Review Essay

NEOCONTRACT POLEMICS AND UNCONSCIONABLE SCHOLARSHIP

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Peter W. Huber, *Liability: The Legal Revolution and Its Consequences*. New York: Basic Books, 1988. 288 pp. $19.95.

On the day that the review copy of Peter Huber's *Liability: The Legal Revolution and Its Consequences* arrived in my mailbox I also received an issue of *Time* containing a two-page advertisement entitled "The Liability Lobby: We All Lose,"[1] which cited Huber's book for the proposition that "today's court system works like a lottery" in products liability cases. The book had earlier been cited as a source in a *New York Times* article on risk in American life,[2] and Huber is a frequent lecturer on the ills of the liability system. Thus the book under review and its author are clearly gaining prominence in the policy debate over tort law. Since Huber publishes widely in law reviews and has had an article linking the "crisis" in liability insurance to changes in the legal environment published in the prestigious journal *Science* (Huber, 1987; but cf. Hayden, 1987), the intellectual community interested in law and social science should be cheered: here is scholarly[3] work on law in society being used in public debates on a policy question.

Unfortunately, the matter is not quite so encouraging, because the work in question combines dubious scholarship with a polemical ideological argument. The scholarship is dubious because it ig-

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[1] The advertisement, on pp. 84–85 in the issue of 26 June 1989, was placed by American International Group, which identifies itself in the text as "[t]he largest underwriter of commercial and industrial insurance in America and the leading U.S. based international insurer."

[2] "Strategies for Making Life's Risks Tolerable," *New York Times* 1, 28 (May 9).

[3] It might be argued that the book is not really "scholarly," since it was written in a style lighter than that of most academic works, was published by a nonacademic press, and is listed by libraries under the category of "popular: non-fiction." Nonetheless, it has been designed to at least appear to be scholarly, with nineteen pages of endnotes, a thorough index, and jacket blurbs by distinguished law professors, two from the University of Chicago and one each from Yale and the University of Virginia. This review will take the appearance at face value and treat the book as a scholarly work.

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nores or misstates contrary evidence and overstates its own case. The argument is polemical and ideological because it fails to take into account possible alternative explanations for the phenomena it examines and sees conspiracy among those who might oppose its tenets. After reading this book, a scholar who knew the literature on the subject could only be discouraged: How could work so patently one-sided be so well received? And the corollary: Why has not more careful, scholarly work on this topic had much impact? The remainder of this review discusses the book's flaws and briefly considers these last two questions. First, however, it is necessary to present the basic points of Huber's argument, since Huber does raise some interesting and potentially important questions about the current system of liability law. Unfortunately, the manner in which he argues and supports his case makes it difficult to determine how much credence is due them.

THE NEOCONTRACTUAL ARGUMENT

The book begins with the assertion that tort liability is a "tax" which adds unreasonable and unjustifiable expenses to many, perhaps most, goods and services and drives many beneficial ones from the marketplace completely. Further, it asserts that "although the tax ostensibly is collected for the public benefit, lawyers and other middlemen pocket more than half the take" (p. 4); and that while tort law is based on idealism and is intended to benefit the ordinary consumer or accident victim, it has had the opposite effect, raising the costs of products and services that are meant to improve health and safety and rendering many of them uninsurable and thereby driving them from the market entirely. The result has been that "[i]n both its safety and its insurance effects, the new tort system is highly regressive: those who have the least to begin with are hurt the most" (p. 13).

Huber puts the blame for this sorry state of affairs on the judges who have created modern tort law. In a fascinating if rather breezy revisionist history of the development of tort doctrine since the 1950s, he argues that, until then, most accidents had been handled under the category of contract rather than tort. Huber bases this conclusion on the assertion that "most unintended injuries occur in the context of commercial acquaintance" and that "more often than not, both parties to a transaction recognize there is some chance of misadventure and prudently take steps to address it beforehand" (p. 5). According to Huber, traditional common law practice had been to search for and respect such agreements. Over the past thirty years, however, the trend of the law has been to repudiate such contractual theories and to concentrate instead on allocating the costs of accidents in such a way that those costs are minimized and that potential victims are "provided with the accident insurance that not all of them currently buy or can

afford" (p. 7). It has done this by imposing liability on manufacturers and providers of services despite contractual provisions limiting their liability and by continually striking down attempts to revive such limitations.

