

Fear Unbound: A Reply to Professor Sunstein

Rachel F. Moran*

In *The Laws of Fear*,¹ Cass Sunstein assesses the role that this emotion plays in the regulatory process. According to Sunstein, popular fears are often misplaced and distort rational risk analysis in counterproductive ways. Without expert guidance, popular misconceptions lead agencies to overinvest in preventing dramatic but relatively minor dangers and to underinvest in protecting against subtle but substantial ones. Sunstein therefore prefers to leave decision-making to technocrats, who can transcend the vicissitudes of public opinion to measure and manage risk efficiently.

Sunstein raises intriguing questions about the nature of emotion and the role of law. By narrowly defining fear as an undesirable artifact of bounded rationality, he reduces it to nothing more than a cognitive heuristic, a mental shortcut that subverts thinking about danger. Sunstein's approach overlooks other meanings of fear that might inform the regulatory process. Rather than address all of the competing conceptions that could be relevant, I confine myself to showing that fear is given short shrift in light of Sunstein's own work on behavioral law and economics and civic republicanism. In doing so, I do not mean to pass judgment on the potential significance of alternative approaches to defining fear. Rather, I merely leave to another day a full exploration of philosophical, psychological, and sociological approaches to understanding this emotion.

In evaluating the role of fear in the regulatory process, Sunstein focuses on problems of bounded rationality to the exclusion of bounded willpower and bounded self-interest. As a result, he ignores concerns about personal agency and fairness, important values that influence public expressions of fear. Sunstein dismisses too quickly the idea that lay people bring a rival rationality to the regulatory process, a perspective that makes public participation vitally important. Courts, by contrast, have long recognized that values other than rationality inform the meaning of reasonable fear. Although judicial de-

* Robert D. and Leslie-Kay Raven Professor of Law, University of California School of Law (Boalt Hall). I am grateful to Bill Rich, Myrl Duncan, and the editors of the *Washburn Law Journal* for affording me the opportunity to deliver the 2002 Foulston Siefkin Lecture, which served as the basis for this Article. I am also indebted to the faculty who participated in a workshop at Boalt Hall. Their comments provided me with extremely helpful feedback in revising this paper. Correspondence with Christopher Kutz and Stephen D. Sugarman further helped me to clarify key issues.

1. Cass R. Sunstein, *The Laws of Fear* (John M. Olin Law & Econ., Working Paper No. 128, 2d Series, 2001), at http://papers.ssrn.com/paper.taf?abstract_id=274190; Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000)) [hereinafter Book Review].

cisions focus on individual responsibility, I will show that questions of human will and distributive justice remain critical to understanding fears that accompany the regulation of collective hazards.

I. WHEN LAW AND ECONOMICS MEETS LAW AND EMOTION

In evaluating the relationship between law and fear, Sunstein addresses disparities between actual and perceived risk and how they affect sound regulatory policy. Although he never makes his definition of fear explicit, he clearly equates it with the cognitive misapprehension of danger. This approach to fear builds on his work on bounded rationality in behavioral law and economics.² According to Sunstein, bounded rationality involves the use of cognitive heuristics to save time and resources in making decisions. Relying on these rules of thumb can be rational, but it produces decisions and behavior that deviate from predictions made under conditions of unbounded rationality.³ Turning to the work of Paul Slovic, Sunstein concludes that people estimate risks by using mental shortcuts that are convenient but regularly lead to misconceptions about hazards.⁴

For example, the availability heuristic prompts people to overestimate a threat. When the image of an event is readily available to people, they overstate the likelihood that the event will occur. So, shortly after an earthquake or flood, consumers are eager to buy insurance to cover natural disasters. But their interest steadily declines as these terrible events fade in their memories.⁵ In a similar vein, individuals overestimate the probability of dying from highly publicized, dramatic causes and underestimate the probability of succumbing to unspectacular killers that quietly take their victims one at a time. For this reason, people regularly assume that more deaths occur due to accidents than disease, when in fact the statistics clearly cut the other way. If regulators respond to these misplaced fears, public resources will be misdirected.⁶

2. Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13, 14-15 (Cass R. Sunstein ed., 2000); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78 (1998) [hereinafter Stanford Article].

3. Jolls, Sunstein & Thaler, *supra* note 2, at 14-15; Stanford Article, *supra* note 2, at 1477-78.

4. Sunstein, *supra* note 1, at 6; Book Review, *supra* note 1, at 1123-24.

5. Sunstein, *supra* note 1, at 5-6; Book Review, *supra* note 1, at 1125-28; Paul Slovic, Baruch Fischhoff & Sarah Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 463, 465-66 (Daniel Kahneman et al. eds., 1982).

6. Sunstein, *supra* note 1, at 6-7; Book Review, *supra* note 1, at 1130-31; Slovic, Fischhoff & Lichtenstein, *supra* note 5, at 466-67.

Popular perceptions of hazards are influenced by the “social amplification of risk.”⁷ People who have little independent knowledge of a danger rely heavily on others’ beliefs. So, highly visible, dramatic events that capture media attention generate immense public concern that is disproportionate to the actual risk. According to both Slovic and Sunstein, the accident at Three Mile Island in 1979 is an example. Although no one was killed or even harmed by the accident, the event triggered strict regulations, cutbacks in the use of reactors worldwide, and enhanced opposition to nuclear power.⁸ By contrast, other risks are so familiar that “social attenuation of risk” takes place. Because a danger is taken for granted, the risk is systematically underestimated and insufficient measures are taken to prevent it. Relying on Slovic, Sunstein cites smoking, indoor radon, and driving without a seat belt as examples.⁹

Expanding on Slovic’s discussion, Sunstein explores the mechanisms that lead to social amplification or attenuation of risk. According to Sunstein, “risk perception cascades” create a sometimes misleading consensus about hazards as one person relies on another to conclude that an activity is dangerous, and others in turn rely on these two, so that eventually, there appears to be widespread agreement.¹⁰ In some cases, these processes are aided by “reputational cascades” in which individuals do not wish to disagree for fear of being labeled out of touch or unreasonable. Lawmakers in particular are vulnerable to reputational cascades.¹¹ Sunstein argues that group deliberation can actually entrench and intensify beliefs about risk, so that public opinion becomes increasingly polarized. The result is either growing alarm or greater indifference to hazards.¹²

The popular concept of emotion as something other than mere cognition is oddly missing from this account of fear. Slovic himself acknowledges that psychological research on risk has been too cognitive and that the emotional side of reaction to danger should be explored. As he points out, the terms “panic, hysteria, and terror” connote feeling and not just thought. To account for emotion, Slovic devises an “affect heuristic” that uses people’s feelings about an activity or good to direct their perceptions of its hazards. When people have positive views of an activity because it is perceived as beneficial,

7. Sunstein, *supra* note 1, at 10; Book Review, *supra* note 1, at 1130; Roger E. Kasperon et al., *The Social Amplification of Risk: A Conceptual Framework*, in *THE PERCEPTION OF RISK* 232, 237 (Paul Slovic ed., 2000).

8. Sunstein, *supra* note 1, at 10; Book Review, *supra* note 1, at 1130; Kasperon et al., *supra* note 7, at 234-35; *see also* Slovic, Fischhoff & Lichtenstein, *supra* note 5, at 485-88.

9. Sunstein, *supra* note 1, at 10; Book Review, *supra* note 1, at 1130; *see also* Kasperon et al., *supra* note 7, at 235.

10. Sunstein, *supra* note 1, at 11-12; Book Review, *supra* note 1, at 1132-33.

11. Sunstein, *supra* note 1, at 12-13; Book Review, *supra* note 1, at 1133-34.

12. Sunstein, *supra* note 1, at 14; Book Review, *supra* note 1, at 1135-36.

they presume that it is low-risk. Conversely, when people have negative views of an activity because it is perceived as not beneficial, they assume that it is high-risk.¹³

Even with this concession to affect, Sunstein criticizes Slovic for undertheorizing the nature of emotion. After all, Slovic's affect heuristic is still a mental shortcut, even if feeling comes first and directs cognition.¹⁴ For Sunstein, the knottiest problem is the distinction between cognition and emotion, an issue that Slovic does not address. Sunstein contends that affect must be based on thinking, but he does not try to resolve "large debates about whether an emotion is a form of thought, or whether thoughts are necessary and sufficient conditions for emotions, and whether emotions [in] a sense precede or outrun cognition."¹⁵ Instead, he concludes that regardless of whether some primitive fearful reactions are triggered in the brain before cognitive sectors are activated, most reactions to risk in today's complex society involve elements of thinking.¹⁶ Unfortunately, in Sunstein's view, much of this thinking is based on misguided bias rather than rational assessment. In particular, feelings cause people to focus on bad outcomes, rather than the probability that they will occur, especially when the outcome can be imagined in graphic and terrifying detail.¹⁷

Neither Slovic nor Sunstein offers a compelling, comprehensive framework for analyzing fear as something other than a fertile field for cognitive mistakes. Slovic converts feeling into a heuristic, while Sunstein briefly touches on the biological foundation of fear and its relationship to higher cortical processes. Despite these detours into affect and biology, both Slovic and Sunstein understand emotion almost exclusively in relation to cognition. Rationality remains the sine qua non of the analysis, and fear is little more than a mark of misinformation. In this cognitive universe, social interactions are just a way to find out about danger, and "risk cascades" and "reputation cascades" become nothing more than processes that generate often misleading information about hazards. Sunstein and Slovic do not explore how people come to attach significance to their emotional states. Instead, both assume that the label "fear" is automatically applied to a perception of risk. The role of socialization in converting recognition of danger and biological arousal into the experience of fear remains an

13. Sunstein, *supra* note 1, at 24; Book Review, *supra* note 1, at 1137-39; *see also* Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, 13 J. BEHAV. DECISION MAKING 1, 3, 13-14 (2000) (arguing for affect heuristic and offering empirical evidence of its operation in making estimates of risk).

