Cass R. Sunstein

Fear and Liberty

INTRODUCTION

When a nation's security is threatened, are civil liberties at undue risk? If so, why? Consider a plausible account. In the midst of external threats, public overreactions are predictable. Simply because of fear, the public and its leaders will favor measures that do little to protect security but that compromise important forms of freedom.[1] The internment of Japanese-Americans during World War II is perhaps the most salient example, but there are many more. Consider, for example, the McCarthy period, restrictions on dissident speech during World War I, Lincoln's suspension of habeas corpus during the Civil War, and the imposition of martial law in Hawaii in 1941. Many people believe that some of the actions of the Bush administration, in the aftermath of the September 11 attack, fall in the same basic category. Is it really necessary to hold suspected terrorists in prison in Guantánamo? For how long? For the rest of their lives?

In explaining how public fear might produce unjustified intrusions on civil liberties, I emphasize two potential sources of error: the availability heuristic and probability neglect. The availability heuristic, widely used by ordinary people, can lead to a grossly exaggerated sense of risk, as salient incidents make citizens think that a risk is far more serious than it actually is. When probability neglect is at work, people focus on the "worst case" and disregard the question whether it is likely that the worst case will occur—an approach that can also lead to excessive regulation. With an understanding of the availability heuristic and probability neglect, I believe that we are able to have a better appreciation of the sources of unsupportable intrusions on civil

liberties. But there is an additional factor, one that requires a shift from psychological dynamics to political ones. In responding to security threats, government often imposes selective rather than broad restrictions on liberty. Selectivity creates serious risks. If the restrictions are selective, most of the public will not face them, and hence the ordinary political checks on unjustified restrictions are not activated. In these circumstances, public fear of national security risks might well lead to excessive restrictions of civil liberties.

What is necessary, then, is a set of safeguards that will insure against those restrictions. In constitutional democracies, some of those safeguards are provided by courts, usually through interpretation of the Constitution. The problem is that courts often lack the information to know whether and when intrusions on civil liberties are justified. Civil libertarians neglect this point, tending to think that the meaning of the Constitution does not change in the face of intense public fear. This view is implausible. The legitimacy of government action depends on the strength of the arguments it can muster in its favor; and if national security is genuinely at risk, the arguments will inevitably seem, and will often be, unusually strong. In the context of safety and health regulation generally, cost-benefit analysis is a partial corrective against both excessive and insufficient fear; and sometimes courts can use a form of cost-benefit analysis as a check on overzealous and inadequate regulation. When national security is threatened, cost-benefit analysis is far less promising, because the probability of an attack usually cannot be estimated.

But this does not mean that courts cannot play a constructive role. I suggest three possible approaches. First, courts should ordinarily require restrictions on civil liberties to be authorized by the legislature, not simply by the executive. Second, courts should give more skeptical scrutiny to measures that restrict the liberty of identifiable minorities, simply because the ordinary political safeguards are unreliable when the burdens imposed by law are not widely shared. Third, case-by-case balancing, by courts, might well authorize excessive intrusions into liberties—and hence clear rules and strong presumptions, for all their rigidity, might work better than balancing in the actual world.

EXCESSIVE FEAR

Why might the public show excessive fear, in a way that leads to unjustified responses to external threats or risks generally? Two mechanisms play a large role.

A. Availability

Begin with the availability heuristic. When presented with hard questions, people often ask themselves easier questions, which serve to simplify their inquiry (Kahneman and Frederick, 2002; Jolls et al., 1998: 1518-1519). The answer to the easier questions operates as a heuristic or a rule of thumb. Of these rules of thumb, the "availability heuristic" is probably the most important for purposes of understanding national security and risk regulation. Thus, for example, "a class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable" (Tversky and Kahneman, 1986: 38, 55). The point very much bears on private and public responses to risks, suggesting, for example, that people will be especially fearful of the dangers of AIDS, crime, earthquakes, terrorism, and nuclear power plant accidents if examples are easy to recall (Slovic, 2000a: 37-48).

In this way, familiarity can affect the availability of instances. But salience is important as well. "The impact of seeing a house burning on the subjective probability of such accidents is probably greater than the impact of reading about a fire in the local paper" (Slovic, 2000a: 37-48). Similarly, earlier events will have a smaller impact than later ones. The point helps explain much about fear and about human behavior with respect to personal safety and risk. For example, whether people will buy insurance for natural disasters is greatly affected by recent experiences (Slovic, 2000a: 40). If floods have not occurred in the immediate past, people who live on flood plains are far less likely to purchase insurance (Slovic, 2000a: 40). In the aftermath of an earthquake, insurance for earthquakes rises sharply—but it declines steadily from that point, as vivid memories recede (Slovic, 2000a: 40). For purposes of law and regulation, the problem is that the availability heuristic can lead to

serious errors of fact, in terms of both excessive controls on small risks that are cognitively available and insufficient controls on large risks that are not.

What, in particular, produces availability? An illuminating study attempts to test the effects of ease of imagery on perceived judgments of risk (Sherman et al., 2002: 82). The experimenters asked subjects to read about an illness (Hyposcenia-B) that "was becoming increasingly prevalent" on the local campus. In one condition, the symptoms were concrete and easy to imagine—involving muscle aches, low energy, and frequent severe headaches. In another condition, the symptoms were vague and hard to imagine, involving an inflamed liver, a malfunctioning nervous system, and a vague sense of disorientation. Subjects in both conditions were asked both to imagine a three-week period in which they had the disease and to write a detailed description of what they imagined. After doing so, subjects were asked to assess, on a 10-point scale, their likelihood of contracting the disease. The basic finding was that likelihood judgments were very different in the two conditions, with easily imagined symptoms making people far more inclined to believe that they were likely to get the disease (Sherman et al., 2002: 88).

