Precautionary Schemes

*Jane K. Winn**

"And remember you're in France: The customer is always wrong!"[1]

Many years ago, there was intense debate about what the Precautionary Principle ("PP") is, or is not. More recently, as the battle lines in that debate have ossified, academic attention seems to have shifted to a focus on the somewhat more subtle question of how the term PP, whatever it may mean, is used by different actors in different contexts. David Vogel's recent book, The Politics of Precaution: Regulating the Environmental Risks in Europe and the United States (2012) (hereafter "Politics"), is a good recent example of such commentary. Vogel's approach recognizes the diversity of relevant developments, he seeks to impose a coherent narrative framework on those developments.

The academic debate expanded still further with the publication of The Reality of Precaution: Comparing Risk Regulation in the United States and Europe, edited by Jonathan B. Wiener, Michael D. Rogers, James K. Hammitt, and Peter H. Sand (2011) (hereafter "Reality"), which deploys sophisticated empirical methods in an attempt to discern what role, if any, PP actually plays in regulatory responses to risk. Wiener seeks to transcend the narrative structure of the commentaries suggested by Vogel and others with rigorous empirical methods to gain a new and critical perspective on the PP debate. Both books demonstrate erudition and meticulous scholarship, and both merit serious attention. By staking out different positions in what is a wide-ranging and important debate, these two books taken together may help to define the terms of the debate in this field for years to come.

Not only does each book document the history and variety of issues relevant to understanding the PP controversy, they each manifest a markedly different approach the problems of meaning and explanation with regard to social phenomena. Vogel's book is a scholarly monograph that develops and defends his well-known thesis that a "regulatory flip-flop" has taken place with regard to the politics of PP, i.e., that the U.S. started out more pro-active but has now backed off from that position, while Europe started off as less engaged and has become more engaged in advancing PP as a framework for regulating risk. Although Vogel is by training a political scientist, his analysis is informed by a sense of the historical evolution of the debate, responding to what another historian described as "[t]he craving for an interpretation of history...so deep-rooted that, unless we have a constructive outlook over the past, we are drawn either to mysticism or to cynicism."[2] For the purpose of this essay, Vogel's approach to analyzing the role of PP in society shall be referred to as "humanist."

Wiener's edited volume is more than twice the length of Vogel's monograph and includes twenty separate contributions by noted scholars drawn from diverse areas of risk regulation. The Wiener volume includes essays on genetically modified organisms, beef hormones, tobacco, nuclear power, automobile emissions, climate change, marine environment, biodiversity, chemicals, new drug approvals, terrorism and weapons of mass destruction, information disclosure, risk assessment, risk assessment frameworks, political institutions, administrative systems, risk perceptions and attitudes, and heuristics. For the purpose of this essay, Wiener's approach to analyzing the role of PP in society shall be referred to as "empiricist."

There have been many attempts to impose a coherent narrative structure on the bewildering mass of debates about PP in recent decades, and Wiener concedes that Vogel's "regulatory flip-flop" analysis is probably the leading example of that approach. Wiener's empirical analysis not only changes the methodology of the inquiry and expands the frame of reference, he also claims that his empiricist approach can be used to demonstrate the invalidity of Vogel's humanist approach. After reading both

* Charles I. Stone Professor of Law, University of Washington, School of Law.

1 Fanny Chenal (Marion Cotillard) in "A Good Year" (2006), <http://www.imdb.com/character/ch0056576/quotes> (last accessed on 06 March 2013).

2 Frederick Maurice Powicke, quoted in Chapter 5, Edward Hallett Carr, *What Is History?* (1961).

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books, however, I found Wiener's claims to have invalidated Vogel's thesis unpersuasive.[3]

Vogel begins by sketching out the main contours of his argument, and the criticisms of it in the first chapter of his book. His second chapter outlines the institutional factors that might have first fueled American enthusiasm then disaffection with precaution, and the opposite sequence of reactions in the European Union. This is followed by four case studies – food, chemicals, air and consumer safety – that catalogue the evidence for and against the flip-flop thesis in different contexts. Vogel is so careful to narrowly tailor his claims that he occasionally seems to slip into making generalizations as banal as "in a democratic society, the current level of precaution in risk regulation will be a function of popular sentiment." In the final three chapters of the book, he ties together the disparate threads of the four case studies into a coherent narrative regarding political structures, popular culture and specific instances of widely noted harms on both sides of the Atlantic.

The essays in Wiener's edited volume are generally informative and well written, and as a collection, cover a dazzling array of topics related to risk regulation. In a telling concession by Wiener as editor, however, many of the same themes and specific points highlighted by Vogel are echoed in the essay by Giandomenico Majone, the most humanist contribution in an otherwise largely empiricist collection of essays. Some of the essays did appear to me to be a bit overworked, however. For example, the essay by Peter Sand on information disclosure was only 15 pages long but had 23 pages of references.

