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Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment

Paul Horwitz
University of Alabama - School of Law, phorwitz@law.ua.edu

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FREE SPEECH AS RISK ANALYSIS: HEURISTICS, BIASES, AND INSTITUTIONS IN THE FIRST AMENDMENT

Paul Horwitz[*]

* Visiting Assistant Professor, University of Iowa College of Law; Associate, O'Melveny & Myers LLP, Washington, D.C. Thanks to Randy Bezanson, Christina Bohannan, Bill Buss, Kevin Davis, Raj De, Sean Donahue, David Fontana, Dan Markel, Jeffrey Rachlinski, Kelly Riordan, and Alissa Starzak for reading and commenting on this Article, to Carmon Harvey for editorial advice, and to Melanie Warco and Melanie Stutzman for their invaluable assistance. This Article benefited from the opportunity to present it as a talk before faculty members at the University of Toronto Faculty of Law, the Queen's University Faculty of Law, and the University of New Brunswick Faculty of law, for which I am grateful.

I. INTRODUCTION

The post-September 11 era is a propitious, if deeply unfortunate, one in which to reexamine the landscape of the First Amendment's protection of free speech. That this might be so was surely evident even before the smoke had cleared on that awful day. I do not believe I was the only person who wondered in the wake of those events what would become of civil liberty in what seemed to be a new wartime environment. Free speech, often thought of as the first freedom, seemed likely to be among the first to suffer.[1]

It is all the more important to turn one's thoughts to our settled ways of thinking about the First Amendment now because that fear turns out to have been almost entirely misplaced.[2] Although the United States has enacted anti-terrorist legislation that is sweeping in scope and raises significant constitutional concerns about a host of criminal protections and about associative freedom, in the United States, at least, the freedom of speech has gone largely untouched by

1. *See, e.g.*, Susan Gellman, *The First Amendment in a Time That Tries Men's Souls*, 65 LAW & CONTEMP. PROBS. 87, 87 (2002) ("In the aftermath of the terrorist attacks of September 11, 2001, not only legal scholars, but all Americans, wondered what the civil liberties fallout would be. A particular area of concern was, and still is, the First Amendment protections, especially of speech and press.").

2. Gellman, *supra* note 1, continues,

> And then a surprising thing happened: Nothing. Well, not *nothing*, but significantly less, in the way of government infringement upon civil liberties, than many of us had feared in the dangerous early period. . . . [A]t least of this writing, it truly cannot be said that government in the United States has responded to the current crisis by grossly restricting our First Amendment rights of speech, press, or religion.

Id. at 87-88.

recent events.[3]

This outcome was hardly compelled by lack of public support for speech-restrictive measures. As one poll taken in the fall of 2001 noted, a slim majority of the American public at the time favored government censorship of news it believes is a threat to national security.[4] Nor, however tempting it may be to think so (a product of the very phenomena I discuss below), was there anything unique about the circumstances of September 11 that might have dissuaded legislators from enacting, or law enforcement officials from enforcing, the kind of speech-restrictive measures that have been a common feature in other periods of hot and cold war. To be sure, the September 11 attacks involved acts taken by foreigners on domestic soil as a result of persuasive speech that was delivered abroad, and the attacks evoked little sympathy on these shores. But although Congress, in responding to the September 11 attacks, cast a broad net over radical (and even moderate) Muslims who might have been dimly connected to foreign terrorist networks, it could have gone still further. It could also have reasoned that speech that was even slightly sympathetic to the aims of foreign terrorist groups such as al-Qaeda or Hamas posed a risk of further terrorist

3. *See, e.g.*, Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441, 443-56 (2002) (listing potential civil liberties concerns raised by government response to September 11 without listing First Amendment curtailment, although noting that law enforcement officials may engage in increased numbers of investigations based on speech and associational ties of targets of investigation); Marin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America*, 13 STAN. L. & POL'Y REV. 185, 186, 200 (2002) (cataloging some instances of *private* criticisms of certain speakers in the wake of September 11, while acknowledging that "[t]he First Amendment . . . is not concerned, as a conceptual matter, with situations where private actors take or threaten action that might chill or limit speech"). The only government incursion on speech identified by these authors is the enactment of legislation providing that aliens who donate to groups certified as terrorist organizations are subject to deportment—a potential First Amendment violation, but far from the same character as the historical examples discussed in this Article. *See id.* at 187.

In May 2002, the Attorney General proposed expanding the Federal Bureau of Investigation's powers to permit agents to monitor Internet sites, political and religious groups, and libraries. *See* Neil A. Lewis, *Ashcroft Permits F.B.I. to Monitor Internet and Public Activities*, N.Y. TIMES, May 31, 2002, at A18 (describing links between terrorism and increased FBI surveillance). Early reactions from legal experts and civil liberties groups generally concluded that these investigative activities would not violate the First Amendment, but raised concerns that expanded monitoring of domestic activities could create chilling effects on speech and association. *See* Adam Liptak, *Changing the Standard: Despite Civil Liberties Fears, F.B.I. Faces No Legal Obstacles to Domestic Spying*, N.Y. TIMES, May 31, 2002, at A1 (discussing impact of new guidelines on public debate and academic community). Even if such fears are well-founded, these measures fall well short of the sort of historical incursions on First Amendment freedoms discussed below. *See* Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMM. 261, 288 (2002) (stating that current Bush administration has diminished relatively few civil liberties compared with past wars led by Lincoln, Wilson, and Roosevelt).

4. *See Terror Coverage Boosts News Media's Image: But Military Censorship Backed*, SURVEY REP. (Pew Research Ctr. for the People & the Press, Wash., D.C.), Nov. 28, 2001 (summarizing polling data), *at* http://people-press.org/reports/display.php3?PageID=10. This represents an increase from polling data finding that thirty-eight percent of respondents favored government censorship of national security threats in October 1985, but is less than the fifty-eight percent of respondents who approved of government censorship in March 1991. *Id.*

actions, and so should be proscribed. Indeed, as we will see below, prior restrictions on speech in or around wartime have often aimed at a broader target than direct incitement, and included within their ambit anything that might conceivably be said to hamper the war effort. But recent legislative efforts have left all of this speech unregulated.

In short, if there is anything extraordinary about the constitutional questions that have arisen in the wake of September 11 and the concomitant legislative responses, it is not that some civil liberties have been threatened, but that one of our central constitutional rights has *not* been threatened, although history suggests it has been among the first targets of wartime governments. In the wealth of discussions about civil liberties that have occurred in the wake of the attacks, this unprecedented change has gone largely unremarked.[5] What evolution in the legal and political environment of the First Amendment can account for this quiet but significant shift?

In this Article, I suggest that the answer to this question lies within the study of behavioral analysis and its application to the law.[6] Loosely defined, law and behavioral analysis is the study of real-world decision-making in the world of law. Law and economics, perhaps the dominant paradigm of decision analysis in law, proceeds from a model of individuals as rational actors.[7] Behavioral analysis of law, by contrast, relaxes the assumption of rationality and proceeds from the view that departures from rationality "can be described, used, and sometimes even modeled."[8] By examining predictable heuristics and biases in individual and group decision-making, we can gain a new understanding of the ways people operate under given legal regimes, the way the law succeeds and fails in taking into account actual decision-making processes, and the path of

5. *But see* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.-C.L. L. Rev. 1, 1 (2003) (arguing that a number of commentators have pointed to the relative lack of direct speech restrictions in the wake of September 11). Cole argues that despite superficial shifts in the government's approach, "it would be more accurate to say that we have adapted the mistakes of the past, substituting new forms of political repression for old ones." *Id.* But the pressing question of why this shift has been necessary is not satisfactorily answered in this otherwise instructive article. To say that the government has adopted law enforcement methods that attack freedom of speech or association less directly because they are barred by history and the Constitution from targeting people for their speech or associations" still raises the question of why the courts came to set the bar so high. *Id.* at 8. This Article is an attempt to answer that question.

6. I use the term "behavioral analysis" here, but this body of work has been variously referred to as "judgment and decision theory," "behavioral decision theory," "behavioral economics," and other phrases, all denoting the same school of thought.

7. *E.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3-4 (5th ed. 1998). Posner explains,

> The task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions—what we shall call his "self-interest." Rational maximization should not be confused with conscious calculation. Economics is not a theory about consciousness. Behavior is rational when it conforms to the model of rational choice, whatever the state of mind of the chooser . . . .

Id. (footnote omitted).

8. Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS 1, 1 (Cass R. Sunstein ed., 2000).

appropriate legal reforms.[9]

One area in which behavioral analysis yields particularly valuable insights is risk analysis.[10] Assessments of risk and probability are subject to a host of standard, predictable heuristics, which may in turn lead to biased assessments of risk.[11] For example, decision makers commonly fall prey to the *availability heuristic*—a tendency to "assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind."[12] Thus, people will overestimate the likelihood of certain dramatic and disastrous events that are subject to substantial media coverage, such as airplane disasters, tornadoes, and nuclear meltdowns, while underestimating the higher risk of such unexceptional events as car accidents.[13] Demands for regulation of salient risks may thus be driven by anecdote rather than a rational assessment of risk.

Similarly, individuals tend to display *hindsight bias*, or "the tendency to view what has already happened as relatively inevitable and obvious—without realizing that retrospective knowledge of the outcome is influencing one's judgments."[14] Juries and judges are regularly called upon to evaluate the likelihood of an event *ex post*, as when they decide whether an alleged tortfeasor was responsible for an accident.[15] Courts deciding whether to impose a subsequent penalty for speech may thus, in certain cases such as those involving incitement of unlawful action, have to decide whether a speech act was likely *ex ante* to have caused consequences, such as a riot or an act of terrorism, that in fact occurred.

Although behavioral analysis of law is a burgeoning field, so far it has been applied primarily to private law problems, not public law issues.[16] In particular,

9. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics* (sketching potential impact of incorporating more realistic conception of human behavior in legal analysis), *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 8, 13, 50-51.

10. I should note that this phrase has often been used specifically with reference to professional assessment of risks, as in the literature on environmental hazards. I use the phrase in a decidedly broader fashion here, to refer to both expert and lay assessments of the probability of occurrence of harm.

11. *See, e.g.*, SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 131-44 (1993) (listing standard heuristics and biases and concluding that such biases underline fallibility of probability and risk assessments).

12. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11 (Daniel Kahneman et al. eds., 1982).

13. *See, e.g.*, Paul Slovic et al., *Cognitive Processes and Societal Risk Taking*, *in* THE PERCEPTION OF RISK 32, 37-38 (Paul Slovic ed., 2001) (discussing results of study and concluding that media coverage distorts frequency of traumatic events); Jolls, *supra* note 9, at 37-38 (stating that judgments about probabilities of environmental hazards are affected by frequency of hazard and its salience).

14. PLOUS, *supra* note 11, at 35.

15. *See, e.g.*, Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, (noting retroactive methodology of judicial decision making), *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 8, 95, *passim*.

16. Important recent exceptions exist to this rule. *See* Symposium, *Getting Beyond Cynicism: New Theories of the Regulatory State*, 87 CORNELL L. REV. 267 (2002) [hereinafter Symposium] (collecting articles that apply behavioral and cognitive analysis to host of public policy issues).

few if any writers have asked what applications behavioral analysis may have for issues in constitutional law, including the interpretation of the First Amendment.[17] But there is a natural fit between behavioral analysis and First Amendment law. Much of our current free speech jurisprudence is based on the assumption that the government should not regulate speech because, in an unregulated marketplace, people will be perfectly capable of responding rationally to speech.[18] We protect speech to ensure "that the people are aware of all the issues before them and the arguments on both sides of these issues."[19] Though Justice Holmes doubtless did not intend to subscribe to the ideal of the perfection of human reason, this tradition is closely related to his famous metaphor of the "marketplace of ideas"—that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[20] But First Amendment jurisprudence must contend with the unmistakable truth that people are *not* rational, and that the individual can in fact be "irrational, a captive of emotion rather than reflection, capable of being 'swept away by hysterical, emotional appeals.'"[21]

Criticism of the marketplace of ideas metaphor is now commonplace. What this Article proposes is not. For the purposes of this Article, what is important is that individuals are *predictably* irrational. Thus, behavioral analysis can provide the tools for a new positive analysis of First Amendment jurisprudence—*how* it

17. Jolls, Sunstein, and Thaler suggest, however, that behavioral analysis might be able to explain the law's imposition of a high bar against prior restraints of speech, because the endowment effect suggests that "[a] prosecutor who has sought an injunction may be particularly insistent on ensuring that punishment occurs." Jolls, *supra* note 9, at 36; *see also* Owen D. Jones, *The Evolution of Irrationality*, 41 JURIMETRICS J. 289, 314 (2001) (suggesting that combination of behavioral analysis and evolutionary theory may have implications for free expression); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74-77 (2000) (exploring potential speech implications of behavioral phenomenon of group polarization); Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 671-76 (1993) (addressing First Amendment implications of recommendation that government take more active role in compelling disclosures and providing information of its own with respect to social phenomena). *See generally* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998) (reviewing literature that applies behavioral psychology to legal terrain).

18. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963) ("In the traditional theory, freedom of expression is not only an individual but a social good. It is, to begin with, the best process for advancing knowledge and discovering truth"). John Milton writes the following:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

John Milton, *Aereopagitica*, *in* 32 GREAT BOOKS OF THE WESTERN WORLD 381, 409 (Robert Maynard Hutchins ed., 1952).

19. OWEN FISS, LIBERALISM DIVIDED 5 (1996) (describing, but not subscribing to, the traditional social view of free speech).

20. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

21. Paul Horwitz, *Citizenship and Speech*, 43 MCGILL L.J. 445, 463-64 (1998) (book review) (quoting R. v. Keegstra, [1990] S.C.R. 697, 747 (internal quotation and citation omitted)).

has developed, *why* it has developed as it has, and *where* it should go. Behavioral analysis can give us some idea of how and when people will be incapable of responding rationally to speech in the marketplace of ideas. Equally important, behavioral analysis suggests that we must give thought to the biases of *all* the players in the marketplace: speakers and listeners, legislators and judges.

To return to the principal theme of this Article, one reason we have seen no speech-restrictive measures in the wake of September 11 is that the First Amendment safeguards for political speech that may incite violence or impede war efforts have been ratcheted so high that a successful conviction for such speech is almost impossible to obtain. The story of how this area of the law has become so protective is one of the central narratives of First Amendment history.[22] In a series of cases early in the twentieth century, arising out of speech protesting American entry into World War I, as well as prosecutions arising out of the "Red Scare" following the Russian Revolution, judges began forging tests for the constitutionality of speech constituting "illegal advocacy" of violent and non-violent resistance to the government.[23]

In a landmark series of dissents that eventually became law, the courts developed an increasingly strict version of a test demanding that government show a "clear and present danger" of imminent harm before it can successfully bar speakers from inciting others to resist government actions. Two significant themes touched on in these cases, both of which are discussed more fully below, were how grave and imminent the risk of danger must be before the government can prosecute, and what degree of deference courts must assign to both juries and legislators in determining the acceptable level of risk. Although this test was hailed for providing protection to unpopular speakers in times of emergency, its effectiveness was called into question once another perceived emergency arose. In the face of concerns over domestic Communism in the early days of the Cold War, the Supreme Court reinterpreted the clear and present danger test to permit government regulation of speech as long as the perceived risk of harm is sufficiently great, even if the actual likelihood the speech would result in the danger the regulation was intended to avert was small. Again, the central themes over which the Court contended were the level of risk that should subject speech to restriction, and to *whom* the task of evaluating that risk should be assigned—judges, juries, or legislators. Finally, in *Brandenburg v. Ohio*[24] and *Hess v. Indiana*,[25] the Court revisited the test for illegal advocacy, arriving at a

22. See *infra* Part II for a mapping of the genealogy of free speech doctrine from the perspective of behavioral analysis.

23. *See, e.g.*, DANIEL A. FARBER, THE FIRST AMENDMENT 57 (1998) (stating that modern First Amendment doctrine is "intellectual child" of early twentieth century judges who recognized centrality of free speech to democratic society); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 23 (1993) ("Holmes and Brandeis wrote extraordinary dissenting opinions, rejecting the conventional view that government could ban political speech merely because the speech was dangerous.").

24. 395 U.S. 444 (1969).

25. 414 U.S. 105 (1973).

test that explicitly speaks in terms of risk analysis, permitting the regulation of advocacy of violence only when it is directed to inciting *imminent* lawless action and is likely to produce such action.[26] Over the same period, the courts became increasingly distrustful of the risk analysis capacity of both legislators and juries, and increasingly seized the power to evaluate whether the speech met the test. This analysis thus supports the conclusion that a fruitful way to examine the development of the strictly protective test for illegal advocacy is as an example of the evolution of the law in a way that recognizes and guards against the predictable shortcomings in our ability to perform accurate risk analysis that behavioral analysts have highlighted.[27]

But this Article also suggests that other areas of First Amendment law have failed to adequately acknowledge and account for these same tendencies. One such area is commercial speech doctrine. In one sense, both illegal advocacy doctrine and commercial speech doctrine might be viewed as similar: both lines of cases have seen the Court moving toward an increasingly speech-protective approach to the speech at issue. As this Article argues, however, they differ in an important respect: while the illegal advocacy doctrine evolved to account for and guard against cognitive shortcomings, commercial speech doctrine increasingly has failed to recognize the effect of these shortcomings on consumers.

In the end, a behavioral analysis-based treatment of these areas of First Amendment jurisprudence, rather than one based on history or on the standard tropes of First Amendment theory, helps focus our attention on two central questions that range across the whole field of First Amendment law: (1) how do we craft restrictions on speech that appropriately measure the extent of the risk generated by the speech in question; and (2) how do we evaluate the respective propensity of different players in the system of free speech—judges, juries, and legislators—to suffer from the cognitive illusions that hamper their ability to measure risk?

By taking this approach, we may therefore sweep aside some of the

26. For a column addressing *Brandenburg* in the context of September 11, see Julie Hilden, *September 11, The First Amendment, and the Advocacy of Violence*, WRIT, Dec. 27, 2001, *available at* http://writ.findlaw.com/hilden/20011227.html.

27. *See* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 63 (2000). Rachlinski notes:

> Many professions develop procedures to compensate for the limitations of human judgment. Over the centuries of their existence, common-law courts might have done the same. Like engineering, the law is a learned profession with a long tradition that presumably has had the opportunity to learn from its mistakes. This observation implies that the law has adapted to cognitive illusions of judgment. Such illusions would not, therefore, provide a basis for advocating widespread reform efforts, although they would facilitate an understanding of how the law has developed.

Id.; *see also* Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671, 678 (2002) ("It is no stretch to think of the law, particularly the incremental case-centered process of common-law reasoning, as just that sort of experience-based expertise that should be expected to approach (through hesitating and uneven steps) sensible mechanisms to overcome some of the frailties of individual human actors.").

prevailing metaphors of First Amendment theory, and realize the benefits of a new guiding metaphor for First Amendment analysis, in which First Amendment law is a species of risk analysis.[28] Equally important, we may gain some insight into a central question that may come to take center stage in thinking about the application of behavioral analysis in the law: the question of institutional analysis. Not all players suffer from the same cognitive illusions at the same time or in the same degree. In considering proposals for legal reform based on behavioral analysis, we must therefore ask which institution should be assigned decision-making responsibility in given cases, and how we can structure formal and informal institutions to moderate the effect of the cognitive illusions to which we are all subject.[29]

Part II of this Article presents a summary of some basic findings of behavioral analysis, including a discussion of some basic cognitive illusions that may hamper our ability to rationally analyze risk. Part III returns to the development of illegal advocacy doctrine, and demonstrates that it has closely tracked the specific concerns with risk analysis that are the subject of much of the work in behavioral analysis. As the law of illegal advocacy has developed, it has gradually accounted for the distorting effects of cognitive illusion by tightening the requirements for a successful conviction, and by assigning the primary responsibility for performing risk analysis to the courts.[30] Part IV offers a contrasting examination of an area of law in which behavioral analysis may counsel a *departure* from current First Amendment jurisprudence, in a less speech-protective direction: commercial speech. Thus, by contrasting the doctrine of illegal advocacy with the doctrine of commercial speech, this Article suggests that the two central questions raised above may sometimes result in different approaches to different varieties of speech, and in varied assignments of institutional responsibility. Part V examines some implications of the behavioral approach, and offers a response to some potential objections to behavioral theory and some suggestions about why we may benefit from a

28. For a recent book arguing that the government, and particularly the United States government, has a pervasive and important, but often unrecognized role in managing risk, see DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER 1-21 (2002).

29. *Cf.* Issacharoff, *supra* note 27, at 671-72 (arguing that, so far, "the literature has had relatively little to say about the role of institutional mechanisms that may buffer or even neutralize defective heuristics that can dominate individual decision making"). *But see* Symposium, *supra* note 16 (addressing institutional concerns arising in the intersection between behavioral analysis and administrative law); Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 115, 146 (1999) (believing that "[t]here is also good reason to consider institutional arrangements that might insulate government from some of the unfortunate effects of cognitive and motivational errors."); *id.* at 150 (asking, "What institutions work best at reducing the effects of biases?").

30. A separate, and important, question arising in this area is how far the *Brandenburg* line of cases should apply. Should the *Brandenburg* test apply to conduct that falls outside the narrow scope of expressly *political* speech urging unlawful conduct? *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233, 250 (4th Cir. 1997) (rejecting direct application of *Brandenburg* test in suit against publisher of manual offering instruction to would-be professional killers). That question, however, lies outside the scope of this Article, which focuses solely on classic instances of politically motivated advocacy of unlawful conduct.

behavioralist approach to First Amendment doctrine.[31]

II. A BEHAVIORAL ANALYSIS PRIMER

Before moving to the doctrinal areas that are the subject of this Article, it may be useful to provide a capsule review of the analytical approach that will be applied to them. This Part summarizes some of the key findings of behavioral analysis, building from a discussion of the settled assumptions about rationality that still regularly form the foundation for legal analysis to a look at some of the cognitive shortcomings that have been identified and modeled by the leading behavioral research. In addition, this Part provides a foundation for the other major area of inquiry in this Article—the question of allocation of decision-making responsibility in the First Amendment. As this Part observes, not all actors suffer from the same cognitive failings in the same degree. Thus, in considering how well the courts have dealt with illegal advocacy and commercial speech doctrine, we must also consider whether other institutions would be better suited to evaluate these categories of speech. In short, as this Part suggests, behavioral analysis may offer valuable insights into two crucial First Amendment questions: *how* we decide whether particular speech acts may have unduly harmful effects, and *who* should make such decisions.

A. Rationality and Bounded Rationality

The guiding assumption from which behavioral analysis departs is rational choice theory—the assumption that "man is a rational maximizer of his ends."[32] Across a range of disciplines, including law, rational choice theory is the "central account of human decision making."[33] Whether it is a descriptively accurate account is the central question of behavioral analysis.

At the outset, it may be noted that multiple understandings of the term "rationality" are relevant here. Rationality can be understood internally as a description of *how* people think; ideally, at least, it suggests that individuals may

31. One important area not canvassed by this paper is the question of group decision-making. This field of study ultimately has implications for both issues addressed in this Article: the shape and future of First Amendment doctrine, and the question of institutional choice in the First Amendment. Does First Amendment doctrine require reshaping to deal with the problems and benefits of group deliberation? Must the question of institutional choice be responsive to the unique features of deliberation among groups, as opposed to the individual decision-making that is the focus of most of this Article? More broadly, does (or should) our understanding of the constitutional framework recognize that a host of institutions, both formal and informal – such as appellate judicial panels, legislators, the press, and religious and other closely tied communities – may impose a sense of group identity on their members despite the otherwise heterogeneous nature of these groups? These and other related questions are the subject of future work, so I shall set them aside for present purposes. For useful discussion of these questions, however, see generally, Sunstein, *Deliberative Trouble?*, *supra* note 17; Cass R. Sunstein, CONFORMITY AND DISSENT (John M. Olin Law & Economics Working Paper No. 164 (2d ser. 2002), *available at* http://www.law.uchicago.edu/Lawecon/index.html.

