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Security *vs.* Liberty: An Imbalanced Balancing

*"The metaphor of balancing the public interest against personal claims is established in our political and judicial rhetoric ..."*²

*"As a matter of attitude, the language of 'balancing' is apt language, easily conformable language, for the job of cutting down to what somebody thinks is comfortable size the claims to a sometimes awkward human freedom which the Bill of Rights set out to protect."*³

*"[T]he idea of trading off freedom for safety on a sliding scale is a scientific chimera ... Balance should not enter the equation; it is false and misleading."*⁴

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² Ronald Dworkin, *Taking Rights Seriously* (1977) 198.

³ Charles L. Black, Jr., 'Mr. Justice Black, the Supreme Court, and the Bill of Rights' *Harper's Magazine*, February 1961, 63 at 66. See also Mordechai Kremnitzer, 'National Security and the Rule of Law: A Critique of the Landau Commission's Report', in *National Security and Democracy in Israel* (Avner Yaniv ed., 1993) 153 at 170–71 (arguing that if it is true that "in a normal utilitarian balancing process the value of human dignity does not stand a chance against the value of human life," then "the value of human dignity should be protected by taking it out of the balance, making it ... a part of natural law" (quoting Winfried Hassemer)); Thomas Nagel, 'War and Massacre', in *War and Moral Responsibility* (Marshall Cohen et al. eds., 1974) 3 at 9 ("Once the door is opened to calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies.").

⁴ Philip Thomas, 'Emergency and Anti-Terrorist Powers 9/11: USA and UK' (2003) 26 *Fordham Int'l L. J.* 1193 at 1208.

The metaphor of balancing and the use of “balancing tests” are dominant features in legal discourse. They have become so ubiquitous across many jurisdictions around the world that some have identified “a transition from ‘balancing’ as a feature within fundamental rights adjudication to ‘balancing’ as an emblematic characteristic of entire legal systems and cultures.”⁵ The perceived inevitability of the need to engage in some sort of balancing has rendered balancing, as a conceptual methodology and form of constitutional interpretation and reasoning, almost unchallengeable. While we may argue about particular outcomes of balancing, there seems to be little, if any, point in arguing about the need *to* balance.⁶ It has even been suggested that the concept of balancing constitutes an element of the “ultimate” rule of law.⁷

Balancing is offered as a theory of constitutional interpretation and adjudication that identifies competing interests, e.g., individual rights and governmental powers, and then values and compares them.⁸ It rejects calls to treat interests as absolutes that may never be balanced off against other interests. A proper balance must be struck between them. Since the terrorist attacks of September 11, 2001, the metaphor of balancing has been invoked so regularly to explain the need for a trade-off between liberty and security that it has become an “ambient feature of our political environment.”⁹

If the metaphor of balancing has become dominant in legal and constitutional discourse, the terminology of utilitarian cost-benefit analysis has come to dominate, certainly in the United States, the exercise of balancing tests.¹⁰ In this context, balancing tests assume that those who engage in the act of balancing are rational actors, who engage in rational

⁵ Jacco Bomhoff, ‘Balancing, The Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law’ (2008) 31 *Hastings Int’l & Comp. L. Rev.* 555 at 556.

⁶ A “weaker” version is offered by the former President of the Israeli Supreme Court, Aharon Barak, when he writes that: “balancing’ and ‘weighing,’ though neither essential nor universally applicable, are very important tools in fulfilling the judicial role.” Aharon Barak, ‘The Supreme Court 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy’ (2002) 116 *Harvard L. Rev.* 16 at 93.

⁷ David Beatty, *The Ultimate Rule of Law* (2004).

⁸ T. Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 96 *Yale L. J.* 943 at 945.

⁹ Jeremy Waldron, ‘Safety and Security’ (2007) 85 *Nebraska L. Rev.* 454 at 455.

¹⁰ Russell B. Korobkin & Thomas S. Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88 *California L. Rev.* 1051 at

decision-making, seeking to maximize their own (or social) ends, while also possessing knowledge and capacity to assess the potential outcomes and consequences of their actions. In other words, those engaged in the act of balancing are able to estimate accurately both the benefits and harms that are involved and the probabilities of uncertain outcomes.

The general critiques of balancing tests are well known and can be noted here briefly. Balancing is based on the ability (of judges, for example) to identify correctly the competing interests and to assign them appropriate weight as well as to compare the respective weights of the relevant interests. However, determining which interests and what factors are relevant in any given case and which ought to be balanced against each other may prove highly problematic.¹¹ The problem of commensurability further exacerbates the challenge. It is often argued that certain interests, values, or factors cannot be measured by any common currency or on a same scale and therefore cannot be compared, or balanced, one against the other.¹² The inherent link between commensurability and balancing highlights the ideological choices that are involved in the concept of balancing. Some consequentialist theories regard all values as commensurable, whereas other moral theories, such as deontological or virtue ethics, reject that claim and deny not merely the desirability but the possibility of balancing in circumstances involving certain interests and values. Furthermore, in all but simple cases, balancing tests undermine predictability and offer less by way of general guidance than bright-line rules.¹³ Balancing tests are regarded by their detractors as “subjective,” and “manipulable.”¹⁴ The lack of objective criteria for valuing the relevant interests and for establishing the appropriate basis for comparing them results in decisions that are suffused with the decision-makers’ own personal preferences while coated with a veneer of seemingly objective

1062–63; Jonathan S. Masur, ‘Probability Thresholds’ (2006–07) 92 *Iowa L. Rev.* 1293 at 1299.

¹¹ Aleinikoff, ‘Age of Balancing’, p. 977.

¹² Frederick Schauer, ‘Commensurability and Its Constitutional Consequences’ (1994) 45 *Hastings L.J.* 785 at 786. There are those who argue that even if we accept that the relevant values and interests could be somehow compared, or balanced, one against the other, we should still make the choice not to do so.

¹³ Antonin Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 *U. Chi. L. Rev.* 1175 at 1186.