According to Huber, this approach has been an unmitigated blunder. When companies are forced to assume the costs of accidents in excess of the amount they would freely agree to pay, they raise their prices or even withdraw from the market. Second, these developments in the law have made liability insurance more expensive, and hence less available, by rendering the insurance companies liable for risks that they have not agreed to undertake. Finally, the new tort law discourages innovation, since new processes inevitably induce risks that cannot be entirely foreseen and can no longer be insured against. Most of the book (eleven of fourteen chapters) is devoted to developing these points and documenting them, largely by a procession of anecdotes purporting to show the bizarre, illogical, unfair, and inefficient workings of the present tort system.

This is not a particularly original analysis, but Huber makes it noteworthy in two ways. First, he carries the argument to an interesting conclusion, in which he asserts that the reintroduction of contract principles into the processing of accidents will serve to increase insurance coverage without regard to the classic principles of fault and the process costs of tort law. Huber proposes that a priori contractual arrangements will be both fair and efficient, providing compensation after an accident occurs that is perhaps "somewhat thinner than the occasionally munificent tort system" but also "certain to be much broader" (p. 196). The reasoning here is that those who agree to assume liability will extend lesser amounts to more people, and those who may be injured will be getting a good deal by agreeing to give up their uncertain chances for a big payoff in return for certainty of a smaller one. At a time when many conservative commentators are decrying what they perceive as the abandonment of the principle of basing liability on fault, Huber argues for carrying that process to its extreme. And while he is not the first to do so (he acknowledges the work of Robert Cooter, Stephen Sugarman, and particularly Jeffrey O'Connell), Huber makes this point with a verve and vigor that is missing from more restrained commentators.

It is in fact this vigor that gives the other noteworthy quality to the analysis. Huber writes in a combination of high dudgeon and moral certainty that is rare in scholarly work, though not in politics (see Bailey, 1983). Thus the first page of the book, labeling tort liability a "tax," is politically loaded in the read-my-lips environment of 1988–89. More telling, however, is the implicit characterization of the difference between tort and contract as being between choice (or consent, or cooperation) and coercion (p. 5), between private choice and public choice (p. 8). The implications

are best seen in a quasi-religious depiction of contract law: in the past,

> Most transactions were covered by what came to be known as private law, created by the parties themselves and formalized in contract. Public law, whether written by legislatures or by the courts, governed only at the margins and intersections, where there was no private law to follow. *Private law formed a structure as inviolable and as complete unto itself as a cathedral. In cases like* Lochner, *the courts guarded its sanctity by preventing public law from invading and desecrating the sacred grounds.* (P. 25; emphasis added)

In terms of this imagery, modern tort doctrine that ignores bargained-for allocations of responsibility for injury is not only wrong, but heresy, perhaps sacrilege.

It is this reverence for contract above tort law that distinguishes the neocontract position. To the neocontractarion, contract means consent, hence freedom, while tort means *coercion* by the government. Huber ends his book with a short chapter on "Consent and Coercion" which makes this point clear, citing specifically Nozick's *Anarchy, State and Utopia* (1974). From this perspective, the solution to the liability problem is a return to contract, although Huber recognizes that there must now be provisions to ensure "open warnings and informed consent" (p. 216) rather than the traditional rule of caveat emptor. Such a return to contract will, it is argued, optimize safety, consumer protection, and economic rationality, and avoid the problem of the "lottery" element of tort law, in which a few plaintiffs win big and many lose completely.[4]

The argument is sophisticated, and could be debated on both theoretical and empirical grounds. Unfortunately, Huber does not provide readers with the means to do so, for reasons that are discussed in the remainder of this review. And this failure is rather ironic: in the marketplace of ideas, Huber does not afford his readers the information that would be required to make an informed choice of whether to accept his arguments.

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[4] While we are on the subject of the "lottery effect," a different use of the gambling metaphor may be indicative of the moral tone of this extremist neocontract book. In a passage on the effect of replacing tort with contract, Huber acknowledges that the most severely hurt people will lose out but dismisses that potential moral problem by saying:

> [A] few victims of particularly tragic accidents would lose their ticket to the $100 million liability sweepstakes. By good fortune, however, most states have now started up lotteries of a more orderly nature, with higher payoff ratios. So people who can afford to indulge a taste for gambling can still play this kind of game without going to the trouble and aggravation of dealing with the courts. (P. 198)

It might not be to the taste of all to thus equate severely injured people with players in state lotteries.

