INTRODUCTION

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THE contributions to this volume emerged from a conference on cost-benefit analysis held at the University of Chicago Law School in September 1999. The conference was motivated by the observation that cost-benefit analysis has become a very common tool of project evaluation in the federal government and indeed, as Robert Hahn's contribution shows, in state governments, but that the academic literature on the subject remains skeptical. The academic literature is also fragmented, and we believed that by bringing together prominent contributors from different disciplines—economics, philosophy, and the law—some progress could be made in understanding cost-benefit analysis. The contributions to this volume are cogently summarized and criticized in Richard Posner's comment. Rather than duplicate these labors here, we will make some general observations about the debate and about possible directions for future research.

General Observations about the (New) Debate about Cost-Benefit Analysis. There are already large philosophical, legal, and (especially) economic literatures on cost-benefit analysis dating back to the 1920s. Does this volume have anything to contribute to them? We think that it does.

First, it shows that cost-benefit analysis is a rich area for interdisciplinary work. Economists have defined the central cost-benefit methodology. They have also done a huge amount of crucial technical work in elaborating that methodology, for example, in determining how government should gather information about compensating variations, particularly where market prices are unavailable; in explaining how costs and benefits should be discounted over time; in adapting the methodology to areas where it first seemed inapplicable, for example, to governmental projects that cause death; and in illuminating the connections between cost-benefit analysis and other normative standards in economics like the Kaldor-Hicks standard. Economists still have much to say about cost-benefit analysis, as here evidenced by the contributions of Gary Becker, Robert Frank, Hahn, and W. Kip Viscusi. But philosophers should also be involved in the debate. For example, they can help illuminate the basic moral terrain (see the papers by

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John Broome, Martha Nussbaum, and Amartya Sen), or specify alternative procedures different from those proposed within the economic literature (see Henry Richardson's paper). We do not mean to suggest that a philosophical perspective is the only noneconomic perspective of relevance to cost-benefit analysis. The papers by Viscusi and Cass Sunstein powerfully demonstrate that cognitive psychology can sharpen our understanding both of the justifiability of cost-benefit analysis and of its appropriate limits. And legal scholars have a critical role to play in answering legal and policy questions about cost-benefit analysis—for example, in debating the proper scope and content of Executive Order 12,866—by synthesizing economic, philosophical, psychological, and other relevant scholarship.

Second, we hazard to suggest that the new debate about cost-benefit analysis will be more empirical and pragmatic than the older literature. Most, perhaps all, of the contributors would apparently agree that if government agencies should employ cost-benefit analysis, then they should do so because it is a beneficial tool, not because the sum-of-compensating-variations test or any related test has basic moral weight. This conceptualization of cost-benefit analysis does not preclude theoretical work, as the Broome, Nussbaum, and Sen papers show. (We still need to know what the underlying moral criteria are.) But it also opens the door to a more concrete discussion of matters such as the following: the various types of cost-benefit methodologies that agencies and other governmental bodies might employ; the conditions under which cost-benefit analysis is relatively useful, or relatively unproductive (be they public choice conditions, cognitive-psychological conditions, or others); the conditions under which cost-benefit analysis is likely to be manipulated by agencies, or applied in relatively good faith; the policy areas in which, as a historical matter, cost-benefit analysis has proved to be a good, bad, or indifferent tool; the alternative tools that agencies might use; and the role of courts in reviewing cost-benefit studies conducted by agencies. Our optimistic prediction is that the new debate about cost-benefit analysis will bring to bear a more sophisticated philosophical and normative apparatus and use that apparatus as the framework for a detailed and empirically rich evaluation of cost-benefit analysis as a decisional tool. Older assumptions about the impossibility of interpersonal welfare comparisons, or the necessary equivalence of welfare and preference-satisfaction, will we hope be abandoned or at least be defended in new ways.

We turn now to some more concrete examples of the possible future directions of cost-benefit analysis.

Normative Justifications for Cost-Benefit Analysis: Boundary Conditions and Alternative Procedures. Even the proponents of cost-benefit analysis do not generally argue that it should be the sole decision procedure for administrative agencies and other governmental bodies. There may well be scenarios where it is welfare maximizing for agencies to employ some other procedure, such as QUALY-based assessment or (nonmonetized) multidimensional assessment. Similarly, if cost-benefit analysis is a procedure for implementing some normative criterion other than overall well-being, it could well be the case that—under certain conditions—alternative procedures implement that criterion better than cost-benefit analysis. Research remains to be done both (1) in specifying the details of these alternative procedures and (2) in specifying the boundary conditions under which agencies and other governmental bodies should switch from CBA to some alternative.

Normative Justifications for Cost-Benefit Analysis: Case Studies. An empirical (but normative) assessment of cost-benefit analysis would also be useful. One could take some set of actual agency choices and evaluate those choices using both cost-benefit analysis and whatever normative criterion cost-benefit analysis is supposed to implement. For example, it would be useful to collect the cost-benefit analyses published by federal agencies in the Federal Register, in the course of evaluating major rules, and then attempt to conduct a parallel assessment of those rule-making decisions in light of the appropriate normative criterion. What were the rule makings in which cost-benefit analysis produced the correct outcome—the outcome that (in the scholar's determination) is the outcome ranked highest by the proper normative criterion? What were the rule makings in which cost-benefit analysis produced a suboptimal outcome? An empirical study of this kind could be helpful in determining whether and how cost-benefit analysis should be modified (for example, through distributive weights) and in specifying the conditions under which agencies should employ some alternative procedure.

