Risk Management: Gone Too Far?

By Oliver Houck

Breaking the Vicious Circle, by Stephen Breyer. Harvard University Press, 1993, 127 pages. $22.95. (To order, call 617-495-2577.)

BREAKING THE VICIOUS Circle is a guided tour through the woods of risk management. The decisions of the EPA, the Food and Drug Administration, and more than a dozen other federal agencies on safety levels for toxic discharges, automobile bumpers, food coloring, and other hazards of contemporary life are technical, confusing, bizarrely disparate—and extremely consequential.

These decisions call for—or avoid—the expenditure of big bucks to reduce risks from waste sites, water pollutants, paint pigments, and aerosols. They are often based on a smattering of epidemiological studies (e.g., 15 years ago, in Turkey), extrapolations from laboratory tests (e.g., on minnows or mice), and assumptions about doses and responses (e.g., if 1 milligram grows tumors in mice then 100 milligrams grows tumors in humans . . .), safety factors (. . . but to be safe, let's say that 10 milligrams grows tumors in humans), and exposure pathways (e.g., hypothetical individuals at the fenceline breathing .01 milligrams for 70 years). Anyone visiting these woods is left wide-eyed in wonder and, with whatever energy remains, groping for a better way.

Stephen Breyer, who sits on the First Circuit Court of Appeals, conducts this tour in a concise, readable, and knowledgeable way, and goes on to dare a solution. The book is divided into three parts, and its depiction, in part one, of the uncertainty of risk analysis and the inequality among risk management conclusions is familiar ground to aficionados of this field, but informatively summarized all the same. Tables comparing degrees of risk posed by everyday activities and costs to avoid them provide neat and compelling illustrations of what almost any observer will conclude is a flawed process. Comparisons of pollution exposures to those exposures Americans voluntarily assume through cigarette smoking bring the issue home. The case histories offered—including *United States v. Ottati,* which involved a Superfund cleanup, and the Fifth Circuit's recent remand of the EPA's asbestos abatement regulations, *Corrosion Proof Fittings v. EPA*—are easily grasped examples of what Judge Breyer calls "going too far," prompting his call for action.

Parts two and three present Judge Breyer's argument. The argument is, part two, that risk management has fallen victim to public misperception and influence heightened by irresponsible media, by a Congress unable to make these decisions itself, and by agencies marching like automatons toward unattainable statutory goals. Which marches all of us toward greater and greater expenditures on what is often hysteria. In part three, Breyer proposes his solution: a new institution variously modeled after the Office of Management and Budget, the Office of Information and Regulatory Affairs (of OMB), and the French Conseil d'Etat.

The function of this new institution is to bring risk management to order, to prioritize risks, reduce expenditures on their abatement, and, although it is not made explicit, to see that these new priorities are implemented. The institution would be staffed by a new form of Civil Service, apolitical experts who would go on in their careers to staff legislative committees, agencies, and even the judiciary. While the manner of their appointment remains somewhat opaque, they would be "insulated" from politics and "the pressure of public opinion," free to reorder the decision making of the respective federal agencies through their own expertise and on the merits.

The first observation to make about this book is not what it contains but rather what it omits. Anyone with even a limited background in risk management knows many examples of under regulation, of deformed children and uncompensable suffering resulting from delayed bumper standards, unregulated pesticides, and safety levels that were compromised or, worse, not promulgated at all. While the book mentions in passing the possibility of under regulation, each case history presented, each example offered, is an example of regulation going "too far." Never not far enough.

The judicial opinions noted are those invalidating a federal regulation as too stringent, including and most prominently the *Ottati* case authored by Judge Breyer himself, an experience that may well have catalyzed this book. The secondary sources cited, impressive in number and quality, include reports of the Reagan administration's Office of Management and Budget, presentations to the Cato Institute and other business-sponsored think tanks, and the London *Economist;* one does not see references to relevant, more consumer-oriented literature as Samuel Epstein's *The Politics of Cancer.*

One does not see, next to *Ottati,* Judge J. Skelly Wright's dissenting opinion in *Ethyl Corp. v. EPA,* reviewing the EPA's regulation of lead in gasoline:

"The majority tells us that the Administrator, the environmental expert installed and staffed by Congress, has Hamlet-like, stabbed blindly 'through a curtain of ignorance, inflicting anguish, but in our judgment not rationally solving any problem.' I suggest, to the contrary, that it is the majority that, without scientific background or access to expertise, is stabbing blindly through the curtain of ignorance. And, with due deference to the 'anguish' the Administrator has inflicted on the suppliers of lead for the petroleum industry, it is the anguish of the children and urban adults who must continue to breathe our lead-polluted air that moves me."

