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9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism

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WHAT COUNTS IN COUNTERTERRORISM

Jonathan H. Marks*

Abstract

The recent bombings in London and Madrid raise the specter of episodic terror attacks in the United States that fall short of the “mushroom cloud” scenarios discussed in the aftermath of 9/11 and the run-up to the Iraq war. Despite the smaller scale of these attacks, they have the potential to generate widespread fear and anger. This article builds on new work in behavioral law and economics to show how these emotional responses can generate systematic biases that motivate and direct counterterrorism policy. These biases should be cause for concern, not least when they lead us to adopt policies that are more burdensome on others instead of those that are most effective at preventing further attacks. Not surprisingly, policies which impose burdens on others—and therefore appear less costly—tend to interfere with civil liberties, particularly those of non-citizens. Recent psychological studies offer an unprecedented opportunity to recognize and understand these biases, and to take action to correct them. One process-oriented corrective that I propose

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here is to conduct systematic human rights impact assessments during the formulation of counterterrorism law and policy. These assessments should lead to measures more protective of both liberty and security.

I. INTRODUCTION .................................................................103
II. LESSONS FROM LONDON AND MADRID ..........................106
III. INDIVIDUAL RESPONSES TO TERRORISM .....................107
    A. Cognitive and Emotional Responses .......................107
    B. Moral Strategems .........................................................112
IV. COLLECTIVE RESPONSES TO TERRORISM .....................114
    A. Social Mechanisms of Multiplication and Amplification ...114
    B. Legal Stratagems: Variegated Exceptionalism ...............118
V. IMPLICATIONS OF OUR RESPONSES FOR LAW AND POLICY ......................................................122
VI. EVIDENCE OF COUNTERTERRORISM DISPLACEMENT ........127
VII. THE EMERGENCY CONSTITUTION AND THE ROLE OF PROCESS .........................................................135
VIII. HUMAN RIGHTS IMPACT ASSESSMENTS ......................140
     A. Some Impact Assessment Antecedents ......................140
     B. The Nature and Content of HRIAs .............................147
         1. The Language of Human Rights .........................147
         2. The Nature of the Inquiry and the Analysis ............148
         3. Spheres of Impact .....................................................150
         4. Responsibility for Conducting the Assessment .......151
         5. Prospective and Retrospective Review ...............152
     C. The Role and Functions of Human Rights Impact Assessments ..................................................153
         1. Transparency ..............................................................154
         2. Antidote to Security Panics .................................156
         3. Antidote to Legal Exceptionalism ..........................157
         4. Antidote to Libertarian Panics ..............................158
         5. Calibration and Mediation ....................................159
IX. CONCLUSION ...............................................................159
I. INTRODUCTION

Since I came to live in the United States four years ago on one of the first flights across the Atlantic after 9/11, I have taught several courses on terrorism and the law. I have often asked my students what they think, but—perhaps unsurprisingly—never what they feel. I have tried to reason dispassionately about terrorism and the legality of our responses to it, and I have encouraged my students to do the same. The suicide bombings in London on July 7, 2005 reminded me of the impossibility of that endeavor.

London was my home for more than a decade. I lived there through the IRA bombings of the 1990s. So, on July 7, I spent most of the day frantically trying to contact friends and family by phone or email. Fortunately, they all escaped the bombings. But my brother—a physician at a children’s hospital in central London—mourns the death of two colleagues. Six other co-workers were injured, including a recovery nurse who lost her leg.

After my initial panic, I quickly became enraged at the senseless loss of life and limb: more than fifty people were dead and a further seven hundred were maimed or injured. But it was not long before another burgeoning emotion was competing for my attention. Little more than two weeks later, and only days after a failed second round of attacks in London on July 21, I was due to fly back to the city for a good friend’s wedding. Just as I had agonized about whether to fly to America only days after 9/11, I struggled again over whether I should come back to London and, if so, whether I should use the London Underground. I knew that I was more likely to be killed on the cab ride to Dulles airport than to be the victim of a terrorist attack. But my fear seemed impervious to statistics. In the end, however, I somehow overcame the fear, flew to London and—after a few expensive cab rides—traveled on the Tube. Weddings tend, of course, to be emotional affairs, but my friend’s was tinged with unexpected sorrow. In the sermon, the priest explained why a bride due to be married in the same church a few weeks later would not be walking down the aisle after all: she lost both legs in the attack.

High-profile terror attacks—whether the recent bombings in London, the Madrid bombings on March 11, 2004, or the events of 9/11—can provoke powerful emotional responses. This article, then, is about the distorting effects of these emotive reactions. Until very recently, they have been largely ignored by economists and legal scholars who have studied the effects of cognitive

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2. This is not intended to suggest that emotion is necessarily counterproductive. See infra text accompanying notes 31–32.
biases on personal and public choices. Yet our emotional reactions to terrorism, particularly to vivid attacks, can create potent biases that not only influence individual decisions about whether or not to take a plane or a train, but also direct and shape nations’ counterterrorism policies.

Recent research exploring the effects of strong primary emotions, such as anger or fear, on cognition provides new insights into how systematic biases can transform policy choices, at times in dangerous ways. One notable study, for example, indicates that anger is more likely than fear to make us predisposed to poorly targeted—or even untargeted—retributive responses. The vividness of aggressive measures such as the “shock and awe” bombing raids in Iraq also helps explain what makes them more appealing than less spectacular measures that might more effectively reduce vulnerability to further attack.

In this article, I draw on this psychological research, as well as related work in behavioral law and economics, to show how our individual and collective reactions to terrorism put us at high risk of pursuing policies that impose substantial burdens on others and appear less costly, both politically and financially, for ourselves, instead of choosing more effective counterterrorism programs that are better able to forestall future attacks. I term this phenomenon *counterterrorism displacement*.

Policies that impose burdens on others—and therefore tend to appear less costly financially and politically—usually involve interference with civil liberties, in particular the rights and liberties of non-citizens. Justice William J. Brennan once ruefully observed that “[a]fter each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.”

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3. See infra note 23 and accompanying text.
4. Although I draw heavily on behavioral psychology in this article, I acknowledge that other disciplines—and other forms of interdisciplinary scholarship—may also contribute to a better understanding of our individual and collective responses to terrorism. See Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 Colum. L. Rev. 405 (2005), for a map of the expanding field of law and behavioral biology—a field that also draws on many other disciplines including evolutionary biology.
5. Behavioral economics has traditionally been used in support of arguments that urge restraint in the regulation of environmental and public health risks. See, e.g., Cass Sunstein, *Risk and Reason: Safety, Law and the Environment* (2002). Although the discipline has recently been applied to terrorism (see infra note 27), it has never been used to make the argument I develop here. For a related thesis—published shortly after this article was submitted for publication—see Jules Lobel & George Loewenstein, *Emote Control: The Substitution of Symbol for Substance in Foreign Policy and International Law*, 80 Chi-Kent L. Rev. 1045 (2005), discussed further at infra notes 35, 120 and 280.
6. William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in*
Insights from recent psychological studies present us with a fresh opportunity to avoid repeating the excesses of the past. We know now that our behavior, both individual and collective, in a heightened emotional state can appear incomprehensible to us once we have cooled off. Acknowledging this “empathy gap” within ourselves is the first step towards addressing it. In the context of terrorism, one of the next steps—and it is one I urge here—is to pay greater attention to human rights implications when formulating counterterrorism law and policy. But I do not mean to suggest that this is the only solution, or, indeed, that it is a complete one. My more modest hope is that my proposal here will trigger further dialogue and scholarship not simply about its merits, but about other structural, analytical, or interpretive devices that may be deployed within the three branches of government in order to restrain excesses due to emotion.

In Part II, I draw some lessons concerning our emotive responses to terrorism from the recent bombings in London and Madrid. In Parts III and IV, I explore the psychological and social pathways of individual and collective reactions to high-profile terror attacks. In Parts V and VI, I discuss the impact of these responses on law and public policy, showing how that impact has been underestimated by Adrian Vermeule, and I present evidence to support my displacement hypothesis. In Part VII, I critique the proposal by Bruce Ackerman and others to create an emergency constitutional mechanism that could be invoked in response to large-scale terrorist attacks. I argue that such mechanisms magnify the cognitive distortion and displacement problems that bedevil counterterrorism policy-making and law. Finally, in Part VIII, I make a case for human rights impact assessments as a systematic and proactive remedy for cognitive distortion and displacement in the formulation of legal and policy

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8. See infra text accompanying notes 29 and 30.

responses to terrorism. By clarifying our understanding of the costs of counterterrorism policies, including costs externalized to others, I argue that human rights impact assessments can make counterterrorism planning and law-making more protective of both liberty and security.

II. LESSONS FROM LONDON AND MADRID

The events of July 7—together with the train bombings in Madrid on March 11, 2004—remind us that there are at least two forms of terrorism that may be the objects of our fear, and to which we must respond. The first might be called “mass terrorism,” an attack that uses non-conventional means to kill very large numbers of people. 10 The paradigm for this sort of terrorism is a nuclear explosion in a major city such as Baltimore, dramatically destroyed in the post-9/11 movie, The Sum of All Fears, 11 or one that kills hundreds of thousands of people in a very short period of time using a biological agent, such as the aerosolized smallpox attack described by Richard Posner in his recent book, Catastrophe. 12 Terror attacks that merit the epithet “mass” have not only animated writers, book publishers, and Hollywood producers; the prospect of such an attack was invoked to elicit public support for the Iraq war. 13 Such attacks may threaten the life of the nation or—in Posner’s words—bring about “utter overthrow or ruin.” 14

A second threat, one that materialized in both London and Madrid, is that of smaller scale terrorist attacks that kill fewer people, although the fatalities and injuries are by no means insignificant. They may damage or destroy some part of our critical infrastructure. No single attack of this type is likely to threaten the life of the nation. Cumulatively, such attacks have the potential to erode public confidence in potential targets (for example, mass transit systems), in security services, and in the government more generally. However, Londoners endured repeated IRA bombings in the 1990s. Israel has

10. This term draws on the language of weapons of mass destruction. It is just one of a number of terms that convey a similar meaning. Others include “superterrorism” or “mega-terrorism.” See, e.g., Ehud Sprinzak, The Great Superterrorism Scare, Foreign Pol’y Autumn 1998, at 110. For an analysis of the definition of terrorism generally, see, for example, Louis René Beres, The Meaning of Terrorism—Jurisprudential and Definitional Clarifications, 28 Vand. J. Transnat’l L. 239 (1995).
even learned to adjust to frequent suicide bombings: while they contribute to political instability,\textsuperscript{15} they have not destroyed the nation. There is no bright line dividing these two types of terrorist attack, and some kinds of attack—for example, one using a biological agent—have the potential to fall on either side of the line. The anthrax attacks in the fall of 2001 killed only a handful of people, but a well-planned anthrax attack could kill more than 100,000.\textsuperscript{16} A “dirty bomb” would not cause anywhere near the same devastation as a nuclear blast, but the fatalities, beyond those killed in the explosion, would be due to increased incidence of cancer resulting from radiation exposure and would depend on the type and quantity of the isotope employed.\textsuperscript{17}

Recognizing the psychological and political distinction between these two types of terrorism is important, particularly in light of the recent bombings in Madrid and London. Unlike mass terrorism, smaller episodic attacks are unlikely to lead to the imposition of martial law, a state of emergency, or even the widespread suspension of existing norms. However, the attacks may inspire widespread public anger and fear, particularly where they make the unthinkable, mass terrorism, seem more likely. Such emotions may lead to policies that suppress civil liberties, particularly the liberties of those who belong to a minority group and are perceived as “other.” For these reasons, it is important to think carefully about how we should formulate our responses to these smaller attacks.

\section*{III. INDIVIDUAL RESPONSES TO TERRORISM}

\subsection*{A. Cognitive and Emotional Responses}

Long before economists and psychologists forged the discipline of behavioral economics, Oliver Wendell Holmes observed that “[m]ost people reason dramatically, not quantitatively.”\textsuperscript{18} There have been few events more

\begin{itemize}
  \item \textsuperscript{15} See, e.g., David Fielding, \textit{Modelling Political Instability and Economic Performance: Israeli Investment during the Intifada}, 70 Economica 159 (2003).
  
  
  \item \textsuperscript{17} For further discussion of dirty bombs, see \textit{infra} text accompanying notes 51–55.
  
\end{itemize}
dramatic than the images of the planes hitting the Twin Towers and the even more gut-wrenching footage of occupants leaping to their deaths. It would have been surprising if such an event had not induced fear of further terrorist attacks, as well as general anxiety. This was not lost on at least one pharmaceutical company whose advertisements in the New York Times in October 2001 sought to exploit this anxiety with the caption: “Millions suffer from chronic anxiety. Millions could be helped by Paxil.”

Holmes’ explanation has a simplicity that would undoubtedly have appealed to William of Occam, but it has been illuminated and elaborated by the work of behavioral law and economics scholars.

These scholars tell us that people tend to fear so-called “dread risks,” apparently uncontrollable low-probability high-consequence events, such as mass terror attacks, more than they fear more pedestrian or chronic risks which may cause many more fatalities, though often over a longer period of time. This is why most Americans are not moved to action by the large number of deaths due to traffic accidents or lack of health insurance.

There are several reasons why low-probability risks can evoke disproportionate fear. One long-accepted cognitive mechanism is the availability heuristic, whereby the probability of an event is assessed by reference to whether a readily available example comes to mind. Since images of the World Trade Center on 9/11 are more readily available than, say, the images of road traffic fatalities that are rarely even mentioned in the media, the availability heuristic suggests that we may be inclined to exaggerate the probability of further terrorist attacks. However, an experiment conducted on 973 Americans within two months of 9/11 showed that subjects exposed to stimuli designed to heighten anger believed the risk of further terror attacks to be higher than those exposed to fear

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22. Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in Judgment Under Uncertainty, supra note 20, at 465; see also Timur Kuran & Cass Sunstein, Availability Cascades and Risk Regulation, 51 Stan. L. Rev. 683, 685, 735–46 (1999) (defining availability heuristic as “a pervasive mental shortcut whereby the perceived likelihood of any given event is tied to the ease with which its occurrence can be brought to mind”).
stimuli. So, in some cases at least, anger, rather than fear, may better explain the substance of terrorism-inspired concerns.

Recent work by George Loewenstein also indicates that heuristics and other cognitive tools cannot fully account for the role played by emotion, whether anger, fear, or some other “hot state.” Although risk is evaluated cognitively, we react to it emotionally. A more potent explanation of our responses to terrorist events may be that the vividness of an event results in an intensification of emotional responses associated with the outcome. This can result in what Cass Sunstein has termed probability neglect. Where strong emotions lead people to focus on the “badness” of the outcome, probability can become irrelevant. On this analysis, probability is not exaggerated, but ignored.

The role of emotion may also be so powerful that we have difficulty predicting its force and, once the emotion has subsided and we are restored to a “cold state,” we have difficulty understanding the behavior that the emotion provoked. This disconnect between our hot and cold states, one that Loewenstein calls the “hot-cold/cold-hot empathy gap,” has been observed in drug addicts who under-predict the force of future craving. It may apply equally to the fear or anger provoked by a terrorist attack.