32. POSNER, *supra* note 7, at 3.

33. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060 (2000).

apply models of careful and logical reasoning in making decisions.[34] From an external perspective, however—the perspective that is relevant to the work of law and economics, and whose predictive power is called into question by behavioral analysis—rationality "is not a theory about consciousness."[35] It is an objective concept that does not depend on the actual state of mind of the decision maker.[36] It is simply the assumption that, in the aggregate at least, "people respond to incentives—that if a person's surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so."[37] Rationality is thus a predictive model, standing outside the actual processes of cognition, which makes certain assumptions about the direction in which people's decisions will proceed. [38] It is also, however, a model of how people's thinking *would* proceed, if they were living up to the assumed human capacity to allow one's ends to guide one's actions.

As Korobkin and Ulen note, there are a range of potential descriptions of rational choice theory, ranging from thin to thick.[39] Rationality at its thinnest is simply a definition of a means of thinking that "suit[s] means to ends," without any normative theory of the means or ends in mind.[40] Thicker theories of rationality do posit some of the means and ends. For example, some versions of rational choice theory assume that individuals act to maximize their self-interest,[41] or more specifically still, that they act to maximize their wealth.[42]

In the middle of this spectrum lies one of the most popular and prevalent definitions of rationality, expected utility theory, which has been called "the major paradigm in decision making since the Second World War."[43] This theory holds that in making decisions, "decision makers conduct an explicit or implicit cost-benefit analysis of competing options and select the optimal method of achieving their goals . . . subject to external constraints."[44] It assumes a number of further principles: (1) rational actors will order alternatives by preference, assuming they are not indifferent between the two; (2) rational actors will never adopt decisions or decision-making strategies that are weaker than other decisions or strategies—that is, that result in a poorer outcome; (3) rational

34. *See* POSNER, *supra* note 7, at 17 (providing definition of rationality as ability and desire to use reason to carry on life).

35. *Id.* at 4.

36. *See id.* at 4, 17 (discussing concept of rationality).

37. *Id.* at 4; *see also* JONATHAN BARON, THINKING AND DECIDING 55 (3d ed. 2000) (describing rational methods as "those that are generally best in achieving the thinker's goals").

38. *See* Baron, *supra* note 37, at 5 (explaining that "rational" means what one would do to achieve one's goals if aware of one's own best interests).

39. Korobkin & Ulen, *supra* note 33, at 1061; *see also* Sunstein, *supra* note 29, at 148 (noting that the notion of rationality "is quite ambiguous, at least until it is specified").

40. Korobkin & Ulen, *supra* note 33, at 1061.

41. *See id.* at 1064-66 (discussing self-interest version of rationality).

42. *See id.* at 1066 (discussing effect of desire for wealth on rationality).

43. Paul J.H. Schoemaker, *The Expected Utility Model: Its Variants, Purposes, Evidence and Limitations*, 20 J. ECON. LITERATURE. 529, 529 (1982).

44. Korobkin & Ulen, *supra* note 33 at 1062-63.

actors will ignore the common aspects of alternative outcomes when deciding between them; (4) rational actors will choose transitively: within a set of ordered preferences, if they prefer A to B, they will prefer A to C; (5) a rational actor will prefer a gamble between best and worst outcomes to a moderate but sure outcome, if the odds of the best outcome are high enough; and (6) rational actors will not be affected by the order in which alternatives are presented.[45]

Economists regularly concede that their assumptions of rationality can be "one-dimensional and pallid when viewed as descriptions of human behavior," while insisting on their usefulness as a set of predictive assumptions.[46] Behavioral analysis proposes to add color and depth to the picture of judgment and decision-making.[47] But it goes further than that, arguing that standard versions of rationality are less predictively accurate than is generally assumed and that behavioral analysis can provide a better set of descriptive and prescriptive models.[48] It emphasizes a number of ways in which individuals depart from a standard economic model of rationality.[49] In particular, it emphasizes the ways in which decision-making is flawed because human beings are flawed. Individuals regularly lack perfect information in making decisions, and would not be infinitely skilled at weighing that information even if they had it. Their memories are finite and subject to distortion and failure. Moreover, they lack the time to conduct the kind of analysis that would lead to a perfectly "rational" decision (to the degree it could be considered "rational" to expend such resources on any given decision).[50] Thus, individuals are capable only of "bounded rationality," and so will make decisions hobbled by their limited cognitive capacities, resulting in outcomes that would be sub-optimal according to expected utility theory.[51] The decision-making shortcuts that are the result of our bounded rationality will be the main concern of this Article.[52]

45. *See* PLOUS, *supra* note 11, at 81-82 (discussing principles upon which expected utility theory is based); *see also* REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 18, 43-45 (2001) (outlining rational choice criteria and examining future probability decision tree).

46. *See* POSNER, *supra* note 7, at 17-18 (discussing economic theory).

47. *See, e.g.*, Jones, *supra* note 17, at 310 (stating that rational actor model of human behavior works well when people act rationally but varies when people act differently; therefore, behavioral economics may provide better model).

48. *See* William M. Goldstein & Robin M. Hogarth, *Judgment and Decision Research: Some Historical Context*, *in* RESEARCH ON JUDGMENT AND DECISION MAKING: CURRENTS, CONNECTIONS, AND CONTROVERSIES 3, 11 (William M. Goldstein & Robin M. Hogarth eds., 1997) (arguing that this schism has been present since birth of expected utility theory).

49. *See* Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LITERATURE 11, 11 (1998) (arguing that psychology can teach us how individuals differ from their traditional economic description).

50. *See* PLOUS, *supra* note 11, at 94-95 (noting some flaws in expected utility theory); Jolls, *supra* note 9, at 14-15 (discussing concept of bounded rationality).

51. Jolls, supra note 9, at 14; Korobkin & Ulen, *supra* note 33, at 1075-76. The phrase is Herbert Simons's. *See generally* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955) (proposing modification of traditional economic theory postulates of economic man and coining phrase "bounded rationality").

52. *Cf.* Jolls, *supra* note 9, at 16 ("Bounded rationality as it relates to judgment behavior will come into play whenever actors in the legal system are called upon to assess the probability of an

In addition, individuals are capable only of "bounded willpower." Because of such traits as habit, addiction, and other visceral drives, they will not always act in accordance with their long-term self-interest. They will smoke, engage in other unhealthy or high-risk behavior, and waste money.[53] This cognitive limitation will come into play when we discuss the insights behavioral analysis may offer into the First Amendment's treatment of commercial speech. Finally, and more controversially, behavioral analysis suggests that, contrary to classic rational choice theory, individuals exhibit "bounded self-interest"—that is, the expectation that they will act in their own self-interest will regularly be bounded by such non-instrumental concerns as fairness.[54]

B. Heuristics, Biases, and Other Standard Features of Behavioral Analysis

Given the limitations on time, information, and cognitive capacity suggested by the concept of bounded rationality, individuals attempt to cope with these deficiencies by using "mental shortcuts and rules of thumb."[55] These shortcuts, which have been dubbed "heuristics,"[56] form the cornerstone of the work of modern behavioral analysts such as Daniel Kahneman and Amos Tversky.[57]

Of course, there is nothing irrational in the use of shortcuts.[58] It often makes more sense to operate according to mental shorthand than to expend the time and effort it takes to arrive at an optimal decision: It makes more sense, for example, to drive between home and work by the same reasonably effective route than to seek out and choose between every possible alternative route, or to consult traffic and weather reports every day when deciding how to get home. Heuristics "reduce the time and effort required to make *reasonably* good judgments and decisions."[59] Experimental work in behavioral analysis has yielded a number of common, predictable heuristics that regularly figure in individuals' decisions, some of which are described below.

But shortcuts sometimes fail. In some cases, they lead to "biases"—erroneous conclusions that lead to departures from the ideal outcomes that

uncertain event.").

53. *See id.* at 15 (discussing effects of human will-power on rationality); Korobkin & Ulen, *supra* note 33, at 1113-19 (discussing effects of habit, tradition, addiction, and craving on rationality).

54. *See* Jolls, *supra* note 9, at 16 (discussing effect of fairness on human rationality).

55. *Id.* at 14.

56. *See, e.g.*, BARON, *supra* note 37, at 50 (discussing coining of this term by George Polya).

57. For a recent updated collection of papers on this phenomenon, see HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002).

58. *See* PLOUS, *supra* note 11, at 109 (arguing that shortcuts reduce time and effort necessary to make good decisions); Jolls, *supra* note 9, at 14 (stating that humans use shortcuts to deal with limited brain power and time); Roger G. Noll & James E. Krier, *Some Implications of Cognitive Psychology for Risk Regulation* (discussing human risk analysis and heuristics), *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 8, 325, 327.

59. PLOUS, *supra* note 11, at 109; *see also* Noll & Krier, *supra* note 58, at 327 (stating that use of shortcuts is not necessarily irrational because it saves information-processing and decision-analysis costs).

would be prescribed by theories of rational decision-making.[60] Of particular importance, heuristics regularly lead to *systematic* biases.[61] Behavioral analysis not only charts the common rules of thumb by which people make decisions under conditions of bounded rationality, but also provides a basis for predictions concerning how they will depart from favored outcomes under standard rational choice theories of decision-making.[62]

Although a host of sources of bias or error have been catalogued,[63] this section will focus on only a few of the heuristics and biases that have been identified and confirmed by repeated experiment. A number of the heuristics and biases described below will figure prominently in any consideration of the insights behavioral analysis may offer First Amendment law.

1. The Availability Heuristic

The heuristic most relevant to this Article is the *availability heuristic*, defined as "a rule of thumb in which decision makers 'assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind.'"[64] This is frequently an accurate rule of thumb; an event may be easily recalled because it is, in fact, common.[65] But the individual's tendency to evaluate the likelihood of an event according to the ease with which examples come to mind, and the possibility that factors such as the vivid or emotional content of an event will make it especially "available" to the decision maker's recall, often results in errors in the individual's estimation of probability.[66]

The availability heuristic has been observed across a range of experiments.

60. *See* Noll & Krier, *supra* note 58, at 327 (arguing that these shortcuts often lead to inferior decisions compared to those that would have been reached without shortcuts); *see also* Sunstein, *supra* note 29, at 139 (noting that "[h]euristics are not biases, and often they are good, because they economize on decision costs; but they can lead to several mistakes").

61. PLOUS, *supra* note 11, at 109.

62. *See, e.g.*, Jolls, *supra* note 9, at 14 (rational use of mental shortcuts can still produce "*predictable* mistakes") (emphasis added).

63. *See, e.g.*, Ward Edwards & Detlof von Winterfeldt, *On Cognitive Illusions and Their Implications* (noting that one source has defined "at least 27 sources of bias or error in judgment and decision making"), *in* JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 592, 593 (Terry Connolly et al. eds., 2d ed., 2000).

64. PLOUS, *supra* note 11, at 121 (quoting Tversky & Kahneman, *supra* note 12, at 11); *see also* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 18-19 (1980) (describing availability heuristic); Sunstein, *supra* note 29, at 139 (citing Tversky & Kahneman). For a careful recent study of the availability heuristic, see Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 57, 103, *passim*.

65. *See* Korobkin & Ulen, *supra* note 33, at 1087 (discussing effect of rationality on jurors).

66. *See* NISBETT & ROSS, *supra* note 64, at 19 (pointing out that availability heuristic can be misleading because many factors uncorrelated with frequency can influence ease with which occurrences can be brought to mind). *See generally* HASTIE & DAWES, *supra* note 45, ch. 4 (examining various factors influencing judgments from memory).

For example, Tversky and Kahneman conducted an experiment in which respondents were asked whether it is more likely that a word *starts* with the letter K, or that a word has the letter K as its *third* letter. Although there are twice as many words in the latter category as there are in the former, 105 of the 152 people surveyed thought more words would begin with K—a result attributed to the comparative ease with which people can come up with words beginning with a letter as opposed to one seated somewhere in the middle of a word.[67]

Although this is a trivial example, the heuristic has been observed leading to miscalculation of probability in instances that may lead to a misallocation of scarce public resources. For example, an experiment in which individuals were asked to evaluate which of two potentially lethal events is more likely showed that people overestimated the risk of accidents, cancer, botulism, and tornadoes, all vivid events subject to intense media coverage, while underestimating the risk of commonplace but non-vivid events that receive little media coverage, such as asthma and diabetes, which in fact are significant causes of death. Spectacular, multi-victim events such as fires were assumed to be considerably more frequent than commonplace single-victim events such as drowning. In fact, both occur with approximately equal frequency.[68] In sum, "[i]n making risk assessments, individuals will often allow 'available' evidence to trump much more probative statistical information of which they are aware."[69]

2. The Representativeness Heuristic

Individuals tend to judge the frequency or likelihood of something according to how much it resembles something else. Because other factors besides resemblance often are more relevant in a given case to the ultimate calculation of probability, this heuristic can lead to error.[70] For example, in a classic study, respondents were provided with the following information:

> Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in antinuclear demonstrations. Please check off the most likely alternative:
>
> __ Linda is a bank teller.
>
> __ Linda is a bank teller and is active in the feminist movement.[71]

67. *See* PLOUS, *supra* note 11, at 122 (discussing study reported in Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 12, 163, 166-67).

