LAWS OF FEAR

Beyond the Precautionary Principle

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CHAPTER 9

Fear and Liberty

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 precautionary measures that do little to protect security but that compromise important forms of freedom. In American history, the internment of Japanese-Americans during World War II is perhaps the most salient example, but there are many more. Consider, for example, Abraham Lincoln's suspension of habeas corpus during the Civil War, restrictions on dissident speech during World War I, the Roosevelt Administration's imposition of martial law in Hawaii in 1941, and the Communist scares during the McCarthy period. 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, under some sort of Precautionary Principle, to hold suspected terrorists in prison in Guantanamo? For how long? For the rest of their lives?

In explaining how public fear might produce unjustified intrusions on civil liberties, I shall emphasize two underlying sources of error: the availability heuristic and probability neglect. With an understanding of these, 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 precautions that amount to excessive restrictions on civil liberties.

The implication for freedom 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 risk is all the greater when an identifiable subgroup faces the burden of the relevant restrictions. 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 the nation's enemies, 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.

What is necessary, then, is a set of safeguards that will ensure against unjustified 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 interpretation of the Constitution should 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. If national security is genuinely at risk, the arguments will inevitably seem, and will often be, much stronger. In the context of safety and health regulation generally, I have urged that cost-benefit analysis is a partial corrective against both excessive and insufficient fear. 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 possibilities. *First*, courts should require restrictions on civil liberties to be authorized by the legislature, not simply by the executive. *Second*, courts should give special scrutiny to measures that restrict the liberty of members of identifiable minority groups, 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.

BAD BALANCING: A SIMPLE ACCOUNT

An understanding of the dynamics of fear helps explain why individuals and governments often overreact to risks to national security. A readily available incident can lead people to exaggerate the threat. If the media focus 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 as well, people might not think about probability at all. Both private and public institutions will overreact. This is almost certainly what happened in the case of the 2001 anthrax attacks in the United States, in which a few incidents led both private and public institutions to exaggerate a small threat. Of course, it is possible that such incidents are a harbinger of things to come. They might also disrupt a kind of public torpor, leading people to concern themselves with hazards that had been wrongly neglected. My only suggestion is that because of how human cognition works, this is hardly guaranteed; the increase in public fear might be unjustified.

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. Suppose that there is an optimal tradeoff among the relevant variables. If so, then the availability heuristic and probability neglect, combined with social influences, will inevitably produce a tradeoff that is less than optimal – one that unduly sacrifices liberty in the name of security. In the context of threats to national security, it is predictable that governments will infringe on civil liberties without adequate justification. History offers countless examples.[1] These are especially troublesome

[1] For America alone, see Geoffrey R. Stone, *Perilous Times* (New York: Norton, 2004).

applications of the Precautionary Principle, unnecessarily compromising freedom for the sake of an exaggerated risk.

WORSE BALANCING: SELECTIVE RESTRICTIONS

In the context of national security, and indeed more generally, a clear understanding of the possibility 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 government scrutiny when they are dealing with substances that might be used in bioterrorism. By contrast, we can 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 combatants at Guantanamo. When restrictions apply to all or most, it is reasonable to think that 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. 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 even if it doesn't.) 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 writes, "If all that is prohibited and enjoined is prohibited and enjoined for all without exception (unless such exception follows from another general rule) and if even authority has no special powers except that of enforcing the law, little that anybody may reasonably wish to do is likely to be prohibited."[2] Hence, "how comparatively innocuous, even if irksome, are most such restrictions imposed on literally everybody, as . . . compared

[2] Friedrich A. von Hayek, *The Constitution of Liberty* 155 (Chicago: University of Chicago Press, 1960).

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 consequence on them. But if indulging fear is costless, because other people face the relevant burdens, then the mere fact of "risk," and the mere presence of fear, will seem to provide a justification.

TRADEOFF NEGLECT AND LIBERTY

Return in this light to Howard Margolis' effort to explain why experts and ordinary people sharply diverge with respect to certain risks.[3] I have mentioned Margolis' suggestion that sometimes people focus only on the hazards of some activity, but not on its benefits, and therefore conclude, "better safe than sorry." This is sometimes the state of mind of those who favor precautions. But in other cases, the benefits of the activity are very much on people's minds, but not the hazards – in which case they think, "nothing ventured, nothing gained." In such cases, precautions seem literally senseless. In still other cases, both benefits and risks are "on-screen," and people assess risks by comparing the benefits with the costs. For infringements on civil liberties, a serious problem arises when the benefits of risk reduction are in view but the infringements are not; and this is inevitable in cases in which burdens are faced by identifiable subgroups.