¹⁴ See, e.g., *Blakely v. Washington*, 542 U.S. 296 at 307–08 (2004) (Scalia J.).

rhetoric.¹⁵ In the context of judicial decisions, balancing tests also result in less transparent judicial opinions since the judges are utilizing balancing-speak as a shield in order to avoid the need to elaborate on the sources that they used to evaluate the weights of the relevant interests and to compare them. At the same time, the scientific-like rhetoric of balancing by courts reduces the opportunity for a meaningful constitutional dialogue and interaction among the various branches of government as well as between them and the general public.¹⁶

Balancing also presents significant questions that pertain to institutional concerns and to the nature of the constitutional legal adjudicative project. Judicial balancing seems to replicate the work done by the legislative branch of government with no inherent reason to assume that courts are positioned to arrive at a better, more accurate, calibration of interests.¹⁷ At the same time, Aleinikoff argues that balancing undermines our understanding of constitutional law as an interpretive enterprise, transforming it into a general discussion of the reasonableness of governmental conduct. Thus, “[u]nder a regime of balancing, a constitutional judgment no longer looks like a trump. It seems merely to be a card of a higher value in the same suit.”¹⁸

This Article focuses on challenges to balancing that are either unique or somehow exacerbated in the context of responding to violent crises. It argues that when faced with extreme violent emergencies (real or perceived), the public and its leaders are unlikely to be able to assess accurately the risks facing the nation. In those circumstances an act of balancing between security and liberty is likely to be biased in ways that ought to be recognized and accounted for. Furthermore, the pressures exerted by acute exigencies on decision-makers (and the public at large), coupled with certain unique features of crisis mentality and thinking, are likely to result in a systematic undervaluation of one interest (liberty) and

¹⁵ Aleinikoff, ‘Age of Balancing’, pp. 992–995; Barak, ‘A Judge on Judging’, p. 95 (“Naturally, acts of balancing and weighing are not scientific in nature. They do not negate the existence of judicial discretion. Nonetheless, they confine such discretion to those situations in which the legal system fails otherwise to clarify the relative social status of the conflicting values and principles. In this respect, one should not trade one extreme for the other. Just as balancing and weighing do not negate judicial discretion entirely, these techniques also do not constitute an open invitation for judicial discretion in every case.”).

¹⁶ Aleinikoff, ‘Age of Balancing’, p. 992.

¹⁷ *Id.*, p. 984–86.

¹⁸ *Id.*, p. 992.

overvaluation of another (security) so that the ensuing balance would be tilted in favor of security concerns at the expense of individual rights and liberties.

This argument does not depend on a claim that the presence of risk turns individuals and decision-makers into irrational actors. Rather it is of more modest proportions, suggesting that there are certain challenges to the rational actor model that are somehow exacerbated in the context of responding to violent crises. Those challenges suggest that acts of balancing in this context are likely to be systematically biased and that our ability to analyze and measure risk accurately is prone to suffer from endemic distortions.¹⁹ The systematic nature of those biases suggests that failure to address them may turn the mistakes and errors that are discussed below into cognitive pathologies, i.e., decision methods that are not only mistaken but irrational.²⁰

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Individuals operate under certain cognitive limitations and biases that may prevent them from capturing the real probabilities of the occurrence of certain types of risks and uncertainties. Because accurate risk analysis requires information pertaining to both the magnitude of the risk and the probability of that risk materializing, such cognitive limits color our risk assessment and create a strong tilt toward putting undue emphasis on certain potential risks. While similar observations hold true in a wide variety of areas, the risks involved in acute national crises, in general, and in violent threats, in particular, coupled with other factors that undermine rational decision-making, have a special tendency to trigger such cognitive limitations and biases due not only to their potential magnitude, but mostly due to the manner in which they are perceived.

The concept of “bounded rationality” relates to our limited knowledge and computational imperfections and explains our failure to process

¹⁹ The remainder of this article considers bias that results from the use of cognitive heuristics. For an approach that considers emotions and risk perceptions to be a form of expressive perception that links risk management options with a person's values, allowing for rational cultural evaluations of risk. Dan M. Kahan, ‘Two Conceptions of Emotion in Risk Regulation’ (2008) 156 U. Pennsylvania L. Rev. 741 at 748–52 (discussing the “Cultural Evaluator” theory).

²⁰ Roger G. Noll & James E. Krier, ‘Some Implications of Cognitive Psychology for Risk Regulation’ in Cass R. Sunstein (ed.), *Behavioral Law & Economics* (2000) 325 at 327.

information perfectly. As Herbert Simon explains it: “The capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problems whose solution is required for objectively rational behavior in the real world—or even for a reasonable approximation to such objective rationality.”²¹ Not only may we not possess all the relevant (and complex) information that is required to formulate and solve such complex problems, but it is suggested that even if we did possess perfect information we would not have been able to formulate or solve these problems. For example, an important element of information processing and analysis is the time needed to investigate consequences and alternatives. Violent emergencies, characterized by sudden, urgent, and usually unforeseen events or situations that require immediate action, often without time for prior reflection and consideration, accentuate the problems related to our ability to process information and evaluate complex situations. Hence, such crises tend to lead to an increased reliance on cognitive heuristics—shortcuts that people use when making decisions—as a means of countering the lack of sufficient time to properly evaluate the situation.²² Generally, the use of heuristics makes perfect sense and is rational as it “reduce[s] the time and effort required to make reasonably good judgments and decisions.”²³ However, the most common heuristics may create patterns of mistaken assessments.²⁴ Those patterns are further reinforced when heuristics are applied in times of crisis.

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The *availability heuristic* means that individuals tend to link their assessment of the probability of an occurrence of a particular event to their ability to imagine similar events taking place.²⁵ The easier it is to recall

²¹ Herbert A. Simon, *Models of Man: Social and Rational* (1957) 198; Korobkin & Ulen, ‘Removing the Rationality Assumption’, pp. 1075–76.

²² See, e.g., Melissa L. Finucane et al., ‘The Affect Heuristic in Judgments of Risks and Benefits’ (2000) 13 *Journal of Behavioral Decision Making* 1 at 5–8 (the effects of time pressure on the (inverse) relationship between perceived risks and perceived benefits of an activity).

²³ Scott Plous, *The Psychology of Judgment and Decision Making* (1993) p. 109; Noll & Krier, ‘Some Implications of Cognitive Psychology for Risk Regulation’, p. 327.

²⁴ Plous, *The Psychology of Judgment and Decision Making*, pp. 131–44.

²⁵ Amos Tversky & Daniel Kahneman, ‘Availability: A Heuristic for Judging Frequency

an event—the more familiar we are with it, for example, from personal experience—the more we are likely to overestimate the likelihood of its occurrence in the future.²⁶ Such events are not merely abstract notions, but rather are tangible and real and hence also more probable events. Moreover, experiential familiarity is not a necessary condition for “availability.” The stronger and the more vivid and salient the images that are associated with a particular event are—the closer they are in space or time, the more emotionally exciting they are, or the more concrete and “image provoking” they are—the more such events are going to be perceived as likely to occur in the future, even if not experienced personally.²⁷ As the two pioneers in this field, Amos Tversky and Daniel Kahneman, note: “[T]he 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.”²⁸ The images linked to the September 11, 2001, terrorist attacks—the planes hitting the Twin Towers, the towers crumbling down, firefighters and police officers battling against time, and people jumping to their death—were exceptionally powerful. Moreover, the attacks have been followed by obsessive public discussion of possible future attacks, regardless of any meaningful analysis of the probability of many of the specific scenarios ever materializing. Repeated official warnings of pending attacks and periodic—and at times frequent—changes in the ill-conceived and ill-executed official color-coded

and Probability’ (1973) 5 *Cognitive Psychology* 207; Amos Tversky & Daniel Kahneman, ‘Judgment Under Uncertainty: Heuristics and Biases’, in *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman et al. eds., 1982) 3 at 11.

