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COST-BENEFIT ANALYSIS AND HUMAN RIGHTS

WILLIAM J. ACEVES[†]

INTRODUCTION

The human rights movement has long sought to find arguments in support of rights that do not rely solely on morality or normative suasion.¹ Granted, some scholars, from Amartya Sen to Ronald Dworkin, argue that human rights are worth protecting even if it is inefficient to do so.² Other scholars, including Gareth Evans and Mohamed Sahnoun, suggest that states have a responsibility to protect human rights as a basic obligation that arises from their sovereign status within the international community.³ But, such calls are often met with skepticism, particularly by governments that must make difficult resource allocation decisions.⁴ Protecting human rights can be a costly endeavor. Not all rights can be protected, and trade-offs are inevitable.⁵

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¹ See, e.g., ARI KOHEN, IN DEFENSE OF HUMAN RIGHTS: A NON-RELIGIOUS GROUNDING IN A PLURALISTIC WORLD 3 (2007); WILLIAM F. SCHULZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL 6–7 (2001); KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 15–16 (2017).

² RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24–25 (1977); AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999); cf. SIKKINK, *supra* note 1, at 16; Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 281 (1997).

³ INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 13 (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>; see also RUTI G. TEITEL, HUMANITY'S LAW 108 (2011); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 522–26 (2009).

⁴ Cf. Aoife Nolan, *Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis*, 2015 EUR. HUM. RTS. L. REV. 360, 368–69 (2015); Lutz Oette, *Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?*, 15 HUM. RTS. L. REV. 669, 670 (2015).

⁵ See, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999); Richard A. Posner, *The Costs of Enforcing Legal Rights*, 4 E. EUR. CONST. REV. 71–73 (1995). Studies on the costs of human rights

This Article considers whether cost-benefit analysis can provide the human rights movement with the answers it seeks.⁶ It offers an instrumentalist and empirical approach to complement the normative arguments that are most often used by the human rights movement. If human rights could be fully monetized, states could consider the full range of benefits that arise from protecting rights and the costs that occur when rights are violated. This approach could provide states with a more accurate methodology for making decisions that affect human rights. In fact, protecting human rights may prove to be cost-effective, particularly when second order costs are considered, thereby offering a compelling argument for their defense.⁷

I. THE CALCULUS OF COST-BENEFIT ANALYSIS

Cost-benefit analysis is a commonly used decision-making methodology that facilitates the allocation of state resources and the selection of economically efficient policies.⁸ This methodology requires the monetization of all relevant costs and benefits. Some costs and benefits are easy to monetize; others are not. When values cannot be readily monetized, they must still be incorporated into the analysis. Through the monetization of all relevant values, cost-benefit analysis quantifies the risks and rewards of discrete decisions.⁹ This allows for effective

typically address economic, social, and cultural rights. See generally Eitan Felner, *Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights*, 1 J. HUM. RTS. PRAC. 402 (2009).

⁶ Some commentators suggest that advocates should use cost-benefit analysis because it is "here to stay" and can offer unique opportunities. See MICHAEL A. LIVERMORE & RICHARD L. REVESZ, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* 10–11 (2008); Michael A. Livermore & Richard L. Revesz, *Retaking Rationality Two Years Later*, 48 HOUS. L. REV. 1, 2 (2011) ("By learning how to use cost-benefit analysis to advance their agendas, protection-oriented groups (such as environmentalists, labor unions, and consumer groups) could help correct historical biases and bad practices that have crept into the methodology of cost-benefit analysis.").

⁷ In recent years, the use of rational choice methods to study international law has grown in prominence. See, e.g., *ECONOMIC ANALYSIS OF INTERNATIONAL LAW* 249 (Eugene Kontorovich & Francesco Parisi eds., 2016); *RESEARCH METHODS IN HUMAN RIGHTS: A HANDBOOK* 229, 257 n.14, 261 (Bård A. Andreassen et al. eds., 2017). For one of the earliest studies, see William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT'L ECON. L. 995 (1996).

⁸ See LIVERMORE & REVESZ, *supra* note 6, at 12.

⁹ See Robert W. Hahn, *The Economic Analysis of Regulation: A Response to The Critics*, 71 U. CHI. L. REV. 1021, 1054 (2004). See generally William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 DUKE L.J. 629 (2001). Cost-benefit analysis is

comparisons between competing policies. Through such comparative methodology, cost-benefit analysis can facilitate the selection of the most economically efficient policies.¹⁰

Governments regularly use cost-benefit analysis to make a broad array of decisions.¹¹ Indeed, this methodology has become a centerpiece of the modern regulatory state. Government agencies are often required to conduct cost-benefit analysis when considering policies that may have a significant political, economic, or social impact. As a result, regulations on environmental standards, health requirements, transportation rules, and worker safety protocols have been considered and adopted when their monetized benefits exceeded expected costs.¹² On other occasions, proposed regulations have been rejected when their costs would exceed expected benefits.¹³

In the United States, federal agencies are required by Executive Order 12,866 to use cost-benefit analysis when making regulatory decisions.¹⁴ This analysis must consider “both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential

one of several decision-making methods. GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 31–49 (1978). The precautionary principle, which counsels caution in the face of uncertainty, offers a competing methodology. DANIEL STEEL, *PHILOSOPHY AND THE PRECAUTIONARY PRINCIPLE* 2 (2015).

¹⁰ See generally ANTHONY E. BOARDMAN ET AL., *COST-BENEFIT ANALYSIS* (5th ed. 2018); *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES* (Matthew D. Adler & Eric A. Posner eds., 2001); *RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION* (Robert W. Hahn ed., 1996); HAROLD WINTER, *TRADE-OFFS: AN INTRODUCTION TO ECONOMIC REASONING AND SOCIAL ISSUES* (2005).

¹¹ CASS R. SUNSTEIN, *VALUING LIFE: HUMANIZING THE REGULATORY STATE* 3–4 (2014). Some countries are less receptive to the use of cost-benefit analysis in the decision-making process. Marion Fourcade, *The Political Valuation of Life*, 3 *REG. & GOVERNANCE* 291, 295–96 (2009).

¹² While commonly used, cost-benefit analysis is subject to significant criticism. See, e.g., MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* 92–114 (2012); DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 46 (2010); Henry S. Richardson, *The Stupidity of the Cost-Benefit Standard*, 29 *J. LEGAL STUD.* 971, 975 (2000).