UNCONSCIONABLE SCHOLARSHIP, OR TAKING A GOOD JOKE TOO FAR

Huber's book is a contribution to a form of political tale that could be called the liability insurance crisis literature. Note the term *insurance:* the liability insurance business is central to the tales, though this fact is often suppressed in the telling. In the case of the present book, the so-called tax that Huber cites in his opening pages is not, as he defines it, "tort liability . . . collected and disbursed through litigation" (p. 4), but instead consists mainly of liability *insurance premiums*. The tales of woe that Huber relates are in general not of the effects on the parties of litigation or awards in particular cases, but rather of reactions to the sudden sharp increases in liability insurance premiums that many companies charged *circa* 1986. Thus the book is really as much about the business of insuring against liability as it is about liability per se. As such, it is part of a genre, the liability insurance crisis literature (see Hayden, 1989), which is itself a subcategory of another variety of doomful literature, that on the supposed "litigation explosion" (see Galanter, 1983, 1985, 1986). Basic to both forms is the assertion that civil litigation is harming the country. In the liability insurance crisis genre, the basic position (one shared by Huber (1987), as evidenced by his article in *Science*) is that excessive litigation has forced insurance companies to impose huge increases in liability insurance premiums simply to stay in business, with the consequent expense and scarcity of insurance disrupting or distorting various (most?) sectors of the economy. This is the "tax" that Huber mentions at the start of his book.

At first glance, this argument is not implausible, since the insurance industry, like any other business, may have to raise the price of its product when its own costs increase. Yet there is more to the story than a simple model of premiums flowing in and settlements flowing out of an otherwise steady-state "insurance lake" (see, e.g., Huber 1987: 31–32) would indicate. The insurance industry operates in a complex economic environment in which different forms of investments continually vary in profitability, as does the future value of each incoming premium dollar. A number of studies, by institutions such as the U.S. General Accounting Office, the National Association of Attorneys General, the Michigan House of Representatives (see Mann, 1989: chap. 9), and the National Consumers Union (*Consumer Reports*, 1986) have suggested that the insurance business is cyclical and has been since at least the 1920s. The cycle includes an upward portion "characterized by rising prices . . . and market withdrawals," while the downward portion is "a period of price competition, 'fueled by favorable investment opportunities, by optimism respecting real costs, and by new entrants in the marketplace' " (Mann, 1989: IX-3, quoting a study done for the Michigan House of Representatives). According

to these studies, much of the increase in premium prices in the upward swing of the cycle is due to bad insurance company management in the downward swing, a situation that has in fact been acknowledged by some insurance company executives (e.g., Mascotte, 1987). By the terms of this scenario, the increasing prices of liability insurance during the "crisis" of 1986 were largely caused by the actions of the companies themselves during the previous downward swing of the cycle, not by the unreasonable demands of the tort system.

I raise this second explanation not to disprove Huber's arguments but rather simply to show that other plausible explanations exist for the phenomena with which he deals. In fact, the two explanations are not mutually exclusive, and perhaps no single factor can explain the size and nature of the insurance crisis (see Abraham, 1987). Yet Huber has chosen not to consider alternative explanations. A single vague reference to the insurance cycle dismisses the question of its role in regard to the crisis of 1986 as "unresolvable" and "of little importance" (p. 138). This cavalier disregard of a plausible and well-known competing explanation for the phenomena that he discusses cannot increase one's faith in Huber's own explanation.

Other issues are also avoided. The widely held assumption that there has been a "litigation explosion" has been challenged (see Galanter, 1983, 1985, 1986), as has the assumption that liability awards are "skyrocketing" (see Daniels and Martin, 1986). Both challenges draw heavily on data that Huber has chosen to ignore, even though the challenged assumptions are critical to his argument. Similarly, comments about "lawyers and other middlemen pocket[ing] more than half the take" of liability awards (p. 4) or of lawyers being paid "half the accident insurance dollar" (p. 224) tell only part of the story. The implication is that lawyers, not tort victims, profit from tort law, yet empirical research also indicates that usually civil litigation pays, in the sense that "the parties often secure monetary results that exceed the fees they pay lawyers (Trubek *et al.*, 1983: 119). While one study of asbestos litigation did indeed indicate that lawyers obtained large percentages of the total awards (see Kakalik *et al.*, 1983), viewing that rather special, exceptionally complicated mass tort as representative of tort cases in general is not acceptable methodologically.

A somewhat different kind of question concerns the nature of what the law calls adhesion contracts, dismissed by Huber (pp. 27–32) as a concept of "flypaper contracts." After stating some of the principles underlying the concept, such as the general inability of individuals to "hold their own" with large corporations and the presumption that few consumers read or understand contract provisions (p. 30), Huber dismisses the idea by saying that it ignores the possibility "[t]hat an individual consumer might freely chose to bargain away her divinely given entitlement to safety" (p. 31). At

the conclusion of the book, he states that the "flypaper" idea must be rejected "categorically," because even though individuals cannot bargain effectively with large corporations, the ability to choose between goods and services offered by different suppliers amounts to the same thing (p. 210).