There are several implications for fear, policy, and law. The public demand for law should be much higher if people can easily imagine the harm in question; in such cases, the law might well reflect a kind of hysteria. But if the harm is difficult to imagine, we might well see a pattern of neglect. We would therefore predict that easily imaginable harms will lead to relatively greater private precautions and relatively greater governmental concern. Well-organized private groups should, and do, take advantage of this fact, attempting to publicize visible examples of harms to which they seek to draw attention. Many such groups work as "availability entrepreneurs," invoking particular events in order to drive public fear in their preferred directions (Kuran and Sunstein, 1999). Terrorists might be seen, in this light, as extreme examples of availability entrepreneurs, using vivid examples to harm to suggest that people "cannot be safe anywhere."

Because safety is always a matter of degree, the idea of "being safe" is itself preposterous; but when an incident is highly salient, people are likely to exaggerate the likelihood of its occurrence. And when exaggerations occur, excessive precautions are likely, in a way that might well lead to unjustified restrictions on liberty. The McCarthy period is an example. In fact, communist agents, most famously Alger Hiss, were in the government in the 1930s and 1940s, but a few available incidents, including the Hiss case, led, in many circles, to a kind of fear-driven witch hunt that could not be justified by the reality of the 1950s.

B. Probability Neglect

The availability heuristic can produce an inaccurate assessment of probability. But sometimes people will attempt to make little assessment of probability at all, especially when strong emotions are involved. Fear can be impervious to the fact that it is highly unlikely that the risk will come to fruition. In such cases, large-scale variations in probabilities matter little—even when those variations unquestionably should make a big difference. The point applies to hope as well as fear; vivid images of good outcomes can crowd out consideration of probability too. Lotteries are successful partly for this reason, and state governments make strategic use of probability neglect to convince people to play. Governmental responses to fear are often driven by probability neglect too.

Probability neglect has received its most direct empirical confirmation in a striking study of people's willingness to pay to avoid electric shocks.[2] The central purpose of the study was to test the relevance of probability in "affect rich" decisions. One experiment investigated whether varying the probability of harm would matter more, or less, in settings that trigger strong emotions than in settings that seem relatively emotion-free. In the relatively emotion-free setting, participants were told that the experiment entailed some chance of a $20 penalty. In the "strong emotion" setting, participants were asked to imagine that they would participate in an experiment involving some chance

of a "short, painful, but not dangerous electric shock" (Rottenstreich and Hsee, 2001: 181). Participants were asked to say how much they would be willing to pay to avoid participating in the relevant experiment. Some participants were told that there was a 1 percent chance of receiving the bad outcome (either the $20 loss or the electric shock); others were told that the chance was 99 percent; and still others were told that the chance was 100 percent.

The key result was that variations in probability affected those facing the relatively emotion-free injury, the $20 penalty, far more than they affected people facing the more emotionally evocative outcome of an electric shock. For the cash penalty, the difference between the median payment for a 1 percent chance and the median payment for a 99 percent chance was predictably large and indeed broadly consistent with standard theories of economic rationality: $1 to avoid a 1 percent chance, and $18 to avoid a 99 percent chance. For the electric shock, by contrast, the difference in probability made little difference to median willingness to pay: $7 to avoid a 1 percent chance, and $10 to avoid a 99 percent chance. Apparently people will pay a significant amount to avoid a small probability of a hazard that is affectively laden—and the amount that they will pay will not vary greatly with changes in probability.

To investigate the role of probability and emotions in responses to risk, I conducted an experiment, asking 83 University of Chicago law students to describe their maximum willingness to pay to reduce levels of arsenic in drinking water (Sunstein, 2002a). Participants were randomly sorted into four groups, representing the four conditions in the experiment. In the first condition, people were asked to state their maximum willingness to pay to eliminate a cancer risk of 1 in 1,000,000. In the second condition, people were asked to state their maximum willingness to pay to eliminate a cancer risk of 1 in 100,000. In the third condition, people were asked the same question as in the first, but the cancer was described in vivid terms, as "very gruesome and intensely painful, as the cancer eats away at the internal organs of the body." In the fourth condition, people were asked the same ques-

tion as in the second, but the cancer was described in the same terms as in the third condition. The central hypothesis was that the probability variations would matter far less in the highly emotional conditions than in the less emotional conditions. More specifically, it was predicted that differences in probability would make little or no difference in the highly emotional conditions—and that such variations would have real importance in the less emotional conditions. It was also expected that the tenfold difference in probabilities—between 1/100,000 and 1/1,000,000—would not, in either condition, generate a tenfold difference in willingness to pay.

The result for the central hypothesis was confirmed. With an unemotional description, the difference in probability produced a statistically significant difference in mean willingness to pay; with an emotional description, the difference was smaller and was not statistically significant. The second hypothesis was also supported. Consistent with other work on probability neglect, varying the probability had a relatively weak effect on people's willingness to pay: The tenfold increase in the risk produced barely more than a doubling of mean willingness to pay. From this experiment, there is one other noteworthy result. By itself, making the description of the cancer more emotional had a large effect on mean willingness to pay.

For an example of probability neglect in the particular context of risks of terrorism, consider an illuminating study by W. Kip Viscusi and Richard Zeckhauser (2003). The authors used surveys to see how much people are willing to pay to reduce stated risks of terrorism. The median willingness to pay (WTP) to decrease the current risk to 1/1,000,000 was $25; the median WTP to decrease the current risk to 1/10,000,000 was $27; the median WTP to reduce to current risk to zero was $50 (Viscusi and Zeckhauser, 2003: 116). Thus a tenfold difference in risk—from 1/1,000,000 to 1/10,000,000—produced no significant difference in WTP. This finding is clear evidence of probability neglect, caused by the emotional valence of the idea of terrorism risk. As the authors state: "Whether the terrorism risk is reduced to 50% of its current level, 1 in 1 million per flight, or 1 in 10 million per flight or zero," does not produce

"significantly different" willingness to pay, and hence "[d]oing something about terrorism risks that is incomplete but beneficial consequently has a fairly similar attractiveness across" options (Viscusi and Zeckhauser, 2003: 116). Here too a form of probability neglect seems to be at work.

