**Abstract**

*Is Cost-Benefit Analysis the Only Game in Town?*

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Standards which prescribe more than efficient precaution against physical harm and health injury are commonplace in American environmental, health and safety regulation. The safe level standard, for example, requires the elimination of all significant risks. The feasibility standard requires the elimination of significant risks to the extent that can be done without impairing the long run survival of the activities which give rise to the risks. These standards reach back more than a generation to the founding of the EPA and OSHA. You might think that they are too well-entrenched in American law to be subject to serious dispute. Yet these standards are now routinely decried as irrational or incoherent. Cost-benefit analysis is, we are told, “the only game in town for determining appropriate standards of conduct for socially useful but risky acts.” Cass Sunstein—the most influential legal academic of our time—has long argued that we are “becoming a cost-benefit state” and rightly so. “Uncontroversial” considerations, Sunstein writes, “suggest” that “[i]t is not possible to do evidence-based, data-driven regulation without assessing both costs and benefits, and without being as quantitative as possible.”

This conviction is not confined to academics. In *Michigan v. EPA*, all nine Justices of the Supreme Court apparently conclude that it is irrational for a regulatory agency not to consider costs in determining whether or not regulatory action is appropriate, even when the relevant regulatory authority appears to exclude costs from consideration. In a nutshell, the conventional wisdom is that cost-benefit analysis is rationality incarnate and the cost-justified level of precaution is *the* rational level of precaution. No matter how highly we value safety, the benefits of achieving a particular level of safety must be traded off against the costs of doing so. The rational way to trade costs off against benefits is to balance them so that we maximize net value and thereby make ourselves as well off as we can be. Taking more than efficient precaution yields less—not more—value. Preferring less value to more value is flatly irrational.

This paper argues that the charge of irrationality is mistaken, and that the safety and feasibility norms are justifiable. These norms are directed against very serious harms—the kind of health injuries that deal out death and serious disability. Costs and benefits may be symmetrically important in the way that positive and negative externalities are, but both our ordinary intuitions and our legal institutions treat the avoidance of harm as more important than the conferral of benefit. Tort is robust and restitution is anemic. There is a takings clause, but there is no givings clause. Harm’s special significance is a consequence of its intimate connection to autonomy. There is nothing special about harm from an efficiency perspective; harms are simply costs and all costs are comparable at some ratio of exchange. The special significance that harm has in our ordinary thinking only becomes intelligible within a framework which takes our separateness and independence as persons to be fundamental, and which understands us as agents who have a fundamental interest in authoring our own lives. From that perspective, harms have special significance. Physical harms—death, disability, disease, and the like—compromise a foundational condition of effective human agency. Impairing basic powers of human agency cripples the pursuit of a wide range of human ends and aspirations, and denies normal human lives to those whose powers are impaired. The imposition of physical harm is bad for those harmed, not matter what particular aspirations and commitments they happen to have. Very few benefits, by contrast, are comparably essential conditions of effective agency. Benefit, like happiness, is mostly for each of us to pursue as best we can.

The asymmetry of harm and benefit lends general support to standards which impose stringent obligations to avoid harm. The safety and feasibility standards are plausible expressions of that priority in the domains to which they apply. Safety-based risk regulation is justified when eliminating significant risks of devastating injury does not compromise in a comparable way a condition of human agency which is as important as health or physical integrity. For instance, requiring pesticide residue on foods to be reduced to the point where it poses no significant health risks is justified when doing so does not depress agricultural productivity to the point where a need as urgent as health—say, adequate nutrition—is jeopardized. Feasibility-based risk regulation is justified when the elimination of all significant risk would require shutting down basic productive activities such as milling cotton and refining petroleum. These are activities which we cannot live without and their elimination would do more harm to the workers whose health we are trying to protect than tolerating their significant risks.