

L'ACB dans le Droit

(Benefit-Cost Analysis and the Law)

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Abstract

BCA and the Law (L'ACB dans le Droit)

Benefit-cost analysis may be a superior method of decisionmaking, but is it legal? The answer varies. Different countries have adopted different laws and rules regarding the legality of BCA. Some countries require BCA for important decisions, some prohibit it, and some both require and prohibit BCA in different laws (and sometimes even in different provisions of the same law). Moreover, even when BCA is required, the meaning of such legal requirements varies and is often ambiguous, inviting judicial interpretations (which in turn also vary), and allowing inconsistency across government agencies. After reviewing these variations, several reform proposals are offered to improve the use of BCA by governments.

BCA and the Law

- Legal options for BCA
- BCA in United States law
- BCA in European Union law
- Recommendations for reform

Legal Options for BCA

- Types of policy analysis:
 - Benefit-Cost Analysis (BCA): B vs. C ; $B > C$; $\max(B - C)$
 - Risk-Risk Analysis (R-R): ΔR_1 vs. ΔR_2 ; $\min(R_1 + R_2)$
 - Cost-Effectiveness Analysis (C-E): $\$/\Delta \text{output}$; $\min(\$/\Delta \text{output})$
- Legal Boundaries: The 3 Basic Options of “Deontic Logic”
 - Required, Obligatory: “must”
 - Discretionary, Permitted: “may”
 - Prohibited, Forbidden: “may not”

Comparing Types of Analysis

- In theory, BCA embraces all effects.
- In practice, BCA is often limited to looking only at:
 - ΔTR vs. Industry compliance cost
 - Problem: Risk-risk tradeoffs are ignored. Need to add R-RA to BCA.
 - Focus on TR omits countervailing/ancillary effects.
 - Focus on industry compliance cost favors options with low-cost substitutes. But substitutes pose their own risks = R-R.
 - Solution: Full portfolio analysis (“treat the whole patient”): Maximize net benefits ($\max(B-C)$) = maximize overall risk reduction (including Countervailing Risks and Ancillary Benefits) less overall social costs:
$$= \text{Max}(\Delta TR - \Delta CR + \Delta AB - C)$$
- “Income-risk analysis” (“health-health”): translates C into risk units (“riskizes” \$ instead of monetizing risks), but does not address CR or AB.
- “Precaution” looks only at ΔTR and ignores CR and C.
- Focus on “Administrative Costs” (“red tape”) is often popular. Problem: it’s only a subset of C; and reducing Administrative costs could increase social costs. Example: a good BCA itself incurs administrative costs.

Legal options for BCA:

If BCA is required, what kind of requirement ?

1. Consideration Rule:

- Must assess C, or B vs. C, or R_1 vs. R_2 , or C-E of alternatives.
- Decision can still yield $C > B$, or $R_2 > R_1$, or choice of less C-E alternative.
- Example: Environmental Impact Assessment (EIA; under NEPA): must assess environmental impacts, but need not reduce impacts, nor choose least harmful option. “Stop and Think.”

3. Consideration + Explanation for suboptimal choice:

- Must analyze B vs. C, or R_1 vs. R_2 , or C-E of alternatives.
- If decision would still yield $C > B$, or $R_2 > R_1$, or choice of less C-E alternative, must explain why [to executive/public/courts/legislature/...].

5. Decision Rule:

- B must $>$ C (“outweigh”), or decision must not yield $C > B$.
- B must “justify” C. B must be “reasonably related” to C.
- Decision must not yield $R_2 > R_1$, or it must “reduce overall risk.”
- Must choose most C-E (“least burdensome”) alternative.

If BCA is required, How Rigorous ?

- A spectrum from Cool to Hot Analysis:
 - “Cool Analysis”: strict economic optimization, all impacts quantified & monetized; highly technocratic.
 - “Hot analysis” (?) = “moral outrage,” especially after a crisis event.
 - Intermediate approach: “Warm analysis”: careful comparison of full portfolio of pros & cons, both quantitative and qualitative; cognitive process for good judgment; democratic device for transparency and accountability.
 - Benjamin Franklin (1772): “prudential algebra.”
 - J.M. Keynes: “better to be roughly right than precisely wrong.”
 - Cass Sunstein: “cognitive case” for BCA
 - BCA of BCA: VOI vs. COI: higher MB from including all important factors, than from quantifying & monetizing fewer factors?
- BCA as a “tool not a rule”
- Often difficult to tell which is intended by the law.
 - “Courts and Congress often use the phrase ‘cost-benefit analysis’ imprecisely, with the result that it is difficult to discern just what type of analysis is intended.”
Quivira Mining Co. v. NRC, 866 F.2d 1246, 1250 (10th Cir. 1989).