14. Sunstein, *supra* note 1, at 26; Book Review, *supra* note 1, at 1140.

15. Sunstein, *supra* note 1, at 26; *see also* Book Review, *supra* note 1, at 1140.

16. Sunstein, *supra* note 1, at 26-27; Book Review, *supra* note 1, at 1140-41.

17. Sunstein, *supra* note 1, at 27; Book Review, *supra* note 1, at 1141.

enigma. For Slovic and Sunstein, it seems, facts are learned, but fear is not.

Because both Slovic and Sunstein adopt a highly cognitive approach to analyzing fear, rationality figures prominently in their evaluation of the regulatory process. Sunstein contrasts two types of decision-making: technocratic and populist. Technocrats use scientific expertise to gauge actual risk, although they know that science will suffer from gaps in understanding and cannot be the sole basis for determining an appropriate course of action. Experts find that the general public is often ill-informed about risk, and when public opinion and hard science diverge, science should govern.¹⁸ Populists, on the other hand, distrust experts and believe that “in a democracy, government should follow the will of the citizenry rather than a self-appointed technocratic elite.”¹⁹ So what matters to populists, Sunstein says, is “what people actually fear, not what scientists, with their own, inevitably fallible judgments, happen to think.”²⁰ For populists, these fears should shape the decision-making process because “ordinary intuitions have normative force.”²¹

According to Sunstein, because expert calculations and popular perceptions of risk diverge significantly, populist influence leads to a “regulatory state [that] suffers from poor priority-setting.”²² Echoing Justice Stephen Breyer’s concerns about distorted policymaking, Sunstein urges a technocratic system of risk management, one that draws on “a new body of risk specialists, with expertise in many fields.”²³ Having concluded that ordinary intuitions are systematically and predictably unreliable, Sunstein believes that regulators must “respond to people’s values, not to their errors.”²⁴

Slovic, far from deriding everyday assumptions about risk, argues that lay people display a “rival rationality” that should be respected.²⁵ An agency considers only the number of lives at stake, but the general public weighs whether the risk is dreaded, potentially catastrophic, inequitably distributed, involuntary, uncontrollable, new, and faced by future generations.²⁶ As a result, lay people account for some concerns that experts miss, and the regulatory process should be both

18. Sunstein, *supra* note 1, at 2; Book Review, *supra* note 1, at 1120-21.

19. Sunstein, *supra* note 1, at 2; *see also* Book Review, *supra* note 1, at 1121.

20. Sunstein, *supra* note 1, at 3; *see also* Book Review, *supra* note 1, at 1121.

21. Sunstein, *supra* note 1, at 3; *see also* Book Review, *supra* note 1, at 1121.

22. Sunstein, *supra* note 1, at 34; Book Review, *supra* note 1, at 1166.

23. Sunstein, *supra* note 1, at 34; Book Review, *supra* note 1, at 1166.

24. Sunstein, *supra* note 1, at 35; Book Review, *supra* note 1, at 1168.

25. Sunstein, *supra* note 1, at 35; Book Review, *supra* note 1, at 1144-45; *see also* Paul Slovic, Baruch Fischhoff & Sarah Lichtenstein, *Regulation of Risk: A Psychological Perspective*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 241, 262-65, 270-74 (Roger G. Noll ed., 1985).

26. Sunstein, *supra* note 1, at 15-16; Book Review, *supra* note 1, at 1145; Slovic, Fischhoff & Lichtenstein, *supra* note 25, at 262-65.

democratic and technocratic. That is, “it should pay a great deal of attention to . . . the structured and sometimes subtle thinking of ordinary people.”²⁷ In response to this claim for a rival rationality, Sunstein takes Slovic to task for ignoring the many ways in which people make sloppy and inaccurate risk assessments. Focusing exclusively on bounded rationality, Sunstein decries public misconceptions that undermine the regulatory process, infecting it with “paranoia and neglect.”²⁸ Sunstein concludes that ordinary people do not have a richer ethic than experts but are simply more apt to make cognitive mistakes.²⁹ In short, Sunstein reduces rival rationality to nothing more than inferior thinking.

Sunstein’s reductionist interpretation of rival rationality is surprising in light of his earlier work in behavioral law and economics.³⁰ There, he explores not just bounded rationality but also bounded willpower and bounded self-interest. Bounded willpower refers to “the fact that human beings often take actions that they know to be in conflict with their own long-term interests.”³¹ As a result, people spend money for immediate gratification, even when they know that saving is in their long-run interest. Aware of their limited self-restraint, these spenders sometimes take steps to protect themselves from temptation. For instance, they will arrange for money to be withheld automatically from paychecks to be deposited into a retirement plan.³²

Bounded self-interest reflects “an important fact about the utility function of most people: They care, or act as if they care, about others, even strangers, in some circumstances.”³³ As a result, norms of fair dealing operate to limit the unrestrained pursuit of self-interest. So, in one experimental game, the Proposer is asked to offer an allocation of a sum of money to the Responder. The Responder can either take the amount offered or reject it, in which case both parties get nothing. Rationally, the Proposer should offer the smallest sum possible, say, a penny, and the Responder should accept because even a penny is bet-

27. Sunstein, *supra* note 1, at 3; *see also* Book Review, *supra* note 1, at 1145-46; Slovic, Fischhoff & Lichtenstein, *supra* note 5, at 488 (creating “an atmosphere of trust and a recognition that both experts and lay persons have something to contribute, may permit some exchange of information and deepening of perspectives”).

28. Sunstein, *supra* note 1, at 4; Book Review, *supra* note 1, at 1123.

29. Sunstein, *supra* note 1, at 19-21; Book Review, *supra* note 1, at 1150-52.

30. By choosing behavioral law and economics to frame this analysis, I mean to build on Professor Sunstein’s own work, but I do not intend to dismiss the important philosophical and economic debates about the utility of this emerging field. Although these controversies are beyond the scope of this essay, the key issues are nicely illustrated in recent work by Kyron Huigens and Richard A. Posner. *See* Kyron Huigens, *Review Essay: Law, Economics, and the Skeleton of Value Fallacy*, 89 CAL. L. REV. 537 (2001) (calling for richer conceptions of moral agency and responsibility as part of virtue ethics); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (taking behavioral law and economics to task for giving up too quickly on rational choice).

31. Jolls, Sunstein & Thaler, *supra* note 2, at 15; Stanford Article, *supra* note 2, at 1479.

32. Jolls, Sunstein & Thaler, *supra* note 2, at 15; Stanford Article, *supra* note 2, at 1479.

33. Jolls, Sunstein & Thaler, *supra* note 2, at 16; Stanford Article, *supra* note 2, at 1479.

ter than nothing. But, in fact, Proposers tend to offer a far more equitable allocation of the money, and Responders reject paltry offers. Each party operates on the basis of some unspoken but shared norm of fairness.³⁴

Under this expanded framework, Slovic's rival rationality can be linked not just to bounded rationality but also to bounded willpower and bounded self-interest. Returning to the factors that lay people weigh in evaluating risk, it is clear that the magnitude of the harm and the likelihood that it will materialize are both relevant considerations for rational risk assessment, whether bounded or not. The concerns with whether a risk is involuntary or uncontrollable implicate a sense of personal efficacy, or willpower. And, the equitable distribution of risk as well as its intergenerational consequences relate to norms of fairness, or bounded self-interest. Had Sunstein evaluated popular intuitions about danger in light of all three elements of behavioral law and economics, he might have reached a more sanguine – or at least more nuanced – conclusion about the normative relevance of popular concerns to the regulatory process.

With his exclusive emphasis on cognitive deficiencies, Sunstein takes a rather pessimistic view of the potential for agencies to educate citizens and enhance their role in the regulatory process. He believes that people are “intuitive toxicologists” who treat risks as all or nothing rather than as part of a spectrum of probabilities. As a result, popular sentiments about danger are influenced primarily by the badness of the outcome rather than its likelihood.³⁵ Sunstein considers this wrongheaded way of thinking intractable, so he urges government officials to capitalize on graphic images rather than statistical information in stamping out risky driving, smoking, or taking drugs.³⁶ Instead of explaining in detail the perils of drugs, public service announcements should show an egg being cracked and fried with the voiceover “[t]his is your brain on drugs.”³⁷ Sunstein is not concerned that this strategy leaves the public uninformed, so long as behavior changes. Nor does he worry that these scare tactics will be subverted once the emptiness of the reasoning behind them is revealed. Apparently, Sunstein has not seen teenagers who sport T-shirts with pictures of a full breakfast and the caption: “This is your brain. This is your brain on drugs. This is your brain on drugs with bacon and toast on the side.”

34. Jolls, Sunstein & Thaler, *supra* note 2, at 21-23; Stanford Article, *supra* note 2, at 1489-93. A real life example is the tendency of diners to leave tips in out-of-town restaurants, even though they do not expect to return there. Jolls, Sunstein & Thaler, *supra* note 2, at 23; Stanford Article, *supra* note 2, at 1492-93.

