Senseless Kindness: The Politics of Cost Benefit Analysis

By Louis E. Wolcher*

Abstract
This essay identifies a social phenomenon that the Russian-Jewish novelist and war correspondent Vasily Grossman calls "senseless kindness." Emerging without prior warning from certain face-to-face encounters between human beings, the striking reversal of preferences that characterizes this phenomenon can be used to cast a critical light on the practices of Cost Benefit Analysis ("CBA"). Not only does senseless kindness highlight the troubling theoretical problem of determining the "correct" ex ante—the point in time at which CBA measures people's preferences—it also points towards the possibility of a more general critique of CBA's indifference to how preferences are formed and expressed. The essay shows that CBA ignores the concrete experiences of everyday human sociality and communicative action by modeling them in all instances as "transactions costs" to be reduced or avoided rather than celebrated, or at least studied for their meaning. Missing from CBA is any sense that the face-to-face encounter between human beings is, or can be, a moment of both individuation (of the participants) and transformation (of their preferences), in which genuine freedom and politics, in the largest senses of these words, are first made possible. Obsessed with what preferences are, CBA ignores the question of how they emerge. The result is not just a partial and partisan view of the possibilities open for human decision-making, but also a technique that puts the validity claims of individual preferences beyond all question and rational deliberation. Skeptical or afraid of government's ability to change culture, certain scientifically-minded decision makers are happy to rely on techniques such as CBA that purport merely to reflect information about "what the people want." However, CBA does not in fact "reflect" preferences as they are; instead, it constructs them as they would be if the entire meaning and value of human reason were reduced to purely instrumental (means-ends) calculations on the basis of correct technique, and if (per impossible) all contexts of people's life histories in concrete forms of life were somehow removed. Purporting to be a descriptive science of what people just happen to prefer, in many instances CBA's theoretical model actually produces a peculiarly asocial account of what their preferences ought to be.

Knowledge and Opinion
Distilled to its essence, philosophy's most valuable contribution to social science is to remind it, more or less constantly, that what is unquestioned is not necessarily unquestionable. In the West, this willingness (indeed, passion) to question began when the Greeks, from whom we have inherited most of our philosophical and scientific traditions, drew a fundamental distinction between knowledge (epistēmē) and opinion

* Charles I. Stone Professor of Law, University of Washington School of Law, William H. Gates Hall, Box 353020, Seattle, Washington 98195-3020, USA. E-mail address: wolcher@u.washington.edu.
(doxa). The distinction was fundamental for them because almost all Greek thinkers starting with Parmenides ranked theoretical knowledge of that-which-is (ousias, or being) above the unquestioned and "obvious" truths of common sense. Classifying the attainment of pure knowledge and wisdom (sophia) as an end in itself, they also ranked it above mere know-how (phronēsis). The latter kind of knowledge is practical, and manifests itself as the use of instrumental reason as a means for achieving particular ends in politics, in material production, and in daily life. While the Greeks did not deny that phronēsis possesses its own kind of truth—the kind that pertains to effective action (praxis) in the world of production (technē)—they also believed that phronēsis takes far too much for granted about the world to be able to penetrate beneath the outward appearance (eidos) of things and, in a moment of pure viewing (theoria), catch sight of them as they really are. Although doxa is always content to take what "they" say about a thing for granted, those who pursue the hard path of epistēmē know that "a thing's real constitution has a tendency to conceal itself," as Heraclitus puts it (1987: 71). Hence truth, for Greek philosophers, was not an idea or a statement in accord with some already-visible "fact"; rather, their word for truth, alētheia, signifies the arduous effort of un-concealing something in its truth—something that would have remained hidden and obscure but for the event of un-concealment.

These ancient distinctions cast an interesting light on the modern social scientific practice known as Cost-Benefit Analysis ("CBA"). Standing on the "theoretical knowledge" side of the opposition between knowledge and opinion, CBA finds itself in the unusual position of seeking theoretical knowledge about mere opinions, rather than theoretical knowledge about an underlying reality that people's opinions may have distorted or obscured. As the Greeks would have said, probably with a certain degree of contempt, CBA seeks epistēmē about doxa: that is, it acquires theoretical knowledge of mere human opinions (preferences), most of which are themselves pre- or un-theoretical. What is more, CBA is a positive social science in the modern sense of the word—i.e., a fact-oriented technique for producing useful results—and therefore is generally disinclined to question its own grounds. For example, although it is well known that a person's revealed preferences are in part a function of her existing level of wealth, CBA accepts, uncritically, the existing legal distribution of entitlements in society as a pre-given "fact." As a consequence of this, the legitimacy of its policy or welfare recommendations necessarily depends on the (unquestioned) legitimacy of the particular property rights that underlie both the relevant supply and demand functions (see Heyne
1988) and the "psychological reference point" that determines people’s beliefs about ownership (see Zerbe 2001: 38).

All questions of legitimacy aside, CBA also shows no interest in the question why people have the preferences they have, or why their willingness to pay ("WTP") to achieve gains and their willingness to accept ("WTA") to compensate for losses are what they happen to be at any given point in time. It is true, of course, that rational choice theory has always been aware, at least at some level, that people's preferences are affected by the opportunities afforded them by their individual experiences and by prevailing social and institutional arrangements—in short, by history in the largest sense of the word. A few rational choice theorists have even called for CBA to take the "why"-question more seriously, perhaps by making it into an object of analysis or, better still, a formal variable in the theory. Robert Higgs, for example, alleges that rational choice theory ought to take account of the powerful influence of ideology on preference-formation (1987: 35-56), while Michael Hechter observes (and bemoans) economists' relatively low level of theoretical sophistication concerning what he calls the "micro-macro link" that connects individual preferences to their social conditions (1992: 1-2). Despite these and other calls for CBA to broaden its scope of inquiry, its mainstream practitioners by and large remain uninterested in the question why people have the preferences they have. As Paul Heyne puts it: "It is quite true that economists take the existing system for granted in their work; it would make no sense to do anything else" (1988: 57). For CBA it is enough that people simply appear (out of nowhere, so to speak) with measurable WTPs and WTAs that can be summed up and then brought into quantitative relationships.

In thinking about CBA's theoretical and practical indifference to the question "Why?" it is important to remember that this question, although it is exceedingly common in everyday speech, is nonetheless ambiguous in this context. "Why?" can seek factual information about the causes and conditions of a preference or it can inquire after the preference's grounds. The first inquiry aims at a historical explanation; the second seeks a normative reason or justification. Although CBA's indifference to the historical explanation of preferences can (perhaps) be defended on the basis of an academic division of labor that assigns causal questions to disciplines like history, sociology and psychology, reserving "economic" and "policymaking" questions to CBA, its indifference to the normative grounds of preferences has deeper roots than an academic division of labor. Whether it does so consciously or unconsciously, CBA is one of those academic
disciplines that wholeheartedly appropriates Max Weber's central thesis that the environing world—the human world in both its natural and social dimensions—has become disenchanted (1978: I, 506).

Beginning with the Enlightenment, human reason in the form of science and technology has achieved and continues to achieve an ever-increasing mastery over natural and social processes. However, as Western thinkers from Plato to Weber have always reminded us, science as such can give us no answer to the question of how we should live or what we should do (Plato 1961: 119; Weber 1958a: 143). Moreover, the exponential growth of highly successful techniques for gaining mastery over people and things has come at a significant social and psychological cost, for by gradually dissolving the irrational elements and effects of superstitions, prejudices, errors and religious orthodoxies, instrumental reason has also destroyed people's access to a stable and agreed-upon ultimate meaning of the world. An end is not the same as its meaning: ends are what means aim at, whereas meaning shows itself within the very historical process of using means to accomplish ends. For example, the relentless pursuit of consumer goods by earning as much money as possible to pay for them can be explained as the rational use of means to accomplish material ends; but the ultimate meaning of consumerism as a way of life cannot be so easily explained.¹ In short, our gain of technological control over the world (as a means) has combined with the loss of any stable sense that the world (as an end) possesses any universal rational meaning. While the empirical result of this dynamic process of gain-and-loss is a formally rationalized social system—one that maximizes the ability of individuals to calculate the consequences of their actions—the resulting content of social life can be substantively irrational when viewed from the standpoint of ultimate values such as brotherliness, social justice and even the attainment of individual happiness (see Brubaker 1984: 61-87). Weber's famous metaphor of the "iron cage" of rationality (Weber 1958b: 181)² shows that a social system can become instrumentally rational to the highest degree without necessarily affording the people within it the chance to imagine and pursue a substantively rational way of life: witness the all-too-familiar phenomena in ultra-developed societies such as the United States and Japan of "living to work" (instead of