Benjamin Franklin, letter to Joseph Priestley, Sept. 19, 1772:

“In the Affair of so much Importance to you, wherein you ask my Advice, I cannot for want of sufficient Premises, advise you *what* to determine, but if you please I will tell you *how*. When those difficult Cases occur, they are difficult, chiefly because while we have them under Consideration, **all the Reasons *pro* and *con* are not present to the Mind at the same time; but sometimes one Set present themselves, and at other times another, the first being out of Sight. . . .**

“To get over this, my Way is, to divide half a Sheet of Paper by a Line into **two Columns; writing over the one **Pro**, and over the other **Con**. Then during three or four Days Consideration, I put down under the different heads short Hints of the different Motives, that at different Times occur to me, *for* or *against* the Measure. When I have thus **got them all together in one View**, I endeavour to **estimate their respective Weights** . . . and thus proceeding I find at length where the Ballance lies . . .**

“And, tho’ the Weight of Reasons cannot be taken with the Precision of Algebraic Quantities, yet, when each is thus considered, separately and comparatively, and **the whole lies before me, I think I can judge better, and am less liable to make**

How Rigorous? Courts vary

- Quivira Mining v. NRC (10th Cir. 1989): challenge to NRC's standards for licensing uranium mills and tailings sites.
 - Statute: consider costs & benefits. Legislative history: reasonable relationship of B and C. Court held that statute requires generalized (not strict quantitative) BCA, that NRC properly performed such BCA, and that NRC was within its discretion under BCA requirement to find that **increase in product price of 1-2% was a cost "reasonably related to the benefit."** But the benefit was not quantified.
- Corrosion Proof Fittings v. EPA (5th Cir. 1991): challenge to EPA ban on asbestos under TSCA. Court invalidated the ban, because of:
 - Failure to consider **less burdensome alternatives** (C-E). TSCA says use the "least burdensome alternative." EPA considered a ban on all remaining uses, or no action, but EPA did not assess intermediate options.
 - Failure to **compare monetized benefits to costs** (BCA). TSCA says "prevent unreasonable risk" and "consider costs and benefits." EPA estimated a cost of \$71m per life saved. Court: too high [or at least EPA should have compared to monetized value of saving these lives]. Court agreed that qualitative factors can matter, but said they cannot be a "trump card" when quantified costs substantially exceed quantified benefits.
 - Failure to **consider risk-risk tradeoffs** (R-R). TSCA says "prevent unreasonable risk." EPA declined to consider the cancer risks of asbestos-substitutes (e.g. PVC), or the highway fatality risks of non-asbestos brake linings (less effective, with longer stopping distances).

Why do Governments sometimes avoid BCA ?

- Unfamiliarity, misunderstanding, illusion of no tradeoffs
 - Lack of expertise, capacity to conduct BCA
 - Populism (vs. technocracy)
 - Distrust in numbers
 - Distaste for monetizing human life, or discounting future impacts
 - Concern about potential biases embedded in BCA, e.g. costs overstated, benefits understated, key values omitted. (Or, that RA & CV overstate benefits...)
 - Elitism (vs. accountability)
 - Sanctimony of “knowing” the right result
 - Fear that BCA will expose poor decisions
 - Costs of analysis
 - Out-of-pocket expenses: suggests lack of capacity, or narrow focus on administrative costs rather than social costs & benefits
 - Could efforts to “cut red tape” and “reduce administrative costs” also cut back on BCA ?
 - Time -- delay in acting: suggests need for meta-BCA (VOI vs. COI)
- Result: a thin slice of consequentialists, squeezed between:
- Those who “know” action is good, regardless of the costs
 - Those who “know” action is bad, regardless of the benefits

