

Missing the Wood for the Trees?

Adam Burgess*

There is little debate, particularly clear, ‘no bullshit’ debate within the risk and regulation community, much as there is a lack elsewhere within academia. Without it, much goes unclarified and arguments aren’t tested and pushed to their limits, which is generally where they need to go. On these grounds alone I would welcome the different approaches to European/American precaution set out by Vogel and Wiener. But there are more positive things to say about these competing representations, irrespective of which one prefers. This is a discussion rich in empirical detail but that goes beyond individual issues towards systemic patterns, relating the data to wider themes and an overall framework. What’s more, it concerns a matter of real contemporary significance and interest that citizens generally – at least those of America and Europe – should know about, and even have a view upon. And it’s genuinely interesting – irrespective of any engagement with the academic study of risk and regulation. Challenging the intuitive view of most Europeans, in particular, we learn that the precautionary approach began in – of all places (!) – America...and from way back in the 1960s. This fact alone provides pause for thought about the nature of modern societies and how we locate such trends politically, and it is a shame that this remains a relatively confined rather than more public debate. And it’s a debate of methodological interest to anyone attempting any kind of research beyond single case studies. To an extent, this is a debate about sampling; about which examples are most representative of overall trends and the extent to which there can be exceptions to a rule. But these are also both books that can be read by the non-specialist, not being burdened by unnecessary academic language and concerning many familiar issues.

Judging the debate, it can seem the proverbial ‘no brainer’ – in favour of Wiener’s rebuttal of Vogel’s ‘flip flop’ characterisation of European/American precaution. Wiener’s was an enormously impressive project, marshalling a range of experts, massive quantity

of data and combining different methodological approaches. His insistence on the need to go beyond selective examples and consider a fuller range of regulatory activity is a sound one, at least in the abstract (although, of course, his remains a sample like Vogel’s). And there is a core argument that doesn’t simply assemble data as if it can speak for itself, with ‘hybridization’ standing as Wiener’s alternative characterisation to Vogel’s ‘flip flop’. Above all, in crude terms, he has the easier position to defend. His is the relatively safe, more negative and limited stance, as it only has to suggest that Vogel has gone a step too far with its insistence that Europe has now gone beyond American precaution. Wiener can simply point out that there are some examples of American precaution beyond the watershed 1980s period; ‘It is just to say that US regulatory inactivity is not the reality.’ (p. 527) He only has to establish ‘reasonable doubt’ in a field with a massive range of issues that are open to interpretation and uncertainty as to what examples might legitimately be included. By contrast, with the argument that Europe has not only ‘caught up with’ but actually gone beyond American precaution, the onus is on Vogel to make a strong and difficult case. In the absence of every European regulatory position being like the clearly precautionary one taken over GMOs, it seems a much safer bet to simply suggest that whilst both are now similar it primarily ‘depends on the issue’. And there is no denying that we can find examples that contradict the notion of Europe now being more precautionary than the US. As for Wiener’s hybridization, nor can there be any dispute that such a process has taken place, even if it doesn’t necessarily constitute that much of an insight. And finished off with an engaging introduction and summary, it is no wonder that Wiener’s account has already dazzled some, including from a comparative legal perspective in the pages of this journal.¹

Yet, for me, Wiener’s case doesn’t really convince and I’m inclined to side with Vogel’s approach, albeit with a significant caveat. In the simple metaphor of my title, Wiener’s many trees of data rather misses a sense of what has substantively changed with ‘the wood’ of American and European regulation and, behind this, what has changed within these societies. Vogel has done a great service by sticking his neck

* Reader in Social Risk Research, University of Kent.

1 Fabrizio Cafaggi, Book Review of *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe*, 2(3) *European Journal of Risk Regulation* (2012), pp.265–272.

