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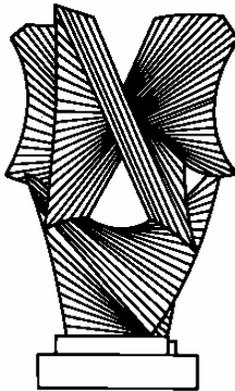
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LIBERTARIAN PANICS

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Libertarian Panics

Adrian Vermeule *

In a standard analysis, the history of civil liberties is characterized by a series of security panics.¹ A range of social mechanisms—cognitive heuristics and biases, various forms of cascading and herding, conformity and preference falsification, and so on—cause periodic panics in which aroused publics demand repressive measures to curtail the civil liberties of perceived enemies of the nation, particularly noncitizens or other outsiders. Government officials may themselves panic, or will at least supply the panicky measures that constituents demand. The standard remedy is to urge changes to legal doctrine or institutions, in order to curtail government’s power to repress civil liberties in response to security panics.

The standard model of security panics has been criticized on several grounds.² Sometimes security panics are justified, even if produced by disreputable mechanisms; fear can motivate beneficial action as well as detrimental action. In any event, legal doctrines, and perhaps even institutional design, will prove incapable of constraining a genuinely panicked public.

*Bernard D. Meltzer Professor of Law, The University of Chicago. Thanks to Ronald Collins, David Strauss, and Cass Sunstein for helpful comments, to Eric Posner and Geof Stone for many enlightening conversations on civil liberties and related topics, and to Justin Rubin for excellent research assistance. This paper is forthcoming in a symposium volume of the *Rutgers Law Journal*.

¹I take this to be a central theme of Geof Stone’s magisterial book. See GEOFFREY R. STONE, *PERILOUS TIMES : FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004). Other treatments include Cass R. Sunstein, *Fear and Liberty*, 71 *SOCIAL RESEARCH* (forthcoming)(manuscript on file with author); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1 (2003).

²See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 *STAN. L. REV.* 605 (2003).

In what follows I will sketch a different criticism of the standard model. Even if that model is right as far as it goes, it is fatally incomplete. My central claim is that the mechanisms underlying security panics have no necessary or inherent pro-security valence. The very same mechanisms are equally capable of producing libertarian panics: episodes in which aroused publics become irrationally convinced that justified security measures represent unjustified attempts to curtail civil liberties. I will suggest that libertarian panics have been a regular occurrence in American history, and that we may be living through one now, in the form of a widespread and thoroughly irrational, even hysterical, reaction to small legal changes adopted after 9/11. Indeed, the tendency to diagnose the existence of a security panic can itself be symptomatic of a libertarian panic.

The existence of libertarian panics undermines the institutional reforms urged by the advocates of the standard model. The very reforms that would minimize the risks and harms of security panics will maximize the risks and harms of libertarian panics. The institutional-design problem, then, is to optimize in light of these offsetting risks; whatever legal and institutional arrangements turn out to be optimal, they will necessarily prove less protective of civil liberties than the arrangements favored by advocates of the standard model.

Part I shows that the mechanisms that produce security panics are equally capable of producing libertarian panics. Part II examines libertarian panics during the Founding era and after 9/11, to show that libertarian panics are not only conceptually possible but actually occur. Part III discusses the significance of security panics and libertarian panics for the design of legal doctrine and institutions. A brief conclusion follows.

I. The Mechanisms of Panic

A security panic produces excessive governmental intrusion on liberty, where “excessive” is defined by some background normative theory of the optimal balance between liberty and security. The focus here is not on the background theory—not on the question what is to count as excessive intrusion—but instead on the irrationality of the process that produces the government’s actions. In the standard model, security panics can be produced by a range of cognitive and social mechanisms. (One might sort the

mechanisms into different categories, although the upshot would be the same). I will briefly consider each type, with a view to showing that these mechanisms are inherently neutral with respect to the tradeoff between security and liberty. Panicked crowds may run in any direction, towards excessive security or excessive liberty; proponents of the standard model have overlooked that the mechanisms they cite are too coarse-grained to produce security panics alone. I conclude with brief remarks on a political mechanism said to produce excessive government intrusion on liberties: the possibility that democratic majorities will externalize the costs of security onto political minorities or outsiders. This is not a mechanism of panic, strictly speaking, but a similar point obtains: democratic majorities, whether or not in the grip of a libertarian panic, may also ignore the interests of minorities by externalizing the costs of liberty, exposing minorities to excessive security risks where majorities will not bear the costs. So the mechanism of political cost-externalization has no inherent anti-libertarian valence either.