²⁶ The flip side is that unavailability might lead to underestimation, and as a result also underreaction. This may have accounted to the intelligence failure in foiling the attacks of September 11 and comprehending the true nature of the risk. See, e.g., Cass R. Sunstein, ‘On the Divergent American Reactions to Terrorism and Climate Change’ (2007) 107 *Columbia L. Rev.* 503 at 535; Max H. Bazerman & Michael D. Watkins, *Predictable Surprises* (2004) at 15–41; Noll and Krier, ‘Some Implications of Cognitive Psychology for Risk Regulation’, p. 351 (“while availability may account for overreaction to a catastrophe, anchoring may explain underreaction. As yet, the [cognitive] theory [of choice under uncertainty] cannot tell us very much about which mistakes are likely to occur in any given circumstance.”). Another potential cause of underreaction is people’s “belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us.” Korobkin & Ulen, ‘Removing the Rationality Assumption’, p. 1091.

²⁷ Plous, *The Psychology of Judgment and Decision Making*, p. 126.

²⁸ Tversky & Kahneman, *Judgment Under Uncertainty*, p. 11.

terror alert level,²⁹ and the prominence of the wars in Afghanistan and Iraq in the public's mind, have further fed the terrorism frenzy, increasing the imaginability of various potential hazards and hence their perceived riskiness and the concomitant sense of individual and national insecurity. Individuals tend to overestimate the likelihood of dramatic events that attract significant media coverage and attention and underestimate the risks of "mundane" events that are, in fact, more—perhaps even much more—likely. For example, studies have demonstrated that even prior to the terrorist attacks on 9/11, individuals were ready to pay higher premiums to obtain flight insurance for death due to (imaginable) "terrorist acts" than to obtain flight insurance covering death resulting from (more abstract) "all possible causes."³⁰ That being the case, we can expect greater attention and public pressure, and consequently more resources, to be directed at controlling, minimizing, insuring against, or preventing (to the extent possible) the former.³¹ Overestimation of the likelihood of such risks would also mean that when put on the balancing scales and be

²⁹ George Loewenstein & Ted O'Donoghue, "We Can do this the Easy Way or the Hard Way": Negative Emotions, Self-Regulation, and the Law' (2006) 73 *U. Chicago L. Rev.* 183 at 201 (arguing that the color-coded terrorist alert system "that provides no guidance about what to do, but terrifies the population, is a perfect example of government policies that impose almost pure deadweight losses."); Philip G. Zimbardo, 'The Political Psychology of Terrorist Alarms' (2003) (available at <http://www.apa.org/about/division/terrorism.html>); J.N. Shapiro & D.K. Cohen, 'Color blind: Lessons from the failed homeland security advisory system' (2007) 32 *International Security* 121; John Paul & Sangyoub Park, 'With the Best of Intentions: The Color Coded Homeland Security Advisory System and the Law of Unintended Consequences' (2009) 4(2) *Research and Practice in Social Sciences* 1.

³⁰ George F. Loewenstein et al., 'Risk as Feelings' (2001) 127 *Psychological Bulletin* 267 at 275. This anomaly can be partly (but only partly) explained by the existence of an embedding effect: whether you ask about one risk or a larger category in which it is embedded, you get the same result. W. Kip Viscusi & Richard J. Zeckhauser, 'Sacrificing Civil Liberties to Reduce Terrorism Risk' (2003) 26 *J. of Risk and Uncertainty* 99 at 113. In the example above, however, the issue was not one of embedding but rather the difference between a concrete (and therefore imaginable) threat and a more abstract category of possible threats.

³¹ Paul Slovic, 'What's Fear Got to Do with It? It's Affect We Need to Worry About' (2004) 69 *Missouri L. Rev.* 971 at 984–89 [hereinafter 'The Affect Heuristic'] (Difficult balance between alerting and informing people about serious risks—allowing for analytical assessment of the risks involved—and creating exaggerated fears as a result of assessing such risks emotionally and affectively).

compared to other, competing, interests, we are likely to perceive such risks as weighing the scales down more than they actually ought to.

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Prospect theory and *probability neglect* suggest that individuals tend to give excessive weight to low-probability results when the stakes are high enough and the outcomes are particularly bad (or, in fact, particularly good).³² In cases of high-magnitude, low-probability risks, attention is directed almost exclusively to outcomes rather than to the likelihood of such outcomes materializing. Terrorist threats are particularly challenging in this regard. According to Paul Slovic, individuals perceive risks as more “serious”, the more “dreaded” and “unknown” they are. The problem is that “as risks become increasingly dreaded and unknown, people demand that something be done about them regardless of the probability of their occurrence, the costs of avoiding the risk, or the benefits of declining to avoid the risk.”³³ A risk is “dreaded” if people perceive it to be involuntary and potentially catastrophic, and one over which they lack control. It is “unknown” if it is new and not well understood, among other things. Terrorist attacks are “dreaded” risks and as such are considered to be of an especially serious nature.³⁴ At the same time, the range of “modern” terrorist threats creates what Kai Erikson calls a “new species of trouble,” that makes analytical risk assessment extremely difficult and increases our reliance on affective assessment.³⁵

³² Daniel Kahneman & Amos Tversky, ‘Prospect Theory: An Analysis of Decision Under Risk’, in Daniel Kahneman & Amos Tversky (eds.), *Choices, Values, and Frames* (2001) 17; Slovic, ‘The Affect Heuristic’, pp. 982–83.

³³ Christina E. Wells, ‘Questioning Deference’ (2004) 69 *Missouri L. Rev.* 903 at 925.

³⁴ Paul Slovic, *The Perception of Risk* (2000) 220–31; Slovic, ‘The Affect Heuristic’, pp. 985–86.

³⁵ Kai Erikson, *A New Species of Trouble: Explorations in Disaster, Trauma, and Community* (1994); Slovic, ‘The Affect Heuristic’, p. 985; Viscusi & Zeckhauser, ‘Sacrificing Civil Liberties’, p. 101 (“Terrorism presents a situation of tremendous uncertainty, or perhaps a better phrase is ‘ignorance’ ... Given this, attempts to estimate terrorism risks will fall prey to some of the more salient biases and anomalies that have been identified in the risk and uncertainty literature.”). The fact that such unknown risks create stronger emotional responses does not contradict the availability heuristic. As Masur correctly observes, individuals “react most strongly to threats that have been much discussed within the press but that are sufficiently complex or ‘scientific’ that the average layperson cannot comprehend them.” Masur, ‘Probability Thresholds’, pp. 1341–42.

