BOOK REVIEW

A Review of *The Cost-Benefit Revolution* and *Carceral Capitalism*

THE COST-BENEFIT REVOLUTION

by Cass R. Sunstein

CARCERAL CAPITALISM

by Jackie Wang

James Hannaway[*]

INTRODUCTION

Cass Sunstein is modest in celebrating what he calls the "cost-benefit revolution."[1] As one of the most prominent proponents and architects of cost-benefit analysis ("CBA"), his revolution appears complete. Presidents from Ronald Reagan to Barack Obama to Donald Trump have all affirmed the command to federal agencies: quantify every agency rule's benefits and costs to ensure that the benefits outweigh the costs.[2] Sunstein was at the vanguard

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1 CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION, at xvi (2018).

2 *See* SUNSTEIN, *supra* note 1, at 3–4.

of the "cost-benefit revolution" as a young lawyer in the Office of Legal Counsel of the Department of Justice when President Reagan issued Executive Order 12,291,[3] the first iteration of modern CBA that established its basic framework within the Executive Branch.[4] During the administrations of Presidents George H.W. Bush, Bill Clinton, and George W. Bush, Sunstein emerged as a formidable chronicler and defender of the practice.[5] Recently, as head of the Office of Information and Regulatory Affairs in the Obama administration, he presided over the solidification and expansion of CBA in agency rulemaking.[6]

He is modest because, in spite of these achievements, many of the problems associated with CBA have not been fully fixed. CBA today tends to benefit the rich at the expense of the poor.[7] CBA also tends to deprioritize intangible values, such as dignity or equity, in favor of anything with a monetary value.[8] Sunstein has no silver-bullet solution to these problems, but he has some ideas of how to mitigate them. In spite of these limitations of CBA, he is immodest in another sense because he argues for CBA's expansion into novel, seemingly unquantifiable areas of policy analysis. He sees CBA as a potential device to settle debates surrounding free speech, privacy and national security.[9] He also wants to expand applications of CBA in courts by essentially having courts consider CBA-less regulations presumptively unlawful.[10]

In the world of administrative law, his revolution appears secure for the moment. Yet this triumph has not stopped scholars from questioning its use. Some scholars outside the legal academy like Jackie Wang are mounting a full-frontal assault on the kind of technocratic governance typified by CBA. In her book *Carceral Capitalism*, Wang views technocracy as a tool of the powerful to parasitically extract wealth from poor people of color.[11] As illustrated by the Flint Water Crisis and municipal fine practices,

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3 46 Fed. Reg. 13,193 (Feb. 19, 1981).

4 *See* SUNSTEIN, *supra* note 1, at 6–15.

5 *See* CASS R. SUNSTEIN, RISK AND REASON (2002); Cass R. Sunstein, Legislative Forward, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996); Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs of Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895 (2007); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651 (2001); Cass R. Sunstein, *Is Cost-Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299 (2001); Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO. L.J. 2255 (2002).

6 *See* SUNSTEIN, *supra* note 1, at 18–21.

7 *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1661–62 (2018).

8 *See* Lisa Heinzerling, *Markets for Arsenic*, 90 GEO. L.J. 2311, 2313 (2002).

9 *See* SUNSTEIN, *supra* note 1, at 171–205.

10 *Id*. at 149.

11 *See* JACKIE WANG, CARCERAL CAPITALISM 69–72 (2018).

technocratic governments mimic market actors and, in so doing, hurt the most vulnerable.[12] Critiques of CBA have been more measured within the legal academy.[13] Wang's more fundamental disagreement reveals how Sunstein's basic assumptions are now under fire.

Harvard Law School, where Sunstein is a professor, and the Harvard African and African American Studies Department, where Wang is a Ph.D. candidate, are an eight-minute walk apart, but Sunstein and Wang occupy different worlds.[14] To Sunstein, Wang would be an "expressivist" and "populist," someone who reaches conclusions based on values, not facts.[15] To Wang, Sunstein would be an enabler of the policies she decries. They both try to answer the same questions: What should a government be? What do markets do? By forcing them into a conversation here, one can hopefully see what consequences are at stake in considering or not considering costs and benefits in policymaking.

I. SUNSTEIN'S COST-BENEFIT REVOLUTION

The modern "cost-benefit revolution" began in 1981 when President Ronald Reagan issued Exec. Order No. 12,291.[16] In part to "reduce the burdens of existing and future regulations" and to "insure well-reasoned regulations," Reagan required nonindependent agencies to demonstrate that any regulation with an effect on the economy of $100 million or more annually would have benefits that exceeded their costs.[17] The executive order empowered the Office of Information and Regulatory Affairs ("OIRA"), which Sunstein would later lead, to oversee this process.[18]

While law and economics scholars and other Presidents laid the foundation for CBA before Reagan's executive order, Reagan defined CBA as it exists today.[19] Reagan's implementation of CBA was part of a broader

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12 *See* discussion *infra* Section II.A.