out with such a bold thesis over a prolonged period, in a manner comparable to how sociologist Ulrich Beck argued some years ago that 'late modernity' has become a 'risk society'. He too was attacked for a partial account that lacked empirical foundation – in his case with much more justification than in this discussion (Beck's book not only lacked virtually any empirical foundation but he clearly knew nothing about things like radiation that were central to his thesis). Whatever their imperfections, both vantage points are ones that encourage the most stimulating insights. Although I don't quite agree with Vogel's quantitative characterisation of Europe having become *more* precautionary he retains emphasis on the crucial historical point that these trends began in the US – whilst Wiener ends up obscuring, even denying this. More generally, Wiener's trajectory tends to blur a clear sense of what has changed in favour of emphasising what remains relatively similar. As for my own view, it is that the difference lies not so much in the *quantity* of precaution (which, as Vogel reminds us, is a very difficult thing to prove) but in its *character*. Contemporary European precaution tends to be more *politicised* than its American forebears. Whilst there are numerous reasons and impulses behind this more vocal and declaratory stance (on selected issues), it is most importantly related to the European *crisis of identity*. The politics and rhetoric of precaution has become an important source of identity for a European project otherwise lacking any compelling vision or even point of engagement with its, very distant, citizens. This dimension is alluded to in Vogel's account, in particular, but not really drawn out and made sufficiently central, in my view.

I think Wiener lacks reflection on the limitations of his approach, focusing too single-mindedly on the limitations of others. Different approaches to problems are rarely a perfect solution but part of a process of grappling towards better illumination of the processes, and Wiener's model is by no means perfect. And he chooses to dwell on selected examples at particular moments, and in that respect it isn't fair to allow that charge to be laid exclusively at Vogel's door. Vogel is as dry as ever, despite being cast here as the overly bold generaliser, disinclined to stick closely enough to the overall data and over eager to extrapolate from only particular examples. On the other hand, despite being here the one cautioning against making a broad argument that ignores awkward evidential truths, Wiener's opening essay is rather bold and sweeping, full of interesting

historical reflections and peppered with quotes and even artistic analogies. This is welcome, showing the subject to be a broad one going beyond direct regulatory matters and into changing public perception and styles of governance. Yet Wiener can be accused of doing here what he accuses his opponent of; constructing an argument from selected quotations – in this case to the effect that there is some kind of consensus around Europe being more precautionary than America. This portrayal feels like something of a straw man, set up to provide a clearer target for Wiener's own argument. It certainly seems overstated to say that: 'Claims of a broad reversal...are legion and remarkably bold', as Wiener does (p. 13). More the problem here, however, is the lack of reflection on the quotations Wiener uses in his introduction boasting of Europe's more precautionary nature. What is interesting is not what they tell us about either the real balance of affairs or the weight of public discussion. Rather they illustrate 'the rhetoric of precaution' – as Wiener entitles his first chapter, employed here to put forward a European identity organised around protection of its citizens from threats they are said to face in the course of their everyday life.

Precaution is, as both authors indicate but don't always emphasize sufficiently, about politics. It is a symbolic as much as real game. It is for this reason that, as Wiener observes in his conclusion, that 'it is moderated in practice' (p. 555). The projection of consumer and environmental protection has become a vital part of European identity since the 1980s, in the face of a profound crisis of legitimacy and any other means to even potentially connect with the citizens of its different nation states. The problem for Majone's European regulatory state 'is how to legitimize these institutions and the regulatory policies they pursue'.² I argued this back in 2001, explaining the construction of European consumer concerns and the reorientation of the originally narrowly economic nature of the European Union.³ Along with identity promotion, the newfound consumer and environmental agenda became a means through which the European bureaucracy became able to exert power more effectively over member states. Running parallel there have been national crises that have stimulated pre-

2 Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford: Oxford University Press, 2003).

3 Adam Burgess, "Flattering Consumption: The Growth of Consumer Rights and Product Safety Concerns in Europe", 1(1) *Journal of Consumer Culture* (2001), pp. 93–119.

cautionary reorientations in France and, to an even greater extent, the UK. The blood scandal in France was one important experience that further reinforced this new European politics of precaution. Most importantly, the BSE crisis not only reoriented British policy but recast European politics around ensuring that risk was never downplayed, and health and safety concerns eagerly embraced even on unlikely hazards such as radiation from mobile phones.⁴ These have fed into and reinforced the pan European trajectory. Recognising the European political identity game is a vital part of the puzzle not fully developed even in Vogel's account; it helps explain the gap between consistency in actual European precautionary legislation and the self-projection by the European bureaucracy of themselves as guardians and protectors of their citizens' safety. Precautionary pressures continue to be generated through the European parliament, in particular, as uncompromising consumer and environmental lobby groups funded by Brussels pursue their agendas.