¹ This is more or less what Martin Heidegger meant when he famously declared that "the essence of technology is nothing technological" (1977: 35).
² We actually owe the phrase "iron cage" to Talcott Parsons, who used these words to translate Weber's German expression, ein stahlhartes Gehäuse. The latter can also be translated as "a casing, or housing, as hard as steel" (Sayer 1991: 144).
Thus it is that post-Enlightenment history, in the form of what Nietzsche calls the "advent of nihilism" (1968: 3), has delivered us a scientific discipline (CBA) which interprets the world as a kind of warehouse or store that is full of material fit only for the purposive-rational pursuit of individual interests, whatever they may be. CBA is nihilistic in the precise Nietzschean sense that its highest value—respect for individual choices—has devalued itself by removing any objective criterion of the rightness or reasonableness of choices. According to Weber, the rationality that predominates in, and even defines, modernity is a purposive, or means-end, kind of rationality (Zweckrationalität), the aim of which is to harness the object world and other human beings in the service of particular interests (see Brubaker 1984: 51-53). In place of universal morality predicated on a tradition-based consensus, social life shows itself to CBA as a plurality of competing "values." From the standpoint of the neo-Kantian metaphysics of subjectivity that explicitly informs Weberian thought (and implicitly informs CBA), these values cannot be rationally grounded—only chosen. CBA performs the alchemy of transforming these admittedly incommensurable values into commensurable preferences only by counting people's ability to back their values up with cash in the form of WTPs and WTAs. But of course the result of a balance between cash bids and counter-bids cannot make a project (or its absence) right or reasonable if the individual values that motivate the bids are themselves immune to all rational criticism. Putting all questions of money aside for the moment, if freedom is defined negatively (in the tradition of political liberalism) as the mere absence of certain government constraints on choice, how is the individual supposed to rationally choose his values in a disenchanted world—a world in which all traditional modes of grounding values have lost their binding force?

When it still thought of itself as political economy, economics as a discipline cared about the problem of how the economic system (pertaining to the material reproduction of society) affects the various normative systems that integrate individuals into the social order (the symbolic reproduction of society). But today, as Habermas has noted, economics as a specialized science has broken off the relation between material reproduction and the various normative systems that integrate individuals into the social order. 

---

3 I am referring to so-called "Marburg neo-Kantianism," according to which science, ethics and law are said to exist solely as cultural products, and instead of there being a thing-in-itself there exist only competing constructions of the world (see Honderich 1995: 611-12).

4 Max Weber, for example, styled himself a "political economist" (1958a: 129).
reproduction and symbolic reproduction, and has absolved itself from any questions about the legitimacy of the social order, including its possible pathologies (1984: I, 4). Under such circumstances economists construe rationality in purely functional terms—as a means to economic equilibrium and rational choice—and economics as a discipline loses its historical connection to the rational study and evaluation of the socio-political structures within which all equilibriums and choice occur. In particular, CBA becomes a kind of semi-autonomous administrative system, and its connection to the life world is maintained at only one discrete point: the point at which CBA intervenes to measure preferences. The forces that shape preferences go unexamined, with the result that CBA can contribute nothing to the study or the development of the public sphere within which preferences are continuously being formed and reformed.

It is therefore not surprising that CBA turns away from the question whether individual preferences are well-grounded in ethics, morality or some other normative system: as an empirical social science, CBA has been configured in such a way that it lacks any mechanism for adjudicating the validity of these preferences. One might even go so far as to say that the very existence of CBA as a well-respected discipline tends to prove Nietzsche's thesis that in today's world "the highest values devaluate themselves; the aim is lacking: 'why?' finds no answer" (1968: 9). Instead, as Habermas puts it, "the situation to be regulated [or analyzed], which is embedded in the context of a life-history and a concrete form of life, has to be subjected to violent abstraction, not only because it has to be subsumed under a law but also in order that it can be dealt with administratively" (1984: I, xxxiv). Habermas's remark draws attention to the fact that there is an intimate connection between CBA's methods and purely administrative modes of decision making: once its numerical data on preferences is collected, CBA's calculations lead directly to administration, bypassing the social processes that are constantly socializing and individuating the people whose lives will be affected by the decisions that administration makes. Perhaps this explains why certain CBA practitioners admit that their criterion of economic efficiency "does not tell us 'the right thing to do' in a transcendent moral or spiritual sense" (Zerbe 2001: 29). Implicit in this way of thinking about values is a contestable (albeit historically understandable) view about the nature of morality: namely, that moral actions are always deduced once and for all by individuals from personally chosen criteria that are immune both to rational criticism and to the messy historical processes in which individual preferences—including moral preferences—are formed and expressed.
Why and How

Although CBA's indifference to the question "Why?" in both its causal and normative senses is understandable, given its premises, the same cannot be said about its equally profound indifference to the question of how preferences are formed. The questions "Why?" and "How?" do not seek the same kind of knowledge. Why a thing is pertains to its antecedents or its grounds—its historical causes or normative reasons—but how a thing is always co-determines what it is. The causal why of a thing is usually investigated by those who are concerned with general laws of human action and the useful explanations they afford; whereas the task of investigating a thing's normative why traditionally falls to those who care about its legitimacy. In contrast, determining the unified what-and-how of a thing requires ontological investigation, and aims towards a description rather than an explanation or a justification. That these different ways of making sense of the world sometimes find themselves in tension, or even at cross-purposes, is indicated by a remark of Wittgenstein's: "People who are constantly asking 'why' are like tourists who stand in front of a building reading Baedeker and are so busy reading the history of its construction, etc., that they are prevented from seeing the building" (1984: 40e). Putting why to the side for a moment, one could say that what and how are opposite sides of the same coin—different aspects of one and the same being. To borrow a distinction drawn by the medieval Scholastics, the what-being (essentia) of an individual preference is its determination as a present entity possessing such-and-such attributes, whereas its how-being (existentia) consists in its having a certain mode of existence—a manner or style of persisting (and perhaps changing) through time.

It is tempting to think that the discipline of CBA is a perfect example of what Edmund Husserl describes, in The Crisis of European Sciences, as "the positivistic reduction of the idea of science to mere factual science"—the kind of science that turns away from the enigma of subjectivity to mere calculation on the basis of what is taken for granted about the nature of individual preferences (Husserl 1970: 5-6). Despite Husserl's unflattering hypothesis that "merely fact-minded sciences make for merely fact-minded people" (1970: 6), one would like to think that the formation and expression of preferences as lived phenomena are (or should be) of great interest to CBA, especially if it could be demonstrated that the scientific truth of a preference's "what"-being cannot be thought independently of its "how"-being. To borrow one of the earlier-noted distinctions drawn by the Greeks, the difficult task of un-concealing knowledge about the nature of preferences is not the same as taking one's opinion about
preferences for granted. And indeed it is true: during the past twenty years the proposition that the what and the how of preferences are inextricably linked has been demonstrated time and again by behavioral economists.

Once considered marginal and exotic by mainstream economists, the academic discipline of behavioral economics has shown experimentally that phenomena such as "framing" affect the outcomes that people choose despite the fact that the choices available to them are all mathematically equivalent. For example, in an important 1981 paper Tversky and Kahneman describe an experiment with subjects who were presented with a hypothetical scenario in which the United States is preparing for an outbreak of an unusual disease that is expected to kill 600 people. First asked to choose between Program A that would save a projected 200 people and Program B that carries a one-third probability that 600 people will be saved and a two-thirds probability that no one will be saved, seventy-two percent of the subjects in the experiment chose Program A, even thought the expected outcomes of the two programs are identical. Then the experimenters restated the problem, presenting subjects with a choice between Program C, in which 400 people will die, and Program D, in which there is a one-third probability that no one will die and a two-thirds probability that 600 will die. This time seventy-eight percent chose Program D, despite the fact that it is mathematically equivalent to Program C. The difference between the two experiments consists solely in the manner in which the choices were expressed: lives "saved" versus lives "lost." It would appear that people are risk averse when it comes to saving lives but risk takers when it comes to lives being lost: a prime example of what the authors call a "framing effect" (Tversky and Kahneman 1981: 453).

Experiments like this show that by manipulating the environment in which preferences are expressed—i.e., manipulating the how of preference formation—behavioral economists are able to observe measurable differences in what those preferences are. While the insight of behavioral economists into the constitutive relation between how and what is unquestionably an improvement over the aprioristic deduction of preferences from a purely mathematical model of rational choice, it is important to remember that behavioral economics is still at bottom a causal science. That is, it conceives of social mechanisms such as framing as mere variables that produce measurable outcomes in people's choices. It subordinates or ignores what goes on as preferences are formed in order to determine what the preferences ultimately "are" in relation to the different modes of framing that precede them. Thus, behavioral
economics remains just as indifferent as CBA is to the phenomenological dimension of human preferences: their "how" as seen from within as lived phenomena. At one level this is understandable: no science can proceed without constructing its objects in a manner that allows them to be measured. But when one considers that CBA’s entire raison d’être is to assist government in deciding whether and how to proceed with its various projects—projects that will affect people’s lives for better or worse—then this overtly political dimension of CBA makes its methodological decisions all the more significant. I will argue in what follows that by recognizing preferences only insofar as they fit into pre-established functional units that are fit for measurement, CBA creates a kind of bureaucratic blindness to the spontaneous processes of opinion- and will-formation. And this blindness, in turn, makes it easier for decision makers to decouple their political decisions from the concrete, identity-forming contexts in which people's preferences actually arise, as well as to eschew investment in public institutions that would make widespread popular deliberation and discussion of competing political preferences possible.