BCA in US Law: a variety of applications

- Public projects
 - Dams (1940s) ... and now?
 - National Forest management ? NFMA sec. 6(k) ... diluted.
 - Via Environmental Impact Assessment ? NEPA (1970), as initially interpreted in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission* (D.C. Cir. 1971); but later the U.S. Supreme Court held NEPA is “purely procedural,” “stop and think.”
- Defense / military decisions
 - McNamara’s “Whiz Kids” at DOD (1960s)
 - Forgotten after Sept. 11, 2001 ? Stern & Wiener (2006)
- Tort Law (civil liability)
 - the “Hand Rule” for negligence liability (1947)
- Regulation
 - Presidential oversight: Executive Orders (since the 1970s)
 - Judicial review of agency action: APA “arbitrary and capricious” clause ? (enacted 1946, interpreted since ~1970s)

BCA in the USA: Tort Law

(civil liability, “responsabilité civile”)

- Negligence standard
 - Specific conduct, e.g. industry custom, proper medical practice
 - Balancing test largely replaces conduct test (except in medical malpractice)
 - Tortfeasor held negligent if “unreasonable”
 - Judge Learned Hand, *U.S. v. Carroll Towing* (2d Cir. 1947): a reasonable person invests in precautions that prevent more costly harms. Therefore, “unreasonable” if did not invest when $B < p(L)$, where B = burden of precautions, p = probability, and L = liability.
 - Legacy of the Hand Rule: “unreasonable” as a code word for failing to act when $MB > MC$.
 - Victim bears risk of residual injuries (non-negligent, where $MB < MC$)
- Strict liability (liability without fault)
 - Shifts risk of residual injuries (above $MB=MC$) from victims to tortfeasor
 - In short term, achieves identical result: tortfeasor invests up to $MB=MC$
 - In long term, = incentive to innovate ways to reduce MC , avoid liability
- Do juries punish BCA? Ford Pinto case; Viscusi study.

BCA in the USA: Presidential orders

- Every President since Jimmy Carter has required BCA of major new regulations, by Executive Order (EO).
 - Carter EO 12044 (1978): economic impact analysis; RARG
 - Reagan EO 12291 (1981): Regulatory Impact Analysis (RIA); Bs must “outweigh” Cs, $\max(B-C)$; OMB/OIRA authority to review & “return”
 - Clinton EO 12866 (1993): changed “outweigh” to “justify”; added qualitative & distributional effects; added R-R; enhanced transparency.
 - Bush admin. (2001-) using Clinton EO. Issued more “return” letters (“No”). Plus new “prompt letters”: using BCA to say “Yes” (e.g. trans-fat labels on food; defibrillators in the workplace).
 - New RIA Guidelines (2003): more C-E analysis; lower discount rates (3% as well as 7%); probabilistic scenarios if $> \$1b$; BCA of homeland security regs.
- Agencies usually quantify some Bs or Cs, but quantify & monetize both Bs and Cs only about 50% of the time (Hahn & Muething, 55 Admin. L. Rev. 608-42 (2003)).
- Is the USA now a “cost-benefit state” (Cass Sunstein) ?

Executive Order 12291 (President Ronald Reagan, 1981)

Section 2. *General Requirements.* In promulgating new regulations ... all agencies ... shall adhere to the following requirements: ...

- (b) Regulatory action shall not be undertaken unless the potential **benefits** to society for the regulation **outweigh** potential **costs** to society;
- (c) Regulatory objectives shall be chosen to **maximize net benefits** to society;
- (d) Among alternative approaches to any given regulatory objective, the alternative involving the **least net cost** to society shall be chosen; and
- (e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society ...

Section 3. *Regulatory Impact Analysis and Review.* ... (d) To permit each proposed major rule to be analyzed in light of the requirements of Section 2 ..., each preliminary and final **Regulatory Impact Analysis** shall contain the following information:

- (1) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms, and the identification of those likely to receive the benefits;
- (2) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs;
- (3) A determination of the potential net benefits of the rule, including an evaluation of effects that cannot be quantified in monetary terms;
- (4) A description of alternative approaches that could substantially achieve the same regulatory goal at lower cost ... and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted; and
- (5) ... an explanation of any legal reasons why the rule cannot be based on the requirements set forth in Section 2 ...

Executive Order 12866 (President Bill Clinton, 1993)

Section 1. Statement of Regulatory Philosophy and Principles.

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law ... or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures ... and qualitative measures ... Further, in choosing among alternative regulatory approaches, agencies should select those approaches that **maximize net benefits** (including potential economic, environmental, and other advantages; distributive impacts; and equity) ...

(b) *The Principles of Regulation.*

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as the significance of that problem.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives ... such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(5) ... an agency ... shall design its regulations in the **most cost-effective** manner to achieve the regulatory objective ...