13 *See, e.g.*, Liscow, *supra* note 7, at 1661–62 (characterizing some but not all forms of CBA as rich-biased).

14 *See* Walking Directions from Harvard Law School to Harvard African and African American Studies Department, GOOGLE MAPS, http://maps.google.com [https://perma.cc/RU3T-CJVP] (follow "Directions" hyperlink; then search starting point field for "Harvard Law School" and search destination field for "Harvard African and African American Studies Department").

15 *See* SUNSTEIN, *supra* note 1, at ix–x, 28–29.

16 46 Fed. Reg. 13,193 (Feb. 19, 1981).

17 *See id.*; SUNSTEIN, *supra* note 1, at 10–11.

18 *See* 46 Fed. Reg. at 13,196; SUNSTEIN, *supra* note 1, at 9, 18–21.

19 *See* Don Bradford Hardin, Jr., *Why Cost-Benefit Analysis? A Question (and Some Answers) About the Legal Academy*, 59 ALA. L. REV. 1135, 1169–70 (2008). Some amount of CBA in the federal government can be traced back to 1936. *See* Edward P. Fuchs & James E. Anderson, *The Institutionalization of Cost-Benefit Analysis*, PUB. PRODUCTIVITY REV., 25, 25 (1987). Moreover, Presidents Nixon, Ford, and Carter made some efforts to have agencies

anti-regulation and anti–big government agenda.[20] Despite its conservative roots, Presidents across the ideological spectrum since have affirmed the basic principles of CBA.[21] To conservatives, CBA may be appealing in limiting unnecessary government regulations. For those like Sunstein with more faith in agencies, CBA appeals to an idealized conception of agencies as apolitical experts who make decisions based on the facts before them.[22] Alternatively, it is a means of ensuring political accountability of agencies by an elected President.[23] No matter how one rationalizes CBA as a policy matter, it is no surprise that Presidents across the spectrum would hold on to any control over agencies that their predecessors maintained.[24]

The idea of weighing costs and benefits in the abstract is uncontroversial. Many agree that pro-con lists, for example, are a good idea.[25] CBA within administrative agencies, however, has a distinct flavor. It is not a simple weighing of pros and cons but entails putting a dollar sign next to every cost or benefit. Consider a rule by the Environmental Protection Agency ("EPA") to regulate powerplants.[26] Powerplants require a huge amount of water to cool the huge amount of heat they generate.[27] Powerplants have "cooling water intake structures" which take in water from the waterways around them.[28] The Clean Water Act[29] gives the EPA the power to regulate these structures and requires that facilities use the "best technology available for minimizing adverse environmental impact."[30] The

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conduct more CBA, but none of the three Presidents established the framework for mandatory OIRA review as Reagan did. *Id*. at 26–30.

20 *See, e.g.*, President Ronald Reagan, State of the Union Address, (Jan. 25, 1984) (transcript available at https://www.reaganlibrary.gov/research/speeches/12584e [https://perma.cc/N2XQ-3URF]) (expressing concern about "an ever-growing web of rules and regulations").

21 *See* SUNSTEIN, *supra* note 1, at 3–4.

22 *See id*. at 28–29.

23 *See* Helen G. Boutrous, *Regulatory Review in the Obama Administration: Cost-Benefit Analysis for Everyone*, 62 ADMIN. L. REV. 243, 248 (2010) (explaining that "presidents view the federal bureaucracy as an entity over which they must gain a measure of control if they are to achieve the goals that they hope will help to ensure the policies and legacies they desire").

24 *See id*.

25 Amy Sinden, *Cost-Benefit Analysis, Ben Franklin, and the Supreme Court*, 4 U.C. IRVINE L. REV. 1175, 1176 n.2 (2014) (noting that Ben Franklin regularly made pro-con lists as a kind of "moral or prudential algebra") (quoting Letter from Benjamin Franklin to Joseph Priestly (Sept. 19, 1772)).

26 *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208 (2009).

27 *Id*. at 212–14.

28 *Id*.

29 33 U.S.C. §§ 1251–1388 (2012).