**Senseless Kindness**

One of this essay's goals is to open up the phenomenological dimension of preference formation and expression. Since my concern here is to demonstrate the ideological effects of CBA’s purely theoretical structure—including its method of modeling preferences—I will leave for another day the difficult questions of whether and how CBA’s model can be applied in the real world to yield reliable and usable data. Economists can measure revealed preferences because they manifest WTPs and WTAs through consummated (and hence observable) market transactions in which people put their money where their mouths are, so to speak. But CBA considers itself relevant to government decision making precisely because the market has not provided a solution to the problems of public policy that it analyzes. Developing a research method for determining the facts about people’s WTPs and WTAs in the absence of actual transactions in which all relevant preferences are revealed thus becomes a particularly acute (and difficult) problem for CBA. Nevertheless, in this essay I will assume away this problem of application, not because I think it is uninteresting, but because I want to focus on CBA's theoretical model itself, both in relation to what it purports to model and in relation to its meaning for the possibility of politics.

The words "senseless kindness" in the essay's title come from a scene in *Life and Fate*, an epic novel about Stalinist repression and the invasion of the Soviet Union
by the Nazis during the Second World War (Grossman 1985: 409). Its author, Vasily Grossman, was a Russian-Jewish novelist and war correspondent for Krasnaya Zvezda, or Red Star, the official newspaper of the Red Army (Grossman 2005: vii). Although the manuscript of the book was actively suppressed by the Soviet authorities, the great physicist and dissident Andrei Sakharov managed to smuggle a microfilm copy abroad, and the novel was eventually published in 1980, sixteen years after the author's death. Since the recent discovery and publication of Grossman's wartime notebooks, it has become clear that many if not most of the war scenes in the novel are based on actual incidents that Grossman heard about or observed as a correspondent. He was embedded (as we would say today) with Soviet forces as they retreated in panic following Germany's invasion of the Soviet Union in June of 1941, as they fought from near-disaster to victory during the nightmarish battle of Stalingrad in 1942-43, and as the Red Army made its slow but relentless advance from central Russia all the way to Berlin and the end of the war in May of 1945.5

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

The woman thought to herself how simple it would be to strangle him.

---

5 A recent article on the editorial page of the New York Times notes: "What the war gave Grossman were the materials and the mind to write 'Life and Fate,' arguably the greatest Russian novel of the 20th century." Verlyn Klinkengborg, Westward into War with the Soviet Novelist and Reporter Vasily Grossman, N.Y.Times (Feb. 1, 2006), at A28.
There he was, muttering away, his eyes closed, weeping, sucking his lips. Suddenly he opened his eyes and said in very clear Russian: "Water, Mother." "Damn you," said the woman. "What I should do is strangle you." Instead she gave him some water. He grabbed her by the hand and signed to her to help him sit up: he couldn't breathe because of the bleeding. She pulled him up and he clasped his arms round her neck. Suddenly there was a volley of shots outside and the woman began to tremble. Afterwards she told people what she had done. No one could understand; nor could she explain it herself. This senseless kindness is condemned in the fable about the pilgrim who warmed a snake in his bosom. It is the kindness that has mercy on a tarantula that has bitten a child. A mad, blind kindness. People enjoy looking in stories and fables for examples of the danger of this senseless kindness. But one shouldn't be afraid of it. One might as well be afraid of a freshwater fish carried out by chance into the salty ocean. The harm from time to time occasioned a society, class, race or State by this senseless kindness fades away in the light that emanates from those who are endowed with it. This kindness, this stupid kindness, is what is most truly human in a human being. It is what sets man apart, the highest achievement of his soul. No, it says, life is not evil! (Grossman 1985: 408-09).

Many other gratuitous and unforeseen acts of kindness appear in this book, and, in a good example of form following content, they seem to occur almost randomly during the course of the narrative. To mention but one other example, there is a scene in which a captured German officer and his men are removing decomposing bodies from a basement in Stalingrad at the end of the battle, in the winter of 1943. A woman in a crowd of Russian onlookers takes great delight in witnessing the obvious misery and suffering of the Germans, who have been forced by Russian troops to perform this heinous task. At that point the Germans bring out the corpse of an adolescent girl on a stretcher, and the woman collapses and wails in grief when she sees that it is the body of her daughter. Getting to her feet, the woman strides towards the captive officer, and a Russian guard lets her pass. Sensing that she is about to take vengeance, the crowd cannot take their eyes off her. The narrative continues:

The woman could no longer see anything at all except the face of the German with the handkerchief round his mouth. Not understanding what
was happening to her, governed by a power she had just now seemed to control, she felt in the pocket of her jacket for a piece of bread that had been given to her the evening before by a soldier. She held it out to the German officer and said: "There, have something to eat." Afterwards, she was unable to understand what had happened to her, why she had done this (Grossman 1985: 805-06).

Much later still, laying on her bed, the woman remembered what she had done outside the cellar in Stalingrad, and she thought to herself: "I was a fool then, and I'm still a fool now." (1985: 806).

The philosopher Emmanuel Levinas was greatly impressed with Life and Fate, and not just because of its plot or its excellent writing. He was affected most of all by the many scenes and stories in the book depicting unaccountable acts of kindness passing from one person to another, most of which were performed under circumstances in which one might expect the twin impulses of self-regard and self-preservation to be at their strongest. Indeed, Levinas was inclined to interpret the novel as a quasi-philosophical text full of meaning about the essential nature of human goodness itself. To distill a rich and variegated body of philosophical work to its essence, Levinas (and probably Grossman too) believed that human goodness as such cannot be reduced to or explained by a person's compliance with ethical or legal norms; nor can it be equated with an individual "preference" for goodness that could be quantified and compared with other individual preferences according to some sort of politico-scientific calculus. As I have said elsewhere, Levinas dwells (or obsesses) on "the phenomenal irrationality of the ubiquitous small kindnesses that pass between strangers before reason has 'explained' them by reducing them to calculations based on short- or long-term reciprocity" (Wolcher 2005: 142).

The difficulty of understanding the nature of these small kindnesses lies much deeper than at the level of the familiar question of whether it is legitimate for economists to make interpersonal comparisons of utility by transforming ordinal values into cardinal ones. Rather, the real difficulty posed by the phenomenon of senseless kindness has to do with the very possibility of rational explanation itself: if human kindness arises from the particularities of each case rather than from the generality of a norm or preference that aspires to control or at least explain all of the cases that fall under it, then it follows that the faculty of reason can neither control nor properly account for primordial kindness as a phenomenon. Senseless kindness reminds us of the fundamental uncertainty of
human action, for as Hannah Arendt says, "we never quite know what we are doing when we begin to act into the web of interrelationships and mutual dependencies that constitute the field of action" (Arendt 1985: 56). Nevertheless, responsible decision-oriented technologies such as CBA seek the most reasonable technical solution to difficult social problems, and therefore cannot see the point or value of those practices that do not generate "data" that might contribute to the solution. From this point of view, if the possibility of an unintended negative consequence can be foreseen, then its value can be calculated and incorporated into the analysis. And if it cannot be foreseen, well, then, one can always appeal to the advice contained in one of Wittgenstein's best (and pithiest) aphorisms: "What the eye doesn't see the heart doesn't grieve over" (1983: 205).

Richard Zerbe has expressed CBA's attitude towards any information that does not contribute to an efficient solution to problems of public policy by putting what is at stake in terms of a kind of competition between different methods of decision making: "If the government uses [the] KH or KHZ [criteria of efficiency] for evaluating all of its decisions instead of using some other criteria it has the best chance of making all of the people in a society better off 'at the end of the day'" (2001: 28). However honestly and fervently held this opinion may be, though, its very mode of expression confirms Bernard Stiegler's description of the modern "technocratic state." According to Stiegler, this state is one that "no longer has as its aim either the encouragement of communicative action or the achievement of a critical distance toward purposive-rational action"; instead, the state's "activity consists in finding solutions to questions of a technical nature, those that escape public discussion" (1998: 12). By characterizing policymaking as a purely technical problem, thinkers such as Zerbe overlook the possibility that other "methods" of policymaking might actually be (or include) ends rather than means—that they might express the kind of rationality that Weber calls Wertrationalität: behavior that is believed to possess intrinsic value or inherent rightness in itself, even if it does not lead to policy outcomes that are efficient when measured by the sum of people's pre-behavior preferences (Brubaker 1984: 51-53). In short, CBA fails to consider the possibility that the coming-and-being-together of political discussion and mutual learning in the context of policy problems might be part of the good life itself, not to mention a catalyst that can reshape the problems and people's feelings about them. Instead, CBA thinks of decision making methods as merely costs to be borne in the pursuit of solutions to problems the contents of which remain unaffected by the way in which they are decided.
Likewise, defining policymaking solely in terms of competing methods for making the mass of people in general better off in the future cannot explain a fact that is well known to any law professor who has ever tried to teach the insights of law-and-economics in the classroom: namely, that many (or even most) law students seem viscerally averse to reducing problems of decision making—legal or otherwise—to the *ex ante* calculation of costs and benefits according to the criterion of efficiency. What can or should CBA do with a *preference to avoid CBA itself* in favor of, say, deontological modes of decision making such as Kant's Categorical Imperative or the ancient maxim *fiat justitia pereat mundis*? As Lon Fuller's well-developed procedural theory of natural law shows, people have moral preferences for the *way* decisions are made that can be at least as strong as their preferences concerning the *contents* of those decisions (Fuller 1969). If the preference for an exclusively deontological mode of decision making is (or becomes) sufficiently widespread, and if it is backed up by enough aggregate WTP, then it would seem to follow from CBA's own methods and criteria that it ought to go out of business, or at least cease being relevant to government policy making.