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the **benefits** of the intended regulation **justify its costs**.

(8) Each agency shall ... to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(11) Each agency shall tailor its regulations to impose the **least burden** on society ... consistent with obtaining the regulatory objectives ...

BCA in the USA: Congressional statutes

- Congress often requires BCA. E.g.:
 - CPSA (1972) (consumer products)
 - FIFRA (1975) (pesticides)
 - TSCA (1977) (toxics)
 - Paperwork Reduction Act (1980)
 - UMRA (1995) (“unfunded mandates” on states, businesses)
- Sometimes Congress permits BCA without requiring it, e.g.:
 - CWA (1977) (BCT for water pollution)
 - SDWA (1996 amds.) (drinking water contaminants)
- But some statutes prohibit BCA. E.g.:
 - CAA sec. 109 (1970) (national ambient air quality standards)
 - OSHAct sec. 6(b)(5) (1972) (workplace toxics)
 - ESA sec. 7 (1973) (endangered species)
 - RCRA sec. 3004m (1984) (hazardous waste treatment standards)
 - CERCLA sec. 121 (1986) (hazardous waste cleanup standards).
- Is there any coherent pattern to choices by Congress ??

“How much” to control risk ?

Ensure no risk / zero risk

Minimize threat

Ensure reasonable certainty of no harm

Ensure as close to no harm as feasible

Ensure unperturbed balance of nature

Ensure no significant risk

Ensure safe, protect public health/welfare

Ensure best control technology (BAT)

As low as reasonably achievable (ALARA)

Reduce emissions by a given amount

Inform the public about emissions / risk

Liable for harm caused

Prevent unacceptable risk

Prevent unreasonable risk

Consider costs (but need not compare to benefits)

Consider costs and benefits

Consider risk-risk tradeoffs

Compare costs and benefits / costs in relation to benefits

Costs must bear a reasonable relationship to benefits

Costs must not be disproportionate to benefits

Benefits must justify costs

Benefits must outweigh / exceed costs

Examples

Delaney clause (FFDCA 409) (1958)

RCRA 3004(m)

revised Delaney clause (FQPA) (1996)

OSHAct 6(b)(5); SDWA (until 1996)

CWA 303(d); Wilderness Act; *Sierra Club v. Morton*; 28 Fla. Stat. 373.4592

OSHAct 3(8) (via “safe”) (*Benzene*)

OSHAct 3(8); CAA 109; CAA 112 (until 1990)

CAA 111, 112; CWA 301/304, 306, 307

Atomic Energy Act

CAA acid deposition title; CAA 604 (CFCs)

NEPA, EPCRA (TRI), OSHAct, Fed. Cigarette Labeling, SDWA (1996)

Tort law (negligence; strict); CERCLA 107; OPA

Justice Stevens in *Benzene*

Negligence rule (L.Hand); OSHAct 3(8) ?;

FHSA; CPSA; TSCA 6(a); FIFRA; CWA 301(b)(2)

CWA 304(b)(2) (BAT) (9th Cir.)

SDWA (1996)

CAA 612; EO 12866; TSCA 6(a); SDWA 1412(b)(5) (1996)

CWA 304(b)(1) (BPT); CWA 301(b) (BAT, BCT, BPT) (per 4th Cir.)

CWA 304(b)(4) (BCT); UMTRCA; TSCA 6(a);

CPSA; FIFRA; OSHAct 3(8) ?; H.R. 1022 in 104th Cong.

CWA 304(b)(1) (BPT) (9th Cir.)

EO 12866; H.R. 1022 in 104th Cong.; S.981 (Levin-Thompson) in 105th Cong.

EO 12201; S. 343 in 104th Cong.

Is Congress coherent? Air

Clean Air Act (CAA) provisions (1970):

- Sec. 109: Set national ambient air quality standards “at the level which, in the judgment of the Administrator, is requisite to protect the public health with an adequate margin of safety.”
 - US Supreme Court (*American Trucking*, 2001, following D.C. Circuit in 1980): prohibits BCA. Footnote emphasizes prohibition: agency may not use BCA in secret.
 - Breyer, concurring: a silent statute would leave it to the agency’s discretion, but here legislative history shows: no BCA.
 - D.C.Circuit (1999): requires R-RA (here, O₃ – UV).
- Sec. 111: new source performance standards. Must consider cost, and any non-air quality health & environmental impacts (R-RA).
- Sec. 112: hazardous air pollutants. From 1970-1990: similar to sec. 109. Added 1990: MACT for 189 pollutants listed in the statute (no BCA).
- Acid rain program (added 1990): sets cap on total SO₂ emissions. No BCA.
- Sec. 612 (added 1990): CFC phaseout. Must “reduce overall risk” (R-RA).