To identify strong basic emotions or their behavioral sequelae as potentially problematic is not to suggest that emotions are always problematic or that they are necessarily counterproductive. On the contrary, we consider emotions to be an inherent part of a full psychological life, and—as most

23. Jennifer S. Lerner et al., Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment, 14 Psychol. Sci. 144, 146 (2003). Of course, certain stimuli may provoke both fear and anger, and the former may be the source of the latter. See, e.g., Raymond H. Johnson, Jr., Facing the Terror of Nuclear Terrorism, 72 Occupational Health & Safety 44 (2003).
26. Id. at 275–76. See also George Loewenstein, Out of Control: Visceral Influences on Behavior, 65 Organizational Behav. & Hum. Decision Processes 272, 280–81 (describing sources of “vividness” and the ways in which it may have a detrimental effect on decision-making).
28. Id. at 121.
29. Loewenstein & Lerner, supra note 24, at 634–35.
30. Id.
parents of toddlers know—a sign of healthy child development. There is good reason for this: emotions, such as fear, have evolved in order to promote survival. But as neuroscientist Antonio Damasio has observed, “[n]ot all emotions are alike in their potential to promote survival and well-being, and both the context in which an emotion is engaged and the intensity of the emotion are important factors in the potential value of an emotion on a specific occasion.” As Damasio notes, phobias can be a “major hindrance”; he further opines that anger is “mostly counterproductive in modern societies.” The trick—and the challenge—is to recognize when a particular emotion is acting as a “terrible advisor” and then to work out how to reduce the adverse consequences of its advice.

There is strong evidence that fear of terrorism may lead to more risky individual behavior. In the months following 9/11, millions of Americans

32. When parents take their twelve-month old child to the pediatrician, they are sometimes required to complete a questionnaire that asks whether the child is displaying emotions such as jealousy, fear, and separation anxiety. Physicians expect parents of a healthy child to answer affirmatively. For a philosophical account of emotional agency drawing on the literature of child emotional development, see Nancy Sherman, Taking Responsibility for Our Emotions, in Responsibility 294 (E. Paul et al. eds., 1999).

33. Antonio Damasio, Looking for Spinoza: Joy, Sorrow and the Feeling Brain 39 (2003). Some emotions that evolved to promote survival—and did so—may be less effective or even counterproductive in modern society. For an account of the phenomenon of “time-shifted rationality,” see Jones & Goldsmith, supra note 4, at 447–50.

34. Damasio, supra note 33, at 40. There may be cultural or regional variations in emotional responses and their effects. Unlike the USA PATRIOT Act, the Terrorism Bill introduced by the British government after the July 2005 bombings faced serious opposition. Notably, the proposal to extend the period of detention without charge from fourteen days to ninety days was defeated, resulting in a “compromise” of twenty-eight days. For a discussion and critique of that compromise, see Conor Gearty, Comment, It’s 1867 All Over Again, The Guardian, Nov. 29, 2005, at 28, available at http://www.guardian.co.uk/comment/story/0,,1652860,00.html. (For the text of the final provisions on detention, see sections 23 to 25 of the Terrorism Act 2006.) Variations in fear responses can also be seen outside the realm of terrorism. Europeans, for example, tend to be more fearful of hormone-treated beef and genetically-modified foods. See M. Gregg Bloche, WTO Deference to National Health Policy: Toward an Interpretive Principle, 5 J. Int’l Econ. L. 825, 835–48 (2002); Catherine Button, The Power to Protect: Trade, Health and Uncertainty in the WTO 134-40 (2004).

35. Damasio, supra note 33, at 40. On the relationship between emotion and cognition, see Jones & Goldsmith, supra note 4, at 438–42. Jones and Goldsmith note that “[e]motions supply us generally with wants and desires, and these lead us to pursue those desires in ways that sometimes involve conscious planning.” Id. at 439. The paradox is that while moderate levels of emotion may be necessary to trigger deliberative processes, such emotion may simultaneously begin to assume control over behavior, skewing or overwhelming the very deliberative processes that have been triggered. See Lobel & Loewenstein, supra note 5, at 106. For a view of emotions as “cognitive sets, interpretive frameworks, patterns of attention,” see Cheshire Calhoun, Cognitive Emotions, in What Is An Emotion? 236, 245 (Robert C. Solomon ed., 2d ed. 2003).
stopped or reduced their air travel and many of them took to the roads instead. By one account, this resulted in 317 additional fatal car crashes in the last quarter of 2001, causing 353 deaths. Whether or not this effect extended beyond the end of 2001, the number of additional road fatalities exceeded the total number of passengers and crew killed on 9/11. This casts doubt on the quality of the decision-making of these long-distance drivers, but perhaps only with the benefit of hindsight: 9/11 revealed profound weaknesses in airport security, and the probability of further attacks in the immediate aftermath could not be definitively assessed. Government communication—by actions as well as words—may have an important role to play in encouraging people to make choices that maximize health benefits and minimize risks. However, my real concern here is not that our cognitive and emotional responses to terrorism will lead us, as individuals, to make “bad” choices in our own lives. Rather, it is that they may lead to us to opt collectively for domestic and foreign policies that unduly interfere with the rights and liberties of others—policies which, in a cold state, we may come to regret.

A recent study, in which subjects were exposed to audiovisual stimuli designed to increase either fear or anger, suggests that emotion has a significant impact on the type of counterterrorism policies that Americans support.

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37. See George M. Gray & David P. Ropeik, *Dealing With the Dangers of Fear: The Role of Risk Communication*, 21 Health Affairs 106 (2002). See also Sunstein, *supra* note 27, at 132 (arguing that the government’s first line of attack should be information and education to address fear). For fear that persists or descends into irrationality, the solution may be the pharmaceutical company’s dream and the HMO’s nightmare: a combination of drug therapy and psychotherapy. See Anahad O’Connor, *A Pill That Helps Ease Grip of Irrational Fears*, N.Y. Times, Mar. 22, 2005, at F8 (reporting that the antibiotic D-cycloserine—which does nothing to soothe panic or calm nerves—increases learning and memory, and may help people overcome fears faster in psychotherapy). For a discussion of the role played by the brain’s “guard-dog,” the amygdala, in the generation of fear, see Laura Helmuth, *Fear and Trembling in the Amygdala*, 300 Sci. 568 (2003).

Anger-conditioned respondents were more likely than those conditioned by fear stimuli to favor the deportation of foreigners in the United States who lacked valid visas.39 In addition, they were less likely to favor conciliatory measures that sought to strengthen ties with countries in the Muslim world.40 Similarly, respondents conditioned to be fearful preferred investment in general capabilities—such as creating a stronger public health system—over specific measures such as a smallpox vaccination.41 The authors of the study concluded that “[a]s expected, experimentally primed anger activated more punitive preferences,” but “fear enhanced preferences for conciliatory policies and investment in broadly applicable precautionary measures.”42 This supports the view that New Yorkers who conducted vigils and formed pressure groups urging the administration not to use military force, “not in our name,”43 were motivated primarily by fear of future attacks rather than anger at the events of 9/11.

B. Moral Strategems

Some supporters of more aggressive counterterrorism measures may also rely on moral stratagems. These are devices we use to address the moral overload that occurs when we encounter competing moral imperatives.44 In an effort to alleviate the moral dissonance and psychological discomfort caused by this overload, we resort to exercises in moral compartmentalization and moral reconstruction.45 For example, some Americans who oppose the use of torture find it difficult to maintain that opposition in the face of the perceived security imperatives presented by the “war on terror.” In a recent survey, almost one in four respondents believed that it was “too restrictive” to say that governments should never use torture, but that it would be unacceptable for a foreign
government ever to use torture against an American detainee. More than half of respondents then described as “convincing” the view that “[g]iven what we learned from the 9/11 attacks, we cannot afford to tie our hands by declaring off limits any method for getting information that could be useful in the war on terrorism.” This study suggests that some respondents compartmentalize the “war on terror,” believing that it has created a new paradigm to which pre-existing moral precepts do not apply. They have also constructed a new formal moral framework to govern that paradigm.

These phenomena are not only evident in the answers given by anonymous respondents to surveys. They are also manifest in the academic debate, both legal and philosophical, on the use of torture. The most notable example—but by no means the only one—is Alan Dershowitz, who has advocated the use of judicial “torture warrants” to address the philosophical conundrum of the “ticking time bomb.” His proposal is not merely an exercise in moral compartmentalization and reconstruction. He advocates a whole new legal framework, the judicial authorization of torture. Such a proposal would undermine the absolute prohibition that is, as Jeremy Waldron has powerfully argued, “archetypal” of the line separating law from brutality. In another attempt at moral reconstruction, the then-President of the American Society of International Law argued on the eve of the Iraq war that even though the attack would violate international law, it might prove legitimate.

Similar moral stratagems may also explain why the media use the term “dirty bomb” to describe a potential weapon in the Al Qaeda arsenal, but tend to ignore the “dirtiness” of depleted uranium (DU) munitions used by the United States in the “war on terror” in Afghanistan and Iraq. This tension is

47. Id. at 7.
highlighted by Richard Posner’s definition of “dirty bomb” as “a conventional bomb coated with radioactive material,” a phrase that is equally, if not more, applicable to describe DU munitions. Both are principally conventional weapons relying on conventional explosives to create a blast. On detonation, both release fine particles of material that are radioactive and chemically poisonous. Admittedly, there is a difference in the users’ intent: DU munitions are intended to have improved armor piercing capacity, while dirty bombs are intended to create panic and fear. Additionally, a single “dirty bomb” has the potential, depending on the nature and quantity of the isotope employed, to cause many more cancer deaths than a DU munition. Nevertheless, each device has adverse effects on both the environment and health beyond initial impact.

Individual moral stratagems that ignore such tensions should be cause for concern. However, they are even more troubling when they become collective stratagems and most troubling of all when relied upon in the creation and interpretation of legal norms.

IV. COLLECTIVE RESPONSES TO TERRORISM

A. Social mechanisms of multiplication and amplification

Social mechanisms enable individual cognitive errors, emotive responses, and moral stratagems to multiply, to be amplified, and to be embraced by collectives, including legislative bodies. One powerful vehicle for...
this process is the social cascade, a social movement in which “many people
end up thinking something, or doing something, because of the beliefs or
actions of a few early movers.”57 There are two types of cascade. The first
might be called descriptive or factual cascades. These occur when people rely
upon and follow or reiterate others’ descriptions of the world, their express or
implied statements about what is. This might explain the popular—and
somewhat indestructible—belief among Americans that there were weapons of
mass destruction (WMDs) in Iraq and that Saddam Hussein had contacts within
Al Qaeda to whom he might sell those WMDs.58 The second category of
cascade might be called normative cascades. These occur when people rely
upon and follow the apparent views of others about what ought to be—for
example, what powers should be conferred on the FBI to prevent further terror
attacks or whether the United States should invade Iraq without authorization
from the United Nations Security Council. Clearly, the two types of cascade
may go hand-in-hand. In the United States, a cascade reinforcing a description
of Iraq in possession of WMDs and having links with Al Qaeda undoubtedly
contributed to a normative cascade supporting the invasion of Iraq.59

These cascades may result from a number of factors. They may be due
to an actual or perceived information differential. For example, the views of
some people may be followed where it is perceived that they have more or
better information. This may have been a factor in the case of the alleged Iraqi
WMDs. The assumption was that members of the administration had access to
persuasive intelligence information that the rest of us could not see, an
assumption Secretary of State Colin Powell tried to reinforce when he made his
presentation to the Security Council on February 5, 2003.60 A second factor is
an actual or perceived expertise differential. This may arise when some people
are perceived as being better qualified to interpret the data available to others.

57. See Cass R. Sunstein, Conformity and Dissent (Univ. Chicago Law & Econ., Olin
Dissent 55–71, 74–81 (2003) (describing the formation and dangers of informational and
reputational cascades); Kuran & Sunstein, supra note 22, at 735–46, (describing the impact of
availability cascades on democratic decision-making). Although I am indebted to Sunstein for
his insightful analysis, I have adopted my own taxonomy and explication of social cascades
that is drawn from Marks, supra note 13. See infra text accompanying notes 58–64. Sunstein
and Kuran’s availability cascades would fall into the first category described in this paragraph.

58. See Marks, supra note 13.

59. The University of Maryland’s Program of International Policy Attitudes (PIPA)
has conducted a number of studies that support this claim. For an analysis of the studies, see
Marks, supra note 13. The PIPA studies are available on the PIPA Homepage, www.pipa.org
(last visited Mar. 30, 2006).

60. Colin Powell, U.S. Sec’y of State, Address to the U.N. Security Council (Feb. 5,
Another factor may be an actual or perceived confidence differential, where those who describe the world or how it ought to be appear so confident that they may lead us to doubt our own view of the world. A fourth factor is reputational concern. Even where none of the differentials described above exist or appear to exist, we may be inclined to adopt the description of the world proffered by others because we are concerned about the perceptions others have of us. This was at the heart of John Stuart Mill’s concern about tyranny of the majority.\footnote{61}{John Stuart Mill, On Liberty 5–18 (1869).} Although we may believe that others have no better information than we do, have no greater expertise than we do, and have no reason to be more confident than we are, we follow them because we fear social persecution or judgment. All four factors may play a role in the case of either type of cascade. However, information and expertise differentials tend to fuel descriptive cascades, while confidence differentials and reputational concerns often prevail in normative cascades.

When left unchecked, cascading cognitive evaluations fuelled by elevated emotional responses can cause public panics.\footnote{62}{Loewenstein & Lerner, supra note 24, at 278–79.} The rush to buy duct tape in the U.S. following Colin Powell’s February 5, 2003 presentation to the UN Security Council about Iraq’s alleged WMD capabilities may be an example of this.\footnote{63}{Kenneth Chang & Judith Miller, Duct Tape and Plastic Sheeting Provide Solace, If Not Security, N.Y. Times, Feb.13, 2003, at A21.} However, disclosers, who convey new information, and dissenters, who present alternative opinions, may counteract these social mechanisms.\footnote{64}{Cass Sunstein, Why Societies Need Dissent 74–81 (2003).} In particular, disclosers may be important antidotes to descriptive cascades, while dissenters may provide a powerful countervailing force in the case of normative cascades. However, since descriptive cascades are likely to be entwined with normative cascades, disclosure will often be a prerequisite for effective dissent.

Cascades may, on the other hand, be deliberately encouraged and reinforced, particularly by those perceived as possessing special information or expertise. A number of claims that are, in effect, allegations of cascade manipulation have been made since 9/11, and not just by human rights groups and activists.\footnote{65}{For an argument that the motivating fear after 9/11 is political rather than personal, see Corey Robin, The Politics and Antipolitics of Fear, Raritan, Spring 2004, at 79. Personal fear flows directly from acts of terrorism. It is the type of fear that sent us speeding to the freeways after 9/11 and is described by Robin as an “artifact of our own psychologies.” Id. at 81. Robin argues that political fear, by contrast, is an artifact of institutions of government and media that seek to define the public objects of apprehension. Id. at 82.} One of Britain’s senior judges, Lord Steyn, recently accused the
British and U.S. governments of provoking public fear after 9/11.66 Adrian Vermeule has characterized these concerns—with a hint of derision—as a claim that there are “security entrepreneurs: government officials and interest groups who whip up security panics for political advantage.”67 However, the case for counteracting cascades is not dependent upon irrefutable proof that cascades may be deliberately manipulated and that such manipulation is designed to achieve the ends of political actors. It is sufficient that such cascades occur and are premised upon demonstrable untruths.