The central essay in Reality describes the data collection and analysis effort Wiener and colleagues mounted in their effort to provide a new, critical perspective on existing commentaries, with Vogel's highlighted as a leading example.[4] The collection of data started with the collection and pooling of lists of risks, using all available published studies of risk perceptions and rankings, which produced a list of 2,878 "unique risks," which were organized by risk type. Then a random sample of 100 risks was extracted from the collection of unique risks, and the regulatory responses to those risks were analyzed in detail in order to score them according to the degree of precaution they represented. The study's authors found that the results demonstrated that, over the broad array of risks studied, "neither the U.S nor Europe can claim to be "more precautionary" across the board. The reality of precaution has not been principle, it has been *parity and particularity*."[5] I found comparisons of this type to be somewhat disingenuous, however, as I don't recall Vogel ever claiming to have discovered that either Europe or the U.S. were "more precautionary" across the board. I found Wiener's claims to have disproved Vogel's thesis to be distracting, and was left with the impression that if Wiener really had the courage of his empiricist convictions, he would not have needed to draw such comparisons.

Overall, Wiener did not convince me that I needed to be more skeptical about Vogel's conclusions, which struck me as both narrowly tailored and nuanced. Rather, I found myself feeling skeptical about the value of Wiener's approach. In his introductory essay, Wiener criticizes those who, like the French waitress in the Ridley Scott romantic comedy quoted at the beginning of this essay, rely on stereotypes to organize their thinking.[6] But I remained unconvinced that the accounts Wiener was rejecting were merely based on stereotypes. All humans use cognitive schemas to make sense of the world, which are not the same as stereotypes.[7] The notion of a scheme was originally proposed by Bartlett to explain how thought could represent "an effort after meaning" rather than the creation of meaning.[8] Schemas are learned frames of reference or scripts that help to organize perception, memory, and decision-making. Reference to schemes are necessary to any thought that makes sense of experience, which is a much broader category of reasoning that the invocation of stereotypes. It is in the implicit contrast between what has been already been recorded in our memories as schemas and what we experience in the present that permits us to distinguish normal from abnormal, a process that both

3 I feel compelled to disclose the limitations of my own qualifications to critique such an ambitious empiricist work as Reality. I have no advanced training in social science or statistics, only an undergraduate social science degree and a U.S. JD., hence my assessment is more impressionistic and lacks the rigor of Wiener's own work.

4 Brendon Swedlow, Denise Kall, Zheng Zhou, James K. Hammitt, and Jonathan B. Wiener, A Qualitative Comparison of the Relative Precaution in the United States and Europe, 1970–2004, in Reality.

5 Jonathan B. Wiener, "The Rhetoric of Precaution" at 28, in Reality.

6 Jonathan B. Wiener, "The Rhetoric of Precaution" at 7–9, in Reality.

7 Brady Wagoner, "Notes on a Social Psychology of Thinking: A comparison of Bartlett and Moscovici", 21 Papers on Social Representations 6.1-6.14 (2012), <http://www.psych.lse.ac.uk/psr/PSR2012/2012_1_6.pdf> (last accessed on 29 May, 2013).

8 Frederic C. Bartlett, *Remembering: A study in experimental and social psychology* (Cambridge: Cambridge University Press, 1932).

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precedes and informs what our conscious mind finds meaningful. Schemas are learned, and can be unlearned, and may be widely shared or idiosyncratic.

The schemas I use for understanding the attitudes toward risk of the people around me in America and Europe have been built up from my personal experiences in America and Europe,[9] from my reading of historical and social science accounts of institutions in those societies, and from teaching U.S. and EU law from an American legal realist perspective for more than twenty years. My own comparative studies of American and European regulatory and popular culture have focused on the Internet and electronic commerce.[10] Because they corresponded to the frame of reference I use in analyzing differences between U.S. and European institutions, I find observations of the following sort provided throughout the Vogel book to be both insightful and helpful:

> Thus the influence of the precautionary principle in Europe reflects both increased public pressures for more stringent risk regulations and the greater willingness of policy makers to respond to them, while the increased reliance on regulatory risk assessments in the United States is linked to a decline in public and political support for further expansion of risk regulation.[11]

By contrast, I find Wiener's descriptions of the results of his large-scale empirical test of the pattern of relative precaution in U.S. and European risk regulation to be less meaningful:

> Our results suggest that (a) averaging over risks, there is no significant difference in relative precaution over the period [1970–2004]; (b) weakly consistent with the flip-flop hypothesis, there is some evidence of a modest shift toward greater relative precaution of European regulation since about 1990; although (c) there is diversity of trends across risks, of which the most common is no change in relative precaution –including cases where Europe and the United States are equally precautionary and where one of the two was consistently more precautionary. The overall finding is of a mixed and diverse pattern of relative transatlantic precaution over the period.[12]

Given that Wiener greatly expanded the scope of the phenomena covered by his analysis and redefined PP in more generic terms, I found it unsurprising to learn that it became harder for him to impose a coherent narrative on the data. Wiener appears to be applying the kind of "meta-analysis" that is now commonly used in medicine to discover commonalities across separate medical research studies. But law and medicine differ in the degree of reflexivity of the subject and object of study, and an empirical method that is profoundly helpful in medicine may not be very helpful in the study of law.