Levinas astutely observes that the numerous acts of senseless kindness described in *Life and Fate* do not call for any political action, just as they do not preach anything that could be called an ethical doctrine (2001: 90). On the contrary, he writes that "the scenes of goodness in an inhuman world are disseminated throughout the book, without transforming it into a virtuous book for virtuous readers" (Levinas 2001: 81). The many simple acts of kindness that appear in the course of the novel are "exterior to all system," Levinas claims, and they leave the mind to grasp (if it can) a kind of "ethics without ethical system" in which "the only thing that remains is individual goodness, from man to man" (2001: 81). Levinas even interprets *Life and Fate* as a kind of argument against all efforts to rationalize or systematize the kind of behavior that the book celebrates:

> [Grossman] thinks that the "small goodness" from one person to his fellowman is lost and deformed as soon as it seeks organization and universality and system, as soon as it opts for doctrine, a treatise of politics and theology, a party, a state, and even a church. Yet it remains

---

6 As is well known, Kant eschewed all forms of consequentialism in matters of ethics in favor of a mode of decision making that focuses on the intrinsic rightness of the action that is willed (see 1993: 155)("A good will is good not because of what it performs or effects, nor by its aptness for attaining some proposed end, but simply by virtue of the volition"). The maxim *fiat justitia pereat mundis* means "let justice prevail even if the world should perish."
the sole refuge of the good in being. Unbeaten, it undergoes the violence of evil, which, as small goodness, it can neither vanquish nor drive out. A little kindness going only from man to man, not crossing distances to get to the places where events and forces unfold! A remarkable utopia of the good or the secret of its beyond (Levinas 1998: 230).

As this passage suggests, Levinas (if not Grossman) undoubtedly would have been horrified at the prospect of any social-scientific effort to account for the phenomenon of senseless kindness by reducing it to a political factoid the numerical value of which could then be compared with the numerical values of other political factoids: horrified, in other words, by CBA. This is in part because CBA concerns itself with the formal and atemporal structure of things rather than with things as they show themselves through time. Seen from the latter point of view an “event” is always singular and never universal. It is always open to—indeed nurtured by—what Alain Badiou calls the “surprise of the unexpected” (Badiou 2003: 56). CBA attempts to smother the unexpected with an intervention that violently abstracts preferences from the unpredictable context of their formation. And there is no better example of this than CBA’s interpretation of the phenomenon of kindness as the expression of a "preference for altruism."

CBA and the Preference for Altruism

Recent CBA scholarship has made a determined effort to transform the so-called "preference for altruism" into a monetary value that can be measured in terms of the market-oriented categories of WTP and WTA. Richard Zerbe, for instance, argues that CBA should henceforth define as a "good" any value or good for which there is a willingness to pay, and he criticizes the traditional economic literature for its arbitrary tendency to ignore and exclude from its calculations the obvious willingness that many people have to pay for the values of fairness and kindness towards others (Zerbe 2001: 24-26). On this question he is right: any economic analysis that ignores "soft" goods like fairness that people are actually willing to pay for risks being accused of overt political bias. But note: the well-defined "regard for others" that Zerbe identifies as a good must be capable of showing itself as a preference before the project whose net social value it is the job of the economist to ascertain. In contrast to this kind of well-bounded and conscious preference for altruism, the sort of senseless kindness that Grossman describes in Life and Fate cannot in principle show itself before the deed; it cannot, by its very nature or definition, fall within what CBA would call an ex ante set of
preferences or utility function. This is because the category of senseless kindness displays a peculiar property: it does not implement an earlier preference for altruism, but rather erupts with no prior warning, so to speak, in a way that squarely contradicts the actor’s previous preference for the very opposite of altruism.

The phenomenon of senseless kindness is the product of a concrete encounter between human beings who, all of a sudden and even perhaps unwillingly, find themselves standing face-to-face with one another. In the literal nakedness of the other’s face can be glimpsed the phenomenon of mortality, for every face-to-face encounter between two people—and not just friends—is haunted by the certainty that one of them will outlive the other.\(^7\) I say "can be glimpsed" to indicate that the inevitable death of the other is not necessarily (or even often) encountered as a theme, but that the primordial experience of this truth shows itself as an existential possibility in every face-to-face relationship. Levinas describes the phenomenal structure of this kind of encounter in vivid, almost lyrical terms:

> But that face facing me, in its expression – in its mortality – summons me, demands me, requires me: as if the invisible death faced by the face of the other – pure alterity, separate, somehow, from any whole – were "my business." As if, unknown by the other whom already, in the nakedness of its face, it concerns, it "regarded me" before its confrontation with me, before being the death that stares me, myself, in the face. The death of the other man puts me on the spot, calls me into question, as if I, by my possible indifference, became the accomplice of that death, invisible to the other who is exposed to it; and as if, even before being condemned to it myself, I had to answer for that death of the other, and not leave the other alone to his deathly solitude. It is precisely in that recalling of me to my responsibility by the face that summons me, that demands me, that requires me – it is in that calling into question – that the other is my neighbor (Levinas 1999: 24-25).

It is important to understand that Levinas's description of the ethical encounter that leads to senseless kindness is not an argument for senseless kindness, as if there were too little of it in the world and he wanted to encourage people to be nicer to one another.

\(^7\) Derrida speaks of this certainty in terms of the relationship between friends, both of whom know that one of them will outlive the other; on account of this mutual knowledge of mortality, the friends become what Derrida calls "virtual survivors" in life (Derrida 2001: 171).
This way of putting it wrongly imagines that senseless kindness is an event that one can plan for or take aim at on the basis of an ethical norm or individual preference that could be taught, as it were, in Sunday school. The phenomenal facts of the case are otherwise: the essence of this phenomenon consists in the fact that it stealthily *comes upon* or *surprises* the one who, all of a sudden, finds herself inexplicably exhibiting kindness towards another human being. In short, Levinas attempts to give a rigorous phenomenological description of what *is* (at least sometimes) rather than a normative lecture about what *ought* to be. He wants to describe something that just happens in daily life—albeit always in small ways that fly under the radar screen of political and social theory—even if it is also true that the counter-phenomena of cruelty, greed and selfishness are often more visible to us.

From the "*ex ante* point of view" that informs the modern quest for economic rationality, the possibility that *this* kind of unpredictable encounter might pop up to disturb an actor's well-thought-out plans and projects involves what CBA (if not the actor) would classify as a "transactions cost." In other words, mainstream economic theory interprets an unwanted face-to-face encounter between people as a burden rather than a benefit, and it counts the reduction of transactions costs as an *a priori* gain rather than as the loss of an opportunity for something new and unexpected to emerge. As this attitude towards transactions costs suggests, mainstream economic theory nurtures a general preference for market solutions to individual and social problems. While the origin of this preference for markets is a normative commitment to efficiency, the preferred *means*—the market as such—consists in people *coming together* in real or virtual face-to-face encounters. Indeed, the very existence of the discipline of CBA is based on the recognition that there are barriers (transactions costs) that prevent otherwise willing people from coming together. The idea that the law should mimic hypothetical market solutions when transactions costs prevent real market solutions is simply a corollary of economists' general preference for markets (Posner 2003: 251). Since it counts the pursuit of government "projects" as a second-best solution to social problems, CBA argues that public policy ought to be guided, or at least informed, by an analysis of the hypothetical things that people would willingly do with (and to) one another if there were no transactions costs (Zerbe 2001: 14-33).

The phenomenon of senseless kindness poses an acute challenge to this way of thinking, for it implies that the coming-together process is not just (or at least not necessarily) a "cost." If we take this phenomenon as a symbol for the general thesis that
something unexpected yet desirable can arise whenever human beings interact, it implies that coming together is, or at least can be, a transformative event. Indeed, thinkers such as Habermas have even argued that there is an intimate connection between coming together in discussion and the very concept of rationality itself. In earnest discussion about what is to be done, the participants make claims that they attempt to vindicate and criticize through arguments. As Habermas says, "in virtue of their criticizability, rational expressions also admit of improvement," which means that to be deaf to argument—to be "closed" to it—is to be irrational (1984: I, 18). In attempting to ground our own claims we learn from others, and in learning from others we expose ourselves to the possibility of change. Thus, "we call a person rational who interprets the nature of his desires and feelings in the light of culturally established standards of value, but especially if he can adopt a reflective attitude to the very value standards through which desires and feelings are interpreted" (Habermas 1984: I, 20). By bringing us to see certain aspects of a problem that we did not see before, it follows that the "coming together" of discussion changes us, and thus can change what we prefer.