A second and related social mechanism that can amplify individual views and cognitive errors is group polarization.68 This process, which may operate in conjunction with cascades, tends to occur when like-minded people deliberate, particularly when members of a group similarly self-identify—according to political ideology, for example—or when they are linked by bonds of affection, also known as “affective ties.”69 Group cohesiveness, self-censorship, insulation, and homogeneous ideology can all impair decision-making when they result in selective bias in the processing of information, failure to survey and assess alternatives adequately, or reluctance to examine the risks of a preferred choice.70 Heterogeneity of views reduces these effects, but where it is not achievable there are process-oriented antidotes: the group should have access to a diversity of information and—just as importantly—should be vigilant in the processing of that information.71

Sometimes emotion that has an adverse effect on individual behavior may be beneficial if acted on collectively. We have seen that an individual decision to avoid flying after 9/11 might reflect probability neglect. However, the cumulative risks posed to all passengers over time, coupled with the belief that further large-scale terror attacks are inevitable,72 suggest that additional measures to protect airline passengers would be warranted, even if motivated by

66. See Clare Dyer, Britain Accused of Creating Terror Fears, The Guardian (June 11, 2005), http://www.guardian.co.uk/terrorism/story/0,12780,1504266,00.html. Having acknowledged the “very real risk of international terrorism,” Lord Steyn described the “public fear whipped up by the governments of the United States and the United Kingdom since September 11, 2001 and their determination to bend established international law to their will and to undermine its essential structures.” Id.


69. Sunstein, supra note 64, at 113, 129.

70. Irving Janis, Groupthink 174–75 (2d ed. 1982).

71. Sunstein, supra note 64, at 134, 144.

72. See, e.g., Richard Cheney, Vice President of the U.S., Remarks on Fox News Sunday (May 19, 2002), at www.foxnews.com/story/0,2933,53155,00.html (“I think that the prospects of a future attack on the U.S. are almost a certainty. It could happen tomorrow, it could happen next week, it could happen next year, but they will keep trying.”).
fear. Ironically, recent reports, some of them official government reports, indicate that we have failed to act collectively in order to address and reduce these cumulative risks. At other times, collective action inspired by heightened emotion and cascades may subsequently be the source of regret. Loewenstein’s “empathy gaps” apply to collectives as well as individuals: the security concerns that led to the internment of almost 120,000 Japanese Americans in World War II no longer seem to justify this action, and many cannot now comprehend it.

The challenge is to learn from and draw on insights from behavioral psychology in order to ensure that our “hot-state” responses to terrorism do not become further sources of profound embarrassment. Some have argued persuasively that we have continued to repeat our mistakes in the wake of 9/11. But even those who contest this view must acknowledge the enormity of the challenge to civil liberties that will be presented in the event of another terrorist attack on the mainland United States, including, for example, an assault on a mass transit system that mirrors the London or Madrid attacks.

B. Legal Stratagems: Variegated Exceptionalism

Moral stratagems that operate at an individual level also have their collective counterparts. Compartmentalization and reconstruction have had an impact on the interpretation of international legal norms. The first casualties of this stratagem in the “war on terror” were the Geneva Conventions. Recall the characterization of the war by then-White House Counsel Alberto Gonzales as a “new paradigm” that “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.” But Gonzales was not the first to rely on these stratagems. Compartmentalization has a rich and ugly history. The wars between the city-states of ancient Greece, as well as the war waged by Alexander the Great

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73. See infra Part V.
74. Loewenstein & Lerner, supra note 24.
75. For an insightful discussion of the internment and related issues, see Muller, supra note 7. There have been renewed efforts to justify the internment. See Michelle Malkin, In Defense of Internment: The Case for Racial Profiling in World War II and the “War on Terror” (2004).
76. See, e.g., David Cole, The New McCarthyism: Repeating History in the War on Terrorism, 38 Harv. C.R.-C.L. L. Rev. 1, 1–2 (2003) (arguing that there has been “not so much a repudiation as an evolution of political repression”). But see also Steven R. Shapiro, The Role of the Courts in the War Against Terrorism: A Preliminary Assessment, Fletcher F. World Aff., Winter 2005, at 103 (arguing that the courts have been more ready to intervene post 9/11 than in the past).
against the Persians, were marked by respect for the life and personal dignity of war victims. Temples, embassies and priests of the opposing side were spared and prisoners of war were exchanged. Yet both the Greeks and the Romans failed to demonstrate similar respect for those regarded as barbarians. Likewise, a century ago, there were efforts to justify gross violations of the laws of war by American soldiers in the Philippines on the grounds that the enemy was “not civilized.” More recently, Nazi doctors perceived Jews as Untermenschen (or sub-humans) who were, by reason of this categorization, not protected by the 1931 Reichsgesundheitsrat regulations prohibiting human experimentation that was fatal, disabling, or conducted without the voluntary consent of the subject. Although Nazi doctors could see that Jews were human—after all they clearly shared the same basic physiology as Aryans—they chose not to do so. This is, of course, not intended to suggest that, in the war on terror, we have descended to the horrors of Nazism. However, it may be salutary to acknowledge that the tools of exceptionalism, taken to the extreme, were instrumental in facilitating the Nazi descent.

When moral stratagems operate at the legal level, they may take a number of more subtle forms. What follows is a brief typology of the varieties of exceptionalism engendered by such stratagems. The first might be called collective exceptionalism, in which group characteristics are relied upon to justify exclusion from the application of protective norms. The blanket classification of detainees captured in Afghanistan as unlawful combatants who do not qualify for prisoner of war status is an example of this. The second is spatial or geographic exceptionalism, in which physical locality is relied upon to justify the non-application of protective norms and procedures. A good

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79. Id.
80. Id.
84. These categories are not mutually exclusive. The typology of exceptionalism described here is not intended to be nation-specific, and it should not be confused with the increasingly popular term “American exceptionalism.” For a collection of essays exploring different conceptions and typologies of American exceptionalism, see American Exceptionalism and Human Rights (Michael Ignatieff ed., 2005).
example of this is Guantanamo Bay, selected by the administration in an effort to keep detainees beyond the habeas corpus jurisdiction of federal courts. Consider also the CIA’s interrogation centers in Eastern Europe and other foreign locations. These prisons—referred to in government documents as “black sites”—were established in order to circumvent the ban on cruel, inhuman, and degrading treatment, pursuant to the administration’s view that the ban did not apply to aliens held outside the United States. The third category is temporal exceptionalism, in which norms are suspended for a period of time. Sometimes the vehicle is the creation of a state of emergency, usually to confer additional powers on the executive while suspending civil liberties. After 9/11, for example, the United Kingdom sought to derogate from the provisions of the European Convention on Human Rights on the grounds that there was a “public emergency threatening the life of the nation.”


88. *Id.* The term may reflect the notion that these are places where the light of the law does not shine!

89. This view was reaffirmed by then-White House counsel, Alberto Gonzales, during the hearings that preceded his confirmation as Attorney General. For a transcript of the confirmation hearings, see Gonzales Nomination Transcript, www.humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_testimony_010604.htm (last visited Mar. 30, 2006). This is the view that the so-called McCain Amendment (the amendment to the Defense Appropriations Bill proposed by Senator John McCain and others)—now section 1003 of the Detainee Treatment Act of 2005—was intended to address.


91. See Anti-terrorism, Crime and Security Act, 2001, § 23 (Eng.) (providing for the indefinite detention of non-nationals suspected of being international terrorists); Human Rights Act, 1998, (Designated Derogation) Order 2001, S.I. 2001 No. 3644 (seeking to derogate from the right to liberty conferred by Article 5 of the European Convention on Human Rights). See also A & Others v. Secretary of State for the Home Department [2004] UKHL 568 (U.K.), available at http://www.publications.parliament.uk/pa/lid200405/ldjudgmt/jd041216/a&oth-1.htm (Section 23 and the Order were incompatible with Articles 5 and 14 of the Convention on the grounds that they were disproportionate and discriminatory, since the power of indefinite detention applied only to those who were not British citizens). Following the decision, the Government introduced legislation providing for “control orders” that
technique of temporal exceptionalism, adopted for some (but by no means all) of the additional powers conferred by the USA PATRIOT Act, is the sunset provision that expires on a designated date, unless it is renewed by the legislature.\textsuperscript{92} A fourth technique is interpretive exceptionalism, in which norms are reinterpreted in order to narrow the scope of the protection conferred or of the conduct that is prohibited. The now infamous and discredited August 2002 memorandum from then-Assistant Attorney General Jay Bybee to then-White House Counsel Alberto Gonzalez, which narrowly defined physical torture to require pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, the permanent impairment of a significant bodily function, or even death,” is one of the best known examples of this in the war on terror.\textsuperscript{93} Another related example is the view—expressed at one time by Department of Defense officials—that doctors assigned to military intelligence to help develop interrogation strategies at Abu Ghraib and Guantanamo Bay were not acting as physicians.\textsuperscript{94} This position, designed to relieve those effectively permit house arrest and apply to British citizens as well as non-nationals. See Prevention of Terrorism Act, 2005, c. 2 § 1 (Eng).

\textsuperscript{92} For an analysis of the provisions to which the sunset applies, see Charles Doyle, Cong. Research Serv., Patriot Act: Sunset Provisions that Expire on Dec. 31, 2005 (2004), http://www.fas.org/irp/crs/RL32186.pdf. The relevant provisions of the USA PATRIOT Act are Sections 201 (wiretapping in terrorism cases), 202 (wiretapping in computer fraud and abuse felony cases), 203(b) (sharing wiretap information), 203(d) (sharing foreign intelligence information), 204 (Foreign Intelligence Surveillance Act (“FISA”) pen register/trap and trace exceptions), 206 (roving FISA wiretaps), 207 (duration of FISA surveillance of non-U.S. persons who are agents of a foreign power), 209 (seizure of voice-mail messages pursuant to warrants), 212 (emergency disclosure of electronic surveillance), 214 (FISA pen register/trap and trace authority), 215 (FISA access to tangible items), 217 (interception of computer trespasser communications), 218 (purpose for FISA orders), 220 (nationwide service of search warrants for electronic evidence), 223 (civil liability and discipline for privacy violations), and 225 (provider immunity for FISA wiretap assistance). Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act].


\textsuperscript{94} M. Gregg Bloche & Jonathan H. Marks, When Doctors Go To War, 352 New Eng. J. Med. 3, 3–6 (2005). The position was subsequently refined, the argument then being that these medical personnel were not caregivers, and that they should not be held to the same rigorous ethical standards as caregivers. For further discussion of the ethical constraints on these personnel, see Jonathan H. Marks, The Silence of the Doctors, The Nation, Dec. 26, 2005, at 26; Nancy Sherman, Mind Games at Gitmo—Psychiatrists and Psychologists Should Have Nothing to do with Interrogating Prisoners, L.A. Times, Dec. 12, 2005 at B11.
physicians of the constraints of medical ethics, has legal implications too: the
laws of war prohibit states from requiring medical personnel to perform acts or
carry out work that is contrary to medical ethics.95

I do not mean to suggest that distinctions cannot properly be made or
that categories cannot be legitimately drawn. But we must be wary of the
potential for “adaptive learning,” that is, the formulation of “repressive
measures . . . [that] evolve to circumvent norms, precedents and institutional-
civil-liberties protections erected after past abuses were recognized and
regretted.”96 Two questions should therefore be asked. First, what are the
factors, whether legal or moral, that are invoked in support of an exceptionalist
approach, and, second, to what extent do these factors justify each and every
difference in the application of legal norms? Exceptionalism that cannot
withstand this scrutiny should prompt serious concern, and mechanisms that
may counteract such legal stratagems—in particular, the mechanism I outline in
Part VIII below—merit exploration.

V. IMPLICATIONS OF OUR RESPONSES FOR LAW AND POLICY

Adrian Vermeule has argued that the responses and mechanisms
described in the preceding sections are as likely to result in “libertarian panics,”
defined as “episodes in which aroused publics become irrationally convinced
that justified security measures represent unjustified attempts to curtail civil
liberties,” as they are to result in “security panics” in which civil liberties are
repressed.97 There is some truth to the claim that social mechanisms may—in
theory—operate just as effectively to exaggerate other kinds of concern,
including anxiety about civil liberties. But Vermeule’s argument does not take

95. M. Gregg Bloche & Jonathan H. Marks, Doctors and Interrogators at
Guantanamo Bay, 352 New Eng. J. Med. 6, 6–8 (2005). See also Protocol Additional to the
Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of
International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 16(2) (entered into force
Dec. 7, 1978) (prohibiting states from compelling medical personnel to perform acts contrary
to medical ethics). Although the United States has not ratified the protocol, it has been
persuasively argued that there is now a rule of customary international law to the same effect
binding all states: see Jean-Marie Henckaerts and Louise Doswald-Beck, Customary
International Humanitarian Law (2005), Vol. 1, at 86–88. For a more detailed discussion of
the legal and ethical implications of physician participation in interrogation, see Jonathan H.

96. Robert M. Chesney, Civil Liberties and the Terrorism Prevention Paradigm: The
James X. Dempsey, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of
National Security (2002) and Cole, supra note 7). In his review, Chesney characterizes the
approach of Cole and Dempsey as one that reflects an “adaptive learning model.” Chesney,
supra, at 1412. He critiques that model but does not conclusively reject it.

97. Vermeule, supra note 67, at 3.
adequate account of the magnitude and direction of individual cognitive and emotive responses, amplified by the social mechanisms described above. The threat of terrorism following 9/11 is particularly vivid. We have not just the images of the Twin Towers, burning and collapsing, that we can bring so quickly to mind. Filmmakers have given us Dirty War, a docudrama that portrays the detonation of a “dirty bomb” in London, and, more disturbing still, The Sum of All Fears, in which Baltimore is turned into an atomic wasteland. Violations of civil liberties, on the other hand, have not been shown to evoke emotive responses to the same extent, and there are reasons to doubt that any such demonstration would be possible.

When not recorded in graphic form, as happened at Abu Ghraib, violations of rights or liberties are unlikely to arouse a strong social and political response. This is because they are, by their very nature, not normally visible. And when they are visible, they almost invariably lack the vividness of a terror attack. As Jeremy Waldron has recently reminded us, at least three types of civil liberties concerns are implicated by state responses to terrorism. Put simply, they are freedom to perform actions we believe the state should not restrict (for example, freedom of speech, religion and movement), freedom from government scrutiny (privacy), and protection of procedural rights when we are detained or charged. When restrictions of the first category are caused by prolonged or indefinite detention, this is likely to “fall below the radar,” especially if the identity and location of the detainees are not disclosed. Notably, details concerning Muslim Americans detained after 9/11, including their identities, were suppressed by the administration. Many detainees were subsequently deported on release, so they were unable to tell their stories to the American media. And when the detentions themselves are not visible to us, how can we “visualize” the denial of the third type of civil liberties, due process rights such as habeas corpus and the right to consult with an attorney? Finally, as far as privacy is concerned, we are not told, and it is unlikely that we would ever find out, that our phones have been tapped or our library records

98. This criticism applies equally to Eric A. Posner & Adrian Vermeule, Accommodating Emergencies, 56 Stan. L. Rev. 605 (2003). It should also be noted that the authors of that paper focus on fear rather than anger, and they do not draw directly on empirical evidence either to support their critique of the effects of those emotions on individual policy choices or to rebut claims of bias in counterterrorism policy since 9/11.


