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Cass R. Sunstein

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A NOTE ON “VOLUNTARY” VERSUS “INVOLUNTARY” RISKS

CASS R. SUNSTEIN*

Ordinary people seem to perceive voluntarily incurred risks as less troublesome than involuntarily incurred risks. Consider the diverse public reactions to airplane crashes and automobile crashes. Or consider the fact that tobacco is by far the largest source of preventable deaths in the United States. Why do we not devote much more of our regulatory effort to reducing smoking? The reason seems to lie in a judgment that smoking is a voluntary activity, and hence, the resulting deaths are less troublesome than are other sorts of deaths. People have voluntarily assumed the relevant risks. This idea helps account for the fact that the government devotes relatively little in the way of resources to control not only smoking, but also to combat the habits of poor diet and insufficient exercise, which produce at least 300,000 premature deaths every year.

The distinction between voluntary and involuntary risk may well be the central element in the difference between lay and expert judgments about risk. Experts tend to focus on aggregate lives at stake; lay people care a great deal whether a risk is undertaken voluntarily. Their concern on this score seems quite reasonable, in part because it accords so well with widespread intuitions. But my basic claim here is otherwise. I suggest that judgments about whether a risk is “involuntary” often stem from confusion and selective attention, and that the real basis for such judgments frequently lies in an antecedent judgment of some other kind. It is important to identify and defend such judgments.

More generally, and more importantly, I contend that the effort to exempt “voluntary” risks from governmental concern—undoubtedly a response to the public demand for regulation—results in hundreds of thousands of unnecessary and preventable deaths each year. If the government focused its attention on more of the supposedly “voluntary” causes of death—consider smoking, poor diet and exercise, and automobile accidents—it could save an enormous number of lives, and it could do so at a relatively low cost.

* Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago Law School and Department of Political Science. This essay draws on Cass R. Sunstein, *Bad Deaths*, 14 J. OF RISK AND UNCERTAINTY 259 (1997); Cass R. Sunstein, *Selective Fatalism*, 26 J. LEGAL STUD. (forthcoming 1997).

I. PUZZLES

It is tempting to think that the apparent lay preference for according greater weight to "involuntary" risks to life requires significant qualification of any criterion that experts may use, such as lives or life-years saved. But a simple reference to voluntariness, if taken to suggest something special about "lay rationality," raises many puzzles. The most important problem is that it is not simple to know when a risk is voluntarily incurred. "Voluntariness" may be entirely absent in the case of an unforeseeable collision with an asteroid; but voluntariness is not, in cases of environmental, occupational, or most other social risks, an all-or-nothing matter. Instead it is a matter of degree. Return to the conventional thought that airplane crashes are "involuntary" and automobile crashes more "voluntary." Certainly it would be possible to see the risks from air travel as voluntarily run; people have a choice about whether to fly, and when they do fly, they pay a certain amount for a certain package, including risks of various sorts. The same is true of automobile safety—and it is not in any way less true, however disparately the two kinds of risks may "seem." Perhaps people are responding to the perceived fact that they have no control over the pilot's behavior, whereas they have considerable control over automobile safety since they are themselves drivers. But airlines respond to market forces, including the market for safety, and many people injured in automobile accidents are not at fault. Thus, along the dimension of voluntariness, this is hardly a crisp distinction. The difference between the two risks is hardly so categorical as to justify an assessment that they fall on poles of some voluntariness-involuntariness divide. Indeed, it is not clear even what is meant by the suggestion that one is voluntary and the other is not. Something else appears to underlie that suggestion.

II. THREE CASES: INFORMATION, CONTRACT, AND COST

To shed some light on the issue, consider three classes of cases. First, consider the question whether workers exposed to cancer risks are voluntarily or involuntarily so exposed. If workers do not know about such risks—if they lack relevant information—we seem to have an easy case of involuntariness. Thus it makes sense to say that risks are run involuntarily when the people running them do not know about them. Lack of adequate information provides a legitimate case for a judgment of involuntary exposure to risk. But of course, information itself can be obtained at some cost, pecuniary or otherwise. In

cases of this kind, we are thus dealing with high costs of risk avoidance, in the distinctive form of high (sometimes prohibitively high) costs of acquiring relevant information.

