, e.g., Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 72 (1998) (“Virtues like altruism, dignity, equity, fairness . . . that are highly valued in a civilized society are belittled or ignored entirely in a cost-benefit regulatory regime in which allocative efficiency is the only goal.”); Ackerman, *supra* note 8, at 3 (arguing that “[c]ost-benefit analysis fails because it assigns prices to the dignity of human life and the natural world”). Although I draw on the incommensurability problem as one (among other) critiques of the monetization of dignity, I reject the stark opposition between unmonetized goods and CBA that is prevalent in the “pricing the priceless” literature. Rather, I claim that dignity can and should be incorporated into agency practices of CBA in an unmonetized, qualitatively specific form.

front of monetization. Third, regulators faced with a monetized value for dignity may seek to derive a trans-contextual measure of dignity. Such a measure of dignity would be at odds with dignity's highly contextual nature. More broadly, the impulse behind monetization seems to be to constrain government discretion, but monetization in the context of dignity would appear to produce relatively opaque numbers.

After arguing against the attempt to monetize dignity, I propose and defend an approach I call "qualitative specificity." The term "dignity" has many meanings. Dignity could be perceived, for example, in terms of a status of equality;<sup>13</sup> a feature of individuals with autonomy;<sup>14</sup> or an element of basic humanity violated, say, by torture.<sup>15</sup> Dignitary harm, in turn, can take on multiple forms: for instance, loss of reputation in the eyes of others; psychological feelings of humiliation; exposure of intimate details; loss of control over one's surroundings; lowering to a diminished status; exclusion from a group; or being treated as a "mere means" instead of an end in itself.

Given the diverse possibilities involved in conceptualizing dignity, agencies pursuing qualitative specificity would identify the nature of the dignitary harm that a given regulation is meant to ameliorate. They would also weight this harm based on qualitative scales of intensity (unlikely to very likely; short-lived to long-lasting; moderate to severe). Importantly, agencies would not be required to lay down the appropriate sense of "dignity" on their own. Rather, agencies could draw on input from outside parties both before and during the notice-and-comment period and thereby gain access to the lived experience of those for whom dignity matters. The presentation of qualitative specificity in this Note builds on existing Office of Management and Budget (OMB) guidance to agencies regarding CBA,<sup>16</sup> but it provides a more nuanced understanding of the ways in which qualitative specificity could be achieved, and is less ambivalent about the appropriate role of qualitative methods.<sup>17</sup>

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13. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 690, 723 (2008); Reva B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-Sex Marriage*, 10 INT'L J. CONST. L. 355, 365 (2012).

14. McCrudden, *supra* note 13, at 659, 723; Siegel, *supra* note 13, at 365.

15. See McCrudden, *supra* note 13, at 683.

16. CIRCULAR A-4, *supra* note 10, at 27 (noting that agency explanations of unquantified benefits or costs "could include detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs").

17. See *infra* notes 31-36 and accompanying text.



This Note contends that qualitative specificity has advantages over monetization along at least two dimensions. First, qualitative specificity more fully vindicates the value of dignity by acknowledging the concept's complexity instead of seeking to assign a clear-cut monetary value. Second, qualitative specificity has the democratic benefits of greater transparency and increased participation. In terms of transparency, qualitative specificity clarifies the specific meaning that agencies take "dignity" to assume in a particular context and the weight that agencies attach to a particular dimension of dignity. In terms of participation, qualitative specificity envisages a significant role for engaged members of the public to bring to bear their experiences in defining the nature and weight of dignitary concerns in a particular context.

Qualitative specificity cannot deliver the goods that advocates of monetization prize, such as determinacy and complete constraint of agency discretion. This need not be viewed as a deficiency, however, because the excision of judgment in weighing benefits and drawbacks of regulation is a futile goal. Attempts to monetize dignity, I suggest in this Note, do not replace complex moral decision-making with a pure focus on hard numbers, but they do run the risk of hiding this complexity behind the numbers, and this is a risk that qualitative specificity avoids. The question is whether the practice of cost-benefit analysis as carried out by administrative agencies can adapt to the features of dignity that elude monetization; qualitative specificity represents, I argue, agencies' best bet. In addition to these implications for the theory and practice of CBA, the Note has ramifications for the legal function of dignity. Dignity plays a role in a number of legal contexts, particularly involving constitutional law and human rights, though there is no clear consensus on what dignity means and what kind of legal function this concept should serve.<sup>18</sup> This Note looks at the role of dignity in a different context, the administrative sphere, and presents a view about the most appropriate understanding of dignity for the purposes of evaluating the effects of regulation: not as absolute value, but as a contextually-specific valuable quality among others. The Note, in other words, elucidates a plausible legal role for dignity that transcends a conception of dignity as "absolute value."

Finally, I wish to clarify the nature of my claims in advocating a particular way for agencies to consider dignity in CBA. First, the Note is designed to speak to existing agency mandates. Dignity has been added to the list of

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18. See, e.g., JEREMY WALDRON, *DIGNITY, RANK, & RIGHTS* 13-15 (2012); McCrudden, *supra* note 13, at 722-24; Siegel, *supra* note 13, at 365.

unmonetized values that agencies may lawfully incorporate into CBA, and I argue that qualitative specificity provides a more suitable way to exercise this authority. In other words, when agencies consider dignity, they have and will do so under the rubric of an existing practice called “cost-benefit analysis”; this Note aims to influence the way in which this practice is carried out.

Second, the Note conceives of the incorporation of dignity into agency documents that are called “cost-benefit analyses” as a positive good, on the condition that agencies embrace qualitative specificity instead of pursuing monetization. A basic reason is that the significant value of dignity should not be left out of a crucial tool that agencies use to assess the benefits and drawbacks of regulation. A more complex reason is that including dignity in CBA, in qualitatively specific form, furthers the goal of encouraging agencies to be more transparent about the basis for regulation and provides greater opportunity for public participation in the development of a regulatory regime that evinces a concern for dignity.

## **I. COST-BENEFIT ANALYSIS: HISTORICAL AND THEORETICAL CONTEXT**

### *A. The Theory of CBA*

The question of what counts as “cost-benefit analysis” has no settled answer, and this creates significant ambiguity regarding the issue of whether and how dignity can be incorporated into CBA. I start with an account of CBA that can justifiably be characterized as traditional or conventional, and then move to understandings of CBA (including parts of official OMB guidance) that challenge the traditional understanding.<sup>19</sup> This Note, in highlighting the importance of not monetizing dignity, seeks to pull readers’ views of CBA closer to non-traditional conceptions. In other words, to the degree that readers have fluid understandings of whether CBA requires full monetization, the Note aims to move their understandings in the unmonetized direction.

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19. See MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 9-24 (2006) (describing “the traditional view” of CBA as derived from the Pareto and/or Kaldor-Hicks principles); RICHARD O. ZERBE JR. & ALLEN S. BELLAS, *A PRIMER FOR BENEFIT-COST ANALYSIS* 14 (2006) (characterizing “the modern version of [Kaldor-Hicks]” as “the mainstream view” of CBA).

### 1. *The Traditional Understanding of CBA*

CBA emerges from the field of welfare economics, which evaluates policies based on whether they increase people's welfare, understood as preference satisfaction.<sup>20</sup> The difficulty of making interpersonal comparisons of preference satisfaction inspired a turn to the Pareto criterion, namely the endorsement of those policies that make at least one person better off and no one worse off.<sup>21</sup> Given the paucity of policies that actually produce such a result, however, economists have drawn on the concept of "potential Pareto improvements," or the Kaldor-Hicks criterion. According to this criterion, society should endorse policies that would make everyone better off if those who gained from the policy *in theory* compensated the "losers."<sup>22</sup>

CBA requires selecting the policy that maximizes net benefits, in the sense of the largest difference between what the "winners" would pay to implement the policy and what the "losers" would require in compensation for the policy. The result is to select the policy that maximizes potential Pareto improvements.<sup>23</sup> The question of how much people would be willing to pay can be answered either through "contingent valuation" studies, which ask people to put a price on a particular outcome (for instance, preventing the extinction of bald eagles), or by inference from people's conduct in other markets (revealed preference studies).<sup>24</sup> For instance, the cash value of risks to human life can be calculated by measuring the extra wages that are paid to workers with riskier jobs, on the assumption that workers accept the heightened risk in exchange for a certain price.<sup>25</sup>

As Elizabeth Anderson notes, this understanding of CBA requires that "everything [people] value which is affected by the policy has a monetary equivalent."<sup>26</sup> Richard Layard and Stephen Glaister, in a text explaining the theory and practice of CBA, confirm this view: "The only basic principle is that we should be willing to assign numerical values to costs and benefits, and arrive at decisions by adding them up and accepting those projects whose

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20. HAUSMAN & MCPHERSON, *supra* note 4, at 84.

21. *Id.* at 87-88.

22. ADLER & POSNER, *supra* note 19, at 10-11.

23. HAUSMAN & MCPHERSON, *supra* note 4, at 93-94.

24. Ackerman & Heinzerling, *supra* note 12, at 1557-58.

25. *Id.* at 1558.

26. ANDERSON, *supra* note 12, at 191.

benefits exceed their costs.”<sup>27</sup> On the traditional understanding, therefore, CBA is entirely monetized.

## 2. *Alternative Understandings of CBA*

An alternative perspective on CBA appears in the work of Richard Hahn and Cass Sunstein. Hahn and Sunstein indicate that they use the term “CBA” in a “modest, nonsectarian way,” according to which “cost-benefit analysis requires a full accounting of the consequences of an action, in both quantitative and qualitative terms.”<sup>28</sup> This account would seem to contradict the focus in conventional descriptions of CBA on monetizing costs and benefits. However, Hahn and Sunstein then write: “We do not insist that regulators should be bound by the ‘bottom-line’ numbers; qualitative considerations, and a sense of distributive impacts (not themselves considered ‘benefits’ in the analysis), are permitted to influence public officials,” though there is a presumption against proceeding when “the benefits do not exceed the costs.”<sup>29</sup> This suggests that qualitative benefits do not actually count as “benefits” for the purposes of CBA as understood by Hahn and Sunstein. But qualitative benefits for Hahn and Sunstein are still relevant to CBA, if only in the sense that they can rebut a presumption against enacting a policy whose monetized costs exceed its monetized benefits. Hahn and Sunstein continue: “On this view, the antonym to regulation guided by cost-benefit analysis is regulation undertaken without anything like a clear sense of the likely consequences—or regulation that amounts to a stab in the dark.”<sup>30</sup>

This passage takes a valuable step towards a conception of CBA that disavows the ambition of monetization. However, it evinces some degree of ambivalence about the degree to which CBA requires monetized costs and benefits. The potential for confusion indicates the need for greater clarity regarding the ways in which CBA could take account of benefits, such as dignity, that seem to elude monetization.

Another example of an alternative conception of CBA—albeit one that also contains some ambivalence—can be found in OMB guidance to agencies on

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27. Richard Layard & Stephen Glaister, *Introduction* to COST-BENEFIT ANALYSIS 1, 2 (Richard Layard & Stephen Glaister eds., 2d ed. 1994).

28. Hahn & Sunstein, *supra* note 9, at 7.

29. *Id.*

30. *Id.* at 8.