A. Cognitive Mechanisms

A range of cognitive mechanisms have been invoked to explain security panics. These are, typically, heuristics: rules of thumb that boundedly rational individuals use to navigate settings in which information is limited, or in which a full assessment of all relevant information would outstrip their limited computational capacities.³ Consider the availability heuristic, under which “a class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable,” and probability neglect, under which judgments of risk are insensitive to variations in probability.⁴

Standardly, these and similar mechanisms are said to produce excessive fear of terrorism and other security risks. Yet it should be immediately obvious that nothing inherent in these mechanisms speaks at all to the content of the risk whose availability inflates judgments of frequency, or whose probability is neglected. Consider the risk that government will impose excessive security measures (defining “excessive” according to some background normative theory of the optimal balance between liberty and security).

³See Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1041-50 (2003).

⁴Amos Tversky & Daniel Kahneman, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, IN JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (1982).

Suppose that people neglect the probability of this risk, treating it as virtually certain, or as much higher than it actually is. Or suppose that a few highly available or salient episodes of unjustified governmental intrusion on civil liberties are easily recalled, causing individuals to form exaggerated estimates of the risk of intrusion. Then availability and probability neglect would push individuals towards a libertarian panic rather than towards a security panic.

B. Social Mechanisms

Security panics are sometimes said to be rooted in social mechanisms as well as individual-level mechanisms. Social cascades may occur, such that a large number of individuals influence each other to hold exaggerated perceptions of security risks.⁵ Such cascades need not be the product of “panic” in any pejorative sense. Consider rational herding mechanisms, in which the early actions of a succession of individuals, each possessed of some private information, influence later individuals in the chain; even if all are rational, the whole chain may act erroneously if the first movers’ information was erroneous.⁶ Yet there are also irrational or quasi-rational mechanisms, such as “availability cascades” that spread highly salient, albeit misleading, anecdotes through social networks, producing biased and exaggerated perceptions of risk.⁷ Within decisionmaking groups, mechanisms such as group polarization may skew risk perceptions even farther; highly salient or available fears will be amplified by group discussion.⁸

In all these cases, however, the problem is that the social mechanisms of panic may produce libertarian panics as easily as security panics. Highly salient or available examples of governmental intrusions on liberty may circulate in popular discourse, exaggerating perceptions of the risk of governmental oppression. If government commits some rate of error (at least from the standpoint of hindsight) in detaining individuals as a risk to national security, or in detaining material witnesses, vivid tales of individual

⁵See generally Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000)(discussing the effect of social influences on individual decision making)[hereinafter Sunstein, *Deliberative Trouble?*].

⁶*Id.* at 84.

⁷See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

⁸Sunstein, *Deliberative Trouble?*, *supra* note 5.

injustice will appear in the media. Within groups, an initial libertarian skew may be exaggerated by the prevalence of such anecdotes, polarizing the group even farther in a libertarian direction. Of course these points are conceptual, not empirical; below I will offer some examples of libertarian panic, especially in America after 9/11. The point here is just that the social mechanisms of panic cut in no particular direction. In the abstract, it is impossible to claim that social mechanisms are systematically more likely to produce security panics than libertarian panics.

C. Does Panic Have a Valence?

We may generalize the last point by asking whether panic systematically tends to push individuals in any particular direction. On the analysis here, the answer is emphatically no; panic has no intrinsic valence. Panicked individuals, and crowds, can stampede in any direction, towards excessive liberty as well as excessive security. The standard diagnosis of security panics is not wrong (bracketing criticisms I do not explore here), but it is incomplete. The mechanisms of panic produce panics, not necessarily or merely security panics; another possible consequence is a libertarian panic.

There are two ways of expressing this point. Government intrusion on the proper scope of civil liberties—defining the proper scope of civil liberties according to some normative account—is a risk like any other. Any mechanism that causes people to miscalculate risk, or to express mistaken judgments about risk, applies to the risk of governmental oppression as much (or little) as it applies to any other risk. In the abstract, a panicked judgment that government is highly prone to abrogate civil liberties is just as likely as a panicked judgment that civil liberties must be abrogated for security reasons.