68. *See* Slovic, *supra* note 13, at 37-38 (discussing ratios and providing table listing judgments of relative frequency for selected pairs of lethal events).

69. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 663 (1999).

70. *See* Tversky & Kahneman, *supra* note 12, at 4 (noting errors resulting from such an approach to judgment of probability because similarity cannot be influenced by several factors that should affect judgments of probability).

71. PLOUS, *supra* note 11, at 110.

The vast majority of respondents concluded Linda was more likely to be a bank teller and feminist than just a bank teller. Even after additional experiments were conducted to account for the possibility that people interpreted "Linda is a bank teller" to mean "bank teller who is not active in the feminist movement," people still assumed it was more likely Linda was a feminist bank teller than a bank teller.[72] On reflection, this answer cannot be right as a statistical matter, since it cannot be more likely that Linda is *both* a bank teller and feminist than that she is *either* a bank teller or a feminist.[73] Behavioral analysts have concluded from these and other experiments that people are more likely to attach significance to the amount of detail in a scenario because that detail makes the scenario more representative, even though the increased detail also makes the probability of an event less likely.[74]

Another consequence of the representativeness heuristic is the tendency to believe in the "law of small numbers." Individuals tend to believe that random samples will resemble each other and the general population more than statistical analysis suggests they will. For example, when asked to write down a simulated short sequence of coin tosses, people will tend to include alternations between heads and tails, and exclude long runs of either heads or tails, in an effort to create randomness in the small sample, even though statistical analysis suggests otherwise.[75] This can lead individuals to commit the *gambler's fallacy*—the belief that after a streak of good or bad luck, the reverse outcome is more likely, even where the outcome is completely random, as in a roll of the dice.[76]

Like the other heuristics and resultant biases discussed here, the representativeness heuristic can have consequences for public policy.[77] Individuals will tend to overestimate the importance of patterns in random events and to assign too much significance to irrelevant details even when they are made aware of base rate probabilities.[78] In short, in calculating probabilities they are likely to steadily and predictably misinterpret the odds when factors giving rise to the representativeness heuristic are present.

72. *Id.* at 110-11. *See generally* Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness* (discussing representativeness heuristic), *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 12, 84.

73. *See* PLOUS, *supra* note 11, at 110-11 (discussing illogic of survey results).

74. *See, e.g.*, *id.* at 111 (discussing effect of inclusion of greater detail in survey questions).

75. PLOUS, *supra* note 11, at 112.

76. *Id.* at 113; *see also* Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers* (discussing how most people irrationally view small random sample as highly representative), *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 12, 23, *passim*.

77. *Cf.* Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 571 (2002) (noting how "policymaking structures and practices that fail to acknowledge the threat posed by illusions of judgment, and to employ measures that counteract human cognitive limitations, will generate improvident regulatory policy").

78. *See* Hanson & Kysar, *supra* note 69, at 667 (arguing that desire to see patterns in random events causes decisionmakers to have unrealistic expectations about "the replicability of prior beneficial experiences").

3. Optimistic Bias

In evaluating the probability of various events, individuals regularly exhibit an optimistic bias: "the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us."[79] Even when individuals are fully informed as to the actual probability of an event, they will still be unduly optimistic that such negative possibilities as car accidents, heart attacks, or AIDS infection (even among fully informed members of high-risk communities) will not happen to them, while positive events such as owning their own home *will* occur.[80] Overconfidence can thus impact public policy by encouraging individuals to underestimate the preventive measures they ought to take in their own lives to avoid significant risks, and requiring the law to set deterrent penalties high enough to compensate for overconfidence.[81]

A related observed bias is the *confirmatory* or *self-serving bias*—the tendency to prefer information that is consistent with one's previously held views, or to interpret information in ways that confirm those views.[82] This bias may affect both judicial reception of arguments that favor or disfavor previously held views, and litigants' own reception of additional information through the discovery process, which may increase each side's own confidence in its likelihood of success rather than encourage reasonable settlement discussion.[83]

4. Hindsight Bias

Everyone is familiar with the phenomenon of "Monday morning

79. Korobkin & Ulen, *supra* note 33, at 1091. Korobkin and Ulen refer to this as "overconfidence bias" rather than optimistic bias. I have used the latter term to distinguish this bias from a separate bias relating to overconfidence in one's own calculation of probabilities, which is discussed below.

80. *See, e.g.*, PLOUS, *supra* note 11, at 134-35 (recognizing that people rate themselves as more likely to experience positive events than negative events); Korobin & Ulen, *supra* note 33, at 1091 (arguing that people generally believe that good things are more likely to happen to them than bad things); Sunstein, *supra* note 8, at 4 (stating that vast majority of people believe that they are less likely than other people to fall victim to negative events). These discussions draw largely on Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980) (discussing study revealing that people have tendency to be unrealistically optimistic about future events).

81. *See* Korobkin & Ulen, *supra* note 33, at 1091-93 (stating that policymakers must set penalties higher to counteract individuals' tendencies to be overconfident). That is not to say, however, that optimistic bias is all bad. There is at least some literature suggesting that the most successful individuals are likely to display unrealistic optimism, while individuals who accurately evaluate their own personal abilities tend to suffer from clinical depression. *E.g.*, Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 8, 288, 292, 300 nn.25-26; Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)* (discussing these findings and noting that they are "not uncontroversial") *in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 8, 144, 155, 166 n.39.

82. *See, e.g.*, PLOUS, *supra* note 11, at 231-34 (discussing concept of self-fulfilling prophecies); Korobkin & Ulen, *supra* note 33, at 1093 (same).

83. *See* Korobkin & Ulen, *supra* note 33, at 1093-94 (discussing concept of self-serving bias) .

quarterbacking." Experiments in behavioral analysis have demonstrated that this phenomenon, called "hindsight bias," occurs with some regularity. Once an event has occurred, individuals overestimate the likelihood that that event would have occurred.[84] They also tend to "overestimate the *ex ante* prediction that they had concerning the likelihood of an event's occurrence after learning that it actually did occur."[85] For example, in an early study, five groups were given a description of the events leading to a 19th Century war between the British and the Gurkas in Nepal. Each was asked the likelihood that each of four specific outcomes would have resulted. Four of the groups were told that a different specified outcome had occurred, while the fifth group was told nothing. The subjects in each of the groups who were given a specified outcome gave an estimate of that outcome that was higher than the prediction for that outcome made by the control group.[86] Indeed, not only do people tend to overestimate the *ex ante* likelihood of an event once they are aware of the outcome, but they also come to misrecall their own *ex ante* predictions to make them more accurate.[87]

As Jeffrey Rachlinski's discussion illustrates, hindsight bias is a classic problem for the courts, which after all "primarily judge in hindsight."[88] Judges and jurors are regularly called upon to assign tort liability *after* an accident has occurred, but according to the standard of whether the alleged tortfeasor's conduct was reasonable *when* it occurred. Hindsight bias regularly leads fact-finders to assume that the actor's conduct was unreasonable if an accident did in fact occur, and that it was reasonable if no accident occurred—although whether the accident occurred or not should be irrelevant.[89]

5. Anchoring and Adjustment

What is the exact percentage of African countries in the United Nations? And what connection does this question have to a wheel of fortune? Consider this experiment, conducted by Tversky and Kahneman. A set of subjects was confronted with a wheel of fortune, which was spun and landed on sixty-five. They were first asked whether the percentage of African countries in the U.N. was more or less than sixty-five percent, and then what the exact percentage was. These respondents gave a median estimate of forty-five percent. Another set of subjects was faced with a wheel of fortune that landed on ten. They gave a

84. *See, e.g.*, Rachlinski, *supra* note 15, at 95 (discussing psychological research on judging in hindsight).

85. Korobkin & Ulen, *supra* note 33, at 1095; *see also* Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight* (stating that past is often viewed by people as "having repetitive elements"), *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 12, 335, 336.

86. Korobkin & Ulen, *supra* note 33, at 1095-96.

87. *See, e.g.*, Hanson & Kysar, *supra* note 69, at 659-60 (discussing effect of hindsight bias).

88. Rachlinski, *supra* note 15, at 99.

89. *Id.*; *see also* Korobkin & Ulen, *supra* note 33, at 1096-97 (arguing that if jurors are affected by hindsight bias, defendants may be found negligent in situation where they acted in a socially responsible way, but simply had bad luck).

median estimate of twenty-five percent.[90] This example illustrates the phenomenon of *anchoring and adjustment*: individuals who are asked to estimate a number often "anchor" on an original starting value, and then fail to adjust sufficiently up or down from this original starting point.[91] This is true even when the anchor is arbitrarily chosen, or is outrageously extreme.[92] Juries deliberating on damage awards may center on an "anchor" figure, thus skewing the damage determination toward that number, even if it is too low or high.[93]

C. Behavioral Problems and Risk Analysis

The last section provided a general toolbox of cognitive illusions, and showed that heuristics and biases are likely to figure prominently in everyday decisions made by individuals that may be of relevance to law and public policy—for example, decisions whether or not to engage in different forms of risky behavior. Similarly, the cognitive illusions uncovered by behavioral analysis may be present in decisions made throughout the legal system. These decisions are made by legislators deciding how to allocate resources to prevent various risks, by juries evaluating the *ex ante* reasonableness of an alleged tortfeasor's conduct following an accident, and by judges making a range of factual determinations or framing rules that will govern people's conduct and decision-making in the future.

Here, I wish to focus on one specific aspect of behavioral analysis: the question of how people evaluate risk. To be sure, some of the heuristics discussed above have already been shown to be pertinent to, and potentially a distorting factor in, the decision maker's analysis of risk and probability. Since that question forms the basis for a significant part of this Article's discussion of the behavioral aspects of free speech jurisprudence, however, a closer look is needed. This discussion thus refers back to some of the heuristics that have been discussed above, but provides additional detail and some additional behavioral insights into the common and predictable features of the decision-making process that may distort judgment.[94]

The starting point for this discussion is, once again, the availability heuristic. Recall that under this heuristic, "one judges the probability of an event . . . by the ease with which relevant instances are imagined or by the number of such instances that are readily retrieved from memory."[95] While this heuristic often leads to accurate risk assessments, the availability of an event "is also affected by recency, emotional saliency and other subtle factors that may be unrelated to

90. Amos Tversky & Daniel Kahneman, *supra* note 12, at 14-15.

91. *See* PLOUS, *supra* note 11, at 145 (pointing out effect of anchoring and adjustment).

92. *Id.* at 146.

93. *See* Sunstein, *supra* note 8, at 5 (discussing concept of anchoring and its effect on juries).

94. *See, e.g.*, Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, *passim* (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)) (observing that "because of predictable features of human cognition, ordinary people deal poorly with the topic of risk).

95. Paul Slovic et al., *Decision Processes, Rationality and Adjustment to Natural Hazards*, *in* THE PERCEPTION OF RISK, *supra* note 13, 1, 13.

actual frequency."[96] Significantly, because these factors regularly apply to increase an individual's perception of the frequency and probability of an event, "use of the availability heuristic results in predictable systematic biases in judgment."[97]

A number of factors that lead to overestimation of probability and risk in conditions in which the availability heuristic applies are likely to be present in situations in which the legal system may seek to restrict speech, or less controversially, to devote social resources to reducing one risk over another. Thus, in a study conducted by Paul Slovic and his co-authors in which people were asked which of two causes of death produced more fatalities, "overestimated items were dramatic and sensational whereas underestimated items tended to be unspectacular events which claim one victim at a time and are common in non-fatal form."[98] Thus, "highly publicized events make people fearful of statistically small risks,"[99] such as the risk of airplane accidents as compared to, say, the risk of death from heart disease.