30 *Entergy*, 556 U.S. at 213–14 (quoting the Clean Water Act, 33 U.S.C. §§ 1251–1388).

cooling towers destroy a lot of aquatic life and the EPA is empowered to minimize that impact.[31] In 2004, the EPA essentially had two choices based on emerging technologies.[32] Option One was to require only closed-cycle, recirculating cooling systems that would dramatically cut down the loss of aquatic life because most of the water would be reused.[33] Option Two was to not require the closed-cycle systems but allow less effective, but less expensive alternatives.[34]

First, the EPA considered costs: Option One would have used more energy and cost the industry more than $3.5 billion per year.[35] The combined set of other remedial technologies in Option Two would cost industry $389 million per year.[36] Next, the EPA considered benefits: closed-cycle systems in Option One could have reduced 98% of the loss of aquatic life.[37] A mix of other alternatives in Option Two would cut the loss of aquatic life by 60% to 90% or 80% to 95%, depending on the cause of the fish loss.[38] Aquatic life can be caught, sold, and eaten, and thus has a quantifiable "use value."[39] The quantifiable benefit of harvesting more fish under Option Two was $82.9 million per year.[40] Because the costs of compliance were greater and the increased benefits were marginal under Option One, the EPA decided on Option Two.[41]

In making its conclusion, the EPA also made an effort to quantify intangible benefits like "local biodiversity" and "public satisfaction with a healthy ecosystem."[42] Agencies tend to rely on an assessment of the public's willingness to pay for these benefits in an effort to quantify them.[43] Here, the EPA worked backwards, first determining the difference between the "use value" of $82.9 million and costs of $389.4 million, then determining how much 60.4 million households would be willing to pay in order for the

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31 *Id*. at 215.

32 *Id*. at 215–16.

33 *See id*.; National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 69 Fed. Reg. 41,575, 41,628 (Aug. 15, 2014) (codified at 40 C.F.R. §§ 9, 122–125) [hereinafter "EPA Powerplant Regulations"].

34 *Entergy*, 556 U.S. at 216.

35 EPA Powerplant Regulations, *supra* note 33, at 41,605.

36 *Id*. at 41,650.

37 *Id*. at 41,601.

38 *Id*. at 41,599–600.

39 *Id*. at 41,661.

40 *Id*. at 41,647, 41,666.

41 *Id*. at 41,667.

42 *Id*. at 41,662.

43 *Id*. at 41,624–25; Elise Golan & Fred Kuchler, *Willingness to Pay for Food Safety: Costs and Benefits of Accurate Measures*, 81 AM. J. AGRIC. ECON. 1185, 1185 (1999).

analysis to "break even."[44] The analysis found that affected households would have to be willing to pay an average of $5.07 per year for Option Two to "break even" in terms of costs and benefits.[45] An agency finding that the analysis "breaks even" meets OIRA's CBA requirements.[46]

A. Sunstein's Case for Cost-Benefit Analysis

Arguments for CBA come from many places. Some law and economics scholars argue that CBA promotes the ultimate goal of "wealth maximization" by more efficiently allocating resources in society.[47] CBA gives resources to people who most value those resources, which tends to broadly increase wealth.[48]

Sunstein rationalizes CBA not as the best means to increase wealth, but as the best way to increase "welfare" in a broader, utilitarian sense.[49] Sunstein's argument boils down to one fundamental claim: "quantitative cost-benefit analysis is the best available method for assessing the effects of regulation on social welfare."[50] Sunstein defines welfare to include not just economic utility, but also "physical and mental health" and "clean air and water."[51] Sunstein argues that CBA should be prioritized because it provides the best way of measuring these benefits or costs as a result of regulation.[52] The alternative is "expressivism," prioritizing values at the expense of experts and the "facts."[53]

In contrast to this "expressivist" mode of decisionmaking, CBA measures welfare objectively by mimicking a marketplace. Various interested parties will either shoulder costs or enjoy benefits as a result of a policy. Sunstein advocates willingness to pay (either to enact or not enact a policy) as the north star of decisionmaking.[54] If someone next to a waterway

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44 EPA Powerplant Regulations, *supra* note 33, at 41,663–64.

45 *Id*.

46 *See* Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1385 n.64, 1406–13 (2014) (listing examples of breakeven analysis). The EPA is a unique example because the Clean Water Act does not require CBA per se, but a "best technology available" analysis. *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218–19 (2009). So the EPA Powerplant rule did not conclude that Option Two *did* break even, only that if the willingness to pay figures were accurate, it would have.

47 *See, e.g.*, Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 110–11, 119–20 (1979).

48 *See* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 188–91 (1999).

49 SUNSTEIN, *supra* note 1, at 23.

50 *Id*. at 22 (emphasis omitted).

51 *Id*. at 23.

52 *Id*. at 38.

53 *Id*. at ix–x.