Perhaps it is odd to see the chance of bad government policy as a risk, although that approach is now standard in many areas of legal and economic theory.⁹ But the point can be put another way, operationally equivalent to the first. People's reactions to security policy are plausibly a composite or function of two variables—their perception of security risks and their trust in government as an agent to prevent those risks.¹⁰ The security panics analysis says that the mechanisms of panic can exaggerate the perception

⁹Cf. Louis Kaplow, *Legal Transitions: Is there an Ideal Way to Deal with the Non-Ideal World of Legal Change?* 13 J. CONTEMP. LEGAL ISSUES 161 (2003).

¹⁰With regard to trust in government, see RUSSELL HARDIN, *TRUST AND TRUSTWORTHINESS* ch. 7 (2002)

of risk too much (as measured by some background theory). But the mechanisms can also reduce trust in government too much (as measured by some background theory). Panic can produce a widespread and unjustified suspicion of governmental responses to genuine security risks.

The same point holds when the analysis of security panics is put in terms of fear and risk aversion. Sometimes security panics are ascribed to a human tendency to minimize false negatives, or the failure to react to a risk, rather than false positives, reaction or overreaction to a nonexistent or exaggerated risk.¹¹ This skew in risk-related decisionmaking, said to represent a holdover response to evolutionary conditions, may be rational if the harms of the false negative are systematically greater than the harms of the false positive. If a shadow under the trees might be a tiger, the expected costs of running away from a nonexistent tiger are far less than the expected costs of failing to run away from a real tiger.

Whether or not this skew is rational, however, the point of interest here is that risk aversion gives no reason to think that security panics are more probable or more costly than libertarian panics. What counts as “the tiger” is not given by the risk-aversion argument itself. If the relevant risk is that government will unjustifiably curtail civil liberties, the argument from risk aversion suggests that behavior will be skewed towards minimizing the failure to prevent governmental overreaching; the result will be excessive distrust of government.

Overall, then, the mechanisms of panic have no systematic relationship to the tradeoff between security and liberty. The standard analysis observes that the mechanisms of panic may cause society to purchase too much security and too little liberty, but the opposite is also possible and equally likely, at least in the abstract. A corollary is that a given society at a given time can undergo both security panics and libertarian panics. The former will increase the perception of risk, while the latter will reduce trust in government to prevent those risks; the net result is unclear, and it will be a sheer fortuity if the two effects cancel each other out. Although it is possible in principle that the very same institutions or social groups might undergo a security panic and a

¹¹See STONE, *supra* note 1, at 530.

libertarian panic simultaneously, it is more likely that both types of panics occur at the same time but among different institutional or social sectors. Pointing to the existence of a security panic in one sector is not even *prima facie* inconsistent with the possibility of a libertarian panic in other sectors. If legislators are in the grip of a security panic, judges may be in the grip of a libertarian panic, or vice-versa. We will return to these institutional implications below.

D. A Note on Democratic Cost-Externalization, and Other Political Distortions

The literature on security panics often runs together the diagnosis of panic with a different idea: that democratic majorities will sacrifice the civil liberties of outsider groups—foreigners, resident noncitizens, illegal immigrants, and so on—in the interest of maximizing the majority’s security. This idea strictly speaking has nothing to do with panic. On the picture sketched by these accounts, a rational, albeit self-interested, democratic majority would sacrifice the civil liberties of outsider groups just because the majority captures the security gains while shunting the costs of its illiberal policies onto others. The basic idea is not one of panic, but of rational cost-externalization. Nonetheless, the claim here parallels the standard claim about security panics: in both cases, a decisionmaking distortion causes the democratic majority to purchase too much security and not enough liberty, from the social point of view.

And the problems with the two claims are also parallel. As with security panics, the mechanism of democratic cost-externalization is pitched at too high a level of abstraction to produce the conclusion that civil libertarians want to reach. If the structure of the political system allows democratic majorities to externalize costs onto minorities and outsiders, they may externalize any sort of cost, not merely the costs of purchasing security.

In particular, it is quite possible that democratic majorities will externalize the costs of *liberty* onto minority and outsider groups, purchasing too little security because majorities do not bear the costs of insecurity. This is a familiar point in debates over criminal-justice policy, where affluent libertarians are charged with supporting constitutional rights that protect the criminals who prey upon poor minority communities. The affluent libertarians do not bear anything like the full costs of crime, and thus support

a more expansive scheme of civil liberties than would be produced if poor minority communities had proportionate influence in the political system.