CBA. This guidance initially presents a fairly traditional understanding of CBA, or “benefit-cost analysis” (BCA):

A distinctive feature of BCA is that both benefits and costs are expressed in monetary units, which allows you to evaluate different regulatory options with a variety of attributes using a common measure. By measuring incremental benefits and costs of successively more stringent regulatory alternatives, you can identify the alternative that maximizes net benefits.

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When important benefits and costs cannot be expressed in monetary units, BCA 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.<sup>31</sup>

However, OMB guidance also envisions analysis of unmonetized benefits and costs in its instructions regarding CBA. OMB expresses a preference for “[s]ound quantitative estimates of benefits and costs,” on the grounds that “they help decision makers understand the magnitudes of the effects of alternative actions.”<sup>32</sup> OMB acknowledges, however, that “some important benefits and costs (e.g., privacy protection) may be inherently too difficult to quantify or monetize given current data and methods.”<sup>33</sup> In this case, OMB recommends *quantifying* (as opposed to monetizing) these costs and benefits: for example, providing numbers on how many miles of water would undergo improvement even if improvements in water quality cannot be monetized.<sup>34</sup> When quantification is not possible, OMB suggests that agencies should “present any relevant quantitative information along with a description of the unquantified effects, such as ecological gains, improvements in quality of life, and aesthetic beauty,” including “detailed information on the nature, timing, likelihood, location, and distribution of the unquantified benefits and costs.”<sup>35</sup>

The result of OMB guidance is to authorize agencies to consider qualitative factors in CBA and—significantly—to treat this consideration as part of CBA, while simultaneously defining CBA in a way that may seem to exclude

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31. CIRCULAR A-4, *supra* note 10, at 10 (footnote omitted).

32. *Id.* at 26.

33. *Id.* at 26-27.

34. *Id.* at 27.

35. *Id.*

qualitative factors. The most consistent reading of OMB guidance would likely be that OMB highly favors monetization but is willing to treat non-monetary analysis as part of CBA when monetization is not possible. In fact, agency CBAs do consider unmonetized factors, as the description of CBAs involving dignity below suggests.<sup>36</sup>

This discussion demonstrates that there exists a practice that agencies call “cost-benefit analysis” and that incorporates unmonetized factors. However, the incorporation of these factors is disfavored, and OMB regulators remain fairly ambivalent about whether the analysis of unmonetized variables counts as “CBA proper.” This Note supports a conception of CBA that embraces unmonetized variables in the area of dignity.

### *B. CBA in U.S. Executive Agencies*

In the context of regulation by U.S. executive agencies, there were precursors to CBA in the Nixon and Carter Administrations, but the major milestone was President Reagan’s Executive Order 12,291.<sup>37</sup> President Reagan’s Order required executive agencies to prepare a Regulatory Impact Analysis (RIA) for each “major”<sup>38</sup> rule they promulgated, and ordered the analysis to contain a description of the potential benefits and costs of the rule.<sup>39</sup> As the CBA regime developed, evaluations of regulatory actions became subject to the oversight of OMB and in particular OIRA.<sup>40</sup>

President Reagan’s Executive Order set off a storm of political controversy.<sup>41</sup> Critics charged that CBA would be used to curtail regulation in favor of business interests, that the process could be manipulated to derive the

36. See *infra* Part III.

37. Hahn & Sunstein, *supra* note 9, at 13.

38. Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982). The Order indicates that:

‘Major rule’ means any regulation that is likely to result in: (1) An annual effect on the economy of \$100 million or more; (2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

*Id.* at 127-28.

39. *Id.* at 129.

40. See Exec. Order No. 12,866, *supra* note 3, at 640.

41. Hahn & Sunstein, *supra* note 9, at 13.

desired results, and that CBA “require[d] assigning dollar values to things that are essentially not quantifiable: human life and health, the beauty of a forest, the clarity of the air at the rim of the Grand Canyon.”<sup>42</sup> Despite the controversy, the Reagan Administration and later the Bush Administration retained the CBA requirement, and President Clinton reaffirmed the commitment to CBA in E.O. 12,866 (1993).<sup>43</sup>

E.O. 12,866 specified that costs and benefits included both quantifiable measures “and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider” and that benefits included “potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity.”<sup>44</sup> President Clinton’s Executive Order was not the first to mention non-quantified costs and benefits; in fact, E.O. 12,291 under President Reagan directed agencies to consider effects “that cannot be quantified in monetary terms, and the identification of those likely to receive” the benefits or bear the costs.<sup>45</sup> President Clinton’s Order, however, drew specific attention to unmonetized costs and benefits, as well as elaborating on their nature.

Against this background, President Obama’s E.O. 13,563 (2011) endorsed CBA as the appropriate method for evaluating government regulation.<sup>46</sup> As several observers noted, an innovation of E.O. 13,563 was the addition of “human dignity” to the “values that are difficult or impossible to quantify” but which agencies may consider “[w]here appropriate and permitted by law.”<sup>47</sup>

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42. Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES, Nov. 7, 1981, <http://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html>.

43. Hahn & Sunstein, *supra* note 9, at 14; *see* Exec. Order No. 12,866, *supra* note 3, at 645.

44. Exec. Order No. 12,866, *supra* note 3, at 639.

45. Exec. Order No. 12,291, *supra* note 38, at 129.

46. Exec. Order No. 13,563, *supra* note 1, at 215; *see also* Barack Obama, *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, <http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html> (“As the executive order I am signing makes clear, we are seeking more affordable, less intrusive means to achieve the same ends – giving careful consideration to benefits and costs.”).

47. Exec. Order 13,563, *supra* note 1, at 216; *see* APA at 65: *Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs?: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 23 (2011) (statement of Susan E. Dudley, Director, George Washington University Regulatory Studies Center) [hereinafter *APA at 65*]; *Regulatory Impediments to Job Creation: Hearing before the H. Comm. on Oversight & Gov’t Reform*, 112th Cong. 201 (2011) (statement of Jerry Ellig, Senior

Critics charged that the addition of “human dignity” to E.O. 13,563 would dilute the precision and transparency of CBA.<sup>48</sup> Eric Posner correctly noted in *The New Republic*, however, that the impact of the inclusion of dignity “depends on how the executive order is implemented.”<sup>49</sup> How, then, could agencies incorporate dignity into CBA? Part II provides an account of several possible answers to this question, and Part III examines agencies’ record to date.

This Part’s discussion of theoretical and historical accounts of CBA reveals that a fully-monetized conception of CBA is the traditional view, but is not monolithic. However, existing alternative accounts are not entirely clear about whether qualitative analysis counts as a part of CBA and seem to treat this possibility as a last resort.

## II. OPTIONS FOR INCORPORATING DIGNITY INTO CBA

This Part indicates several methods by which agencies can take dignity into account when assessing the effects of government regulation. The question of which of these methods counts as “CBA” – and, therefore, whether dignity can be successfully incorporated into CBA – depends on which of the understandings of CBA presented in the previous Part is endorsed. The previous Part indicated that a view of CBA as entirely monetized does not apply across the board, and I identify points at which the incorporation of dignity requires this kind of alternative understanding of CBA. The rest of the Note, in arguing for an unmonetized treatment of dignity, supports an alternative view of CBA.

For illustrative purposes, I use a hypothetical example based on a Rule by the Department of Health and Human Services (HHS) mandating conditions of participation for Community Mental Health Centers (CMHCs) under the Medicare program.<sup>50</sup> HHS does not prepare an RIA listing costs and benefits of this Rule, because it determines that the Rule does not count as a “major”

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Research Fellow, George Mason University Mercatus Center); *Obama Review of Regulatory Burden*, *supra* note 6.

48. See *supra* notes 6-7 and accompanying text.

49. Eric A. Posner, *Obama’s Cost-Benefit Revolution*, *NEW REPUBLIC*, Jan. 22, 2011, <http://www.newrepublic.com/article/81990/obama-cost-benefit-revolution>.

50. Medicare Program: Conditions of Participation (CoPs) for Community Mental Health Centers, 78 Fed. Reg. 64,604 (Oct. 29, 2013) (to be codified at 42 C.F.R. pt. 485) [hereinafter Conditions of Participation].



rule and is therefore not subject to the cost-benefit requirements of E.O. 13,563.<sup>51</sup> Although HHS lists several categories of monetized costs, it does not list dignity among the Rule's benefits. Nevertheless, HHS indicates that one of the Rule's provisions is to require CMHCs to conduct individual or group therapy sessions "in a manner that maintains client privacy and ensures client dignity."<sup>52</sup> We can concentrate on the dignitary benefits of the requirements for therapy sessions, and postulate for the purposes of the example that conducting a therapy session of a kind that ensures client dignity involves requiring CMHCs to set aside a sufficient number of rooms closed to the outside in which therapy can take place.

Before presenting the options for incorporating dignity into an assessment of the consequences of regulation, I wish to make three preliminary points. First, I employ OMB's distinction between "monetized" and "quantified" factors, namely that a factor can be broken down in terms of the number of people or inanimate objects affected without being priced in monetary terms.<sup>53</sup>

Second, the set of options presented here – and the Note as a whole – treats dignity as a *benefit* of regulation. This is largely because the Note aims to speak to current agency practice, and dignity is treated as a benefit in all existing agency CBAs discussing dignity, in addition to the available secondary literature. But this is by no means a necessary choice, for regulatory measures with cost savings could well have dignitary harms. An example would be a decision to lighten protections for patients' health privacy information on the grounds that they inflict substantial costs on businesses, even though patients' dignity is more likely to be compromised since it is now more probable that their health information will be released without their agreement. Provisionally, the same analysis of the options for incorporating dignitary benefits into CBA could be expected to apply to dignitary costs, and the same arguments regarding the importance of specifying dignity in qualitative terms instead of monetizing dignity would be operative. Such symmetry is particularly likely since the conception of qualitative specificity presented in this Note directly examines the dignitary harms that regulation is designed to ameliorate. However, a fuller examination of dignitary costs could certainly be beneficial.

Third, the HHS regulation in question, like most other regulations, has benefits other than dignity. For example, counseling in private rooms, in

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51. See *supra* note 38 and accompanying text.

52. Conditions of Participation, *supra* note 50, at 64,636.

53. CIRCULAR A-4, *supra* note 10, at 27.

addition to promoting dignity, may be more efficacious in terms of promoting mental health than counseling in which patients have less privacy. Although this Part discusses the process of weighing dignitary benefits against the costs of regulation, we should keep in mind that there would be other items on the “benefits” side of the ledger; the discussion here is not meant to suggest that dignity would be the only benefit under consideration.<sup>54</sup> However, regulators will still have to think about how they value dignity in comparison to the costs of achieving greater dignity, and so this example – while simplified – illustrates the basic issues that could be involved in making such an evaluation.

#### *A. Option 1: Qualitative Balancing*

Under a Qualitative Balancing approach, agencies would balance the disadvantages of the regulation (in this case, requiring CMHCs to set aside therapy rooms closed to the outside) against (among other factors) the increased respect for dignity that people (in this case, mental health patients) would experience as a result. One disadvantage could be, for instance, that CMHCs would have less room for their staff operations, or would have to rent or build additional space. Agencies would not monetize either the disadvantages or the dignitary benefits, but would weigh the interests involved and use their judgment to decide which interest ought to predominate.<sup>55</sup> One might (though agencies likely would not) select this option as a way to engage in a wide-range balancing endeavor unconstrained by the need to provide hard numbers, perhaps out of a concern that assigning these numbers risks dwarfing and hence marginalizing non-quantitative factors.