In the context of high-magnitude, low-probability risks, individuals often demonstrate probability neglect, i.e., the failure to assess at all the probability that a certain scenario will materialize, but instead focus exclusively on the worst possible outcome—the worst-case scenario. This has been famously captured by former Vice President Dick Cheney’s statement that “If there’s a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response.”³⁶ Such predictions are especially potent—and at the same time likely to be biased—when the expected outcome is “affect rich,” as when it involves not merely a serious loss, but one that produces particularly strong emotions.³⁷

Individuals also entertain myopic perspectives about the future in that they tend to undervalue and discount future benefits and costs when comparing them with present benefits and costs. While a strong governmental response against terrorism is perceived by the public as socially beneficial, the longer-term costs to individual rights and liberties tend to be overly discounted.³⁸ That such future costs seem mostly intangible and abstract, especially in comparison with the very tangible sense of fear for one’s person and loved ones, coupled with a feeling of increased security as a result of governmental action and a sense that government’s infringements on civil liberties target “others” (as discussed below), only exacerbate this facet of our risk assessment.³⁹ One should note that such myopia might seem to be counter-balanced by what is known as “optimism bias”: studies have shown repeatedly that people are often overly optimistic about the likelihood of positive outcomes of future actions and often underestimate the likelihood of negative effects of such actions. However, Slovic notes that one exception to the optimism bias concerns terrorism threats, which seem to make every member of the target community feel vulnerable.⁴⁰

³⁶ Quoted in Ron Suskind, *The One Percent Doctrine* (2006) at 61–62.

³⁷ Cass R. Sunstein, ‘Probability Neglect: Emotions, Worst Cases, and Law’ (2002) 112 *Yale L.J.* 61 at 66; Cass R. Sunstein, ‘The Laws of Fear’ (2002) 115 *Harv. L. Rev.* 1119 at 1137–44; Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (2005).

³⁸ See also Sunstein, ‘Terrorism and Climate Change’, pp. 527–28, 531–32 (noting that “[w]hen the costs are placed squarely ‘on screen,’ people begin to weigh both costs and benefits, and their enthusiasm for regulatory expenditures diminishes.” *Id.*, p. 528).

³⁹ Sunstein, ‘Terrorism and Climate Change’, pp. 524–29.

⁴⁰ Slovic, ‘The Affect Heuristic’, p. 986.

Cognitive theory of decision-making under conditions of uncertainty suggests that the systematic biases identified above are not unique to decision-making in times of violent crises. However, as already noted, exigencies tend to exacerbate such systematic challenges. There are additional features of dealing with violent crises that are likely to aggravate further these difficulties.

Few situations can solidify broad national consensus behind the government. Times of crisis and emergency can and do. James Madison noted that constitutions originated in the midst of great danger that led to “an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions.”⁴¹ Moved by perceptions of substantial physical threat, motivated by growing personal fear of being the next victim and by hatred toward the terrorists, and frustrated by the continuance of terrorist activities, the public is likely to “rally ’round the flag.”⁴² Consensus may, in turn, result in *group polarization* on both the level of the public at large as well as of distinct groups of experts: “When like-minded people deliberate with one another, they typically end up accepting a more extreme version of the views with which they began.”⁴³ Of the various explanations for group polarization, four are of special significance in our context, namely emotional contagion, social interactions, over-confidence, and “groupthink.”⁴⁴

⁴¹ *The Federalist No. 49* (James Madison) (Clinton Rossiter ed., 1961), p. 315; Karl R. Popper, *The Open Society and Its Enemies* (5th ed. 1971) vol. 1, pp. 43, 198; E.L. Quarantelli & Russell R. Dynes, ‘Community Conflict: Its Absence and Its Presence in Natural Disasters’ (1976) 1 *Mass Emergencies* 139 at 140, 145 (noting that emergency periods are characterized by an absence of conflict, as conflict is deemed dysfunctional for the maintenance or survival of the relevant social system); Eugene V. Rostow, ‘*The Japanese American Cases—a Disaster*’, (1945) 54 *Yale L.J.* 489, 490–91.

⁴² Bruce Russett, *Controlling the Sword: The Democratic Governance of National Security* (1990) 34 (describing the “rally ’round the flag effect” as the phenomenon by which “a short, low-cost military measure to repel an attack ... is almost invariably popular at least at its inception. So too are many other kinds of assertive action or speech in foreign policy.”); Gad Barzilai, *A Democracy in Wartime: Conflict and Consensus in Israel* (1992) 248–60.

⁴³ Cass R. Sunstein, *Why Societies Need Dissent* (2003) 111–35. See also Cass R. Sunstein & Reid Hastie, ‘Four Failures of Deliberating Groups’ (April 2008) (available online at <http://ssrn.com/abstract=1121400>).

⁴⁴ Sunstein, *Laws of Fear*, pp. 100–01.

Strong emotions such as fear, hysteria, panic, outrage, and xenophobia are invoked by violent emergencies. Such emotions carry a pronounced effect on people's perceptions of, and reactions to, risk as they act as multipliers of (perceived) likelihood of risk.⁴⁵ That effect is then amplified and re-amplified as a result of emotional contagion. Individuals are highly responsive to emotions expressed by others. Moreover, some emotions, such as fear, are particularly contagious. People also shape their opinions (particularly their expressed opinions) and adjust them so as to be in sync with the dominant position within the relevant reference group since they like to "belong" and to be favorably perceived and counted by others.⁴⁶ This is especially so the less people feel that they know about a certain issue; they would tend then to rely on the judgments of those "in the know." Decision-making that takes place under conditions of uncertainty is particularly prone to suffer from distortions that result from the interplay of informational and reputational influences and cascades.

"In an informational cascade," writes Cass Sunstein, "people cease relying ... on their private information or opinions. They decide instead on the basis of the signals conveyed by others ... It follows that the behavior of the first few people can, in theory, produce similar behavior from countless followers."⁴⁷ Matters of national security almost always present significant information asymmetries among the various branches of government and between the government and the public and are thus especially prone to the effects of informational cascades. Informational cascades may also partially explain the tendency of "civilians"—including not merely the public at large but also the judicial and legislative branches of government as well as individuals within the executive branch—to defer to the judgment of military experts in such matters.⁴⁸ Informational and reputational cascades may, in fact, be manipulated by availability entrepreneurs who have particular stake in the outcomes of the policy making process and seek to shape and influence public dis-

⁴⁵ Sunstein, 'Terrorism and Climate Change', pp. 544–45; Peter Sandman, 'Hazard Versus Outrage in the Public Perception of Risk', in *Effective Risk Communication: The Role and Responsibility of Government and Nongovernment Organizations* (Vincent T. Covello et al. Eds., 1989) 45 ("outrage model").

⁴⁶ For discussion of "reputational cascade" see Sunstein, *Why Societies Need Dissent*, pp. 74–95.

⁴⁷ Sunstein, *Why Societies Need Dissent*, p. 55.