Is Congress coherent? Water

Clean Water Act (CWA) provisions (1972, 1977)

- 302, 303, 304: Set ambient water quality standards using “scientific knowledge”
- 301, 304: Technology standards.
 - BAT: “take into account ... cost”.
 - BCT: “consider ... reasonableness of relationship between the costs ... and ... benefits”.
 - BPT: “consider ... total cost ... in relation to ... benefits”.

Safe Drinking Water Act (SDWA) (1977, 1996)

- 1412(b): set MCL “as close to MCLG [no adverse effect] as feasible” = no BCA
- 1996 amdts. added 1412(b)(4, 5, and 6): require BCA and R-RA (consideration rule); also permit but do not require BCA and R-RA to modify MCL

Is Congress coherent? Toxics

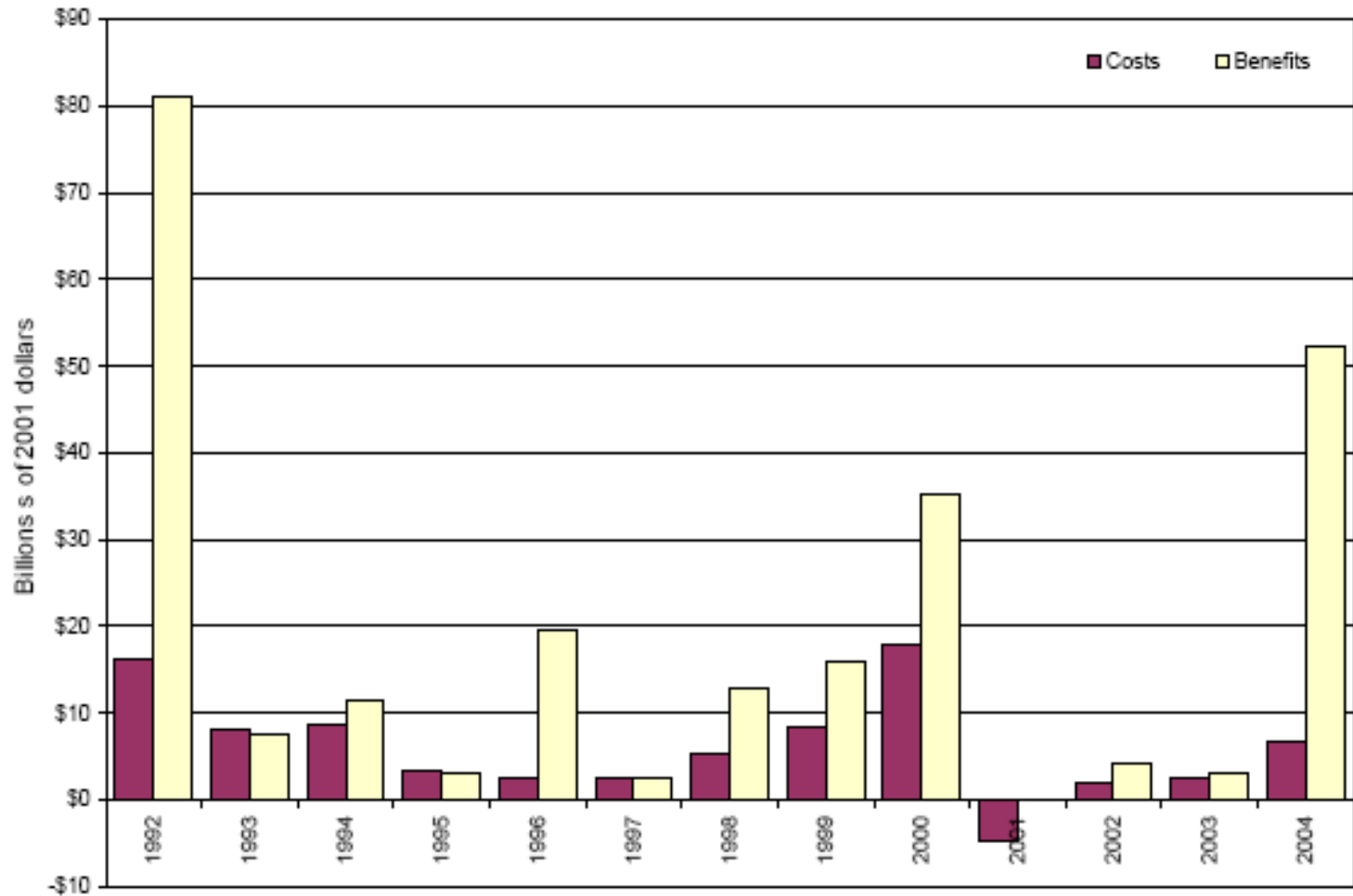
- OSHA Act (1972) distinguishes workplace toxics from other risks
 - Sec. 6(b)(5): ensure no harm from workplace toxics “to the extent feasible.” US Supreme Court (*Cotton Dust*, 1981): “feasibility” test precludes BCA.
 - Sec. 3(8): “reasonably necessary and appropriate to assure a safe and healthful workplace” = BCA permitted, but not required, for all other risks.
- Statutes directing agency to “prevent unreasonable risk” held to require BCA
 - CPSA (1972) (consumer products)
 - FIFRA secs. 2, 3, 6 (1975) (pesticides)
 - TSCA sec. 6(a) (1977) (toxic substances); plus “least burdensome” option and sec. 6(c) “consider costs and benefits”; courts hold: BCA, RTA and C-EA.
- Hazardous waste statutes held to preclude BCA
 - RCRA sec. 3004m (added 1984): “threats to human health and the environment [must be] minimized” ; D.C. Cir. holds not limited by cost.
 - CERCLA sec. 121 (added 1986): cleanup must meet “all applicable relevant and appropriate requirements”; courts hold = no BCA.
- CAA sec. 112 (air toxics)
 - 1970 version: “protect public health with an ample margin of safety”; D.C. Cir. initially allows BCA, then revises to preclude BCA except in choosing “margin” (1987)