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54. The same is true of the costs. There may be costs to providing private rooms other than administrative outlays, including unmonetized costs; for example, perhaps rooms taken up for private therapy sessions would otherwise have been used for patients’ recreational activities. The overall point is that costs and benefits in the real world can rarely be considered in isolation.
55. Note that balancing with unmonetized costs would address one of Ronald Dworkin’s criticisms of CBA, namely, that it is not clear why social wealth is a value worth promoting. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 194 (1980). Balancing dignity against a sum of funds in society’s coffers suggests that two things of value are being weighed against each other. In Dworkin’s view, however, social wealth is valuable insofar as it allows people to obtain other goods that they care about, such as social justice and public safety, and social wealth does not necessarily track these goods faithfully. *Id.* at 196, 205. A balancing approach along the lines of Qualitative Balancing (and Option 2, Quantitative Balancing) would allow regulators to weigh the promotion of dignity directly against the reduced ability to pursue other social benefits.

Qualitative Balancing may not count as CBA under many people's conceptions of CBA. For instance, Anderson, a critic of CBA, contends that "any rational evaluation of policies must take account of their costs and benefits" but should do so in a qualitative fashion that rejects the willingness-to-pay measure.<sup>56</sup> Anderson's approach to the evaluation of a regulation's consequences seems to involve the form of balancing captured in Qualitative Balancing, but her approach is a far cry from many conventional accounts of CBA, such as that of Hausman and McPherson.<sup>57</sup> Of course, if the antonym of CBA is "regulation that amounts to a stab in the dark," as Hahn and Sunstein suggest,<sup>58</sup> then Qualitative Balancing would count as a form of CBA. Qualitative Balancing, therefore, would permit the incorporation of dignity into CBA, but only on a conception of CBA distinct from the traditional understanding.

### *B. Option 2: Quantitative Balancing*

Under a Quantitative Balancing approach, agencies would not monetize either benefits or costs, but they would break down the benefits and costs according to the number of people who would be affected. On the benefits side, for example, HHS would take note of the fact that requiring CMHCs to set aside closed rooms for therapy would enable (say) fifty mental health patients in one particular CMHC per month to undergo a more dignified therapy session. HHS would collect similar data from other CMHCs. In other words, agencies would specify the number of people who would experience increased respect for dignity as a consequence of a regulation. One might select this option on the basis that indicating the number of beneficiaries is a sensible way to gauge the importance of a regulation and does not carry the same risk of appearing to price dignity as assigning a monetary value to the costs.

According to OMB, a practice along the lines of Option 2 could be called quantification, though not monetization.<sup>59</sup> Although this form of analysis would likely not count as CBA on the account provided by Hausman and McPherson, OMB seems to treat quantification as a form of CBA,<sup>60</sup> though as

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56. ANDERSON, *supra* note 12, at 215.

57. HAUSMAN & MCPHERSON, *supra* note 4, at 93-95.

58. HAHN & SUNSTEIN, *supra* note 9, at 8.

59. CIRCULAR A-4, *supra* note 10, at 27.

60. *Id.*

noted earlier, OMB is somewhat ambivalent on this point, and it treats the inclusion of any unmonetized factors as a non-ideal option.

### C. Option 3: Cost Monetization

Under a Cost Monetization approach, agencies would identify costs in monetary terms, but would not monetize the dignitary benefits, although they would identify the numbers of people who would experience greater dignity (along the lines of Option 2). Agencies would then weigh these factors against each other and make a determination that the accommodation is or is not worth pursuing. The notion of weighing monetized costs against unmonetized benefits can be considered a form of “threshold” or “breakeven” analysis, according to which an agency asks, “How small could the value of the non-quantified benefits be . . . before the rule would yield zero net benefits?”<sup>61</sup> or, put differently, “*What would the benefits have to be, in order to justify the costs?*”<sup>62</sup> The motivation for engaging in this kind of analysis is that agencies should draw on whatever information they can gather. Even if dignity cannot be monetized, at least some of the costs of regulation can be monetized; leaving out these cost figures could produce less-informed outcomes.

Using the mental health therapy example, the agency could determine the amount of funds that each CMHC would have to spend to set aside closed therapy rooms (because the CMHC would have to rent or build new space, say, or because the reduced space for staff operations would produce inefficiency). The agency would divide this amount (\$*X*) by the number of people who would derive dignitary benefit from these rooms. The agency would then weigh the per-person cost of \$*X* against the increased respect for mental health patients’ dignity that would result from the expenditure. If the agency came to the conclusion that CMHCs should be required to spend \$*X*, they would not do so on the basis of an inquiry into mental health patients’ willingness-to-pay for increased respect for dignity. Rather, the agency would come to this conclusion on the basis of a comparison of \$*X*, on the one hand, and dignity, on the other. Of course, some might draw the conclusion that dignity *costs* \$*X*, and to the extent that monetization of dignity ought to be avoided (as I argue), this is one of the risks of engaging in Option 3. It may, however, be possible to preserve the thought that a regulation has both monetary costs and non-

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61. *Id.* at 2.

62. Sunstein, Nonquantifiable, *supra* note 10, at 2.

monetary dignity benefits, and these factors can be balanced against each other without engaging in an independent inquiry into the price of dignity.

*D. Option 4: Full Monetization*

Under a Full Monetization approach, agencies would use the techniques of traditional CBA to derive a monetary equivalent for dignity in a particular context (say, access to closed therapy rooms for mental health patients). They could do so through contingent valuation studies asking mental health patients what they are willing to pay for closed therapy rooms, or they could use observations of some form of market behavior to gauge people's revealed preferences—for instance, the additional funds that people are generally willing to spend for therapy in more private settings. In other contexts (such as that of prison rape<sup>63</sup>), agencies might try to derive monetary values for dignity from jury damage awards or settlements. Agencies would then implement the regulation only if monetized benefits justified monetized costs. Agencies could be motivated to monetize dignity in the interests of providing the “common measure” that OMB Circular A-4 emphasizes as a crucial feature of CBA.<sup>64</sup> Access to such a measure might be considered valuable in the service of a less discretionary and more fixed regulatory review process.

*E. Option 5: Trans-Contextual Monetization*

Under a Trans-Contextual Monetization approach, after conducting the analysis described in Option 4, agencies would derive a monetary value of dignity that they could then transport to other contexts. For instance, the value assigned to dignity in the mental health therapy context could be used to compute the benefits of increased protection for dignity in the context of age discrimination.<sup>65</sup> Agencies might opt for Trans-Contextual Monetization for the sake of preserving consistency across different CBAs, which in turn might be desirable as a manner of constraining agency discretion. Furthermore, agencies might lean towards Trans-Contextual Monetization over time if willingness-to-pay figures for dignity accumulate, since these numbers would be at hand. As I argue below, however, dignity is a highly contextual notion that depends on relations among different individuals and could be conceived

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63. See *infra* notes 85-86 and accompanying text.

64. CIRCULAR A-4, *supra* note 10, at 10.

65. See *infra* notes 101-105 and accompanying text.

in terms of status equality, autonomy, the absence of psychological feelings of shame, privacy, and much more. Abstracting dignity from its context therefore makes little sense and, moreover, would produce consistent numbers at the expense of capturing the values that are genuinely at stake in the choice whether or not to regulate.

### III. THE EXISTING TERRAIN

In light of the framework provided in Part II, this Part reviews agency CBAs that have mentioned dignity and contrasts their approaches. This Part presents the most comprehensive account thus far of references to dignity in agency CBAs. The Part warns against the dangers of excessive generality in the current treatment of dignity and seeks to further a self-conscious approach to the incorporation of dignity into CBA. Agencies have taken dignity into consideration in CBA in the areas of (a) disability; (b) privacy of health information; (c) prison rape; (d) age discrimination; and (e) air toxics standards.<sup>66</sup> Most mentions of dignity take place after the promulgation of E.O. 13,563 in January 2011, and some agency reports after this date indicate that the instruction to consider dignity is on their agenda.<sup>67</sup> Not all mentions of dignity by agencies, however, post-date E.O. 13,563. The disability rule, which contains some of the most prominent references to dignity, came out in September 2010,<sup>68</sup> and one part of a rule on prison rape that details

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66. This summary comes from a search of the Federal Register. Other agency rules mention dignity, for instance in the context of responding to comments, but do not include dignity in their regulatory impact analyses. *See, e.g.*, Medicaid Program; State Plan Home and Community-Based Services, 5-Year Period for Waivers, Provider Payment Reassignment, and Home and Community-Based Setting Requirements for Community First Choice and Home and Community-Based Services (HCBS) Waivers, 79 Fed. Reg. 2948, 2959 (Jan. 16, 2014) (to be codified in scattered sections of 42 C.F.R.) [hereinafter Medicaid Rule] (citing comments indicating that home and community-based services under Medicaid should recognize individuals' rights to "privacy, dignity and respect").

67. *See, e.g.*, HHS Plan for Retrospective Review Under Exec. Order 13563, 76 Fed. Reg. 20568, 20569 (Apr. 13, 2011) (noting that "HHS is interested in comments on ways to quantify values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts"). The idea of seeking to "quantify values that are difficult or impossible to quantify" might contain some internal tension.

68. Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. § 35 (2010) [hereinafter Disability Rule]. For the regulatory impact analysis, see *Final Regulatory Impact Analysis of the Final Revised Regulations Implementing Titles II and III of the ADA, Including Revised ADA Standards for Accessible Design*, U.S. DEP'T JUST. (July

unmonetized benefits including dignity alludes to President Clinton's E.O. 12,866.<sup>69</sup> For this reason, and because the number of CBAs is limited, this Section does not come to strong conclusions about the exact impact of E.O. 13,563's mention of dignity on CBA. Existing material, however, provides an indication of current agency practice. A study of these rules suggests that dignity is at times monetized and at times left unmonetized, sometimes in the same CBA, and that dignity is largely discussed at a fairly high level of generality. I contend that agencies are correct to incorporate dignity into CBA but that they should do so with greater self-consciousness and specificity.

### A. *Treatment of Dignity in Agency CBAs*

In this Section, I examine the ways in which various RIAs take dignity into account. In particular, I note that agencies employ divergent approaches to the issue of whether to monetize dignity, both within individual RIAs and between different RIAs. In the next section, I consider implications of these divergences.

#### 1. *Disability Rule*

In 2010 the Department of Justice (DOJ) issued a Rule regarding non-discrimination on the basis of disability in state and local government services.<sup>70</sup> This Rule requires increased access for disabled people in a variety of settings. The RIA first considers dignitary benefits in a cost-benefit analysis of a specific part of the rule, which sets standards requiring sufficient space in single-user toilet rooms for a wheelchair user to transfer to the toilet from the side rather than from the front.<sup>71</sup> This means that wheelchair users will not have to go to an establishment with someone who can help them in the bathroom, or go alone to the bathroom and risk needing help once they get

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3, 2010), [http://www.ada.gov/regs2010/RIA\\_2010regs/DOJ%20ADA%20Final%20RIA.pdf](http://www.ada.gov/regs2010/RIA_2010regs/DOJ%20ADA%20Final%20RIA.pdf) [hereinafter *Disability RIA*].