The same mechanism might operate in the terrorism context. Consider the possibility that libertarian majorities, mostly living outside of the large urban areas that are the best target for terrorism, will cause the political system to invest too little in terrorism prevention because they do not bear the full costs of its occurrence. On this account, the red-state voters who supported the Republican party in 2000 and 2004 might cause the national political process to provide too much liberty and inadequate security for blue-state urban centers.¹² Whether or not this story is true, the point is that there is no general reason to think that cost-externalization systematically tilts in the direction of producing too much security, rather than too much liberty. Whatever the optimal balance at a given time, and whatever political forces produce the actual balance at a given time, the appeal to democratic cost-externalization is too general to get much traction on the issues.

The same is true of other libertarian claims that political “distortions” can cause government to produce too much security and not enough liberty. Here, of course, the libertarian background theory must specify both an optimal liberty-security tradeoff and an account of undistorted political process. I bracket the content of that background theory, however, in favor of a different point. Even if such a theory exists, whatever political distortions it identifies can also operate in exactly the same manner to produce excessive liberty and inadequate security.

Consider the suggestion that security panics are produced by self-interested security entrepreneurs: government officials and interest groups who whip up security panics for political advantage. The implicit model here is underspecified: are voters and citizens rationally ignorant, or just irrational? If the latter, why are their agents rational (albeit self-interested)? In any event, why does not institutional competition cause, say,

¹²Dean E. Murphy, *Security Grants Still Streaming to Rural States*, NY TIMES A1 (October 12, 2004); Keven Diaz, *Pork-barrel security; Federal money to protect Americans from terrorism may not be going to states that need it the most. Formulas and politics are behind the disparities*, STAR TRIBUNE (Minneapolis-St. Paul) 1A, (September 11, 2004); Elizabeth Shogren, *More Federal Aid Sought for Cities at Risk of Attack; Under the current rules, a large chunk of such funds goes to less vulnerable areas. Efforts to redirect money have stalled in Congress*, L.A. TIMES A21, (August 10, 2004).

competing candidates for office, or other branches of government, to attempt to dampen the panic? Finally, what are the microfoundations of the account—how exactly does expanding the power of the governmental security apparatus personally benefit self-seeking officials and groups?¹³

Even bracketing such points, however, the problem is that the opposite political distortion is equally possible, at least in the abstract. Officials, candidates for office, and interest groups may act as self-interested libertarian entrepreneurs. Such entrepreneurs—we might think of the ACLU and Michael Moore most recently—may whip up a libertarian scare, exaggerating reports of governmental intrusion in order to establish a public climate that is hostile to governmental power, to oust a disfavored incumbent, or to increase membership and donations. Here again, political failure in the sense of panic-ridden and nondeliberative public discourse turns out to have no general authoritarian (as opposed to libertarian) valence.

II. Libertarian Panics in America

Nothing in the mechanisms of panic suggests any systematic tilt towards security panics, as opposed to libertarian panics. But do libertarian panics actually occur? I believe that they do; not only can it happen here, it has. I cannot offer a full historical treatment, for lack of both space and expertise. Instead I will very briefly consider both the founding era and the period after 9/11, merely to generate plausible hypotheses for further research.

A. Colonial America

Bernard Bailyn describes the atmosphere of public opinion in Colonial America after 1763 in the following terms:

[The colonists] saw about them, with increasing clarity, not merely mistaken, or even evil, policies violating the principles upon which freedom rested, but what appeared to be evidence of nothing less than a deliberate assault launched surreptitiously by plotters against liberty both in England and in America. . . . This belief transformed the meaning of the colonists' struggle, and it added an inner accelerator to the movement of opposition. For, once assumed, it could not be easily dispelled: denial only confirmed it, since what conspirators profess is not what they believe; the ostensible is not the real; and the real is deliberately malign.

¹³See Daryl J. Levinson, *Empire-Building Government in Constitutional Law* 118 HARV. L. REV. 915 (2005).