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 goal is to place the relevant burdens or costs "on-screen," and hence

[3] See Howard Margolis, *Dealing With Risk* 71–143 (Chicago: University of Chicago Press, 1996).

to broaden the class of people burdened by government action, if only through an act of imagination. Thus Pastor Martin Niemöller'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 be easily cabined.

The danger of unjustified infringement is most serious 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; when people are primed to think about their own death, they are more likely to think and act in accordance with group-based stereotypes.[4] 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.

[4] See William von Hippel et al., Attitudinal Process vs. Content: The Role of Information Processing Biases in Social Judgment and Behavior, in *Social Judgments* 251, 263, ed. Joseph P. Forgas, Kipling D. Williams, and William von Hippel (Cambridge: Cambridge University Press, 2003).

PROTECTING LIBERTY

It would be possible to take the arguments just made as reason for an aggressive judicial role in the protection of civil liberties, even when national security is threatened. But there are real complications here. 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 dangers 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 same 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 were commonly voiced about the absence of serious 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 attention. I have stressed that 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 in the question whether the release of a dozen prisoners at Guantanamo would create a nontrivial risk of a terrorist attack. It is quite possible that an aggressive judicial posture in the protection of civil liberties, amidst war, would make things 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.[5] The remarkable decisions of the United States Supreme Court in 2004 mainly reflected a simple point: If people are being deprived of liberty, they have a right to a hearing to test the question whether they are being lawfully held.[6] This is a singularly important principle. But it is also a modest one.

I suggest that courts should and can approach the relevant issues through an institutional lens, one that pays close attention to the underlying 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 permitted to come from the executive 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 find that ad hoc balancing favors the government, even when it does not.

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

[5] See William Rehnquist, *All the Laws but One* (New York: Knopf, 1998).
[6] See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

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.[7] 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 legislative 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 resolving 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 references. 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 presidential action, under a vague or ambiguous law, would not be enough.

We can take this decision to stand for the general principle that 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

[7] *Association for Civil Rights in Israel v. The General Security Service* (1999). Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 *I.L.M.* 1471 (1999).

that political safeguards, in the form of agreement from a diverse and deliberative branch of government, 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 a 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.

By way of ironic comparison, consider the highly publicized 2002 memorandum on torture, written by the Office of Legal Counsel in the United States Department of Justice for the White House. The most remarkable aspect of the memorandum is its suggestion that as Commander-in-Chief of the Armed Forces, the President of the United States has the authority to torture suspected terrorists, so as to make it constitutionally unacceptable for Congress to ban the practice of torture. Where the Supreme Court of Israel held that clear legislative *authorization* is required to permit torture, the United States Department of Justice concluded that clear legislative *prohibition* is insufficient to forbid torture.[8] But the position of the Department of Justice was not well defended, and it is most unlikely that the Supreme Court, or an independent arbiter, would accept that position.

In the United States, a good model is provided by the remarkable decision in *Kent v. Dulles*,[9] decided at the height of the Cold War. In that case, the Supreme Court was asked to decide 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

[8] To be sure, the position of the Department of Justice was stated with a degree of tentativeness, with the suggestion that the congressional ban on torture "might" be unconstitutional in the context of battlefield interrogations; but the general impression is that the ban probably should be so regarded.

[9] *Kent v. Dulles*, 357 U.S. 116 (1958).

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 the legislature 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 first question to ask in cases in which the executive branch is alleged to have violated civil liberties: Has the legislature specifically authorized that branch to engage in the action that is being challenged?

Of course requiring specific authorization is no panacea. It is possible that the legislature, itself excessively fearful, will permit the President to do something that cannot be justified in principle. It is also possible that the legislature will fail to authorize the executive 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 legislative permission is a good way of reducing the relevant dangers – those of excessive and insufficient protections against security risks.

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 by American Supreme Court Justice Robert Jackson:[10]

> 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.