69. *Regulatory Impact Assessment for PREA Final Rule*, U.S. DEP'T JUST. 66 (May 17, 2012), [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_ria.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf) [hereinafter *Prison Rape RIA*]. The prison rape RIA also cites E.O. 13,563's reference to dignity in previewing its discussion of "benefits from reducing rape and sexual abuse in confinement facilities that are not readily monetizable." *Id.* at 39. One might speculate that references to dignity in the disability rule influenced the development of E.O. 13,563 or constituted a kind of "trial run" for the inclusion of dignity in E.O. 13,563.

70. *Disability Rule*, *supra* note 68.

71. *Disability RIA*, *supra* note 68, at 142.

there.<sup>72</sup> The RIA explains that “[a]lthough the *monetized* costs of these requirements substantially exceed the *monetized* benefits, the benefits that have not been monetized (avoiding stigma and humiliation, protecting safety, and enhancing independence) are expected to be quite high.”<sup>73</sup>

If the “avoidance of stigma and humiliation” is understood as a dignity interest, then dignity as an unmonetized benefit is being set against monetized costs and used to help make up a shortfall in monetized benefits. DOJ, in other words, is practicing Cost Monetization.

Yet the RIA then moves closer to fuller monetization. First, the RIA conducts a break-even analysis. The RIA calculates that the monetized costs of the new standards exceed their monetized benefits by \$36.2 million per year for one type of toilet room, and \$19.14 million per year for another type of toilet room.<sup>74</sup> Therefore, “for the costs and benefits to break even in this context, people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at just under 5 cents per use” for one type of toilet room, and \$2.20 per use for another type of toilet room.<sup>75</sup>

The attempt to put a price on safety, independence, and the avoidance of stigma and humiliation suggests that the RIA is approaching Full Monetization (Option 4), which involves the monetization of dignity. The RIA confirms this impression with a section elsewhere in the Rule titled “Value of Stigmatic Harm.”<sup>76</sup> In this section, the RIA measures “the proportion of persons with disabilities who elect to use adapted transit when dial-a-ride is available at equal or lesser fare and better time costs,” on the basis that these people’s preference for “integrated transportation service as opposed to segregated service suggests an interest in avoiding the stigma of being disabled.”<sup>77</sup> The RIA uses this proportion to calculate a “weight on the value of time” of 0.25, which it then applies to the time savings measure used to calculate monetized benefits.<sup>78</sup> The result is to narrow the gap between monetized costs and monetized benefits. This exercise, in essence, monetizes the “avoidance of stigmatic harm” through the medium of people’s valuations of time on the

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72. *Id.*

73. *Id.*

74. *Id.* at 142-43.

75. *Id.* at 143.

76. *Id.* at 143-46.

77. *Id.* at 143.

78. *Id.* at 144.



basis of a revealed-preference study. Such an exercise is more in accordance with Full Monetization (Option 4) than Cost Monetization (Option 3). The idea of transferring the valuation of “avoiding stigmatic harm” from the sphere of transportation to toilets edges the process closer to Trans-Contextual Monetization (Option 5), although the broad category of disability remains the same.

The disability RIA does not, however, monetize all dignitary benefits. It later notes that “promulgation of the final rules would also likely generate many other substantial unquantified benefits aside from avoidance of stigmatic harm,” which suggests that dignitary gains are again being treated as an “unquantified benefit.”<sup>79</sup> The RIA continues: “For persons with disabilities, these additional benefits might well include avoided humiliation (*i.e.*, embarrassment beyond the general desire to avoid ‘standing out’ as a person with a disability) . . . .”<sup>80</sup> It is not entirely clear what the RIA means by “avoided humiliation,” but this too seems to be a dignitary interest that the RIA leaves unmonetized.

The RIA’s invocations of dignity, therefore, fall variously along the lines of Cost Monetization, Full Monetization, and Trans-Contextual Monetization (Options 3, 4, and 5). The RIA seems to be oscillating between placing weight on unmonetized benefits in their own right and justifying this weight with reference to a monetary figure.

In addition to the monetization options (3, 4, and 5) in the RIA, the disability rule itself notes that at least some individuals discuss dignity in terms that may be reminiscent of the balancing options (1 and 2). This reference occurs in a description of comments received from advocacy groups and individuals about the proposed rule. Commenters discussed the indignities, embarrassment, and shame that persons with disabilities experience in specific social situations, such as the indignity children experience when they are unable to access a stage during school plays and graduation.<sup>81</sup> DOJ notes that “[t]hese commenters did not provide a method to quantify the benefits that would accrue by having direct access to stages. One commenter stated, however, that ‘the cost of dignity and respect is without measure.’”<sup>82</sup> This perspective suggests an unwillingness to reach Full Monetization (Option 4), which requires that dignity be monetized. It could be interpreted as a

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79. *Id.* at 145.

80. *Id.*

81. Disability Rule, *supra* note 68, at 663-64.

82. *Id.* at 664.

statement that the cost of dignity is infinite, which would rule out even balancing in the sense captured by Qualitative Balancing (Option 1). But it could also be interpreted simply to mean that there is something inappropriate about seeking to assign a monetary value to dignity, which would not rule out the options that do not monetize dignity (Options 1, 2, and 3). DOJ is not necessarily endorsing these commenters' suggestions, but it is at least taking cognizance of these commenters' approach. Overall, then, the DOJ's RIA for the disability rule sometimes incorporates dignity as a monetized value but sometimes does not.

## 2. *Prison Rape Rule*

Another RIA that confronts the choice about whether to monetize dignity is the DOJ's RIA on the Prison Rape Elimination Act, released in May 2012.<sup>83</sup> This RIA assesses the costs and benefits of regulations designed to reduce prison rape. In one part of the RIA, "loss of dignity" is included among the monetized costs of prison rape (that is, among the benefits of regulations meant to lower prison rape).<sup>84</sup> The RIA cites a study by Ted Miller for the proposition that "the largest quantifiable cost to victims of sexual abuse is pain, suffering, and loss of dignity—put otherwise, a diminution in the victim's quality of life."<sup>85</sup> Miller's monetary figures come from an analysis of jury awards and settlements.<sup>86</sup> Although Miller does not specifically derive a monetary figure for dignity, the RIA seems to accept that a monetized figure can cover "loss of dignity" among other harms. The agency's approach can perhaps be described as somewhere between Cost Monetization and Full Monetization.

Elsewhere, the RIA more categorically includes dignity among the *unmonetized* benefits of the Prison Rape Elimination Act. The DOJ states that "[t]he individual rights enshrined in our Constitution express our country's deepest commitments to human dignity and equality . . . . In thinking about the qualitative benefits that will accrue from the implementation of the final rule, these values stand paramount."<sup>87</sup> The DOJ also notes under the heading

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83. *Prison Rape RIA*, *supra* note 69.

84. *Id.* at 44.

85. *Id.*

86. *Id.*

87. *Id.* at 66.

“[n]on-quantifiable benefits for rape victims” that “the standards will reduce [inmates’] re-traumatization, together with their loss of dignity and privacy, associated with evidence collection, investigation, and any subsequent legal proceedings.”<sup>88</sup> As in Options 1, 2, and 3, dignity is not monetized. The point is not that the PREA rule contains a direct contradiction between monetized and unmonetized dignity, but that it reflects an interest both in emphasizing dignity’s unmonetizable nature and incorporating dignity into the traditional tools of CBA.

### 3. *Air Toxics Rule*

An RIA that alludes to monetizing dignity, though it does not carry out contingent-valuation or revealed preference studies, is the Environmental Protection Agency’s RIA for standards regulating mercury and air toxics (December 2011).<sup>89</sup> This RIA describes uncertainties in calculating the value of a statistical life as part of identifying the costs of increased mortality due to air pollution.<sup>90</sup> The RIA notes that there may be a disjunction between the valuation of workplace mortality risks and the valuation of air pollution-related risks, because the latter tend to involve more protracted death, “involving prolonged suffering and loss of dignity and personal control.”<sup>91</sup> The willingness-to-pay to avoid a more protracted death, according to the RIA, may therefore be greater, and so the willingness-to-pay measurements employed on the basis of workplace mortality measurements may be too low. This discussion of dignity has similarities to Full Monetization (Option 4); the idea is that people would be willing to pay a certain amount of money for a death with dignity. At the same time, the EPA does not actually carry out a contingent-valuation or revealed-preference study to gauge the monetary value of dignity.

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88. *Id.* at 66-67.

89. *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, ENVTL. PROTECTION AGENCY (Dec. 2011), <http://www.epa.gov/mats/pdfs/20111221MATSfinalRIA.pdf> [hereinafter *Mercury and Air Toxics RIA*].

90. *Id.* at 5-44 to -45.

91. *Id.* The EPA also notes that the potential “downward bias” (or systematic undervaluation) may also result from the difference in voluntariness between work-related harms and pollution-related harm. In other words, the potential downward bias is not solely dignitary in nature.

#### 4. Health Privacy Rule

One of the remaining agency CBAs that mentions dignity does not even allude to monetization. In January 2013 HHS promulgated a final rule on Modifications to the Health Insurance Portability and Accountability Act's Privacy, Security, Enforcement, and Breach Notification Rules.<sup>92</sup> These modifications are designed to strengthen protections for individuals' health information. HHS predicts the total cost of compliance with the rule's provisions in monetary terms.<sup>93</sup> HHS then states:

We are not able to quantify the benefits of the rule due to lack of data and the impossibility of monetizing the value of individuals' privacy and dignity, which we believe will be enhanced by the strengthened privacy and security protections, expanded individual rights, and improved enforcement enabled by the rule.<sup>94</sup>

After quantifying the costs, HHS embarks on a "Qualitative Analysis of Unquantified Costs"<sup>95</sup> and then a "Qualitative Analysis of Unquantified Benefits."<sup>96</sup> HHS does not specifically identify dignity in this detailed analysis of unmonetized benefits, but these benefits include gains in privacy for individuals, as well as a lower risk of identity theft and reputational harm<sup>97</sup> (which, HHS notes, was identified by a commenter as a dignity interest<sup>98</sup>). One explanation of the insertion of "dignity" into the general description of the Rule's benefits is that dignity might seem like the classic kind of benefit that is "difficult or impossible to quantify,"<sup>99</sup> and so mentioning dignity serves to highlight the unmonetizable aspect of these benefits. HHS's rule was adopted even though the benefits included in its CBA were deemed unmonetizable and

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92. A description of the RIA is contained in Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules, 78 Fed. Reg. 5,566 (Jan. 25, 2013) [hereinafter Modifications to HIPAA Rules]. The rule itself is codified at 45 C.F.R. §§ 160, 164 (2012).

93. Modifications to HIPAA Rules, *supra* note 92, at 5,567.

94. *Id.*

95. *Id.* at 5,679.

96. *Id.* at 5,682.

97. *Id.*

98. *Id.* at 5,585.

99. E.O. 13,563, *supra* note 1, at 216.

unquantifiable.<sup>100</sup> This constitutes an approach along the lines of Cost Monetization (Option 3), or perhaps a mixture of Cost Monetization and Qualitative Balancing (Option 1), because some of the costs are also left unmonetized.