It was this—the overwhelming evidence, as they saw it, that they were faced with conspirators against liberty determined at all costs to gain ends which their words dissembled—that was signaled to the colonists after 1763, and it was this above all else that in the end propelled them into Revolution.¹⁴

Bailyn emphasizes that this widespread, and wildly overheated, suspicion and mistrust of the British colonial administration “rose in the consciousness of a large segment of the American population before any of the famous political events of the struggle with England took place.” The 1763 Stamp Act was “a danger signal”:

For though it could be argued, and in a sense proved by the swift repeal of the act, that nothing more was involved than ignorance or confusion on the part of people in power who really knew better and who, once warned by the reaction of the colonists, would not repeat the mistake—though this could be, and by many was, concluded, there nevertheless appeared to be good reason to suspect that more was involved.¹⁵

If Bailyn is right, then the very Revolution itself¹⁶ might be described as the consequence of a widespread and sustained libertarian panic, or perhaps a wave of serial panics. Bailyn does little to identify the mechanisms that produced the founding-era libertarian panics; of course that is not his chief concern. It takes little imagination, however, to see the mechanisms of panic at work. A social-scientific version of Bailyn’s treatment might suggest that the colonists focused obsessively on highly salient or available episodes of government oppression, whether or not those episodes were representative of British policy; neglected the probabilities of an antilibertarian conspiracy, focusing solely on what consequences it would have if it did materialize; and polarized, through group discussion and other social mechanisms, towards an extremist libertarian viewpoint.

B. The Patriot Act Panic

Let us provide a bookend to the founding era by examining the reaction, particularly among intellectuals and other segments of the elite public, to statutes and administrative policies created after 9/11 to reduce terrorism risks. The subject is heterogeneous; for convenience, I will focus on the most salient component of terrorism policy, the USA

¹⁴BERNARD BAILYN, ORIGINS OF THE AMERICAN REVOLUTION 95 (1992).

¹⁵*Id.* at 99

¹⁶Not, however, the Constitution or the Bill of Rights, which were framed several decades after the events Bailyn describes.

Patriot Act of 2001.¹⁷ Many civil libertarians denounce the Patriot Act in apocalyptic terms. Since 9/11, some 360 local communities, and 4 States, have passed ordinances calling the Act a fundamental retrenchment of American civil liberties.¹⁸ Much popular and academic commentary takes an equally lurid line.¹⁹

Many of these claims can only be described as ignorant; many are also irrational, even hysterical. The most common mistake is a sort of baseline error. Civil libertarians ascribe to the Patriot Act “deprivations” of civil liberties as measured from some baseline set of entitlements that either never existed, or that was changed in the relevant respects long before the Patriot Act was passed.

Here are some examples of baseline error. First, consider one of the Act’s most controversial provisions, the so-called “sneak and peek” provision (Section 213). The provision allows for the required notice to the target of a search warrant to be delayed for a reasonable period, if a court finds reasonable cause for doing so. Local ordinances and public statements by libertarian advocacy groups have denounced the provision in lurid terms, as a fundamental curtailment of civil liberties;²⁰ the ACLU claimed that it marks a “sea change in the way search warrants are executed in the United States.”²¹ The problem

¹⁷For the point that the Patriot Act’s very name may have helped to spark libertarian panic, see Eric A. Posner & John Yoo, *The Patriot Act Under Fire*, *The Wall Street Journal*, December 9, 2003 at A26.

¹⁸See List of Communities that have Passed Resolutions at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (last visited on 1/2/05).

¹⁹See, e.g., Elaine Scarry, *Acts of Resistance*, *Harper’s Magazine*, May 2004, at p. 15; William E. Zieske, *Demystifying the USA Patriot Act*, 92 ILL. B.J. 82 (2004); Jeremy C. Smith, *The USA Patriot Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security*, 82 N.C.L. REV. 412 (2003); Patria Mell, *Big Brother at the Door: Balancing National Security with Privacy Under the USA Patriot Act*, 80 DENV. U.L. REV. 375 (2002); Jennifer C. Evans, *Hijacking Civil Liberties: The USA Patriot Act of 2001*, 33 LOY. U. CHI. L.J. 922 (2002).