35. Sunstein, *supra* note 1, at 27-28; Book Review, *supra* note 1, at 1128-30.

36. Sunstein, *supra* note 1, at 27-28; Book Review, *supra* note 1, at 1166.

37. Jolls, Sunstein & Thaler, *supra* note 2, at 44; Stanford Article, *supra* note 2, at 1537.

Slovic, by contrast, hopes for a cooperative relationship between the regulator and the regulated. Not only will public participation infuse the regulatory process with a rival rationality, but it also will overcome the distrust that has contributed to difficulties in government management of hazardous technologies. Trust is fragile, far easier to destroy than to create. As a result, “[e]vents that might weaken trust have a significant effect, whereas events that strengthen trust do very little.”³⁸ The news media exacerbate these tendencies, and Slovic believes that lay participation in decision-making is essential both to make room for alternative values and to dispel distrust.³⁹ Slovic envisions involvement that “go[es] well beyond public relations to include much more in the way of actual power-sharing.”⁴⁰

Despite his longstanding commitment to civic republicanism,⁴¹ Sunstein questions the desirability of broad public participation in the regulatory process. Because he emphasizes rational risk assessment, he leaves little room for the popular values that are critical to a rival rationality. Nor does Sunstein believe that lay participation will necessarily dispel distrust of experts. Having characterized intuitive toxicology as an intractable set of cognitive errors, Sunstein worries that “high levels of public participation in highly technical domains will [simply] increase public fear, with unfortunate consequences for policy.”⁴² Had Sunstein considered the role of bounded willpower and self-interest as well as rationality, he might have found useful ways to contrast expert risk assessment with public concerns about the limits of self-efficacy and the need for equitable distribution of hazards. Technocratic and populist decision-making could then become complementary ways of balancing distinctive values, rather than mutually exclusive, antagonistic perspectives on risk.

II. THE UNEMOTIVE EMOTION

Because both Slovic and Sunstein reduce fear to little more than a cognitive shortcut, it becomes a curiously unemotive emotion. With rationality defined as accurate risk assessment, any heuristic, fear included, is necessarily inferior to full-scale, scientific number crunching. For those who believe that fear is an important psychological and social phenomenon, this privileging of cognition is distinctly unsatisfying. As Eric Posner points out, the cascades that Sunstein and Slovic describe are purely informational in nature, so they “would occur

38. Sunstein, *supra* note 1, at 30.

39. *Id.*

40. *Id.* at 31.

41. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 74-75, 81-87 (1985).

42. Sunstein, *supra* note 1, at 31; see also Book Review, *supra* note 1, at 1161.

even in a hypothetical world in which people had no emotions.”⁴³ Posner is another member of the law and economics school who wants to give emotion its due. With respect to fear, he notes that people who describe events like exposure to toxic substances at Love Canal emphasize their anxieties, their anger, and their hysterical reactions. These accounts strongly suggest that emotional responses are not merely epiphenomena but play an important role in understanding the meaning of accidents.⁴⁴

To make feelings more than incompetent handmaids to reason, Posner defines emotion as a state in which individuals have temporary preferences, abilities, and beliefs that differ from those in a calm state.⁴⁵ Posner does not treat preferences experienced in an emotional state as inherently less valid than those experienced in a calm state. As he explains,

[I]t may be wrong for the calm self to discount the preferences felt by an emotional self. The reason is that the preferences of the emotional self are sometimes better attuned to the agent’s well-being. But not always. And that is what makes normative analysis so difficult.⁴⁶

Posner instead argues that the law must be sensitive to emotional states because they affect how individuals respond to incentives and because these states can be managed to avoid antisocial behaviors.⁴⁷

Posner’s approach is helpful in at least two ways. First, it acknowledges a richer role for emotion than the mere misestimation of statistical probabilities. Emotions can legitimately shape both beliefs and preferences, that is, not just perceptions of, but also tastes for, risk. Second, Posner refuses to treat people as captives of their feelings. Sunstein treats cognitive errors as the inevitable fallout of clouded emotional judgments, but Posner insists that people can cultivate their emotional states because they are generally aware of their own sentiments and dispositions.⁴⁸ By treating emotional states as short-term disruptions that can be controlled while in a calm state, Posner leaves considerable room for law to manipulate and manage emotion.

Although Posner complicates the meaning of emotion, his approach probably comports more closely with the needs of law and eco-

43. Eric A. Posner, *Law and the Emotions* 22 (John M. Olin Law & Econ., Working Paper No. 103, 2d Series), at http://papers.ssrn.com/paper.taf?abstract_id=241389 (last visited Oct. 31, 2002); Eric A. Posner, *Law and the Emotions*, 89 *Geo. L.J.* 1977, 2002 (2001) [hereinafter *Georgetown Article*].

44. Posner, *supra* note 43, at 22; *Georgetown Article*, *supra* note 43, at 2002-03.

45. Posner, *supra* note 43, at 4-5; *Georgetown Article*, *supra* note 43, at 1978.

46. Posner, *supra* note 43, at 30 (footnote omitted); *see also Georgetown Article*, *supra* note 43, at 2011-12.

47. Posner, *supra* note 43, at 6; *Georgetown Article*, *supra* note 43, at 1978.

48. Posner, *supra* note 43, at 7; *Georgetown Article*, *supra* note 43, at 1978.

nomics than with the observations of behavioral psychologists. Empirical studies have distinguished between brief emotional reactions and long-term emotional predispositions, called moods. According to this research, moods are far more intractable and far more likely to affect beliefs and attitudes than are short-term emotional disruptions.⁴⁹ Temporary emotional states respond to specific events, but moods have diffuse origins and frequently are impervious to events that might disturb them.⁵⁰ Indeed, the stability of moods is even reflected in their impact on the body. Transient emotions trigger particular facial expressions and physiological reactions, while moods do not.⁵¹

Though the research is limited, moods are probably more significant than fleeting emotions in determining how people estimate and respond to risk. Individual differences in the expression of feelings like fear and distress can be observed at an early age and remain fairly constant throughout a person's lifetime.⁵² These emotional predispositions "create emotion based schemata or scripts that guide an individual's cognitive processes and behavior in emotion-specific ways."⁵³ The effect may be similar to that of enduring stereotypes and self-beliefs, which influence behavior and are not easily changed in response to countervailing evidence. Emotional scripts have distinct consequences for perceptions of risk. An anxious person is apt to feel uncertain about the future, while an angry person or a happy one has a strong sense of certainty.⁵⁴ Research suggests that angry individuals

49. Richard J. Davidson et al., *How Are Emotions Distinguished From Moods, Temperament, and Other Related Affective Constructs?*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 49-96 (Paul Ekman & Richard J. Davidson eds., 1994).

50. James R. Averill, *A Constructivist View of Emotions*, in *1 EMOTION, THEORY, RESEARCH, AND EXPERIENCE* 305 (Robert Plutchik & Henry Kellerman eds., 1980).

51. Paul Ekman, *Expression and the Nature of Emotion*, in *APPROACHES TO EMOTION* 319-43 (Klaus R. Scherer & Paul Ekman eds., 1984). See generally *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* (Paul Ekman & Richard J. Davidson eds., 1994); *PAUL EKMAN & WALLACE V. FRIESEN, FACIAL ACTION CODING SYSTEM: INVESTIGATOR'S GUIDE* (1978); Paul Ekman, *Facial Expressions of Emotion: New Findings, New Questions*, 3 *PSYCHOL. SCI.* 34 (1992); Paul Ekman et al., *Autonomic Nervous System Activity Distinguishes Among Emotions*, 221 *SCI.* 1208 (1983); Paul Ekman & Wallace V. Friesen, *Measuring Facial Movement*, 1 *J. ENVTL. PSYCHOL. & NONVERBAL BEHAV.* 56 (1976); Paul Ekman, Wallace V. Friesen & Sonia Ancoli, *Facial Signs of Emotional Experience*, 39 *J. PERS. & SOC. PSYCHOL.* 1125 (1980); Robert W. Levenson, *Autonomic Nervous System Differences Among Emotions*, 3 *PSYCHOL. SCI.* 23 (1992).

52. Jerome Kagan & Nancy Snidman, *Temperamental Factors in Human Development*, 46 *AM. PSYCHOL.* 856 (1991).

53. Jennifer Susan Lerner, *Beyond Valence: Toward an Emotion-Specific Framework for Predicting the Influence of Dispositional Affect on Risk Perception and Risk Preference* 8 (1998) (Ph.D. dissertation, University of California at Berkeley); see also CARROLL E. IZARD, *HUMAN EMOTIONS* (1977); Carol Z. Malatesta, *The Role of Emotions in the Development and Organization of Personality*, in *NEBRASKA SYMPOSIUM ON MOTIVATION* 1 (1990); Carol Z. Malatesta & Arnold Wilson, *Emotion Cognition Interaction in Personality Development: A Discrete Emotions, Functionalist Analysis*, 27 *BRIT. J. SOC. PSYCHOL.* 91 (1988).

54. Jennifer S. Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 *J. PERS. & SOC. PSYCHOL.* 146, 147, 149, 154-55 (2001); see Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgement and Choice*, 14 *COGNITION*

systematically fail to perceive danger and engage in riskier behaviors as a result. Anxious people, on the other hand, may hold back in ways that prevent them from forming significant attachments.⁵⁵ All of these findings indicate that moods affect perceptions of risk, but they do not produce uniform errors, nor are they always easily manageable, labile states.

Although Posner's model is at odds with available psychological evidence, it does suggest that reason and emotion are not antithetical. Because people can reflect on and evaluate their feelings, they can manage them in the service of the general good. Arguments for reasoned emotion need not pit descriptive, biological accounts against normative, social ones. There is no doubt that biological processes play an important role in our emotional lives. Neurobiologists agree that a sense of fear is rooted in the amygdala, a small almond-shaped mass of nerves in the brain.⁵⁶ When a person experiences fear, the amygdala interacts with corticostriatal motor systems in complex and poorly understood ways to convert feeling into response. So, the amygdala can trigger a sense of fear when you see a snake, but only a complicated interplay of this neurological response with motor controls prompts you to jump away. And, "[a]s little as we know about voluntary emotional actions, we know even less about conscious emotional feelings."⁵⁷ According to Joseph LeDoux, a doctor of neural science, "feelings may result from the representation in working memory that an emotion system, like the fear system, is active."⁵⁸

Working memory plays a role in conscious emotion because feelings are learned reactions, not just biological states of arousal. Emotional sensations like fear result from socialization that links physiological responses to acceptable cognitive understandings and courses of action. Through this process, emotions become not simply individual conditions but products of collective normative judgments.⁵⁹ After all, there are relatively few states of arousal, but there are many ways of labeling them as fear, love, anger, joy, envy, sympa-

& EMOTION 473 (2000); Craig A. Smith & Phoebe C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 J. PERS. & SOC. PSYCHOL. 813 (1985).