⁴⁸ See, e.g., Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2003) 112 *Yale L.J.* 1011 at 1034.

course so as to control the policy selection process.⁴⁹ In the context of national security issues the military-industrial complex may fulfill such a role.⁵⁰ Such interest groups, seeking to influence national policy towards increased spending on defense and national security and according greater weight to national security concerns in setting national priorities, enjoy the benefits of possessing and controlling specialized information and expertise about potential national security risks and of being highly organized. This may not only lead other institutions, such as the courts, to accord a significant margin of appreciation and deference to the judgments of national security entrepreneurs, but it may also mold the general public's perception of the risks that terrorists, wars or emergencies present to the nation.⁵¹ Thus, if availability entrepreneurs acting in the area of national security present certain risks as highly likely to occur (or of special magnitude) their position is likely to influence greatly decision-makers and the public at large. Moreover, the combination of emotional contagion and consensus leading to the prioritization of a "dominant position" will increase the ability of availability entrepreneurs to shape and influence public opinion and policy-making through reputational cascades when "people think they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the good opinion of others."⁵²

In seeking to manipulate public opinion and decision-making, the framing of the relevant issues is critical. Policy choices are frequently shaped more by the framing of outcomes than by the substance of the issues at stake. Thus, in order to increase public support for its actions, the government (and particularly the executive branch) may seek to manipulate information pertaining both to the magnitude and probability of

⁴⁹ Timur Kuran & Cass R. Sunstein, 'Availability Cascades and Risk Regulation' (1999) 51 *Stanford Law Review* 683 at 727; Sunstein, 'Terrorism and Climate Change', p. 539. See also Molly J. Walker Wilson & Megan P. Fuchs, 'Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns' (2009) 30 *Cardozo L. Rev.* 2147.

⁵⁰ Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), available at <<http://www.eisenhower.utexas.edu/farewell.htm>>. See also Jon D. Hanson & Douglas A. Kysar, 'Taking Behavioralism Seriously: The Problem of Market Manipulation' (1999) 74 *N.Y.U. L. Rev.* 630 at 722–43; Jon D. Hanson & Douglas A. Kysar, 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation' (1999) 112 *Harvard L. Rev.* 1420.

⁵¹ Sunstein, *Why Societies Need Dissent*, pp. 54–95.

⁵² Sunstein & Hastie, 'Four Failures of Deliberating Groups', pp. 15–17.

potential risks or to the costs and benefits of pursuing different measures in response to such risks.⁵³

As noted above, national security related risks, in general, and high-magnitude, low-probability threats, in particular, are especially susceptible to governmental “probability inflation”⁵⁴ since they involve acute informational asymmetries between the Executive and other government branches and the public, resulting in greater deference towards the Executive.⁵⁵ Another type of framing takes place when events are characterized in different ways, invoking a potentially different set of parameters of response. It may well be that framing the events of September 11, using the language and rhetoric of “war” led to different responses to the threats than would have been the case had the events and the threat from al Qaeda been captured through the language of crimes and criminal law.⁵⁶ This is also linked to the phenomenon of “anchoring.” Amos Tversky and Daniel Kahneman demonstrated that the first number with which a decision-maker is presented has a demonstrable effect on that person’s ultimate choice. That first number becomes the anchor to which all future assessments are then tied. It strongly influences the ultimate decision in so far as it would be taken as the starting point from which certain adjustments can be made.⁵⁷ In our context it may be said that anchoring the events of September 11th in the context of “war” has greatly shaped and influenced the responses to such events.

⁵³ See, e.g., Richard L. Hasen, ‘Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules’ (1990) 38 *UCLA L. Rev.* 391; Michael Stohl, *War and Domestic Political Violence: The American Capacity for Repression and Reaction* (1976) 82–95; Paul Slovic et al., ‘Facts Versus Fears: Understanding Perceived Risk’, in *Judgment Under Uncertainty: Heuristics and Biases*, p. 483; Slovic, ‘The Affect Heuristic’, p. 981. See also George Loewenstein & Jane Mather, ‘Dynamic Processes in Risk Perception’ (1990) 3 *J. Risk & Uncertainty* 155 at 161–65.

⁵⁴ Masur, ‘Probability Thresholds’, p. 1325.

⁵⁵ *Id.* p. 1329. Masur notes that “High-magnitude harms are national-security-implicating harms, and national-security-implicating harms are the province of the executive.” *Id.* p. 1330.

⁵⁶ See, e.g., Elaine Tyler May, ‘Echoes of the Cold War: The Aftermath of September 11 at Home’ in Mary L. Dudziak (ed.), *September 11 in History: A Watershed Moment?* (2003) 35.

⁵⁷ Amos Tversky and Daniel Kahneman, ‘Framing of Decisions and the Psychology of Choice’ (1974) 211 *Science* 453 at 457–58; Plous, *The Psychology of Judgment and Decision Making*, p. 146.

At the same time, the more confident “trusted” officials are in the correctness of their own assessments, that might, in and of itself, breed more radical responses to the perceived threats. As Sunstein suggests, “people with extreme views tend to have more confidence that they are right, and ... as people gain confidence, they become more extreme in their beliefs.”⁵⁸ Once again, the significant asymmetries in information between the experts and everyone else may contribute further to such confidence by the “experts” in the correctness of their positions. Overconfidence is often buttressed by notions of self-fulfilling prophecies and the observable tendency to prefer information that is consistent with one’s previously held views, or to interpret information in ways that confirm those views.⁵⁹ This may also account for an attitude of suspicion and even disregard towards divergent positions that are advocated by “civilians.” At the same time, the phenomenon of “Monday morning quarterbacking” (known in scholarly circles as the “hindsight bias”) means that people tend to believe that they knew and assessed correctly all along a particular risk and its probability, even though the risk was completely unanticipated.⁶⁰ The problem is that if people, in hindsight, believe that the risk was more foreseeable and still occurred that might be interpreted to mean that not enough measures had been taken in order to prevent the harm from taking place. That may lead “experts” whose professional reputations depend on their ability to anticipate threats and foil them to claim that the only reason for the failure to prevent the threat from materializing must be that they (i.e., the nation) were forced to fight the threats “with one hand tied behind their back” and to put the blame for the failure to act on those who are castigated as “soft on terrorism.” This may also contribute to the adoption of even more draconian counter-terrorism measures today than would have otherwise been justified by the circumstances.

Finally, group polarization is even more probable in circumstances that are likely to result in groupthink, i.e., a “mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when

⁵⁸ Sunstein, *Laws of Fear*, p. 100. See also Jeffrey J. Rachlinski, ‘The Uncertain Psychological Case for Paternalism’ (2003) 97 *Northwestern U. L. Rev.* 1165 at 1172–73.

⁵⁹ Paul Horwitz, ‘Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment’ (2003) 76 *Temple L. Rev.* 1 at 17; Plous, *The Psychology of Judgment and Decision Making*, pp. 231–34.