An understanding of probability neglect casts new light on the finding that visualization or imagery matters a great deal to people's reactions to risks (Slovic et al., 2000b). When an image of a bad outcome is easily accessible, people will become greatly concerned about a risk, holding probability constant (Loewenstein, 2001). And when people are asked how much they will pay for flight insurance for losses resulting from "terrorism," they will pay more than if they are asked how much they will pay for flight insurance from all causes (see Johnson et al., 1993). The evident explanation for this peculiar result is that the word "terrorism" evokes vivid images of disaster, thus crowding out probability judgments. Note also that when people discuss a low-probability risk, their concern rises even if the discussion consists mostly of apparently trustworthy assurances that the likelihood of harm really is infinitesimal (Alkahami and Slovic, 1994: 1094). The reason is that the discussion makes it easier to visualize the risk and hence to fear it.

The implication for restrictions on civil liberties should be clear. If an external threat registers as such, it is possible that people will focus on the worst-case scenario, without considering its (low) probability. The result will be steps that cannot be justified by reality. The internment of Japanese-Americans during World War II undoubtedly had a great deal to do with probability neglect. A vivid sense of the worst case—of collaboration by Japanese-Americans with our enemy, producing a kind of Pearl Harbor for the West Coast—helped to fuel a step that went far beyond what was necessary or useful to respond to the threat.

Both the availability heuristic and probability neglect can be connected to "dual process" approaches of the sort that have received considerable recent attention in psychology (see generally Kahneman and Frederick, 2002). According to such approaches, people use two cognitive systems. System I is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and more likely to be error-

free. Heuristic-based thinking is rooted in System I; it is subject to override, under certain conditions, by System II (Kahneman and Frederick, 2002).[3] For purposes of policy and law, an important task is to develop institutions and rights that create a kind of System II corrective to heuristic-driven judgments and probability neglect, simply because these produce errors and serious risks of their own.

C. Social Dimensions

My emphasis thus far has been on individual thinking about risks. But of course social influences are quite important. Sometimes availability and salience spread through social bandwagons or cascades, in which apparently representative anecdotes and gripping examples move rapidly from one person to another. In fact, a process of this sort played a large role in the 2002 Washington area sniper attacks, in the 2001 anthrax attacks, and in many other sets of social processes producing public fear. Consider a stylized example. Andrew hears of a social risk, which he finds to be revealing or illustrative. (The event might involve crime, environmental hazards, or threats to national security.) Andrew tells Barry, who would be inclined to see the event as not terribly informative, but who, seeing Andrew's reaction, comes to believe that the event does indeed reveal a great deal. Once Carol hears from Andrew and Barry, she is likely to find it revealing as well. Deborah will require a great deal of private information to reject the shared opinion of Andrew, Barry, and Carol (Hirschleifer, 1995). Stylized though it is, the example shows that once several people start to take an example as probative, many people may come to be influenced by their opinion, giving rise to cascade effects. For example, vivid examples, alongside social interactions, account for decisions to purchase insurance against natural disasters (Gersen, 2001). In the domain of social risks, "availability cascades" are responsible for many social beliefs (Kuran and Sunstein, 1999). The point is amplified by the fact that fear-inducing accounts, with high emotional valence, are peculiarly likely to spread.

There is a closely related phenomenon. Processes of social deliberation typically lead like-minded people to accept a more extreme

version of the views with which they began (Sunstein, 2000). This is the process known as group polarization (Moscovici and Zavalloni, 1969). If several people fear global warming, and speak to one another, their fear is likely to increase as a result of internal discussions. If group members believe that the United States cannot be trusted in its dealings with other nations, that very belief is likely to be heightened after members have started to talk. Group polarization has not been studied in connection with the availability heuristic. But the clear implication is that the effect of certain available examples will become greatly amplified through group discussion.

Suppose, for example, that several people are discussing a recent wave of sniper attacks, or cases involving the kidnapping of young girls, or situations in which the government has wrongly ignored a serious foreign threat. If the particular examples are mentioned, they are likely to stick. And if the group has a predisposition to think that one or another risk is serious, social dynamics will lead the group to believe that the example is highly revealing. So too if the group is fearful. An initial predisposition toward fear is likely to be aggravated as a result of collective deliberations.

It should be clear that in the real world, some voices are more important than others, especially when availability and salience are involved. In particular, the behavior and preoccupations of the media play a large role. Many perceived "epidemics" are in reality no such thing, but instead a product of media coverage of gripping, unrepresentative incidents (Best, 1999). Attention to those incidents is likely to ensure availability and salience, promoting an inaccurately high estimate of probability and at the same time some degree of probability neglect. And in the face of close media attention, the demand for governmental responses will be significantly affected.

EXCESSIVE FEAR AND NATIONAL SECURITY

A. Bad Balancing

We are now in a position to make some general claims about why individuals and governments might overreact to perceived social risks,

including the risks of terrorism. A readily available incident is likely to lead people to exaggerate the threat. If the media focuses on one or a few incidents, public fear might be grossly disproportionate to reality. And if one or a few incidents are not only salient but emotionally gripping, people might not think about probability at all. Both private and public institutions will overreact. It is easy to think of examples. This is almost certainly what happened in the case of the anthrax attacks in the United States of 2001, in which a few incidents led both private and public institutions to exaggerate a small threat.

Now suppose that in any situation there is some kind of balancing between security and civil liberty. Suppose, that is, that the degree of appropriate intrusion into the domain of liberty is partly a function of the improved security that comes from the intrusion. The problem is that if people are more fearful than they ought to be, they will seek or tolerate incursions into the domain of liberty that could not be justified if fear were not disproportionate. If there is an optimal tradeoff among the relevant variables, the availability heuristic and probability neglect, combined with social influences, will inevitably produce a tradeoff that is less than optimal—that unduly sacrifices liberty at the expense of security. In the context of threats to national security, it is predictable that governments will infringe on civil liberties without adequate justification.