55. Lerner, *supra* note 53, at 63-64.

56. Joseph LeDoux, *Fear and the Brain: Where Have We Been, and Where Are We Going?*, 44 BIOLOGICAL PSYCHIATRY 1229, 1229-32 (1998) [hereinafter *Fear and the Brain*]. Indeed, there is even a website where the eager and curious can go to "click their amygdala" by exposing themselves to certain types of stimuli. *Id.* at 1229. See generally JOSEPH LEDOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE (1996) (describing neurological foundations of emotional states).

57. *Fear and the Brain*, *supra* note 56, at 1234.

58. *Id.*

59. David L. Scruton, *The Anthropology of an Emotion*, in SOCIOPHOBICS: THE ANTHROPOLOGY OF FEAR 7, 12-22 (David L. Scruton ed., 1986).

thy, or hate.⁶⁰ Far from being captives of a “felt perturbation,” people are active participants in “the ordering, selecting, and interpreting work upon which . . . acts of management of fragments of life depend.”⁶¹ Emotional scripts educate individuals about what they feel, when they act, and when they restrain themselves. These scripts in turn reflect a sociopolitical economy of emotion that assigns people a place in the status hierarchy by directing them to adopt the emotional deference of subordinates or to enjoy the privilege of expressing their feelings freely.⁶²

In socializing individuals to manage their emotional lives, the law offers critical instruction about the need for both personal restraint and sensitivity to others. Far-ranging philosophical debates about the meaning of emotion are beyond the scope of this paper,⁶³ but even within the parameters of behavioral law and economics, researchers acknowledge emotion’s role in empirical accounts of bounded willpower and bounded self-interest. When individuals act against their own best interests, they sometimes use emotion as a barometer of overborne will, a way of naming the boundaries of self-control. For example, statutory “cooling off” periods allow hapless consumers to renounce decisions made in haste and excitement.⁶⁴ Moreover, if people believe that self-interest must cede to the needs of others, they rely on the language of emotion to mark ordinary expectations of fair dealing. So, when one party tries to grab more than a just share, the other responds with “spiteful” behavior.⁶⁵ Though this research focuses on negative emotions, sentiments like “courage” describe acts of extraordinary generosity that provoke admiration and wonder precisely because they defy principles of individual rationality.⁶⁶

The treatment of emotion in behavioral law and economics remains in a nascent state, so it is often difficult to distinguish descriptive accounts from efforts to make predictive inferences and normative judgments. Sunstein’s analysis of fear, for example, describes cognitive misapprehensions, predicts that they will prove intractable, and concludes that they are markedly inferior to scientific

60. Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 749 (2001).

61. Rom Harré, *An Outline of the Social Constructivist Viewpoint*, in THE SOCIAL CONSTRUCTION OF EMOTIONS 4 (Rom Harré ed., 1986); see George Turksi, *Experience and Expression: The Moral Linguistic Constitution of Emotions*, 21 J. FOR THEORY SOC. BEHAV. 373, 373-74, 385 (1991).

62. Moran, *supra* note 60, at 751-52; CANDACE CLARK, MISERY AND COMPANY: SYMPATHY IN EVERYDAY LIFE 226-51 (1997); Theodore D. Kemper, *Predicting Emotions From Social Relations*, 54 SOC. PSYCHOL. Q. 330, 333-34 (1991).

63. For a highly illuminating discussion of these issues, see MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 19-248 (2001).

64. Jolls, Sunstein & Thaler, *supra* note 2, at 15; Stanford Article, *supra* note 2, at 1479-81.

65. Jolls, Sunstein & Thaler, *supra* note 2, at 25; Stanford Article, *supra* note 2, at 1493.

66. WILLIAM IAN MILLER, THE MYSTERY OF COURAGE 9-14, 137, 151-62 (2000).

expertise. His assessment turns on treating fear as a set of universal mistakes in lay processing of information, errors that self-awareness alone cannot correct. Implicitly, he presumes that unbounded rationality is the normative ideal.⁶⁷ Even these assertions are contestable. As discussed earlier, psychological evidence suggests that people differ in their patterns of risk perception, and educability about risk may depend on whether emotions are short-term or long-term states.⁶⁸ Moreover, as Sunstein himself would agree, at times cognitive shortcuts can be the superior choice when unbounded rationality is not worth the candle.⁶⁹

Including bounded willpower and bounded self-interest in the analysis greatly complicates the tasks of description, prediction, and normative evaluation. Once questions of agency and fairness are put on a par with cognitive rationality, there is no easy way to assert that patterns of behavior are universal and predictable, nor is there a ready means of identifying the desired course of conduct. With respect to bounded willpower, it seems unlikely that all individuals face similar constraints on personal agency. People can be described as dependent, suggestible, or even addictive personalities, for example.⁷⁰ Although unbounded will may be the normative ideal, virtue also could reside in self-awareness, that is, prudent efforts to guard against inevitable lapses in personal control. For instance, behavioral law and economists point to automatic withdrawals for retirement as evidence that individuals recognize and adjust to the limits of their willpower. These strategies may be the course of virtue if, indeed, complete self-control is not a realistic aspiration.⁷¹

Bounded self-interest presents problems of its own. Again, individuals vary greatly in their capacity to suppress their own desires for the benefit of others. Some people are described as narcissistic and self-involved, while others are seen as altruistic and self-sacrificing.⁷² Here, too, it is by no means clear that unbounded self-interest is the normative ideal. After all, untrammelled selfishness is sometimes considered antisocial behavior, as some behavioral law and economics re-

67. Sunstein, *supra* note 1, at 15; Book Review, *supra* note 1, at 1136-37.

68. See *supra* notes 49-55 and accompanying text.

69. See *supra* note 3 and accompanying text.

70. The psychiatric profession recognizes both substance dependence and dependent personality disorder. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 192-98, 721-24 (4th ed., text rev. 2000) [hereinafter DSM-IV].

71. For a discussion of strategies of self-restraint and their moral implications, see Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 652-71 (1992).

72. The psychiatric profession, for example, recognizes narcissistic personality disorder as an extreme form of traits generally seen in the population. DSM-IV, *supra* note 70, at 714-17. Altruism has been described as a basic personality predisposition. Patrik S. Florencio, *Genetics, Parenting, and Children's Rights in the Twenty-First Century*, 45 MCGILL L.J. 527, 536 n.41 (2000).

search on fairness suggests.⁷³ At the other extreme, those who too readily concede their interests can be condemned as well, as self-abnegation becomes a self-defeating martyrdom.⁷⁴

Behavioral law and economics research has not untangled the dilemmas of description, prediction, and normative judgment that arise when rationality is no longer the sine qua non of the analysis. So, perhaps it should come as no surprise that Sunstein privileges cognition over willpower and fairness. This strategy simplifies the analysis but at the cost of seriously understating the descriptive and normative complexity of fear's role in the regulatory process. In fact, the law already has grappled with the nuances of fear and their implications for personal responsibility and fairness. Far from being categorized as a cognitive mistake, fear has mediated judgments of the reasonableness of human behavior in tort and crime.

III. REASONABLENESS AND RATIONALITY: RIVALS IN THE LAW

To better understand how the legal process can account for the complexity of emotion, I turn now to the common law's development of the concept of reasonable fear. Juries often are charged with determining whether a fear is reasonable, and this determination need not depend entirely on rational risk assessment.⁷⁵ In examining juridical approaches to rationality and reasonableness, I want to look at two areas in which fear occupies a central place in the analysis. In criminal law, a defendant's claim of self-defense rests on the reasonableness of a fear of imminent grievous bodily harm or death.⁷⁶ In tort, compensation for negligent infliction of emotional distress turns on whether a victim reasonably feared for her safety.⁷⁷

In defining reasonable fear, courts have long acknowledged that ordinary intuitions have normative force. Lay juries play a central part in infusing a standard of reasonableness with moral and legal content.⁷⁸ Reasonableness is the common law's rival to rationality, and its label carefully refrains from according rationality a presumptive

73. See *supra* notes 33-34 and accompanying text.

74. See, e.g., Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 61-63, 89-93 (1994) (criticizing battered women's defense as improperly rewarding women for submissive and self-defeating behavior).

75. Mark Kelman, *Reasonable Evidence of Reasonableness*, 17 CRITICAL INQUIRY 798, 800-04 (1991) (commenting that in self-defense cases, judgments of reasonableness turn not on the accuracy of risk estimates but on their blameworthiness).

76. *Id.* at 800.

77. See Andrew R. Klein, *Fear of Disease and the Puzzle of Futures Cases in Tort*, 35 U.C. DAVIS L. REV. 965, 974-79 (2002); Glen Donath, *Curing Cancerphobia Phobia: Reasonableness Redefined*, 62 U. CHI. L. REV. 1113, 1117-32 (1995).