54 *See id*. at 39–41.

affected by EPA rules is willing to pay $5.07 per year for certain benefits of a regulation, that is a fair proxy for the regulation's effect on their welfare.[55] To Sunstein, this methodology is ideal because it produces the same result as it would if the parties had bargained through a voluntary exchange.[56] By contrast, a regulation that does not engage in CBA results in a forced exchange where at least one party would not have agreed to the bargain.[57]

B. Sunstein's Modesty

The most common criticism of CBA is that it does not account for moral, distributional, or other intangible concerns.[58] Sunstein acknowledges these flaws but he does not think they doom CBA. Rather, he thinks that CBA can usually take those concerns into account by measuring them.

At the beginning of the cost-benefit revolution, various scholars tried to poke holes in its underlying assumptions. Ronald Dworkin provides a hypothetical that points to several conundrums for CBA[59]:

> Derek is poor, and Amartya is rich. Derek has a book that Amartya would like. Because of his poverty, Derek would be willing to part with the book, which he holds dearly, for $2. Amartya, though he is not very interested in the book, is willing to pay $3 for the book due to his great wealth.[60]

A rule considering relative costs and benefits would conclude that, because of the value Derek and Amartya give the book, a voluntary transfer would result in giving the book to Amartya. A regulation considering who gets the book would award it to Amartya because it results in positive net "social wealth."[61] Amartya's willingness to pay outweighs Derek's desire to keep the book and Derek's legal right to the book.

One concern is that a forced transfer of property may be immoral or unjust because the book properly belonged to Derek.[62] A second concern,

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55 *See supra* notes 42–46 and accompanying text.

56 SUNSTEIN, *supra* note 1, at 48–50.

57 *Id*.

58 *See* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS 212–13 (2004) (arguing for a holistic, less quantitative-heavy CBA that takes into account health, safety, and ethical values).

59 Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 197–200 (1980). Dworkin broadly critiques wealth maximization as a goal of policy (which Sunstein rejects in favor of welfare as a goal), but Dworkin's critique extends to any analysis which places special weight on a willingness to pay. *Id.* at 191–94.

60 Liscow, *supra* note 7, at 1661 (summarizing and quoting Dworkin, *supra* note 59).

61 Dworkin, *supra* note 59, at 197.

62 *See* Fifth Ave. Peace Parade Comm. v. Hoover, 327 F. Supp. 238, 242 (S.D.N.Y. 1971) (holding, in case concerning whether amount-in-controversy was met, that "'priceless' does not necessarily mean 'worthless'").

not raised by Dworkin's example but raised by opponents of CBA generally, is health and safety.[63] Instead of a book, consider what would happen if Derek's nonprofit owned an industrial water purifier he used to clean the water in his community, and Amartya owned a bottled water company that could use a new purifier.[64] Critics contend that CBA, with its emphasis on willingness to pay, would not take into account the interest of Derek's community in clean, healthy water.[65] A third concern raised by the hypothetical is distributional—the book-transferring rule hurts a poor person to benefit a rich person.[66]

Sunstein's response to morality concerns boils down to one solution: agencies should quantify moral commitments by assessing parties' willingness to pay for them. He acknowledges that a moral commitment like a desire to "prevent mass atrocities in a foreign country" is both important yet hard to measure.[67] For Sunstein, willingness to pay still represents the most effective way of weighing costs and benefits in regulation, and the same principle applies no matter if the cost or benefit is intangible or noneconomic.[68] He offers limiting principles—some moral commitments are contrary to the law and so should not be measured.[69] But his answer to this problem is to reiterate his broader rationale for CBA. Measuring is better than not measuring and empiricism is better than "expressivism."[70]

Sunstein's response to concerns about CBA's failure to take health and safety into account is essentially the same. It may be hard to measure the potential effect of repealing clean air rules because no one can authoritatively say it will cause 1,000 people to develop cancer and 10,000 people to have a lessened quality of life.[71] Often, the question is whether a rule will reduce risk.[72] Depending on what a regulation provides, it may increase the risk of, for example, 1 million people developing cancer from 1 in 100,000 to 1 in

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63 *See* Heinzerling, *supra* note 8, at 2313 (arguing that assessing willingness to pay in environmental matters results in "a series of numbers that are almost comically meaningless").

64 *See id*.

65 *See generally id*. at 2330 (noting that willingness to pay involves the perspective of affected parties as consumers, not citizens).

66 *See* Liscow, *supra* note 7, at 1690–91 (explaining how Sunstein's proposal leads to rich-biased policies).

67 SUNSTEIN, *supra* note 1, at 104.

68 *Id*.

69 *Id*. at 112. This acknowledgement may address the Derek-Amartya problem. Though his qualification relates to legal obligations created by Congress, Sunstein seems to acknowledge that legal rights generally may trump CBA. Derek's common law right to his property may stop the transfer of the book.