Huber's analysis here seems questionable for several reasons. First, the key word qualifying consent is "freely"; even under Huber's proposals for reform, consent to a contract should be freely given and informed (see pp. 211–12). And this raises the question of the ability of a party in a position of gross inequality of bargaining power to "freely" consent to provisions she may not understand and certainly cannot alter through negotiations. Yet Huber does not consider the implications of unequal relative bargaining power. And while it might be true that in some cases, divers suppliers may offer a good or service on such different terms that the effective substitute for bargaining Huber envisions does exist, we might be skeptical as to how often this will occur. Often, competing suppliers use the same or very similar form contracts, and in such a situation, the "choice" that Huber sees is literally nonexistent.

These empirical and practical questions are hardly trivial. To ignore their existence may be effective polemic, but as scholarship it is inadequate. And in the case of a book meant to reach a nonscholarly public, this inadequacy is unconscionable. Like an unconscionable contract, such scholarship is "too one-sided" and does not entitle its expositor to belief; it is "carrying a good joke too far" (cf. *Campbell Soup Company v. Wentz* (1948)). Even if it succeeds in its efforts to persuade, such an argument is rather like an adhesion contract, accepted without understanding of its terms or their implications by people not well enough informed or otherwise in a poor position to question its elements. In the instant case, this situation is darkly ironic, because Huber has accused the judges who have written modern tort doctrine of having set out to establish a "shining new legal kingdom" on the basis of a "mixture of logic, dogma, faith, and superstition, untroubled by much in the way of empirical observation" (p. 27). The same might be said for this book.

UNCOVERING CONSPIRATORS, OR THE PROTOCOLS OF THE ELDERS OF TORT LAW

One indicator of the polemical character of this book is its treatment of the lawyers, judges, and scholars who have developed modern tort law. According to Huber, the people to blame for the sorry state of tort law are a shadowy group that he calls "the Founders of modern tort law," or simply "the Founders" (p. 6 and *passim*). This "visionary group of legal theorists" remains unidentified except for single initial references to William Prosser, John

Wade, and Roger Traynor in the 1950s, with (dis)honorable mention to Guido Calabresi and Richard Posner as following the Founders "a decade or so later" (p. 6). These are the people alleged to have worked the "revolution" of the book's title.

The Founders are often discussed as though they were conspirators, working together to achieve their common goal. Huber alleges as much in his frequent references to "their" actions, but the allegations never specify exactly who did what, when, and under what circumstances. They descend into caricature on occasion:

> The Founders welcomed the arrival of express disclaimers much as a pack of chimpanzees welcomes a python, with much howling and chest pounding and waving of arms and throwing of rocks. The main reaction seemed to be outrage that anyone would dare to block the march of progress. (P. 29)

But surely this picture reveals more about its author than it does of its subjects. *Why* and *how* was this supposed group of "thoughtful, well-intentioned legal academics . . . and judges on the most respected state benches" (p. 6) simultaneously so misguided and so successful? Why were their ideas accepted so widely? These questions are not addressed, and we are left with only the implication of conspiracy.

MISSING ISSUES, OR AN OPPORTUNITY LOST

These scholarly failings are unfortunate, because some of the questions that Huber raises merit serious discussion. Perhaps the best sections of the book are those that discuss the problems of insuring new products in ways that ensure compensation to people injured by them but do not discourage innovation by making doing so uninsurable. This problem is particularly acute in the realm of medications, and most notably when the medications involved are of unquestioned benefit to public health as prophylaxis against dangerous diseases otherwise endemic (e.g., whopping cough; see p. 104). And Huber's lottery metaphor is apt in some instances: as he notes, the manufacturers of products that are generally accepted as safe by the scientific community may nonetheless be held liable for heavy damages in particular cases, even when the weight of scientific evidence is against liability and they are held not liable in other cases that involve essentially the same injuries and essentially the same scientific evidence (see pp. 102–3). It is difficult to see how a company can be expected to cope with such repeated and unpredictable jeopardy, and revisions of the system of factfinding in mass tort cases may well be needed.

Huber is also stimulating when he discusses the necessity of trade-offs in selecting acceptable levels of risk and of the problems of insuring for public risks. While not all will agree with his anal-

yses and assessments, his vigorous arguments and the starkness of his positions prompt thought and compel reaction. In raising issues like these in such a vivid fashion, Huber achieves one part of the difficult task of making the public and political actors aware of complex problems. It is unfortunate that he does not himself contribute much to the rational discussion of the questions that he raises.