⁶⁰ See, e.g., Chris Guthrie et al., ‘Inside the Judicial Mind’ (2001) 86 *Cornell L. Rev.* 777 at 799–803.

the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action."⁶¹ Groupthink is more likely when groups are insulated from outside influence, are relatively homogeneous, lack an impartial leader and systematic procedures for evaluating evidence and make decisions in times of great stress.⁶²

The fact that violent crises breed very strong emotions, and that those emotions are particularly subject to emotional contagion, increases the danger of bias and distortions in another important way. Cognitive theory researchers have developed theories of thinking, knowing, and information processing that are known as "dual-process" theories. One such theory argues that emotions are part of "System I reasoning" (that Slovic calls "the experiential system"), which is "fast, automatic, effortless, associative, and often emotionally charged," as contrasted with "System II reasoning" ("the analytic system"), which is "slower, serial, effortful, and deliberately controlled."⁶³ As such, system I, which incorporates heuristic-based reasoning, is deemed more error-prone than system II.⁶⁴ Although system II is linked to analytical, logical reasoning, and system I is mostly affective, both systems may well be rational and serve different functions.⁶⁵ According to theory, affective responses to, and the use of cognitive heuristics to deal with, situations, actions or other individuals, i.e., responses that belong in System I happen rapidly and automatically.⁶⁶ Not only are such affective responses our first reactions, but they also guide information processing and judgment by the analytic system—system II—and serve as an orienting mechanism for the deliberative processes that take place in system II.⁶⁷ To the extent that violent crises invoke strong, even extreme emotional responses that are likely to be amplified throughout society and groups of decision-makers, it seems reasonable to assume that whatever biases and errors that taint system I, would carry over and distort our

⁶¹ Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (1982) 9

⁶² *Id.* pp. 242–59; Wells, 'Questioning Deference', pp. 927–28.

⁶³ Daniel Kahnman, 'Maps of Bounded Rationality: Psychology for Behavioral Economics' (2003) 93 *Am. Econ. Rev.* 1449 at 1451; Paul Slovic, 'What's Fear Got to Do with It? It's Affect We Need to Worry About' (2004) 69 *Missouri L. Rev.* 971 at 972.

⁶⁴ Sunstein, 'Terrorism and Climate Change', pp. 522–23.

⁶⁵ One need only consider the role played by instinct and intuition in the struggle for survival.

⁶⁶ Slovic, 'The Affect Heuristic', p. 971.

⁶⁷ *Id.* pp. 974–75.

long-term deliberative capacity.⁶⁸ Furthermore, once opinions about the risk of future terrorist attacks are formed (even if somewhat tentatively at first), decision-makers, and the public at large, are likely to seek evidence that will further confirm their initial assessments and to reject and exclude relevant evidence that may contradict such assessments. This leads to further entrenchment of mistakes.⁶⁹

* * *

The biases mentioned above suggest that under extreme circumstances governmental overreaction against terrorist and other violent threats is a likely outcome. This conclusion is buttressed further by prevalent characterizations of violent emergencies in dichotomized and mutually exclusive “us versus them” terms.⁷⁰ The contours of conflict are drawn around groups and communities rather than individuals. Such distinctions need not be taken as given; counterterrorism measures often actively produce and construct a suspect community.⁷¹ What is critical, though, is the identification of such a community of “others.” In times of crisis the dialectic of “us versus them” serves several functions. It allows people to vent fear and anger in the face of actual or perceived danger, and direct negative emotional energies toward groups or individuals clearly identified as different.⁷² The same theme also accounts for the greater willingness to confer emergency powers on the government when the “other” is well-defined and clearly separable from the members of the community.⁷³ The

⁶⁸ Lowenstein et al., ‘Risk as Feelings’, pp. 275–76.

⁶⁹ Max Bazerman, *Judgment in Managerial Decision Making* (1998) 35. See also, Ian S. Lustick, *Trapped in the War on Terror* (2006).

⁷⁰ See Oren Gross & Fionnuala Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006) 220–27.

⁷¹ Paddy Hillyard, *Suspect Community: People’s Experience of Prevention of Terrorism Acts in Britain* (1993) 257; Leti Volpp, ‘The Citizen and the Terrorist’ in Mary L. Dudziak (ed.), *September 11 in History: A Watershed Moment?* (2003) 147.

⁷² Sunstein, ‘Terrorism and Climate Change’, pp. 542–44 (discussing what he calls the “Goldstein Effect,” i.e., “the ability to intensify public concern by giving a definite face to the adversary, specifying a human source of the underlying threat and a person to be blamed for it ... people are especially likely to respond to an identifiable perpetrator—just as they are especially likely to respond to an identifiable victim.”).

⁷³ W.A. Elliott, *Us and Them: A Study of Group Consciousness* (1986) 9; Vincent Blasi, ‘The Pathological Perspective and the First Amendment’ (1985) 85 *Columbia L. Rev.* 449 at 457; David Cole, ‘Enemy Aliens’ (2002) 54 *Stanford L. Rev.* 953 at 955; Oren Gross,

fact that the targets of emergency and counter-terrorism measures are perceived as outsiders, frequently foreign ones, has important implications when communities set out to strike a proper balance between liberty and security in times of crisis. The clearer the distinction between “us” and “them” and the greater the threats “they” pose to “us,” the greater in scope the powers assumed by government and tolerated by the public become. Balancing takes place not between security and liberty as such, but rather between *our* security and *their* liberty.⁷⁴

Targeting outsiders is likely to incur little political cost for decision-makers. It may even prove to be politically expedient: While the benefits (perceived or real) of fighting terrorism and violence accrue to all members of society, the costs of such actions seem to be borne disproportionately (even exclusively) by a distinct and ostensibly well-defined group of people. Moreover, inasmuch as violent emergencies may lead to the targeting of “foreigners,” those targeted may lack the most basic of requirements for a meaningful political leverage—the right to vote political officials out of office.

Times of great danger (real or perceived) have brought about a confluence of two mutually reinforcing trends, namely the tendency of the public to fear and hysteria, and nativistic tendencies. In his seminal study, *Strangers in the Land*, John Higham analyzes the phenomenon of American Nativism, which he defines as “intense opposition to an internal minority on the ground of its foreign (i.e., ‘un-American’) connections.”⁷⁵ Higham finds patterns of nativistic attitudes throughout American history, focusing, in particular, on anti-Catholicism, anti-radicalism, and racial nativism. Yet, he also notes that “nativism usually rises and falls in some relation to other intense kinds of national feeling.”⁷⁶ Intense moments, such as

‘Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?’ (2003) 112 *Yale Law Journal* 1011 at 1082–85; Ileana M. Porras, ‘On Terrorism: Reflections on Violence and the Outlaw’ (1994) *Utah L. Rev.* 119; Natsu Taylor Saito, ‘Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States’ (1998) 1 *Yale Hum. Rts. and Development L. J.* 53 at 57–59; Leti Volpp, ‘The Citizen and the Terrorist’ (2002) 49 *UCLA L. Rev.* 1575.

⁷⁴ David Cole, *Enemy Aliens* (2003) 4–5. Compare with Sunstein, ‘Terrorism and Climate Change’, pp. 529–30 (discussing the perception that tackling climate change would involve “American costs” and “Foreign benefits.”).

⁷⁵ John Higham, *Strangers in the Land: Patterns of American Nativism, 1860–1925* (1983) 4.