Vividness is another key ingredient of the availability heuristic. A vivid event is one that is highly concrete and imaginable, or (which will often be the same thing) emotionally interesting or exciting, or close in space or time.[100] Studies by behavioral analysts "have shown that decision makers are affected more strongly by vivid information than by pallid, abstract, or statistical information."[101] Especially pertinent for legislative and judicial evaluations of risk in situations which are likely to elicit legal restrictions on speech are "particularly vivid crimes or terrorist actions," which may have "a disproportionate influence on judgments" as compared to more pallid event data such as crime statistics.[102]

In a series of pathbreaking studies of risk analysis, Paul Slovic has uncovered a host of experientially based "intuitive judgments, emotional responses, and other subtle, nonconscious reactions to external stimuli" that will tend to distort people's evaluation of risky events.[103] These reactions are collectively known as "affect."[104] Thus, risks may be perceived as less acceptable

96. *Id.* at 14.

97. *Id.*

98. Paul Slovic et al., *Rating the Risks, in* THE PERCEPTION OF RISK, *supra* note 13, 104, 107.

99. Sunstein, *supra* note 94, at 1127.

100. *See* PLOUS, *supra* note 11, at 125-26 (discussing concept of vividness and how it affects decision making).

101. *Id.* at 126 (citing NISBETT & ROSS, *supra* note 64). Nisbett and Ross identify the following factors as prime contributors to vivid information: "it [the event] is (a) emotionally interesting, (b) concrete and imagery-provoking, and (c) proximate in a sensory, temporal, or spatial way." NISBETT & ROSS, *supra* note 64, at 45.

102. *Id.*

103. Hanson & Kysar, *supra* note 69, at 669 (citing Paul Slovic & Sarah Lichtenstein, *Comparison of Bayesian and Regression Approaches to the Study of Information Processing in Judgment*, 6 ORG. BEHAV. & HUM. PERFORMANCE 649, 712-16 (1971)).

104. *Id.* (citing Seymour Epstein, *Integration of the Cognitive and Psychodynamic Unconscious*, 49 AM. PSYCHOLOGIST 709, 710-13 (1994)).

when, for example, they are "dread" risks—risks "characterized by a 'perceived lack of control, dread, catastrophic potential, fatal consequences, and the inequitable distribution of risks and benefits.'"[105] Whether a risk is unknown or new may also contribute to an affective response to risk, as may the number of people who could be exposed to the risk.[106] Slovic argues that these affective responses to risk may not be evidence of ordinary people's inability to evaluate risk as compared to experts.[107] Another response to the same evidence, however, is that the sort of factors that lead to affective perception of risk are those that are likely to bring an event readily to mind, and thus under the availability heuristic create a heightened fear of risk.[108] In any event, whether affective responses to risk constitute a subtle *rival* response to risk as compared to experts' responses to the same events or not, these responses still constitute a departure from purely probabilistic evaluations of risk.

Cass Sunstein has proposed another category of predictable departure from accurate risk evaluation: Sometimes people focus on the worst case scenario, which triggers strong emotions. When this is so, "people do not give sufficient consideration to the likelihood that the worst case will actually occur."[109] Sunstein distinguishes this phenomenon, dubbed "probability neglect," from the availability heuristic: while that heuristic leads individuals to substitute the question of whether salient examples come readily to mind for the question of what the actual statistical risk of an event is, under conditions of probability neglect the question of probability will simply be irrelevant to the actor.[110] In practice, however, it may be impossible to tell which phenomenon is at issue, since the outcome will be the same.[111] Probability neglect is likely to occur when strong emotions, such as fear, are present.[112] In particular, "vivid images and concrete pictures of disaster can 'crowd out' other kinds of thoughts, including the crucial thought that the probability of disaster is really small."[113] One likely triggering source of the kinds of vivid images that can trigger disproportionate fear of statistically small risks is the media: coverage of events such as terrorist

105. PLOUS, *supra* note 11, at 139 (quoting Paul Slovic, *Perception of Risk*, *in* THE PERCEPTION OF RISK, *supra* note 13, 220, 225).

106. *See* PLOUS, *supra* note 11, at 139 (describing three basic dimensions connected with public perceptions of risk).

107. *See* Sunstein, *supra* note 94, at 1138 (discussing Slovic's argument).

108. *Id.* at 19.

109. Cass R. Sunstein, *Probability Neglect: Emotion, Worst Cases, and Law*, 112 YALE L.J. 61, 67 (2002); *see also* Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 1979 (2001) (noting that behavioral analysis has thus far "focused on cognition rather than emotion," but noting that "some psychologists have recently argued that cognitive biases are best analyzed as the result of emotional dispositions or feelings").

110. Sunstein, *supra* note 109, at 64-65.

111. *See id.* at 82 (stating that in practice it is difficult to discern whether availability heuristic or probability neglect is driving behavior).

112. *See, e.g.*, Eric A. Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL'Y 681, 684 (2002) (stating that fear "sits uneasily with the rational actor premises of standard accounts of risk regulation").

113. Sunstein, *supra* note 109, at 82.

attacks, including the post-September 11 threat of anthrax, is likely to drive out any careful attention to probability and elicit a public response that may not be warranted by the actual threat presented.[114]

Finally, it should be noted that the behavioral problems associated with risk analysis are compounded by another behavioral trait that accompanies them. As Paul Slovic has observed, "A particularly pernicious aspect of heuristics is that people are typically very confident about judgments based on them."[115] Perhaps because they are unaware of the operation of decision-making heuristics, individuals are regularly overconfident in the accuracy of their own judgments. For example, the participants in a study on the causes of death also took part in a follow-up study in which they were asked to evaluate the odds that they were correct in their judgment between which of two risks was greater. The results suggested that the respondents were routinely overconfident in their judgments. Odds of 100:1 or greater were given about twenty-five percent of the time; in fact, about one in eight of the answers given with this level of confidence were mistaken.[116] Another study suggested that confidence and accuracy may be closely aligned, up to confidence estimates of 3:1, but accuracy does not increase appreciably beyond that point, even as confidence increases up to an estimate of 100:1.[117] Average confidence levels may not exceed accuracy by more than ten to twenty percent.[118] Nevertheless, in considering the cognitive frailties that may lead people to miscalculate risk, we must also keep in mind that people may be overconfident that their assessment of risk is correct, notwithstanding the presence of decision-making heuristics that are likely to lead to significant error.

In sum, for a host of reasons, individuals may respond to predictable categories of risk without appropriate regard for the likelihood that those risks will actually come to fruition. In particular, highly salient, vivid events will lead to fear of risk out of proportion to the conclusions that a statistical evaluation of the same event might offer.[119] This inability to properly evaluate risk will play a central role in our consideration in Part III of the development of First Amendment doctrine with respect to the advocacy of unlawful conduct.

D. "Ordinary" People, "Experts" and Institutional Actors, and Debiasing

Are all individuals equally likely to suffer the distorting effects of these cognitive illusions? In particular, are the different actors in the legal process—legislators, judges, and juries—equally likely to miscalculate risks and probabilities? And can anything be done to counteract the effects of common

114. *See id.* at 86 (explaining that when media emphasizes deaths from anthrax, there is rise in public concern because people do "not naturally make sufficient judgments from the standpoint of probability").

115. Paul Slovic et al., *Rating the Risks*, *in* THE PERCEPTION OF RISK, *supra* note 13, 104, 109.

116. *See id.* at 109-10 (discussing effects of overconfidence in decision making).

117. PLOUS, *supra* note 11, at 220 (examining confidence and accuracy in decision making).

118. *Id.* at 229.

119. *See, e.g.*, *id.* at 126 (pointing out that stories about particularly vivid crimes or terrorist actions can overshadow crime statistics).

behavioral tics such as the availability heuristic? The answers to this question go to the other major issue touched on in this Article: the question of what institutional actors should be charged with evaluating risk where the First Amendment is concerned.

The answers are mixed. First, it is clear that at least as a starting point, even experts share in the human condition, and so are also likely to suffer from the sort of cognitive illusions that afflict non-expert decision makers. "Cognitive illusions influence representatives, senators, presidents—even so-called experts are not immune."[120] In particular, I would suggest that where official actors such as judges receive and evaluate information in much the same context and manner as other "ordinary" actors, under conditions in which they are equally susceptible to cognitive illusions and equally likely to be exposed to media repetition of the same instances of highly vivid risks, they may also evaluate that information through the same distorted lens. It is thus unlikely that judges and jurors would be significantly differently situated when receiving vivid and emotional evidence of an exceptional event, such as terrorism, and evaluating the risk of future disasters. It is also likely that political institutions, whether or not they suffer from the same degree of disproportionate reaction to events that evoke cognitive illusions, will still respond disproportionately if the public outcry is sufficiently great, regardless of the harmfulness or inefficiency of the resulting policy.[121] By contrast, although experts may be susceptible to judgment-distorting effects, they also have access to more information,[122] and may have the opportunity to evaluate that information in a calmer, more clinical environment that is likely to evoke a less affective response. Experts and institutional actors may thus have an edge over ordinary actors—but only a slight edge, and only in particular circumstances.[123]

The effort to craft "debiasing" techniques to ease the effect of cognitive illusions has also been a mixed bag. There is evidence that at least some biases

120. Richard H. Thaler, *Illusions and Mirages in Public Policy*, *in* JUDGMENT AND DECISION MAKING, *supra* note 63, 85, 90; *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782-83, 783 nn.26-27 (2001) (collecting citations for proposition that "empirical studies demonstrate that cognitive illusions plague assessments that many professionals, including doctors, real estate appraisers, engineers, accountants, options traders, military leaders, and psychologists, make. Even lawyers fall prey to cognitive illusions."); *cf.* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 118-38 (2002) (discussing heuristics judges employ in order to avoid complexity).

121. *See, e.g.*, Sunstein, *supra* note 109, at 100 (describing public-driven political response to anthrax scare in fall of 2001).

122. *See* Sunstein, *supra* note 94, at 1136 (summarizing Slovic's discussion of lay-expert conflict).

123. In emphasizing the limited and context-sensitive advantage that institutional actors may enjoy over ordinary individuals, I readily acknowledge that those actors may be subject to cognitive shortcomings stemming from the very fact that they function as *institutions*. A rich literature explores the special problems involved in group decision-making. That issue, and its relationship to the twin questions of free speech doctrine and institutional choice, is the subject of future work and lies beyond the scope of this Article. For a discussion of the flaws and advantages of group decision-making in a legal context, see, e.g., Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 Vand. L. Rev. 1 (2002).

may be subject to offsetting effects. For example, hindsight bias may be diminished when subjects are invited to explicitly consider whether and how past events might have turned out differently.[124] Similarly, studies have shown that overconfidence in one's own probability assessments can be improved by repeated evaluation and feedback intended to force decision makers to stop and consider the reasons why their judgment might be wrong.[125] In short, instilling qualities of sober second thought may serve to reduce the effect of distorted judgment. Experts are the most likely to find themselves with repeated access to the kind of training and feedback that can assert a debiasing influence.[126]

Nevertheless, that kind of counteracting education may not always be available: where an outcome is not easily attributable to a particular action, or no information is available about what the outcome would have been if a different decision had been made, or where the decision in question was a unique, one-time choice, there will be little opportunity to improve the actor's decision-making skills.[127] And while some success has been shown in reducing decision-making bias, it is often difficult to reduce and impossible to eliminate.[128]

Recent work has brought these questions to the door of the institution that is the primary focus of this Article: the courtroom. Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich performed an extensive study of decision-making by 167 federal magistrate judges.[129] Their study tested for the presence of anchoring, framing (a demonstrated bias in which individuals treat equivalent gains and losses differently, in defiance of standard rational choice expectations), hindsight bias, the representativeness bias, and egocentric bias (the tendency to overestimate one's abilities).[130] "[E]ach of these cognitive illusions influenced the decision-making processes of the judges in [the] study."[131] But they did not all distort the judges' evaluations to an equal extent. Compared to other actors, judges were just as susceptible to anchoring, hindsight bias, and egocentric bias,

124. PLOUS, *supra* note 11, at 36-37; *see* Rachlinski, *supra* note 15, at 98 (citing studies that have reduced hindsight bias, but concluding that "the psychological research demonstrates that the hindsight bias is an extremely robust phenomenon").