100. See Paramount Pictures, supra note 11.


102. Id.

103. Cole, supra note 7, at 25–31. Efforts to obtain this information under the Freedom of Information Act were ultimately unsuccessful. See Center for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918 (D.C. Cir. 2003).
Secondly, and more importantly, most of us do not believe that we will be victims of civil liberties violations. Violations of the rights of others are unlikely to provoke the same emotive response as the prospect that we (or our loved ones) will be killed or maimed in a terror attack. Most Americans have good reason to suspect that their liberties will not be violated. As Ronald Dworkin has observed, counterterrorism measures after 9/11 cost them “almost nothing in personal freedom.”

For example, certain powers of surveillance are circumscribed in the case of “U.S. persons,” that is, citizens and permanent residents. Warrants for pen registers recording the numbers of outgoing phone calls and trap and trace devices recording the numbers of incoming calls may not be authorized by the Foreign Intelligence Surveillance Court in support of an international terrorism investigation “conducted [against a U.S. person] solely upon the basis of activities protected by the first amendment.”

When it was revealed that some Americans have nonetheless been the subject of extrajudicial surveillance for over three years, public concern was less than one might have expected. It was first reported in mid-December 2005 that President Bush had signed a secret executive order in 2002 authorizing the National Security Agency to “eavesdrop” on American citizens without a court order and that, as a result, the international telephone calls and emails of thousands of Americans have been monitored. Although concerns were expressed in the media and Congress, a Washington Post opinion poll taken just two days after

104. Legislative provisions are often designed to ensure that secrecy. Section 215 of the USA PATRIOT Act amended the Foreign Intelligence Surveillance Act of 1978 to provide that “[n]o person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.” USA PATRIOT Act § 215. It would appear that the FBI rarely seeks a warrant under section 215, preferring to make informal requests or to issue a national security letter. On the use of national security letters—a form of administrative subpoena—see Michael J. Woods, Counterintelligence and Access to Transactional Records: A Practical History of USA Patriot Act Section 215, 1 Nat’l Security L. & Pol’y 37 (2005). For discussion of the effect of the reauthorization of the USA PATRIOT Act on both section 215 and national security letters, see infra notes 189 and 256.


106. USA PATRIOT Act, § 505(a)(2). Jeremy Waldron also makes this point, supra note 101, at 200.

this revelation recorded an eight-point increase in the President’s approval rating for his conduct in the war on terrorism. Presumably respondents did not think their calls had been monitored.

Similar observations can be made regarding indefinite detention without charge. The controversial—albeit unused—provisions of the USA PATRIOT Act permitting indefinite detention only apply to aliens. And, with few exceptions, those who in fact have been subjected to prolonged or indefinite detention without charge within the United States—in particular, the thousands of Muslim men rounded up in the aftermath of 9/11—were not American citizens. The most famous exception is Jose Padilla, who was detained without charge as an “enemy combatant” for more than three years. However, his conversion to Islam some years ago may make it easier for many Americans to consider him as “other.” Similarly, none of the Guantanamo

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108. See Washington Post–ABC News Poll (2005), http://www.washingtonpost.com/wp-srv/politics/polls/121905_monthly_trendfinal.pdf. For an analysis of the poll, see Dan Balz & Richard Morin, Bush’s Support Jumps After a Long Decline, Wash. Post, Dec. 20, 2005, at A1. I acknowledge that the increase in the counterterrorism approval rating is not mono-causal and that the revelation itself might not account for any of the increase. But it is interesting that the rating increased significantly despite the revelation.

109. Section 412 of the USA PATRIOT Act amends the Immigration and Nationality Act and in effect provides for the indefinite detention of aliens. The administration has not relied on this power because it is premised on certification by the Attorney General (or his Deputy) that the alien is inadmissible or deportable on terrorism grounds. For an analysis of the powers on which the administration has relied in support of prolonged or indefinite detention within the United States, see Margaret H. Taylor, Dangerous by Decree: Detention Without Bond in Immigration Proceedings, 50 Loy. L. Rev. 149 (2005). In the UK, provisions for the indefinite detention of non-nationals on the grounds that they were suspected international terrorists were found to be disproportionate and discriminatory. See A & Others v. Secretary of State for the Home Department [2004] UKHL 568 (U.K.), available at http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm.

110. Cole, supra note 7, at 25. Of the seventy people detained under the material witness statute in the wake of 9/11, seventeen were American citizens but, with one possible exception, they were all Muslim by birth or conversion. See Human Rights Watch, Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11 (2005), http://hrw.org/reports/2005/us0605/us0605.pdf.

111. Only after a petition for writ of certiorari had been filed at the Supreme Court on Jose Padilla’s behalf (following his second habeas corpus petition), was he finally indicted in November 2005 and transferred from military custody to the control of the Attorney General. See Neil A. Lewis, Indictment Portrays Padilla as Minor Figure in Plot, N.Y. Times, Nov. 24, 2005, at A1. For a copy of the indictment, see Superceding Indictment, United States v. Hassoun, No. 04-60001-CR-COOKE (S.D.Fla. Nov. 17, 2005), available at http://www.wiggin.com/db30/eqt-bin/pubs/11-17-05%20indictment.pdf. As a result of Padilla’s release from military custody, the Supreme Court declined to hear his case: see Padilla v. Hanft, No. 05-533, 2006 WL 845383 (April 3, 2006) (cert. denied).
detainees are American citizens.\footnote{112} In fact, when the administration discovered that Yaser Hamdi (who had been turned over to the Americans by the Northern Alliance in Afghanistan) was a U.S. citizen, he was quickly transferred from Guantanamo Bay to a military brig in Norfolk, Virginia.\footnote{113} Finally, the President’s order establishing military commissions to try suspected international terrorists expressly does not apply to U.S. citizens.\footnote{114}

If, as I postulate, concerns about the civil liberties of others tend to evoke less powerful cognitive and emotional responses—outside human rights circles and academia, at least—it is unlikely that they will result in cascades or so-called “libertarian panics” that might counteract the effect of cascades provoked by our emotional responses to terrorism. As a result, the only restraint on our collective responses to terrorism may be the financial cost of counterterrorism measures. And if costs are the only effective constraint, it is easy to see how we might interfere with civil liberties, particularly the liberties of those who are considered “other,”\footnote{115} rather than spend money on measures that would, for example, help to secure our container ports and chemical plants.\footnote{116} From a purely economic perspective, the tendency of “democratic majorities [to] sacrifice the civil liberties of outsider groups—foreigners, resident non-citizens, illegal immigrants, and so on—in the interests of maximizing the majority’s security” might appear to be “rational cost-
But counterfeit displacement—the shifting of policy responses from those that are most effective to those that appear to incur the fewest costs financially and politically, usually because they impose substantial burdens on others—should be as disturbing to economists as it is to civil liberties advocates. And surely there is also a place for analysis that highlights both the nature of the “costs” that proposed measures incur and the distribution of those costs.

VI. EVIDENCE OF COUNTERTERRORISM DISPLACEMENT

Before proposing such analysis, I will perform a quick biopsy to test for traces of the systematic bias identified in my displacement hypothesis. There are two strands to the hypothesis. The first strand is the tendency toward coercion, rather than preparedness, capacity-building, and improving critical infrastructure security—all of which require investment in resources and manpower. Conferring increased power of coercion on public officials, on the other hand, does not necessarily require the same level of investment. Moreover, coercion, even when directed against a few, irrespective of whether they pose a threat, has symbolic force and may provide reassurance to an emotive populace. A tendency toward coercion is also to be expected if the principle constraints on our responses to terror are financial. The moral hazards are highlighted by Richard Posner’s approach to bioterrorism, which he identifies as one of a number of “catastrophic risks” that may lead to “utter overthrow or ruin.” In his analysis, Posner describes how a terrorist might infect 1,000 people with aerosol-dispersed smallpox and—within just three weeks—cause over 150 million people to become infected, taking into account delay in diagnosis and ease of transmission. Having got our attention, he argues that we must be “wary about throwing money at the problem.” For Posner, the costs easiest to incur—because they are difficult to quantify—are

117. Vermeule, supra note 67.
118. This does not purport to be an exhaustive empirical study, nor conclusive proof of my hypothesis. However, the existence and availability of so much evidence of displacement (and I have only reproduced a small part of it here) in the absence of an exhaustive study tends to support my hypothesis.
119. Of course, additional coercive powers may—depending on how they are exercised—create a drain on existing manpower resources. In such cases, further manpower investment may be desirable.
120. For a discussion of the way in which emotive responses to terrorism tend to lead to symbolism in foreign policy, see Lobel & Loewenstein, supra note 5.
122. Id. at 78.
123. Id. at 198.
Several reports indicate that these hazards have materialized. One national security expert has observed that “[a]lthough the CIA has concluded that the most likely way weapons of mass destruction (WMD) would enter the United States is by sea, the federal government is spending more every three days to finance the war in Iraq than it has provided over the past three years to prop up the security of all 361 U.S. commercial seaports.” Another expert opined that at the current rate of spending, the United States would put astronauts on Mars long before effective port security would be achieved. Official reports offer little to challenge this view. In January 2005, an internal audit conducted by the Office of the Inspector General of the Department of Homeland Security (DHS) found that, as of September 2004, the Department’s port security grants program had “not yet achieved its intended results in the form of actual improvement in port security.” The report noted that while grants had been awarded for low-risk inland ports, the DHS could give “no assurance that the program is protecting the nation’s most critical and vulnerable port infrastructure and assets.”

Similarly, a report prepared by a committee of the National Academy of Sciences found that a terrorist attack on a spent nuclear fuel pool—of which there are currently seventy-four in the United States—was possible and could

124. Id. at 155–56, 238, 262. The problems with Posner’s approach are discussed further at infra text accompanying notes 215–17.


128. Id; Eric Lipton, Audit Faults U.S. for Its Spending on Port Defense, N.Y. Times, Feb. 20, 2005, at A1; see also Editorial, Our Unnecessary Insecurity, N.Y. Times, Feb. 20, 2005, § 4, at 8 (expressing the view that since 9/11 the “biggest obstacles to making the nation safer have been lack of political will and failure to carry out the most effective policies”): see also Eric Lipton, US to Spend Billions More to Alter Security Systems, N.Y. Times, May 8, 2005, § 1, at 1 (reporting that screening equipment installed at seaports and airports after 9/11 is unreliable and/or ineffective, and will need to be replaced). For additional concerns that money from the DHS is being squandered on measures that do little or nothing to improve safety or security, see CBS News, Handouts for the Homeland, Apr. 11, 2005, http://www.cbsnews.com/stories/2005/03/31/60minutes/main684349.shtml.
lead to the release of radioactivity.\textsuperscript{129} The committee found that “readily implemented” measures could be taken to reduce the risk. It also found that additional work was “needed urgently” to help understand the vulnerabilities of spent fuel pools to terrorist attack and the potential release of radioactivity in the event of such an attack.\textsuperscript{130} Although the report acknowledged that a number of security measures had been instituted at nuclear power plants in the United States since 9/11, the committee took little comfort from this, noting that it had not been given sufficient information to evaluate the efficacy of those measures.\textsuperscript{131} Finally, in June 2005, a confidential DHS report on airport security concluded that “[u]rgent attention needs to be given to some security measures that can be taken very quickly at relatively low costs.”\textsuperscript{132} Its recommendations included wider use of machines that can detect traces of explosives.\textsuperscript{133}

Security of land-based mass transit is, however, even more worrisome. In February 2005, the former Inspector General of the Department of Homeland Security, Clark Kent Ervin, wrote that “[t]oo little attention has been paid and too few resources devoted to modes of transportation other than aviation.”\textsuperscript{134} Although roughly one third of global terrorist attacks in recent years have been directed at ground transit systems, a new report by a former professional staff member of the 9/11 Commission described transit security in the United States as “an afterthought,” noting that only 1.4% of the transportation security budget is targeted at surface transportation.\textsuperscript{135} The recent bombings in London and


\textsuperscript{130} See Free Executive Report, supra note 129, at 6.

\textsuperscript{131} Id. at 5. The Committee similarly noted that the security restrictions on information sharing with industry actually hampered efforts to address security vulnerabilities!


\textsuperscript{133} Id.


\textsuperscript{135} Bill Johnstone, Ctr. for Am. Progress, New Strategies to Protect America:
Madrid have done little to raise the priority of transit security. Bizarrely, within a month of the London attacks, the Senate voted to cut $50 million from transport security grants for Fiscal Year 2006.\footnote{P.J. Crowley, Ignoring the Lessons from London, S.F. Chron., Aug. 21, 2005, at B5.} It remains to be seen how the nation would respond in the event of an attack on the mass transit systems of Boston, Washington, D.C., or New York. But the analysis I offer here suggests that there will be a temptation to defuse anxiety with a campaign of poorly targeted arrests and detentions, at the cost of taking steps to reduce vulnerabilities.\footnote{One Madrid official stated that measures implemented after the March 2004 attack “were not so much about combating terrorism; rather they were used to help riders recover a feeling of security.” See Brian D. Taylor, Ctr. for Am. Progress, Terrorism and Transit Security: 12 Recommendations for Progress 5 (2005), http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/TAYLOR_TRANSIT_SECURITY.PDF. Of course, measures designed to make passengers feel secure need not necessarily violate the rights of others.} The failure to address security vulnerabilities may also be—in part—a reflection of so-called “pork barrel” politics in which expenditure is appropriated in order to yield jobs or other benefits for a particular locale and generate patronage opportunities for its political representative.\footnote{See, e.g., the December 2005 report of the 9/11 Public Discourse Project—comprising former members of the 9/11 Commission—giving Congress an “F” (or failing grade) because it has not allocated homeland security funding on the basis of risk. 9/11 Public Discourse Project, Final Report on 9/11 Commission Recommendations 1 (2005), http://www.9-11pdp.org/press/2005-12-05_report.pdf. Public choice theory emerged to explain why government actions tend to work to the benefit of special interests rather than the public good, but not surprisingly the enterprise—which applies rational choice theory to politics—has failed to provide a complete account. See Daniel Farber & Philip Frickey, Law and Public Choice: A Critical Introduction (1991).} The former chairman and vice chairman of the 9/11 Commission have been especially vocal in their criticisms of “homeland security” expenditures on items such as air-conditioned garbage trucks, leather jackets, and self-improvement seminars for sanitation workers.\footnote{See Thomas H. Kean & Lee H. Hamilton, A Formula for Disaster, N.Y. Times, Dec. 5, 2005, at A23.} However, this phenomenon is not inconsistent with my thesis. First, I do not claim that emotion, or the ensuing counterterrorism displacement, is the sole cause of our continuing vulnerabilities. But secondly, and more importantly, pork-barrel politics is arguably a reflection of the very phenomenon I describe. When officials claim to be spending money on homeland security, they are often spending it in name only, seeking to gain
political advantage rather than to improve terrorism preparedness and critical infrastructure security. They rely instead on the more satisfying coercive measures I describe below in order to protect us from further attack.