78. See Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 980-81 (2002); Catharine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

normative supremacy.⁷⁹ Because courts must make case-by-case decisions that do justice to individuals, questions of personal agency and responsibility figure prominently in the analysis. Judges and juries decide not only whether an act was bad but also whether the actor was blameworthy.⁸⁰

In tort and criminal law, fear is not simply a cognitive defect, but a vehicle for structuring a dialogue about the boundaries of human perception, the limits of self-efficacy, and the obligations of fairness. Bounded rationality describes situations in which individual perceptions are systematically inaccurate. Precisely because the errors are widespread, they do not seem blameworthy.⁸¹ Bounded willpower assesses the limits of human agency. When people predictably fail to act in their own long-term best interest, the law can make allowances for human frailty in assigning blame.⁸² Finally, fairness on occasion requires that individuals sacrifice themselves for the benefit of others. Bounded self-interest means that even a rational act can be blameworthy.⁸³

According to behavioral law and economics, fear should readily be deemed reasonable when a risk is accurately recognized or rational, the person's reaction falls within the boundaries of an ordinary exercise of will, and the response does not unfairly externalize harm onto others. For instance, when a person sees a stranger at close range with a stiletto drawn, it is rational to fear death or serious bodily injury, and it is reasonable to react by drawing a weapon for self-protection. Under these circumstances, the law of self-defense does not require that fear be managed by waiting for additional information about the danger. Nor does it require complete fairness to the stranger, whose motive for wielding the knife is unknown. Even the de-

79. For accounts of the relationship between rationality and reasonableness in tort law, see George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996). The literature on the role of rationality and reasonableness in the law is voluminous, and I do not seek here to add to that debate. Rather, I hope to demonstrate only that in contrast to the regulatory process, the common law has long recognized a struggle between rationality and its rivals.

80. Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 262 (1996) (commenting that courts distinguish between a bad act and a blameworthy actor).

81. See Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 931 (1981).

82. See Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight Into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 179-81 (2000) (describing problems of bounded willpower in criminal behavior and its potential relevance to penalties).

83. See Huigens, *supra* note 30, at 558-67 (analyzing the requirements of fairness and their relationship to bounded self-interest but arguing that virtue ethics is a more useful way to explain them).

ranged stranger who is not morally responsible for his acts can be attacked in self-defense.⁸⁴

The question of reasonableness becomes more vexing as problems of bounded rationality, bounded willpower, and bounded self-interest arise. In his analysis of regulation, Sunstein focuses exclusively on situations in which bounded rationality leads to cognitive mistakes. Courts, too, have struggled with this problem. Often, rational risk assessment and reasonable fear coincide, but they can diverge when a risk is novel and prompts widespread hysteria. In *K.A.C. v. Benson*,⁸⁵ for example, Dr. Benson was HIV-positive and had open lesions on his arms, but he failed to inform his patients of his condition before performing pelvic examinations.⁸⁶ Although he observed other recommended precautions, such as wearing gloves, there was still a remote risk of transmission.⁸⁷ Eventually, Dr. Benson sent out a letter to his patients, informing them of his infection and suggesting that they might wish to be tested for HIV.⁸⁸ A class of patients sued, alleging negligent infliction of emotional distress, even though they tested negative for the virus. All but the plaintiff eventually settled with the doctor.⁸⁹

In denying the plaintiff's claim, the court applied a zone of danger test. Under this test, the plaintiff had to establish actual exposure to recover. Because the Center for Disease Control estimated that the risk of transmission during the examinations was minuscule, there was no substantial risk of death or serious bodily injury that could qualify as exposure. Even if the plaintiff was genuinely distressed and even if many other patients would feel the same way, she could not recover for her fear of contracting HIV.⁹⁰ Actual exposure was a question of objective fact, so expert testimony on the statistical incidence of HIV transmission was dispositive. Without actual exposure, the court did not reach the question of whether the patient's fear was reasonable, that is, authentic and widely shared. The *Benson* decision performed an educative function by clarifying the risks associated with a relatively new and misunderstood disease like AIDS, but it did so

84. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 377-81 (1996) (summarizing traditional self-defense doctrine).

85. 527 N.W.2d 553 (Minn. 1995).

86. *Id.* at 556-57.

87. *Id.* at 556-58. The Center for Disease Control estimated that during invasive procedures, transmission from an infected health-care worker to a patient would "occur in one of 2.4 million to one of 24 million" cases. *Id.* at 559 n.8.

88. *Id.* at 557.

89. *Id.* at 555-56.

90. *Id.* at 557-60.

without ever passing on the genuineness of the HIV-negative patient's suffering.⁹¹

In other cases, rationality and reasonableness diverge because whatever people know, they lack the will to act on that knowledge. In these cases, courts must decide whether to accommodate bounded willpower, the human frailty that subverts a rational response. Consider, for example, the controversy over "the battered woman's defense." This defense allows battered women who kill an abusive partner to introduce a history of domestic violence, so that juries can consider it in evaluating culpability. The defense is now recognized in most jurisdictions, but its application is far from uniform.⁹² Depending on the jurisdiction, courts either treat the defense as exculpatory or use it as a basis for diminishing but not absolving responsibility.⁹³ Some judges insist on expert testimony about the effects of battering, while others consider this testimony unnecessary for the jury to properly weigh the evidence.⁹⁴ In some states, a woman can invoke the defense even if she killed her abuser while he was asleep, while in others, the defense is unavailable under these circumstances.⁹⁵

The reasons for these jurisdictional differences lie in the distinctive arguments made for admitting the history of abuse. Evidence of battering can be relevant to assessing the accuracy of a woman's perception of risk, that is, whether it was rational. According to this view,

91. Although the opinion focuses heavily on the divergence between expert and popular assessments of risk, a concern about fairness also could have influenced the outcome. If an exaggerated fear stemmed in part from homophobia, the decision protected gays from bearing the disproportionate burden of being wrongly stigmatized as highly contagious risk carriers. See Michael L. Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights*, 61 ALB. L. REV. 897, 961-65 (1998); Am. Bar Ass'n AIDS Coordinating Comm., *Calming AIDS Phobia: Legal Implications of the Low Risk of Transmitting HIV in the Health Care Setting*, 28 U. MICH. J.L. REFORM 733, 775-79 (Eric N. Richards & Salvatore J. Russo eds., 1995).

92. Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 977-78 (1999) (describing gradual acceptance of battered woman syndrome by judicial decision or statute after 1984 and continuing controversies over its application).

93. See Elizabeth Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477, 492-95 (1996); Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUST. 329, 377-83 (1998) (describing sometimes contested distinctions between justification and excuse in battered woman's defense).

94. Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 386, 425-31 (1991) (commenting that most jurisdictions permit expert testimony on battered woman's syndrome); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 81-91 (1997) (discussing different judicial approaches to admission of expert testimony on battered woman's syndrome and criticizing quality of research).

95. Kadish, *supra* note 92, at 978; Maguigan, *supra* note 94, at 386 (defining distinction between confrontational and non-confrontational encounters, evaluating relevant law, and concluding that most battered women kill during a confrontation). In part, these jurisdictional differences depend on whether a harm must be immediate to qualify for the defense. If so, then a woman who kills her batterer in a non-confrontational situation typically will not be able to invoke the defense. If, however, courts adopt a broader view of when harm is imminent, even a woman who attacks her abusive partner in his sleep may be able to use the defense. *Developments in the Law - Legal Responses to Domestic Violence: V. Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574, 1576-77, 1582, 1596 (1993).

battered women perceive the risk of violence in a more sophisticated way than someone who is unaware of the patterns of abuse. That is, victims have “local knowledge,” specific to the relationship, that alerts them to dangers that might otherwise go undetected.⁹⁶ Once the woman’s conduct is put in context, her perception of an imminent risk of death or serious bodily harm becomes appropriate and her response proportionate. As a result, she deserves to be absolved of wrongdoing because her fear was rational and her reaction therefore reasonable.⁹⁷

Another key rationale for the battered woman’s defense is rooted in a conception of reasonableness that acknowledges the problems of bounded willpower. Under this view, killing a violent husband or lover can be reasonable, even when the fear of imminent harm is based on distorted perceptions of danger. Under these circumstances, expert testimony on the psychopathology of battering relationships is highly relevant. Building on early work by Lenore Walker,⁹⁸ proponents of “battered woman syndrome” argue that repeated cycles of domestic violence subject victims to “learned helplessness.” That is, women who are battered suffer diminished self-esteem that destroys their sense of personal efficacy. For this reason, victims do not take steps to divorce abusive husbands or leave violent lovers.⁹⁹ The act of killing a batterer is the moment when the woman “loses it” and can endure no more. The killing becomes the coda to the victim’s growing sense that life is out of control.¹⁰⁰ There is no reason to think that this last act of desperation will happen only during a violent confrontation. A woman can “snap” as she watches her abuser sleeping peacefully on the couch.¹⁰¹

96. Kelman, *supra* note 75, at 812-13; Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1061-63 (1998). Sunstein notes with interest Slovic’s finding that there are important demographic differences in risk perception. In particular, women are more likely to perceive risk than men, and non-Whites are more likely to perceive risk than Whites. These differences are almost entirely accounted for by the perceptions of educated, affluent, and generally conservative White males, who report lower levels of risk than other groups. Sunstein, *supra* note 1, at 28-29; Book Review, *supra* note 1, at 1156-59. Sunstein makes a preliminary effort to connect these disparities to power and status, but he does not address the legal consequences of these differences. Sunstein, *supra* note 1, at 29; Book Review, *supra* note 1, at 1159.

97. Morse, *supra* note 93, at 378-79.

98. See LENORE E. WALKER, *THE BATTERED WOMAN* (1979) [hereinafter *BATTERED WOMAN*]; LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989) [hereinafter *TERRIFYING LOVE*].

99. *BATTERED WOMAN*, *supra* note 98, at 45-51; *TERRIFYING LOVE*, *supra* note 98, at 49-53.

100. ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 128-30 (1987); Evan Stark, *Representing Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 997-99 (1995).

101. Beth Bjerregaard & Anita Neuberger Blowers, *The Appropriateness of the Frye Test in Determining the Admissibility of the Battered Woman Syndrome in the Courtroom*, 35 U. LOUISVILLE J. FAM. L. 1, 4-5 (1996-97). Precisely because battered woman’s syndrome portrays women as helpless victims, some feminists have criticized the doctrine for entrenching stereotypes that characterize women as less capable decision-makers than men. Chimene I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38, 72-78 (2002). For a general account of the dilemma of difference and equality in the field of

Not surprisingly, some critics have argued that taking the life of another is a supreme act of self-efficacy.¹⁰² In deciding whether a battered woman's act reflects bounded willpower, the courts have used the language of emotion to distinguish those with diminished responsibility from the fully guilty. For instance, when battered women hire hit men to kill a spouse or lover, courts regularly exclude evidence of a history of abuse because the defendants acted out of malice or revenge, rather than helpless terror.¹⁰³ Here, terms that connote intense fear mark the boundaries of jury sympathy for a defendant who appears incapable of taking control of an increasingly desperate situation.

In weighing rationality and reasonableness, courts have grappled with another contentious question that transcends risk perception, that is, whether courts should require individuals to subordinate a rationally self-interested reaction in the name of fairness.¹⁰⁴ If bounded self-interest were a salient part of the common law definition of reasonableness, it is hard to imagine that judges would outright reject a duty of easy rescue. In the classic law school hypothetical, a man is walking by some railroad tracks when he hears a baby crying. He soon sees that the infant, previously unknown to him, is lying on the tracks and will surely be killed when the next train comes by. The man reassures himself that no locomotive is coming, and he could without any real peril to himself save the child. Still, he decides that he would prefer not to be inconvenienced and goes on about his business. The child is killed when the next train rolls down the tracks. The law leaves no doubt that the man's conduct is morally reprehensible, but he is not legally liable for the baby's death. Whatever informal norms of fairness apply, the courts refuse to make a defendant pay for acting on unbounded self-interest. Autonomy, even in this extreme form, remains a sacrosanct principle.¹⁰⁵

Despite this unfavorable precedent, legal scholars continue to argue that norms of fairness sometimes require that individuals sacrifice

feminist jurisprudence, see Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 863-64 (1997).

102. See Faigman & Wright, *supra* note 94, at 82.

103. *Id.* at 84-85; see also Maguigan, *supra* note 94, at 434-35 (showing that courts rejected the battered woman's defense that her behavior was reasonable when she was motivated by vengefulness rather than victimization).

104. Compare Fletcher, *supra* note 79, at 547 n.40 (1972) (suggesting that tort law is designed to do corrective not distributive justice), with Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 219-24 (2000) (noting that fairness and distributive justice explain the use of enterprise liability), and Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997) (stating that one goal of enterprise liability is to promote fairness, not just efficiency, in the allocation of risks).

105. Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 605-06, 621-24, 638-43, 651-52, 662-63 (2001) (canvassing key arguments for and against a duty of easy rescue in tort).

their own interests for the welfare of others. In his book *Negrophobia and Reasonable Racism*,¹⁰⁶ Jody Armour takes a dim view of Whites who justify quick action to defend themselves against Black males based on general probabilities of criminal behavior. This statistical argument is exemplified by social philosopher Michael Levin's claim that when he is jogging at night and encounters a stranger, he is justified in fearing a young Black male more than a young White male. Levin explains that "[i]t is widely agreed that young Black males are significantly more likely to commit crimes against persons than are members of any other racially identifiable group. Approximately one Black male in four is incarcerated at some time for the commission of a felony, while the incarceration rate for White males is between 2 and 3.5%."¹⁰⁷ As a result, "jogging alone after dark, . . . it remains more rational to be more fearful of the Black than of the White [male]."¹⁰⁸

Armour first responds to Levin's argument by contending that perceptions of risk, far from being rational, are infected by racial stereotypes that exaggerate the dangers posed by Black men. Armour argues that

[t]he Bayesian [probability theorist] assumes that our minds can passively mirror the world around us, that they can operate like calculators, and that social stereotypes can be represented in our minds as mere bits of statistical information, as malleable and subject to ongoing revision as the batting averages of active major-league baseball players.¹⁰⁹

But Armour argues that these assumptions fly in the face of psychological evidence about the impact of stereotypes on human perception. Stereotypes prime people to see evidence that confirms their biases. As a result, Whites are likely to overestimate the threat posed by Black males.¹¹⁰

Not content to rest his case on the claim of distorted stereotypes, Armour contends that even if the perception of enhanced risk is rational, fairness demands that Whites refrain from using deadly force more quickly against a Black than a similarly situated White. According to Armour, the law must take into account "not only . . . the rationality of its underlying factual judgments, but equally . . . the consequences of error if those factual judgments are mistaken."¹¹¹ Allowing Whites to act on unbounded self-interest is manifestly unfair to Blacks, most of whom will not commit a violent act. As Armour observes,

106. JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997).

107. *Id.* at 37.

108. *Id.*

109. *Id.* at 40.

110. *Id.* at 41-42.

111. *Id.* at 47.

when the Bayesian decides to act on his race-based factual judgment by using deadly force more quickly against ambiguous Blacks, he implies that the risks of error in his hastier use of deadly force against Blacks can be safely disregarded in view of the interests that wrong predictions will injure.¹¹²

Armour concludes that this Bayesian approach denies Blacks their moral agency by inflicting harm on the basis of race-based suspicions. That is, Blacks are converted into “predictable object[s]” rather than “moral being[s] capable of personal autonomy.”¹¹³ Precisely because Blacks must fear that they will be injured by the hasty use of force, they will be unable to participate in the community on the same terms as Whites.¹¹⁴

Armour’s call for legal reform is an intriguing effort to temper commitments to rationality with a concern for moral fairness. His push for change faces serious obstacles, in part because self-sacrifice and compassion sit uneasily alongside the concept of reasonable fear. Courts applaud heroism, but they generally do not mandate acts of personal courage in everyday life. Armour wants people to transcend their fear in the service of social justice. What he demands is a standard of reasonable courage, not reasonable fear. The common law courts, either less sanguine or more realistic about human nature, continue to treat anger as the likely bedfellow of fear. Fear and anger impel the trapped and powerless to act. These feelings can generate a kind of physical courage, if not an entirely moral one.¹¹⁵ Armour demands a different kind of bravery where race is concerned. Individuals must develop the character to trust Blacks as they would Whites when they fear for life and limb. So far, Armour’s prescription for distributive justice in self-defense law remains a moral exhortation, but it is not an ordinary intuition about fairness that courts enforce through criminal penalties.

The common law’s approach to reasonable fear suggests that courts sometimes put concerns about personal agency on a par with the quest for rationality. Because judges and juries are committed to doing individualized justice, they carefully describe a party’s situation and subjective reactions as well as what an objectively reasonable person might do. If a tribunal is committed to educating the public, as in the *Benson* case, it most strongly emphasizes objective standards. When a court is reluctant to punish an individual for commonplace shortcomings, it makes allowances for subjective limitations. In making these concessions to human frailty, judges can preserve the normative message of self-control by mitigating responsibility but not

112. *Id.* at 50.

113. *Id.* at 53.

114. *Id.* at 52; see also Kelman, *supra* note 75, at 815-16.

115. MILLER, *supra* note 66, at 227-28.

absolving a defendant of guilt. Courts have been hesitant to constrain self-interest to account for distributive fairness. Perhaps, judges believe that class-based reforms should be the province of legislatures and agencies, decision-making bodies that are not hamstrung by the ad hoc quality of case-by-case litigation. The question then arises whether fear can play a nuanced role in deliberations about the collective good.

IV. REGULATION REVISITED: DEMOCRATIC PARTICIPATION, RIVAL RATIONALITIES, AND THE ROLE OF EMOTION

Regulatory agencies deal with problems of aggregate social welfare rather than individualized justice. Officials are far more interested in collective patterns of behavior than in the acts and motives of a particular person. As a result, experts generate statistical predictions of risk, numbers that advance efficiency but lack a human face. Yet, even when the focus shifts from individual responsibility to collective wellbeing, fear need not play the paltry and unproductive role that Sunstein assigns it. Though not dispositive of debates about regulation, fear can identify pertinent public concerns that merit further deliberation. Agencies are primarily interested in generalizations and predictions, but experts can fall prey to tunnel vision about risk. Moreover, bounded willpower can be critically important in evaluating whether people will adhere to regulatory requirements. Finally, concerns about fairness take on a new urgency when the distributive consequences of regulations are assessed. Lay participation offers a way to counter experts' mistakes, identify pitfalls of compliance, and introduce collective values into the decision-making process. All of these public concerns will at times be couched in the language of fear.

With respect to rationality and efficiency, public participation can serve as a corrective to technocratic oversights. Experts make mistakes, as Sunstein himself acknowledges.¹¹⁶ Although professional training prevents some cognitive errors, it also creates blind spots. By overrelying on a single set of analytical tools, technocratic decision-makers can become overconfident of their findings.¹¹⁷ Or, as Dale Griffin and Amos Tversky put it, experts are "often wrong but rarely in doubt."¹¹⁸ Far from being a form of pure and perfect rationality, "expertise can have similar consequences to heuristics in laypersons: clearly useful, but dangerous if overused."¹¹⁹ Although members of

116. Sunstein, *supra* note 1, at 2, 9-10; Book Review, *supra* note 1, at 1130-31.

117. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 560 (2002).

118. Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 412 (1992).