¹³ SUNSTEIN, *supra* note 11, at 17–18.

¹⁴ Exec. Order No. 12,866, 58 *Fed. Reg.* 51,735 (Sept. 30, 1993); Lisa A. Robinson, *How US Government Agencies Value Mortality Risk Reductions*, 1 *REV. ENVTL. ECON. & POL'Y* 283, 285 (2007). See generally STEPHEN BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* (7th ed. 2011); CHRISTOPHER HOOD ET AL., *THE GOVERNMENT OF RISK: UNDERSTANDING RISK REGULATION REGIMES* (2001).

to consider.”¹⁵ In addition, federal agencies undertaking “significant regulatory action” are required to prepare detailed regulatory assessment plans that consider the costs and benefits of proposed action. These plans are required when regulatory action would result in a rule that may “[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”¹⁶ Regulatory assessment plans must be submitted for review and approval to the Office of Information and Regulatory Affairs (“OIRA”), which is located within the Office of Management and Budget (“OMB”).¹⁷ With limited exceptions, decisions to accept or reject regulations that constitute significant regulatory action are made using cost-benefit analysis. If the anticipated benefits exceed the costs, OIRA will approve the regulations. If the anticipated costs exceed the benefits, OIRA will reject the regulations unless a law requires their adoption.¹⁸

Cost-benefit analysis is also used outside the United States. For example, cost-benefit analysis has been used to study large-scale water projects in India and China.¹⁹ Researchers have used cost-benefit principles to study deforestation in the Amazon

¹⁵ Exec. Order No. 12,866, 58 Fed. Reg. § 1(a).

¹⁶ *Id.* § 3(f). A “significant regulatory action” is also defined to include rules that may “[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency,” that may “[m]aterially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof,” or that may “[r]aise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.” *Id.*

¹⁷ SUNSTEIN, *supra* note 11, at 16–26. For a recent example of a regulatory impact analysis, see U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS: REVISIONS TO EMISSION GUIDELINE IMPLEMENTING REGULATIONS; REVISIONS TO NEW SOURCE REVIEW PROGRAM (2018), https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf. See generally Christopher Aluka Berry, *Trump’s New Power Plan Comes with a Deadly Price*, WIRED (Aug. 22, 2018), <https://www.wired.com/story/trump-new-power-plan-air-pollution-deaths/>.

¹⁸ See, e.g., *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 519–22 (1981) (concluding that Congress required the implementation of appropriate regulatory standards to protect worker health even if such regulations were unsupported by cost-benefit analysis).

¹⁹ See generally Hisham El-Bihbety & Harvey Lithwick, *Cost-Benefit Analysis of Water Management Mega-Projects in India and China*, in *THE ARID FRONTIER: INTERACTIVE MANAGEMENT OF ENVIRONMENT AND DEVELOPMENT* 295 (Hendrik J. Bruins & Harvey Lithwick eds., 1998).

region.²⁰ From air pollution in Singapore to fuel standards in Mexico, the principles of cost-benefit analysis have been used on countless occasions throughout the world to assess government policies.²¹ Its effectiveness as a decision-making methodology is evidenced by its ability to address such a diverse array of issues in an equally diverse group of countries.

Cost-benefit analysis is used by private entities as well as governments. For example, corporations routinely use cost-benefit analysis in their decision-making processes. On some occasions, corporations use this methodology in deciding whether to pursue certain business ventures. On other occasions, corporations use cost-benefit analysis to engage in risk assessment, such as whether to install safety features in their products.²² Even individuals make personal choices—from using certain modes of transportation to selecting particular medical procedures—that involve the simple balancing of financial costs and personal benefits.²³ The prevalence of cost-benefit analysis as a decision-making methodology is explained, in part, by its simplicity. As noted by Amos Tversky and Daniel Kahneman, “people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations.”²⁴ Thus, many private decisions are made through cost-benefit analysis. But whereas corporations and individuals are concerned about private welfare, governments must consider the social costs of their decisions.

²⁰ See generally LYKKE E. ANDERSEN, *A COST-BENEFIT ANALYSIS OF DEFORESTATION IN THE BRAZILIAN AMAZON* 27 (1998).

²¹ See, e.g., Michael A. Livermore et al., *Global Cost-Benefit Analysis*, in *THE GLOBALIZATION OF COST-BENEFIT ANALYSIS IN ENVIRONMENTAL POLICY* 3, 10 (Michael A. Livermore & Richard L. Revesz eds., 2013).

²² See, e.g., W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 *STAN. L. REV.* 547, 572–73 (2000); W. Kip Viscusi, *Pricing Lives for Corporate and Governmental Risk Decisions*, 68 *VAND. L. REV.* 1117, 1123 (2015); cf. Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 *RUTGERS L. REV.* 1013, 1014 (1991).

²³ See, e.g., Glenn C. Blomquist et al., *Values of Risk Reduction Implied by Motorist Use of Protection Equipment: New Evidence from Different Populations*, 20 *J. TRANSPORT ECON. & POLY* 55, 55 (1996); Robert W. Crandall & John D. Graham, *The Effect of Fuel Economy Standards on Automobile Safety*, 32 *J.L. & ECON.* 97, 116–17 (1989); Mark K. Dreyfus & W. Kip Viscusi, *Rates of Time Preference and Consumer Valuations of Automobile Safety and Fuel Efficiency*, 38 *J.L. & ECON.* 79, 80 (1995); Jahn K. Hakes & W. Kip Viscusi, *Automobile Seatbelt Usage and the Value of Statistical Life*, 73 *S. ECON. J.* 659, 661 (2007).

²⁴ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124, 1124 (1974).