B. Better Balancing? Dual Processing, System II, and Cost-Benefit Analysis

Are institutional correctives possible? In the context of ordinary risk regulation, cost-benefit analysis, understood as an effort to catalogue the consequences of both risk and risk reduction, is a possible remedy. In fact cost-benefit analysis can be understood as an institutionalized System II safeguard against System I errors on the part of ordinary citizens and even public officials. If the government attempts to assess the costs and benefits of regulation, it can provide a measure of protection against both public hysteria and public torpor (Sunstein, 2002b). Such an assessment might show that a risk that is causing a great deal of fear is actually low; it might demonstrate that the public is neglecting a danger that threatens to kill many people.

Of course a large problem is how to quantify the variables involved. In the context of risks to national security, cost-benefit analysis runs into especially formidable obstacles, because calculation of the expected benefits of risk reduction is at best guesswork. Frequently regulators are operating in circumstances of uncertainty rather than risk. They cannot calculate the probability that harm will occur—an informational gap that confounds formal analysis of the benefits of regulation. In its 2003 report to Congress, the Office of Management and Budget (OMB) lists no fewer than 69 regulations related to homeland security, including regulations governing agricultural bioterrorism, screening aliens and others seeking flight training, requiring identification cards for border crossing, registering and monitoring certain nonimmigrants, and governing terrorism risk insurance. For almost all of these 69 regulations, neither costs nor benefits were quantified. OMB emphasizes that "the difficulty in estimating the likely benefits from a particular regulatory action" is a product not only of the difficulty of predicting a terrorist attack, but also of the fact that terrorists "can react and respond to the security and other counterterrorism measures that the government and private sector adopt" (OMB report to Congress, 2003: 83).

But even when deciding about how to reduce risks associated with terrorism, an informal version of cost-benefit analysis is unquestionably at work. The risk of terrorist attacks could surely be reduced if the nation eliminated all airline flights, but the costs of eliminating all airline flights is simply too high. So too, it would be possible to require all those who attend baseball games to present their identification in order to gain admission, but the benefits of this requirement would be far too low to justify the (admittedly low) costs. When restrictions are imposed, a rough assessment of both benefits and costs is necessarily involved. In fact, the OMB has shown considerable interest in more formal analyses of antiterrorism measures, even recognizing the formidable informational barriers to such analyses (OMB report to Congress, 2003: 85). To say the least, it is exceptionally difficult not only to estimate probabilities but also to monetize some of the relevant costs (for

example, curtailment of civil rights and liberties); but the effort to do so can be seen as an institutional check on cognitive processes that might produce either hysteria or neglect.

C. Worse Balancing: Selective Restrictions

In the context of national security, and indeed more generally, an understanding of the problem of excessive fear must make an important distinction. We can imagine restrictions on liberty that apply to all or most—as in, for example, a general increase in security procedures at airports, or a measure that subjects everyone, citizens and noncitizens alike, to special scrutiny when they are dealing with substances that might be used in bioterrorism. We can also imagine restrictions on liberty that apply to some or few—as in, for example, restrictions on Japanese-Americans, racial profiling, or the confinement of enemy aliens at Guantánamo. When restrictions apply to all or most, political safeguards provide a strong check on unjustified government action. If the burden of the restriction is widely shared, it is unlikely to be acceptable unless most people are convinced that there is good reason for it; and for genuinely burdensome restrictions, people will not be easily convinced unless a good reason is apparent or provided. (I put to one side the possibility that because of the mechanisms I have discussed, people will think that a good reason exists whether or not it does.) But if the restriction is imposed on an identifiable subgroup, the political check is absent. Liberty-reducing intrusions can be imposed even if they are difficult to justify.

These claims can be illuminated by a glance at the views of Friedrich Hayek about the rule of law. Hayek (1960) writes, "If all that is prohibited and enjoined is prohibited and enjoined for all without exception," then "little that anybody may reasonably wish to do is likely to be prohibited." Hence "how comparatively innocuous, even if irksome, are most such restrictions imposed on literally everybody, as . . . compared with those that are likely to be imposed only on some!" Thus it is "significant that most restrictions on what we regard as private affairs, such as sumptuary legislation, have usually been

imposed only on selected groups of people or, as in the case of prohibition, were practicable only because the government reserved the right to grant exceptions." Hayek urges, in short, that the risk of unjustified burdens dramatically increases if they are selective and if most people have nothing to worry about. The claim is especially noteworthy in situations in which public fear is producing restrictions on civil liberties. People are likely to ask, with some seriousness, whether their fear is in fact justified if steps that follow from it impose burdensome consequences on them. But if indulging fear is costless, because a select few face the relevant burdens, then the mere fact of "risk," and the mere presence of fear, will seem to provide a sufficient justification.

D. Tradeoff Neglect

Consider in this light Howard Margolis's (1996) effort to explain why experts and ordinary people sharply diverge with respect to certain risks. Margolis thinks that in some cases, ordinary people are alert to the hazards of some activity, but not much alert to its benefits, which are cognitively "off-screen." In such cases, people will tend to think, "Better safe than sorry," and they will have a highly negative reaction to the risk. In such cases, they will demand aggressive and immediate regulation. In other cases, the benefits of the activity will be very much on people's minds, but not the hazards—in which case they will tend to think, "Nothing ventured, nothing gained." In such cases, they will think that regulators are overzealous, even fanatics. In still other cases—in Margolis's view, the cases in which observers are being most sensible—both benefits and risks will be "on-screen," and people will assess risks by comparing the benefits with the costs.

Margolis offers a nice example to support this prediction. The removal of asbestos from public schools in New York City was initially quite popular, indeed demanded by fearful parents, even though experts believed that the risks were statistically small. But when it emerged that the removal would cause schools to be closed for a period of weeks, and when the closing caused parents to become greatly inconvenienced, parental attitudes turned around, and asbestos removal seemed like a

really bad idea. When the costs of the removal came on-screen, parents thought much more like experts, and the risks of asbestos seemed like the risks of X-rays: Statistically small, not a source of significant fear, and on balance worth incurring. In this light it is both mildly counterintuitive and reasonable to predict that people would be willing to pay less, in terms of dollars and waiting time, to reduce low-probability risks of an airplane disaster if they are frequent travelers. A preliminary study (Harrington, 2002) finds exactly that effect.