### 5. *Age Discrimination Rule*

The final CBA I discuss in this Note involves an Equal Employment Opportunity Commission (EEOC) rule on disparate impact and the reasonable factors other than age defense under the Age Discrimination in Employment Act (March 2012).<sup>101</sup> As with the HHS mental health rule, the EEOC concludes that this rule does not count as a “major” rule for the purposes of E.O. 13,563.<sup>102</sup> The EEOC is not, therefore, required to prepare an RIA under E.O. 13,563. However, in justifying its conclusion about the absence of an adverse effect on the economy, the EEOC notes that the Commission has taken into account, in addition to monetary benefits, “qualitative, dignitary, and related intrinsic benefits,” including “the values identified in E.O. 13,563, such as equity, human dignity, and fairness.”<sup>103</sup> The Rule then lists qualitative benefits, the first of which is that “[r]educing discrimination against older individuals promotes human dignity and self-respect, and diminishes feelings of exclusion and humiliation.”<sup>104</sup> The second benefit is that “[r]educing discrimination against older individuals also yields third-party benefits such as reduction in the prevalence of age-based stereotypes and associated stigma.”<sup>105</sup> As in Qualitative Balancing (Option 1), Quantitative Balancing (Option 2), and Cost Monetization (Option 3), dignity is not monetized.

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100. Dep’t of Health & Human Servs., *Report Under 5 U.S.C. § 801(a)(2)(A) on a Major Rule Issued by the Department of Health and Human Services, Office of the Secretary Entitled “Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules,”* GOV’T ACCT. OFF. (2013), <http://www.gao.gov/assets/660/652154.pdf>.

101. A description of the RIA is contained in Disparate Impact and Reasonable Factors Other than Age Under the Age Discrimination in Employment Act, 77 Fed. Reg. 19,080, 19,090 (Mar. 30, 2012) (codified at 29 C.F.R. pt. 1625) [hereinafter Age Discrimination Rule].

102. *Id.* at 19,094.

103. *Id.* at 19,092.

104. *Id.*

105. *Id.*

## B. Conclusions Regarding Agencies' Consideration of Dignity in CBA

### 1. To Monetize or Not to Monetize?

Agencies incorporating dignity into CBA at times portray dignity as a monetizable value and at times emphasize the unmonetizable nature of dignity (sometimes within the same RIA).<sup>106</sup> This combination of ways to treat dignity does not necessarily reflect a direct contradiction. OMB guidance, after all, instructs agencies to “monetize quantitative estimates wherever possible.”<sup>107</sup> Agencies may consistently decide that certain dignitary values can be monetized, while others “cannot be quantified due to methodological and data constraints.”<sup>108</sup>

The “monetize whenever possible” approach may also be on display in Sunstein’s work. Sunstein takes the example of the disability rule to promote building access for people in wheelchairs, which would reduce stigmatic harm and humiliation.<sup>109</sup> According to Sunstein, the agency could believe that a \$25 million shortfall in monetized benefits is “not fatal, because nonquantifiable values are involved. Those values may well be sufficient to justify the regulation.”<sup>110</sup> This suggests that dignity as an unmonetized benefit is being weighed against monetized costs, and winning. But as Sunstein further explicates this model, he tends towards monetization of dignity:

Suppose that the regulation would benefit relatively few people—that the number of disabled people who would have access to bathrooms, as

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106. Unmonetized dignitary benefits, when included in CBA, do not always explicitly play a deciding role in CBA. For instance, in the prison rape rule, the RIA suggests that the monetized benefits can reasonably be expected to break even with the monetized costs (depending on how successful the regulations are in reducing prison abuse). *Prison Rape RIA*, *supra* note 69, at 4-5. This means that the agency believes the prison rape rule would be “worth it” even if no unmonetized dignitary considerations existed. Of course, dignitary benefits might *actually* be playing a more significant role in DOJ’s deliberations, but if so, the agency’s CBA does not reflect this point. In the mercury and air toxics RIA, dignity is not left unmonetized, but the EPA indicates that dignitary considerations would only increase people’s willingness-to-pay for the rule, *Mercury and Air Toxics RIA*, *supra* note 89, at 5-45, and that monetized benefits outweigh monetary benefits already, *id.* at ES-2. Therefore, dignity in this context does not play a deciding role in CBA.

107. CIRCULAR A-4, *supra* note 10, at 27.

108. *Disability RIA*, *supra* note 68, at vii.

109. Sunstein, *The Real World*, *supra* note 11, at 194-97.

110. *Id.* at 18.

a result of the regulation, would be around 200 per year. If so, the question would be whether it would be worthwhile to spend over \$46 million annually for each. Recall that some studies suggest that the value of a statistical life ranges around \$7-\$8 million; in that light, a \$46 million annual expenditure would seem difficult to defend.<sup>111</sup>

After “200 per year,” Sunstein has reached Quantitative Monetization (Option 2). After “whether it would be worthwhile to spend over \$46 million annually for each,” Sunstein has reached Cost Monetization (Option 3). But in order to resolve the question of whether to spend \$46 million, he turns to studies on the value of a statistical life, such as those based on wage differentials in risky jobs, which are commonly used in conventional CBA.<sup>112</sup> These techniques constitute monetization in the sense of Full Monetization (Option 4).<sup>113</sup>

Sunstein, like the authors of the PREA Rule, is not necessarily being inconsistent. He is plausibly read as pointing out that unmonetized dignitary benefits could serve as a “finger on the scale” in a case in which the monetized costs and benefits were fairly close, but that these unmonetized dignitary benefits cannot serve the same role when the gap between monetized costs and benefits is high, since doing so would implicitly value dignitary benefits several times higher than the value of a statistical life. In Sunstein’s view, therefore, dignity could be seen as monetizable as a matter of scale—not as precisely monetizable. The idea of providing an implicit valuation of dignity by comparison to the value of a statistical life nevertheless suggests that dignity can be monetarily valued at least within a certain range, and potentially that the effort to derive a range of monetary values for dignity is the ideal for agency CBAs even if it cannot always be realized. It remains to be seen whether a robust commitment to incorporating unmonetized values in CBA can operate alongside a preference for approximate monetization. This Note seeks to build on Sunstein’s approach and push this approach in an even more clearly unmonetized direction.

More broadly, the decision to portray dignity as monetizable in some RIAs (such as the disability rule) raises certain difficulties. The most important is

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111. *Id.* at 20.

112. See Ackerman & Heinzerling, *supra* note 12, at 1558.

113. In fact, Sunstein notes elsewhere that “breakeven analysis can be made more tractable if agencies draw comparisons with cases in which monetary values have previously been assigned.” Sunstein, Nonquantifiable, *supra* note 10, at 3. For instance, “harms that fall short of death” could be compared to the value of a statistical life, which he sets at \$9 million. *Id.*

that monetization of dignity is undesirable as a general matter, as I argue in the next Part. Another is that because not all dignitary benefits are susceptible to monetization (as the next Part contends), there is a risk that those dignitary benefits that are monetized will be taken more seriously (whether by regulators or the public) than dignitary benefits left unmonetized. The favor shown in OMB guidance towards monetization<sup>114</sup> reflects a general interest among those conducting CBA in producing “hard numbers.” Partial monetization, therefore, may result in agencies’ focusing primarily on the harms that can be monetized. But the fact that there happen to exist monetary figures for dignity in a particular context (such as usage figures for dial-a-ride versus adapted transit, or the value of a statistical life for comparative purposes) does not provide sufficient reason to weight dignity in this context more heavily than in others.

The overall point is that greater self-consciousness about the choice whether or not to monetize dignity would be beneficial. Dignity is a highly context-specific value, and the proper conception of dignity for the purposes of one regulatory program may legitimately diverge from the appropriate conception of dignity for the purposes of another. However, divergences in agency treatment of dignity should reflect a considered decision to draw on context-specific understandings of dignity. In the next Part I explain the way in which qualitatively specific descriptions of dignity can achieve this task.

## 2. *Generality of Most Allusions to Dignity*

Another feature of most current allusions to dignity in agency CBAs is their fairly general nature.

For instance, in three separate paragraphs, the RIA for the prison rape rule refers to “loss of dignity,”<sup>115</sup> “our country’s deepest commitments to human dignity and equality,”<sup>116</sup> and prison rape victims’ “loss of dignity and privacy.”<sup>117</sup> In one brief paragraph, the RIA for the air toxics standard indicates that air-pollution-related deaths can be more protracted, “involving prolonged suffering and loss of dignity and personal control.”<sup>118</sup> The health privacy rule discusses, at somewhat greater length though still tersely, “the impossibility of monetizing the value of individuals’ privacy and dignity, which we believe will

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114. See *supra* notes 31-32 and accompanying text.

115. *Prison Rape RIA*, *supra* note 69, at 44.

116. *Id.* at 66.

117. *Id.*

118. *Mercury and Air Toxics RIA*, *supra* note 89, at 5-45.



be enhanced by the strengthened privacy and security protections, expanded individual rights, and improved enforcement enabled by the rule.”<sup>119</sup> The age discrimination RIA indicates that “[r]educing discrimination against older individuals promotes human dignity and self-respect, and diminishes feelings of exclusion and humiliation.”<sup>120</sup>

The relative generality of these statements about dignity<sup>121</sup> limits the public’s ability to ascertain the basis on which a given regulation is being defended. For instance, what exactly does “loss of dignity” mean in the context of a death from air pollution? Without greater elaboration it is difficult to gain a sense of the agency’s concerns and to evaluate their validity. “Dignity” risks becoming an abstract term that agencies can draw on without providing a clear sense of what is at stake. Such an outcome may increase administrative opacity and decrease the likelihood that agencies will give meaningful reasons for their actions to the public. The unavailability of these reasons, in turn, hampers the public’s ability to participate in and inform agency regulation.<sup>122</sup>

The regulations considered in this Part—regarding age discrimination, disability, and prison rape, for example—have genuine dignitary benefits. Agencies *should* therefore be considering dignity when assessing the benefits and drawbacks of regulation. The prevalent form of such a consideration is currently CBA, and I argue in the next Part that we should understand this practice to include examination of dignity in unmonetized form. One possible response to the concern about transparency, in particular, is to urge the monetization of dignity to the greatest extent possible to ensure that agencies must work with “hard numbers” and pursue clear goals. In the next Part, I argue against this response and in favor of greater qualitative specificity.

#### IV. RECOMMENDATIONS FOR INCORPORATING DIGNITY INTO CBA

##### A. *Against Monetization*

One potential response to the challenge of incorporating dignity into CBA is to monetize dignity, or at least to attempt to approximate a monetary

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119. Modifications to HIPAA Rules, *supra* note 92, at 5,567.

120. Age Discrimination Rule, *supra* note 101, at 19,092.

121. The most specific description of dignity appears in the disability rule, which is discussed at greater length and critiqued below. *See infra* note 141 and accompanying text.

122. *See infra* Subsection IV.B.2.

measure of dignity to the greatest extent possible (the latter may be the most plausible interpretation of Circular A-4's approach).<sup>123</sup> The appeal of monetizing or approximating monetization is that agencies would be forced to translate the apparently "squishy" factor of dignity into concrete numbers. On this account, agencies would not simply be able to appeal generally to an abstract concept to justify a rule that will cost a great deal of taxpayer money. Moreover, the process of monetizing dignity or approximating monetization would ostensibly force agencies to clarify their valuation of dignity and so would help to avoid the transparency problem.<sup>124</sup> Efforts to monetize dignity are misguided for three main reasons. First, dignity's complex and malleable nature makes this concept difficult to monetize for principled theoretical reasons. Second, the attempt to monetize dignity likely results in the failure to value dignity in the proper way. Third, monetized CBA may tend toward trans-contextual valuation, and it is especially important to resist this trend in the case of dignity.