II. THE VALUE OF COST-BENEFIT ANALYSIS

To those who study human rights (and to those who promote these rights), cost-benefit analysis offers an intriguing and provocative opportunity. State action in support of human rights is often criticized as being ineffective or inefficient.²⁵ Protecting human rights is also seen as an expensive proposition.²⁶ While such criticisms are quick to point out the financial costs of protecting rights, they seldom engage in a rigorous assessment of the monetized and non-monetized benefits.²⁷

Assessing the benefits of protecting human rights requires consideration of the costs that occur when rights are violated. If human rights could be quantified through the conversion of monetary and non-monetary costs and benefits into a common unit of measure, states could more accurately consider the net benefits of protecting human rights. Perhaps the most undertheorized benefit is the value of the human right itself, which involves the monetized benefit of avoiding the loss of that right. This can be assessed through contingent valuation.²⁸ For example, stated preference studies use surveys to measure how much people would be willing to pay in order to reduce or eliminate discrete threats or harms.²⁹ Revealed preference studies use observational data of human behavior to make similar determinations.³⁰ Other related benefits—or co-benefits—that arise from the protection of human rights can include the ongoing social and economic productivity of those individuals whose rights are not violated. When these values are extrapolated across an entire population, the monetized benefits of protecting human rights are significant. Many of these benefits are recurring. These future benefits must also be incorporated into the analysis, subject to an appropriate discount rate.

²⁵ See, e.g., Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1382–84 (2005); Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95, 95 (1999); cf. Varun Gauri, *Social Rights and Economics: Claims to Health Care and Education in Developing Countries*, 32 WORLD DEV. 465, 467–68 (2004).

²⁶ Gauri, *supra* note 25, at 467, 472.

²⁷ *Id.* at 472–73.

²⁸ See, e.g., Ike Brannon, *What is a Life Worth?*, 27 REG. 60, 61 (2004).

²⁹ *Id.*

³⁰ *Id.* at 60–61.

Other benefits merit consideration.³¹ These include the emotional benefits that accrue to the family and friends of individuals whose rights are not violated. They can include the moral interests of community members who value the human right and would suffer from its loss. Other non-monetized benefits which inure to the benefit of the country that protects human rights include promotion of the rule of law and political stability.³² Diplomatic benefits may also accrue.

Admittedly, not all the benefits that result from the protection of human rights can be readily monetized or subject to contingent valuation studies. And yet, these non-monetized benefits can be significant and should be incorporated into the analysis. These non-monetized benefits can be assessed through breakeven analysis, which considers how significant these benefits would need to be in order to justify their costs.³³ Breakeven analysis can be used to identify the value of a proposed benefit even when that benefit is not amenable to standard monetization. It functions through a process of inductive reasoning by using the known costs to determine the benefits needed to justify those costs. Breakeven analysis is regularly used in cost-benefit studies to ensure that even non-monetized benefits are considered.³⁴

It may seem puzzling to consider the financial benefits associated with the prevention of human rights abuses. But, in fact, similar studies are routinely performed to assess the financial benefits of crime prevention.³⁵ These studies consider both the tangible and intangible costs of crime and the corresponding benefits associated with crime prevention. The

³¹ See generally Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809 (2017).

³² See, e.g., Ariel Benyishay & Roger R. Betancourt, *Civil Liberties and Economic Development*, 6 J. INSTITUTIONAL ECON. 281, 283 (2010); Lorenz Blume & Stefan Voigt, *The Economic Effects of Human Rights*, 60 KYKLOS 509, 518–24 (2007); Axel Dreher et al., *Globalization, Economic Freedom, and Human Rights*, 56 J. CONFLICT RESOL. 516, 522–24 (2012).

³³ SUNSTEIN, *supra* note 11, at 65–66; Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1375–79 (2014) [hereinafter Sunstein, *The Limits of Quantification*].

³⁴ Sunstein, *The Limits of Quantification*, *supra* note 33, at 1385–89.

³⁵ See, e.g., Brandon C. Welsh et al., *Benefit-Cost Analysis of Crime Prevention Programs*, 44 CRIME & JUST. 447, 447–49 (2015); see also COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 34–36 (2016); John Roman, *Cost-Benefit Analysis of Criminal Justice Reforms*, NAT'L INST. JUST. J., Sept. 2013, at 30, 31.

benefits of crime prevention can include the cost savings to victims, taxpayers, and even to perpetrators.³⁶ By calculating the costs of discrete crimes—from murder and rape to even low-level offenses—governments can determine the appropriate allocation of state resources to protect society.

The Prison Rape Elimination Act (“PREA”) provides a good example of cost-benefit analysis in the crime prevention field. Congress adopted PREA in 2003 to address the ongoing problem of sexual abuse in the U.S. prison system.³⁷ PREA established the National Prison Rape Elimination Commission, which was tasked with investigating the causes of sexual abuse in the prison system and considering potential solutions. In 2009, the Commission issued its findings, including an extensive list of recommendations.³⁸ Based on these recommendations, the Department of Justice (“DOJ”) developed a proposed set of regulations that were then subjected to public review.³⁹

As part of the regulatory review process, the DOJ performed a cost-benefit analysis that compared the costs of implementing the proposed regulations with the benefits associated with the reduction of sexual abuse in the prison system.⁴⁰ In calculating the proposed benefits, DOJ considered the value associated with the monetized benefits of avoiding sexual abuse.⁴¹ This value was then compared with the anticipated costs of implementation.⁴² Through a rigorous assessment of these costs and benefits, the study concluded that the proposed benefits of implementation would exceed the expected costs. Indeed, the

³⁶ CHRISTIAN HENRICHSON & JOSHUA RINALDI, VERA INST. OF JUST., COST-BENEFIT ANALYSIS AND JUSTICE POLICY TOOLKIT 16–20 (2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/cost-benefit-analysis-and-justice-policy-toolkit/legacy_downloads/cba-justice-policy-toolkit.pdf; JENNIFER ROSENBERG & SARA MARK, INSTITUTE FOR POLICY INTEGRITY, BALANCED JUSTICE: COST-BENEFIT ANALYSIS AND CRIMINAL JUSTICE POLICY 10 (2011), <https://policyintegrity.org/publications/detail/balanced-justice/>.

³⁷ Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003).

³⁸ NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 237 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

³⁹ U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT REGULATORY IMPACT ASSESSMENT 9–11 (2012), https://ojp.gov/programs/pdfs/prea_ria.pdf.

⁴⁰ See generally *id.*

⁴¹ *Id.* at 39–69.