The rhetoric of precaution is all the more striking because at least one part of American strategy since the 1970s has been to do precisely the opposite and defuse politicisation. In this sense the US has been a willing accomplice in the ideological counter position of a protective Europe against an unregulated America. From the 1960s the US was unwelcomely assailed by the champions of the new politics of consumer and environmental protection like Ralph Nader, Rachel Carson and Erin Brockovich and captured in Douglas and Wildavsky's famous account.⁵ During a period of disorientation and defensiveness amongst political, scientific and business elites. One response was to stimulate the precautionary period of American regulatory activity described by Vogel. Less noticed was the strategy of devolving decision making to neutral agencies and expertise, such as Nixon's creation of the EPA. Vogel notes that in the US, '...regulatory policymaking was becoming more technocratic and politically insulated...' (p. 72). In an example of what Wiener would call hybridization there has been some European attempt to copy the earlier American approach with the creation of agencies such as the Food Standards Agency in the UK

and EFSA in Europe more widely, as a response to a similar crisis of trust and legitimacy. Yet the strategy has not been so successful in the European context, with levels of trust still not approximating those routinely found for agencies like USDA. At least to some extent this failure should be understood in a context where wider developments elsewhere continue to be politicised; indeed politicisation has been institutionalised through Brussels' creation of a substantial consumer rights lobby which, as Vogel notes, has significant influence on the European parliament and others. Whilst the bizarre circus that is contemporary European Union politics may seem quite irrational (funding groups that then spend their time continually attacking your compromises with industry!) we should remember how important the projection of a precautionary identity has become and, at least as things stand, this is intimately bound up with sponsorship of precautionary politics.

The debate is, to some extent, about sample size and range, and Wiener emphasizes this. Vogel restricts his examples to those health, safety and environmental risks caused by business. In one sense this is restrictive given that many of us are ultimately interested in these developments with regard to more general socio-political trends, and from this perspective Wiener's inclusion of other issues like smoking and terrorism is welcome.

But equally it is problematic, as these other issues, especially, have quite different dynamics which are not necessarily usefully understood in relation to precaution. America's uniquely restrictive attitude towards alcohol, for example, is not an example of precaution so much as its historic moralization of 'the demon drink'. It is an approach that continues to this day – albeit in the disguised form of a mobilisation of more harm-based argumentation that has generally taken the place of a discredited explicitly moral agenda. Another 'exception' is American opposition to stem cell research which, again, reflects the distinctive moralisation within US society and its proclamation of an abstract right to life. The precautionary anti-terrorism, 'homeland security' architecture throughout the Western world is an even broader phenomenon; a means of reasserting of American power, establishing post Cold War identity without a Soviet bogeyman as well as a disciplining of society and provision of continued largesse for a lucrative security industry. Other countries have been forced to buy into this agenda, to greater or less degree, reflecting their closeness of their relationship to the

4 Adam Burgess, *Cellular Phones, Public Fears and a Culture of Precaution* (New York: Cambridge University Press, 2004).

5 Mary Douglas and Aaron Wildavsky, *Risk and Culture* (Berkeley, CA: University of California Press, 1982).

US. Such problems of distinctiveness plague any attempt to look across diverging issues and there is unfortunately no obvious solution that can impose meaningful comparability. Another problem is that the tendency of Wiener's more quantitative approach is to suggest that each regulatory decision is of equal significance. As we all know some regulatory areas and decisions have been massively influential, impacting upon quite unrelated areas (like BSE) whilst others have remained inconsequential. Equally, some periods of regulatory activity in particular countries have been more influential than others.

This is also about how we look at the process of historical change. One can identify breaks or continuities in history and it is generally easier to do the latter because, at least as far as appearances go, it is easier to identify. But changes often happen beneath the surface, staying formally similar in how they appear. Wiener tends to emphasize what is similar between the American and European experiences whilst Vogel probes into what makes them so different.

To take an example, Wiener tells us that: 'Likewise, there may have been more policy action in Europe in the 1970s than is generally recognised today. That decade is, after all, when the notion of precaution blossomed in German, Swedish and Swiss environmental law' (p. 528). Whilst conceding that this was a quiet European regulatory period he still wants to trace a continuity and contests the definition of 'policy action' which is equated with the beginnings of legal foray into environmental formulation. The emphasis upon what is common tends to distract from what is most interesting and important. Instead of a varied historical process with distinct phases Wiener ends up with only the notion that particular societies tend to worry about different things at different times. National variations do reflect how different cultures have different targets for similar concerns. Behind this stands the cultural argument on risk that all societies have their own boundaries that are reinforced through the language of risk and blame.⁶ What this tends to ignore is the process of historical change *within* particular cultures and how, at certain points, a breaking point is reached which makes a return to the past impossible.