⁷⁶ *Id.*, p. 4.

the Haymarket Affair of May 1886,⁷⁷ while not creating nativism, certainly flared up such emotions and attitudes and led to the intensification and polarization of pre-existing nativistic sentiments. Violent emergencies tend to result in situations where the cost bearers are sufficiently few and powerless, or have certain substantial (perhaps even insurmountable) barriers to their coalescing to fight the government's actions.⁷⁸ Under such circumstances, the danger is that political leaders will tend to strike a balance disproportionately in favor of security and impose too much of a cost on the target group without facing much resistance (and, in fact, receiving strong support) from the general public.⁷⁹

Research has demonstrated that when people contemplate their mortality they tend to punish or judge more harshly those who violate—or are at least perceived to violate—deeply held cultural values.⁸⁰ The specter of our own mortality tends to lead us to make decisions that reinforce deeply held cultural values. To the extent that “foreign” connotes that which is not part of our group cultural identity and is even perceived to threaten it, it is not hard to see why, in the context of terrorist threats, “foreign” will be particularly targeted.⁸¹

The stigma of foreignness is not limited to the distinction of citizenship. “Outsiders” need not necessarily be (although they primarily

⁷⁷ *Id.*, pp. 52–63.

⁷⁸ William J. Stuntz, ‘Local Policing After the Terror’ (2002) 111 *Yale L. J.* 2137 at 2165.

⁷⁹ Blasi, ‘The Pathological Perspective’, p. 457; Juan E. Méndez, ‘Human Rights Policy in the Age of Terrorism’ (2002) 46 *St. Louis U. L. J.* 377 at 383; Stuntz, ‘Local Policing’, p. 2165; Volpp, ‘Citizen and Terrorist’, pp. 1576–77; Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004) 545; Henry P. Monaghan, ‘The Protective Power of the Presidency’ (1993) 93 *Columbia L. Rev.* 1 at 26.

⁸⁰ Jeffrey J. Rachlinski et al., ‘Inside the Bankruptcy Judge’s Mind’ (2006) 86 *Boston U. L. Rev.* 1227 at 1256. Rachlinski, Guthrie and Wistrich suggest that mortality salience has more influence on an individual’s decision making when she is forced to contemplate her personal mortality rather than mortality in the abstract. Terrorist threats, as noted above, often lead to a strong sense of personal insecurity and fear of death or serious harm befalling oneself or loved ones.

⁸¹ Rachlinski et al., ‘Inside the Bankruptcy Judge’s Mind’, pp. 1250–52 (discussing the “mortality salience” hypothesis). See also Kenneth L. Karst, ‘Threats and Meanings: How the Facts Govern First Amendment Doctrine’ (2006) 58 *Stanford L. Rev.* 1337 at 1342–43 (noting that lethal threats, such as the ones invoked by terrorism, trigger not only short-term fear but also long-term anxiety that may continue to preoccupy the person who was targeted long after the initial life-threatening shock).

are) non-citizens. Crises tend to lead to focus on identity and solidarity, rather than the formal legal characteristics of citizenship.⁸² Citizens who are somehow identified with the enemy are also seen as outsiders, as the internment of American citizens (together with non-citizens) of Japanese ancestry during World War II demonstrated. “Foreign” connotes, therefore, anything that threatens the “American way of life.”⁸³ The links to things and influences from abroad can then be easily made.⁸⁴ Race, religion, and eventually ideas and beliefs and associations can, and have been, described as “foreign,” mobilizing significant popular forces against particular groups. As William Wiecek notes: “Since the early nineteenth century, Americans have nurtured a consistent fear that alien ideologies, as well as the foreigners who were thought to be their vectors, were invading the pristine American republic.”⁸⁵

Whether drawn along citizenship, ethnic origin, race, or religion, a sense of clear distinction between “us” and “them” facilitates pushing the emergency powers’ envelope. A bright-line separation between “us” and “them” allows for piercing the Rawlsian veil of ignorance.⁸⁶ We allow for more repressive emergency measures when we believe that we are able to peek beyond the veil and ascertain that such powers will not be turned against us. The portrayal of the sources of danger as “foreign” and terrorists as “others” who are endowed with barbaric characteristics and who are out to destroy us and our way of life is used further to prove the urgent need for radical measures to meet the threat head on.⁸⁷

While the distinction between us and them is not unique to the sphere of emergency powers crises lead to heightened individual and group consciousnesses. Allegiance to the community and the willingness to sacrifice for the community’s sake—in certain situations, the willingness to make

⁸² Volpp, ‘Citizen and Terrorist’, p. 156; Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7 *Indiana J. of Global Legal Stud.* 447; Christina E. Wells, ‘Fear and Loathing in Constitutional Decision-Making’ (2005) *Wisconsin L. Rev.* 115.

⁸³ See, e.g., Rupert Brown, *Prejudice: Its Social Psychology* (1995) (discussing threats to a group’s social identity).

⁸⁴ Wells, ‘Questioning Deference’, pp. 909–21.

⁸⁵ William M. Wiecek, ‘The Legal Foundations of Domestic AntiCommunism: The Background of *Dennis v United States*’ (2001) *Supreme Ct. Rev.* 375 at 381.

⁸⁶ John Rawls, *A Theory of Justice* (1999) 102–07.

⁸⁷ Porras, ‘Violence and the Outlaw’, pp. 121–22. See also Deborah A. Small & George Loewenstein, ‘The Devil You Know: The Effects of Identifiability on Punishment’ (2005) 18 *J. Behavioral Decision Making* 311 at 315–16.

the ultimate sacrifice of one's own life—receive a higher premium and attention in times of peril that endanger the group. The lines of ins and outs are more clearly and readily drawn.⁸⁸ Stereotyping is often employed with respect both to insiders and to outsiders, emphasizing good, noble, and worthy attributes of the former, and negative traits of the latter. Collective derogatory name-calling and identification of the others as “barbarians” are symptoms of that trend.⁸⁹ Internal conformities within the community are exaggerated, while divergence from “outsiders” is emphasized.⁹⁰

* * *

Cognitive theory of decision-making raises significant concerns about balancing tests and their outcomes, in general, and in the context of violent crises, in particular. After identifying and recognizing the biases and distortions noted above, two general inquiries ought to be followed in order to examine whether the effects of these biases might be moderated, mitigated, or prevented. The first inquiry pertains to institutional questions, i.e., whether some institutions (such as the courts, the legislature or the executive branch of government) may be better suited than others to engage in balancing acts in as much as they are less prone to suffer from these cognitive biases.⁹¹ The second inquiry is whether any changes should be, and in fact could be, made in the utilization of balancing tests in order to achieve results out of the balancing process that are less affected by distortions. It is to this second inquiry that I now turn briefly by looking at some corrective mechanisms that have been used in the context of First Amendment jurisprudence in the United States.