⁴² *Id.* at 70–156. See generally BOOZ ALLEN HAMILTON, PRISON RAPE ELIMINATION ACT (PREA) COST IMPACT ANALYSIS: FINAL REPORT (2010), <https://ojp.gov/programs/pdfs/preacostimpactanalysis.pdf>.

calculations were striking. The costs of implementing the PREA regulations were approximately \$468 million, whereas the benefits in eliminating sexual abuse could reach \$52 billion annually.⁴³ This amount did not include several non-monetized benefits, such as the benefits that would accrue to society by avoiding sexual violence.⁴⁴ Eventually, the PREA regulations were adopted.⁴⁵

This example is by no means unique. Cost-benefit analysis has been used in a variety of areas that implicate human rights. For example, the rights of persons with disabilities have been the subject of several cost-benefit studies as part of the review and approval process for federal regulations implementing the Americans with Disabilities Act (“ADA”).⁴⁶ These studies assessed both the monetized and non-monetized benefits of the proposed ADA regulations.⁴⁷ Cost-benefit studies have also been conducted to assess what constitutes acceptable levels of carcinogens in the water supply or pollutants in the air, both of which implicate the quality of life and life itself.⁴⁸

In sum, cost-benefit analysis could provide states with an innovative methodology for making decisions that affect human rights. By monetizing human rights, states could determine which rights are cost-effective, and should be protected, and which could be deferred because their costs exceed potential benefits. Moreover, if rights cannot be protected at any cost, it would be inefficient to allocate resources to protect them. This analysis could be performed on a variety of human rights, from civil and political rights to economic, social, and cultural rights. If the goal of human rights is to promote social welfare, cost-

⁴³ U.S. DEP’T OF JUSTICE, *supra* note 39, at 1–2.

⁴⁴ *Id.* at 66–69.

⁴⁵ 28 C.F.R. § 115.11(a) (2018).

⁴⁶ SUNSTEIN, *supra* note 11, at 76–77; *see also* 28 C.F.R. § 35.101 (2018).

⁴⁷ *See, e.g.*, U.S. DEP’T OF JUSTICE, FINAL REGULATORY IMPACT ANALYSIS OF THE FINAL REVISED REGULATIONS IMPLEMENTING TITLES II AND III OF THE ADA, INCLUDING REVISED ADA STANDARDS FOR ACCESSIBLE DESIGN (2010), https://www.ada.gov/regs2010/RIA_2010regs/DOJ%20ADA%20Final%20RIA.pdf.

⁴⁸ SUNSTEIN, *supra* note 11, at 55–59, 94; *see also* *Benefits and Costs of the Clean Air Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/clean-air-act-overview/benefits-and-costs-clean-air-act> (last visited Nov. 15, 2018); *Economic Analysis and Statutory Requirements*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/dwregdev/economic-analysis-and-statutory-requirements> (last visited Nov. 15, 2018).

benefit analysis offers a viable and tested methodology to assess the success or failure of such efforts. Human rights advocates could also use this methodology in their own advocacy work.

III. APPLYING COST-BENEFIT ANALYSIS TO HUMAN RIGHTS⁵¹

The principles of cost-benefit analysis can be applied to human rights in several ways. In the United States, federal agencies are required to consider whether a proposed treaty would result in significant regulatory action.⁴⁹ If so, the applicable federal agency must consult with OIRA and convey the outcome of such consultations to the U.S. Department of State.⁵⁰ This obligation is codified in the Foreign Affairs Manual, which governs the operations of the Department of State.⁵¹

If a proposed agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a significant regulatory action (as defined in section 3 of Executive Order 12866), the agency proposing the arrangement shall state what arrangements have been planned or carried out concerning timely consultation with the Office of Management and Budget (OMB) for such commitment. The Department of State should receive confirmation that OMB has been consulted in a timely manner concerning the proposed commitment.⁵²

⁴⁹ See Jonathan B. Wiener & Alberto Alemanno, *Comparing Regulatory Oversight Bodies Across the Atlantic: The Office of Information and Regulatory Affairs in the US and the Impact Assessment Board in the EU*, in *COMPARATIVE ADMINISTRATIVE LAW* 309, 328 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

⁵⁰ In addition to the requirements of Executive Order 12,866, Executive Order 13,609 was adopted in 2012 to promote international cooperation in regulatory matters. Exec. Order No. 13,609, 77 Fed. Reg. 26,413 (May 1, 2012). Such cooperation would facilitate the work of federal agencies and their foreign counterparts “[i]n meeting shared challenges involving health, safety, labor, security, environmental, and other issues, . . . [and] can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.” *Id.* § 1.

⁵¹ Publication, Coordination, and Reporting of International Agreements: Amendments, 71 Fed. Reg. 28,831 (May 18, 2006) (codified at 22 C.F.R. pt. 181).

⁵² 22 C.F.R. § 181.4(e)(2) (2018). See also U.S. DEPT OF STATE, 11 FOREIGN AFFAIRS MANUAL § 724.3(e) (2006) (requiring that action memorandum “shall indicate whether a proposed treaty or agreement embodies a commitment that could reasonably be expected to require (for its implementation) the issuance of a ‘significant regulatory action’ (as defined in section 3 of Executive Order 12866); and if so, what arrangements are being planned or carried out concerning timely

Despite these provisions, it does not appear that any regulations or rules arising from human rights treaties under consideration by the United States have been subjected to cost-benefit analysis, regulatory impact assessments, or any form of OIRA review.

There may be several reasons why human rights treaties have not been subject to the rigors of cost-benefit analysis. Some regulations and rules that may arise out of a proposed treaty may simply be excluded from the regulatory review process by the terms of Executive Order 12,866.⁵³ This order excludes regulations or rules that pertain to a military or foreign affairs function of the United States.⁵⁴ Other regulations and rules may also fall outside the definition of significant regulatory action because they do not have an annual effect on the economy of \$100 million or more or they do not otherwise adversely affect the economy.⁵⁵ Government statements made during the treaty ratification process often result in the exclusion of regulations and rules from cost-benefit analysis. To gain domestic support for ratification, for example, the U.S. Senate regularly attaches declarations of non-self-execution to human rights treaties. Essentially, these declarations limit the domestic “costs” of treaty implementation by indicating that a treaty will not give rise to enforceable rights or domestic obligations in the absence of further congressional action.⁵⁶ Such declarations may forestall the need for any regulations or rules. In addition, the Executive branch will often assert that a treaty will not result in any significant changes to U.S. law or practice.⁵⁷ While these

consultation with OMB.”). In addition, federal agencies are required to consult with OMB if a proposed international agreement “embodies a commitment to furnish funds, goods, or services that are beyond or in addition to those authorized in an approved budget.” 22 C.F.R. § 181.4(e)(1).