70 *See* SUNSTEIN, *supra* note 1, at ix.

71 *See id*. at 39–40.

72 *See id*. at 43–45.

1,000. CBA in this context would simply weigh what people would be willing to pay to avoid that risk.[73] Sunstein's solution for health and safety concerns is the same as for moral concerns: assess people's willingness to pay to reduce that risk and have that form the foundation for decisionmaking.

Sunstein's response to concern about distributive effects is a little more complicated and worth unpacking. Embracing a "norm of equality," Sunstein says government should not adjust its analysis because poor people are always going to be less willing (or more accurately, able) to pay for a certain policy.[74] Because CBA approximates a voluntary transfer, giving any party more "money" in the analysis deprives them of making actual choices about their preferences.[75] One proposal might be to simply treat poor people equally to wealthier people. To Sunstein, this would be an error because "[g]overnment does people no favors by forcing them to pay the amount that they would pay if they had more money."[76] Even assuming Sunstein is normatively correct that it is wrong to "force[]" poor people to pay for policies, coming to this conclusion assumes that enacting a policy involves, as a matter of fact, payment by the people who "win" a particular regulatory dispute.[77] That is, a government considers a rule, assesses willingness to pay, and after enactment, the parties who "win" actually pay. Though Sunstein concedes that in some "harder" cases, this is not true and willingness to pay should not be dispositive there, he can only point to two examples where regulation actually results in a payment.[78] In any event, to Sunstein, the proper response to distributional concerns is not to rework CBA. The proper response is a potential subsidy or tax to ameliorate distributive effects after the policy is enacted.[79] He also concedes that in some situations, distributional concerns can be one factor in the analysis, but only after an

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73 *Id*. at 46–48.

74 *Id*. at 49.

75 *Id*.

76 *Id*. at 47. Sunstein goes further than the typical proponent of CBA goes in arguing for the disaggregation of the value of a statistical life. *See also* Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385, 424 (2004) (arguing the same point that treating poor people differently from wealthy people when calculating willingness to pay is appropriate). The government uses a uniform figure without taking account of relative wealth when, for example, assessing the threats to human health. *See id*. at 385, 423–25. Sunstein's position to value lives individually is an outlier. *See* Liscow, *supra* note 7, at 1688–89.

77 SUNSTEIN, *supra* note 1, at 49.

78 *Id*. at 50–51, 59–61. The two examples are workers' compensation, where workers' wages are reduced dollar-per-dollar to pay into the fund, and drinking water regulations, where costs are directly passed onto consumers. *Id.* at 50–51.

79 *Id*. at 62–63. Sunstein seems to represent the consensus of cost-benefit proponents on this question. *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

agency provides the "foundation" of assessing parties' willingness to pay.[80]

Sunstein's normative and factual assumptions are revealing. First, though he eschews "expressivism," he forcefully argues for a normative approach, a "norm of equality."[81] He is concerned that poor people would be "forced" to pay for policies they cannot "afford."[82] Second, he assumes that the thought exercise of CBA is real,[83] though, in day-to-day regulatory analysis, it is more often than not theoretical. For example, workers who benefit from a lessened risk of losing their hands because of new Occupational Safety and Health Administration ("OSHA") regulations do not have to actually pay for their employers' compliance or, if they do, they pay only a portion because their employer spreads the cost across their entire business. Third, and most fundamentally, he conceives of distribution concerns as separate from—or at least secondary to—cost-benefit analysis. Sunstein concedes that in some situations, hurting the poor relative to the rich could result in a net social cost that CBA may not pick up, but there are "very few cases" like this.[84] As the Derek-Amartya example shows, however, these concerns are inherent in any weighing of costs and benefits where the rich have more ability to pay.[85]

Sunstein has several potential solutions: taxes, subsidies after a regulation with a negative distribution effect, or including distribution at the tail end of an analysis.[86] The first two solutions are a clean way to pass along responsibility for any negative distributive effects that are inherent in CBA to another branch of government. The third solution is similarly unsatisfying. President Obama included "distributive impacts" as a component of CBA in an Executive Order, but there is no evidence that it ever made a difference in any regulation.[87] Sunstein points to no examples. There are two potential explanations for the paucity of examples: either distributive impacts rarely counsel against a particular policy or policymakers lack the tools to take

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80 SUNSTEIN, *supra* note 1, at 65–66.

81 *Id*. at 49.

82 *Id*.

83 *See supra* notes 76–78 and accompanying text.