BCA in the USA: overarching laws

- Administrative Procedure Act sec. 706 (1946): “arbitrary & capricious”
 - “Reasoned rulemaking”; substantive teeth?
- NEPA 102 (1970)
 - Initially held to require BCA, in order to get non-environmental agencies to consider the environmental costs of their projects (*Calvert Cliffs*, 1971)
 - Later held to be “purely procedural,” stop & think, no BCA (*Strycker’s Bay*)
 - EPA actions often exempted as “functional equivalent” of NEPA process, or by statute
- UMRA (1995)
 - Every regulation must be accompanied by “a qualitative and quantitative assessment of the anticipated costs and benefits ... including the costs and benefits to state, local, and tribal governments or the private sector, as well as the effect of the [regulation] on health, safety, and the natural environment.” ... “unless otherwise prohibited by law” (§202(a)).
- Levin-Thompson bill, S.981, 105th Congress (1996) (not enacted)
 - §623 requires analysis of B, C, R-R (“substitution risk”), and C-E.
 - §623(d) requires a “determination” of whether “benefits justify costs” (and whether most C-E approach has been chosen), or an explanation of why not.
 - §627: no judicial review. §622: no change to any “substantive standard” in prior law.

Trend in ex ante BCAs in USA (aggregate):

Figure 2-2: Costs and Benefits of Major Rules (1992-2004)



(Source: U.S. OMB, Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (Dec. 2005), p.38.)

Ex post evaluation of ex ante BCA

- How accurate are ex ante BCAs?
- Need routine & systematic ex post evaluation, used to revise policies, and to improve ex ante methodologies.
- OMB review of only 47 cases (out of over 1000; and, not a representative sample):

Table 3-2: Tabulation of the 47 Case Studies

	Benefits	Costs	Benefits-Cost Ratio
Accurate	18 (38%)	12 (26%)	11 (23%)
Over	19 (40%)	16 (34%)	22 (47%)
Under	2 (4%)	12 (26%)	14 (30%)
Not Estimated	8 (17%)	7 (15%)	0 (0%)

(Source: U.S. OMB, Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities (Dec. 2005), p.47.)