⁸⁸ Frederick Schauer, ‘Community, Citizenship, and the Search for National Identity’ (1986) 84 *Michigan L. Rev.* 1504; Quarantelli & Dynes, ‘Community Conflict’, pp. 143–44.

⁸⁹ Elliott, *Us and Them*, p. 9; J. Glenn Gray, *The Warriors: Reflections on Men in Battle* (1973) 157–202; Jon Hanson & David Yosifon, ‘The Situational Character: A Critical Realist Perspective on the Human Animal’ (2004) 93 *Georgetown L.J.* 1 at 55–57.

⁹⁰ Elliott, *Us and Them*, p. 9.

⁹¹ On the significance of the “institutional” question see, for example, Cass Sunstein, ‘Behavioral Law and Economics: A Progress Report’ 1 *Am. L. & Econ. Rev.* (1999) 115 at 146; Samuel Issacharoff, ‘Behavioral Decision Theory in the Court of Public Law’ 87 *Cornell L. Rev.* (2002) 671 at 671–72.

One such mechanism that courts have been using in order to minimize the distortions that emerge when dealing with high-magnitude, low-probability risks are “probability thresholds” that enable the courts to focus on issues of likelihood and probability rather than on potential magnitude of harm.⁹² Probability thresholds set a lower boundary on how likely a potential harm must be in order for that harm to register in the constitutional calculus, i.e., be accounted for in any subsequent act of constitutional balancing, regardless of the harm’s magnitude. The use of such thresholds prevents balancing from taking place unless the probability of the asserted harm crosses a certain threshold. Regardless of the projected magnitude of the particular harm, if its occurrence is so unlikely as to not clear the threshold, First Amendment doctrine “instructs courts to refuse to weigh the expected harm from the event against the benefits that the speech in question is likely to produce.”⁹³ As a result, low-probability harms are eliminated from consideration, and balancing will not take place, no matter how great their magnitude might be.

Yet, even when a particular potential harm does cross the probability threshold, other mechanisms may be used to mitigate the harmful consequences of cognitive biases. Analyzing First Amendment jurisprudence through the prism of risk analysis,⁹⁴ it has been suggested that one major reason for the surprising fact that “in the United States, at least, the freedom of expression has gone largely untouched” by and during the war on terror is that “the First Amendment safeguards for political speech that may incite violence or impede war efforts have been ratcheted so high that a successful conviction for such speech is almost impossible to obtain.”⁹⁵ The claim is that First Amendment case law has developed in that direction so as to recognize and guard “against the predictable shortcomings in our ability to perform accurate risk analysis.”⁹⁶

Others have been less sanguine about the ability of doctrinal formulas to protect effectively civil liberties in times of acute crisis and argued that no true balancing test—no matter how strict the judicial review may be and how compelling the interests involved are—may ever be robust enough to not become meaningless in such perilous times. While not

⁹² Masur, ‘Probability Thresholds’.

⁹³ *Id.* p. 1297.

⁹⁴ Horwitz, ‘Free Speech as Risk Analysis’, pp. 27–49.

⁹⁵ *Id.* pp. 2, 7.

⁹⁶ *Id.* p. 8.

rejecting the potential usefulness of doctrinal standards, Vincent Blasi seems to put greater trust in the efficacy of “mechanistic measures” that confine the range of discretion that is left to future decision-makers over standards that require in their application that are more susceptible to distortions that would result in less speech protective outcomes under intense pressure.⁹⁷ In order to prepare for such intense pressures, he argues for the adoption of “pathological perspective” in adjudicating First Amendment disputes and fashioning First Amendment doctrines. He suggests that such an approach is necessary in light of governmental proclivity to violate the rights that are protected by the First Amendment in times of crisis.⁹⁸ Courts are called upon to make “a conscious effort ... to strengthen the central norms of the First Amendment against the advent of pathology.”⁹⁹ Emphasis ought to be put “in adjudication during normal times on the development of procedures and institutional structures that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics.”¹⁰⁰

These attempts at curbing and moderating the pernicious effects of bias through institutional and doctrinal mechanisms operate as precommitments that are designed to limit, *ex ante*, our ability to engage in cognitively fraught act of balancing of constitutional rights against overestimated possibilities of harm.¹⁰¹

⁹⁷ Blasi, ‘The Pathological Perspective’, pp. 474–80. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 109–16.

⁹⁸ Blasi, ‘The Pathological Perspective’, p. 450 (“Pathology” ... is a social phenomenon, characterized by a notable shift in attitudes regarding the tolerance of unorthodox ideas. What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe.”).

⁹⁹ *Id.* p. 459.

¹⁰⁰ *Ibid.* p. 468. Blasi advocates a “keep it simple” guideline, i.e., judges should use simple First Amendment principles in order to strengthen the restraining power of the First Amendment in times of crisis. *Ibid.* pp. 466–76. Blasi suggests viewing the First Amendment as concentrating on core values that are more easily defensible in repressive times. *Ibid.* pp. 476–80.

¹⁰¹ Horwitz, ‘Free Speech as Risk Analysis’, p. 66. See also Sanford Levinson, ‘Precommitment’ and ‘Postcommitment’: The Ban on Torture in the Wake of September 11’ (2003) 81 *Texas L. Rev.* 2013; Steven R. Ratner, ‘Overcoming Temptations to Violate Human Dignity in Times of Crisis: On the Possibilities for Meaningful Self-Restraint’ (2004) 5 *Theoretical Inquiries in Law* 81; Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (rev. ed. 1984); Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (1995); Note, ‘War, Schemas, and Legitimation: Analyzing

Cognitive theory of decision-making under conditions of uncertainty suggests that balancing processes, in general, and those seeking to balance such interests as liberty and security, in particular, are likely to suffer from identifiable biases. Its insights indicate that the outcomes of such delicate and complex balancing acts are likely to be distorted and thus sub-optimal. While the theory does not, necessarily, make claims as to what the equilibrium between the competing interests ought to be at any given context¹⁰²—for example, it does not seek to determine what an acceptable level of risk from terrorist attacks ought to be—it does suggest that once such a decision is made, the analysis that decision-makers perform in particular cases and in adopting specific counter-measures is likely to be significantly flawed. Perhaps even more importantly, it suggests that such flaws are systematic and that they are going to be tilted in one direction—i.e., towards more security—than the other, i.e., more liberty.

the National Discourse about War' (2006) 119 *Harvard L. Rev.* 2099 at 2118–20 (advocating binding precommitments about what would be acceptable justifications for war, in order to safeguard against “potentially biasing heuristics”).

¹⁰² As Aharon Barak, the former President of the Israeli Supreme Court, notes: “The balancing point between the conflicting values and principles is not fixed. It differs from case to case and from issue to issue. The damage to national security caused by a given terrorist and the nation’s response to the act affects the way in which the freedom and dignity of the individual are protected.” Aharon Barak, ‘The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism’ (2003) 58 *U. of Miami L. Rev.* 125 at 135; Barak, ‘A Judge on Judging’, pp. 93–97.