84 SUNSTEIN, *supra* note 1, at 65.

85 *See* Liscow, *supra* note 7, at 1690–91 (describing how Department of Transportation funding allocation policy prioritizes the rich). Liscow points out that not all CBA rules inherently favor the rich, but Sunstein's insistence on including individual's actual willingness to pay necessarily leads to that result. *Id.* at 1669–71, 1689–91.

86 SUNSTEIN, *supra* note 1, at 62, 65.

87 *See* Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011). *See generally* Penn Program on Regulation, *Obama's Order on Equity and Regulatory Analysis*, REG. REV. (Feb. 8, 2011), https://www.theregreview.org/2011/02/08/obamas-order-equity-and-regulatory-analysis/ [https://perma.cc/2NWE-8CKR] (noting the lack of guidance regarding application of the "distributive impacts" component).

distribution seriously. Given the foregoing analysis, the first explanation is unlikely.

C. Is Sunstein Really So Modest?

In spite of acknowledging its flaws and offering qualifications to its application, Sunstein advocates for CBA's expansion as a primary tool of governance writ large. Not satisfied with its entrenchment in administrative law, Sunstein imagines CBA as an essential tool in resolving debates about free speech or national security.[88] To Sunstein, these are new frontiers. While the application of CBA to these debates may be novel, Sunstein's analysis and response to objections is familiar. If policymakers can quantify costs and benefits, they should use that measurement to guide analysis.[89]

Sunstein's more audacious call for CBA's expansion is in courts. He essentially advocates for CBA to be considered law.[90] Today, CBA is a powerful check on nonindependent agencies by the executive branch.[91] It may be a strong means of executive control, but it is not law passed by Congress and signed by the President.[92] Sunstein maintains that, in general, any refusal to engage in CBA or failure to show that benefits outweigh costs is always arbitrary and capricious in violation of the Administrative Procedure Act.[93] This proposal is bold in two ways.

First, for CBA to not apply, it requires Congress to opt out explicitly or list alternative standards.[94] Because Sunstein sees CBA as a transsubstantive and nonideological tool for good governance, he does not see the democratic problem in courts effectively amending every organic statute to include a command to engage in CBA. No member of the current Supreme Court has been willing to go so far. Sunstein points to *Michigan v. EPA*,[95] where the Court held that the EPA must consider costs as required by the Clean Air Act, and that a lack of weighing costs and benefits necessarily means that a regulation is arbitrary and capricious.[96] Sunstein acknowledges that the

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88 *See* SUNSTEIN, *supra* note 1, at 180–82, 198–200.

89 *Id*. Sunstein offers caveats with a more thoughtful and nuanced perspective on these issues than the length of this book review can provide. *See id*.

90 *See id*. at 149.

91 *See id*. at 6–13.

92 *See id*. at 4.

93 *See id*. at 149. Under Sunstein's exceptions, a rule would still be reasonable if Congress has explicitly said CBA should not apply, the agency shows CBA is infeasible, intangible values weigh against CBA, or CBA would not capture other welfare effects. *See id*.

94 *See id*. at 157–58 (pointing to the Clean Air Act and OSHA regulations as areas where organic statutes require considerations other than quantitative costs and benefits).

95 135 S. Ct. 2699 (2015).

96 *See* SUNSTEIN, *supra* note 1, at 153–55.

Court explicitly did not require "a formal cost-benefit analysis" and that its ruling was limited to the Clean Air Act.[97] Indeed, every major case involving CBA is context-specific because each involves an analysis of whether the agency considered the facts and the relevant factors outlined by Congress.[98] CBA is one tool that agencies use to assess whether what they are doing conforms with democratic will and the facts before them. Under Sunstein's proposal, it would be the default rule even if Congress did not intend it to be.

Second, Sunstein's rule would be a de facto expansion of CBA to independent agencies. OIRA's reach does not currently extend to the Federal Trade Commission, National Labor Relations Board, Equal Employment Opportunity Commission ("EEOC"), or other agencies not under the direct control of the President.[99] If the EEOC, which is in charge of issuing regulations pursuant to the Americans with Disabilities Act,[100] refuses to engage in quantitative CBA in a rule which recognizes that Attention Deficit Disorder is a cognizable disability under the Act, Sunstein's general rule may mean that the rule is struck down no matter what the rule does. Sunstein's exceptions to his general rule could come into play. The statute could preclude the use of CBA. One could imagine the EEOC arguing that CBA would not capture welfare effects. But a court may determine that the EEOC could have and should have engaged in CBA. That risk alone may cause agencies to err on the side of quantifying to the detriment of nonquantifiable benefits like conforming to contradictory congressional commands, recognizing intangible values, and taking account of distributive effects of policies. Today, independent agencies do not have a CBA sword of Damocles hanging over their heads as a potential court challenge. Sunstein's proposal would change that.