It is only natural, in this light, that those concerned about civil liberties try to promote empathetic identification with those at risk or to make people fearful that they are themselves in danger. The point of the effort at identification is to place the relevant burdens or costs "on-screen," and hence to broaden the class of people burdened by government action, if only through an act of imagination. Pastor Martin Niemoller's remarks about Germany in the 1940s have often been quoted by civil libertarians: "First they came for the socialists, and I did not speak out because I was not a socialist. Then they came for the trade unionists, and I did not speak out because I was not a trade unionist. Then they came for the Jews, and I did not speak out because I was not a Jew. Then they came for me, and there was no one left to speak for me." In many situations, the apparent lesson of this tale is empirically doubtful. If "they" come for some, it does not at all follow that "they" will eventually come for me. Everything depends on the nature of "they" and of "me." But the tale is psychologically acute; it attempts to inculcate, in those who hear it, a fear that the risks of an overreaching government cannot easily be cabined.

The danger of unjustified infringement is amplified when the victims of the infringement can be seen as an identifiable group that is readily separable from "us." Stereotyping of groups significantly increases when people are in a state of fear; and if people are primed to think about their own death, they are more likely to think and act in accordance with group-based stereotypes (von Hippel et al., 2003). Experimental findings of this kind support the intuitive idea that when people are afraid, they are far more likely to tolerate government action

that abridges the freedom of members of some "out-group." And if this is the case, responses to social fear, in the form of infringements on liberties, will not receive the natural political checks that arise when majorities suffer as well as benefit from them. The simple idea here is that liberty-infringing action is most likely to be justified if those who support that action are also burdened by it; in that event, the political process contains a built-in protection against unjustifiable restrictions. In all cases, it follows that government needs some methods for ensuring against excessive reactions to social risks, including unjustified intrusions on civil liberties.

PROTECTING LIBERTY

It would be possible to take the arguments just made as a reason for an aggressive judicial role in the protection of civil liberties, even when national security is threatened. But there are real complications here.[4] Taking a page from the environmentalists' book, let us notice that the availability heuristic and probability neglect might be leading people not to overstate risks but to take previously overlooked hazards seriously—to pay attention to hazards that had not previously appeared on the public viewscreen. In the environmental context, the point seems right; readily available incidents help to mobilize people formerly suffering from torpor and indifference. The cognitive processes that produce excessive fear can counteract insufficient fear.

The same might well be true of risks to national security. Indeed, lax airline security measures before 9/11 were undoubtedly a product of the "unavailability" of terrorist attacks. Availability bias, produced by the availability heuristic, is accompanied by unavailability bias, produced by the same heuristic. If an incident does not come to mind, both individuals and institutions should be expected to take insufficient precautions, even in the face of expert warnings (as in fact were commonly voiced about the absence of careful security measures before the 9/11 attacks). Probability neglect can produce intense fear of low-probability risks; but when risks do not capture attention at all, they might be treated as zero, even though they deserve considerable atten-

tion. Much of the time, public fear is bipolar: either dangers appear "significant" or they appear not to exist at all. The mechanisms I have discussed help explain hysterical overreactions, but they can provide corrections against neglect as well.

There is also an institutional point. Courts are not, to say the least, in a good position to know whether restrictions on civil liberty are defensible. They lack the fact-finding competence that would enable them to make accurate assessments of the dangers. They are hardly experts on the question whether the release of a dozen prisoners at Guantánamo would create a nontrivial risk of a terrorist attack. It is quite possible that an aggressive judicial posture in the protection of civil liberties, amid war, would make things far worse rather than better. In any case, courts are traditionally reluctant to interfere with publicly supported restrictions on civil liberties; they do not like simply to "block" restrictions that have both official and citizen approval (Rehnquist, 1998).

I suggest that courts should and can approach the relevant issues through an institutional lens, one that plays close attention to the underlying psychological and political dynamics. There are three points here. The first and most important is that restrictions on civil liberties should not be permitted unless they have unambiguous legislative authorization. Such restrictions should not be allowed to come from the president alone. The second point is that in order to protect against unjustified responses to fear, courts should be relatively more skeptical of intrusions on liberty that are not general and that burden identifiable groups. The third and final point is that constitutional principles should reflect second-order balancing, producing rules and presumptions, rather than ad hoc balancing. The reason is that under the pressure of the moment, courts are likely to favor the government, even when they should not.

A. The Principle of Clear Statement

For many years, Israel's General Security Service has engaged in certain forms of physical coercion, sometimes described as torture, against suspected terrorists. According to the General Security Service, these

practices occurred only in extreme cases and as a last resort, when deemed necessary to prevent terrorist activity and significant loss of life. Nonetheless, practices worthy of the name "torture" did occur, and they were not rare. Those practices were challenged before the Supreme Court of Israel on the ground that they were inconsistent with the nation's fundamental law. The government responded that abstractions about human rights should not be permitted to overcome real-world necessities so as to ban a practice that was, in certain circumstances, genuinely essential to prevent massive deaths in an area of the world that was often subject to terrorist activity. According to the government, physical coercion was justified in these circumstances. A judicial decision to the opposite effect would be a form of unjustified activism, even hubris.

In deciding the case, the Supreme Court of Israel refused to resolve the most fundamental questions (*Association for Civil Rights in Israel v. The General Security Service*, 1999). It declined to say whether the practices of the security forces would be illegitimate if expressly authorized by a democratic legislature. But the court nonetheless held that those practices were unlawful. The court's principal argument was that if such coercion were to be acceptable, it could not be because the General Security Service, with its narrow agenda, said so. At a minimum, the disputed practices must be endorsed by the national legislature, after a full democratic debate on the precise question. "[T]his is an issue that must be decided by the legislature branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed."

It is worthwhile to pause over a central feature of this decision. Instead of deciding the fundamental issue, the court relied on the inadequacy, from the democratic point of view, of a judgment by the General Security Service alone. To say the least, members of that organization do not represent a broad spectrum of society. It is all too likely that people who work with the General Security Service will share points of view and frames of reference. When such people deliberate with one another, group polarization is likely to be at work; the

participants will probably strengthen, rather than test, their existing convictions, very possibly to the detriment of human rights. A broader debate, with a greater range of views, is a necessary precondition for coercion of this sort. The Supreme Court of Israel required clear legislative authorization for this particular intrusion on liberty; it insisted that executive action, under a vague or ambiguous law, would not be enough.