BCA in European Union (EU) Law

- Nice Treaty article 174(3) requires assessing “the potential benefits and costs of action or lack of action” in environmental policy (OJC 325, 24 Dec. 2002).
- “Proportionality principle” = BCA
- “Precautionary Principle”: “Communication” of Feb. 2000: PP requires BCA.
- Member states’ laws: sometimes require BCA (including in adoption of PP).
- “Better Regulation” initiative (2002 -).

Proportionality Principle

- General principle of European Union law
- *Pfizer Animal Health S.A. v. Council, Case T-13/99, 2002 WL 31337 (European Court of First Instance, Sept. 11, 2002)*, ¶¶ 410-411: "The Court considers that a **cost/benefit analysis is a particular expression of the principle of proportionality** in cases involving risk management. . . . the principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and where there is a choice between several appropriate measures, recourse must be had to the **least onerous**, and the disadvantages caused must not be disproportionate to the aims pursued"
 - **But:** *id.* ¶ 456: "The protection of public **health**, which the contested regulation is intended to guarantee, must **take precedence over economic considerations**."
- "the relation between precautionary and proportionality principles is obviously one of the most important disputed subjects in the [Commission's] Communication on the precautionary principle" – Hannes Veinla, 8 *Juridica Int'l* 186, 196 (2003)

Precautionary Principle

- The rise of the “Precautionary Principle” (PP)
 - 1970: German *Vorsorgeprinzip*
 - 1976: US Clean Air Act, decision in *Ethyl Corp v. US*
 - 1992: Rio Declaration para. 15
 - 1992: Maastricht Treaty art. 130r (now Nice Treaty art. 174)
 - 2000: European Commission “Communication on the PP”
- Is the PP opposed to BCA ?

Defining Precaution: 3 Narrative Versions

PP version 1: “Lack of full scientific certainty about a risk shall **not justify postponing** action to prevent it.”

E.g.: Bergen 1990; Rio 1992 (plus “cost-effective”); European Commission Communication 2000 (with qualifications).

PP version 2: “Uncertainty about a risk **justifies action** to prevent it.” E.g.: “better safe than sorry”; “prevention > cure”. Wingspread 1998.

PP version 3: “The proponent of an activity posing uncertain risk bears the **burden of proving** that the activity poses **[no] / [acceptable]** risk before the activity can go forward.”

E.g.: pre-market screening (e.g. for new drugs, toxics, pesticides); German nuclear licenses. Wingspread 1998. If must prove “no risk,” this is tantamount to a ban; O.Godard calls this the “Abstention Rule.”

PP Version 4: Reclaiming the PP as Decision Analysis

- European Commission, “Communication on the Precautionary Principle” (February 2000): measures based on the PP should be:
 - *proportional* to the chosen level of protection,
 - *non-discriminatory* in their application,
 - *consistent* with similar measures already taken,
 - *based on an examination of the potential benefits and costs* of action or lack of action (including, where appropriate and feasible, an *economic cost/benefit analysis*),
 - *subject to review*, in the light of new scientific data, and
 - *capable of assigning responsibility for producing the scientific evidence* necessary for a more comprehensive risk assessment.
- In effect, reclaims the PP as part of decision analysis.
- Shift in EU policy from PP to Impact Assessment (Wiener, Lofstedt)
- Similar to US Executive Order 12866 (Clinton, 1993; still in force)

BCA in Europe - Member States' Laws

- UK
 - *Edwards v. National Coal Board* (1949): “reasonably practicable” if “sacrifice (in money, time or trouble)” is not “in gross disproportion” to “risk” thereby avoided
 - Health and Safety at Work Act (1974): reduce risks “so far as reasonably practicable” (or, As Low As Reasonably Practicable – ALARP)
 - Regulatory Impact Analysis (RIA), with review by Cabinet Office
 - HM Treasury, “Risk Appraisal Guidance” (2004)
 - Better Regulation Executive
- France
 - Loi Barnier (1995): precautionary regulation must be “commensurate” with the risk and “at economically acceptable cost”
 - Precaution added to French Constitution (2004)
 - Economic analysis of regulations?
- Germany
 - Proportionality principle
 - Precautionary regulation cannot eliminate all risk, and must be based on benefit-risk analysis
- Sweden
 - Goal to eliminate all toxics