My suggestion is that Wiener's account tends to be too one-sided, focusing on the (often less interesting) degree of continuity and what is historically common. Yet what is common to both Europe and America, and their 'hybridization' into other parts

of the world remains an important and interesting aspect (once we have the predominant trends and patterns). One of the best sections of Vogel's account is his account of how Europe is exporting its regulatory model as part of its self promoting strategy. Today he points to how the EU is exporting its regulatory models enabling it to 'carve out an identity and a profile for itself as a 'normative' or 'civilian' power on the world stage' (p. 13). Irrespective of any active process such as this, we can also see similar developments in other parts of the world, suggesting there is something common to late modernity and its socio-economic malaise that tends toward an agenda of health, safety and security. Taking one of Wiener's interesting examples, smoking bans are being universalized. The campaign to eliminate further lifestyle risks is an international one, reflecting how health promotion has become a universal imperative and comfortable contemporary politics, even within a traditionally ordered country like Russia. In our post-political and relativistic late modern world health and safety have become elevated as one of the few 'beliefs' remaining.

Leaving aside any 'flip flop' or not, perhaps the most interesting issue is how to historically situate the early American foray into a more protective, publicly oriented legislative style. On the one hand it seems natural that it should reach this 'stage' earlier, as a society historically more focused on individual consumption and recourse to the law, and without the obstacle of class politics, for example. On the other hand, it seems like a moment of post-1960s disorientation where the political, business and scientific elites were surprised by not only sudden public disengagement but apparently active rejection of their values, leading to a highly defensive political mood. Temporarily, at least, campaigners like Ralph Nader, Erin Brockovich and Rachel Carson won the day and drove through a reorientation towards protection. Vogel's most reflective suggestion is that this was not an American style of regulation but 'turns out to have been historically contingent' (p. 290). But now normal American service has been resumed, perhaps, as we are left with a very different side of America's distinctive inter-relationships coming to the fore, with politicians who are more directly financially beholden to a corporate sector able to insulate itself from regulatory zeal. But we also have

6 Douglas and Wildlavsky, *Risk and Culture*, *supra*, note 5.

to consider how 'historically contingent' the European experience has been. Vogel rightly ends with an emphasis on the BSE experience, which is surely the defining one in Europe and demands far more critical analysis.

So what of the future? An appreciation of the distinctive developments seems important to understanding. An emphasis upon common trends can neglect or blunt recognition of what is distinct and unusual, a key example here being the entrenched nature of politicised precaution in Brussels. Majone – in Wiener's book – describes a policy learning process in the States that is institutionally difficult in Europe. He is rather equivocal in his conclusion, demonstrating that there is, unfortunately, no reason to believe that Europe will go through a similar process. Yet, at another point, he hopes that there will eventually be a sensible convergence around an evidence-based approach. It is one thing to recognise that common sense should prevail but another to really understand that this can become impossible when such powerfully vested interests in the European Union maintain what he calls 'single issue politics'. He is referring here to the circus of Brussels politics which resembles the entrenched cultural stand-off of American Republican vs Democrat politics (but not its regulation). In Brussels it is a declaratory war between lobby groups and industry. There seems no easy end

in sight to either. A more direct question is to ask whether continued global recession will impact upon these trends? To an extent, precaution is a luxury we can now ill afford. The global market has already collapsed in what we might call precautionary food, organics.

Finally, having said all this, one's conclusion on this debate depends upon what one is looking for, and interested in. I am not interested in regulation only for its own sake but as part of a broader picture as to how 'risk societies' first emerged and were then reproduced.

The stuff of the risk society – food panics, paedophile anxieties, environmental contamination contests etc – these began in the United States and presented themselves at a later date, if not consistently in Europe as a whole, in the UK. Vogel recollects being struck by the extent of change in French political culture towards risk aversion. Similarly I have lived through and been fascinated with the, arguably more thoroughgoing, transformation of British political culture in a risk-centred and often risk-averse direction. The famously resilient 'stiff upper lip' disappeared in the 1980s, as the UK followed a similar trajectory to the American one it had previously mocked. 'Only in America' was the expression which used to greet the stories of suing MacDonald's for hot coffee and impounding Kinder eggs. No longer.