[10] *Railway Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

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 (via the due process clause) that some conduct cannot be regulated at all, it is intervening, in a major way, in democratic processes, making that conduct essentially "unregulable." Consider, for example, a decision to the effect that certain security measures, applicable to everyone in (say) public spaces, are unacceptable because they intrude unduly into the realm of personal privacy. The second point is that when the Court strikes government action down on equality grounds, it merely requires the government to increase the breadth of its restriction, thus triggering political checks against unjustified burdens. Consider, for example, a decision to the effect that certain security measures, applicable only to people with dark skin, are unacceptable because they do not treat people equally.

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, voting rights, and political association are not involved; an exception for these rights makes sense in light of the fact that democratic processes cannot work well without them.) If government is intruding on everyone, it is unlikely to do so unless it has a good reason, one founded in something other than fear alone; recall Hayek's claims about the rule of law. 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 the great *Korematsu* case,[11] challenging the internment of Japanese-Americans during World War II, the Court should have been far more skeptical of the government's justification. The reason is that the racist and selective internment was peculiarly immune from political checks on unjustified intrusions on liberty. Most Americans had nothing to fear from it. The same point holds for some aspects of the contemporary "war on terrorism." In the United States, many of the relevant restrictions have been limited to noncitizens, in a way that creates a real risk of overreaching; the most obvious examples are the detentions at Guantanamo Bay. Noncitizens cannot vote and they lack political power. If they are mistreated or abused, the ordinary political checks are unavailable.

When the legal texts leave reasonable doubt, 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. Hence the Supreme Court should be applauded for its insistence that foreign nationals, challenging their detention, have a right of access to federal courts to contest the legality of what has been done to them.[12]

Compare in this regard one of President 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

[11] *Korematsu v. United States*, 323 U.S. 214 (1944).
[12] See *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

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. Sadly, Attorney General John Ashcroft duplicated the error a few years later, suggesting that Supreme Court decisions in 2004 had given "new rights to terrorists," when a key question was whether the detainees were terrorists at all.

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 in public places, with frequent requests for identification; permit military tribunals to try those suspected of terrorist activity; hold detainees whom it suspects of terrorism; and allow the police to engage in practices that would not be permitted under ordinary circumstances.

Under the balancing approach, everything turns on whether the relevant fear is justified. What is the extent of the risk? If we believe that we should find a good tradeoff among the relevant variables, then excessive fear will inevitably cause a serious problem, by sacrificing liberty to protect 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 an assessment of consequences can never authorize this kind of intrusion. I believe that in this form, the argument is a kind of moral heuristic,[13]

[13] See Cass R. Sunstein, Moral Heuristics, *Behavioral and Brain Sciences* (forthcoming).

one that is far too rigid, even fanatical. Is it really sensible to ban torture when torture is the only means of protecting thousands of people from certain death? Suppose that a bomb is about to explode, killing thousands or hundreds of thousands of people, and that reasonable people believe that without torture, the bomb will indeed explode. Might not torture be morally permissible? Might it not be morally obligatory? The ban on torture can easily be seen as a moral heuristic, one that usually works well but that predictably misfires.

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. I am not sure that this view is right, but it is entirely plausible. And if it is, we might adopt a barrier to torture, even when public fear is both extreme and entirely justified. Under most real-world circumstances, I believe that such a barrier is indeed 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*,[14] 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

[14] *Dennis v. United States*, 341 U.S. 494 (1951).

crime." In its most important analytic step, the Court concluded that the "clear and present danger" 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."

Note the close relationship between the Court's analysis here, the Precautionary Principle, and President George W. Bush's doctrine of preemptive war. In the face of threats to national security, President Bush plausibly contended that if a country waits until the risk is "imminent," it may be waiting until it is too late; so, too, for those who invoke the Precautionary Principle. So, too, perhaps, for certain conspiracies, even conspiracies founded essentially on speech.

