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Book Review

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K. S. SHRADER-FRECHETTE, RISK AND RATIONALITY (U. California Press 1991) [312 pp.] Index of Names, Index of Subjects, Notes. CIP 91-3294; ISBN 0–520–07287–1 (Cloth $39.95); ISBN 0–520–07289–8 (Pbk. $15.95). [2120 Berkeley Way, Berkeley, CA 94720.]

There are odd moments when one is glad that contemporary philosophers have not altogether removed themselves from the debate over public issues. After reading this book, I experienced one of those moments. Professor Shrader-Frechette has welded an apparently encyclopedic knowledge of environmental risk events with a deep understanding of epistemology, ethics, economics, science and politics to create an exhaustive critique of present practices in risk assessment. She finds them lacking and proposes a clear alternative.

The problem presented by large scale activities that expose unknown people (the "public") to risks of uncertain range, duration, and severity is clear: A market mechanism is not even arguably able to solve such problems, and a second best solution will inevitably result in decisions by one set of people that expose others unwittingly and unwillingly to risk. Professor Shrader-Frechette argues that the two existing candidates for second best — naive positivism and cultural relativism — are critically misguided. Where naive positivism attempts value-free objectivity, it succeeds only in burying value choices in the complexity of its analysis. And cultural relativism, which rejects the possibility of objective analysis where values are concerned, condemns the entire activity to simple choice, unilluminated by rational discourse.

Professor Shrader-Frechette's proposal, "scientific proceduralism," is based upon the proposition, which she strongly argues, that rationality is possible in value-laden decisions. Risk-cost-benefit analysis (RCBA) might, for example, form the basis for risk evaluation, but, where that is the end of the process of evaluation to the naive positivists, she would subject it to adversarial assessment from

alternative ethical systems. A given RCBA might, then, be evaluated and argued from the standpoint of Benthamite utilitarianism, Rawlsian egalitarianism, Nietzshean elitism, or Paretian libertarianism. Each ethical system would provide a ground from which the RCBA could be assessed. The procedure would be competitive, each advocate arguing the strengths of one interpretation over the others.

Professor Shrader-Frechette devotes the last two chapters of the book to suggestions for implementing scientific proceduralism. The idea has obvious applicability in the regulatory process, where RCBA is ubiquitous. Its implementation in the political arena, which is significant because of the decentralized nature of American land use decisions, is less clear. It is in her discussion of the judicial process that her ideas are to me, perhaps because I am a lawyer, most compelling.

On the face of it the judicial process is not a likely prospect for the implementation of scientific proceduralism. Only when it passes on an appeal from a regulatory or political decision is the judicial process involved in a risk decision prior to the creation of the risk, and then its review is narrowly procedural. Courts are generally involved after a risk has manifest itself in injury, as in the case of environmental tort litigation. That is hardly the time or place to implement scientific proceduralism, though one might imagine that if it were required, rather than RCBA, the failure of the defendant to implement it properly might be the basis for a finding of fault.

The judicial process comes into this story in a different way, according to Professor Shrader-Frechette. Were those injured by an environmental risk better able to prove the case, the costs of an environmentally risky project would be forced onto the actor, who would then have to internalize them. Knowing that it would be forced to internalize the cost of injuries, the actor would be forced before undertaking a risky project to put its money where its mouth was: To undertake only those actions for which it could afford to adjust the cost of its product or service. Any inaccuracy in its RCBA would then come

back to haunt it, for it would either fail to undertake projects because of overstated RCBAs, or undertake projects that turned out to be more costly than the RCBAs had predicted. Under such circumstances, one might expect the people involved to act responsibly.

But how might the judicial process be made efficient enough to make such discipline on risky actors effective? Professor Shrader-Frechette mentions a variety of proposals. The fundamental problem is that conventional tort law is not the ideal place for claims by those who have been injured by environmental risks. Tort law looks for fault on the part of the actors, and in these actions the actors are liable to be able to show extraordinary expense and effort bent to assessing and avoiding harms. What is needed is a cause of action in which the plaintiff need only prove that a recognized risk caused harm. The plaintiff's recovery would be proportioned to the statistical contribution that the defendant's actions made to the likelihood or severity of the injury. Such a procedure would force the defendant to internalize all of the costs of its actions, not simply those that resulted from fault.