II. WANG'S TECHNOCRATIC NIGHTMARE

In her 2018 book, *Carceral Capitalism*, Jackie Wang provides a different lens with which to understand technocratic governance.[101] Sunstein and Wang both conceive of governments as facilitators and actors in markets, but Wang does not think this is a good development.

She rejects several of Sunstein's assumptions, the most basic of which

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97 *See id*.

98 *See* Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 219–20 (2009).

99 *See, e.g.*, Exec. Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (exempting independent agencies).

100 *See generally* 29 C.F.R. § 1630 (2018).

101 WANG, *supra* note 11. This review is woefully underinclusive and only summarizes several chapters that are relevant to technocratic governance. The book includes many other essays and poetry about prison, her brother (who was sentenced as a juvenile to life without parole), the intersection of gender and capitalism, and the debt economy.

is that markets tend to maximize ideal outcomes. Relying on Rosa Luxemburg, David Harvey, and contemporary scholars of racial capitalism who suggest that racial differentiation and exploitation is inherent in the structure of capitalism, she sees markets as fundamentally "parasitic."[102] Markets are not usually places where people thoughtfully bargain and assess risk as CBA proponents imagine. Markets are places where people in power use their position to exert power and extract resources from poor people of color.[103]

Wang provides history and theory to clarify why CBA's insistence on mimicking markets may lead to inherent distributive effects of the kind Dworkin describes.[104] Historians and economists posit that, because of ever-increasing labor productivity, markets always have an ever-expanding pool of capital to expend.[105] At the same time, people lose their jobs or are underworked due to these same productivity gains, so have less money to spend.[106] Companies can always continue to sell products to the lower class, but with rising inequality, the tendency is to use capital to dispossess people of what they already have through subprime mortgages, predatory loans or, more dramatically, police power to extract fines and incarcerate more people to make use of their labor.[107] Furthermore, the market differentiates within lower classes to enable greater dispossession of historically exploited communities.[108]

A. How Expropriation Works

Wang compiles example after example of state and local governments that, as a result of being overly financialized, resemble market actors. To Wang, the root of the problem is financialization.[109] Modern cities and states see their roles as maintaining and increasing revenue streams.[110] They issue bonds, deal in complex securities, and offer lucrative taxpayer-financed projects to developers to enlarge their tax base.[111] When those revenue streams drop as they did in the 2008 financial crisis, the state must "loot the public to pay back its creditors."[112] The result is a "parasitic" relationship

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102 *Id*. at 104–18.

103 *See id*.

104 *See* Dworkin, *supra* note 59, at 197–200.

105 *See* WANG, *supra* note 11, at 101–14.

106 *See id*.

107 *See id*. at 70–72, 134, 150, 158–59, 170–86.

108 *See id*. at 135.

109 *See id*. at 182–88.

110 *See id*.

111 *See id*. at 174–84.

112 *Id*. at 173.

between government and its people.[113] These governments use police and courts to fine citizens to pay back creditors instead of "promot[ing] the well-being of the community."[114] Ferguson, Missouri is the prototypical example. In 2013, 20.2% of the town's $12.75 million budget came from fees and fines.[115] The municipal court in Ferguson issued 32,975 arrest warrants for nonviolent offenses.[116] This was an intentional policy created by a revenue shortfall after the 2008 financial crisis.[117]

Governments also fill in budget gaps via the criminal justice system through outsourcing probation services. The example of Tom Barrett from Augusta, Georgia, is a representative example.[118] After being arrested for stealing a can of beer, a judge gave him the choice of either serving a term in jail or going on probation with a bracelet that could detect if he was drinking.[119] He chose the bracelet and was charged over $400 per month for the privilege by Sentinel Offender Services, a private company.[120]

Local governments also engage private companies to become more "efficient" through predictive policing technologies. These technologies purport to be able to predict where and when crime will happen before it does by using past crime data.[121] The problem is that predicting crime relies on old statistics and tends to "reproduce racist patterns of policing."[122] This use of data to attempt "objective" policing leads only to "ossification of racialized police practices."[123] Municipalities' growing need for revenue through fines compounds the problem.

Another consequence of financialized municipalities is austerity. To pay off creditors, there must be not just more revenue, but also fewer expenditures. For a mayor or emergency manager looking to pay off creditors, for a city like Flint, something like water treatment might be a lesser priority.[124]

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113 *Id*. at 175.

114 *Id*.

115 *Id*. at 160.

116 *Policing and Profit*, 128 HARV. L. REV. 1723, 1724 (2015).

117 *See* WANG, *supra* note 11, at 161 (quoting an email from the town manager to the police chief which said "unless ticket writing ramps up significantly before the end of the year, it will be hard to significantly raise collections next year"). *See generally* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (holding excessive fines by a state to be unconstitutional).