⁵³ See, e.g., Implementation of the Defense Trade Cooperation Treaty Between the United States and the United Kingdom, 77 Fed. Reg. 16,592, 16,596 (Mar. 21, 2012) (“The Department is of the opinion that restricting defense articles exports is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive order 12866.”).

⁵⁴ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 3(d)(2) (Sept. 30, 1993).

⁵⁵ *Id.* § 3(f).

⁵⁶ See David L. Sloss, *Executing Foster v. Neilson: The Two-Step Approach to Analyzing Self-Executing Treaties*, 53 HARV. INT’L L.J. 135, 145–46, 153 (2012); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 703–04 (1995).

⁵⁷ See, e.g., Convention on the Rights of Persons with Disabilities, June 30, 2009, S. TREATY DOC. No. 112-7 (2009) (stating that Convention provisions cannot be directly enforced by U.S. courts or give rise to individually enforceable rights in the

statements are made to gain support for ratification, they may actually be counterproductive because they do not allow for meaningful assessment of the costs and benefits of a proposed treaty.

In cases of human rights treaties, the regulatory assessment process may also be limited because it only focuses “on benefits and costs that accrue to citizens and residents of the United States.”⁵⁸ If a federal regulation will have an impact outside the United States, such effects are reported separately.⁵⁹ Bifurcating the domestic and foreign effects of a proposed treaty may be reasonable because it highlights the unique domestic costs and benefits that flow from proposed regulatory action. However, foreign effects should not be wholly excluded from the analysis because they may also provide both costs and benefits to the United States.⁶⁰

Cost-benefit analysis may thus offer an important contribution to treaty ratification debates in the United States.⁶¹ A regulatory impact assessment that fully monetizes the benefits of protecting human rights, including the costs that occur when rights are violated, could justify ratification of long-stalled treaties, such as the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities.⁶² The arguments used against these treaties

United States); S. REP. NO. 112-6, at 9 (2012) (stating that key Convention terms should be defined to be coextensive with terms in existing U.S. law); cf. Yvonne M. Dutton, *Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms*, 34 U. PA. J. INT'L L. 1, 15–16 (2012); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1822, 1832, 1856 (2003).

⁵⁸ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR No. A-4 (2003).

⁵⁹ *Id.*

⁶⁰ See Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 573 (2014).

⁶¹ See, e.g., *Have Human Rights Treaties Failed?*, N.Y. TIMES (Dec. 28, 2014), <https://www.nytimes.com/roomfordebate/2014/12/28/have-human-rights-treaties-failed>.

⁶² See, e.g., Michael G. Heyman, *The Time Has Come for the United States to Ratify the Convention on the Elimination of All Forms of Discrimination Against Women*, 9 WASH. U. GLOBAL STUD. L. REV. 195, 196 (2010); Tara J. Melish, *The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify*, 14 HUM. RTS. BRIEF 37, 42 (2007); Martha Middleton, *The Last Holdout*, ABA J., Mar. 2016, at 64; Lainie Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 172 (2006); cf. Lawrence A. Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's*

typically do not address the monetized benefits of protecting human rights.⁶³ And, they do not assess these benefits against the costs of treaty implementation. Cost-benefit analysis could thus be used to complement the normative arguments made in support of ratification. Of course, such analysis could provide reasons against ratification.⁶⁴

Cost-benefit analysis may also offer insights into the study of human rights. In recent years, questions surrounding treaty ratification and compliance have received significant consideration.⁶⁵ Why do states ratify some human rights treaties and not others? Why do states comply with some treaty obligations and not others? A rigorous analysis that monetizes the costs and benefits of protecting human rights may reveal unique values that have not been considered in prior studies. This may explain why states ratify certain treaties and allocate more resources to comply with certain treaty obligations.⁶⁶ This

Precautionary Principle as U.S. Law, 7 SANTA CLARA J. INT'L L. 23, 155–56 (2009) (arguing that the regulatory requirements of Executive Order 12,866 should apply to discussions on the proposed ratification of UNCLOS).

⁶³ *But see* Varun Gauri, *The Cost of Complying with Human Rights Treaties: The Convention on the Rights of the Child and Basic Immunization*, 6 REV. INT'L ORGS. 33 (2011).

⁶⁴ As a general matter, cost-benefit analysis does not address normative (political) arguments. *See generally* THEODORE M. PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE* (1996). *But see* Louis E. Wolcher, *Senseless Kindness: The Politics of Cost-Benefit Analysis*, 25 LAW & INEQ. 147 (2007).

⁶⁵ Treaty compliance is of significant interest to lawyers, economists, and political scientists. *See, e.g.*, Adam S. Chilton & Eric A. Posner, *The Influence of History on States' Compliance with Human Rights Obligations*, 56 VA. J. INT'L L. 211 (2016); Geoff Dancy & Kathryn Sikkink, *Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance*, 44 N.Y.U. J. INT'L L. & POL. 751 (2012); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003); Emilie M. Hafner-Burton & James Ron, *Seeing Double: Human Rights Impact Through Qualitative and Quantitative Eyes*, 61 WORLD POL. 360 (2009); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Daniel W. Hill, Jr., *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POL. 1161 (2010); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000); Richard A. Nielsen & Beth A. Simmons, *Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?*, 59 INT'L STUD. Q. 197 (2015); Wayne Sandholtz, *Domestic Law and Human Rights Treaty Commitments: The Convention against Torture*, 16 J. HUM. RTS. 25 (2017); Beth A. Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010).

⁶⁶ *See, e.g.*, Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1, 29 (2006) (“Undoubtedly most states generally place their own economic self-interest above principled responses to human rights

approach offers a competing empirical narrative to critiques that question the efficacy and relevance of human rights treaties.⁶⁷

The use of cost-benefit analysis need not be limited to the study of treaties. It can also be used to study the development of, and compliance with, customary international law.⁶⁸ By monetizing the costs and benefits of accepting and complying with customary norms, cost-benefit analysis can offer some clarity to the study of human rights norms that have not yet been codified but are still binding on states.⁶⁹ It could explain, for example, why some norms rise to the level of custom through consistent state practice and others do not. It could even explain why some customary norms are more likely to be complied with than other norms.