119. Rachlinski & Farina, *supra* note 117, at 561.

the public rely on cognitive shortcuts that at times lead to misplaced fears, technocratic decision-makers can be so blinkered by their disciplinary assumptions that they succumb to misplaced overconfidence, a kind of unfounded fearlessness.

Lay participation can improve not only the quality of regulatory assessments but also the prospects for effective policy implementation. Public trust is critical because without it, compliance is unlikely. As Slovic writes in an essay co-authored with Howard Kunreuther, “trust in risk management is difficult to achieve and maintain. Trust is fragile. It is typically created rather slowly, but it can be destroyed in an instant—by a single mishap or mistake.”¹²⁰ Trust requires that all parties to the regulatory process be educated about how risks are communicated, perceived, and valued. The public requires instruction about how to estimate dangers, but scientists and government officials also must learn how to provide information in ways that lay people can understand.¹²¹ Kunreuther and Slovic believe that these steps are crucial elements of effective regulation because “[o]ne way to generate trust is to encourage public participation as an integral part of the decision-making process.”¹²²

In addition to countering expert overconfidence and promoting trust, public involvement helps regulators to make value judgments that transcend the statistical weighing of risk. Complex regulatory issues implicate “trans-science,” questions that science can pose but not answer.¹²³ As risk assessment and risk management merge, questions of science and social values become inextricably intertwined.¹²⁴ Experts can describe the incidence of risk, but methodological limitations mean that a substantial amount of scientific uncertainty remains, uncertainty that must be managed in a socially responsible fashion. For instance, if estimates of the risk of cancer due to formaldehyde exposure vary widely, regulators have to decide how to quantify the danger in light of the perceived benefits of formaldehyde and the widespread dread of environmentally induced cancer.¹²⁵ Regulators must determine “whether people, with all their peculiarities of need, taste, tolerance, and adventurousness, might be or should be willing to

120. Howard Kunreuther & Paul Slovic, *Coping With Stigma: Challenges and Opportunities*, in *RISK, MEDIA, AND STIGMA: UNDERSTANDING PUBLIC CHALLENGES TO MODERN SCIENCE AND TECHNOLOGY* 331, 342 (James Flynn et al. eds., 2001).

121. *Id.* at 343-46.

122. *Id.* at 342.

123. Alvin M. Weinberg, *Science and Trans-Science*, 10 *MINERVA* 209 (1972).

124. See Eileen Gay Jones, *Risky Assessments: Uncertainties in Science and the Human Dimensions of Environmental Decisionmaking*, 22 *WM. & MARY ENVTL. L. & POL'Y REV.* 1, 35-36 (1997).

125. Jeremy D. Fraiberg & Michael J. Trebilcock, *Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform*, 43 *MCGILL L.J.* 835, 850-57 (1998).

bear the estimated risks” and this is “a value judgment that scientists are little better qualified to make than anyone else.”¹²⁶

In earlier work with Richard H. Pildes, Sunstein himself has acknowledged all of these arguments as legitimate justifications for public engagement in the regulatory process. Their analysis recognizes that ordinary individuals bring a rival rationality to the process, and without lay input, policies will not be effectively implemented.¹²⁷ In addition, Pildes and Sunstein contend that participation has a symbolic or expressive dimension; that is, there is an intrinsic value attached to the democratic process, independent of whether lay people enhance the efficacy of regulation. As a result, Pildes and Sunstein conclude, technocratic decision-makers must be inclusive and respectful of groups and individuals to promote “values of political legitimacy, stability, and fairness.”¹²⁸

Once the case for public participation has been made, the troubling problem is how to reconcile conflicting claims of experts and members of the public. As Pildes and Sunstein note, lay and expert assessments of risk can diverge due to either factual errors or alternative values.¹²⁹ Consequently, “[t]he difficulty is in sorting out irrationalities from qualitative concerns.”¹³⁰ Slovic’s notion of a rival rationality provides a starting point for structuring this sorting process. Some of the factors he identifies go to the adequacy of a cost-benefit analysis rooted in rational choice. For instance, people care not only about how many lives will be lost but also how deaths will take place. Whatever the number of lives lost, individuals typically prefer a relatively quick and painless death to a protracted and agonizing one. This consideration seems entirely appropriate in rational risk regulation.¹³¹ Similarly, when risks are novel, members of the public legitimately worry that scientific uncertainty is substantial, and experts cannot manage this uncertainty without considering social values that transcend risk assessment.¹³² Finally, concerns about potentially catastrophic dangers show that at times, individuals are principally committed to avoiding worst-case scenarios, regardless of

126. WILLIAM W. LOWRANCE, *OF ACCEPTABLE RISK: SCIENCE AND THE DETERMINATION OF SAFETY* 9 (1976).

127. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 55-59 (1995).

128. *Id.* at 71.

129. *Id.* at 61.

130. Andrew J. Green, *Public Participation, Federalism and Environmental Law*, 6 BUFF. ENVTL. L.J. 169, 211 (1999).

131. See Eric A. Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL’Y 681, 687 (2002).

132. See Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1101-05 (1990) (describing why the legitimacy of regulatory decision-making requires that as risks become increasingly complex, officials allow the public to decide “what it shall expose *itself* to, make *it* familiar with the exotic, give *it* control”).

the average range of risk. Again, this priority is far from irrational when the risk of disaster is not trivial and the damage is irreversible.¹³³

Slovic's rival rationality includes other criteria that indicate a pre-occupation with self-efficacy. Slovic reports that lay people are concerned about whether a risk is involuntary or uncontrollable. If, for instance, the public cannot tell whether what they eat is contaminated with hazardous pesticides, additives, or bacteria, regulators will face intense pressure to ensure the safety and purity of the food supply.¹³⁴ On the other hand, if skiing and scuba diving are dangerous activities that can be readily identified and avoided, the public may be happy to allow individuals to decide for themselves whether to encounter these risks.¹³⁵ In addition to looking at whether people generally are helpless to prevent dangers, regulators sometimes identify especially vulnerable people, individuals who perennially fail to make decisions in their own best interest. When activities are depicted as pathological addictions, say to drugs, cigarettes, alcohol, or gambling, regulators can intervene to protect the weak-willed, who lack the self-control to protect themselves from danger.¹³⁶

The recent campaign to fight teenage smoking is an excellent illustration. When tobacco companies targeted advertisements and promotions at young people, anti-smoking activists emphasized that adolescents are impressionable and susceptible to peer pressure because they are not yet secure in their identities. As a result, teenagers are less able than adults to resist glamorous images of smoking, whatever its perceived risks. Once young people begin smoking, they become addicted to nicotine. Even when they mature into adults, they find themselves hooked and unable to stop, whatever the known harms of cigarettes. According to anti-smoking activists, tobacco marketing targeted at teenagers capitalizes on two forms of bounded willpower: the short-term vulnerability to peer pressure and the long-term power of a physiological and psychological addiction. For these reasons, advocates have argued successfully that regulation is vital to

133. John S. Applegate, *A Beginning and Not an End in Itself: The Role of Risk Assessment in Environmental Decision-Making*, 63 U. CIN. L. REV. 1643, 1659 (1995) (“[I]t is hardly irrational to fear and to protect against catastrophic injury.”); Fraiberg & Trebilcock, *supra* note 125, at 878-79 (commenting that a precautionary principle that avoids catastrophic outcomes can be a rational decision rule so long as the risk is not extremely remote); Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 588-89, 596, 614-15 (1992) (explaining that fear of catastrophic losses is not irrational and this concern is captured by Slovic's criteria for a rival rationality).

134. Sunstein, *supra* note 1, at 16; Book Review, *supra* note 1, at 1145.

135. Sunstein, *supra* note 1, at 16; Book Review, *supra* note 1, at 1145.

136. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 682-84 (1999) (describing addiction as a form of bounded willpower).

protect unwary young people from succumbing to seductive images of smoking.¹³⁷

Under Slovic's rival rationality, lay people weigh whether risks are inequitably distributed or faced by future generations. Each of these factors turns on norms of fairness rooted in bounded self-interest. For example, the environmental justice movement has challenged cost-benefit analyses that support placement of hazardous waste sites in low-income communities of color. In addition to alleging that expert calculations wrongly devalue the lives of the marginalized, activists argue that already disadvantaged groups should not bear the brunt of industrial and technological waste.¹³⁸ Even if experts accurately calculate the magnitude of siting risks, they cannot determine whether these risks are equitably distributed. Fundamental questions of fairness must be resolved through public deliberation, and affected communities have to enjoy a meaningful opportunity to participate.¹³⁹

Even if public participation can play a valuable role in raising concerns about personal agency and collective fairness, the question remains whether fear has any contribution to make in this regard. Sunstein dismisses fear as nothing more than a distorted assessment of risk, but once bounded willpower and bounded self-interest are considered, fear takes on complex and multiple meanings. With respect to willpower, fear can reflect the sense of personal vulnerability that comes when people recognize their internal psychic limitations.¹⁴⁰ Individuals rightly dread a loss of self-control when they fail to act as they know they should: to drink in moderation, to refrain from taking

137. See Kathleen M. Paralusz, *Ashes to Ashes: Why FDA Regulation of Tobacco Advertising May Mark the End of the Road for the Marlboro Man*, 24 AM. J.L. & MED. 89, 92-98 (1998) (describing advertisements targeted at teenagers, concerns that youthful insecurity makes teenagers more susceptible than adults to marketing tactics, and the consequent danger of lifelong addiction to cigarettes). These characterizations of teenage smokers differ from those that focus exclusively on their cognitive errors, especially their tendency to underestimate the risks associated with smoking. See Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 DUKE L.J. 1133, 1137-41 (1998).