²⁰ee, e.g., Vermont Legislature Resolution, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12734&c=207>; Community Resolution for Lowell, MA, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17189&c=207>; Community Resolution for Kansas City/Wyandotte County, KS, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17190&c=206>; Community Resolution for Westchester, NY, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16526&c=207>; Richmond, VA, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15549&c=207>; Community Resolution for Homer, AK, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13243&c=206>; See also, the ACLU Draft Resolution, which many of the resolutions copy in some form or another, “Model Local Resolution to Protect Civil Liberties available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11267&c=207>(saying, the Patriot Act “expand[s] the authority of federal agents to conduct so-called “sneak and peek” or “black bag” searches. . .).

²¹How the USA-Patriot Act Expands Law Enforcement "Sneak and Peek" Warrants available at <http://www.aclu.org/Privacy/Privacy.cfm?ID=9769&c=39>

is that the provision merely codifies preexisting settled law. As of 1979, the Supreme Court had already described the argument that notice could not be delayed as “frivolous.”²²

Second, consider Section 215 of the Act, which allows courts to issue subpoenas for business records in national security investigations. Many have denounced the provision as a mechanism of governmental oppression. Yet the provision codifies a power that grand juries (typically dominated by prosecutors) have long exercised without judicial oversight. Measured from that baseline, as opposed to some imaginary libertarian one, the addition of judicial subpoenas looks no worse and possibly better, from the point of view of targets and defendants.

The most critical example of baseline error, however, involves the complaint that the Patriot Act authorizes Orwellian electronic surveillance of persons who pose a threat to national security.²³ The problem is that

[T]he Act did not initiate this practice. The system of secret search and wiretap warrants, granted in a secret hearing by a group of federal judges, without notice to the target, was established 25 years ago by the Foreign Intelligence Surveillance Act [of 1978]. FISA was passed because before 1978 authorities could conduct searches to stop threats to national security without any judicial warrants at all.²⁴

So there is actually a double or nested baseline error in the hysteria about the Patriot Act’s surveillance provisions. The Act’s only significant contribution to the law in this area is Section 218, which eliminated administrative and judicial interpretations of the FISA that had created a “wall” of separation between the information held by counter-intelligence officials and that held by law-enforcement officials. But most of the FISA was in place long before the Patriot Act; and the FISA itself represents a libertarian, rights-protective regime, relative to the pre-1978 legal baseline.

²²*Dalia v. United States*, 441 U.S. 238, 247-48 (1979)

²³The loudest of the groups making such claims include the ACLU, *see* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12263&c=206>; and the Electronic Frontier Foundation, *see* <http://www.eff.org/Privacy/Surveillance/Terrorism/PATRIOT/>; city and state resolutions have also criticized the surveillance power authorized under the Patriot Act as an invasion of rights, *see e.g.* Minneapolis’s resolution, *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12291&c=207>; the Alaska State Legislature’s Resolution, *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12707&c=207>; and the State of Maine Resolution, *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15294&c=207>.

²⁴Posner & Yoo, *supra* note 7.

Overall, the, the reaction to the Patriot Act among journalists, public commentators, and academics is grossly out of proportion to its real effect. The next question is why such a systematic error of public perception has occurred. Future sociological work might trace and specify the mechanisms that have created this libertarian panic. In addition to individual-level cognitive failures such as baseline error, it seems plausible to hypothesize that social mechanisms have been in play, including various forms of polarization, herding and cascades among the state governments, legal elites and libertarian intellectuals who have condemned the Patriot Act in strong terms.²⁵

Finally, let us be clear that the Patriot Act panic, like the colonial panic, has been highly consequential. The consequence of the modern panic may well be that the Patriot Act will not be renewed. If so, future adjustments of the balance between security and liberty will be constrained by widespread but panicky popular opinion that condemns policy innovation by reference to imaginary, and highly libertarian, legal baselines.

C. How Frequent Are Libertarian Panics?

I have not attempted to show either that libertarian panics are frequent in American history, or that they are as frequent as security panics. A full historical investigation, equal in scope and detail to Geof Stone's indispensable history of security panics,²⁶ would be needed to document either of those claims. What I have attempted to show is that that libertarian panics (1) are conceptually possible and (2) have occurred at important moments of our history.