There are analogous concerns about public health preparedness for possible future terror attacks. In June 2002, Congress enacted the Public Health Security and Bioterrorism Preparedness and Response Act, authorizing $4.3 billion to develop new vaccines and other drugs, improve hospital capacity, and strengthen state and local public health departments. But fundamental gaps in the nation’s bioterrorism preparedness remain. This was highlighted in May 2003, when a number of government agencies—including HHS and CDC—participated in TOPOFF 2, a comprehensive terrorism response exercise conducted in Seattle and Chicago. Sixty-four hospitals took part in the exercise in Chicago alone, where officials simulated the release of the pneumonic plague. According to a published summary of the findings, the exercise revealed “the lack of a robust and efficient emergency communications infrastructure.” Some fax communications took over two hours to process and, in at least one location, the phone system was so overloaded that three HAM radio operators had to step in to provide oral communication. Subsequently, in February 2004, Janet Heinrich, Director of the Healthcare and Public Health Issues at the GAO, testified before the House Committee on Government Reform that “no state is fully prepared to respond to a major public health threat” and many states lack “surge capacity,” that is, the capacity to diagnose, evaluate, and treat the large number of patients who would present in a public health emergency. In its January 2005 report, Breathing Easier?, the

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140. Additional spending on civil biodefense through fiscal year 2004 was $14.5 billion. This may seem substantial, but it is dwarfed by the sums spent on the war in Iraq. For a summary of expenditures on the Iraq war and the ways in which the sums expended might have been applied to improve security in the United States, see Michael Pan et al., supra note 116.


142. Id. at 2, 6.

143. Id. at 6.

144. Id. The official results of a further test, TOPOFF 3, held in April 2005, are still to be released. Early reports indicate that for this test the internet was the main communication medium, and that there were some problems due to insufficient bandwidth and incorrectly programmed routers. See Michael Arnone, TopOff Exercise Heads off Virtual Terrorists, Fed. Computer Wk., Apr. 18, 2005, at 58, available at http://www.fcw.com/article88622-04-18-05-Print.

Century Foundation’s Working Group on Bioterrorism Preparedness stated that much more work needed to be done. In particular, the Group recommended that the public health workforce be enlarged and upgraded. It also contended that “federal bioterrorism funding should improve the public health infrastructure as a whole, not weaken its ability to carry out other essential programs,” and recommended that “the emphasis should be on programs, systems, and policies that encourage ‘dual use,’ not narrow applications.”

Some have gone further, arguing that lack of universal access to health care is itself a threat to national security. They contend rather persuasively that in the event of a terror attack, early diagnosis is vital and that uninsured patients are more likely to present in an advanced stage of illness.

Although progress on the road to preparedness has been disturbingly slow, almost immediately after 9/11 there were moves to provide coercive powers in the event of a terror attack. The controversial Model Health Emergency State Powers Act is one of the best examples of this. The first draft of the proposed model act was released by the Centers for Disease Control and Prevention (CDC) on October 23, 2001, three days before the USA PATRIOT Act was signed into law. It proposed a variation on the exceptionalist theme, conferring powers on state public health officials in the event that the governor declares a “state of public health emergency.” The draft was premised on a model of non-cooperation by both medical personnel and citizens in the event of a bioterrorist attack. In addition to powers of isolation and quarantine, the

147. Id. at 3.
150. Id.
152. Id. at 16–18.
Act relied on criminal law to coerce compliance: any person refusing to be examined, tested, or vaccinated would be liable for a misdemeanor, as would any health care provider who refused to perform an examination or test.\textsuperscript{154} In response to criticisms, a revised version of the Act was released on December 21, 2001.\textsuperscript{155} In that version, failure to comply with a public official’s order to undergo examination, testing, or vaccination is no longer a crime. However, it may result in compulsory isolation or quarantine,\textsuperscript{156} and violation of an isolation or quarantine order will be a misdemeanor.\textsuperscript{157} The revision improves on its predecessor by providing, for example, that isolation or quarantine must be the “least restrictive means necessary.”\textsuperscript{158}

Despite continuing criticisms of the revised Act’s impact on civil liberties,\textsuperscript{159} it appears to have had a positive reception in many state legislatures. According to the Act’s authors, it has been implemented in whole or in part by at least thirty-three states and there are bills or resolutions pending in eleven others.\textsuperscript{160} More recently, the Act’s principal architect has argued that cooperative physicians should be added to the coercive enterprise and given power to detain patients on “short-term holds” to prevent the immediate spread of disease “when time is limited.”\textsuperscript{161}

\textsuperscript{154} See Annas, supra note 153, at 1338.
\textsuperscript{156} Id. at §§ 602, 603.
\textsuperscript{157} Id. at § 604.
\textsuperscript{158} Id.
\textsuperscript{159} These criticisms, appearing mainly in the academic literature, were spearheaded by George Annas: see George J. Annas, Puppy Love: Bioterrorism, Civil Rights, and Public Health, 55 Fla. L. Rev. 1171 (2003) (arguing that an earlier count was over-inclusive) and George J. Annas, Blinded by Bioterrorism: Public Health and Liberty in the 21st Century, 13 Health Matrix 33, 60–61 (2003). The Breathing Easier report appears agnostic in its discussion of the Model Health Emergency State Powers Act. Working Group on Bioterrorism Preparedness, supra note 146, at 10–11. It acknowledges that the Act has been criticized on the grounds that (1) it confers too much executive power to interfere with civil liberties without sufficient opportunity for oversight or redress, and (2) its specificity undermines its utility in a real emergency. Id. On the first point, the authors observe that some states have watered down the Act’s provisions: Delaware, for example, requires that public health authorities petition a court within twenty-four hours of isolating or quarantining a person and that the person be heard within seventy-two hours, while the Model Act permits isolation or quarantine for fifteen days before the detainee has the opportunity to be heard by a judge. Id.

\textsuperscript{160} See Ctr. for Law & the Public’s Health, Model State Public Health Laws http://www.publichealthlaw.net/Resources/Modellaws.htm (last visited Mar. 30, 2006). For a critique of these claims, see the articles by Annas, supra note 159.
\textsuperscript{161} Wynia & Gostin, supra note 149, at 1099. The procedural safeguards they propose are (1) the concurrence of two physicians for a “short-term hold,” (2) a limitation on the holding period of 24 hours, and (3) rapid judicial review. Id. Whether physicians would be willing to exercise this coercive power is open to question and the means they would use to
I am not suggesting that coercion in response to a bioterrorist attack will never be appropriate. In some incidents, for a limited number of individuals, coercion may well be necessary. My point is that prevention of a mass attack and preparedness for such an attack are both as important as coercion, if not more so. Yet my biopsy appears to reveal evidence of displacement: the primacy of coercive mechanisms at the expense of measures to improve security and preparedness.\(^{162}\)

The second and related element of the displacement hypothesis might be described—despite the apparent paradox—as stasis and metastasis, a theme that I have to some extent already discussed.\(^{163}\) The lives of most Americans have been largely unaffected by legal and policy responses to terrorism. Going through airport security may take a little longer and may be a little more inconvenient. Gas prices have been uncharacteristically high.\(^{164}\) But essentially life is unchanged. The civil liberties of most Americans have not been palpably interfered with. Americans have not had to give up their dreams or rein in their aspirations. Despite two wars that have been costly in financial terms, leaving aside the terrible loss of life and limb, they have not even had to pay more taxes. But while the majority enjoys stasis, there has been a proliferation of measures that are targeted at the few, specifically those who are considered “other.” In the name of prevention, coercion has been used to detain many Muslim men—most often, non-citizens—whether rounded up for immigration violations, held under the material witness statute, or incarcerated at


\(^163\) See supra text accompanying notes 105–14 and Part VI.

Again, this is not to suggest that all these people were unjustifiably detained. But many clearly were, and it is easy to see why. Their detentions appeared less costly, both politically and financially, than spending substantial sums on improving security at ports and other facilities. Of course, rounding up and detaining many innocent men did incur costs, and not just in terms of wasted resources. The strategy undoubtedly made it more difficult to elicit assistance from Muslim communities with the identification of individuals posing a genuine threat, and our continuing vulnerabilities to attack create opportunities that those individuals might yet exploit.

VII. THE EMERGENCY CONSTITUTION AND THE ROLE OF PROCESS

On December 16, 1952, President Truman boasted that the Constitution of the United States would from that day forth be “as safe from destruction as anything the wit of modern man can devise.” He made this comment at the opening of the new display for the Constitution in the National Archives Building in Washington, D.C. which, at the first hint of fire, vandalism, or even nuclear attack, would drop the important document into a ten-ton protective steel vault. If Bruce Ackerman had his way, there would be a second document in the National Archives displayed next to the Constitution. But that text would only be protected by a thin and easily broken sheet of glass.

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165. See supra text accompanying notes 109–14.
166. As Cass Sunstein has observed, “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” for restrictions on civil liberties. See Cass R. Sunstein, Laws of Fear 208 (2005).
167. And, of course, the number of individuals posing a threat may well have increased. There is a real concern that poorly-targeted and punitive counterterrorism strategies make it much easier to recruit terrorists and suicide bombers, and that new recruits may dwarf the number intercepted or deterred.
169. Id; Michael Beschloss, Remarks at the Ceremony to Unveil Page Two of the Constitution in its New Encasement (Sept. 15, 2000), at http://archives.gov/about/speeches/09-15-00-b.html. It is not clear why this would have been comforting to Americans. In the event of a full-scale nuclear conflict between the U.S. and the USSR, it is unlikely that anyone would have survived, whether or not she followed the government’s instructions to “Duck and Cover” by hiding under the kitchen table or a school desk. Perhaps Truman recognized that the Constitution couldn’t protect the people of America in the event of such a conflict, and thought the next best thing was for the people of America to protect the Constitution. Alternatively, he may have taken his oath to “protect and defend the Constitution” somewhat literally!
Next to it would be a small hammer and this notice: “The Emergency Constitution: In the event of a large-scale terrorist attack, please use hammer to break glass.”

Ackerman’s proposal of a new framework statute to address this scenario is notable, first, as another example of exceptionalism—the invocation of emergency in order to suspend the application of accepted norms—and second, as an example of a thin process-oriented account designed to restrain the potential excesses of collective counterterrorism responses. Ackerman must be given credit for recognizing the importance of process, but his well-intentioned process is problematic and of limited application. Recognizing this, however, helps lay the foundations for a thicker and more broadly-applicable process-oriented proposal.

The emergency constitution—or, strictly speaking, framework statute—has been much debated on the pages of the Yale Law Journal. In brief, it would empower the President, in the event of another large-scale terrorist attack in the United States, to make a declaration of emergency and seek congressional reauthorizations of the emergency at fixed intervals, subject to increasing supermajority requirements. This is Ackerman’s so-called “supermajoritarian escalator,” the procedural hurdle at the heart of a proposal that is intended to ward off permanent restrictions of liberties by sanctioning

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170. See infra note 172 for the actual language of the test proposed by Ackerman, which is less concise, but no easier to apply.

171. I focus on Ackerman’s widely discussed proposal because its author’s elaborate defense seeks to address some of the concerns highlighted here. But others have also endorsed reliance on states of emergency in the war on terror. See, e.g., Ignatieff, supra note 90, at 25–53 (approving Britain’s choice to officially derogate from the International Covenant on Civil and Political Rights in the aftermath of 9/11—a course not pursued by the United States—on the grounds that the British government was consequently required to provide public and extranational justification for its suspension of human rights). C.f. Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 Yale L.J. 1011 (2003) (arguing that public officials should take “extra-legal measures” when justified by an emergency and then seek ex post ratification). For a historical critique of states of emergency and their implications for the war on terror, see Scheppele, supra note 90.

172. See Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029 (2004). Ackerman argues that in the event of a terrorist attack that “kills large numbers of innocent civilians in a way that threatens the recurrence of more large-scale attacks,” the Executive should be empowered to declare a state of emergency unilaterally (for a week if the legislature is in session, two weeks if it is not). Id. at 1047, 1060. A simple majority of the legislature would then be required to sustain an emergency for two or three months, then 60% for the next two months, then 70% for the next two and 80% thereafter. Id. at 1047. He also proposes that minority-led oversight committees should be given “complete and immediate access to all documents” and that such committees should report to the legislature—in secret session, if necessary—prior to each bimonthly debate. Id. at 1050–53. As this article was going to press, Ackerman’s proposal was published for a wider audience: see Bruce Ackerman, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism (2006).

173. Id.
temporary ones. The emergency regime thus authorized would permit detention of suspected terrorists on the basis of some reduced, but unspecified, standard of evidence, and the detainee would be given an opportunity to challenge that evidence in court within two months.\textsuperscript{174} The only substantive protection to which Ackerman appears heavily committed is a ban on torture.\textsuperscript{175} Without more, this prohibition is a disturbingly narrow interpretation of the principle of “decency” that, in Ackerman’s view, should govern temporary suspensions of liberty in the exceptionalist framework he advocates.\textsuperscript{176} Decency demands additional constraints, especially when one recognizes, as Ackerman does, that “many of the detainees [will be] almost certainly innocent.”\textsuperscript{177} To address—or, rather, redress—the problem of innocent detainees, Ackerman proposes a system of compensation.\textsuperscript{178} But as both scholars of incommensurability and the victims of illegal detention and wrongful imprisonment are well aware, loss of liberty and its personal and psychological sequelae can never truly be made good by financial awards. As other critics of Ackerman’s schema have already made clear,\textsuperscript{179} he concedes too much too soon.

Ackerman’s proposed state of emergency is intended to serve a “reassurance function”—demonstrating that the government is visibly and aggressively taking action, first, to contain the crisis and, second, to prevent its recurrence—while seeking to prevent long-term damage to individual rights.\textsuperscript{180} But any party to the International Covenant on Civil and Political Rights, including the United States, that wishes to declare a state of emergency and

\textsuperscript{174} Ackerman envisages each detainee being brought “expeditiously” before a judge in order to give him a “bureaucratic identity.” Id. at 1070–71. In his schema, the prosecutor would not have to present hard evidence of the grounds for detention until a second hearing that would take place forty-five to sixty days later. Id. He argues that arbitrary detention should not be tolerated, but that detention should be permitted based “on an evidentiary basis that is a good deal less substantial than is normally required.” See Bruce Ackerman, \textit{This is Not a War}, 113 Yale L.J. 1871, 1902 (2004) [hereinafter Ackerman, \textit{This is Not a War}]. He describes detention in the face of a terror threat as morally identical to compulsory quarantine in case of a killer virus threat. Id. at 1881–82. However, unfounded opprobrium and notions of guilt are far more likely to result from those detained in the former rather than the latter scenario.

\textsuperscript{175} Ackerman also stresses the importance of the procedural right to counsel as a means of enforcing the ban on torture. Ackerman, supra note 172, at 1071–73.

\textsuperscript{176} Id. at 1071–72, 1076–77.

\textsuperscript{177} Id. at 1071.

\textsuperscript{178} Id. at 1062–66. See also Ackerman, \textit{This is Not a War}, supra note 174, at 1884–85 (discussing the need for financial compensation for innocent individuals detained under his emergency framework).