Of course, not all instances of people coming together involve the prospect of rational and open-minded argumentation. Over a large range of routine economic transactions an increase in transactions costs would admittedly burden the parties without any realistic chance of significantly changing them or their preferences: one thinks of such simple examples as paying bridge tolls, buying bread, and reconciling bank statements. If CBA limited the range of application of its theory to these kinds of human interactions, however, it would be of limited utility to policymakers trying to decide questions of a distinctly political nature, such as whether abortion should be made more (or less) available to women, and whether to allow for drilling in the Arctic National Wildlife Refuge. In situations like these one could argue, as Habermas and Arendt do, that what we need is more discussion (more "transactions costs"), not less—more opportunity for people to test their preferences and possibly change them as a consequence of their interactions with others. To walk a mile in the other's shoes, as the saying goes, is not the expression of an ex ante preference for altruism. Rather, it is a necessary precondition for any deliberation in the political sphere that aspires to become rational in the largest (and most important) sense of the word: namely, the rational evaluation of one's own ultimate ends in light of knowledge about the ultimate ends of others. Socrates said that the unexamined life is not worth living (Plato 1961: 23). But one need not go that far to agree that an unexamined preference is not worth having.
What is more, in all of the examples of senseless kindness described in *Life and Fate*, once the parties incurred what CBA would call the transactions costs of a face-to-face encounter their preferences underwent a metamorphosis that was, if you will, also *pre*-rational: all of a sudden there appeared what CBA would undoubtedly have to recognize as a brand new set of preferences or utility function. Before the Germans entered her hut, the peasant woman described in *Life and Fate* would probably have been "willing to pay" for all the enemy soldiers in her village, wounded and unwounded alike, to be strangled; indeed, she says as much herself, the very instant before she finds herself giving water and comfort to the gut-shot German who is lying on her cot. An intended course of action that threatens to become its own negation once the transactions costs of its implementation are incurred is, to say the least, a very curious kind of revealed preference. Although Zerbe maintains that inefficiency arises only in dynamic societies (2001: 66), the emergence of unexpected choices as a consequence of interpersonal contact seems to show that certain kinds of *efficiencies* can arise only when dynamic conditions change people's preferences. One way or another, one feels entitled to ask what the prospect of this kind of change means for the very concept of economic rationality itself.

**Economic Rationality**

As we have seen, economists normally construe transactions costs as something negative or bad—as barriers standing in the way of many efficient transactions by preventing them from occurring. Thus, if A's WTP for a good owned by B is $100, and B's WTA for this good is $90, then in a world where there are no transactions costs A will wind up acquiring this good from B at some price between $90 and $100, and in the absence of any negative externalities the resulting state of affairs will be a Pareto improvement on its predecessor. But if it would cost the parties jointly at least $11 in transactions costs (travel costs, negotiation costs, etc.) to complete this transaction, then economic theory predicts that A and B will not bother to do it, since there is no price between $90 and $100 that would defray the joint transactions costs that are necessary to effect the exchange. Since the opportunity cost of spending that $11 to consummate the transaction are more highly valued uses of the parties' time and resources, they will not choose to spend it here despite the fact that they would both be better off if the

---

8 "A Pareto optimum is a state of affairs such that no one can be made better off without making someone else worse off. A change in the economy is said to represent a Pareto improvement if at least one person is made better off as a result of the change and no person is made worse off" (Zerbe 2001: 3).
In light of our earlier reflections on the phenomenon of senseless kindness, on the other hand, it is possible to imagine a case in which the cost-prohibitive event of incurring certain transactions costs somehow were able to transform the very opposite of my original preference into the good that I now desire. To put it bluntly, it is as if my WTA of a million dollars for my last piece of bread suddenly and unaccountably became my WTP for that bread to be transferred to another. One could even generalize and reformulate this example as a formal paradox: there is a class of cases such that the circumstance of incurring the inefficiency of excessive transactions costs, either because of a prior miscalculation or through compulsion, leads to a transaction that becomes efficient solely because the costs of engaging in it have resulted in a transformation of the parties’ preferences. Speaking even more generally, one could say that the phenomenon of the unexpected puts into question the very nature of economic rationality. One need not be a sociologist to recognize that senseless kindness, coming as it does to disrupt prior preferences and redirect action away from their realization, makes visible the challenge that the paired phenomena of time and sociality pose to the definition of the "ex ante" in CBA.

Richard Posner observes that "to an economist people who will not make exchanges that improve their net welfare are irrational" (2003: 51). As I have noted already, recent economic theory has introduced the regard for others (altruism) into CBA, a theoretical move that rightly dispels the widely-held misconception that the criterion of economic rationality is satisfied only by choices that maximize an individual's selfish material interests. After all, if I would be willing to pay for a more equal distribution of resources in society, despite the fact that my own monetary income might decline as a consequence, there is no non-dogmatic (or at least non-normative) point of view that can reproach my choice as irrational. 9 As we have seen, microeconomic theory tends to correspond to (if not follow) Max Weber's schema of rational action: an action is subjectively rational if it is directed towards a goal that the actor holds valuable, whatever that goal may be; and it is objectively irrational only if the actor adopts means to achieve his selected goal that are less well-suited than other available means (Brubaker 1984: 53-55). In other words, subjective rationality is a purely descriptive

---

9 Although nothing of importance depends on it here, it should be noted that one consequence of including the preference for altruism in efficiency calculations is that a state of affairs can arise in which aggregate WTPs outweigh aggregate WTAs without the potential compensation test being satisfied (Zerbe 2001: 19).
category—the actor just has the preferences he has, for whatever reason he has them and whatever they may be—whereas the category of objective rationality, although unquestionably normative, is nonetheless limited to assessing the efficiency of the technique the actor has adopted to achieve the particular end that he has set for himself.

Another way to put all of this is to say that CBA would like to take individual preferences as primordial givens—in principle WTPs and WTAs are based exclusively on what people happen to prefer at any given point in time, and not on what an analyst thinks they ought to prefer. However, the stipulation that all preferences are subjective underscores how important it is for CBA to select the “right” point in time to sum them up, for people’s preferences can (and often do) change. If I am willing to pay $1 for an apple instead of a candy bar at $t_1$, and this point in time is the taken to be the relevant ex ante, then my subsequent behavior of buying a candy bar at $t_2$ appears irrational. On the other hand, if we take $t_2$ as the relevant ex ante, then my new preference for a candy bar over an apple makes my act of purchasing it look rational. The problem of selecting the “right” ex ante is even more obvious in the context of the phenomenon of senseless kindness. Consider, for instance, the two examples from Life and Fate that were quoted earlier. As of which ex ante are the women’s preferences (and hence their welfare) to be determined: the ex ante that precedes the moment of facing the German soldiers towards whom they will subsequently act “irrationally” by displaying senseless kindness, or the ex ante that all of a sudden bursts forth to reflect their new desire to be kind to the needy human beings whom they face, and which therefore shows their behavior to be “rational” given their new set of preferences? And if, as Zerbe maintains emphatically, the proper purpose of CBA is “to provide useful information to the decision maker, and not to furnish the decision itself” (2001: 16), then what “information” should the decision maker get if the possibility of a socially determined transformation in preferences lurks just around the temporal corner of any given analysis of ex ante WTPs and WTAs?

**Facts and Meaning**

Among other things, these questions show that method matters. The way we approach any subject precedes and determines not just how we proceed but also what we look for and find. Einstein stressed this dialectical relationship between the “how” of method and the “what” of facts when he said "How a magnitude is measured is what it is" (Wittgenstein 1975: 200). CBA is no exception to Einstein’s rule. What CBA looks for (and finds) is a mathematical relationship between WTPs and WTAs. Calling these phenomena themselves manifestations of individual preferences, CBA proceeds to sum
them up and then recommend (or at least provide "information" about) hypothetical end-states according to a test that most mainstream economists and lawyers accept as the definition of the term "economic efficiency": the Kaldor-Hicks ("KH") efficiency criterion.\footnote{Also known as the "potential compensation" and "wealth maximization" test, KH arose in response to the impracticability of using the Pareto criterion of efficiency as a tool of public policy. The latter requires both that at least one person will be made better off by the move from the status quo to the proposed new state, and that no one will be made worse off (Zerbe 2001: 3-5). "Potential compensation" assures that the winners in the new state are able, in theory, to compensate the losers for their losses, with net gains remaining that improve the winners' welfare relative to their previous positions. In other words, KH is aimed at increasing net social welfare, which is why Richard Posner has called it the "wealth maximization" test (Zerbe 2001: 5). Whether the redistribution actually occurs is not a requirement of the KH test as such, although Zerbe has called for actual compensation to be included in CBA calculations to the extent that there is any willingness to pay for it. (Zerbe 2001: 18). Zerbe's modifications of KH, including primarily his inclusion of the preference for altruistic goods within CBA, has led him and other economists to change the test's name to "KHM," for Kaldor-Hicks-Moral (see Zerbe, Bauman and Finkle 2005).}

While KH can be expressed in a variety of ways, for purposes of this essay I will adopt the definition given by Boadway and Bruce:

State \(a\) is preferable to another state if, in the other state, it is not possible, hypothetically, to carry out lump-sum redistribution so that everyone could be made as well off as in state \(a\) (1984: 97).