It remains possible that security panics occur more frequently, and more intensely, than libertarian panics; the issue is empirical, and cannot be resolved through a priori reasoning. People panic easily at the thought that terrorists are trying to kill them, but they also panic easily at the thought that jack-booted government thugs are coming for them. It bears emphasis, moreover, that no conclusions about optimal institutional design are possible without estimating the relative frequency and gravity of both security panics

²⁵David Strauss has pointed out to me that the Patriot Act panic may not really be about the statute, despite the public claims of the statute's critics; the panic might rest instead on systematic distrust of the Bush administration officials who are charged with enforcing the statute's provisions. Of course, that distrust itself might in turn be the product of various panic-inducing mechanisms, especially various forms of groupthink among libertarian-leaning elites.

²⁶See STONE, *supra* note 1 (passim).

and libertarian panics (a point I pursue in Part III below). The standard model cannot be justified simply by documenting a long history of security panics. Unless and until an equally thorough history of libertarian panics is done, we just do not know the relative expected magnitude of the two effects, and the institutional-design assumptions of the standard model are unjustified.

III. Libertarian Panics, Law, and Institutions

Suppose there are libertarian panics. What follows? In the standard model, the risk of security panics is said to justify legal doctrines or institutional arrangements that place a drag on liberty-restricting governmental action. These rules act as second-best constraints that limit the frequency and gravity of unjustified restrictions on liberty. If there are libertarian panics, however, then the legal and institutional calculus is more complicated. In addition to unjustified restrictions on liberty, we must be concerned about inadequate restrictions on liberty. The very legal rules and institutional arrangements that minimize the first type of error will exacerbate the second type of error. The net result depends on facts, about the relative risks and magnitudes of the two types of error, and we can say little about this in the abstract. It seems clear, however, that optimal legal rules and institutional arrangements will certainly be less libertarian than they would be if security panics were the only type of panic in the picture.

A. Second-best Libertarianism

To understand the institutional implications of the standard model, we need to define a cost-benefit baseline for security policy. On this picture, security and liberty are both valuable goods that trade off against one another in predictable ways. To be sure, security and liberty are complements as well as substitutes; liberty cannot be enjoyed without security, and security is not worth enjoying without liberty. And there is something like a Pareto frontier for liberty and security; in some situations rational policymakers can increase security at no cost to liberty, or increase liberty at no cost to security. But advanced liberal democracies, let us suppose, are typically at or near the frontier already. In their circumstances, an appreciable increase in security will require some decrease in liberty, and vice-versa. The problem from the social point of view is one of optimization: it is to choose the point along the frontier that maximizes the joint benefits of security and liberty (bracketing all of the well-known problems with aggregative social welfare

functions). Neither security nor liberty is lexically prior; no claims of the type “liberty is priceless” or “security at all costs” will be admitted.

So far all this is a common assumption of the standard model, albeit usually an implicit one. Let us turn to the role of security panics in the security/liberty tradeoff. In the most sophisticated version of the argument, decisionmakers who are subject to security panics ought not engage directly in balancing that attempts to strike the optimal tradeoff between liberty and security. Those decisionmakers will predictably skew their judgments in favor of security, resulting in excessively restrictive policies (“excessively” from the standpoint of the social welfare function that defines the optimal tradeoff).

The institutional solution, on this view, is to deny front-line decisionmakers the authority to engage in direct or first-order balancing of liberty and security. The preferred alternative is “second-order balancing,” under which civil liberties are overprotected through second-best rules that mitigate the risk of error in the first-order calculus.²⁷ Consider the Court’s development of overprotective restrictions on government’s ability to punish political speech. An all things-considered first-order optimization or balancing approach to political speech that threatens social harms would “ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”²⁸ Doctrines holding that legislation must be content-neutral, and that government may only punish political speech that “imminently” incites unlawful action,²⁹ build in a skew that compensates for predictable decisionmaker error in the application of the first-order balancing test. As the example shows, the argument for second-order balancing goes beyond an abstract claim that rules may correct for the errors that decisionmakers commit under first-order balancing. In this setting, the argument for second-order balancing is an argument not only for rules, but for rules with a distinctly libertarian slant—a kind of second-best libertarianism. The idea is to build into the second-order rules a skew in favor of liberty that will compensate for predictable pressures towards overweighting security—pressures such as security panics.

B. Two Types of Errors

²⁷Sunstein, *supra* note 1, at 17

²⁸See *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (L. Hand).

²⁹See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Given the possibility of libertarian panics, second-best libertarianism is too simplistic. Doctrines and institutions that compensate for the distorting effect of security panics (relative to the optimum that a perfect first-order balancer would identify) will exacerbate the distorting effect of libertarian panics. The argument for second-order libertarianism focuses exclusively on one type of error—excessive security induced by security panics—and ignores another type of error—excessive liberty induced by libertarian panics.