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layed acting on leaded gasoline we will never know. But the number is undeniably substantial. There is another side to the risk management story, another kind of injustice beyond economic inefficiency, and it is not well represented in this book.

Perhaps the most revealing discussion of this nature is that in which Judge Breyer "suggests many concrete possibilities for obtaining increased health, safety, and environmental benefits through reallocating regulatory resources." Among the suggestions are advertising the dangers of sun bathing, encouraging changes in diet, subsidizing the production of healthier foods, and encouraging the purchase of smoke detectors. From the full list, a single, common denominator emerges: Nothing is required of anyone. One is reminded of former Secretary of Interior Donald Hodell's alternative to signing the Montreal Protocol (committing the United States to reduce the production of chlorofluorocarbons, to protect the Earth's ozone layer): floppy hats and sunscreen.

It is part three of the argument, however, that is the most disturbing. The proposal of a super agency entrusted with the final say over levels of human health and safety in the United States and modeled after OMB and its Office of Information and Regulatory Affairs ignores a widely held perception that these two entities in particular—which conducted an open war against environmental regulation throughout the 1980s—departed a long way from rather fundamental notions of accountability in government. An institution acting almost entirely in secret, inaccessible to the president (and, historically, to those campaign contributors and others in the president's favor) and to virtually no one else, subject to no open meetings laws, no Freedom of Information Act, no notice, comment, or other rudiments of administrative due process (to say nothing of judicial review), with the power not only to second-guess the public rulemaking of existing agencies but to make their budgetary and legislative decisions as well, creates a branch of government subject to checks and balances by none of the existing branches, not even by the press.

THE RISK MANAGEMENT process may be a mess—and it is—but taking it behind closed doors as a remedy is the kind of idea that comes up every couple of decades by people who would like to streamline government for excellent ends and either results in something like the French Revolution's Committee for the Rights of Man or dies a more quiet but equally deserving death. The genius of American government and its most important contribution to world governance since democracy itself is an open, administrative process, the vital organs of which are public participation and judicial review. As recent revelations of extraordinary, undisclosed radiation hazards by the Department of Energy provide only the latest confirmation, truth is more likely to emerge from the crucible of an open process than from the conclusions of inaccessible (to the public, anyway) "experts." And since when was any expert neutral?

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Judge Breyer's choices here are stark. Either we create a new institution with the power to decide, or we have a waste of time. If the new institution has the power to decide, either it will be subject to traditional administrative process or it won't. If it will be, it will soon dissolve into the same tugs of war, litigation, politics, and public pressures (all the pressures referenced in this book, by the way, are from "the public," an uninformed public, as in "the viscitudes of public opinion"; no pressures such as those that led a federal agency deliberately to understate toxic releases from the government's Fernald, Ohio, facility for the last 15 years are alluded to) that perpetuate the existing muddle. If, on the other hand, an agency with this much clout will not be subject to administrative process, we have a new form of government indeed. New to the United States of America, that is.

What, then, is the answer to risk management? The short answer is that I have not written the book, but given the hard shot just taken at Judge Breyer's essay, at least some alternative offering is called for. We may start with the same part one, supplemented with a few examples illustrating abuses of underregulation as well, and agree that we have a mess on our hands.

In part two, we would examine those public health and environmental laws that work, and those we can agree do not. For openers, in the "work" camp we can put the National Pollutant Discharge Elimination System program of the Clean Water Act, the new air toxics abatement program, and pretreatment standards under the Resource Conservation and Recovery Act. They are producing marked reductions in highly hazardous emissions. On the "not work" side we can identify, with ease and near unanimity, the Comprehensive Environmental Response, Compensation, and Liability Act (which cannot come to grips with hundreds of hazardous waste sites) and the Toxic Substances Control Act and the Federal Insecticide, Fungicide, and Rodenticide Act, which have yet to scratch the surface of new toxic substances or pesticides.