We can generalize from this decision to suggest that as a rule, the legislative branch of government must explicitly authorize disputed infringements on civil liberty. The reason for this safeguard is to ensure against inadequately considered restrictions—and to insist that political safeguards, in the form of authorization from a deliberative branch of government with diverse members, are a minimal precondition for intrusions on civil liberties. A special risk is that group polarization, within the executive branch, will lead to steps that have not been subject to sufficiently broad debate. Deliberation within the legislative branch is more likely to ensure that restrictions on liberty are actually defensible. Precisely because of its size and diversity, a legislature is more likely to contain people who will speak for those who are burdened, and hence legislative processes have some potential for producing the protection that Hayek identifies with the rule of law. In these ways, the requirement of clear legislative statement enlists the idea of checks and balances in the service of individual rights—not through flat bans on government action, but through requiring two, rather than one, branches of government to approve.

In the United States, a good model here is the remarkable decision in *Kent v. Dulles* (1958), decided at the height of the Cold War. In that case, the Supreme Court was asked to consider whether the secretary of state could deny a passport to Rockwell Kent, an American citizen who was a member of the Communist Party. Kent argued that the denial was a violation of his constitutional rights and should be invalidated for that reason. The court responded by refusing to rule on the constitutional question. Instead it said that, at a minimum, any denial of a passport on these grounds would have to be specifically authorized by

Congress. The court therefore struck down the decision of the secretary of state because Congress had not explicitly authorized the executive to deny passports in cases of this kind.

Kent v. Dulles has been followed by many cases holding that the executive cannot intrude into constitutionally sensitive domains unless Congress has squarely authorized it to do so. What I am adding here is that because of the risk of excessive or unjustified fear, this is a salutary approach whenever restrictions on civil liberty follow from actual or perceived external threats. If congressional authorization is required, courts have a simple question to ask in cases in which the Bush administration is alleged to have violated civil liberties: Has Congress specifically authorized the president to engage in the action that is being challenged?

Of course, requiring specific authorization is no panacea. It is possible that Congress, itself excessively fearful, will permit the president to do something that cannot be justified in principle. It is also possible that Congress will fail to authorize the president to act in circumstances in which action is justified or even indispensable. What I am suggesting is that as a general rule, a requirement of congressional permission is probably the best way to reduce the relevant dangers—those of excessive and insufficient protections against security risks.

B. Special Scrutiny of Selective Denials of Liberty

I have emphasized that public fear might well produce excessive reactions from Congress. The risk is especially serious when identifiable groups, rather than the public as a whole, are being burdened.

Consider in this regard an illuminating passage from a famous opinion (*Railway Express Agency v. New York*, 1949) by Justice Robert Jackson:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use

against municipal regulations frequently disables all government—state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Justice Jackson is making two points here. The first is that when the court rules that some conduct cannot be regulated at all, it is intervening, in a major way, into democratic processes, making that conduct essentially "unregulable." The second is that when the court strikes

government action done on equality grounds, it requires the government to increase the breadth of its restriction, thus triggering political checks against unjustified burdens. With a modest twist on Jackson's argument, we can see a potential approach for courts faced with claims about unlawful interference with civil liberties. If the government is imposing a burden on the citizens as a whole, or on a random draw of citizens, then the appropriate judicial posture is one of deference to the government (at least if free speech is not involved; an exception for free speech makes sense in light of the fact that democratic processes cannot work well without it). But if the government imposes a burden on an identifiable subclass of citizens, a warning flag should go up. The courts should give careful scrutiny to that burden.

Of course, these general propositions do not resolve concrete cases; everything turns on the particular nature of the constitutional challenge. But an appreciation of the risks of selectivity suggests the proper orientation. In *Korematsu v. United States* (1944), challenging the internment of Japanese-Americans, the court should have been far more skeptical of the government's justification, simply because the internment was peculiarly immune from political checks on liberty. Most Americans had nothing to fear from it. The same point holds for the contemporary war on terrorism. Some of the relevant restrictions have been limited to noncitizens in a way that creates a real risk of overreaching. Courts should take a careful look at the legitimacy of the government's justifications for imposing burdens on people who are unable to protect themselves in the political process. Consider in this regard one of President George W. Bush's less circumspect remarks in defense of the idea that enemy combatants might be tried in special military tribunals. President Bush suggested that whatever procedures are applied, the defendants will receive fairer treatment than they gave to murdered Americans on 9/11. The problem with this suggestion is that it begs the question, which is whether the defendants were, in fact, involved in the 9/11 attack. Here is an illustration of the extent to which fear, and the thirst for vengeance, can lead to unjustified infringements of civil liberties.

C. Balancing and Second-Order Balancing

Thus far I have operated under a simple framework, supposing that in any situation, there is some kind of balancing between security and civil liberty—something like an optimal tradeoff. As the magnitude of the threat increases, the argument for intruding on civil liberties also increases. If the risk is great, government might, for example, increase searches in airports; ensure a constant police presence on public places, with frequent requests for identification; permit military tribunals to try those suspected of terrorist activity; and allow the police to engage in practices that would not be permitted under ordinary circumstances.

Under the balancing approach, everything turns on whether public fear is justified. What is the extent of the risk? If, in short, we believe that there is an optimal tradeoff among the relevant variables, excessive fear will inevitably produce a tradeoff that is less than optimal—that unduly sacrifices liberty at the expense of security. This approach to the relationship between liberty and security is standard and intuitive, and something like it seems to me correct. But it is not without complications. There might be, for example, a "core" of rights into which government cannot intrude and for which balancing is inappropriate. Consider torture. Some people believe that whatever the circumstances, torture cannot be justified; even the most well-grounded public fear is insufficient to justify it. In one form, this argument turns on a belief that consequentialist justifications are never enough to authorize this kind of intrusion. I believe that in this form, the argument is a kind of moral heuristic—one that is far too rigid, even fanatical. Is it sensible to ban torture when torture is the only means of protecting thousands of people from certain death?