\textsuperscript{179} See infra notes 186–87 and accompanying text.

\textsuperscript{180} Ackerman, supra note 172, at 1037. In response to his critics, Ackerman emphasizes the importance of preventing a further attack, although he describes this as his “second prong.” See Ackerman, \textit{This is Not a War}, supra note 174, at 1880.
derogate from the provisions of the treaty must officially proclaim the existence of a “public emergency which threatens the life of the nation” and report this to the Secretary General of the United Nations.\(^{181}\) It is difficult to understand how anyone could derive reassurance from a declaration that the very life of the nation is under threat.\(^{182}\) Thus, it should come as no surprise that, following 9/11, there was an almost universal reluctance among Western states—including the United States—to invoke this provision or similar provisions in regional human rights treaties.\(^{183}\) In addition, Ackerman’s proposal has little or nothing to offer states when they are being forced to confront smaller scale episodic terror attacks rather than a mass terrorist attack.

Ackerman claims that his proposal is a third response model, an alternative to crime or war, that would prevent the rhetorical slide into war talk.\(^{184}\) He contends that while the availability of his new framework would not guarantee its use, it would “create a moral environment that will make [the evasion of the framework] a good deal less likely.”\(^{185}\) But there is too much scope for emotion-driven excess within that framework and there is nothing inherent in Ackerman’s proposal that would create a “moral environment” to restrain those excesses. If such restraint is to become a realistic goal, the attention of the public and of lawmakers must be directed towards human rights norms and the impact of counterterrorism policy on human rights. For the moment, however, I wish to consider how effective Ackerman’s proposal would be in countering the response mechanisms described in Parts III and IV above.

Some of Ackerman’s critics have already pointed out the potential limitations of his framework in addressing the problems of cascades, groupthink, and polarization, and have criticized him for his “procedural


\(^{182}\) As Lawrence Tribe and Patrick Gudridge point out, it is likely that the first declaration of a state of emergency would be particularly unnerving. See Lawrence H. Tribe & Patrick O. Gudridge, \textit{The Anti-Emergency Constitution}, 113 Yale L.J. 1801, 1814 (2004). However, if such declarations occurred with sufficient frequency, they might be perceived with the same skepticism as the DHS’s “Code Orange.” \textit{Id.}

\(^{183}\) This was neither the stated purpose nor the effect of President Bush’s declaration of a national emergency on Sept. 14, 2001 (pursuant to the National Emergencies Act). For the text of the declaration and a discussion of its implications, see Proclamation No. 7463, 66 Fed. Reg. 199 (Sept. 14, 2001) and Harold C. Relyea, CRS Report for Congress: Terrorist Attacks and National Emergencies Act Declarations (2005), www.fas.org/irp/crs/RS21017.pdf. The only European nation that invoked a state of emergency after 9/11 in order to derogate from its human rights obligations was the United Kingdom. See \textit{supra} note 91 and accompanying text.

\(^{184}\) Ackerman, \textit{This is Not a War}, \textit{supra} note 174, at 1873.

\(^{185}\) \textit{Id.} at 1900.
optimism” and, in particular, his reliance on supermajoritarian voting procedures. They contend that repeated deliberations preceding bimonthly congressional votes on extending the state of emergency are likely to polarize legislators. In my view, the real problem is not the danger of increased polarization. It is that the invocation of the emergency constitution and the resulting license to suspend civil liberties can magnify cognitive distortions and the displacement of policy triggered by our emotional reactions to terrorism. Without more, repeated voting may be insufficient to constrain the legislature from unduly curtailing human rights in response to terrorist events. There was, notably, only one senator who voted against the USA PATRIOT Act in October 2001. Four years later, much of the debate about the Act’s future focused on renewing or making permanent the few provisions that sunset at the end of 2005.

Ackerman himself recognizes the importance of informed deliberation. Nevertheless, for deliberation to be fully informed, the legislature and the general public must know more than simply the risks presented by potential terror threats. There must be an assessment of the extent to which proposed measures might reduce terrorism threats and of the adverse effects of those measures that may, of course, lead to calls for their mitigation or even non-adoption. The assessment should not only consider the financial costs of those measures and the resulting fiscal implications. There should also be an analysis of the impact on human rights, expressly conducted in those terms. Only then can there be a meaningful debate about proposed

186. Tribe & Gudridge, supra note 182, at 1816–19.
187. Id. For additional criticisms of Ackerman’s proposal and in particular his endorsement of detention on the basis of less evidence than would ordinarily be acceptable, see David Cole, The Priority of Morality: The Emergency Constitution’s Blind Spot, 113 Yale L.J. 1753 (2004).
189. After two temporary extensions of the expiring provisions, the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 was signed into law on March 6, 2006. That Act makes permanent 14 of the 16 expiring provisions listed supra at note 92. New sunset periods—expiring on December 31, 2009—were established for the remaining provisions (sections 206 and 215, on “roving” FISA wiretaps and FISA orders for business assets). Some additional safeguards were, however, also provided—including greater congressional and judicial oversight for section 215 orders, section 206 roving wiretaps and national security letters. For a discussion of the new Act and the related provisions of the USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub L. No. 109-178, see Brian T. Yeh & Charles Doyle, Cong. Research Serv., USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis (2006), http://www.fas.org/sgp/crs/intel/RL33332.pdf.
190. See Ackerman, supra note 172.
counterterrorism measures.

Ackerman’s critics—in particular, Lawrence Tribe and Patrick Gudridge—argue that we must “embrace the anti-emergency constitution,” that is “the state of constitutional law as we have it now”\textsuperscript{191} where, under the piecemeal ex post supervision of the courts, there is a “real prospect that individual rights would be acknowledged and protected (sometimes) and the government’s concerns would be respected (sometimes).”\textsuperscript{192} However, that view is not entirely satisfying either. Given some of the excesses of the past,\textsuperscript{193} surely there is room to improve on the status quo in a more systematic and preemptive manner without creating a whole new legal order.

VIII. HUMAN RIGHTS IMPACT ASSESSMENTS

In my view, a vital step, one that would come into play long before the courts get involved, would be to mandate human rights impact assessments for counterterrorism lawmaking and rulemaking. While these assessments would not guarantee more effective counterterrorism law and policy, they undoubtedly hold out that potential, for reasons I will give shortly. They constitute one important device in what I hope will become an array of institutional and structural devices designed to restrain excesses in law and policy due to emotion. Before demonstrating how such assessments would address the collective responses and displacement problems I have identified, I will outline the antecedents for these assessments to demonstrate not only that they are far from novel, but that their absence is conspicuous, given the other forms of assessment that currently exist. I will also outline some issues concerning the nature of the proposed assessments.

A. Some Impact Assessment Antecedents

Among the most instructive antecedents are environmental impact assessments (EIAs). These have been carried out in the United States,\textsuperscript{194} the

\textsuperscript{191} Tribe & Gudridge, supra note 182, at 1866–68.

\textsuperscript{192} Id. at 1865–86. For an assessment of the courts’ performance since 9/11, see David Cole, Judging the Next Crisis: Judicial Review and Individual Rights in Times of Emergency, 101 Mich. L. Rev. 2565 (2003) (arguing that while it is too early to make any formal assessment, the record of the courts after 9/11 is—from a liberties perspective—somewhat better than in previous times of crisis).

\textsuperscript{193} See supra note 7 and accompanying text.

European Union,\textsuperscript{195} and dozens of other countries for some time;\textsuperscript{196} they are also required by a number of international treaties.\textsuperscript{197} In general, EIAs involve an assessment of the impacts of projects or policies that are likely to have a significant effect on the environment.\textsuperscript{198} Consideration of alternatives and some form of public consultation are both usually required.\textsuperscript{199} In the United States, the National Environmental Policy Act of 1969 (NEPA) mandates EIAs for “legislation and other major Federal actions significantly affecting the quality of the environment.”\textsuperscript{200} Although there is legitimate concern that EIAs may “frequently [be] viewed as a compliance requirement rather than as a tool to better affect decision-making,”\textsuperscript{201} in some quarters NEPA has been proclaimed a “success,” because it makes federal agencies take a “hard look” at the potential environmental consequences of their actions.\textsuperscript{202} Proponents argue that EIAs lead to more informed, rational, and environmentally-conscious decision-making,\textsuperscript{203} and that public participation serves to enhance transparency and accountability.\textsuperscript{204} Without doubt, there are serious criticisms of NEPA. Some argue that the EIA is an “obstructionist tool” easily manipulated by NGOs, while the prevalent academic critique asserts that NEPA’s essentially procedural requirements are “anemic.”\textsuperscript{205} However, the presence of these

\begin{itemize}
  \item[195.] Council Directive 85/337/EC requires environmental assessment of projects “likely to have significant effects on the environment.” Council Directive 85/337/EC, art. 1, 1985 O.J. (L 175) 40, as amended by Council Directive 97/11/EC, 1997 O.J. (L 73) 5. The directive requires provision of information to, and consultation with, the concerned public and other member states of the EU “likely to be affected.”\textsuperscript{196} This regime has been supplemented by Directive 2001/42/EC, which requires an assessment of underlying plans and policy programs rather than individual projects.\textsuperscript{197}
  \item[197.] See, e.g., the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 206 (requiring an assessment of the effects of activities that states have “reasonable grounds for believing … may cause substantial pollution of or significant and harmful changes to the marine environment.”).
  \item[199.] Id.
  \item[200.] See NEPA § 102.
  \item[201.] NEPA Effectiveness Study, supra note 196, at 7.
  \item[202.] Id. at iii.
  \item[204.] Taylor, supra note 203.
  \item[205.] See Karkkainen, supra note 203, at 339–43 for a summary of these critical views.
\end{itemize}
criticisms tends to bolster rather than undermine the case for EIAs. If no one is perfectly happy, but for opposing reasons—that NEPA has both too many and too few teeth—this suggests that EIAs perform a valuable function. Just as EIAs are required for major federal actions that have environmental implications, regulatory impact assessments (RIAs) are required in order to estimate the economic impact of major federal regulations, including those designed to protect health and safety and the environment. RIAs have generated considerable academic debate, but this is understandable. As the GAO has pointed out, the “measurement of effects of regulation on the economy is imprecise and controversial.” Nonetheless, the rationale for RIAs is clear. They are intended to rein in the perceived excesses of government regulation—in particular, measures to protect the environment and public health—by drawing attention to the impact of these measures on the economy. Some have criticized cost-benefit analysis (CBA), which lies at the heart of RIAs, as inherently deficient on a number of grounds. They argue that, inter alia, CBA fails to pay sufficient attention to benefits that are not easily quantifiable, particularly those related to the protection of the environment or public health, and that it fails to address concerns about equity, in particular the distribution of burdens. Others have reexamined RIAs and sought to


209. See, e.g., Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price*
demonstrate using “scorecards” that many federal regulations, if not the majority, are inefficient, despite the relevant agency’s analysis. However one views these controversial scorecards or the contribution of CBA, it is clear that both RIAs and CBA, in some form, are here to stay.

Counterterrorism and preparedness measures can incur considerable financial costs. But there has been some recent debate about whether the


211. The scorecards referred to here are those purporting to measure economic efficiency; they are discussed further in the texts referred to in the preceding footnote. These should not be confused with the White House’s own scorecards that are designed to track “how well [government] departments and major agencies are executing . . . government-wide management initiatives.” See The President’s Management Agenda: How Does the Scoring Work?, http://www.whitehouse.gov/results/agenda/scorecard.html (last visited Mar. 30, 2006).

212. For a modified form of CBA, see Sunstein, supra note 5, at 107, and Sunstein, supra note 166, at 129–48, 169, 174. See also Parker, supra note 210 (challenging the “regulatory scorecards” used by critics to evaluate the costs and benefits of governmental regulation). It has recently been argued that government agencies should conduct fear assessments as well as risk assessments as part of their cost-benefit analyses. See Matthew D. Adler, Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety, 79 Chi.-Kent L. Rev. 977 (2004) (arguing that fear assessments should be separate from risk assessments and based on an objectivized “welfare equivalent” rather than willingness to pay, that this should be calculated using contingent valuations derived from interviews instead of market-based or other revealed-preference techniques, and that quality-adjusted life years—QALYs, understood as a welfare rather than health scale—may be useful in generating estimates of welfare equivalents).

213. Sometimes these costs are underestimated or simply not estimated at all. If these costs were fully known, some measures that have an adverse impact on civil liberties might be unpopular for fiscal rather than legal or moral reasons. One recent study, for example, estimated that it would cost $206–230 billion over the next five years to deport all the illegal immigrants in the United States. See Rajeev Goyle & David A. Jaeger, Deporting the Undocumented: A Cost Assessment (2005); see also Darryl Feas, $41 Billion Cost Projected to Remove Illegal Immigrants, Wash. Post, July 26, 2005, at A11 (noting that this sum exceeds the annual budget of the Department of Homeland Security).
impact of those measures on civil liberties should also be monetized. Richard Posner has argued that

civil libertarians have not tried to estimate the costs associated with particular curtailments, actual or proposed, of civil liberties. They have been content with uttering extravagant denunciations of any measure, however limited, that cuts back on the current scope of these liberties. . . . Maybe they are science-shy and therefore incapable of evaluating the technological dangers that might make a reduction in civil liberties beneficial to society. Or maybe . . . they believe that the battle for the values they cherish is half lost as soon as those values are subjected to cost-benefit analysis. Or maybe they just lack the confidence that the result of cost-benefit analysis would support their position.215

Assigning a value to liberty or privacy is, for civil libertarians, a mixed blessing. On the one hand, it factors in the impact of civil liberties that might otherwise have been valued at zero or simply ignored by CBA. But monetizing civil liberties, particularly by reducing them to the price someone might be willing to pay to preserve them, puts them at risk of being absorbed into that calculus, stripped of their moral and legal significance and overwhelmed by larger numbers.216 Richard Posner gives substance to those concerns when he argues that since civil liberties costs are difficult to measure, they could be ignored, at least until they became “catastrophically costly.”217 The OMB has recognized that “it may be difficult for an agency to express the [cost of curtailment of civil rights and liberties] in quantifiable, as opposed to qualitative terms.”218 But it encourages agencies to do this in RIAs as far as possible, for example, by indicating the number of people affected by the regulation.219

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216. This is particularly problematic from an international human rights law perspective. That body of law recognizes absolute and non-derogable human rights—such as the right embodied in the prohibition on torture—and these rights can never be “traded.” Interference with qualified rights—such as the right to privacy—may be justified if there is a compelling social need. But legal justification for what some consider to be a “trade-off” requires more than a simple utilitarian calculus. The interference with the right of the individual(s) concerned must be the least restrictive means of achieving a legitimate social goal. See infra note 245 and accompanying text.


219. Id.
OMB has similarly recognized that “the benefits of security are very difficult to quantify and monetize.”\textsuperscript{220} Of the fifteen major rules reviewed by the OMB that did not have fully monetized benefits, seven implemented homeland security programs.\textsuperscript{221} If CBA struggles to accommodate both the costs and benefits of proposed counterterrorism measures, there is surely a place for some other form of analysis to evaluate those measures. If the environmental impact of federal legislation or regulation merits consideration in its own terms, why should the impact of legislation likely to have a significant effect on human rights not also be assessed on its own terms? The force of this argument has been implicitly recognized—albeit to a limited extent—with the more recent introduction of privacy impact assessments (PIAs).