### 1. *The Complexity and Malleability of Dignity*

One problem with monetizing dignity is that the complex and malleable nature of dignity makes dignity difficult to monetize. This is partially a practical problem, but it is not a purely technical one, because the practical problem raises fundamental theoretical issues. In particular, dignitary benefits often come along with, and are closely intertwined with, other types of benefits. Consequently, it is hard to disaggregate people's willingness-to-pay for dignity from their willingness-to-pay for other goods. For instance, the disability RIA determines that for a particular type of bathroom, "people with the relevant disabilities will have to value safety, independence, and the avoidance of stigma and humiliation at just under 5 cents per use."<sup>125</sup> Dignity here is listed along with safety and independence (independence may be a dignitary interest, but the agency does not explain whether it is). If the agency found that people are willing to pay more than five cents to be able to use this type of bathroom, this finding would not imply that the price of dignity in the

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123. For simplicity's sake, I will refer to both as "monetization," keeping in mind that proponents of monetization may not believe that full monetization is possible.

124. See Sunstein, *Nonquantifiable*, *supra* note 10, at 6 ("Quantification helps to promote accountability, transparency, and consistency, and it can also counteract both excessive and insufficient stringency.").

125. *Disability RIA*, *supra* note 68, at 143.

context of disability access is more than five cents, for dignity does not stand on its own.

The “disaggregation” problem with monetizing dignity may apply, to some extent, to several values that are “difficult or impossible to quantify,” such as life, health, and environmental goods. But there is reason to think that the disaggregation problem applies with particular force to dignity.<sup>126</sup> These other goods, compared to dignity, may be more readily considered independently. One could, for example, examine how much people donate to keep an area park from destruction and plausibly view the result as a measure of people’s willingness to pay for an environmental good. But dignity is so closely wrapped up with other concepts—such as liberty and equality<sup>127</sup>—that contingent-valuation and revealed-preference studies may not be very informative about the value of dignity. The comparison between dignity and other goods is not a hard-and-fast rule. The point is that the practical difficulties in monetizing dignity reflect a deep theoretical issue: dignity is a complex and malleable concept, one that overlaps in intricate ways with other concepts. These features of dignity are ill-suited to the often-blunt tool of monetary valuation and are best dealt with, I indicate below, through qualitative specification.

## 2. *Valuing Dignity in the Proper Way*

An even more serious problem with monetizing dignity is that doing so fails to value dignity in the proper way. One way of approaching this issue is to consider the distinction between Cost Monetization (Option 3), which compares monetized costs to unmonetized dignitary benefits, and Full

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<sup>126.</sup> At least one critique of monetization in this Part, then, does not apply with equal force to the monetization of health gains, prevented fatalities, or improvements in environmental quality. The same is true to some extent of the third critique of monetization presented in this Part, namely the difficulty of deriving a trans-contextual measure of dignity. There is reason to think that dignity, partially due to its complex interactions with other concepts, is more difficult to transfer across contexts than even life (from an impersonal government perspective). However, the second critique of monetization presented in this Part (the expressive critique) could apply, as it does in Anderson’s work, to other unquantifiable values. See ANDERSON, *supra* note 12, at 83. In this case the question is whether the failure to capture the values at stake in pursuing monetization of health, life, or the environment is sufficiently debilitating, in the absence of the other critiques of monetization, to doom these practices to failure. If so, agencies could still engage in Cost Monetization (Option 3), which does not fit into the category of traditional CBA. But I do not pursue this question in detail.

<sup>127.</sup> See Siegel, *supra* note 13, at 356.

Monetization (Option 4), which compares monetized costs to monetized dignitary benefits. Is there a genuine distinction between these options? After all, if one announces that dignity in the context of the health privacy rule (say) is sufficient to outweigh a certain monetary figure in costs, is this not the same as saying that dignity *costs* at least as much as this monetary figure?

I would argue, though, that there is an expressive significance in making clear that dignity is being weighed against a monetary figure, but is not being *priced*.<sup>128</sup> One reason is that this statement leaves room for a moral remainder when we make the determination that the promotion of dignity is outweighed by the costs. When commodities are bought and sold in the market, the commodity is presented as equivalent to the price, so that the transaction leaves no “remainder” when it is over. When a trade-off involving dignity is made, however, the fact that dignity has not been assigned a price (under Cost Monetization) allows for the notion that some factor has been left over in the decision that cannot be assigned an exact equivalent. Adopting this attitude towards protections for dignity in the contexts considered in agencies’ CBAs – for instance, prison rape, disability accommodations, and health information privacy – would be an appropriate way to recognize the importance of dignity to people’s lives even when the effort to promote dignity is curtailed because of its costs.

Another, related reason not to price dignity is that doing so would suggest a failure to value dignity in the appropriate way. As Arden Rowell notes, the uneasiness with pricing apparently unquantifiable values, such as life and health, often stems from a concern about commensurability.<sup>129</sup> We tend to think of certain things as incommensurable with money; it would seem somehow inappropriate to say “I value my child’s risk of death at \$7-8 million.”

It may be objected that the “incommensurability” critique is too strong. Rowell, for instance, argues that “[m]any of the effects of a regulation may be incommensurable with money, but when those effects are important – as, for example, with the preservation of the life of a child – people are often willing to pay money to secure them.”<sup>130</sup> In Rowell’s view, regulators can obtain a “partial valuation” of goods that are incommensurable with money by measuring people’s willingness to pay, while recognizing that monetary figures will only partially reflect people’s valuation of these goods. Agencies should

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128. See ANDERSON, *supra* note 12, at 83 (describing “expressive” and “consequentialist” theories).

129. Rowell, *supra* note 5, at 733.

130. *Id.*

obtain these partial valuations, rather than treating the value of a child's life as something that "cannot be monetized" — as if people are willing to spend no money at all to extend children's lives."<sup>131</sup>

The difficulty with Rowell's analysis is that he assumes the unwillingness to monetize is equivalent to "the willingness to spend \$0," that is, a monetization in which the willingness-to-pay is \$0. The point of being unwilling to monetize is not that one is unwilling to spend money, but that one is unwilling to conceive of a certain good in monetary terms. Rowell seems to acknowledge this point in certain exceptional circumstances, however, and one of them involves dignity. Rowell notes that it is possible that not "all goods can be partially valued in terms of money."<sup>132</sup> For some goods, "there is a social stigma attached to monetization or commodification, such as where the good is defined by reference to its lack of susceptibility to exchange."<sup>133</sup> His examples of this type of good are gifts and dignity, "which could arguably lose [their] value if [they are] exchanged for money."<sup>134</sup>

Rowell's account is still incomplete. The problem with monetizing dignity is not necessarily that there is a social stigma attached to monetization or commodification, but that this stigma exists for a reason: because constitutive of our relationship with certain goods is the fact we do not monetize them.<sup>135</sup> The uneasiness about pricing dignity reflects the idea that we would not value dignity in the proper way if we measured how much we were willing to pay for it.

There are at least three ways to understand the incommensurability critique. One is that the monetization of dignity inflicts expressive harm in the sense that someone is insulted, in the way that a person might be insulted if someone came up to a person in the street, pointed at her child, and said "your child is worth no more than \$8 million." A second possibility is that monetizing dignity inflicts harm on the world more broadly by leading to greater commodification — that, as Margaret Jane Radin says of the complete commodification of sex, "[w]ith this change in discourse would come a change in everyone's experience."<sup>136</sup> A third possibility — and the basic one that I

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131. *Id.* at 736.

132. *Id.* at 734 n.45.

133. *Id.*

134. *Id.* at 734-35 n.45.

135. See ANDERSON, *supra* note 12, at 212.

136. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1922 (1987). Radin argues, however, that treating sex as entirely inalienable on the market is not an unmitigated

endorse—is that monetizing dignity involves mismeasurement, or a failure to capture appropriately the value at stake. Mismeasurement is a problem not in the sense that dignity has been assigned too low (or high) a value, but that dignity has been assigned the wrong *kind* of value. When regulators mismeasure dignity, they fail to understand and transmit the genuine nature of the human good in question. Mismeasurement might have the consequence of insulting people or encouraging commodification, but mismeasurement is a problem in itself, regardless of whether these consequences occur.

An important objection to the argument against monetization is that juries award damages for death, bodily injury, and numerous other types of harms that might be viewed as incommensurable with money. If these damage awards are acceptable, then why is it problematic to monetize dignity through CBA?

There are several responses to this concern. First, damages serve purposes other than compensating victims, such as deterring future offenders. The fact that damages are awarded, therefore, is not solely an indication that money is granted to compensate victims (or their families) for their losses. Nevertheless, tort damages are awarded to victims instead of to the state, and so at least part of their aim may be to make victims better off. A second distinction between damages and CBA, then, is as follows. There is a difference between granting people an *ex post* payment after suffering an injury and asking people to price dignity (or another kind of value) *ex ante*. In the *ex post* case, victims and their families are not put in the position of having to decide “how much would I be willing to pay to avoid X outcome, or the risk of X outcome,” because the choice has already been made for them. The idea of asking people to make this decision, or acting as if they have implicitly made this decision, contributes greatly to the troubling nature of monetizing dignity in conducting CBA. But the problematic specter of explicit or implicit *ex ante* trade-offs does not appear in the damages context.

Third, features of public perception differ between the damages context and at least some contexts involving dignity and CBA. The public is unlikely to perceive damage awards as indications that their recipients have been “made whole,” or that recipients are or should be indifferent between suffering the injury and not receiving the award. But people might well think, “can’t patients

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good, especially given that women’s sexuality in our non-ideal world is already “incompletely commodified.” *Id.* at 1923. According to Radin, then, commodification can inflict expressive harm but may not be an immediately desirable goal in non-ideal circumstances.

just be paid a little bit of money, give up their dignity-related qualms about their health information privacy, and be just as well off?" Monetizing dignity (at least in some contexts in which agencies have considered dignity in CBA) creates more risk of encouraging these public perceptions and devaluing dignity as a consequence.

In sum, the attempt to monetize dignity fails to recognize the basic nature of dignity as a good that should not be valued in the same way as market goods and that leaves a "remainder" when it is forgone.

### 3. *Problems with Deriving a Trans-Contextual Monetary Measure of Dignity*

Once people monetize dignity in one context, they may begin to think they can use this monetary figure in contexts very different from the original one. The idea of deriving a trans-contextual monetary measure of dignity corresponds to Trans-Contextual Monetization (Option 5) in Part II. Converting dignity into money, the universal medium of exchange, creates an expectation that one unit of dignity is interchangeable with every other unit of dignity. The "value of a statistical life," after all, is used in multiple contexts. It is not *logically necessary* to move from the monetization of dignity to the development of a trans-contextual monetary value for dignity. But it is *psychologically plausible* that people will do so, and especially that agencies will do so, given their limited resources and the political incentives for them to try to find monetary equivalents for the beneficial effects of their rules.