A tool or criterion of public policy that asks what individuals would be willing to pay or accept for something is useless without a temporal reference-point—i.e., a determination of when they would be willing to open their wallets. Thus, it can be seen that an entire philosophy of time and history is implicit in the foregoing definition of economic efficiency. The notion of a "state" in which people have preferences that they express as WTPs and WTAs not only presupposes a discrete point in time at which these objects can be measured, but also interprets time itself as a mere sequence of "states" which, when each is viewed in isolation from the others, is fully determined and static. CBA refers to this point in time as the "ex ante perspective" (literally "from (or out of) before," in Latin). Since the kind of problem that CBA wants to solve is whether a move from one state to another state is efficient, CBA answers the question "Before what?" with the concept of the "project" (Zebe 2001: 16). A project consists of the means that would have to be adopted to achieve the hypothetical state under review—a new state that may or may not be more efficient than the \(ex\ ante\) state. This shows that CBA constructs the ideal of legitimate public policymaking in democratic societies in terms of a self-conscious movement from a real present "state" to a hypothetical future "state" on the basis of people's preferences as measured before progress towards the
Levinas's view to the contrary notwithstanding, this way of framing CBA's task does suggest a possible technical solution to the "problem" of senseless kindness. In order to account theoretically for this kind of preference reversal, one might attempt to endogenize it by discounting the present value of an actor's *ex ante* preference for the very opposite of kindness. For example, if the peasant woman in *Life and Fate* would have been willing to pay something to have the wounded soldier in her cottage strangled *before* he asked her for some water, then we could reduce the value of her WTP for this "project" by the *ex ante* probability that she might subsequently change her mind and feel kindly towards him. Only by this means could CBA begin to conform its calculations to an existential truth that is (or ought to be) visible to any rational adult who has ever tried to accomplish something in the world: namely, that much if not most of history is "made by men who never know what they are doing and always arrive at letting loose, as it were, something different from what they [originally] intended and wanted to happen" (Arendt 2005: 57). Accounting for senseless kindness in this way would then seem to be a simple matter (at least in theory) of computing the frequency of its empirical occurrence. However, if one takes as one's object of analysis the more general category of an unexpected change in preferences as a consequence of human interaction, then it is difficult to see how a reliable discount factor could be ascertained, since the set of possible outcomes is not itself predetermined. Moreover, even if an actuarial solution to this problem were to be discovered, what it would lack is the same thing that the rigorously "factual" discipline of behavioral economics lacks: namely, any sort of critical reflection on the *meaning* of unexpected changes in preferences, such as the eruption of senseless kindness, for people considered as social and political beings.

Understanding the difference between the fact and the meaning of a phenomenon is absolutely essential for any thinking that aspires to be non-dogmatic. In judging (subsuming) an individual case only that case is judged—not the standard itself or whether it is an appropriate measure of what it is used to measure (Arendt 2005: 102). Given CBA's relentlessly mathematical interpretation of human preferences, it would be useful to illustrate the fact/meaning dichotomy here by drawing an analogy to Edmund Husserl's famous (or infamous) meditations on modern mathematics. In particular, Husserl was interested in the historical fact that algebra had reduced geometrical thought to a technique of calculation rather than a significant description of spatio-temporal idealities. For example, algebra replaces the *idea* (and the description)
of a circle as an area that is inscribed by a fixed radius as it rotates 360 degrees around a single point in two-dimensional space with the formula for a circle, $x^2 + y^2 = r^2$. Husserl argues that this methodological change in the way geometry is done, although it is a clear advancement in mathematical technique, also brought with it a major transformation in the meaning of mathematics.

Kant had attempted to demonstrate in the Critique of Pure Reason that the proofs of classical Euclidean geometry more or less correspond to or mirror our concrete intuitions of space (Kant 1998: 158). However, algebraic geometry radically transforms the relationship between proof and intuition by making the former into a set of pure numerical configurations. It is worth quoting at some length Husserl's interpretation of the significance of this ultimately technological shift in the nature of mathematical phenomena:

In algebraic calculation, one lets the geometric signification recede into the background as a matter of course, indeed one drops it altogether; one calculates, remembering only at the end that the numbers signify magnitudes. Of course one does not calculate "mechanically," as in ordinary numerical calculation; one thinks, one invents, one makes discoveries—but they have acquired, unnoticed, a displaced, "symbolic" meaning....Like arithmetic itself, in technically developing its methodology [algebraic geometry] is drawn into a process of transformation, through which it becomes a sort of technique; that is, it becomes a mere art of achieving, through a calculating technique according to technical rules, results the genuine sense of whose truth can be attained only by concretely intuitive thinking actually directed at the subject matter itself. But now [only] those modes of thought, those types of clarity which are indispensable for a technique as such, are in action. One operates with letters and with signs for connections and relations (+, X, =, etc.), according to rules of the game for arranging them together in a way essentially not different, in fact, from a game of cards or chess. Here the original thinking that genuinely gives meaning to this technical process and truth to the correct results .... is excluded (Husserl 1970: 44-46).

Husserl’s specific point is ultimately the same as Spinoza’s and Wittgenstein’s: the truth of mathematical ideas (what we call mathematical knowledge) depends upon more than a correct series of calculations. A mathematical proposition may be proved, but it is not
until it can be viewed with perspicuity—until a concrete image or images gives meaning to the symbols in the proof (see Spinoza 1955: 24-25). As Wittgenstein puts it:

> Perspicuity is part of proof. If the process by means of which I get a result were not surveyable, I might indeed make a note that this number is what comes out—but what fact is this supposed to confirm for me? I don't know "what is supposed to come out" (1983: 95).

While much more could be said about the significance of perspicuity in mathematics, for present purposes it is sufficient to take note of a more general aspect of Husserl's analysis: namely, the recognition that there is a fundamental conceptual distinction between facts and the meaning of facts.

Taking Husserl's distinction between facts and meaning as our clue, it becomes possible to interpret CBA as a quintessential manifestation of what Husserl's student Martin Heidegger calls "the Framework" (Gestell). The Framework is none other than an entire orientation to being-in-the-world: it subjects the natural and social worlds to the imperatives of mastery and possession according to correct procedure. Of course it is true that humans before the modern era also desired to master and possess their environment. But the main difference between them and us is that only modern humans seek to master and control everything on the basis of correct procedures. In the Framework human beings devote themselves to the "planning and calculating of everything," and do so to such a degree that reality itself is allowed to appear only within the horizon of what is calculable (Heidegger 2002: 35). A culmination of the metaphysical tradition of subjectivity that began in earnest with Descartes, CBA projects a mathēsis universalis over human relationships, and it identifies the essence of human reason with calculation. In practicing CBA, the "I think" of the Cartesian cogito ergo sum (Descartes 1985: II, 17) finds objectivity in purely arithmetical relations, in the summing-up of relevant numerical data. Objectivity (as thus determined) permits conclusions to be drawn and political action to be oriented on the basis of criteria that present themselves as apolitical, if not anti-political. In CBA a political project is not seen to be the result of the complex give-and-take of interpersonal dialogue and persuasion among equals, as it was in the polis of ancient Athenian democracy during its golden age (Arendt 2005: 117). Rather, CBA interprets the project as a hypothesis whose ideality is firmly secured in advance by some human agency or other (if only the analyst's) so that it may then be sold to the highest bidders in a "market" that determines what is and is
not efficient. As the quotation marks are meant to indicate, however, this market is virtual rather than real, since the whole point of CBA is to gather important information about the idea of projects for which existing, real, markets do not provide adequate solutions. CBA's virtual market, governed by a rigorously mathematical conception of efficiency, becomes the Framework that decision-makers should (and often do) impose on the concrete flow of historical time. It follows that CBA cannot be adequately understood if it is conceived as a mere means—a mere "practical measure" for "practical people," as Zerbe puts it (2001: 1). It must also be understood as a way of revealing what is real—a way of being and thinking that does not simply apply a neutral method to pre-methodological "facts," but rather determines in advance what counts as a fact.