Second, suppose that people who are exposed to a certain risk are aware of the risk, but are not in a contractual relation with the risk-producer. Many victims of pollution are in this position; recall that in surveys air pollution is a particular source of public concern. People in Los Angeles may well know that they face high levels of smog. Are they exposed involuntarily? In a way the answer is yes; but they can take steps to reduce the risks associated with exposure to smog, by (among other things) moving away. If we conclude that people in Los Angeles are involuntarily exposed to air pollution risks, we may mean that a risk is incurred involuntarily when and in the sense that it is typically very expensive for people to avoid it—and when someone else can reduce the risks more cheaply. Here a claim that the risk is faced “involuntarily” may mean that those who “run” the risk can reduce it only at very high cost, at least compared to those who “produce” the risk. (The quotation marks are necessary for Coasian reasons; the existence of the risk is attributable to the acts and omissions of people on both sides.)¹ Or it is possible that we mean that on nonutilitarian grounds, the people exposed to the risk have a moral entitlement to be free from it, at least if they have not explicitly sold it.

But turn now to a third class of cases, involving a wage package or contract that does include compensation for the relevant risks. Assuming that point, we might want to distinguish between two different possibilities. In a case of a high-level scientist, knowledgeable about relevant risks and involved in work that he finds rewarding, people may well conclude that we have an instance of voluntariness (in the same category can be found the case of an astronaut). But people might not say the same about a low-level worker who does not like his work at all.² What distinguishes the two cases? If knowledge is present, or if the compensation package includes payment for the relevant risk, it is not clear how the two differ. The underlying judgment must be that the compensation is inadequate, perhaps because background inequality has produced a wage package that seems unfair even if voluntarily chosen by the parties.

1. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

2. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 199-200 (1993).

From this discussion it seems reasonable to speculate that any judgment that a risk is run "involuntarily" is probably based on: (1) a lack of knowledge of the risk, or, more accurately, the high costs of obtaining information about the risk; (2) a belief that, despite adequate information, it would be very costly for people to avoid the risk; or (3) a belief that the risk is unaccompanied by compensating benefits, notwithstanding the belief that the contract is in some sense worth signing. It may seem hard to make sense of the third ground. If people have signed the contract with full information, in what sense can the risk be denominated involuntary? What might be at work is a judgment that background inequalities are producing the relevant bargain (not by itself a good reason to disrupt the deal, because any such disruption will not respond to the inequalities and may even make those who are badly off worse off). Or perhaps there is a belief that workers are competing to their collective detriment, and an agreement not to compete would be in their best interests.³

On this view, the question whether a risk is run voluntarily or not is often not a categorical one but instead a question of degree, associated with information costs, risk-reduction costs, and the existence or not of accompanying benefits. Of course there are interesting background questions about why and when a risk "codes" as voluntary or involuntary; undoubtedly the answer depends a great deal on heuristic devices used by ordinary people, and also on selective attention, as people focus on a single aspect of a complex transaction or set of events.

III. PURPOSES, RESPONSIBILITY, BLAME

Risks may seem "voluntarily" run when people do not approve of the purpose for which people run the relevant risks, and involuntarily run when people think that the purpose for which the risk is run is laudable. It is predictable that people will not want to pour enormous taxpayer resources into lowering the risks associated with skydiving, even if the dollars/life-years saved ratio is quite good. By contrast, it is doubtful that people think that it is wrong to spend enormous resources on the prevention of death from childbirth or from being a police officer, even though the decision to have a child is (with appropriate qualifications) voluntary, as is the decision to become a police officer.

3. See ROBERT H. FRANK, CHOOSING THE RIGHT POND 176-77 (1985).

There is a related point. People may think that when the appeal or purpose of the activity is associated with its very riskiness, resources should not be devoted to risk-reduction. At least this is plausible when the risk is an independent good or part of the benefit of the activity. It is easy to imagine a belief that some activities—unsafe sex, cigarette smoking—can be treated like the skydiving case, perhaps because the risks are sometimes part of the benefit, or because the risks are not incurred for a purpose that observers find worthy or valuable.

It might seem that this consideration—the purpose for which the risk is incurred—overlaps with or is even identical to the question whether there are high costs of risk-avoidance. When the costs are low, as in skydiving, the purpose might seem inadequate. But on reflection, the two ideas are hardly the same; these are quite different moral intuitions. It may well be that failing to skydive, or skydiving with some safety-increasing technology, imposes high costs on skydivers. There seems to be an objective judgment, not necessarily connected with subjective costs, in the claim that some risks are voluntary, or deserve less attention, because they are run for inadequate purposes.