118 WANG, *supra* note 11, at 155 (quoting *Policing and Profit*, *supra* note 116, at 1726 (2015)).

119 *Id*.

120 *Id*.

121 *Id*. at 230–33.

122 *Id*. at 250.

123 *Id*. at 248.

124 *See id*. at 152.

Predictive policing, private contracting of probation services, municipal finance, and emergency manager decisions are often presented as "neutral, unbiased, and rational."[125] For predictive policing in particular, the promise of trustworthy technology lends policing a certain sheen that is lacking after highly publicized police killings of black people and DOJ investigations of Baltimore, New Orleans, Chicago, etc. reveal arbitrary and dangerous police practices.[126] Proponents of predictive policing assert that data yields an objective and therefore less harmful, more efficient police force.

B. Do Expropriation's Benefits Outweigh Its Costs?

Wang and Sunstein talk past one another on several levels. Wang focuses on municipalities. Sunstein focuses on administrative agencies within the federal government. Wang sees governments fundamentally as market actors. Sunstein sees governments as approximating what a market would do by assessing various parties' willingness to pay for particular policies, then counseling that result.

Sunstein would likely argue that Wang's examples are inapposite. First and foremost, the policies that Wang decries may fail CBA. The town of Ferguson, Missouri may not have adequately assessed its citizens' willingness to pay to avoid being burdened by excessive fines. Instead, the town acted self-interestedly to collect more funds for itself, something that an administrative agency rarely ever does under CBA. Moreover, Sunstein does acknowledge that some dignitary harms or distributive concerns should be taken into account in some cases even when CBA points towards a policy like excessive fines. These concerns could outweigh a CBA in "very few cases,"[127] but potentially in a situation like this one.

These are fair distinctions, but they may not make a difference. Consider again Tom Barrett's experience with private probation services.[128] Even if the town of Augusta, Georgia were a disinterested policymaker, the result would have been the same. The policy choices were to allow probation with or without private monitoring services. The private company charged Barrett $400 per month for an alcohol-monitoring bracelet.[129] Poor people facing probation in the town would be able to pay very little to avoid such a policy. Private companies would be willing to pay a lot for a captive source of court-mandated income. There is the added benefit of private companies being able to hire more workers and expand. There is also an arguable benefit in having

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125 *Id*. at 236.

126 *See id*. at 237–38.

127 SUNSTEIN, *supra* note 1, at 65.

128 *See supra* notes 118–120 and accompanying text.

129 WANG, *supra* note 11, at 155.

more bracelets to prevent people like Barrett from drinking.[130] As is the case with most of the CBA advocated by Sunstein, the result would likely be the same regardless of whether or not the town is a disinterested policymaker.

Sunstein could also argue that this is a case where welfare is not captured by willingness to pay, so distributional or other concerns can take precedence.[131] The policy violates the liberty interests of those on probation and creates a cycle of indebtedness for poor people accused of crimes. Still, even in such a situation, Sunstein would advocate willingness to pay as the "foundation" of any analysis and provides no example of how these concerns could outweigh CBA.[132]

Sunstein's approach is both admirable and frustrating. He is admirable because he acknowledges these concerns and provides numerous ways to mitigate CBA's negative effects. Yet his approach is frustrating because these off-ramps seem illusory. Distributive subsidies or taxes can ameliorate CBA's effects, but Congress has to create those subsidies or taxes. An agency can directly inquire into a distributive or other welfare effect to make a decision contrary to a CBA, but Sunstein provides few tools or examples to enable that inquiry. The effect is that Sunstein has helped create a formidable machine of governance that inherently hurts poor people and has few means of limiting those effects. If, as Wang maintains, markets are inherently expropriative, mimicking markets through CBA enables more expropriation.

CONCLUSION

Cass Sunstein takes pride in his technocratic vision for government. To him, approximating a market exchange is the best way to decide what governments should do. While he has every President since Reagan on his side, the future of this consensus depends on the durability of his assumptions, the most central of which is that approximating markets in policymaking leads to ideal outcomes. As admirable as his efforts are to qualify CBA to account for moral, distributive, or health concerns, CBA may have to withstand some formidable objections from scholars like Jackie Wang. If, as Wang posits, markets lead to far-from-ideal outcomes, the costs of CBA may exceed its benefits.

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130 *See id*. To be clear, Barrett took a plea because he did not want to pay $80 for a court-appointed attorney. Whether he stole a can of beer or not, the court system concluded that he was at risk to steal another can of beer. *See id*.

131 SUNSTEIN, *supra* note 1, at 65.

132 *Id*.