At this point in the discussion it would not be unfair to mention that many of those who are drawn to CBA as a policymaking tool tend to see politics as a dangerous practice. When seen from a jaundiced and mistrustful point of view, politics shows itself as a mere means in the service of the well-formed private ends of interested persons and groups, and political interventions are always burdened with the suspicion that they will make most people “worse off” at the end of the day with reference to individual preferences that are themselves pre- or a-political. Here politics is truly "the continuation of war by other means" as Foucault puts it in a striking inversion of Clausewitz’s famous epigram (Foucault 2003: 15). Hannah Arendt’s idea that politics, in the largest sense of the word, is an end in itself—that it is the never-ending endeavor of human beings to live together and share the earth—is completely foreign to CBA’s way of thinking (Arendt 2005). The “transactions costs” of political interaction in Arendt’s sense are not deadweight losses imposed from without on preferences that otherwise would exist without politics: they constitute the very meaning and identity of preference formation as a phenomenon. In other words, her idea that genuine deliberative democracy can be an end in itself and not just another "method" of decision making attempts to re-conceive our relationships with others from a model of strife and competition to a model of discussion and cooperation within a political community. If this idea sounds naively utopian or even dangerous, consider this more modest claim: one can concede that in a democratic society people’s preferences should control (or at least be relevant to) government decision making without also agreeing that the contents of their preferences should be determined by a methodology that takes no account of the dynamic processes of human interaction and discussion that give rise to those preferences.
The Politics of CBA

According to Aristotle, "man is by nature a political animal [zōon politikon]," and anyone who dwells outside the community of men lives a kind of mutilated existence that “may be compared to an isolated piece at draughts” (Aristotle 1984: II, 1987-88). Polis is the Greek word for the city-state, and in ancient Athens there was a public space (agora) set aside for free men to interact and discuss both public and private affairs. The bond of friendship and union between men that Socrates identifies as the condition of the possibility of the polis suggests that human interactions have a positive value that goes beyond whatever projects they may ratify or initiate (Plato 1961: 319-20). For the Greeks human interaction and discussion in the agora was not just a means to establish previously determined public and private ends—for that way of thinking about politics would have reduced free Athenian citizens to the unequal status of ruler and ruled. As Arendt puts it: "The Greeks understood the polis as the public-political realm in which men attain their full humanity, their full reality as men, not only because they are (as in the privacy of the household) but also because they appear" (2005: 21). According to this ancient Greek ideal of popular democracy, the dialogue of free citizens in the agora was a necessary step towards the formation of wise ends and wise citizens.

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

Our public men have, besides politics, their private affairs to attend to, and our ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters; for, unlike any other nation, regarding him who takes no part in these duties not as unambitious but as useless, we Athenians are able to judge at all events if we cannot originate, and instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all (Thucydides n.d.: 120-21)(emphasis added).

The Athenian view that public and private discourse is a good thing—that it is not a "stumbling block in the way of action," as Pericles says, but rather a necessary precondition for wise action—can be described in modern economic terms as the proposition that human interactions are generally benefits rather than costs. Nevertheless, the bias of mainstream economists and fellow-traveling econo-lawyers goes the other way: they tend to interpret human interactions as costs to be overcome or minimized.
If incurred, the "transactions costs" of dealing with others reduce the net value of any resulting transaction; and if the costs are not incurred, the suspicion arises that they may be creating a regrettable barrier to achieving what would otherwise be a mutually rewarding exchange. The following passage, written by Jeffrey Harrison for a popular series of books describing various legal topics, is typical:

A problem, which Professor Coase readily recognized, is that virtually all exchanges have a cost. These costs are called transaction costs. It is important to note that a transaction cost is not the price of an item or a right. Instead, it is the cost of the transaction itself. These costs include search costs, information costs, the cost of meetings, negotiations, and any other costs incurred to make the primary exchange occur. If these costs exceed the gain from the exchange itself, the exchange will not take place (Harrison 2003: 72).

As Harrison correctly suggests, the presumption that human interactions are costs is associated with Ronald Coase's enormously influential article *The Problem of Social Cost* (1960: 1-44). One implication of Coase's work is that people often choose an inefficient solution to a social problem "in order to avoid the cost of getting together," as Mitchell Polinsky puts it (2003: 15). The normative idea that the law ought to facilitate private agreements by reducing transactions costs (including "the need to communicate information," as Douglas Baird says) is also widely shared by law-and-economics scholars (See Baird 2000: 61; Cooter and Ulen 1988: 101). Finally, as was noted earlier, many scholars believe that judges ought to decide difficult cases in such a way that the result mimics the outcome that the parties themselves would have achieved had there been no transactions costs (Posner 2003: 251).

CBA shares this general antipathy to transactions costs. It imagines that we always know our ends in advance, and that this knowledge sanctions the use of the most efficient means for achieving them. CBA cannot accommodate the possibility that our ends might always be "up for grabs" in the course of our acting as social beings: in particular, during the *polis*-like activity of thinking, talking and being together with one another. While I do not mean to suggest in this essay that we need to return to the conditions of Athenian democracy, built as it was on the backs of slaves and the legal subordination of women, I do want to criticize the idea that human interactions are first and foremost costs. I want to suggest that the so-called "transactions costs" of human interactions are in general what make people into free and responsible agents in the first
place. Habermas is right to assert that there is an internal relation between the capacity for instrumental reason and the capacity for reaching intersubjective understanding about things and events (1984: I, 14): an actor's successful use of instrumental reason in a social context implies the ability of make his point of view understood by others whose cooperative actions are necessary to achieve the actor's ends. Habermas calls the latter ability "communicative action," and he notes (as I have repeatedly done in this essay) that empiricist research traditions such as CBA try to separate communicative action from the "cognitive-instrumental rationality based on the monological employment of descriptive knowledge" (1984: I, 14).

CBA conceives of the human being as a vessel that at any given moment of time is full of a set of well-formed preferences. Since conditions in the real world are always changing, it follows for CBA that inefficiency must be the product of institutional failure: the failure of legal rules to keep pace with changes in sentiments, knowledge or technology. As Zerbe puts it:

Inefficiency arises only in a nonstatic society—that is, a dynamic society.
When conditions change a different, new rule may lower transactions costs or create new property, for which rights need to be assigned, or a change in conditions may create an inefficient divergence between psychological and legal ownership (Zerbe 2001: 66).

This way of thinking about the relationship between preferences and entitlements rests of the belief that these two spheres are functionally autonomous from one another: that public institutions such as law are (or should be) merely the externally imposed mechanism within which bargaining in the private sphere transpires. There is no clearer example of this belief than CBA's concept of "tautological efficiency": the view that if the costs of changing legal rules are taken into account then "every society is always completely efficient as a tautology" (Zerbe 2001: 65). Here the idea seems to be that if the costs of rule-change are small enough then the change would have already occurred; and if the change in rules has not occurred, this proves that it would not be cost justified. By interpreting time as a succession of well-formed "states," however, CBA can give no account of how preferences stay the same or change—it can only observe that they have stayed the same or changed. Nowhere in the thesis of tautological efficiency does the possibility appear that legal rules and other public institutions are (or could be) an ongoing project and product of the kind of communicative action amongst individuals that Habermas and Arendt imagine: the kind
that does not and cannot know in advance exactly where it is going, or whether its outcomes will be consistent with KH efficiency as measured with reference to some prior "state" that is perforce no longer even relevant to what people want.

Human interaction, even if it is sometimes undesired before the fact, allows people the space for what Kant called "spontaneity" (1998: 193). In brief, spontaneity means the capacity to initiate new ideas, understandings, and preferences as a consequence of our interactions with others. This realm of spontaneity is the exact opposite of the realm of necessity that CBA constructs in determining the relation between individual ends and the means for their accomplishment. For CBA, a person's preference for or against project X automatically links up with a measurable WTP to achieve X or a measurable WTA to avoid it: all spontaneity is excluded. But without spontaneity people could never commence anything new; they would remain perpetual slaves, so to speak, of their unchangeable wants, mere tools of previously articulated preferences that they are helpless to avoid or alter. This observation about the relationship between preferences and spontaneity suggests the surprising thesis that politics and freedom are the same. Here, once again, I am using the word politics as Hannah Arendt does, as a name for the basic phenomenon of "venturing forth in speech and deed in the company of one's peers, beginning something new whose end cannot be known in advance, founding a public realm (res publica or republic), promising and forgiving others" (2005: viii). By reducing the concept "human being" to a human being in the singular, and "humanity" to mere a mere multiple of this singularity, CBA places the possibility of imagining and implementing this enlarged notion of politics beyond its horizon.

These reflections begin to cast a new light on the ideal world without transactions costs that Coase constructs to show why there is a divergence in the real world between private and social costs, and to prove how important the existence of high transactions costs actually are (Coase 1988: 174-79). In a nutshell, it would not be wrong to say that the so-called Coasean world\(^\text{11}\) is a world without politics. Thought from the point of view of senseless kindness, Coase's world is one in which individual preferences never change as a consequence of "costly" human interactions. "All things come to be through

---

\(^{11}\) Coase himself rejects this terminology, and has written that far from being "his" world, the imaginary world without transactions costs "is the world of modern economic theory, one which I was hoping to persuade economists to leave" (1988: 174). This does not imply, however, that Coase interprets transactions costs as benign, for he sees them pretty much as other economists do, as "barriers" to efficient transactions.
strife," says Heraclitus (1987: 49), reminding us that change as such always comes at a cost, if only the cost of learning to appreciate or desire something new. Without the prospect of change, it follows that the people in Coase's world lack freedom, in the primordial sense of the capacity to initiate something new. How could they be free in this sense, if they know everything there is to be known and require no costly human contact to realize their preferences? Little wonder, then, that Arendt equates politics with freedom:

Living in a real world and speaking with one another about it are basically one in the same. ... Freedom to depart and begin something new and unheard-of or ... the freedom to interact in speech with many others and experience the diversity that the world always is in its totality—most certainly was and is not the end purpose of politics ... something that can be achieved by political means. It is rather the substance and meaning of all things political. In this sense, politics and freedom are identical (Arendt 2005: xxx-xxxi).