Dignity, however, is ill-suited to the assignment of a uniform monetary value. The fact that dignity has multiple meanings has often been remarked, for instance in Congressional testimony about E.O. 13,563 by the OIRA Administrator under President George W. Bush, Susan Dudley: "'Human dignity' is a phrase not found in [President Clinton's] E.O. 12,866, and likely means different things to different people. For example, many might find human dignity in the freedom to make one's own choices, rather than having those choices predetermined by government regulation."<sup>137</sup>

The fact that "dignity" has multiple meanings does not imply that the notion is too subjective or empty to be useful, as some critiques of the inclusion

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137. *APA at 65, supra* note 47, at 23. For other examples of the observation that dignity means different things to different people, see, Ruth Macklin, Editorial, *Dignity Is a Useless Concept*, 327 *BRIT. MED. J.* 1419 (2003); and Steven Pinker, *The Stupidity of Dignity*, *NEW REPUBLIC*, May 28, 2008, <http://www.newrepublic.com/article/the-stupidity-dignity>.

of dignity in E.O. 13,563 imply,<sup>138</sup> but simply that “dignity” takes on a particular meaning relative to a particular social context. As I argue in the discussion of qualitative specificity below, we can provide a concrete sense of what dignity means in the context of allowing disabled people to go to the bathroom on their own instead of relying on others or refraining from visiting an establishment altogether. We can also provide a concrete sense of what dignity means in the context of avoiding prison rape. In these cases, dignity is not an abstract notion, but a practical benefit that characterizes certain human relationships and that plays an important role in people’s lives. The fact that we are able to understand the importance of dignity in both cases, however, does not entail that dignity has the same meaning across different contexts. The idea of deriving a monetary figure for dignity in one context and importing it to another, therefore, would distort the cost-benefit analysis. The willingness-to-pay for dignity in the prison rape context, for example, might be much higher than the willingness-to-pay for disability accommodations. The overall point is that dignity should not be twisted out of shape in order to meet the standardizing expectations of monetization.

In sum, the effort to monetize dignity creates serious difficulties not simply as a technical matter, but as a consequence of the nature of dignity: its malleability, its character as a good that is ill-suited to being bought and sold on the market, and its contextual variability. A more promising approach to incorporating dignity into agency practices of CBA, I argue, is qualitative specificity.

### *B. For Qualitative Specificity*

“Qualitative specificity” (QS) denotes a form of incorporating dignity into CBA that elaborates on the characteristics of dignity in particular circumstances without attempting to monetize dignity or approximate the monetization of dignity. QS is compatible with both Cost Monetization and Full Monetization, as these are described in Part II (weighing unmonetized costs against unmonetized dignitary benefits with a numbers breakdown, and weighing monetized costs against unmonetized dignitary benefits with a numbers breakdown, respectively). In other words, regulators can and should describe dignity in a qualitatively specific manner while also identifying the number of people who would be benefited by the regulation.

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138. See *Obama’s Rule-Making Loophole*, *supra* note 7.



The question of whether QS counts as a form of CBA depends again on the conception of CBA at issue. On the traditional account, the failure to monetize dignity (in both Cost Monetization and Full Monetization) would disqualify QS as a constituent part of CBA. Under the alternative version of CBA provided by Hahn and Sunstein, QS could be incorporated into CBA. The most important question is likely whether QS could be included in agency practices of CBA. In order for agencies to endorse QS given their current practices, agencies would have to stop treating the unmonetized treatment of costs and benefits that are “difficult or impossible to quantify” as a last resort. Some might view this as a fatal blow to agencies’ use of CBA, but I do not think this is a necessary view; a more appropriate response would be to shift the conception of CBA closer towards one that does not require monetization. OMB guidance already provides for qualitative analysis, and agency RIAs contain this kind of analysis, although not in as nuanced a form as would be desirable. Later in this Section, I discuss the agency RIA that deals most extensively with dignity in a qualitative light. While I argue that the treatment of dignity in this RIA is not fully adequate, I believe that RIAs like this one could serve as starting points for a suitable form of qualitative analysis.

The description of QS that follows is not intended to be a full-fledged program for agency action. Rather, it is intended as a set of examples illustrating an approach, together with an argument in favor of this approach. Further work elaborating the approach will be particularly effective with the emergence of new agency CBAs mentioning dignity.

### *1. Illustrating QS*

Agencies should conduct QS in a participatory manner. In their advance notices of proposed rules, they could suggest which of many understandings of dignity might apply to a given context. With regard to each of these understandings, agencies should propose a sense of the probability, duration, and gravity of the kinds of dignitary harm people could suffer without the protection of a given rule. Agencies could then seek feedback from outside individuals and groups about the extent to which their understandings of dignity resonate with others’ experiences. This feedback could come in the form of suggested categories and suggested weights to various understandings of dignity in a given setting, but also in the form of narrative description. Agencies should then take these comments into account, responding to significant ones, in compiling the final RIA.

With regard to the health information privacy rule, for example, HHS could propose the following conceptions of dignity and ask the following kinds of questions:

- One understanding of dignity is in terms of a person's standing in the eyes of others.<sup>139</sup> Without the rule's protections for private health information, how would a person's standing in front of others be damaged? The response to this question depends partially on the likelihood that private health information will be revealed, with and without the rule's protections, and on the question of how broadly the private information would be shared. Furthermore, individuals often have a particular interest in maintaining reputation in front of specific "others" to whom they risk being exposed. In this vein, the agency could ask whether private health information, without the rule's protections, might be shared with people with regard to whom an individual has a particular stake in maintaining reputation (for instance, employers or people who live in the same town).
- In addition to a feature of the individual's reputation in the eyes of others, dignity can be a feature of the individual psyche. In particular, the loss of dignity can also be conceived in terms of psychological feelings of shame. The agency could ask for comments on how intense these feelings of shame are likely to be, as a consequence of the release of private health information, and whether they are likely to be long-lasting or relatively short-lived.
- Loss of dignity, especially in the sense of humiliation, can involve a sense of exposure, including the exposure of intimate details of one's life.<sup>140</sup> Would these types of details be at risk of exposure without the rule's privacy protections? The agency could solicit ideas on the assessment of the degree of intimacy in accordance with a scale of intensity and thus provide a sense of the gravity of this kind of dignitary harm.

Another example is the disability rule's mention of dignity. The existing agency RIA for this rule contains the most involved qualitative description to date:

Some of the most frequently cited qualitative benefits of increased access . . . are the increase in personal sense of dignity that arises from

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139. McCrudden, *supra* note 13, at 670 (noting that dignity can involve the protections of "rights to reputation").

140. *Id.* at 689 (discussing U.S. Supreme Court cases linking dignity and privacy).

increased access and the decline in possibly humiliating incidents due to accessibility barriers. Struggling to join classmates on a stage, to use a bathroom with too little clearance, or to visit a swimming pool all negatively affect a person's sense of independence. In some instances, struggling in a bathroom or to get on a stage for a graduation can lead to humiliating accidents, derisive comments, or just embarrassment. The impact of such incidents can be temporary—such as a period of embarrassment—or more long-term, such as in the case of a student who drops participation in band because he/she is always embarrassed about being unable to get on stage. These humiliations, together with feelings of being “stigmatized . . . as different or inferior” from being relegated to use other, noticeably less comfortable or pleasant elements of a facility (such as a bathroom instead of a kitchen sink for rinsing a coffee mug at work), all have a negative impact on persons with disabilities.<sup>141</sup>

The RIA's qualitative description of the dignitary benefits of the disability rule takes a step towards the type of “qualitative specificity” that this Note recommends. This is encouraging, since it shows that qualitative analysis of dignity is not entirely at odds with agency practice and should be viewed as a viable option. However, the presence of some qualitative description in the disability RIA does not mean agencies are cognizant of the importance of qualitative specificity. After all, the disability RIA is the earliest agency RIA that mentions dignity, and later RIAs have not pursued the path of elaborating the qualitative benefits of rules at greater length. Indeed, later RIAs contain only thinner descriptions of dignity.

Moreover, there are shortcomings to the qualitative description in the disability rule. First, the description is fairly brief, certainly compared to several pages of monetary CBA in this RIA. Second, the qualitative description in the disability RIA is relatively unstructured and unsystematic. The RIA does not characterize different possible forms of dignitary harm in the manner that QS recommends (for instance, loss of reputation from others as compared to psychological feelings of humiliation; embarrassment in front of colleagues compared to embarrassment in social settings). The agency appropriately distinguishes between dignitary harms of different duration (temporary or more long-term), but the agency does not consider the gravity of these harms in a methodical manner. Third, and most significantly, the disability RIA does

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141. *Disability RIA*, *supra* note 68, at 138.

not replace monetization with qualitative analysis; rather, it engages in a lengthy exercise in monetization in addition to mentioning these qualitative benefits.<sup>142</sup> This monetization exercise, in addition to creating unexplained divergences in treatment of dignity, suffers from the general problems with monetization discussed earlier in this Part.

The DOJ could instead investigate the following types of issues:

- The loss of dignity can be conceived in terms of the loss of control over one's environment.<sup>143</sup> Agencies could request comments on the extent to which the disability accommodations envisaged by the rule enable people to exert control over their surroundings (for instance, being able to enter a building, use the bathroom, prepare food, and so on). They could also assign tentative weights, pending public input, to the importance of each of these types of functions to people's overall sense of competence.
- In a related vein, dignity is sometimes conceived as "lowering" from a higher status to a lower one.<sup>144</sup> One type of "lowering" is from the status of adults to the status of children. The agency could examine the extent to which, without the disability accommodations contemplated by the rule, adult disabled individuals would take on the posture of children forced to ask for help to accomplish basic tasks.
- Dignity is closely tied to possessing a respected position in a group, and exclusion from a group may result in a loss of dignity. The agency could consider the extent to which disabled persons, without the benefits of the rule, are excluded from groups to which they would otherwise belong (e.g., co-workers, families, classes).

These conceptions of dignity tend to re-appear in other contexts, accompanied by additional ones. For example, in the prison rape context, the issues of psychological harm and loss of control are paramount. Also relevant in this context, however, is the notion that violating dignity involves treating people as mere means instead of ends in themselves. This conception of dignity

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142. See *supra* Subsection III.A.1.

143. McCrudden, *supra* note 13, at 700 (indicating that a Hungarian court has treated dignity in terms of individuals' capacities to have control over their lives).

144. JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 311-12 (2010).

plays a role in law as well as in philosophy,<sup>145</sup> and it characterizes a key wrong of rape. In the age discrimination context, the issues of status lowering and exclusion loom large. In the setting of air toxics that lead to death without dignity, the issues of loss of control and status lowering are significant.

QS should include elements of both categorization and narrative description. In terms of categorization, agencies after public comments could develop a rubric for different aspects of dignity (for instance, loss of standing in the eyes of others; psychological feelings of shame; exposure; loss of control over one's environment; status lowering; exclusion; being treated as a mere means, and so on) and to weight each of the factors on the rubric based on qualitative scales of intensity (unlikely to very likely; short-lived to long-lasting; moderate to severe). Agencies could add to the rubric explanations of various conceptions of dignity and types of dignitary harm in the form of narrative description. In doing so, they would draw on comments received during the notice and comment process, as well as any available studies (and new types of studies might be expected to result from agencies' adopting the QS approach).

To illustrate the process of applying QS in the weighing process, we can return to the HHS rule regarding rooms for therapy.<sup>146</sup> After opportunity for public input, HHS would produce a list of relevant dignitary considerations. The public's claims should not be prejudged in advance, but it seems plausible that these considerations would include diminishing a sense of exposure of private details and increasing psychological integrity. Agencies could then weigh these dignitary considerations against either the unmonetized drawbacks or the monetized costs of providing additional rooms for therapy. Realistically, however, given the pressure towards cost monetization, agencies would likely be weighing unmonetized dignitary benefits against monetized costs.