“Better Regulation” Initiative

- EU White Paper on Governance (2001)
- Impact Assessment (IA)
 - IA Guidelines (2002) (Prodi Commission)
 - Of the 70 Extended IAs so far (2003-05), fewer than 40% quantify and monetize either Bs and Cs; only 17% compared net benefits (A.Renda, Impact Assessment in the EU (2006), p.63).
 - Revised IA Guidelines (2005) (Barroso Commission)
 - Require BCA
 - Emphasize: Competitiveness, Lisbon Agenda
- Institutional gap: no central “OMB/OIRA” to supervise BCA (so far ...).
- Member States:
 - Better Reg., IA & BCA used in Member States: e.g. UK, Netherlands.
 - IA & BCA also used in Canada, Australia.
- Focus on “Administrative Costs” in Netherlands, UK, etc.; but focusing on “red tape” may neglect full social Costs & Benefits.
- Simplification (rescinding and combining old laws)

Variation in Better Regulation measures across the EU member states.

(Source: European Commission, “Communication on Better Regulation for Growth and Jobs in the EU,” COM(2005)97, 16/03/2005, p.17.)

	Better regulation programme	Specific RIA policy	Obligatory RIA	Alternative instruments considered	Guidelines on RIA	Coordinating body for RIA	Consultation part of RIA	Formal consultation procedures	Direct stakeholder consultation	Tests of impact on small enterprises	Exemptions for SMEs	Total Y+(Y)
Belgium	(Y)	N.A.	(Y)	N.A.	(Y)	(Y)	N	(Y)	(Y)	(Y)	N	7
Czech Republic	Y	N.A.	N	Y	N.A.	N.A.	N.A.	N.A.	N.A.	(Y)	N	3
Denmark	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	10
Germany	Y	N.A.	N.A.	N.A.	Y	Y	Y	Y	N.A.	N.A.	N.A.	5
Estonia	N	N	Y	Y	Y	N.A.	N.A.	N	N	N.A.	Y	4
Greece	(Y)	(Y)	N	N	N	N	Y	N	N	N	N.A.	3
Spain	Y	(Y)	Y	Y	(Y)	(Y)	N	N	N	N	N.A.	6
France	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	0
Ireland	Y	N	N	(Y)	(Y)	N	(Y)	(Y)	N	N	N	5
Italy	(Y)	Y	N	(Y)	Y	(Y)	(Y)	N	Y	(Y)	N	8
Cyprus	N	N	N	N	N	N	N	N	N	N	N.A.	0
Latvia	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	N	9
Lithuania	N.A.	Y	Y	Y	Y	N.A.	N.A.	N.A.	N	N.A.	N.A.	4
Luxembourg	Y	N.A.	Y	Y	N.A.	Y	Y	Y	N	N	Y	7
Hungary	Y	(Y)	Y	N	N	Y	(Y)	(Y)	N	N	N	6
Malta	Y	N.A.	N.A.	N	N.A.	(Y)	N	N	Y	N	Y	4
Netherlands	Y	Y	N.A.	Y	Y	Y	N	N	Y	(Y)	Y	8
Austria	Y	Y	Y	Y	Y	N	Y	Y	Y	N.A.	N	8
Poland	Y	Y	Y	Y	Y	Y	Y	Y	(Y)	N	Y	10
Portugal	N	N	N	N	N	N	N	N	N	N	N	0
Slovenia	Y	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	1
Slovakia	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	(Y)	N.A.	N	1
Finland	Y	Y	Y	Y	Y	(Y)	Y	Y	Y	N.A.	N.A.	9
Sweden	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	9
United Kingdom	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	10
Total Y+(Y)	19	13	12	15	15	14	12	12	11	7	5	

Legend

Y	Measures exist	(Y)	Measures planned/ Available partially	N	No measures exist	N.A.	Information not available
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Recommendations

- USA
 - Use “Warm analysis”
 - Add R-RA to BCA – including on OMB/OIRA scorecard form
 - Increase use of Prompt letters
 - Apply BCA more widely, e.g. trade measures, subsidies, projects, national forest management, counterterrorism measures.
 - Conduct ex post evaluations of ex ante BCAs
 - “Superauthorization”: remove Congressional edicts (required or forbidden), and let executive branch decide which type of analysis is warranted, using VOI/COI.
- Europe
 - Use BCA more often and more systematically
 - Use “Warm analysis”
 - Add R-RA to BCA – including on forms
 - Not just Administrative Cost !
 - Conduct ex post evaluations of ex ante BCAs
 - Create an institutional home – an expert central oversight body, e.g. in General Secretariat of the European Commission.