Just as Wiener concedes that his empirical analysis actually provides weak confirmation of Vogel's thesis, Vogel concedes that there are many counterfactuals that weaken his thesis. I find Vogel's disclosure of the limitations of his analysis to be much less damning that Wiener's, however. To the extent that Wiener has invalidated anything, it seemed to me to be only a straw man he constructed to represent Vogel, and not Vogel's argument itself. By constructing a random sample of risks and regulatory responses on both sides of the Atlantic over a period of more than three decades, Wiener has changed the focus of the discussion. I was at a loss, for example, to understand what possible relevance a discussion of regulatory responses to terrorism and weapons of mass destruction might have to Vogel's analysis, although its relevance to the problem as defined by Wiener was clear enough.

In effect, Vogel and Wiener appear to disagree about what is a relevant "fact" in much the same way that Carr suggested historians and non-historians disagree about what constitutes a fact:

9 I have lived off and on in Europe (mostly France and England) starting 1975, and off and on in Asia, starting in 1985.

10 See, e.g., Jane K. Winn, "The Cape Town Convention's International Registry: Decoding the Secrets of Success in Global Electronic Commerce", forthcoming, *Cape Town Convention Journal* (2012), *University of Washington School of Law Research Paper* No. 2012-11, <http://ssrn.com/abstract=2118963> (last accessed on 06 January 2013); Jane K. Winn and Angela Zhang, "China's Golden Tax Project: A Technological Strategy for Reducing VAT Fraud", forthcoming, *Peking University Law Journal* (2012), <http://ssrn.com/abstract=1641379> (last accessed on 06 March 2013); Jane K. Winn, "Electronic Commerce Law: Direct Regulation, Co-Regulation and Self-Regulation", forthcoming *Cahiers du CRID* (2012), <http://ssrn.com/abstract=1634832> (last accessed on 06 March 2013); Jane K. Winn and Nicolas Jondet, "A 'New Deal' for End Users? Lessons from a French Innovation in the Regulation of Interoperability", 51 *Will. & Mary L. Rev.*, pp. 547–576 (2009), <http://ssrn.com/abstract=1419750> (last accessed on 06 March 2013); Jane K. Winn and Nicolas Jondet, "A 'New Approach' to Standards and Consumer Protection", 31 *J. of Cons. Policy* 459–472 (2008); Jane K. Winn, "Are 'Better' Security Breach Notification Laws Possible?", 24(3) *Berk. J. L. & Tech*, pp. 1133–1166, <http://ssrn.com/abstract=1416222> (last accessed on 06 March 2013).

11 Vogel, Politics, p. 278.

12 Brendon Swendlow, Denise Kall, Zheng Zhou, James K. Hammitt, and Jonathan B. Wiener, "A Qualitative Comparison of the Relative Precaution in the United States and Europe, 1970–2004", in *Reality*, p. 379.

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> What is a historical fact? This is a crucial question into which we must look a little more closely. According to the commonsense view, there are certain basic facts which are the same for all historians and which form, so to speak, the backbone of history – the fact, for example, that the Battle of Hastings was fought in 1066. But this view calls for two observations. In the first place, it is not with facts like these that the historian is primarily concerned. It is no doubt important to know that the great battle was fought in 1066 and not in 1065 or 1067, and that it was fought at Hastings and not at Eastbourne or Brighton. The historian must not get these things wrong. But when points of this kind are raised, I am reminded of Housman's remark that 'accuracy is a duty, not a virtue'." To praise a historian for his accuracy is like praising an architect for using well-seasoned timber or properly mixed concrete in his building. It is a necessary condition of his work, but not his essential function.[13]

Collecting a large volume of information about risks and social responses to them might shed light on to the social construction of risk, or it might not.

The fundamental difference between the two volumes is ultimately a dispute about what constitutes a meaningful explanation of social phenomena. If meaning in this context depends more on schemas than logic, and a humanist approach can bring the understanding embodied in schemas to the surface while an empiricist approach obscures it, then a humanist approach is more meaningful. Wiener appears to concede as much with his repeated invocations of cultural metaphors to explain the significance of his findings, such as his analogy between the works of the painter Peter Breugel the Elder and the analysis in Reality.[14] Wiener's attempt to raise the methodological rigor of the sprawling PP debate is commendable, and the conclusions he draws from his analysis might be more persuasive to those with more training in empirical research methods than I have. I found his insistence that he has disproved Vogel's thesis unpersuasive, however. The fact that he made such claims at all suggested to me that he might be more interested defending the validity of his own empiricist schemas against humanist encroachment than in allowing his results to stand or fall on their own.

13 Carr, *What is History* Chapter 1

14 Jonathan B. Wiener, The Rhetoric of Precaution, Reality at 5 and 26; Jonathan B. Wiener, The Real Pattern of Precaution, Reality at 520, 524, 554–555.

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