Developing Standards for Benefit-Cost Analysis
October 18-19, 2010

Postmodernists and “Crits”
on Benefit-Cost Analysis

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- multiple truths, leading to indeterminacy of legal rules
- legal indeterminacy used as instrument of power
Amadou Diallo was shot 41 times in ... his own home, because he was Black, and he was reaching for his wallet, in the night, in a city plagued by crime. That, a jury found, was sufficient reason for the police to fear for their own lives and, in their confusion, shoot an innocent citizen. Mari Matsuda, *On Causation*, 100 Colum. L. Rev. 2197 (2000).

Yet each tragedy is met with the same systematic response: those without resources, those least able to correct the harm, are considered the legal cause of the harm. The economic and corporate interests that created the structure in which these tragedies occurred are absolved of legal and moral responsibility.
“…the [EPA] Administrator shall allocate for each unit … that is located in the States of Illinois, Indiana, or Ohio …. [a proportion of] allowances in an amount equal to 200,000 …”
Clean Air Act § 404(a)(3)
Postmodernism

• multiple truths, leading to legal indeterminacy
• apparently neutral language is actually tool for exercise of power
“The Oriental woman is no more than a machine; she makes no distinction between one man and another man.”
Flaubert, in correspondence with Louise Colet, 1853
Postmodernism

“..if you are not like everybody else, then you are abnormal, if you are abnormal, then you are sick. These three categories, not being like everybody else, not being normal and being sick are in fact very different but have been reduced to the same thing.”

Michel Foucault, 1975 interview

“My field is the history of thought. Man is a thinking being. The way he thinks is related to society, politics, economics, and history and is also related to very general and universal categories and formal structures.”

"[P]ostmodernists are terrific critical deconstructors, and terrible constructors. They tend to leave that job to those patient liberals … who are still willing to attempt to sort out at least some of those differences between truth and fantasy…"

“What is needed is a decision making standard that accounts for and counteracts this power disparity. Cost-benefit analysis fails to do this. It explicitly avoids distributional issues and actually exacerbates the problem of power imbalance because it is indeterminate and, therefore, endlessly manipulable….”

"[C]ost-benefit analysis is an opaque and technically intricate process accessible only to experts…”
"[E]fficiency or cost-benefit calculus is simply a language for carrying on political or ethical discussion, rather than a way of discovering facts about the external world that can then be politically or ethically assessed.”

"[T]he primary function of efficiency has been to drive the right crazy by using their weapons against them…. The concept will now appear as a way to drive the left crazy by showing that its naive hopes of reconciling social justice with material plenty are inconsistent with elementary economic laws.

“The developed world is speaking the language of efficiency, while the developing world speaks the language of justice.”
"[O]ne is left with a pressing need to know why a person with Professor Sunstein's obvious intelligence and even disposition would conclude that all of this occasionally comprehensible, but frequently preposterous and always manipulable number spinning could possibly lead to better decisionmaking in the real world. Sadly, the answer lies in Professor Sunstein's very apparent contempt for the way that ordinary people—unaided by experts wielding quantitative tools—make decisions about risk.


The most notable trend in this area has been OIRA's insistence on converting technology-based environmental laws into cost-benefit laws. In OIRA's hands, for example, the Clean Water Act is being transformed from a technology-based regime into a cost-benefit regime.

CBA as an false science

“In recent years, economic analysis has substantially succeeded in de-ethicizing environmental issues.”
• Distributional analysis
• Procedural reforms
• Office of CBA?
Cost Benefit Analysis

Cost-benefit analysis (CBA) is an analytical tool that can be used to assess the benefits and costs of regulatory proposals. Costs and benefits are examined from the perspective of the community as a whole to help identify the proposal with the highest net benefit. Where regulation is designed to reduce the risk of physical or economic harm, a CBA should include a risk analysis detailing how the regulation will change the likelihood, frequency or consequences of an adverse event occurring.

CBA is needed for regulatory proposals with significant impacts as part of the preparation of a Regulation Impact Statement (RIS).

Information on undertaking CBA for Australian Government regulatory proposals is available in Appendix E of the Best Practice Regulation Handbook.

Information on undertaking CBA for Council of Australian Governments (COAG) regulatory proposals is available in Appendix C of the COAG best practice regulation guide.

CBA Services
- CBA Guidance Notes
- Consultants on CBA
- Examples of CBA
- Selected Resources on CBA
- CBA Conference
- Working Papers in CBA

CBA Services

The Office of Best Practice Regulation (OBPR) provides training, advice and technical assistance on CBA and risk analysis. A key goal of the OBPR is to help build the capacity of departments and agencies to improve the quality of regulatory proposals.

Assistance in undertaking a cost-benefit analysis can be obtained by contacting the OBPR: phone 02 6215 1955 or email helpdesk@obpr.gov.au.

The OBPR provides:
- training on CBA;
- technical assistance on CBA; and
- advice on Improving CBA done in-house or undertaken by a consultant.

It also acts as a repository for CBA reports. Contact the OBPR for more information.

Back to top

CBA Guidance Notes

In addition to the material in Appendix E of the Best Practice Regulation Handbook and Appendix C of the COAG best practice regulation guide, the OBPR has issued the following specific guidance for departments preparing a CBA. These are working documents, and feedback on their content and usefulness is welcome.

Decision Rules in Regulatory Cost-Benefit Analysis

- Best Practice Regulation Guidance Note: Decision Rules PDF version [↑] 372 KB
- Best Practice Regulation Guidance Note: Decision Rules RTF version [↑] 3.4 MB
• Distributional analysis

• Procedural reforms

• Office of CBA?

• **Citizen Prompt Letters**: can be filed with agencies urging them to explore new regulation *plus* CBA adhering to best practices