PIAs have been carried out for some time in Hong Kong, Canada, New Zealand, and Australia,\textsuperscript{222} and they were recently introduced in the United States. The E-Government Act of 2002 requires U.S. federal agencies to conduct PIAs before developing or procuring information technology or initiating any new collection of personally identifiable information.\textsuperscript{223} In the United States, PIAs must address what information is to be collected, why it is being collected, the intended uses of the information, with whom the information will be shared, what notice would be provided to individuals, and how the information will be secured.\textsuperscript{224} As is the case with EIAs, the focus of the analysis is practical rather than legal, in an effort to predict the impact of the proposed measures rather than determine their legality. However, PIAs have limitations, and they are not a perfect model. These assessments need only be made public “if practicable,”\textsuperscript{225} and, even then, the publication requirement “may be modified or waived for security reasons, or to protect classified,
sensitive or private information contained in the assessment.”

Although counterterrorism measures, such as data-mining, can have significant privacy implications, there is a danger that this clause will too easily permit the circumvention of the publication requirement. Despite this and the absence of any public consultation process for privacy impact assessments, the E-Government Act takes an important first step towards the proposal advanced below by introducing a procedural requirement that compels government agencies to address the implications of their actions for a core human right and civil liberty, the right to privacy.

Proposals for a broader human rights impact assessment (HRIA) are not entirely novel. HRIAs were suggested more than a decade ago by Lawrence Gostin and the late Jonathan Mann as a means to address concerns about the human rights impact of measures designed to protect public health. That proposal has had some positive reception, most notably outside the United States. Civil liberties impact assessments were also recommended in a recent policy paper on U.S. counterterrorism strategies. However, the case for this type of assessment has not been made at any length. I propose to make such an argument here and, in particular, to show how HRIAs could help address some of the problems of our collective responses to terrorism that are highlighted

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230. Ctr. for Am. Progress, Securing America, Protecting Our Freedoms After September 11 14–15 (2005), http://www.americanprogress.org/site/pp.asp?c =biJRj80YV&b=474133. Although the core of my thesis was conceived prior to the publication of this policy paper, I am indebted to the author of the paper, Mark Agrast, for his insightful views on the topic.
B. The Nature and Content of HRIAs

1. The Language of Human Rights

It is both a strength and a weakness of the term “civil liberties” that it is usually understood in a manner that is both self-regarding and limited to consideration of domestic norms. Although the term “civil liberties” has greater currency in domestic political discourse for these reasons, the vocabulary of human rights highlights that the applicable norms are not purely domestic. To this day, human rights terminology tends to be reserved for the discussion of abuses that occur on someone else’s turf, as evidenced by the State Department’s Annual Country Reports on Human Rights Practices. Recognizing the relevance of international norms, however, is not simply important because those norms reflect the nation’s international commitments. The burden of counterterrorism measures often falls on aliens, and violations of their human rights are likely to be viewed as such by the victims and their home

231. My proposal here focuses on counterterrorism measures. Although I do not make such a case in this article, there is a broader—and somewhat persuasive—argument to be made for HRIAs of all measures that are likely to have a significant impact on human rights. This would mirror the circumstances in which EIAs are usually required: see supra text accompanying notes 194–206.

232. With regard to the focus on domestic norms, it is notable that the American Civil Liberties Union describes its function as being “to conserve America's original civic values: the Constitution and the Bill of Rights.” See American Civil Liberties Union: About Us, http://www.aclu.org/about/aboutmain.cfm (last visited Mar. 30, 2006).


states, among others. Furthermore, the language of rights also serves to remind members of the legislature and the executive that even when absolute rights, such as the prohibition on torture, are not involved, their rulemaking may still implicate some prima facie entitlements. Although the term “human rights” is broad enough to cover not just civil and political rights, but also economic, social, and cultural rights, this language does not necessarily imply that an assessment would encompass these rights. Whatever term is used, the important issue is the nature, not the name, of the assessment.

2. The Nature of the Inquiry and the Analysis

There are two ways in which the human rights implications of counterterrorism measures may be analyzed. They are related, but distinct; and they are complementary, rather than mutually exclusive. The first method is essentially a legal inquiry. Are the proposed counterterrorism measures compatible with international law, the Constitution, and, where applicable, statute? The case for this type of inquiry is self-evident. It should hardly need to be said that public officials must consider whether their actions are compatible with all applicable legal obligations, whatever the source.


236. In international human rights law, these are called “qualified rights.” For an analysis of the criteria that must be met in order to justify interference with a qualified right, see infra text accompanying note 245. For the absolute and non-derogable prohibition on torture, see the ICCPR, supra note 181, at art. 7 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, art. 1, S. Treaty Doc. No. 100-20, at 5, 1465 U.N.T.S. 85, art. 2 (entered into force June 26, 1987) [hereinafter Torture Convention].

237. See infra text accompanying notes 249 and 250.

238. Before leaving the semantic discussion, two final points should be made. First, the term “human rights” emphasizes that these are rights earned by virtue of our membership of the human race, however unpopular or despicable we may be. Second, when used in the context discussed above, the term emphasizes that effects on human beings are being assessed, just as environmental impact assessments consider the effects of pollution on air, water or land. By contrast, “civil liberties” sounds somewhat more abstract.

239. While the focus of the international law inquiry would be human rights law, attention should also be paid to the laws of war where applicable. Strictly speaking, these rules make up a distinct body of international law. However, there is an overlap in the application of laws of war and human rights law, since the latter applies in wartime. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 1996 I.C.J. 226 (July 8) at 240 and Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) at para 106. There is also some overlap in the interests that each body of rules seeks to protect.

240. Although some relevant treaty obligations are considered non-self-executing—
The second inquiry is a pragmatic one, requiring analysis similar to that found in an EIA: what, in practical terms, will be the impact of the proposed counterterrorism measures? As the OMB has observed, the legal inquiry does not necessarily dispose of this issue:

[I]n the context of homeland security regulations, the legal conclusion that a regulatory alternative under consideration would not violate a constitutional or statutory protection does not mean that the regulatory alternative would impose no costs with respect to persons’ privacy interests, rights, or liberties. For example . . . requiring individuals in airports and Federal buildings to go through metal detectors, and to have their packages go through x-ray machines, does not violate their Fourth Amendment right against unreasonable searches and seizures. The fact that these metal detector and x-ray inspections are lawful, however, does not mean that these inspections impose no cost in terms of diminished personal privacy. These inspections do diminish personal privacy, and this is indeed a cost of the inspection requirement. The question for the regulatory agency is whether the benefits from these inspections justify their costs, in terms of diminished privacy as well as lost time and convenience.

Although the practical inquiry is important in its own right—for reasons I will elucidate in the following section—it may sometimes also be necessary in order to resolve the legal inquiry. In such cases, if counterterrorism policies are to withstand constitutional challenge and satisfy international legal standards, the exercise of justification would need to be more subtle than the last sentence of the OMB’s analysis may suggest. International human rights law provides that some rights are absolute, such as the right reflected in the prohibition on torture. Other rights, such as the right to privacy, are qualified. Even these qualified rights, however, cannot be “traded” according to some simple utilitarian calculus. States may interfere with qualified rights only if certain conditions are met. The interference must respond to a pressing

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241. Office of Mgmt. & Budget, supra note 218.
243. See ICCPR, supra note 181, art. 7; Torture Convention, supra note 236, art. 2. Both treaties provide that no exception from this prohibition is permitted even in times of public emergency. See ICCPR, supra note 181 art. 4(2); Torture Convention, supra note 236, art. 2(2).
244. See ICCPR, supra note 181, art. 17.
social or public need, pursue a legitimate aim, be proportionate with the achievement of that aim, and be the least restrictive means of achieving it. To ensure these criteria are satisfied, the potential impact of counterterrorism measures must be considered, as must the distribution of impacts. In particular, international human rights law requires that measures are not discriminatory on any one of a number of grounds, including religion and national origin. Consequently, a measure that has the potential to affect a smaller number of people—for example, non-citizens—might appear easier to justify using traditional CBA. But, as the British government recently learned, such measures are likely to fall afoul of human rights law, and, in any event, fail to address the threat posed by so-called “home-grown” terrorists. Finally, it is worth noting that in order to meet the requirement that the interference be the least restrictive means of achieving the legitimate end, alternative counterterrorism measures would have to be considered. The creativity necessitated by that analysis can promote consideration of approaches that would not otherwise have been explored, and result in measures that are also more effective at preventing attacks, from both tactical and strategic viewpoints.

3. Spheres of Impact

An EIA of rules expanding the permissible hours of operation for airports would need to consider the different types of impact of the rule change on the environment, including its effect on air quality and noise pollution. Similarly, an HRIA should consider the different ways in which counterterrorism measures would affect human rights. There are certain spheres of impact that would merit distinct analysis. One of the most important spheres would, of course, be liberty. This would be relevant in the case of prolonged administrative detention or house arrest. It could also encompass interference with freedom of movement—the ability to enter and leave the country—although that might arguably deserve a category of its own. Other spheres


246. Id.; ICCPR, supra note 181, art. 2.


248. See Jonathan Freedland, After the Aftershock: The Realisation that Britons are Ready to Bomb their Fellow Citizens is a Challenge to the Whole of Society, The Guardian, (July 13, 2005), http://www.guardian.co.uk/attackonlondon/comment/story/0,,1527419,00.html (reacting to the revelation that perpetrators of London’s first suicide bombing were British).
would include privacy, freedom of expression, and due process rights, such as the right to a lawyer and to know the grounds on which one is being held. Although it would be possible to extend the scope of the impact assessment to consider the implications of counterterrorism measures on economic, social, and cultural rights, there are reasons that militate against this, most notably the reluctance to recognize these rights in the United States. In general, these rights are also less likely to be implicated by counterterrorism measures. However, there may be an incidental benefit in considering, for example, the right to the highest attainable standard of health. Doing so would provide further reason to support the adoption of a “dual use” measure that not only enhances bioterrorism preparedness but also serves to improve medical care and capacities more generally.

4. Responsibility for Conducting the Assessment

One of the most important issues is the nature of the body that would be charged with responsibility for conducting HRIAs. When agencies are formulating new or revised counterterrorism regulations or policy, they should conduct an HRIA in order to determine whether the proposed new rules should be promulgated or the policy adopted. There is at least one good reason to ensure that those charged with the task are not political appointees: they are less likely to have affective ties with policymakers and are therefore less vulnerable to the hazards of groupthink. This would not, of course, absolve policymakers of the need to become more attuned to human rights concerns. On the contrary, the prospect of an HRIA conducted by others should make them think more carefully about those concerns.) But whoever conducts the assessment, there should be an independent non-partisan—or at the very least, bipartisan—body charged with oversight of the process. That body should


250. ICESCR, supra note 249, art. 12.

251. See supra text accompanying notes 68–71.

252. See National Commission on Terrorist Attacks, 9/11 Commission Report 395 (2004). C.f. Ctr. for Am. Progress, supra note 230 (critiquing the Privacy and Civil Liberties Oversight Board, which resides in the Office of the President and is composed of members who are appointed by and serve at the pleasure of the President). Clearly, the method of appointment of the oversight body’s members will be important. To minimize affective ties to the administration and resulting groupthink which might hamper reasoned deliberation, the executive should not have sole power of appointment.
also be empowered to issue guidance on HRIAs and offer advice. This independent body, or one similar to it, could also conduct HRIAs of primary legislation designed to combat terrorism.  

5. Prospective and Retrospective Review

Like EIAs and other antecedents, HRIAs should be prospective. But that does not mean that they should only be prospective. There is also a strong case for retrospective review of the practical impact of counterterrorism measures, irrespective of whether the courts are given the opportunity to review of the legality of those measures. There are bound to be errors in almost any prospective assessment of practical impact. These errors will only be revealed if a retrospective analysis is carried out. Such a review will create an opportunity to re-visit legislative and regulatory measures that have a greater or lesser impact than was first predicted. And being compelled to re-visit the assessment once the measure is in place would also discourage agencies from disingenuously down-playing predictions of human rights impacts. The ex post debate over the use of the USA PATRIOT Act and the renewal of the provisions that sunset at the end of 2005 demonstrates not only the potential utility of retrospective review, but also one of the hurdles: the reluctance of the administration to disclose—purportedly on national security grounds—the impact of the Act’s provisions. National security concerns might arguably provide reasons for masking detailed information about the exercise of counterterrorism powers, but it is difficult to see how they would support refusal to disclose, for example, the number of immigrants detained within the

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254. Compare Garity & Ruttenberg, supra note 207 (arguing that RIAs tend to overestimate the costs of regulation—in part, because these prospective assessments rely on information provided by “regulatees”—and critiquing the absence of retrospective analyses).

255. In 2002, the ACLU filed two Freedom of Information Act [hereinafter FOIA] requests seeking disclosure by the Department of Justice [hereinafter DoJ] of records pertaining to the implementation and use of the USA PATRIOT Act. After almost two years of litigation, the DoJ reached a settlement with the ACLU in August 2004. The documents disclosed as part of that settlement can be found on the ACLU’s website at Am. Civil Liberties Union, Patriot FOIA, http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15327&c=262 (last visited Mar. 30, 2006). Despite this disclosure, questions remain. For example, the six-page redacted list of national security letters issued by the FBI does not even make clear the total number of recipients (since this too has been redacted). See Transactional Records NSLs Since 10/26/2001, http://www.aclu.org/patriot_foia/FOIA/NSLlists.pdf (last visited Mar. 30, 2006).
United States—on the grounds that they are suspected terrorists or for any other reason—or the number of times a national security letter has been issued. Although retrospective reviews are sometimes conducted by human rights groups, they are often discounted or ignored by those who view the agenda of these organizations with some degree of suspicion or skepticism. Thus, the drafting of HRIAs should be a regular and inherent part of the machinery of government.

C. The Role and Functions of Human Rights Impact Assessments

The process of conducting an HRIA does not guarantee compliance with human rights norms. However, HRIAs would foster the absorption of these norms into society and culture more broadly by bringing them into the deliberative process. Since ratification of human rights treaties does not ensure good human rights practice, there is an important role for acculturation. But, for the moment, I wish to focus on how HRIAs of counterterrorism measures would address the problems identified in Parts III and IV.

256. On the use of national security letters—a form of administrative subpoena—see Woods, supra note 104, at 37. The point I make here regarding national security letters has recently been accepted by Congress. Section 118 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, requires the Attorney General to submit an annual unclassified report to Congress describing the total number of national security letter requests made by the Department of Justice. See Brian T. Yeh & Charles Doyle, supra note 189.

257. See, e.g., Human Rights Watch’s retrospective analysis of seventy detentions under the material witness statute in the wake of 9/11: Human Rights Watch, Witness to Abuse: Human Rights Abuses under the Material Witness Law Since September 11 (2005), http://hrw.org/reports/2005/us0605/us0605.pdf. All seventy material witnesses identified in connection with this report were men. Id. at 16. All but one were Muslim, by birth or conversion. Id. All but two were of Middle Eastern, African, or South Asian descent, or African-American. Id. Seventeen were American citizens. Id. The rest were nationals of Algeria, Canada, Djibouti, Egypt, France, India, Ivory Coast, Jordan, Lebanon, Pakistan, Palestine, Qatar, Saudi Arabia, Sudan, Syria, and Yemen. Id.