These remarks imply that there is something in addition to its changelessness that is extremely odd about Coase's world of zero transactions costs: namely, the mystery of how individual preferences could ever arise in the first place if the "cost" of getting together with and learning from other people is always excluded in principle.

CBA has inherited a Western philosophical mistrust or contempt for politics that can be traced to Plato. The timeless ideas that Plato put above the changeable world of appearances correspond to CBA's set of human "preferences" that are held in a kind of suspended animation at any given point in time. Just as Plato thought that the eternal ideas can be perceived by the philosopher in an act of pure beholding, so too CBA imagines that the ongoing metamorphoses of preferences in social life can somehow be arrested and measured by a technician who need not take account of the phenomenon of temporality. Just as Plato's timeless ideas hold sway over what merely seems to be good, so too CBA's contention that preferences are objective facts at any given moment in time holds sway over what preferences are constantly becoming as a consequence of politics. Plato believed that the truth of the ideas, as interpreted by the philosopher-king, should govern (or inform) politics. CBA recasts this theory into one in which the truth of opinions, as interpreted by the social scientist, should govern (or inform) politics. The truth of Plato's ideas and the truth of CBA's opinions both fulfill the role of an origin and measure—what the Greeks called an archē—for political action. In both cases the archē
is imposed on the changing circumstances and unstable affairs of acting human beings, and to this extent it represents what Arendt calls the "tyranny of truth" (2005: 47). Experiences like senseless kindness, which do not fit into the framework of either truth-as-idea or truth-as-stable-opinion, are excluded as irrelevant by the authoritative interpreter of truth: in one case the philosopher-king and in the other the social scientist.

To illustrate the kind of tyranny of truth that was just mentioned, consider the following example from the philosophical writings of Herbert Marcuse:

A man who travels by automobile to a distant place chooses his route from the highway maps. Towns, lakes and mountains appear as obstacles to be bypassed. The countryside is shaped and organized by the highway: what one finds en route is a byproduct or annex of the highway. Numerous signs and posters tell the traveler what to do and think; they even request his attention to the beauties of nature or the hallmarks of history. Others have done the thinking for him, and perhaps for the better. Convenient parking spaces have been constructed where the broadest and most surprising view is open. Giant advertisements tell him when to stop and find the pause that refreshes. And all of this is indeed for his benefit, safety and comfort; he receives what he wants. Business, technics, human needs and nature are welded together into one rational and expedient mechanism. He will fare best who follows its directions, subordinating his spontaneity to the anonymous wisdom which ordered everything for him (Marcuse 1998: 47).

Not only is the man’s behavior in Marcuse’s example perfectly “rational,” but the dissolution of all rationality into semi-spontaneous reactions to prescribed mechanical norms means that, from the standpoint of technological thinking, only a crank would insist on freedom of action to make journeys in some other, less efficient, way. The cold, wet blanket of conformity to the “correct” thing to do makes any dissent that dares question its correctness from the standpoint of its ultimate meaning look like a symptom of mental illness, rather than the expression of an alternative vision of what being rational means. But the “obvious” ex ante efficiency of the journey the man takes comes at a cost: namely, the chance that a less efficient route that meanders through villages and past farms might actually be more rewarding to him—indeed, that it might change what he prefers, or even who he is, by virtue of the marginal increase in human interactions that it requires of him.
By making human beings into the passive pawns of their own previous preferences, CBA cannot give an account of them as active agents. As Arendt notes, modes of behavior can be objects of systematic research "only if one excludes man as an active agent, the author of demonstrable events in the world, and demotes him to a creature who merely behaves differently in different situations, on whom one can conduct experiments, and who, one may even hope, can ultimately be brought under control" (2005: 105). CBA seeks to control or influence decision making by a theoretical move that deprives men and women of the ability to change their minds in the course of political interaction. In this respect it would not be inappropriate to compare CBA to certain totalitarian modes of thought that impose solutions from above. If Arendt and Habermas are right that the meaning of politics is freedom, then the meaning of CBA itself is the kind of politics that seeks to control or steer freedom into servitude to "data" about what "the people" on balance prefer. But as Lon Fuller says, "the greatness of what we call democratic government does not lie in the mere fact that a numerical majority controls at election time, but at a point further removed from the ballot box, the forces which are permitted to play upon the electorate" (1940: 123). In other words, the public institutions that make communicative action in the political sphere easier or harder, more open or less open, more valued or less valued, are the true grounds of what is called "democracy" in any given society, and not merely what individual voters say they prefer from a slate of choices that they had no role in shaping.

CBA attempts to abolish what Weber calls "the knowledge of the tragedy with which all action, but especially political action, is truly interwoven" (1958a: 117) by ignoring time's relentless destabilization of everything solid. It does this by effectively construing human preferences as if they were contractually binding promises that cannot later be changed without incurring legal (if not moral) responsibility. In contract law, what happens after a binding promise is made—including especially any regrets and changes in the preferences that led to the promise being made in the first place—are generally held to be immaterial as a consequence of the old Latin maxim and legal principle *pacta sunt servanda* ("promises must be kept"). One can see that CBA's controlling metaphor is that of promise most clearly in its claim that the enforcement of settled entitlements are presumed to be "desirable" as a consequence of a previous cost-benefit analysis that must have determined that the distribution in question was efficient (Zerbe 2001: 27). But it is well to remember that thinking by means of metaphors is a dangerous thing to do. The preferences that CBA measures are not in
fact binding promises: they are in principle and in fact malleable social products. As far as CBA is concerned, the social contract must remain a fiction, for legal or moral obligations become "binding" in CBA's world only from the point of view of a normative position that values stability over change. While such a normative position may be reflected in some (or even most) people's preferences, there is nothing that says it has to be. To express this point another way, in the world of politics, unlike the context of a binding contract, one is always free to change one's mind in response to new information and new experiences with others.

In default of genuine discussion and interaction amongst those who are affected by a decision, CBA lays down ends based on an immutable balance of preferences which administration then enacts: CBA sees the state as the monolithic proprietor of force, rather than seeing public force as the consequence (or at least the possible consequence) of freedom in the political realm. But while it seeks to guarantee the ends with the means (a determination of individual preferences), CBA fails to notice that the means do not correspond to human life as it is lived in history. Real human preferences are never essentially private: individual intentions, interests and desires are tied to language and culture, and thus are inescapably social and susceptible to change. Pretending merely to describe individual preferences, CBA actually constructs them as they would be if people never interacted with one another. That the resulting "information" can be used and exploited politically is obvious. That it can seem to be democratic, inasmuch as it counts everyone's "dollar votes" without seeming to impose a solution from the outside, is equally obvious (see Sunstein 2002: 27-28). What is less obvious, but nonetheless true, is that the very information that CBA provides to policymakers reflects a particular point of view on the nature of preferences, just as its method of summing up and weighing WTAs against WTPs adopts an exclusively instrumental point of view on the nature of rationality and the possibilities available for political life. It seems to me that these points of view are themselves political in the precise sense of the word: contestable value claims about what people want (or should want) rather than elements of a descriptive science of what their preferences just happen to be.

**Conclusion**

If this essay has accomplished its purpose, it should be clear by now that no conceivable improvement in the theory of CBA could bring it closer to the facts of the matter, for the politics of CBA as a method for gathering and evaluating what it calls "facts" is precisely
that which has been most at stake in the course of our meditations. CBA enacts a particular vision of what preference formation and decision making in advanced democratic societies can and should be, and in its determination to freeze the evolution of preferences in the life world into forms that can be counted and compared, CBA reflects both the hyper-technological world in which it appears and the atrophied political culture that it informs. This is hardly surprising, for history teaches us that an age usually gets the political institutions that it deserves. If bureaucratically managed decision making on the basis of numerated individual preferences that are modeled as being immune to change is what is wanted, then CBA probably has it right. Indeed, since American society currently lacks the kind of public institutions that would allow for the reasoned public discussion of political ends that Habermas and Arendt envisage, perhaps CBA, like the ballot box and the opinion poll, is the best chance policymakers have for discovering what the public "mood" is. On the other hand, if genuine democracy means more than the counting of dollar votes that are cast at a discrete and politically binding point in time—if it implies popular engagement in decision making in processes that never guarantee the result but always leave room for something new and unforeseen to emerge from the messy dynamics of human interaction—then it seems to me that CBA is part of the problem and not part of the solution. For there is nothing more dangerous to any robust conception of popular democracy than the belief that the determination of "what the people want" is safely in the hands of experts.
References


Fuller, Lon (1940) *The Law in Quest of Itself* (Evanston: Northwestern University Press)


Thucydides (nd) *The Peloponnesian War*, Richard Crawley, tr. (Garden City, NY: Doubleday)