125. PLOUS, *supra* note 11, at 227-28.

126. *See, e.g.*, Rachlinski & Farina, *supra* note 77, at 559-60 (stating that experienced decision-makers have more of an opportunity to evaluate their decisions and gain feedback).

127. *See* Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions* (stating that effective learning requires accurate and immediate feedback about relation between the situational conditions and the appropriate response), *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 67, 90 (Robin M. Hogarth & Melvin W. Reder eds., 1987); *see also* Hanson and Kysar, *supra* note 69 at 691-92 (explaining why this necessary information is not always available).

128. *See, e.g.*, Korobkin & Ulen, *supra* note 33, at 1097 (detailing examples of how bias might be limited); Daniel A. Farber, *Toward A New Legal Realism*, 68 U. CHI. L. REV. 279, 292 (2001) (suggesting that although people can be educated to correct for bias, bias can never be eliminated altogether).

129. Guthrie, *supra* note 120, at 784.

130. *See id.* at 784 (explaining tests used to assess how cognitive illusions influence judges' decision making abilities).

131. *Id.*

but were less likely to fall prey to framing effects or the representativeness heuristic.[132] Thus, while it may make sense to reassign decision-making responsibility to judges rather than juries in certain circumstances,[133] juries may be equal or superior in decision-making competence in other cases.[134]

Leaving the comparison between judges and juries to one side, the question of institutional choice that echoes throughout this Article also raises the question whether the courts generally are better- or worse-suited to perform tasks of risk analysis than other institutions that might be assigned the role, such as administrative agencies. Jeffrey Rachlinski and Cynthia Farina argue that they are not better suited to perform these tasks, because their position as generalists means that they "almost invariably occupy the position of lay decisionmakers."[135] As already suggested above, that situation is compounded when juries are involved.[136] Thus, in some cases, it is preferable to assign the central decision-making role to other institutional actors; I draw the same tentative conclusion here with respect to commercial speech.[137]

But Rachlinski and Farina also observe that judges are "experts in procedure and law and, as members of an expert profession, will have learned a variety of adaptations to minimize erroneous judgments on these points."[138] As I suggest below with respect to the development of the *Brandenburg* test, that description may aptly describe some tests under the First Amendment, whose rule-like character is suited to those tasks that judges are best suited to handle. Because those tests are assigned to judges alone in the first instance, and subject to independent appellate review, the jury and its potential cognitive shortcomings do not enter into the picture.[139] Moreover, because certain situations such as unexpected and unrepeated emergencies may affect all decision makers in the same way, experts and government officials may not be any better positioned to ward off cognitive illusions than any other institutional actor. Thus, in some areas at least, judges may be the ideal decision makers, provided that an appropriate set of institutional constraints is in place.[140]

132. *See id.* at 816-21 (analyzing susceptibility of judges as compared to other decision makers).

133. *Cf.* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risks by the Courts*, 30 J. LEGAL STUD. 107, 108-11 (2001) (describing research suggesting that in series of experimental situations involving accidents, judges were less prone to erroneous risk beliefs than jurors).

134. *See* Guthrie, *supra* note 120, at 826-27 (noting that if judges taught to avoid representativeness heuristic, they will make better decisions, but since jury deliberations are of group-decision making nature, juries are able to fend off biases such as hindsight).

135. Rachlinski & Farina, *supra* note 77, at 577-78.

136. *See id.* at 578 (examining degree of decision making assignment from judge to jury).

137. See *infra* Part IV.C for a discussion of why, with respect to commercial speech, it is sometimes preferable to assign the task of risk analysis to institutional actors other than courts.

138. Rachlinski & Farina, *supra* note 77, at 577.

139. See *infra* Part III.D for a discussion of the *Brandenburg* test and why its application is not impeded by the potential cognitive shortcomings of jury members.

140. *Cf.* ADAM J. HIRSCH, LAWMAKING AND BOUNDED RATIONALITY 75 (Fla. State Univ. Coll. of Pub. L. & Legal Theory, Working Paper No. 52, Apr. 2002) (noting recent consideration by scholars of "how the bounded rationality of juries and trial court judges—whose task it is to apply rules—should influence the attributes of those rules"), *available at* http://papers.ssrn.com/sol3/delivery.cfm/

E. Summary

The importance to law and legal reform of the findings I have summarized should by now be clear. Legal analysis and legal reform regularly depend on assumptions about human nature. The paradigm governing our understanding of human judgment and decision-making has until recently been grounded in a model of rationality whose virtue was not its conformity to actual patterns of decision-making, but its predictable power at a general level. Behavioral analysis departs from the rational choice paradigm by moving from empirical evidence to more abstract propositions, not the other way around. But while behavioral analysis may lack the comfort of an overarching theory that rational-choice models offer,[141] it does not purport to sacrifice predictability for accuracy. Instead, it finds empirical support for an admittedly loose, but generalizable and predictively accurate, set of behavioral patterns that govern our capacity to make accurate decisions, and demonstrates that in predictable circumstances individuals will depart from standard models of rational decision-making.

Because law is ultimately a governing structure for individual and social decision-making, understanding our tendency to err in the estimation of risk and probability may help us understand the ways in which the law leads us to poor outcomes. As the next section of this Article illustrates, however, it may also illuminate the ways in which the law has already evolved to account for and counteract cognitive illusions. But this analysis must always keep in mind the question of who decides. Not all actors suffer equally in all circumstances from the same biases. As always in the law, the question of which institutions we choose to assign responsibility for making important decisions, and what methods these institutions select to make decisions, is one we neglect at our peril.[142]

III. ILLEGAL ADVOCACY DOCTRINE: WHO BEARS THE RISK OF RISK ANALYSIS?

With this catalogue of common cognitive illusions in place, it is possible to examine the history of the illegal advocacy doctrine with an appropriate framework in mind. This Part thus offers a retelling of the history of the development of illegal advocacy doctrine, moving from the initial development of the "clear and present danger" test in the wake of World War I and the Russian Revolution, through the significant and retrograde revisions to that test in the early days of the Cold War era, to the culmination of this doctrine in the Court's highly speech-protective *Brandenburg* test. A literal re-view of this history through the lens of behavioral analysis leads to the conclusion that, in this area at least, the doctrine's evolution can be seen as an effort to work itself

SSRN_ID306859_code020411530.pdf?abstractid=306859.

141. *See, e.g.*, RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 264 (2001) (noting "the undertheorization of behavioral economics").

142. *See generally* NEIL H. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994) (discussing importance of institutional decision making and allocating authority among these institutions).

pure of tests that suffer from a propensity to fall victim to decision-making biases. Understanding the development of illegal advocacy doctrine as a story of the institutionalization of hedges against poor judgment under uncertainty may help us understand why we have seen comparatively few incursions on the First Amendment in this latest era of perceived or real emergency.

A. Schenck*: The Initial Majority Approach to the Clear and Present Danger Test*

The story begins in another time of perceived civil emergency—World War I.[143] On the eve of American entry into the war, the Department of Justice raised concerns that existing law would not adequately "regulate the conduct of the individual during war time," and proposed legislation to bar "political agitation . . . of a character directly affecting the safety of the state, including propaganda that might affect the armed forces."[144] As with the other historical instances discussed in this section in which a perceived emergency gave birth to speech restrictions, those concerns were by no means pure phantasms. A host of groups actively opposed the war effort, and over 330,000 draft evaders or delinquents were reported over the course of the American participation in World War I.[145]

The result of those concerns was the passage of the Espionage Act, two months after the United States' entry into the war. Its provisions included a section stating:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.[146]

The Espionage Act was amended by the Sedition Act of 1918, which criminalized any statement made with intent to obstruct the sale of war bonds, along with the utterance, printing, writing, or publication of any disloyal, profane, scurrilous, or abusive language intended to cause contempt or scorn for the form of government of the United States, the Constitution, or the flag.[147]

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143. For a general treatment of the First Amendment in this period, see Robert M. Cover, *The Left, The Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349 (1981).

144. John Lord O'Brian, *Civil Liberty in War Time*, 42 REP. N.Y. STATE B. ASS'N 275, 277, 299, 300 (1919), *quoted in* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 249 (1997).

145. *See* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT 105-07 (1978) (discussing extent of anti-WWI sentiment and expression thereof by both organizations and individuals).

146. Espionage Act, ch. 30, tit. I, § 3, 40 Stat. 219 (1917) (repealed 1948).

147. Sedition Act, ch. 75, 40 Stat. 553 (1918) (repealed 1921).

The Act also barred statements urging the curtailment of production of war materials with the intent of hindering the war effort, or supporting the cause of any country at war with the United States.[148]

The government began prosecuting antiwar speech under these acts soon after the United States entered World War I, primarily under section 3 of the Espionage Act. Most prosecutions were successful.[149] Two factors led to this high success rate, both of which are germane to this Article's thesis. First, following the courts' existing doctrines in evaluating speech, judges instructed juries that they should weigh the tendency of the speech to reach the results the legislation aimed to prevent[150]—the so-called "bad tendency" test. Second, this power to weigh the bad tendency of speech was left to the broad discretion of jury members,[151] whose deliberation could not help but be tilted toward conviction given the spirit of the times. Thus, the espionage prosecutions combined a calibration of risk on a scale of mere "bad tendency," unbounded by considerations such as the imminence of the harm at issue or the degree of risk, with an assignment of that vague test to juries. Taken in combination, these factors were likely to give full vent to cognitive illusions that prevented an accurate risk determination. It is unsurprising that a high incidence of convictions resulted.

The Supreme Court reached the First Amendment challenge to the Espionage Act in three cases—*Schenck v. United States*,[152] *Frohwerk v. United States*,[153] and *Debs v. United States*.[154] Schenck, as general secretary of the Socialist Party, was responsible for the printing and dissemination by mail of a document sent both to drafted men and the general population. One side of the document "recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict."[155] It urged citizens not to submit to conscription, but "in form at least confined itself to peaceful measures such as a petition for the repeal of the act."[156] The reverse side similarly exhorted readers to assert their rights, including their right to express opposition to the draft.[157] Schenck and others were convicted for violating the Espionage Act's restrictions on speech intended to cause insubordination and obstruction of the American military effort, and for using the mails to send material determined to be "non-mailable" under the Act.[158]

148. *Id.*
149. RABBAN, *supra* note 144, at 255.
150. *Id.* at 257.
151. *Id.*
152. 249 U.S. 47 (1919).
153. 249 U.S. 204 (1919).
154. 249 U.S. 211 (1919).
155. *Schenck*, 249 U.S. at 50-51.
156. *Id.* at 51.
157. *Id.*
158. *Id.* at 48-49.

Writing for the Court, Justice Holmes rejected the appellants' First Amendment claim. Holmes acknowledged that the speech might be lawful in other circumstances, but stated, "[T]he character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[159] His next statement, which would prove to be the jumping-off point for the Court's writing on incitement and the First Amendment for the rest of the century, expressly rests on a calculation of the risk of harm flowing from a speech act:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[160]

Although it has remained unclear how far Holmes' clear and present danger test was intended to stray from the prevailing "bad tendency" approach to speech cases,[161] it is at least clear from the risk-analysis perspective that by framing the question as he did—as one of "proximity and degree," of whether the factual context in which words are spoken and the nature of the speech is sufficient to create a "clear and present danger"—Holmes expressly required the decision maker to go beyond a *general* finding that the subject speech might tend to a bad result, to a *specific* evaluation of the risk that *this* speech would lead to a bad result, in the context in which it occurred. Holmes himself acknowledged[162] that his formulation stemmed from his writing on the law of criminal attempt in his famous work *The Common Law*, in which he had written: "The reason for punishing any act must generally be to prevent some harm which is foreseen as likely to follow that act under the circumstances in which it is done." An act that is harmless in some circumstances will ground punishment in others "because it raises a probability that it will be followed by such other acts and events as will all together result in harm."[163] Thus, "[j]ust as a criminal attempt must come sufficiently near completion to be of public concern, so there must be an actual danger that speech will bring about an unlawful act before it can be

159. *Id.* at 52.

160. *Schenck*, 249 U.S. at 52.

161. *See, e.g.*, RABBAN, *supra* note 144, at 248-49, 256-57 (noting that Holmes used "clear and present danger" as an expression of bad tendency and not to establish more protective standard); Cover, *supra* note 143, at 372 (arguing that clear and present danger test was "born . . . as an apology for repression").

162. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 430 (1993) (discussing letter to Zechariah Chafee that acknowledged that clear and present danger test merely intended to encapsulate law of attempt); *see also* Yosal Rogat, *The Judge As Spectator*, 31 U. CHI. L. REV. 213, 215 (1964) (noting that clear and present danger test was similar to Holmes' analysis regarding attempts, which required specific intent).

163. OLIVER WENDELL HOLMES, THE COMMON LAW 67-68 (1881).

restrained."[164]

In short, in *Schenck* Holmes started the First Amendment, at least in the field of advocacy of unlawful action, on its long journey toward conformity with the concerns of behavioral analysis. He did so in two ways. First, Holmes made explicit that courts and juries venturing into this area were to be engaged in a task of analyzing the risk level of speech. Second, he made the beginnings of an effort to correct for the predictable flaws of risk analysis under conditions in which the decision maker is likely to suffer from decision-making biases, or to apply decision-making heuristics in instances in which those heuristics are unlikely to lead to an accurate assessment of risk. That correction consisted of an effort to provide a metric against which the risk was to be evaluated, in which both the "proximity" and the "degree" of the risk were relevant factors to be brought to the jury's attention. That metric was still too vague, and left far too much scope for judges and juries to engage in a risk analysis guided more by their passions than by a clear-eyed balancing of probabilities: Nevertheless, it represented a significant improvement, or at least a potential improvement, over the lesser "bad tendency" requirement.[165]

If this was a salutary first step along that road, it was nevertheless immediately apparent that the clear and present danger test either was not consciously intended to guard against the risk of flawed risk analysis, or was an ineffective safeguard. That it was ineffective on its face to guard against overinflated estimations of the risk of speech became evident in the companion cases handed down with *Schenck*.

In *Frohwerk*, the Court, again speaking through Justice Holmes, upheld a conviction on charges involving the publication of a series of articles in a German-language newspaper in Missouri criticizing the American war effort and praising Germany. Although neither the vigor of the writing nor the context in which the speech was published arguably posed as great a threat of resultant draft resistance as in *Schenck*,[166] the Court refused to draw such a distinction. The Court concluded that, on the record at least, "it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame [and that that] fact was known and relied upon by those who sent the paper out."[167] Thus, *Frohwerk* again highlights one of the twin themes struck repeatedly by a behavioral analysis of the First Amendment caselaw—the question of who decides. At this

164. Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 217.

165. *See* Frederick M. Lawrence, *The Collision of Rights in Violence-Conducive Speech*, 19 CARDOZO L. REV. 1333, 1344 (1998) ("[A]lthough a 'clear and present danger' test improves upon a 'proximity and degree' or 'bad tendency' test, the clarity and presence of the danger remains largely if not totally in the eye of the beholder.").

166. *See, e.g.*, LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 71-72 (1991) (noting that case against Frohwerk was weaker than case against Schenck based on both intensity of the writing and recipients of the writing and that prosecutor admitted Frohwerk was a "political prisoner").

167. *Frohwerk*, 249 U.S. at 209.

early point, at least, the Court was still unwilling to commandeer the role of risk analyst, assuming instead that the task was no less within the jury's competence than any other question it might be called on to decide.

Similarly, in *Debs*, in which the Court upheld the conviction of a major public figure and perennial fringe presidential candidate for fairly commonplace Socialist political speech,[168] the clear and present danger test did not figure at all, with Holmes referring instead to the jury's use of the prevalent bad tendency test.[169] Significantly for the question of the institutional assignment of risk analysis that is central to this Article, Holmes indicated in private correspondence that he might have voted differently had he been seated on the jury, but he was unwilling to disturb their verdict.[170] Thus, although the clear and present danger test sounded a more speech-protective note than a mere "bad tendency" test, it was, at the very least, ineffective in realizing the hopes civil libertarians entertained for it.[171] By giving full rein to the combined risk determination of the legislature and the jury at a time of overwhelming public concern, Holmes' test left little room for meaningful First Amendment protection of provocative speech. Tellingly, the test created precisely the sort of circumstances in which the availability heuristic, or Sunstein's "probability neglect," would have caused juries to overestimate the risk of speech in connection with the vivid examples of the ongoing war and the Russian Revolution. In short, as Zechariah Chafee noted in his seminal early treatise on the First Amendment, in such circumstances "the human machinery broke down at a second point—the jury."[172]

168. *See, e.g.*, *Debs*, 249 U.S. at 214 (characterizing much of the speech for which Debs was in part convicted as "the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens, attribution to plutocrats of the high price of coal . . ."). Justice Holmes did note that this portion of the speech had only an indirect bearing on the charge. *Id.*

169. *See id.* at 216 (noting that for jury to return guilty verdict, jury instructions required both "natural tendency and reasonably probable effect" of words and "specific intent" of defendant to be obstruction of the draft).

170. *See* RABBAN, *supra* note 144, at 295 (noting Holmes' conflicting statements in his correspondence concerning his view of verdict in *Debs*).

171. *Cf.* Harry Kalven, Jr., *Ernst Freud and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 236-38 (1973) (arguing that *Schenk* and *Debs* must be read together as basis of First Amendment law, especially because of questions raised by *Debs* as to what "clear and present danger" means).

172. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 70 (1942). As an example of this systematic failure, Chafee presented the observations of a judge who tried numerous Espionage Act cases:

> For the first six months after June 15, 1917, I tried war cases before jurymen who were candid, sober, intelligent business men, whom I had known for thirty years and who under ordinary circumstances would have had the highest respect for my declarations of law, but during that period they looked back into my eyes with the savagery of wild animals, saying by their manner, "Away with this twiddling, let us get at him."

Id.

B. Abrams*,* Gitlow, *and* Whitney*: The Shifting Definition of the Clear and Present Danger Test*

Whatever was intended by Holmes' original statement of the clear and present danger test, a sea change in its meaning began to form—albeit in dissent—in another Espionage Act case.[173] In *Abrams v. United States*,[174] the defendants set out to protest the United States' actions in sending a contingent of marines to Vladivostock and Murmansk in the summer of 1918, in the wake of the Russian Revolution, after the Bolsheviks had signed a peace treaty with Germany.[175] They distributed several thousand leaflets, both by hand and by throwing them out a window. The Court rejected the argument that "the only intent of these defendants was to prevent injury to the Russian cause,"[176] and thus only indirectly to obstruct the war effort. It concluded that "the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States. . . ."[177] Thus, the Court rejected any argument that speech whose effect would only be *in*direct would not fall within the clear and present danger test—a test, moreover, that went unmentioned in the Court's opinion.[178]

In one of his most famous opinions, Holmes (joined by Justice Brandeis) dissented.[179] Speaking to the statute itself, Holmes rejected the holding that the evidence demonstrated sufficient intent to violate the Act, because the result criminalized by the statute was not "the *proximate* motive of the specific act"[180] But this was only a prelude to his more significant remarks, on the First Amendment implications of the case.[181] Holmes reasserted his belief that the Court had decided correctly in *Schenck* and *Debs*,[182] but in so doing reworded the test significantly:

> I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about *forthwith* certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other

173. For a discussion of this "metamorphosis," see David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, *passim* (1982).

174. 250 U.S. 616 (1919).

175. For a general history of the *Abrams* case, see RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987).

176. *Abrams*, 250 U.S. at 621.

177. *Id.*

178. *Id.* at 629 (Holmes, J., dissenting) (suggesting that showing obstruction to be indirect effect of speech was not enough).

179. *Id.* at 625-31.

180. *Id.* at 627 (emphasis added).

181. *See Abrams,* 250 U.S. at 627-31 (Homes, J., dissenting) (discussing specific First Amendment implications of this case).

182. *Id.*

times.

> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of *immediate* evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.[183]

In his famous exposition of his views on free speech, Holmes continued by arguing that given the ineffectual nature of the speech, the punishment seemed aimed at the defendants' beliefs rather than their deeds.[184] Although he recognized the logic inherent in restricting speech, he argued that the "experiment" of the Constitution was meant to leave open a "free trade in ideas."[185] Although this section of the opinion has been the subject of most of the scholarship examining Holmes' dissent in *Abrams*, we may pass over it lightly here, and rejoin his opinion at the point at which this principle is instantiated in practical form:

> While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so *imminently* threaten *immediate* interference with the lawful and pressing purposes of the law that an *immediate* check is required to save the country. . . . Only the *emergency* that makes it *immediately* dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."[186]

Whatever the original meaning of "clear" and "present" had been, Holmes's dissent in *Abrams* made clear that the test should significantly narrow the scope of speech that could be lawfully restricted.[187] Where a jury might be tempted to discern a significant risk of harm in generalized protest speech, Holmes's reworked version of the test blunted this danger by pinning it to the requirement that the fact-finder conclude that the risk of harm caused by the speech was highly imminent.[188] While this test was, in a sense, more content-intrusive, because it required the jury to consider whether the speech in its context was merely "silly," as Holmes dubbed the protest leaflets in *Abrams*,[189] it nonetheless improved the test by making it less likely that a jury could fall sway to cognitive illusions and conclude that too wide a range of speech constituted a "clear and present" danger.

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183. *Id.* 250 U.S. at 627-28 (emphasis added).

184. *See id.* at 628 (describing leaflet as "silly" and suggesting it was unlikely that it would be effective in carrying out intent alleged by majority).

185. *Id.* at 630.

186. *Abrams,* 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

187. *See id.* at 629 (arguing against inclusion of indirect, unintended, and undesired effects in range of restrictable speech).

188. *See id.* at 628 (noting that ineffectiveness of speech in achieving alleged intent may exclude such speech from category subject to restriction under "clear and present danger" analysis).

189. *Id.*

This was still not enough for some of Holmes' contemporary critics. In particular, Learned Hand fastened on the fact that it still gave *some* fact-finder—a judge if not a jury—the responsibility of conducting the risk analysis inherent in the clear and present danger test, at precisely those moments when individuals are likely to overestimate the risks of speech:

> I am not wholly in love with Holmesey's test. Once you admit that the matter is one of degree . . . you give to Tomdickandharry, D.J., so much latitude that the jig is at once up. Besides [the] Nine Elder Statesmen have not shown themselves wholly immune from the "herd instinct" and what seems "immediate and direct" to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged. I own I should prefer a qualitative formula, hard, conventional, difficult to evade.[190]

This criticism has bite. Although the reworked clear and present danger test marked at least a significant attempt to cabin the fact-finder's risk analysis of inciteful speech by expressly requiring a risk of truly imminent harm,[191] it still left significant discretion to both juries and judges. It failed, in other words, to expressly address the fundamental question of *who* conducts risk analysis. Still, by independently reviewing the speech in question under the First Amendment, Holmes took an important step away from his earlier opinions by implicitly rejecting the view that Congress alone could make the determination of risk. This debate would soon be engaged more explicitly by later courts.

The steps taken in *Abrams* were followed by two later opinions arising out of criminal prosecutions in the wake of the so-called "Red Scare." In *Gitlow v. New York*,[192] the Court considered the appeal of a conviction for violation of a state law prohibiting advocacy of criminal conduct. Significantly, unlike the Espionage Act, the state provision at issue in *Gitlow* did not address speech "involving the *danger* of substantive evil,"[193] but proscribed *any* speech advocating criminal anarchy, effective or not. Indeed, the Court noted that "[t]here was no evidence [of a harmful effect] resulting from the publication and circulation of the Manifesto" at issue here.[194] The Court rested its affirmance on the view that the legislature should be accorded substantial deference.[195] The Court opined:

> [T]he immediate danger is none the less real and substantial because

190. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 770 (1975) (quoting letter from Learned Hand to Zechariah Chafee).

191. *See, e.g.*, Lawrence, *supra* note 165, at 1347 ("The evaluation of harm is made more objective when it looks to specific instances of imminent harm rather than to those that are general instances of potential long-range harm.").

192. 268 U.S. 652 (1925).

193. *Gitlow*, 268 U.S. at 668 (emphasis added).

194. *Id.* at 656.

195. *See id.* at 668 (noting legislature's determination that advocacy of criminal anarchy involved substantive evil "must be given great weight"); *see also* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1, 33 (1971) (agreeing with *Gitlow* majority that legislature should be accorded deference where subject matter of speech "implicat[es] the safety of the nation").