But another, more plausible form of the argument is rule utilitarian: a flat prohibition on torture, one that forbids balancing in individual cases, might be justified on the basis of a kind of second-order balancing. It might be concluded not that torture is never justified in principle, but that unless torture is entirely outlawed, government will engage in torture in cases in which it is not justified, that the benefits

of torture are rarely significant, and that the permission to torture in extraordinary cases will lead, on balance, to more harm than good. Under certain assumptions, this view is entirely plausible. And if it is, we might adopt a firm prohibition on torture, even when public fear is both extreme and entirely justified.

Can other rights be understood similarly? Consider the area of free speech law in the United States, and the relationship between fear and restrictions on speech. In the Cold War, government attempted to regulate speech that, in its view, would increase the influence of communism. The Smith Act, enacted in 1946, made it a crime for any person "to knowingly or willingly advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of such government." In *Dennis v. United States* (1951), the government prosecuted people for organizing the Communist Party of the United States, an organization that was said to teach and advocate the overthrow of the United States government by force. The court held that the constitutionality of the Smith Act would stand or fall on whether the speech in question "created a 'clear and present danger' of attempting or accomplishing the prohibited crime." In its most important analytic step, the court concluded that this test did not mean that the danger must truly be clear and present; it denied "that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited." When a group was attempting to indoctrinate its members and to commit them to a course of action, "action by the Government is required."

Following the distinguished court of appeals Judge Learned Hand, the court conceived the clear and present danger test, in these circumstances, to involve a form of balancing, so that "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The court said that it would "adopt this statement of the rule." Having done so, the court upheld the convictions. It recognized that no uprising had occurred. But the balancing test authorized criminal

punishment in light of "the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom [defendants] were in the very least ideologically attuned."

Dennis sees the clear and present danger test as one of ad hoc balancing, at least in cases that involve a potentially catastrophic harm. But many people have been skeptical of such balancing, which no longer reflects the law. Instead, the court understands the idea of clear and present danger to require that the danger be both likely and imminent (*Brandenburg v. Ohio*, 1969). This approach is quite different from Judge Hand's balancing test. It does not ask courts to discount the evil by its probability—an approach that would permit speech regulation if an extremely serious evil has (say) a 20 percent chance of occurring. Under the court's current standard, speech is protected if harm is not "likely." And even if a risk has a 70 percent chance of occurring, and is therefore likely, regulation is apparently unacceptable unless the risk is imminent. How should we choose between a balancing approach and one that requires both likelihood and imminence? At first glance, the *Dennis* approach seems much better, at least on consequentialist grounds. If a risk is only 10 percent likely to occur, but 100,000 people will die if the risk comes to fruition, government should not simply stand by until it is too late. In the environmental context, balancing is surely preferable to a rule that would require both likelihood and imminence.

What, then, can be said in favor the requirements of likelihood and imminence? Perhaps the requirements have institutional justifications; perhaps they are a response to a judgment that in the real world, the *Dennis* approach will produce excessive regulation of speech. If balancing is entirely accurate, we should balance. But where speech is unpopular, or when people are frightened of it, government might well conclude that "the gravity of the 'evil,' discounted by its probability," justifies regulation, even though it actually does not.

In the context of speech, there are independent considerations. Public disapproval of the content of speech might result in a judgment

that it is likely to cause harm even if the real motivation for censorship is disagreement with the underlying ideas. And if the harm is not imminent, disagreement and dissent might well prevent it from occurring. The imminence requirement can therefore be understood as a recognition of the idea that more speech, rather than censorship, is the appropriate response to anticipated harm. In these circumstances, we can see the clear and present danger test as reflecting a kind of second-order balancing, one that distrusts official judgments about risks and harms and that requires government to provide an unusually high burden of proof.

As I have suggested, a general prohibition of torture can be understood in similar terms. The justification need not be that torture can never be defended by reference to consequences. A less contentious justification would be that a government that is licensed to torture will do so when torture is not warranted—and that the social costs of disallowing torture do not, in the end, come close to the social benefits. I am not suggesting that this judgment is necessarily correct. But I do believe that aggressive protection of civil liberties and civil rights is often best defended on these grounds, as a safeguard against mass fear or hysteria that would lead to steps that cannot be justified on balance. In a sense, liberties are "overprotected," compared to the level of protection that they would receive in a system of (optimal) case-by-case balancing. Because optimal balancing is not likely to occur in the real world, rule-based protection is a justifiable second best.

Aggressive protection of free speech has been justified on the ground that courts should take a "pathological perspective," one suited for periods in which the public, and hence the judiciary, will be tempted to allow indefensible restrictions in the heat of the moment (Blasi, 1985). The argument is that free speech law builds up strong, rule-like protections, eschewing balancing and sometimes protecting speech that ought not to be protected. The reason for the "pathological perspective" is to create safeguards that will work when liberty is under siege. Such a perspective creates an obvious problem: It might be that when liberty is under siege, public necessity requires it to be. The

pathological perspective runs the risk of overprotecting liberty. But if the argument here is correct, there is reason to believe that public fear, heightened by worst-case scenarios, will result in selective burdens on those who are unable to protect themselves. In such cases, constitutional law operates best if it uses not balancing but rules or presumptions, allowing government to compromise liberty only on the basis of a compelling demonstration of necessity.

CONCLUSION

I have attempted to uncover some mechanisms that can lead a fearful public to support unjustified risk-reduction policies, including unjustified intrusions on civil liberties. The availability heuristic and probability neglect often lead people to treat risks as much greater than they in fact are, and hence to accept risk-reduction strategies that do considerable harm and little good. Civil liberties may be jeopardized for precisely this reason. And when the burdens of government restrictions are faced by an identifiable minority rather by the majority, the risk of unjustified action is significantly increased. The internment of Japanese-Americans during World War II is only one salient example; some aspects of the current war on terrorism might be similarly understood.