Normative Justification for Cost-Benefit Analysis: Feasibility. We agree with Becker that it is not sufficient to say that cost-benefit analysis is "good enough" and that the traditional derivation under a Social Planner model is not satisfactory. What is needed is a second-best model that explains why cost-benefit analysis might be desirable (if this is the case) given various constraints. What are these constraints? Certainly the cognitive limitations of the decision maker, but also constraints imposed by the political process. But if the government's behavior is entirely driven by public choice factors, it is idle to talk about whether various policy instruments are valuable or not.

Suppose, for example, that the public has no influence on political decision making and that all regulations are approved if and only if interest groups that benefit from them have more political power than interest groups that are harmed by them. Under these circumstances, it is hard to imagine a normative argument in favor of using cost-benefit analysis. The results of cost-benefit analysis performed by agencies would not influence their choice of regulations, and it hard to see why any political actors would want agencies to use cost-benefit analysis in the first place.

Now suppose that the public imperfectly monitors regulations and punishes politicians who appoint or support agency chiefs who issue regulations that transfer resources from the general public to interest groups. If this is the case, the president and Congress might want agencies to use cost-benefit analysis as a way of overcoming agency costs. Cost-benefit analyses performed by agencies may disclose whether regulations transfer resources to interest groups from the public. When the president and Congress are apprised of regulations that violate the agencies' own cost-benefit analysis (or, more likely, are justified by transparently manipulated cost-benefit analysis), they will punish the agency chiefs responsible for the regulations. Fearing such punishment, the agency chiefs are deterred, at least partly, from succumbing to interest group pressures.

This account leaves a lot unexplained. Most important, it does not explain the connection between the public interest and cost-benefit analysis. There may be some connection, but surely it is weak. Members of the public will be most interested in regulations that affect them disproportionately (reproducing the public choice problem at the individual level). They may also be concerned about factors from which cost-benefit analysis abstracts, factors such as the distribution of wealth and the effects on minorities. Finally, the president and Congress do not necessarily support regulations that promote the public interest. They may not fear transfers to interest groups, just transfers to the *wrong* interest groups.

Positive Analysis of Cost-Benefit Analysis: Public Choice. As far as we know, no one has tried to explain why Reagan, Bush, and Clinton have all endorsed the use of cost-benefit analysis by agencies. But it would be useful to have an explanation for the political fortunes of cost-benefit analysis—why it was relatively popular before and after the 1970s but was unpopular during that decade. Such an explanation would shed light on the constraints that one would have to take account of in normative analysis.

We can only speculate. It may not be a coincidence that cost-benefit analysis became popular at roughly the same time that deregulation did. It has been argued that deregulation resulted when the deadweight costs resulting from regulation became too high;[1] presumably, savings from deregulation could be used at least in part to compensate losers. Similarly, one might argue that cost-benefit analysis was used to identify regulations or potential regulations with high deadweight costs, so that these regulations could be

[1] See Sam Peltzman, The Economic Theory of Regulation after a Decade of Deregulation, Brookings Papers on Economic Activity: Microeconomics 1 (1989).

eliminated or avoided. But deregulation seems to be running out of steam, whereas cost-benefit analysis seems thoroughly entrenched in the federal bureaucracy.

Positive Analysis of Cost-Benefit Analysis: Public Relations. One interesting aspect of cost-benefit analysis is that it sparks strong emotions; one gets a sense that there is an ideological divide about cost-benefit analysis, with free-market conservatives on one side and liberal environmentalists on the other. But on closer inspection, the story becomes murkier. On the one hand, Clinton has carried through Reagan's cost-benefit initiative. On the other hand, it appears that Clinton's Office of Management and Budget (OMB) has not been as vigorous in enforcing cost-benefit analysis as Reagan's OMB was, particularly against the Environmental Protection Agency. A more telling point is that another initiative—creating markets in tradable pollution rights—has been rather popular, even among environmentalists. So it seems unlikely that the language of economics, or the mere use of the language of trade-offs, or monetization of incommensurables, can explain continuing opposition to cost-benefit analysis among academics and in public policy circles. Indeed, one might argue that the rhetoric of cost-benefit analysis is more powerful than the reality. Agencies seem to be less likely than in the past to say that cost-benefit analysis is undesirable or unsuitable, but that does not mean that they take it seriously.

One possibility is that tradable emission rights are always connected to particular programs in which deals are hashed out between the various interests, including environmental interests. Because of the efficiency of trading systems, business interests are more willing to agree to lower pollutant levels than they are for more conventional policies, and this makes the environmentalists happy. That is to say, if failure to agree to a tradable emission rights program would result in the imposition of a command-and-control system, it is easy to see why all parties would enthusiastically agree to the former, for it results in less pollution (for the environmentalists) at less cost (to business interests). By contrast, the cost-benefit analysis controversy has been about the use of an umbrella policy instrument to supervise all regulations (including regulations emerging from statutes that themselves were the product of interest group deals). We think that it would be valuable for scholars to analyze the relative popularity of tradable emissions rights programs and cost-benefit analysis.

Positive Analysis of Cost-Benefit Analysis: Does It Work? Much has been written about whether the cost-benefit analysis executive orders have actually influenced the behavior of agencies. Knowledgeable scholars in this area seem to doubt that the executive orders have had much influence. There are many reasons why these orders may not have. The enforcement of executive orders is not automatic, so enforcement can be subject to politics. Cost-benefit analysis requires a lot of data, and given cost constraints, speculation often is used in its place. And there is enough controversy over certain kinds of data—from valuations of life to discount rates—that an agency intent on pushing through a regulation may be able to rationalize almost anything.

If the executive orders have not affected agency behavior, if agency behavior remains subject to normal political pressures, then one must ask why anyone bothered with these orders in the first place. It may have been symbolic politics, but then why these symbols? And why use an economic symbolism that seems so unpopular among elites, and even among the lay public if it knows anything about it at all? Much more work can be done on these issues.

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