Relatedly, airplane accidents may seem different from automobile accidents not because the former are less voluntary, and not because of the diverse costs of risk avoidance, but because the victims of airplane accidents are less blameworthy than the victims of automobile accidents in the sense that any death or injury is not a product of their own negligence or misconduct. In the case of an airplane disaster, weather conditions, mechanical failure, or pilot error are likely causes; in the case of an automobile accident, it is more likely (though not of course certain) that the victim could have avoided death through more careful driving. The point is crude, since many victims of automobile accidents are not drivers, and many drivers in accidents do not behave negligently. But the perceived difference, in a significant number of cases, may underlie an apparent judgment of “voluntariness” that is really a judgment about responsibility and blameworthiness. These judgments must of course be defended and earned.

IV. UNDERLYING QUESTIONS AND ASSUMPTION OF RISK

We might therefore conclude that whether a risk qualifies as voluntary raises many of the questions raised by the question whether the government should regulate the market at all. A risk might be characterized as involuntarily run because affected people lack relevant information; because the transactions costs of bargaining are high; because the risks should be seen to amount to externalities; because collective action problems make market outcomes unsatisfactory since (for example) workers are in a prisoner's dilemma best solved through law; or because some motivational or cognitive defect makes successful solutions through markets unlikely.⁴ These of course are among the conventional grounds for regulation in the first instance. When a risk seems voluntary, and not worthy of substantial regulatory resources, the term "voluntary" may well be serving as a placeholder for an argument that there is no sufficient ground for governmental action. This may occur because the accompanying benefits are high or the risk-reduction costs are low, and because market arrangements take adequate account of these facts.

But there are many problems here. Should voluntarily run risks of death or injury receive no public attention, on the ground that the relevant people have already received compensation? The puzzle lies in the fact that it is hard to know when and how a risk is voluntarily run, in such a way as to make a government role inadvisable. Suppose that we consider a risk of death or injury to be incurred voluntarily when an informed person decided to incur it in light of its costs and benefits. Suppose, for example, that someone purchases a small car knowing that it is equipped with fewer safety features, or decides to become a boxer, an astronaut, or a police officer in a dangerous neighborhood. If a death results from such a choice, it might seem that the chooser has no legitimate ground for complaint; there has been *ex ante* compensation for the risk. But even in such cases, it is not clear that the government lacks a role. If the government can reduce a serious risk at low cost, and thus eliminate deaths, it should do so even when there is *ex ante* compensation for the relevant risk. The fact that someone voluntarily ran the risk, in one respect, is no reason not to reduce that very risk. Suppose that the government can reduce

4. See Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. (forthcoming 1997).

the relevant risks in such a way as to survive any cost-benefit test. Why should it not do so?

The general point is that observers frequently confuse two quite different questions: (1) should people be banned from running a certain risk when they have run that risk voluntarily? and (2) should the government attempt to reduce a certain risk when people have run that risk voluntarily? A negative answer to the first question does not answer the second question. People may run a risk voluntarily, but also be better off when that risk is reduced. They are hardly hypocritical or confused when they seek the government to help in risk reduction. They may well say that they acted voluntarily, but that they did not voluntarily run the risk, at least in the sense that they wished it to be lower than it was, and wish it to be lower than it now is.

V. A TENTATIVE CONCLUSION

From these points, it should be concluded that a lay judgment that a risk is "voluntary" should not be decisive for purposes of policy. Many risks that people consider "voluntary" should be the subject of greater governmental concern, not least because hundreds of thousands of lives might thereby be saved. The lay focus on "involuntary" risks sometimes points to reasonable judgments, but it is at most a start. The danger of using it as the basis for policy is that it is, literally, dangerous, in the sense that it ensures that the government will do far less than it could to reduce the number of premature deaths.

In short, there is no special magic in notions like "voluntary" and "involuntary." Judgments about the voluntary character of risk often depend on confusion and selective attention. People often focus on a small part of a complex interaction—not the decision to fly, but the accident when it occurs; not the decision to live in a high-polluting area, but respiratory problems when they are experienced. Risks that appear involuntarily run can often be redescribed, with some plausibility, as voluntarily run, and the converse is also true. A better understanding of what factors underlie a judgment about voluntariness should be used for purposes of regulatory policy. I have attempted to identify some of the possible factors here.

My basic conclusion is simple: the government should attempt to save as many lives, or as many life-years, as it can, subject to the limited public and private resources devoted to risk regulation. Ordinar-

ily, people's concern with voluntariness should not allow dramatic departures from this basic goal, which specifies what the government is generally trying to increase. The most that can be said is that when reasonable judgments underlie a judgment that people have been voluntarily or involuntarily exposed to a risk, the extent of the government's focus might be adjusted. In other words, the government might devote more resources to a problem when those at risk lack relevant information or when the costs of risk-avoidance are especially high, and it might devote fewer resources to a problem when those at risk have the information and when the costs of risk-avoidance are low.