In addition to studying the decisions of individual states, cost-benefit analysis could be used to examine multilateral efforts to protect human rights. The principles of cost-benefit analysis apply with equal rigor to multilateral efforts. For example, the Responsibility to Protect ("R2P") movement has gained greater traction in recent years as the United Nations seeks to convince states of their obligation to prevent serious human rights abuses.⁷⁰ The R2P movement calls for collective state action to prevent genocide, war crimes, crimes against humanity, and other serious human rights abuses.⁷¹ Presumably, the principles underlying the R2P movement could

conditions outside their own territory."); Simon SC Tay, *Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development*, 11 GEO. INT'L ENVTL. L. REV. 241, 289–90 (1999) ("Common sense dictates that cooperation will only succeed if, for all parties, the benefits exceed the cost.").

⁶⁷ See, e.g., ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014). But see Neil A. Englehart & Melissa K. Miller, *The CEDAW Effect: International Law's Impact on Women's Rights*, 13 J. HUM. RTS. 22 (2014); Christopher J. Fariss, *Respect for Human Rights Has Improved Over Time: Modeling the Changing Standards of Accountability*, 108 AM. POL. SCI. REV. 297 (2014).

⁶⁸ See, e.g., Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 399–404 (2014) (suggesting that cost-benefit analysis plays a role in determining whether a state complies with customary international law).

⁶⁹ For other efforts to assess customary international law, see *id.* at 394; George Norman & Joel Trachtman, *Measuring the Shadow of the Future: An Introduction to the Game Theory of Customary International Law*, 2008 U. ILL. L. REV. 127, 129–30 (2008).

⁷⁰ See, e.g., ALEX J. BELLAMY, *THE RESPONSIBILITY TO PROTECT: A DEFENSE* 1, 4–5, 7 (2015) (providing a brief history of R2P and how the United Nations Security Council adopted resolutions reaffirming R2P); *THE ROUTLEDGE HANDBOOK ON THE RESPONSIBILITY TO PROTECT* 7–12 (W. Andy Knight & Frazer Egerton eds., 2012).

⁷¹ G.A. Res. 60/1, ¶¶ 138–39 (Oct. 24, 2005).

be extended to any acts that pose significant harms to human life.⁷² Arguments in support of the R2P movement have often focused on normative and legal justifications.⁷³ Arguments against the R2P movement raise resource limitations and also legal concerns.⁷⁴ By monetizing human rights and comparing the benefits of protecting these rights with their attendant costs, cost-benefit analysis could offer empirical support for humanitarian intervention. Indeed, the influential Albright-Cohen report on atrocity prevention makes clear that preventive action is more cost-effective than inaction.⁷⁵ Efforts to promote international cooperation on other matters of global concern, such as climate change or famine relief, could likewise gain greater support through rigorous cost-benefit analysis.⁷⁶ If human rights are monetizable, the benefits of intervention may be easier to see and harder to ignore.

⁷² INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 3, at viii.

⁷³ See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (5th ed. 2015); Terry Nardin, *From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention*, 24 EUR. J. INT'L L. 67, 68–70 (2013); Chris O'Meara, *Should International Law Recognize a Right of Humanitarian Intervention?*, 66 INT'L & COMP. L.Q. 441, 443–44, 447, 451 (2017).

⁷⁴ Kim R. Holmes, *The Weakness of the Responsibility to Protect as an International Norm*, THE HERITAGE FOUNDATION (Jan. 7, 2014), <https://www.heritage.org/defense/commentary/the-weakness-the-responsibility-protect-international-norm>; see, e.g., David Fetherstonhaugh et al., *Insensitivity to the Value of Human Life: A Study of Psychological Numbing*, 14 J. RISK & UNCERTAINTY 283, 284, 298–99 (1997); Paul Slovic et al., *Psychic Numbing and Mass Atrocity*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 126, 134–37 (Eldar Shafir ed., 2012); Paul Slovic, *When (In)action Speaks Louder than Words: Confronting the Collapse of Humanitarian Values in Foreign Policy Decisions*, 2015 U. ILL. L. REV. SLIP OPINIONS 24, 25, 27 (2015); Lesley Wexler, *Valuing Foreign Lives in Genocides & Mass Atrocities: Law, Humanitarian Intervention, and the Prominence Effect*, 2015 U. ILL. L. REV. SLIP OPINIONS 32, 34–36 (2015).

⁷⁵ GENOCIDE PREVENTION TASK FORCE, *PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS*, at xv (2008) (“If the United States does not engage early in preventing these crimes, we inevitably bear greater costs—in feeding millions of refugees and trying to manage long-lasting regional crises.”).

⁷⁶ See, e.g., CLIMATE CHANGE NEGOTIATIONS: A GUIDE TO RESOLVING DISPUTES AND FACILITATING MULTILATERAL COOPERATION 3–35 (Gunnar Sjöstedt & Ariel Macaspac Penetrante eds., 2013); Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. POL. 7, 7, 16–17 (2011).

IV. THE LIMITS OF COST-BENEFIT ANALYSIS

The use of cost-benefit analysis is not without its critics, many of whom question the appropriateness and accuracy of the valuation process.⁷⁷ These criticisms are magnified when human rights are at issue.⁷⁸ As Sally Engle Merry has written, the process of quantification “risks distorting the complexity of social phenomena.”⁷⁹ While it allows for effective comparisons, it also strips norms “of their context, history, and meaning.”⁸⁰ In fact, such criticisms were leveled at the PREA regulatory approval process, even though that process eventually concluded that preventing sexual violence in the prison system was cost-effective.⁸¹ The criticisms were twofold.

First, protecting individuals from egregious human rights abuses, such as sexual violence, should not be conditioned on whether it is financially feasible to do so. Critics argued that individuals should always be protected from such harms regardless of the costs. In criticizing the PREA regulatory approval process, Lisa Heinzerling challenged the suggestion that cost-benefit analysis was an appropriate methodology for determining whether individuals were entitled to protection from sexual violence: “In the topsy-turvy world of cost-benefit analysis, DOJ was compelled to treat rape as just another market exchange, coercion as a side note, and the elimination of prison rape as a good idea only if the economic numbers happened to come out that way.”⁸² Ronald Dworkin has offered a similar criticism of cost-benefit analysis when he noted that some harms

⁷⁷ See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 9 (2004).