Now, why do the first approaches work and the latter fail? The ones that get the job done do not rely on or even bother with risk management. They

abate toxic water and air emissions, they reduce hazardous waste concentrations, by best-available-technology engineering requirements. For the most hazardous substances (and in this more limited inquiry, risk analysis plays a more useful role)—e.g., CFCs, liquids in landfills —they attempt to set no "safe level" standards. They simply ban them; at which point, invariably, and despite the dire predictions of economic inefficiency and catastrophe from the affected industries, less risk-posing substitutes appear as if by magic.

Turn now to the very few substances regulated at all by TSCA or FIFRA, and even here regulated by such facially inadequate palliatives as warning labels (for Hispanic farm workers?) (but what else can you do with a standard like "unreasonable risk"?) and to the chaos of CERCLA, blamed largely on lawyers for its extraordinary expense and unextraordinary cleanup results. Why do the lawyers litigate? For one, because the cleanup requirements are based on science so soft it would be ineffective assistance of counsel not to litigate and, for another, because no one knows what to do with the factor of costs. All of these decisions are purportedly made on the basis of risk management, with the appropriate consideration of costs, etc., by neutral experts. None of them work. Breyer has proven that if nothing else in part one. Nor will they work any better if done behind closed doors by the super experts of a super agency. The science will become no more firm, simply less visible and, with less participation, less informed. The inquiry is fatally flawed. Judge Breyer has the right question but the wrong answer. He goes too far.

In an increasing number of statutes, the Congress—the same body maligned in this book for creating and not solving the risk management problem—is solving it in a very different way. For much of the field of environmental and public health, it is banning the worst risks, adopting best available technology for the rest, and passing risk management by.

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The Right Way To Do Disclosure

By Erik Meyers

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LEADERSHIP IS AN ELUSIVE quality sought by many. Ironically, often those who most ardently pursue the label of "leader" are those found wanting in the eyes of others. Former U.S. Supreme Court Justice Potter Stewart once answered the question of how to define pornography by writing, "I know it when I see it." Similarly, people know leadership when they see it, not necessarily when they hear it proclaimed.

Nowhere are the demands for probative evidence of leadership higher than in the world of environmental affairs, particularly for business organizations. In the few years since Earth Day 1990, the business world has seized upon positive environmental imaging as a means of improving their corporate standing. Environmental pledges abound, as do many full-color brochures proclaiming corporate good works in caring for the natural environment.

A handful of companies have taken the further step of publishing an environmental annual report, which helps make concrete their stewardship commitment through detailed performance data and identification of needed improvements. According to a 1993 KPMG Peat Marwick study, only 105 companies out of some 690 major U.S. and Western European businesses publish environmental reports, although the number has grown rapidly in the past three years. In fact, a small coalition of companies, calling their effort the Public Environmental Reporting Initiative, have cooperated in producing a set of recommended guidelines on corporate environmental report content.

Some of these companies are responding to calls from public int environmental groups and soc responsible investment adviser more information on environm performance, which they have to rate one company against ano Reporting does seem to have it wards: In December 1993, the p interest group Council on Econ Priorities announced that it ha moved four companies from its l top environmental offenders, in jor part because of the companie creased willingness to disclose ronmental performance data.

One of the major leaders in new corporate environmental countability movement is Monsanto Company. Since ma the "Monsanto Pledge" of envi mental stewardship in 1990, company has, in fact, sought t liver and report on its prog most recently through its "E ronmental Annual Review 19 the third such annual report. example, one of the 1990 Pl promises, which seemed rev tionary at the time it was m was a commitment to reduce t air emissions by 90 percent by end of 1992 (based on 1987 lev in its current environmenta port, Monsanto reports reduct of 92 percent worldwide an percent in the United States. company goes on to add that a nificant part of the reduction achieved by closing major m facturing capacity at one plan Newport, Wales. Without plant closure, toxic air emis rates had receded 44 per worldwide. Other details closed in the report are compli problems which, despite ar crease from 1990 to 1991, decl dramatically in the current re ing period (through the clos 1992).

Such corporate candor on ratir performance and clarity in pres tion earn Monsanto generally grades for its 1993 environmenta nual review. Particularly useful foldout summary of charts and n tive that address the various goa forth in the Monsanto Pledge. V not all reporting periods are the s