There is no clear-cut formula to direct agencies in making this decision; it genuinely requires the exercise of judgment. However, agencies could at least break down their analysis in accordance with the weight they attach to the "subjective" consideration of mental health patients' psychological states as opposed to the weight they attach to the objective fact of exposure. It may be that in the context of mental health patients, the psychological injury would loom large. On the other side of the ledger, it would be useful for agencies to think about the "opportunity costs" of spending money on increased therapy rooms: what could the centers otherwise buy? Of course, HHS's resources

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145. McCrudden, *supra* note 13, at 692; *see also* ROSEN, *supra* note 5.

146. *See supra* notes 50-52 and accompanying text.

(and, more so, the government's resources) would not be restricted to a simple choice between one amenity for these centers or another; but engaging in this back-and-forth could help to fix ideas regarding the value of the psychological element of mental health patients' dignity in comparison to other services that these patients might be offered. Without further specifics, it is not possible to provide a more complete answer, but it is to be hoped that this illustration highlights the importance of focusing on trade-offs between goods to be enjoyed in the world—not simply abstract dollar figures—and recognizing that regulators must make very difficult decisions about which services to prioritize.

If QS is accepted, then our understanding of CBA should shift away from one that requires monetization to one that embraces certain elements of qualitative valuation. Having presented an outline of the QS approach, I flesh out the approach through an argument in favor of QS and responses to objections.

## *2. Advantages of QS*

There are at least three advantages of QS. The first is increased transparency. Instead of simply appealing to dignity in general terms, agencies under QS would indicate to the public which features of dignity are salient in a particular context. This is not to say—by any means—that QS is a cut-and-dry method to apply. Different ways of understanding dignity overlap, such as the idea of exclusion from a social group and the idea of being treated in accordance with a lower status. If this is the case, however, then regulators and commenters would be able to say so, and agencies could incorporate these complexities into their RIAs. Equally, if two types of dignity were at stake in one CBA, the agency could explain the presence of multiple forms of dignity. The reasons why dignity is treated differently in one RIA than another would also become clearer to the public. Controversies about whether agencies correctly identified the relevant qualitative characteristics of dignity and their weight, which would be bound to arise, would nevertheless be focused more closely on a discrete set of issues that agencies took into consideration in promulgating a rule. The overall consequence is that the engaged public would be more informed about the reasons for which agencies decide to regulate (or not).

Second, QS would promote the good of participation. It is unlikely that an agency will be able to identify a list of the relevant characteristics of dignity in a particular context by itself. Drawing on the comments of outsiders would be essential. In its best light, the back-and-forth between commenters and the agency could be construed as a form of democratic dialogue; but even if this is overly optimistic, this exchange could at least improve the participatory and

responsive quality of decision-making. A principal advantage of particularizing the meaning of dignity at stake in a specific context is that it enables another person to say that something important has been left out of the analysis. General agency references to dignity, on the other hand, make it more difficult for outsiders to ascertain which kinds of statements still need to be made. If members of the engaged public are able to grasp what agencies mean by “dignity” and challenge or add to these meanings, they will be better placed to influence agency understandings of dignity towards an outcome that resonates with their experiences. Given that dignity is a concept that contains an important experiential dimension,<sup>147</sup> the opportunity for agencies to learn from those whose dignity is at stake—as well as those who would have to change their practices in order to protect dignity—is crucial.

Third, by virtue of not attempting to monetize dignity, QS avoids the problems discussed in the critique of the monetization approach above. QS accommodates the complex and malleable nature of dignity by enabling context-specific evaluations of the significance of dignity. QS also does not attempt to price dignity and so appropriately recognizes the nature of dignity as a value that is “difficult or impossible to quantify.” Finally, with regard to the derivation of a trans-contextual measure of dignity, QS in some sense contemplates the transfer of categories from one regulatory context to another. For example, violation of dignity as status lowering could play a role both in the case of disability and age discrimination. Nevertheless, QS does not inappropriately transfer assessments of dignity across different contexts. Unlike monetization, which places dignity onto one scale of measurement, QS allows for the elaboration of multiple aspects of dignity. Moreover, in QS, the categories reaching across contexts are limited to those particular contexts for which they are relevant. It is also worth noting that agencies need not and should not end their qualitative descriptions with an enumeration of categories; they can include narrative descriptions and tailor these descriptions to particular settings.

### 3. *Objections to QS and Replies*

#### a. *Illegitimate Increase of Agency Discretion*

QS, it may be objected, leads to an illegitimate increase in agency discretion. Even if agencies enumerate the dignitary benefits of a rule with

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147. See WALDRON, *supra* note 144, at 311-13.

specificity, they would still be able to select the types of dignity they decide are relevant and to exercise judgment in weighing the significance of each kind of dignitary benefit. This would allow agency staff to introduce their own subjective considerations in elucidating the nature of dignity through QS. Those making this objection might even acknowledge that monetization of dignity also produces unreliable results. But in this case, the critique might run, agencies should simply not pursue E.O. 13,563's authorization to consider dignitary benefits.

In response, first, the practice of QS could be expected to take on a less *ad hoc* character as more agencies employ it, sharing techniques where appropriate. Agencies would still exercise judgment and discretion. But there would be a body of dignitary descriptions to draw upon, and agencies could select appropriate ones and shape them for their own purposes. However, it is certainly true that QS does not fully constrain agency discretion. The question is whether this is avoidable or even undesirable.

In order for the "illegitimate discretion" objection to have purchase, critics of QS have to show that the same type of administrative judgment and discretion they criticize are not present in cases of fully-monetized CBA. For example, when DOJ indicates in the "Willingness to Pay Model" section of its RIA for the Prison Rape Elimination Act that willingness-to-pay values for people's avoidance of rape "should not be reduced based on an assumption that society attaches a lower value to preventing harm to inmates,"<sup>148</sup> is the Department simply monetizing costs and benefits through the willingness-to-pay measure and comparing them? Or is the DOJ making a judgment (albeit one it attributes to Congress<sup>149</sup>) about which kinds of costs and benefits are worth taking into account—in effect, concluding that equality of consideration between inmates and others is "more important" than the cost savings that could be achieved by valuing prisoners' willingness-to-pay to avoid rape at a lower grade? The latter seems more plausible. If so, then the "criticism" that QS requires agencies to exercise discretion and judgment is not so much a criticism of QS as a phenomenon that occurs even in monetary forms of CBA. In this case, it is more transparent for agencies to acknowledge openly that they are making normative judgment calls, rather than hiding behind a veneer of numerical objectivity.

Another variation on the "illegitimate discretion" objection is that QS, by emphasizing contextually-specific accounts of dignity, undermines the

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148. *Prison Rape RIA*, *supra* note 69, at 41.

149. *Id.*



ambition of CBA to provide a standard and universal system of assessing regulation. In response, however, QS constitutes a system that can be applied to any form of regulation. It is true that QS provides universality at a higher level of abstraction, but—I argue—this level of abstraction is the only one that can appropriately be achieved in relation to the contextually-specific phenomenon of dignity. The question is whether agencies will be straightforward about their employment of different conceptions of dignity, or whether they will mislead by suggesting that they are considering a unitary type of dignity. Considerations of openness to the public recommend the former approach.

In addition to being unavoidable, the absence of full constraints on agency discretion may not even be desirable. Those who emphasize these constraints prize a potentially misleading sense of numerical fixity over a form of regulatory analysis that thoughtfully considers the positive and negative aspects of regulation. The best option under the circumstances is likely a participatory process that is as open as possible about the kinds of trade-offs being made, and QS is a plausible candidate to play a productive role in such a process.

*b. Distortion of Dignity*

Another objection to QS—from quite a different perspective than the “illegitimate discretion” objection—is that QS distorts the value of dignity. Some might, for example, object to including dignity in any balancing approach on the grounds that dignity is an absolute value and can never be placed on any scales.<sup>150</sup> This perspective would exclude all of Options 1 through 5 for incorporating dignity into CBA. According to this perspective, once an agency shows that a regulation would increase respect for dignity, the agency must approve the regulation. This response, however, is vulnerable to a line of criticism that is often levied against conventional forms of CBA: that it fails to acknowledge the reality of genuinely difficult and potentially tragic choices about which policies to pursue.<sup>151</sup> Government cannot simply adopt a formula according to which any regulation that promotes dignity must necessarily be

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150. For instance, those who adopt a “Kantian” understanding of dignity as having “an unconditioned and incomparable worth.” See KANT, *supra* note 5, at 102-03.

151. See ANDERSON, *supra* note 12, at 63; DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 20 (2010).

pursued. Sometimes such regulations must be rejected, though not without an awareness of a “moral remainder.”

A similar response applies to the objection that dignity should not be broken down according to the number of people whom the rule would benefit (as in Quantitative Balancing, Option 2). According to this objection, each individual’s dignity is inviolable, and calculating the number of people who would experience increased respect for dignity fails to do justice to the immeasurable respect that society should evince towards every single person’s dignity. The response discussed above—that society must sometimes make tragic choices trading off dignity against other values—applies here as well, except that now the point is that society must sometimes make the tragic choice to value dignity to a greater degree when more people’s dignity is at stake.

Both of these responses suggest that incorporating dignity into agency practices of CBA requires a certain understanding of what “dignity” means. In the philosophical literature and even in the decisions of some courts, dignity is sometimes portrayed as an absolute value that attaches to each individual.<sup>152</sup> This is not, however, the only possible understanding of dignity. We can also see dignity as a quality of certain real-world social contexts that is instantiated in some circumstances more than in others, and that is not the only quality to value about any given social circumstance (for instance, we might also value people’s health and safety).

The point is not that “dignity” must always be used in the latter sense rather than in the former. It is that the appropriate understanding of dignity for the purposes of evaluating the consequences of regulation is not a view of dignity as “unconditioned and incomparable worth,” but as a positive quality of social relationships that should be valued alongside other positive qualities. The broader theme is that the issue of how dignity can be taken into account in measuring the positive and negative effects of a policy has implications not only for the theory and practice of CBA, but also for the issue of which conception of dignity best fits a given political and legal context.

## CONCLUSION

This Note has examined the relationship between dignity and cost-benefit analysis as carried out by American administrative agencies. It has urged the adoption of a model of CBA that resists the drive towards full monetization

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152. See KANT, *supra* note 5, at 102-03; ROSEN, *supra* note 5.

and has proposed qualitative specificity as a way of making agencies' considerations of dignity, though not a simple recipe to follow, at least participatory and more transparent to the public.

The broader point is that CBA stands today at a crossroads. OMB has recognized the existence and, to some extent, the importance of unmonetized values in assessing regulation. Dignity, which seems to be a quintessentially qualitative value, has been incorporated into CBA in both a monetized and an unmonetized form. The question is whether agencies will be sufficiently flexible to recognize a role for the qualitative specification of dignity within the practice they term "cost-benefit analysis." If they do this, then the practice of CBA will itself have shifted. Some would say that CBA will have shifted beyond recognition. However, the practice of CBA would continue to be anchored within the experience of administrative agencies, and the overarching concept of "cost-benefit analysis" could thus persist albeit in changed form. In fact, dignity—in presenting the problems with monetization in especially vivid form—may be well-suited to play a role in inducing such a shift in CBA. If agencies emphasize monetization, on the other hand, then they will fail to do justice to dignitary effects of government regulation that matter a great deal to many citizens.