In the hands of an entrepreneurial tort lawyer RISK AND RATIONALITY could be a most potent force for the emergence of a new flavor of tort law. Were such a theory to emerge, however, it would reduce the need for scientific proceduralism for it would approximate a Pareto-like solution to the problem of risk. An action is optimal under the Pareto criterion if everyone is either unaffected by it or made better off. Were firms to be forced by the law to compensate everyone who lost from a risk to indifference, it is at least arguable that they would undertake only projects that satisfied this criterion.

It is not likely, however, that Professor Shrader-Frechette would find this judicial solution satisfactory. One reason is that it would not, in fact, result in a Pareto optimal solution, for it would force costs upon people, then pay those costs. But is suspected that her objection would go deeper. There is in her analysis the rumblings of two values that would not be satisfied by this solution. One is her suspicion of the

willingness of those affected by decisions. Throughout this book, she is concerned that what appears to be willing acceptance of risk is either somehow biologically predetermined (i.e., risk preference) or coerced by circumstance (i.e., poverty). The second weakness that she might find is that it avoids citizen participation. She quotes Thomas Jefferson to the effect that an ignorant citizenry should not be denied the power to make decisions; rather, they should be informed. There is, one suspects, a virtue in public decision-making beyond the plain virtue of better decisions about risk.

RISK AND RATIONALITY is not an easy read. Professor Shrader-Frechette makes a succession of powerful points and resolves them with an important proposed change in the way decisions are made. Her argument is throughout spare and clean, her prose free from didactic asides, and the whole work is illuminated with pithy descriptions of actual controversies. It is demanding but leaves the reader grateful that such demands were made.

W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY (Harvard U. Press 1991). [270 pp.] Appendices, bibliography, index, notes. CIP 90–23161, ISBN 0–674–75323–2 (Cloth $39.95). [79 Garden Street Cambridge, MA 02138.]

In this book, Professor Viscusi has confirmed the lawyer's worst fears of economic analysis of law: He has missed the point. It is as if a deaf man set out to do a policy analysis of classical music. The result might be intriguing because of its unique viewpoint, but one would be highly suspicious at the author's suggestion that all music should, for example, be written in the key of E flat because the most commercially successful classical music has been written in that key.

It is clear that Professor Viscusi recognizes, even insists upon, his perspective: "I view products liability reform... as a question of designing an appropriate institutional mechanism to control risks and

compensate victims of product-related injuries." But he does not assess products liability law *as if* that were its purpose; to Professor Viscusi, that *is* its purpose. For all its empirical tone, the central message of this book is a normative one: If it is not, in fact, the purpose of products liability law to control risks and compensate victims — and there is much of products liability law that is nonsensical from that point of view — it should be.

This book is the coming home to roost of one of the most problematic propositions in Richard Posner's seminal ECONOMIC ANALYSIS OF LAW. From the standpoint of safety, according to Posner, it did not matter whether the law applied a negligence standard or an absolute liability standard to products. If it applied a negligence standard, producers would take cost-justified loss-avoidance. The cost of accidents would rest upon those who were injured by irreducible risks, for they could not show that the manufacturer was negligent. Under an absolute liability standard, firms would take the same level of cost avoidance, though they would have to pay those who were nonetheless injured. There would be a distributional difference between the doctrines (absolute liability would make victims, and their lawyers, richer), but no allocative difference between them; the injury rate would be the same under both regimes.

So what? If the purpose of products liability law was to optimize the injury rate, we would be indifferent as between the two doctrines. If the purpose were to compensate victims, law would favor absolute liability. It follows, then, that if the purpose of the law was both optimizing the injury rate and compensating victims (which are the two purposes that Dr. Viscusi finds underlying products liability), there is an ideal rule: absolute liability. The law, they would predict, will move toward an absolute liability rule as soon as it gets its act together.