Consider two institutional solutions for the problem of security panics.³⁰ The first suggestion involves internal congressional procedures intended to create a barrier against panicky legislation restricting civil liberties. For example, “Congress could enact a rule prohibiting it from enacting wartime legislation without full and fair deliberation.”³¹ The second suggestion is for a “protocol [that] might require any wartime legislation limiting civil liberties to contain a ‘sunset’ provision.”³² The assumption common to such suggestions is that “[a]nything that slows the process, allows for greater deliberation, and limits the potential scope and impact of hastily enacted legislation limiting civil liberties is salutary.”³³

There are many possible lines of objection here. Such protocols, which are not entrenched in the Constitution, may themselves be overridden by panicked legislators, so given the diagnosis of security panics the remedy be a nonstarter.³⁴ And the two suggestions are in some tension with each other, as the knowledge that a given law contains a sunset proviso lowers the stakes of enacting it and may thus detract from the very legislative deliberation that the first protocol is meant to encourage.³⁵

The possibility of libertarian panics supports a different objection, however. To the extent libertarian panics occur, then the danger is that the political system will produce too little legislation restricting civil liberties, rather than too much. Institutional protocols

³⁰Proposed, and discussed with more nuance than I can do justice to here, by STONE, *supra* note 1.

³¹STONE, *supra* note 1, at 539. Cf. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047-51 (proposing a “supermajoritarian escalator” as a way of limiting the ability of the government to use emergency powers).

³²STONE, *supra* note 1, at 540.

³³STONE, *supra* note 1, at 540.

³⁴See Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 432-33 (2004). Stone acknowledges this problem. STONE, *supra* note 1, at 540.

³⁵Jacob E. Gersen, *Temporary Legislation* (2004) (unpublished manuscript, on file with author).

or arrangements that further raise the cost of enacting restrictions on civil liberties will push the system farther away from the optimum, not (as the assumption runs) closer to it. Legislators forced by internal protocols to enact less liberty-restricting legislation than they otherwise would, will merely underprotect security all the more, from the standpoint of the social optimum.

To be sure, the precise shape of the optimal institutional rules will depend upon the relative frequency and gravity of the two types of errors. If libertarian panics are rare and mild, a diluted second-order libertarianism might still be appropriate. But if libertarian panics are as frequent and powerful as security panics, then the optimal rules will just be those suggested by first-order balancing; there will be no reason to introduce a second-order skew to compensate for errors in either direction. We can even imagine, on certain facts, a case for second-best authoritarianism: if libertarian panics are more frequent and powerful than security panics, then second-order institutional design would do well to build in a compensating skew that would push outcomes in the direction of less liberty and more security.

Conclusion

The commentary on emergencies, constitutionalism and civil liberties after 9/11 is rife with claims that America is undergoing a security panic.³⁶ From a different perspective, this widespread diagnosis of a security panic may itself just be evidence of, or even be the very stuff of, a libertarian panic. Bailyn's panicky libertarian colonials saw the specter of authoritarianism in even the mildest policy measures of the British administration, but were content to ascribe the wrongdoing to nefarious motives. Current commentators are more sophisticated. Like the colonials, they see the small-bore legal changes as a massive adjustment of the balance between security and liberty, but they explain the lurch towards authoritarianism on more modern-seeming psychological grounds. On those same grounds, however, it might also be said that panicky libertarians

³⁶See Chisun Lee, *Civil Rights Rollback, The Spread of Racial Profiling Since 9-11*, The Village Voice, August 3, 2004; Anthony Lewis, *Bush and the Lesser Evil*, The New York Review of Books, May 27, 2004, available at <http://www.nybooks.com/articles/17111>; Richard H. Kohn, *Using the Military At home Yesterday, Today, and Tomorrow*, 4 CHI. J. INT'L L. 165 (2003); Aryeh Neier, *The Military Tribunals*, The New York Review of Books, February 14, 2002 available at <http://www.nybooks.com/articles/15122>; Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002).

are especially likely to diagnose security panics in the surrounding society. It might turn out that the very people who are most prone to accuse others of panicking are the people most deeply in the grip of the irrational.

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