⁷⁸ See, e.g., William J. Aceves, *Valuing Life: A Human Rights Perspective on the Calculus of Regulation*, 36 LAW & INEQ. 1, 3 & n.12 (2018).

⁷⁹ SALLY ENGLE MERRY, THE SEDUCTIONS OF QUANTIFICATION: MEASURING HUMAN RIGHTS, GENDER VIOLENCE, AND SEX TRAFFICKING 1 (2016). *But see* José-Miguel Bello y Villarino & Ramona Vijayarasa, *The Indicator Fad: How Quantifiable Measurement Can Work Hand-in-Hand with Human Rights—A Response to Sally Engle Merry’s The Seductions of Quantification*, 50 N.Y.U. J. INT’L L. & POL. 985 (2018).

⁸⁰ MERRY, *supra* note 79, at 1. While Merry acknowledges the “power of quantitative knowledge,” she urges restraint in its application and a clear understanding of how data is compiled and assessed. *Id.* at 26.

⁸¹ U.S. DEPT OF JUSTICE, *supra* note 39, at 1–2.

⁸² Lisa Heinzerling, *Cost-Benefit Jumps the Shark: The Department of Justice’s Economic Analysis of Prison Rape*, GEO. L. FAC. BLOG (June 13, 2012), http://gulcfac.typepad.com/georgetown_university_law/2012/06/cost-benefit-jumps-the-shark.html.

are so egregious they cannot be assessed through mathematical calculations and that “[a] civilised society recognises rights precisely to protect individuals from these grave harms.”⁸³

Second, the market-based assumptions that underlie cost-benefit analysis seem poorly situated for assessing the value of human rights. As part of the PREA regulatory approval process, the DOJ was required to monetize the value to detainees of not being subjected to sexual violence. It did so through contingent valuation by “asking how much money the victims of rape would be willing to pay to avoid rape and also asking how much money these victims would be willing to accept in exchange for being raped.”⁸⁴ Critics argued that such monetization of human rights is neither feasible nor accurate. Several human rights groups, including Human Rights Watch and the Human Rights Defense Center, submitted statements to DOJ addressing the cost-benefit analysis conducted during the PREA approval process.⁸⁵ Human Rights Watch expressed several concerns in its DOJ submission, noting that “estimating the monetary ‘costs’ of crime is at best a fraught and imperfect effort, particularly when dealing with crimes such as sexual abuse whose principal cost is due to the pain, suffering, and quality of life diminution of the victims.”⁸⁶ Significantly, Human Rights Watch took this position even though it ultimately supported the PREA regulations. The methodological limitations of such calculations seem evident. How can human rights be monetized or meaningfully calculated?

⁸³ Ronald Dworkin, *It Is Absurd To Calculate Human Rights According to Cost-Benefit Analysis*, THE GUARDIAN (May 23, 2006), <https://www.theguardian.com/commentisfree/2006/may/24/comment.politics>.

⁸⁴ Heinzerling, *supra* note 82.

⁸⁵ HUMAN RIGHTS WATCH, COMMENTS ON THE NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE, PROPOSED BY THE DEPARTMENT OF JUSTICE ON FEBRUARY 3, 2011, at 1–2 (2011), https://www.hrw.org/sites/default/files/related_material/Human%20Rights%20Watch%20Comments%20on%20Prison%20Rape%20Standards.pdf; Letter from Paul Wright, Exec. Dir., Human Rights Def. Ctr. & Alex Friedmann, Assoc. Editor, Prison Legal News, to Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Dep’t of Justice (May 3, 2010) (on file with author); *see also* CAMPAIGN FOR YOUTH JUSTICE ET AL., PROTECTING YOUTH IN THE PREA NATIONAL STANDARDS (2011), <http://cclp.org/wp-content/uploads/2016/06/PREA-Youth-Comments.pdf>; JUST DET. INT’L, COMMENTS SUBMITTED TO THE DEPARTMENT OF JUSTICE NOTICE OF PROPOSED RULEMAKING ON NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE (2011), <https://justdetention.org/wp-content/uploads/2015/10/Comments-Submitted-to-the-Department-of-Justice-Notice.pdf>.

⁸⁶ HUMAN RIGHTS WATCH, *supra* note 85, at 3.

And yet, advocates of cost-benefit analysis would argue valuation is possible. In assessing whether the value of human life could be subject to economic analysis, for example, Thomas Schelling argued in 1968 that such efforts are both feasible and warranted.⁸⁷ It is possible to monetize the value a society places on reducing mortality risks. According to Schelling, “people have been dying for as long as they have been living; and where life and death are concerned we are all consumers. We nearly all want our lives extended and are probably willing to pay for it.”⁸⁸ To this end, states have regularly used calculations regarding the value of a statistical life (VSL) to quantify the value placed on reductions in mortality risks.⁸⁹ Federal agencies have used VSL calculations to assess countless regulatory proposals, including cigarette warning labels, food safety standards, and ejection mitigation requirements for vehicles.⁹⁰ VSL calculations have even been used to assess the costs of war.⁹¹ In fact, these valuation efforts, which are regularly used by the federal government to make regulatory decisions that implicate human life, may offer the best example for using cost-benefit analysis to assess the feasibility of protecting human rights.⁹²

Admittedly, some human rights would pose unique challenges to cost-benefit analysis.⁹³ There are several human rights norms that reflect unique interests and values within the international community. In such cases, monetization may be particularly difficult.

⁸⁷ Thomas C. Schelling, *The Life You Save May Be Your Own*, in PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127 (Samuel B. Chase, Jr. ed., 1968).

⁸⁸ *Id.* at 128–29.

⁸⁹ See W. Kip Viscusi, *The Value of Life in Legal Contexts: Survey and Critique*, 2 AM. L. & ECON. REV. 195, 201–08 (2000).

⁹⁰ SUNSTEIN, *supra* note 11, at 185–93.

⁹¹ See JOSEPH E. STIGLITZ & LINDA J. BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT 94–96 (2008). *But see* MICHAEL WALZER, ARGUING ABOUT WAR 88–91 (2004).