Courts have indeed toyed with the idea of absolute liability (and its vacuous kin, "strict liability") over the past thirty years but have resoundingly rejected it in every state. That might suggest to economists that there is a dominant purpose lurking in products liability law which

has thus far escaped them. I suspect that this has, indeed, dawned on Professor Posner, now a judge on a federal court of appeals. But it seems to have altogether escaped Professor Viscusi, for he adamantly grounds his analysis on controlling risk and compensating victims.

What then is the deeper purpose that could account for the law's rejection of absolute liability? The answer to that question, unfortunately requires a different way of thinking than that employed by Professor Viscusi. His thinking is what is called "instrumental" or "consequentialist." That is, he views law as an instrument to be used toward the provision of a larger social objective. In this case, products liability should be an instrument for delivering "an appropriate institutional mechanism to control risks and compensate victims." It is no accident that the purposes toward which he imagines products liability law bent happen to be quantifiable and therefore amenable to the kind of quantitative analysis that his discipline prepares him for.

There is another way of thinking about law referred to as "formative reasoning." Here, the law is viewed as a process for forming the normative sense of the members of a society. By publicly recognizing and documenting wrongs, the law reinforces the sense of responsibility in its members and helps shape it to new realities. The sense of right and wrong, under this view, is an emergent phenomenon, as the law itself gropes now left, now right, attempting to unearth the responsibilities that humans have in new situations.

The history of products liability law is particularly supportive of such a view of law. Negligence law grew out of the context of direct human interaction, of people accidentally hitting each other with sticks, running over pedestrians, or docking their boats at piers they did not own. By the end of the nineteenth century, however, the dominant mode of economic organization had become the firm. Decisions made within the firm would affect people whom the decision-makers never knew and cause injuries to people whom they never saw. Worse, those who were injured had a devil of a time proving who had done them

wrong. The tort law of the time was distinctly people-oriented, so the plaintiff had to bring the specific wrongdoer into court. With the advent of the corporation that was not easy.

The corporation itself had a formative effect upon people, but a distinctly negative one. By wrapping the decision-maker in layers of organizational protection, it removed the person from the immediate context within which his sense of right and wrong was triggered. It was entirely possible to feel very good about oneself, to treat wife and neighbors with exemplary kindness, while adopting corporate policies that would strike limbs from the workers and poison the environment.

It became necessary for law to penetrate such a context, to open it to scrutiny. Law has several mechanisms for doing this, and it used them all — antitrust, rate regulation, safety regulation, and so on. Products liability proved to be a particularly handy mechanism, as Professor Posner has pointed out, because it made every person his or her own attorney general, penetrating the corporation in pursuit of redress of wrong. Such a task is not, however, an easy one. Products liability cases are among the most difficult to prove, for the defendant generally has many orders of magnitude more resources to use, and it controls the facts that plaintiffs need to prove. The law needed to expand the products liability plaintiff's power. How to do it?

In retrospect, the law had a mechanism that would have been ideal for the job, the doctrine of res ipsa loquitur. This doctrine shifts the burden of proof to the defendant to prove that it was not negligent upon the plaintiff's showing an injury that was probably caused by someone, somewhere committing a wrong. But in the seminal California case, *Escola v. CocaCola,* Judge Traynor, rejecting the direction of the rest of the court set on the path of applying res ipsa to products cases, opined that this was a good area for absolute liability. Where res ipsa would increase the plaintiff's power by reducing its burden of proof, absolute liability gave the plaintiff the incentive to file suit by promising a pot of gold, whether the defendant was at fault or not.

Absolute liability was a lousy idea, for it compromised the normative foundation of tort law by promising compensation without fault; it threatened to eviscerate the morally formative power of tort law, turning it into a weird form of insurance. As with all bad ideas in law, it eventually died, but not until it had excited plaintiff's lawyers to a frenzy of creativity and had shaken corporate executives to their roots. The confusion that it caused was probably worthwhile, for it got the attention of those most deeply buried in the corporate cocoon, threatening to expose their most private memos to the fresh breeze of discovery.