138. See Sheila Foster, *Justice From the Ground up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 830-41 (1998) (arguing that risk assessment and management are as much social and political issues as legal and technical ones, so that community participation is a vital part of the process); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 31-36, 51-53, 71-76 (1998) (commenting on how traditional environmental groups and agencies focus on cost-benefit analyses and efficiency to the exclusion of equity; environmental justice advocates remain outsiders insofar as they seek to inject concerns about fairness into a technical discourse).

139. Fraiberg & Trebilcock, *supra* note 125, at 879-81 (stating that because judgments about equity cannot be based on scientific estimates of costs and benefits, broader participation in the regulatory process is required); Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 434-36, 450-51, 453-55 (1994) (describing the history of the environmental justice movement, the disenfranchisement of low-income communities of color, and the need for community participation and agency consideration of distributional inequities).

140. DAVID L. ALTHEIDE, *CREATING FEAR: NEWS AND THE CONSTRUCTION OF CRISIS* 87-89 (2002) (describing how a sense of helplessness, for example, in the face of random crime, heightens a sense of fear); see also RALPH KEYES, *CHANCING IT: WHY WE TAKE RISKS* 45-51 (1985) (describing distinction between physical and psychic risks).

illegal drugs, to avoid smoking, to have safe sex, and to wear a seat belt. These fears can alert regulators to the dilemma of balancing respect for personal freedom and concern for human weakness. While fear alone cannot provide the answers, it can signal a need for officials to engage in a dialogue with lay people about the boundaries between protective legislation and paternalistic overreaching.¹⁴¹

Acknowledging bounded self-interest also gives a new face to fear. As it happens, fear has long occupied a prominent place in political philosophy. Indeed, much of the regulatory process operates on the premise that fear of punishment will induce compliance. Under these circumstances, the penalty is designed to prompt people to refrain from behaving in antisocial ways that wrongly privilege their own interests and ignore those of others.¹⁴² At times, though, fear is used to mark the dangers of government overreaching, the risk that individual freedoms can be imperiled by a powerful, centralized government. Based on these concerns, Americans have created checks and balances to keep a sprawling administrative State from becoming an oppressive Leviathan.¹⁴³ All citizens fear despotism, but discrete and insular minorities often dread a tyranny of the majority that locks them out of meaningful participation in the democratic process. The politically powerless worry that they will be isolated, marginalized, and disadvantaged by the ruthless majoritarian pursuit of power and interest.¹⁴⁴ The disenfranchised can convert this fear into demands for social justice, as they “follow a cultural script of dependence, lacking, and powerlessness while relying on state-sponsored social institutions to save and support them.”¹⁴⁵ By turning fear into outrage, the disadvantaged can insist that the social order recognize their demands for “justice, revenge, and, of course, redemption.”¹⁴⁶

In an expanded framework of values, fear has multiple meanings, and its very ambiguity can undercut its utility in the regulatory process. To overcome this difficulty, the language of fear must be supple-

141. For an example of an effort to use emotion to assess the propriety of legal rules that might be considered paternalistic because they seek to protect individuals from cognitive errors, see Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 756-63 (2000) (using terms like optimism and aversion to regret to analyze legal approaches to contract law, particularly liquidated damages clauses).

142. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 165-74 (paperback ed. 1996) (describing the pleasure-pain calculus that should guide utilitarian lawmaking). This work provides a central foundation for much of the efficiency rationale that informs Sunstein’s approach to regulation. See F. Rosen, *Introduction*, *id.* at lxix (noting that Bentham’s work frames the modern debate between utilitarians and retributivists).

143. See Ethan Fishman, *Loper, Begging and Civic Virtue*, 46 ALA. L. REV. 783, 787-89 (1995).

144. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-88, 101-04 (1980) (describing why judicial review is necessary to protect discrete and insular minorities from majoritarian abuses).

145. ALTHEIDE, *supra* note 140, at 90-91.

146. *Id.* at 90.

mented with a wider vocabulary of emotion. Because Sunstein's approach reduces fear to a cognitive mistake, other sentiments seem irrelevant. However, once fear becomes a reasoned emotion with complex underpinnings, feelings like sympathy, compassion, shame, and guilt become important in making sense of fear. Here, I cannot offer a complete taxonomy of emotions that, along with fear, communicate intuitions about lapses of personal control or imperatives of social responsibility. Instead, I will look at a particular emotion, compassion, to illustrate how it might work along with fear to mediate a dialogue about human frailty and fairness. I choose compassion because it implicates several elements of Slovic's rival rationality, can be linked to bounded willpower and bounded self-interest, and has already been usefully analyzed at length by Martha Nussbaum.

For Nussbaum, compassion rests on three beliefs: the suffering of another is profound and not merely trivial; the suffering is undeserved; and the suffering is a significant part of one's own scheme of goals and ends so that it will affect one's own flourishing.¹⁴⁷ Though not strictly necessary, the empathy to imagine that one might someday be in the same situation can prompt a eudaimonistic judgment that an afflicted person is important to one's own scheme of goals and ends.¹⁴⁸ Nussbaum rejects the traditional dichotomy between reason and emotion, so her definition of compassion embodies ethical judgments. The severity of suffering implicates moral proportionality, and its undeservedness relates to personal agency and responsibility. The eudaimonistic judgment that another's plight affects one's own flourishing depends on an image of the good life and a reciprocity of obligation.¹⁴⁹

In defining compassion, Nussbaum captures some of the ordinary intuitions that guide a rival rationality. Lay people's preoccupation with dread and catastrophic harm reflects the seriousness of suffering. Individuals can be expected to cope on their own with temporary inconveniences and minor dislocations but not with profound disruptions of their life chances.¹⁵⁰ To express concern about the involuntary and uncontrolled nature of a risk, members of the public invoke "bad luck," a belief that harm is undeserved because it is outside a person's control.¹⁵¹ In weighing whether a hazard is inequitably allocated and

147. NUSSBAUM, *supra* note 63, at 306-21. A full exploration and critique of Nussbaum's model is not possible in this paper. Suffice it to say that her definition is in many respects highly cognitive and so provides a convenient framework for reevaluating the role of emotion described by Slovic and Sunstein.

148. *Id.* at 315-21.

149. *Id.* at 414-22.

150. *Id.* at 415; *see also* CLARK, *supra* note 62, at 93-100 (noting the expanding number of plights that Americans now consider worthy of sympathy).

151. NUSSBAUM, *supra* note 63, at 313-15; CLARK, *supra* note 62, at 84, 100-12.

whether it will affect future generations, people draw on intuitions about distributive justice, an ethical concern with unfair treatment that jeopardizes individual possibilities to flourish.¹⁵²

Nussbaum's definition helps in beginning to unpack the descriptive and normative significance of reasoned emotions. Bounded willpower describes the limits of self-efficacy, but policy also demands a theory of desert, of personal agency and responsibility. Neither fear nor compassion alone can offer such a theory, but along with other emotions, they can signal the ordinary intuitions that people have about the limits and obligations of self-control.¹⁵³ When individuals express guilt or shame, they may be acknowledging a socially unacceptable failure of will.¹⁵⁴ When they express sympathy or compassion for another's suffering, they make allowances for the limits of personal responsibility. Anger or resentment can reflect a judgment that a person's want of self-discipline is antisocial and inappropriate.¹⁵⁵ Sentiments like these can initiate a discourse about willpower, but normative standards must emerge by extracting and examining the moral intuitions that trigger these emotions.

Similarly, with respect to bounded self-interest, compassion can initiate a dialogue about the capabilities necessary for human flourishing, which fairness requires be available to all on equal terms. In the regulatory process, much of this discourse will focus on a right to physical integrity: to be free of unwarranted invasions of the body and to have a fair opportunity to lead a long and healthy life. Still, as the environmental justice movement indicates, decision-makers also must weigh dignitary goods that are intangible in nature, for example, the right to be treated with respect and to be free of stigma and humiliation based on race, ethnicity, gender, and other traits associated with a history of disadvantage and subordination.¹⁵⁶ Scientific experts can offer statistical estimates of the number of lives lost, but they cannot address the ethical dilemmas that come in drawing the proper boundaries of concern.¹⁵⁷ By indicting the pattern of exporting risk to low-income communities of color, activists insist that technocrats alone cannot redress the tendency to discount damage to lives unlike one's own. Once again, compassion along with other emotions can be a useful place to begin a reasoned discourse about the imperatives of equal

152. NUSSBAUM, *supra* note 63, at 420-22.

153. CLARK, *supra* note 62, at 201-13 (describing how emotion mediates judgments of personal responsibility).

154. NUSSBAUM, *supra* note 63, at 216-18 (analyzing the evolution of moral guilt and shame as a child comes to understand her human limitations).

155. *Id.* at 393-95 (describing inevitable links between compassion, anger, and revenge).

156. *Id.* at 416-17.

157. *Id.* at 420.

dignity and respect.¹⁵⁸ The role of the regulatory process, then, is not to dismiss emotions like fear as necessarily inferior to rational thinking, but to evaluate the fundamental, shared values that lie behind expressions of feelings.¹⁵⁹

V. CONCLUSION

To insist on the studied detachment of the expert and to deny the relevance of the emotionally engaged citizen creates the specter of a dangerous reductionism. This technocratic vision denies humankind an active sensibility and understates the importance of common values that transcend risk estimation. After all, we invest in regulation not only to protect ourselves but to protect others. We care about family and friends not so much as a source of information cascades but as a source of mutual fulfillment. We feel concern for strangers not because they figure into the aggregate social welfare but because we can imagine ourselves in their position. Expert assessments, while extremely important, do not fully capture the basic social norms that underlie the regulatory process. A dialogue that includes these values and the feelings they engender can revitalize public trust in a way that no graduate level seminar on statistical risk assessment ever will.

158. *Id.* at 420-23.

159. *Id.* at 453-54.