LAW AND POLICY SCHOLARSHIP REVISITED, OR CHALLENGING COMMON SENSE

Books like Huber's are simultaneously fascinating and frustrating for anyone seriously interested in sociolegal studies. On the one hand, most scholars believe that law is in general a rather practical matter, often having wide-ranging effects on social life. From this perspective, and despite recent calls for a resistance to "the pull of the policy audience" (e.g., Sarat and Silbey, 1988), a book like Huber's is useful in that it brings important sociolegal issues into the wider public political debate. At the same time, a book that publicizes a sociolegal question by oversimplifying the issues involved or misrepresenting the available evidence bearing on them creates as many or more problems as it does opportunities. It is here that the practical effects of unconscionable contracts and unconscionable scholarship differ: while an unconscionable contract is unenforceable, there is no court or other institution that can counter the effects of unconscionable scholarship—and fortunately so, since censorship is not desirable.

In the specific context of the "litigation explosion"/liability insurance "crisis" literatures the frustration of law and society scholars may be particularly acute, since the arguments and data of careful scholars are routinely ignored or, worse yet, miscited[5] by proponents of the view that civil litigation is a "problem" (see Nelson, 1988: 689). It is difficult to address the policy audience when one's comments are drowned out by rhetorical excesses. In such cases, it is perhaps understandable to view one way out of the posi-

[5] A "miscitation" here refers to a reference to data and arguments that are contrary to the writer's own position but are cited as if they supported it. An example may be seen in a Brookings Institution report on liability that says that Daniels and Martin's (1986) data on jury verdicts in ten states indicate that "awards in medical malpractice and product liability cases were significantly higher and increased at a faster pace than those for personal injury cases generally" (Litan *et al.*, 1988: 9). While a footnote inserts a minor qualification on this assessment, no mention is made of the fact that Daniels and Martin themselves interpret all their data as casting very serious doubt on most of the assumptions of the Brookings volume, among them the statement by Maclaury (1988: vii); "In recent years the United States has witnessed an unprecedented growth in personal injury lawsuits. State and federal courts have been flooded. . . . Jury awards and out-of-court settlements . . . have routinely amounted to hundreds of thousands of dollars." In light of the statement of this assumption as fact in the book's introduction, it is perhaps not surprising that the Brookings volume contains no further citation to Daniels and Martin's work and none whatever to Galanter.

tion of relative powerlessness as lying in the development of better theory, perhaps of the workings of the legal system (cf. *ibid.*, p. 691), or perhaps "questioning the premises of America's version of liberal legalism" (Sarat and Silbey, 1988: 142).

While this option might be attractive to academics, it seems likely to be self-defeating if carried through. Despite current intellectual trends toward deconstructionism and against empiricism, there is a fundamental problem in selling pure theory to nonacademic audiences. In the worlds of Western philosophy, science, and politics, a high value is placed on evidence. This emphasis might well be a conservative one: Those who control the means of production are also in a position to control much of the research. But hegemonies are never complete and sooner or later do become susceptible to accumulating contrary evidence. From this perspective, an essential task is the documentation of discrepancies between that which is assumed and that which perversely seems to be true, and developing theories that account for both the assumptions and the discrepant data (cf. Kuhn, 1962).

In the realm of practical politics, this research task may be difficult because those engaged in it will often be in the position of challenging "common sense," what everyone assumes without reflection to be true, "the way the world works" (Geertz, 1983; cf. Hayden, 1989). Yet "common sense" often reflects political, economic, and social hegemony (see Laitin, 1986), since, as Bourdieu asserts (1977: 164), "Every established order tends to produce . . . the naturalization of its own arbitrariness." Careful observation and analysis of discrepant data undercuts the seeming naturalness and necessity of common sense, and may thus be more *critical* empiricism than theoretical work that looks to the social margins for its examples (cf., *contra*, Trubek and Esser, 1988). Pending the millennium, this type of incremental criticism may be the most constructive tool that sociolegal scholarship has to offer, aiding in the continual adjustment of competing social claims through political and legal activity.

CODA: THE CONSERVATIVE UTOPIA, OR LAW FOR THE LIONS

Anticipating a perhaps rather different millennium, Huber ends his book by paraphrasing Grant Gilmore's comments on law reflecting but not determining the moral worth of a society: "The better the society, the less law there will be. In heaven there will be no law, and the lion will lie down with the lamb" (p. 232). But we are not in heaven, and a more appropriate philosopher to paraphrase for our nonutopian state may be Woody Allen: The lion will lie down with the lamb, but the lamb will not get much sleep. Huber's book is a plea for the lions.

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