A formative perspective would predict that judges would refuse to yield the idea of fault, and that is precisely what has happened. The doctrine of absolute liability was explicitly rejected early on, and in its place came the rhetoric of "strict liability" — from its inception, a name without a notion. There is no intermediate point between negligence liability, that requires the plaintiff to prove causation by fault, and absolute liability, that requires only proof of causation. The rhetoric of strict liability did, however, let judges capture the idea that, where products were concerned, they were not going to apply garden-variety negligence law. Today, it is safe to say that, in most jurisdictions, products liability is negligence law, but the burden shifts to the corporate defendant upon the showing of a "defect" without requiring the plaintiff to identify the individual responsible for the defect.

I suggest, then, that the formative purpose underlying products liability law fits the actual history of this law far better than Professor Viscusi's instrumental purposes (injury reduction and victim compensation). Now it is clear that the two types of purpose are related. If products liability induces a sense of responsibility in otherwise isolated corporate officials, one would expect that to show up in safer products. Safer products are, however, an artifact of the underlying purpose. Victim compensation, by contrast, is the engine that drives the responsibility-producing system. By offering the successful plaintiff the

potential for a financial bonanza, the law creates an incentive for plaintiff's lawyers to penetrate to the deepest layers of corporate insulation. From an instrumental perspective, capping injury awards would save little of the cost of products liability, as Professor Viscusi points out. From a formative perspective, it would drastically reduce the incentive to prosecute a case that is hard to prove. It is a very bad idea, not because it would cause accident rates to rise but because it would create an incentive for corporations to hide their actions under ever deeper layers of protection, making cases against them ever more difficult to prove.

The difference between the instrumental and formative views is best illustrated by the Ford Pinto case. To Professor Viscusi the problem in that case was that Ford based its valuation of life on damage awards by courts, which were too low. As a result, it severely undervalued the losses that the relocation of the gas tank would avoid in its cost-benefit analysis. Had Ford calculated the losses correctly it would have found them to be ten times greater than the costs of making the change. Ford goofed.

That would explain why Ford would have to pay compensatory damages, but it doesn't explain colossal punitive damages, later reduced, assessed against Ford. Clearly the thing that burned up the jury was the very fact that Ford was calculating the value of human life. Doing so, it might be felt, is like a murderer who feels fine about killing a sick person because he knows that the value of the sick person's life is so low that he can afford to compensate for it. To the jury, what Ford did was evil.

It is at precisely this point that the formative and instrumental views clash, and I am tempted to side with the instrumentalists. Products liability law requires that each person act responsibly. A corporate officer is, however, responsible both to his or her customers and shareholders. If expenses are to be increased, those expenses must be justified, and justified in terms of corporate finance. Doing a cost-

benefit analysis does not evince a coldness of spirit but rather responsible corporate behavior. Yet it does evince an impulse to treat human beings as objects, rather than subjects, so is suspect.

It must be said that Professor Viscusi's analysis, in the best traditions of economic analysis of law, sheds considerable light on the operation of the system. Particularly telling is his analysis of the insurance crisis (attributable, in substantial measure, to insurance practices rather than products liability law) and hazard warning law (for which he proposes a sensible general scheme). Odd, however, is his entertainment of one of the worst ideas to make itself onto the products liability scene, Dean Wade's risk-utility test. What, one might ask, is a court doing evaluating the utility of a product? Is that not the quintessential job for markets? Professor Viscusi does indeed ask that question, even shows that it is impossible to administer as a judicial test because it is mired in Kenneth Arrow's indeterminacy of individual values, but proceeds nonetheless to accept it as the most rational of the tests of products liability. One suspects that Professor Viscusi is resident on the utilitarian side of the economic analysis aisle.

Lest this seem to be faint praise for a serious work of scholarship, let me say that I found Professor Viscusi's empirical analysis illuminating, clearly grounded and helpful, particularly in pointing to what appears to be an emerging reinterpretation of law.

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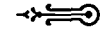

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