What can be done in response? I have suggested three possibilities. First, courts should not allow the executive to intrude on civil liberties without explicit legislative authorization. Second, courts should usually be deferential to intrusions that apply to all or most; they should be more skeptical when government restricts the liberty of a readily identifiable few. Third, courts should avoid ad hoc balancing of liberty against security; they should develop principles that reflect a kind of second-order balancing, attuned to institutional considerations and the risk of excessive fear. These three strategies are unlikely to provide all of the protection sought by civil libertarians against the adverse effects of excessive public fear. But when the risks to national security are real, courts are properly reluctant to be as aggressive as in ordinary times. The task is not to authorize courts to adopt a role to which they are ill-

suited, but to develop approaches that counteract the risk that public fear will lead to unjustified restrictions.

NOTES

1. This view is illuminatingly described and criticized in Posner and Vermeule (forthcoming 2004).
2. See Rottenstreich and Hsee (2001), which finds that when emotions are triggered, variations in probability matter relatively little.
3. The two systems need not be seen as occupying different physical spaces; they might even be understood as heuristics(!) See Kahneman and Frederick (2002). There is, however, some evidence that different sectors of the brain can be associated with Systems I and II. See the discussion of fear in LeDoux (1996), and the more general treatment in Lieberman (2003).
4. For valuable discussion, see Posner and Vermeule (forthcoming 2004).

REFERENCES

Alkahami, A. S., and Paul Slovic. "A Psychological Study of the Inverse Relationship Between Perceived Risk and Perceived Benefit." *Risk Analysis* 14:6 (December 1994).

Best, Joel. *Random Violence*. Berkeley: University of California Press, 1999.

Blasi, Vincent. "The Pathological Perspective and the First Amendment." *Columbia Law Review* 85:3 (April 1985): 449.

Gersen, Jacob. "Strategy and Cognition: Regulating Catastrophic Risk." Unpublished manuscript, 2001.

Harrington, Matthew. "People's Willingness to Accept Airport Security Delays in Exchange for Lesser Risk." Unpublished manuscript, 2002.

Hayek, Friedrich. *The Constitution of Liberty*. Chicago: University of Chicago Press, 1960.

Hirschleifer, David. "The Blind Leading the Blind." *The New Economics of Human Behavior*. Eds. Marianno Tommasi and Kathryn Ierulli. New York: Cambridge University Press, 1995.

Johnson, E. J., et al. "Framing, Probability Distortions, and Insurance Decisions." *Journal of Risk and Uncertainty* 7:1 (August 1993).

Jolls, Christine, et al. "A Behavioral Approach to Law and Economics." *Stanford Law Review* 50:5 (May 1998).

Kahneman, Daniel, and Shane Frederick. "Representativeness Revisited: Attribute Substitution in Intuitive Judgment." *Heuristics and Biases: The Psychology of Intuitive Judgment*. Eds. Thomas Gilovich, Dale Griffin, and Daniel Kahneman. New York: Cambridge University Press, 2002.

Kuran, Timur, and Cass R. Sunstein. "Availability Cascades and Risk Regulation." *Stanford Law Review* 51:4 (April 1999): 683.

LeDoux, Joseph. *The Emotional Brain*. New York: Simon and Schuster, 1996.

Lieberman, Matthew. "Reflexive and Reflective Judgment Processes: A Social Cognitive Neuroscience Approach." *Social Judgments*. Eds. Joseph P. Forgas, Kipling D. Williams, and William von Hippel. New York: Cambridge University Press, 2003.

Loewenstein, George. "Risk As Feelings." *Psychological Bulletin* 127:2 (March 2001).

Margolis, Howard. *Dealing With Risk*. Chicago: University of Chicago Press, 1996.

Moscovici, S., and M. Zavalloni. "The Group as a Polarizer of Attitudes." *Journal of Personality and Social Psychology* 12:2 (1969).

Office of Management and Budget. "Informing Regulatory Decisions: 2003 Report to Congress" <http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html>.

Posner, Eric, and Adrian Vermeule. "Accommodating Emergencies." *Stanford Law Review* (forthcoming 2004).

Rehnquist, William. *All the Laws but One*. New York: Knopf, 1998.

Rottenstreich, Yuval, and Christopher Hsee. "Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk." *Psychological Science* 12:3 (May 2001): 185.

Sherman, Steven J., et al. "Imagining Can Heighten of Lower the Perceived Likelihood of Contracting a Disease: The Mediating Effect of Ease

of Imagery." *Heuristics and Biases: The Psychology of Intuitive Judgment*. Eds. Thomas Gilovich, Dale Griffin, and Daniel Kahneman. New York: Cambridge University Press, 2002.

Slovic, Paul. *The Perception of Risk*. Sterling, Va.: Earthscan Publications, 2000a.

Slovic, Paul, et al. "Violence Risk Assessment and Risk Communication." *Law and Human Behavior* 24:3 (June 2000b).

Sunstein, Cass R. "Deliberative Trouble? Why Groups Go To Extremes." *Yale Law Journal* 110:1 (October 2000).

———. "Probability Neglect: Emotions, Worst Cases, and Law." *Yale Law Journal* 112:1 (October 2002a).

———. *Risk and Reason*. New York: Cambridge University Press, 2002b.

Tversky, Amos, and Daniel Kahneman. "Judgment Under Uncertainty: Heuristics and Biases." *Judgment and Decision Making: An Interdisciplinary Reader*. Eds. Hal R. Arkes and Kenneth R. Hammond. New York: Cambridge University Press, 1986.

Viscusi, W. Kip, and Richard J. Zeckhauser. "Sacrificing Civil Liberties to Reduce Terrorism Risks." *Journal of Risk and Uncertainty* 26:2-3 (March-May 2003).

von Hippel, William, et al. "Attitudinal Process Versus Content: The Role of Information Processing Biases in Social Judgment and Behavior." *Social Judgments*. Eds. Joseph P. Forgas, Kipling D. Williams, and William von Hippel. New York: Cambridge University Press, 2003.