Following the distinguished Court of Appeals Judge Learned Hand, the *Dennis* Court said that the clear and present danger test involved a form of balancing, without an imminence requirement. "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; the Court might even be seen as accepting an Anti-Catastrophe Principle, perceiving the situation as one of uncertainty rather than risk. But many people have been skeptical of ad hoc balancing, which no longer reflects American constitutional law. Instead, the Supreme Court understands the idea of clear and present danger to require that the danger be both *likely* and *imminent*,[15] in a way that explicitly rejects precautionary thinking. This approach is quite different from

[15] See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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. And even if a risk has a 70 percent chance of occurring, and is therefore "likely," regulation of speech is unacceptable unless the risk is imminent. Indeed, regulation is impermissible even if the risk of serious harm cannot plausibly be calculated. The government must, in short, wait until the harm is both likely to occur and about to occur – a view pressed by many who object to "preemptive war" and who say that a nation may not make war on another unless the threat is indeed "imminent."

How should we compare a balancing approach with 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 if 100,000 people will die in the event that 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. For global warming, we ought not to wait until the serious harm is upon us. So, too, for security measures meant to reduce the risk of crime or terrorism. It is worthwhile to invest significant resources if the evidence suggests a real risk, even if the most serious harms are less than likely to occur.

What, then, can be said in favor of the requirements of likelihood and imminence? Perhaps we distrust any balancers. Perhaps the requirements are a response to a judgment that in the real world, the *Dennis* approach will produce excessive regulation of speech. If our 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 if it does not. For all these reasons, the requirements of likelihood and imminence have reasonable institutional justifications, having to do with the incentives and attitudes of government officials and citizens themselves.

In the context of speech, there are independent considerations. Public disapproval of the content of speech – of the ideas that are being offered – might result in a judgment that speech is likely to cause harm even if the real motivation for censorship is less harm

overprotect liberties as safeguard against panic

than disagreement with the underlying ideas.[16] And if the harm is not imminent, further discussion, rather than censorship, is the proper remedy. As long as there is time for public discussion and debate, more talk is usually the best response to speech that seems to create a risk of harm. The imminence requirement is a recognition of this idea. In this light, the clear and present danger test, requiring both likelihood and imminence, reflects a kind of second-order balancing, one that distrusts on-the-spot judgments about risks and harms and that puts on government an unusually high burden of proof. So defended, the test does not reject the idea of balancing in principle, or insist that the protection of liberty does not vary with the extent of the threat to security. The test merely recognizes that our balancing is likely to go wrong in practice – and that we need to develop safeguards against our own bad balancing, especially when public fear will predictably lead us astray.

As I have suggested, a general prohibition of torture can be understood in similar terms. The argument need not be that torture can never be defended by reference to consequences; if the only way to prevent catastrophe is to torture a terrorist, perhaps torture is justified. A more sensible justification for banning torture is that a government that is licensed to torture will do so when torture is not justified – 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. In imaginable circumstances, torture is indeed justifiable. All I am arguing is that aggressive protection of civil liberties and civil rights is often best defended as a safeguard against mass fear or hysteria that would lead to steps that cannot really be justified on balance. In a sense, sensible governments "overprotect" liberties, compared to the level of protection that liberties 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 under the heat of the

[16] For a great deal of evidence, see Stone, *supra* note 1.

moment.[17] 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 goal of the "pathological perspective" is to create safeguards that will work when liberty is under siege and most at risk. The pathological perspective creates an obvious problem: It might be that when liberty is under siege, public necessity requires it to be. Hence 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.

FEAR AND FREEDOM

My goal here has been to uncover some mechanisms that can lead a fearful public to invoke a kind of Precautionary Principle that produces unjustified intrusions on civil liberties. The availability heuristic and probability neglect often lead people to treat risks as much greater than they are in fact, and hence to accept risk-reduction strategies that do considerable harm and little good. 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. Hence precautions can be worse than blunders; they can be both cruel and unjust.

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 be relatively deferential to intrusions on liberty that apply to all or most; they should be far 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

[17] See Vincent Blasi, The Pathological Perspective and the First Amendment, 85 *Colum. L. Rev.* 449 (1985).

that reflect a kind of second-order balancing, attuned to the risk of excessive fear.

These three strategies are unlikely to provide all of the protection sought by civil libertarians. But when the risks to national security are real, courts are properly reluctant to be as aggressive as in ordinary times. When those risks are real, some infringements on freedom are both inevitable and desirable. The task is to develop approaches that counteract the risk that public fear will lead to unjustified restrictions, without authorizing freedom-protecting institutions to adopt a role for which they are ill suited.