1. Transparency

Transparency is vital in a deliberative democracy. The debate over the so-called “torture memos” readily demonstrates this. The initially secret August 2002 Bybee memo, discussed above, was not released to the public for the better part of two years, long after it had the opportunity to influence interrogation policy in the war on terror. When the memo did finally see the light of day, the Department of Justice was compelled to disavow its highly permissive—and unsustainable—interpretation of the ban on torture. It is useful to consider and compare the President’s military order laying the legal foundations for military commissions in November 2001. Published long before any military commission proceedings began, it also resulted in a number of criticisms from several quarters. Although these criticisms did not lead the Bush administration to drop the idea of using military commissions to try suspected members of Al Qaeda, it did prompt a number of subsequent orders that sought to address some of the critics’ due process concerns.


261. At the time of writing, the link between the memo and detainee abuse admittedly remains contentious. In a recent survey, 51% of Americans thought that there was a link between the memo and abuses at Abu Ghraib. See Steven Kull et al., supra note 46. There is also evidence that the use of extreme fear was part of a systemic approach to interrogation. See Neil Lewis, Interrogators Cite Doctors’ Aid at Guantanamo, N.Y. Times, June 24, 2004, at A1; Bloche & Marks, supra note 95, at 6–8; Marks, supra note 95. For an overview of the development of interrogation in the war on terror, see Jane Mayer, The Experiment, New Yorker, July 11–18, 2005, at 60.


Both these examples reveal that transparency can help moderate our responses to counterterrorism. But transparency means more than simply openness as to the existence of a law or policy. The law or policy itself must not be opaque, and we must have some understanding of its implications for ourselves and others. This transparency is all the more important when the law or policy touches on fundamental human rights. Nowhere was the lack of transparency more evident, however, than in the text of the USA PATRIOT Act. The Act ran to 342 pages and amended at least fifteen statutes. It was also incomprehensible unless one read it in conjunction with all the statutes that it amended and carefully followed the instructions to delete various words and phrases, insert others, and then re-number various paragraphs and subparagraphs. The literal meaning of the document was unclear to all but the most studious and dedicated readers, and there were few of these. Congress was asked to vote on the bill just a few hours after the final version had been printed.\(^{266}\) Even the most cursory and superficial of HRIAs would have helped to identify the potential impact of the USA PATRIOT Act’s provisions. Of course, some might challenge my use of the USA PATRIOT Act as an example here, arguing that its provisions are not as egregious as they might have been or as some civil liberties groups contend. But even those who consider the Act’s provisions to be less problematic should acknowledge that this was more likely to have been the result of good fortune than the operation of checks or balances in the legislative process.

Although Cass Sunstein has argued that requiring unambiguous legislative authorization of restrictions on civil liberties—as opposed to executive fiat—should reduce the dangers of excessive counterterrorism measures, he also acknowledges that legislatures may be fearful and that legislative authorization is in itself “no panacea.”\(^{267}\) The circumstances surrounding the passage of the USA PATRIOT Act indicate that there is more than a little merit in this caveat. Sunstein falls back on the courts to restrain the

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excesses of the legislature, arguing that they should be particularly skeptical of measures restricting the liberties of the few.\textsuperscript{268} While I endorse this suggestion, I would argue that the legislative process could be improved by HRIAs.\textsuperscript{269} Such assessments would and should not eliminate the work of the courts, but they may well reduce it.

2. Antidote to Security Panics

HRIAs have the potential to counteract cascades and groupthink following acts of terrorism by providing information and analysis on human rights implications that these social effects might otherwise exclude. That information could also be vital to the articulation of effective dissent, and that dissent can have a cooling effect on impulses stirred by emotion. Not surprisingly, the cognitive arguments made by Cass Sunstein and others in support of RIAs and the application of CBA to environmental measures would equally apply to support HRIAs for counterterrorism measures.\textsuperscript{270} Just as RIAs are meant to ensure that environmental concerns do not lead to regulation that may be costly and ineffective, so HRIAs may help ensure that counterterrorism measures are not costly in terms of human rights. They may do this in a number of ways. First, incorporating an HRIA into the rulemaking and lawmaking processes can do more than direct the attention of policymakers to the human rights consequences of their actions. It can compel consideration of those consequences in the formulation of policy, encourage creative thinking about alternative and less restrictive policy approaches, and thereby counteract cascades and groupthink. Secondly, the disclosure of human rights impacts can give members of the public as well as lawmakers pause. Disclosure may have a beneficial chilling effect, restraining support for excessive policy responses that would otherwise not be mitigated by concerns about human rights. Although this chilling effect would occur primarily where the impacts were anticipated to fall on citizens in general, it might be felt—albeit to a lesser extent—in other cases. For example, it would not be surprising to find that Americans’ support for aggressive interrogation in the war on terror might be a little dampened by consideration of, first, the tendency for abuses similar to those in Abu Ghraib to occur and, second, the likelihood that many innocent detainees will be among

\textsuperscript{268} Id. at 222–23. Sunstein also argues that the courts should develop second-order balancing—adopting rules and presumptions—rather than \textit{ad hoc} balancing of liberty and security. \textit{Id.}

\textsuperscript{269} Just as HRIAs have the potential to improve the ordinary legislative process, they would also enhance the problematic supermajoritarian process articulated by Ackerman. See supra text accompanying note 172.

\textsuperscript{270} For those cognitive claims made in relation to environmental measures, see, for example, Sunstein, \textit{supra} note 5, and Sunstein, \textit{supra} note 166.
3. Antidote to Legal Exceptionalism

An inquiry into the practical impact of counterterrorism measures is not susceptible to stratagems of legal exceptionalism. Whatever arguments can be made about the scope of application of international or constitutional norms—whether detainees are protected as POWs under the Geneva Conventions, for example, or whether the writ of habeas corpus runs in Guantanamo—no one can deny that being a Guantanamo inmate for three years has a practical impact on one’s liberty. Publishing the legal analysis may also make adaptive learning, the deliberate circumvention of established norms, much more difficult. The media response to the August 2002 “torture memo” and the subsequent disavowal of that memo by the Department of Justice support the view that specious justifications for exceptionalism may not survive the glare of public attention.

Of course, international human rights law does not prohibit—and is, therefore, not an antidote to—all forms of exceptionalism. As I have already noted, derogations from many rights are permitted where a public emergency threatening the life of the nation is officially proclaimed. Notably, states are permitted to derogate from the prohibition of arbitrary arrest and detention. However, the derogation must be strictly required by the exigencies of the situation. This limits the duration, geographical reach, and material scope of any derogation, which must also be proportionate to the threat it is designed to address. One authoritative view holds that no emergency could justify subjecting anyone to detention that is indefinite or secret, or depriving a detainee of outside communications or periodic review of his detention by an independent tribunal. Moreover, derogations must not be exercised in a

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271. For a recent survey of American views on torture and aggressive interrogation, see supra note 46.
272. See supra text accompanying note 96.
273. See supra text accompanying note 93.
274. ICCPR, supra note 181, art. 4(1).
275. Id.
276. Id.
278. See United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), at para 70, available at www1.umn.edu/humanrts/instree/siracusaprinciples.html (also stating that “[r]espect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation”). See also General Comment No. 29,
manner that discriminates solely on the basis of race or religion, not to mention a number of other grounds. HRIAs that explore both the practical impact of counterterrorism measures and the legal justifications, whether domestic or international, offered in support of them are more likely to expose unjustifiable exceptionalism triggered by our emotive responses to terrorism.

4. Antidote to Libertarian Panics

At first blush, the case for HRIAs may appear appealing only to those concerned with human rights violations, security panics, or adaptive learning. However, I think that the case can be made far more broadly. HRIAs should also appeal to those who are anxious about so-called “libertarian panics” or embrace a “social learning” model which posits that we learn from historical exaggerations of threats to national security and have become increasingly skeptical regarding contemporary claims. There are two reasons for this. First, in order to accurately apply both the practical and the legal lessons of history, we need to have a proper understanding of the civil liberties implications of proposed counterterrorism measures and of the arguments made in support of any restrictions on civil liberties. HRIAs could greatly contribute to that understanding. Secondly, secrecy itself may sometimes contribute to exaggeration of civil liberties claims. It has been noticeably difficult for the administration to allay civil liberties concerns related to the USA PATRIOT Act while being secretive about the extent to which it has relied on the Act’s provisions. However, for the reasons I have already discussed, these concerns have not resulted in a ‘libertarian panic’ that threatens to jeopardize the Act’s future. Frank analysis and discussion, both prospective and retrospective, about the impacts of counterterrorism legislation and regulation would help to counteract or, at least, defuse any exaggeration by critics. While the analysis in an HRIA might need to be constrained by national security considerations, these should not prevent a discussion, for example, of the number of people deprived

supra note 277, ¶ 15 (on the importance of procedural guarantees for the protection of non-derogable rights).

279. ICCPR, supra note 181, art. 4(1).


281. See Vermeule, supra note 67. The term is intended to denote the exaggeration of civil liberties concerns.

282. For an articulation of this view, see Tushnet, supra note 6, at 283–84.

283. See supra text accompanying note 104.

284. See supra text accompanying notes 97–100, critiquing the “libertarian panic” hypothesis.
of their liberty and the period of their detention.

5. Calibration and Mediation

Rather than leaving to chance whether a libertarian panic will counteract a security panic—a status quo risk acknowledged by Vermeule—HRIAs focus attention directly on the conflict. HRIAs might not only defuse so-called “libertarian panics”: they could assist in the mediation of disputes between those who advocate measures on national security grounds and those who object to such measures because of civil liberties concerns. HRIAs have the potential to provide a focus for debate and negotiation and, depending on those charged with authorship, a springboard for discussion that is independent and non-partisan. In addition, the debate about the civil liberties implications of counterterrorism measures is sometimes framed in terms of errors in “calibration,” whether in support of or opposition to counterterrorism measures. That debate is premised on the model of liberty-security trade-offs, one that is problematic for a number of reasons—not least, that one person’s liberty is often restricted in the name of another’s security. Leaving aside these criticisms, it is difficult to see how any trade-off can be advocated unless it can be shown how a proposed counterterrorism measure will improve security and what its impact on civil liberties will be. If we don’t gauge human rights impacts, we cannot talk about calibration, let alone errors in calibration.

IX. CONCLUSION

Terrorism exploits uncertainty. We don’t know where the next attack will be, whether it will be on a plane, train, bus, or some other part of our critical infrastructure. We can’t predict whether it will be in Rome, Washington, D.C., London (yet again), or some other location. We don’t know whether conventional or non-conventional weapons will be used. And we don’t know whether we—or our loved ones—will be in the wrong place at the wrong time. This uncertainty gives rise to much of the fear and anger that terrorism is intended to inspire. But we have to manage those emotions and channel them productively. We must explore and remedy our vulnerabilities in order to minimize the risk of another attack, particularly a mass terror attack. And we

286. See supra text accompanying notes 251–53.
287. Chesney, supra note 96, at 1413–18.
288. See Waldron, supra note 101, at 195. The 9/11 Commission also displayed its discomfort with the trade-off when it observed that the choice between liberty and security is a “false choice” because “insecurity threatens liberty” and conversely “if our liberties are curtailed, we lose the values that we are struggling to defend.” See National Commission on Terrorist Attacks, supra note 252, at 395.
must also ensure that we are prepared, and that we have the health care and emergency service capacities to respond in the event of a deadly attack.

Managing our emotions also means thinking about structural and analytical devices that might be deployed across the three branches of government to restrain the counterproductive sequelae of emotion. At the same time, we should be wary of devices that have the potential to play into our emotions rather than restrain them. States of emergency, discussed above,\textsuperscript{289} clearly pose this threat. And a not-so-short-lived sunset provision may escape deliberation and scrutiny because its temporary nature provides false comfort.\textsuperscript{290} Addressing the perils of emotion in the face of real or perceived catastrophe scenarios will be a challenge. We may need to re-visit judicial presumptions and refine or reject them. For example, courts might view more critically the invocation of national security by a government trying to resist judicial review. Judges could also be more skeptical of claims by the executive that it has broad authority—under statute or the Constitution—to act unilaterally. Demanding unambiguous legislative authority for restrictions on civil liberties, as Sunstein suggests,\textsuperscript{291} could also help, as might the imposition of heavier justificatory burdens when those restrictions are eventually subjected to judicial scrutiny.\textsuperscript{292} But in my view, these approaches, even if adopted cumulatively, would not be sufficient.

Human rights impact assessments that draw attention to the potential human rights effects of counterterrorism measures before they are implemented will not be a complete solution either. But they should be a core component of any array of anti-emotive devices. Deontological arguments for respecting human rights—in particular, absolute rights like the one reflected in the ban on torture—are compelling for some, but sadly not all. For others, the foreign policy implications of human rights violations make a persuasive consequentialist case for respecting those rights—or at least, for the avoidance of the most public and egregious violations. But in my view, there is a more persuasive reason, also based on self-interest, for paying closer attention to human rights.\textsuperscript{293} Human rights impact assessments may operate as a corrective

\textsuperscript{289} See supra text accompanying notes 90–91 and Part VII.
\textsuperscript{290} See supra text accompanying note 92.
\textsuperscript{291} See Sunstein, supra note 166, at 210–14.
\textsuperscript{292} Id. at 222–23. Sunstein draws here on the work of Vincent Blasi, who has argued, in the context of the First Amendment, that courts should adopt a “pathological perspective” and create safeguards for the worst of times when liberty is most likely to be under siege. See Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449 (1985).
\textsuperscript{293} The argument I make here should also appeal to those who urge restraint in government regulation of environmental and public health risks, since it draws on arguments they have already made. See, e.g., Sunstein, supra note 5.
to errors resulting from our emotional responses to terrorism, including strategic
errors. These assessments can help us to think more broadly and carefully
about what counts in counterterrorism, and more careful and creative thinking
should make for more effective counterterrorism policy.

Undeniably, there are some who care little about and will not regret
unnecessary violations of the human rights of the few. But if we continue to
violate those rights in order to defuse or satisfy our emotions instead of taking
more effective measures to defend and protect ourselves, we are more likely to
invite catastrophe than prevent it.

294. One of the most conspicuous examples of strategic error resulting from emotion
and leading to human rights violations was the Army’s adoption of aggressive interrogation
tactics at Guantanamo Bay and elsewhere in 2002 and 2003. The tactics adopted were not
designed to extract intelligence, but to break a detainee’s will and force compliance to the
point of false confession. See M. Gregg Bloche & Jonathan H. Marks, Do Unto Others as They
Did Unto Us, N.Y. Times, Nov. 14, 2005, at A21. See also Douglas Jehl, Qaeda-Iraq Link
U.S. Cited Is Tied to Coercion Claim, N.Y. Times, Dec. 9, 2005, at A1 (reporting that a
crucial prewar assertion about ties between Iraq and Al Qaeda was based on statements made
by a prisoner “rendered” into Egyptian custody by the U.S.; he later claimed to have
fabricated the ties to escape harsh treatment).