⁹² Using VSL calculations to assess the appropriateness of regulations that implicate human life has been subject to some criticism. See GILLES CARBONNIER, HUMANITARIAN ECONOMICS: WAR, DISASTER AND THE GLOBAL AID MARKET 106–07 (2015); ELIZABETH WICKS, THE RIGHT TO LIFE AND CONFLICTING INTERESTS 225–32 (2010); Aceves, *supra* note 78, at 3; Trudy Ann Cameron, *Euthanizing the Value of a Statistical Life*, 4 REV. ENVTL. ECON. & POL'Y 161, 161–62 (2010).

⁹³ Cf. GHK CONSULTING LTD., HUMAN RIGHTS AND ECONOMICS: TENSIONS AND POSITIVE RELATIONSHIPS 7–8 (2012), http://siteresources.worldbank.org/PROJETS/Resources/40940-1331068268558/Report_Development_Fragility_Human_Rights.pdf.

Consider the prohibition against genocide. The Convention on the Prevention and Punishment of the Crime of Genocide was established because the international community recognized that the destruction of national, ethnic, racial, or religious groups represented a profound loss to all humanity.⁹⁴ In fact, the loss of any such group was viewed as far more consequential than the loss associated with the sum of its individual members.⁹⁵ As a result, the crime of genocide is seen as a unique crime that affects all humanity and implicates the peace and security of the international community.⁹⁶ It is difficult to envision how cost-benefit analysis could properly monetize the value in preventing genocide.⁹⁷ Calculating the value of an entire national, ethnic, racial, or religious group—including its history, culture, tradition, and collective memory—would pose extraordinary challenges. When human rights norms incorporate the moral interests and collective values of the international community, monetization may prove to be quite difficult.

But again, advocates of cost-benefit analysis would argue that monetization of moral interests or complex values is, in fact, possible. According to Eric Posner and Cass Sunstein, even moral interests are subject to valuation and should be monetized in cost-benefit analysis. “If people lose welfare because of the suffering or death of others . . . their loss ought to be counted.”⁹⁸ To disregard moral interests would ignore an important value that should be considered in any cost-benefit analysis. It should not be surprising, then, that the federal regulatory review process supports such valuation efforts. Executive Order 12,866 compels federal agencies to engage in cost-benefit analysis of significant regulatory actions, and it requires this analysis to consider both quantitative and qualitative measures.⁹⁹ Executive Order 13,563 adds that agencies “may consider (and discuss

⁹⁴ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁹⁵ See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 268–69 (1963); BEREL LANG, *GENOCIDE: THE ACT AS IDEA* 28–29 (2017); RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 91 (1944); David Luban, *Arendt on the Crime of Crimes*, 28 *RATIO JURIS* 307, 309 (2015).

⁹⁶ See Reservations to Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

⁹⁷ Cf. Amartya Sen, *The Discipline of Cost-Benefit Analysis*, 29 *J. LEGAL STUD.* 931, 934 (2000).

⁹⁸ Posner & Sunstein, *supra* note 31, at 1813.

⁹⁹ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 1(a) (Sept. 30, 1993).

qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.¹⁰⁰ OIRA also acknowledges that some costs and benefits may be difficult to monetize.¹⁰¹ In such cases, federal agencies are instructed to use their best efforts and to explain such costs and benefits through various assessments, including breakeven analysis.¹⁰² If a federal agency fails to consider these values in its calculations, OIRA may reject the proposed regulations.¹⁰³ In addition, such action may also be a violation of the Administrative Procedure Act, which precludes agencies from acting arbitrarily.¹⁰⁴

CONCLUSION

This Article recognizes that efforts to promote and protect human rights through references to morality or normative suasion have not always succeeded. This explains one of the shortcomings of the modern human rights movement.¹⁰⁵ Indeed, Jeremy Bentham's acerbic critique of rights as "anarchical fallacies" and "nonsense upon stilts" still resonates over 170 years later.¹⁰⁶

At a minimum, a new discourse is necessary—one that empowers advocates by reframing the debate over human rights. For these reasons, "[i]t is time to start over with an approach to promoting wellbeing . . . that is empirical rather than ideological."¹⁰⁷ Cost-benefit analysis thus offers a provocative

¹⁰⁰ Exec. Order No. 13,563, 76 Fed. Reg. 3821, § 1(c) (Jan. 21, 2011).

¹⁰¹ OFFICE OF MGMT. & BUDGET, *supra* note 58, at 27.

¹⁰² *Id.* at 2.

¹⁰³ *Regulations and Rulemaking Process*, OFF. OF INFO. AND REG. AFF., <https://www.reginfo.gov/public/jsp/Utilities/faq.jsp> (last visited Nov. 15, 2018).

¹⁰⁴ Posner & Sunstein, *supra* note 31, at 1813; *see also* Ohio v. United States Dep't of the Interior, 880 F.2d 432, 464 (D.C. Cir. 1989).

¹⁰⁵ *See generally* ROSA FREEDMAN, *FAILING TO PROTECT: THE U.N. AND THE POLITICIZATION OF HUMAN RIGHTS* (2015); STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010); Conor Gearty, *Is the Human Rights Era Drawing to a Close?*, 2017 EUR. HUM. RTS. L. REV. 425 (2017); *cf.* Shima Baradaran et al., *Does International Law Matter?*, 97 MINN. L. REV. 743 (2013); Robert H. Bork, *The Limits of "International Law"*, THE NAT'L INT., Winter 1989/90, at 3.

¹⁰⁶ Jeremy Bentham, *Nonsense Upon Stilts*, in RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 319, 330 (Philip Schofield et al. eds., 2002).

¹⁰⁷ Eric Posner, *The Case Against Human Rights*, THE GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/news/2014/dec/04-sp-case-against-human-rights>; *see also* Edward Anderson, *Economics and Human Rights*, in RESEARCH METHODS IN

opportunity for the human rights movement. However, its contributions must be balanced against both normative and pragmatic considerations.¹⁰⁸ Philosophically, can rights be monetized without devaluing life and debasing human dignity? Practically, are monetization efforts feasible or valid? Legally, do these efforts themselves violate human rights norms such as the principle of equality and the right to life? In assessing the best path forward, human rights advocates must thus engage in their own cost-benefit analysis.

HUMAN RIGHTS: A HANDBOOK, *supra* note 7, at 94, 95; GHK CONSULTING LTD., *supra* note 93, at 6.

¹⁰⁸ Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits to Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005 (2000) (critiquing the ability of cost-benefit analysis to answer difficult questions).