> the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.[196]

As long as the legislature concluded that certain utterances "involve[d] such danger of substantive evil that they may be punished," the question whether there was any real risk of danger was not open to the Court's consideration.[197] The Court contrasted statutes of this kind from the Espionage Act; while it reaffirmed the language of clear and present danger employed by Holmes in *Schenck*—but not the revised version of his *Abrams* dissent—it held that the test was only applicable in statutes where the legislature took upon itself the risk determination.[198]

Holmes and Brandeis dissented again.[199] Holmes refused to defer to the legislature's judgment, insisting instead that in *every* case involving First Amendment concerns, the court must apply the clear and present danger test.[200] Here, he concluded, the test was not met.[201] The mere fact that the speech could be called an incitement was not enough. "Every idea is an incitement. . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason."[202] But to be properly subject to criminal penalties, the speech had to have some "chance of starting a *present* conflagration."[203] If the publication of the speech at issue had "been laid as an attempt to induce an uprising against government *at once*," the court could at least have had a basis to consider whether it "was not futile and too remote from possible consequences."[204] But because there was no such charge here, no conviction could be sustained. Thus, the *Gitlow* dissent began to engage *both* aspects of the clear and present danger test that are of concern to behavioral analysis—how restrictive the risk analysis must be, and who must perform the analysis.

Whitney v. California[205] revisited the debate over both what test should be applied and who should apply it. Anita Whitney was charged with violating California's Criminal Syndicate Act for advocating criminal syndicalism.[206] The Court reaffirmed its holding in *Gitlow* that the legislature should be accorded wide latitude to class speech as dangerous.[207] Justice Brandeis (joined by

196. *Gitlow*, 268 U.S. at 669.

197. *Id.* at 670.

198. *Id.* at 671.

199. *Id.* at 672-73 (Holmes, J., dissenting).

200. *Id.*.

201. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

202. *Id.* at 673.

203. *Id.* (emphasis added).

204. *Id.* (emphasis added).

205. 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

206. *Whitney*, 274 U.S. at 360.

207. *Id.* at 371.

Holmes) concurred, but on substantially different terms.[208] Brandeis again stressed that the legislature could not fix by statute the determination whether speech was sufficiently dangerous to justify restriction.[209] He then revisited the clear and present danger test, noting,

> This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection.[210]

Brandeis concluded that incitement may not be punished "where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."[211] Thus, "[i]n order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.[212]

Moreover, not only must the danger be imminent, but "the evil apprehended [must be] relatively serious."[213] The speech must create "the probability of serious injury to the State."[214] Thus, despite the language suggesting that intent alone might suffice to ground a conviction, Brandeis's *Whitney* concurrence again ratcheted up the clear and present danger test, further restricting both the legislature's ability to conduct risk analysis without independent judicial review and the fact-finder's own risk analysis role.

C. Dennis*: Clear and Present Danger in Retrogression*

If the thesis of this Article is correct, this movement toward a more restrictive test for speech constituting illegal advocacy can usefully be viewed as an example of the development of free speech doctrine in a manner that, consciously or not, recognized the risk that highly emotional times of political emergency are likely to evoke the kinds of cognitive illusions that lead people to overestimate perceived risks. Thus, the clear and present danger test moved ever closer to a version that demanded that fact-finders conduct a heightened evaluation deliberately focused on the true danger and imminence of the speech subject to potential prosecution. Furthermore, it gradually moved away from a posture of deference to either legislatures or juries, as Holmes and Brandeis increasingly asserted an independent duty of judicial review as a backstop for the potentially flawed determinations of other institutional actors within the legal

208. *See id.* at 372-79 (Brandeis, J., concurring) (distinguishing between legislative and judicial roles in restricting speech). For an analysis of other aspects of Justice Brandeis's concurring opinion in *Whitney*, see Horwitz, *supra* note 21, at 465-72.

209. *Whitney*, 274 U.S. at 373-74 (Brandeis, J., concurring).

210. *Id.* at 374.

211. *Id.* at 376.

212. *Id.*

213. *Id.* at 377.

214. *Whitney*, 274 U.S. at 378 (Brandeis, J., concurring).

system. And this evolution is arguably evident in the fact that in a number of post-*Whitney* cases in the first half of the century, the Court did in fact overturn similar convictions.[215] But at this point, one could reasonably interject that even if the development of clear and present danger doctrine did represent the kind of evolution consistent with behavioral analysis described here, no test could withstand the kinds of cognitive illusions described above. The very fact that the test ultimately reposes with judges, who are equally subject to the distorting effects of the availability heuristic, means it would prove no more than a paper tiger when faced with a highly salient, vivid risk.

That objection was at least temporarily borne out when the Court faced its next test. In the early days of the Cold War, a host of troubling events formed the crucible in which the Court's next major clear and present danger decision was decided: the Soviet Union had detonated its first nuclear weapon, the United States had become embroiled in the Korean War, and concern—arguably justifiable, in light of contemporary knowledge—had arisen about Communist espionage within the United States. Against this backdrop, the Court was faced with an appeal by the leaders of the American Communist Party of their convictions for criminal conspiracy. In *Dennis v. United States*,[216] the Court upheld the conviction and failed the test.

A plurality of the Court finally accepted the Holmes/Brandeis view of the clear and present danger test, but in so doing it gave the test a fatal reworking.[217] The Court distinguished the perceived dangers faced by the *Gitlow*-era Court, though they likely seemed real enough at the time, arguing that they "were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis."[218] It eviscerated the imminence requirement, which served as such a potent restraint on faulty risk analysis, holding that "success or probability of success is [not] the criterion" for conviction.[219] Instead, and ironically, the plurality opinion accepted the formulation of the test adopted by Learned Hand, one of the early critics of the clear and present danger test, for the Second Circuit below: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[220]

215. *See* DeJonge v. Oregon, 299 U.S. 353 (1937) (reversing conviction under statute outlawing assisting in the conduct of a meeting sponsored by an organization which advocates illegal means of achieving political change); Fiske v. Kansas, 274 U.S. 380 (1927) (reversing conviction under state law prohibiting advocacy of criminal syndicalism).

216. 341 U.S. 494 (1951).

217. *See* HARRY KALVEN, JR., A WORTHY TRADITION 190-91 (1988) ("[*Dennis*] acknowledges clear and present danger as the constitutional measure of free speech, but in the process, to meet the political exigencies of the case, it officially adjusts the test, giving it the kiss of death.").

218. *Dennis*, 341 U.S. at 510.

219. *Id.*

220. *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

Thus, the Court's reworked test took the bite out of the clear and present danger test. It removed the key elements of the test – a requirement of both gravity *and* immediacy—that made it a dike against the flood of popular sentiment. In their place, it substituted a sliding scale in which any emergency likely to evoke an overestimation of risk would sweep aside any factual requirements that could force the risk determination back to the facts at hand. The *Dennis* Court did take one positive step: it concluded that the first-order determination whether the speech at issue creates a clear and present danger is a question of law to be determined by the Courts, not impassioned juries.[221] But this step away from legislative deference hardly compensated for the retrograde effect of the Court's reworking of the test itself.

All the issues raised by this Article were aired by the Court in *Dennis*. Concurring, Justice Frankfurter went still further than Chief Justice Vinson's opinion, suggesting that the Court should simply apply "a straightforward balance between the costs and benefits of suppressing the communication, without the pretense of a mathematical formula."[222] But he questioned the assignment of the decision-making role to the courts at all, writing, "To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment."[223] That assessment ignored the problem raised above: that legislative determinations in times of national emergency are likely to be driven by popular passions as much as by closely held state secrets.[224] Nor did Justice Frankfurter ask why the legislature's judgment could have deserved deference with respect to the speech at issue, when the Smith Act, under which the defendants were convicted, had been passed in 1940—well before the events leading to the prosecution.[225]

Also concurring, Justice Jackson fastened on the clear and present danger test itself, scoffing at the notion that it could possibly protect "Communist

221. *See id.* at 513 (providing that clear and present danger doctrine is judicial rule to give effect to Constitutional Amendment protections).

222. JOHN HART ELY, DEMOCRACY AND DISTRUST 108 (1980). Justice Frankfurter discussed the purpose of the First Amendment balancing test as follows:

> The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

Dennis, 341 U.S. at 524-25 (Frankfurter, J., concurring)

223. *Dennis*, 341 U.S. at 551 (Frankfurter, J., concurring).

224. See *supra* text accompanying note 120 for support of proposition that legislators suffer from same cognitive illusions that afflict non-decision makers. *See also* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 21 (2001) (noting that legal policy in democratic governments is driven by "social cascade" effects); Posner, *supra* note 112, at 696 ("[I]n a democracy the public is in the saddle. When the public is terrified, elected officials gallop").

225. Hans Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970).

plotting . . . during its period of incubation."[226] If imminence were made a requirement, the government could only act when it would be too late.[227] Again, whatever the wisdom of this argument might be if we could assume that government is capable of sound, rational evaluation of risk, Jackson misses the danger posed by such a test if, as behavioral analysis suggests, institutional actors are likely to fall prey to cognitive illusions leading them to overestimate risk.

By contrast, Justice Douglas's dissent recognized this danger, arguing that "[t]he restraint to be constitutional must be based on more than fear . . . . There must be some immediate injury to society that is likely if speech is allowed."[228] Yet Justice Douglas also protested the reassignment of the decisional role from the jury to the courts[229]—a curious stance, given the likelihood that juries, even more than judges, would disregard whatever test was set before them.

In keeping with his absolutist interpretation of the First Amendment,[230] Justice Black also dissented. Black frontally assaulted the role of rationality in First Amendment analysis, arguing that the First Amendment did not "permit[] us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'"[231] Given that Black's formalist theory of constitutional interpretation rejected the application of balancing methodology in the First Amendment altogether, it is unlikely he would have supported an approach based on behavioral notions of rationality any more than one based on cruder assumptions of classical rationality. But his criticism of an approach based on reasonableness—that it would be unlikely "to protect any but those 'safe' or orthodox views which rarely need its protection"[232]—is perfectly consistent with the behavioral justification for setting a high First Amendment bar to regulation of illegal advocacy.[233]

Dennis thus offers a full airing of the twin themes of this Article—the questions whether First Amendment jurisprudence must depart (and has departed) from standard views of rationality in addressing speech regulation, and to whom that decision should be committed. But it also raises the question whether a strict test is in fact a sufficient guarantee against the departures from careful risk analysis that are inevitable where vivid and salient risks elicit a departure from that norm, and offers an illustration of the costs to free speech if

226. *Dennis*, 341 U.S. at 570 (Jackson, J., concurring).

227. *Id*.

228. *Id.* at 585 (Douglas, J., dissenting).

229. *Id.* at 587.

230. *See, e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) (providing an example of Justice Black's strict interpretation of the language of the First Amendment).

231. *Dennis*, 341 U.S. at 580 (Black, J., dissenting).

232. *Id.*

233. Curiously, Black also complained that the *Dennis* majority's new test "repudiate[s] directly or indirectly the established 'clear and present danger' rule." *Id.* While true, Black's remark gives no indication that *any* such approach would have been inconsistent with his formalist and absolutist approach to the First Amendment, as Justice Douglas would later argue in *Brandenburg*. See *infra* note 250 and accompanying text for Justice Douglas's subsequent view that there is no room in the First Amendment for any clear and present danger test.

a strict test proves to be a parchment barrier. After three decades of development away from a permissive to a restrictive interpretation of the clear and present danger test, this supposed bulwark proved easy enough to overcome in a perceived emergency.[234]

Nevertheless, the apparent failure of the clear and present danger test as a safeguard against poor risk analysis in *Dennis* should not overshadow the fact that the test helped move the Court from its initial, unquestioning acceptance of Congress's ability to regulate speech on the basis of bad tendencies in the *Schenck* era to a heated debate over what level of emergency would be required to permit such regulation, and over where the ultimate responsibility should lie. Moreover, as the high-water mark of public concern over Communism and espionage receded and it became apparent that domestic advocacy of Communism was unlikely to amount to much, the Court may well have felt it had been had. *Dennis* made it apparent that a sliding-scale approach to the risk of illegal advocacy would lead the Court to uphold speech restrictions on the assurances of public officials, such as Senator McCarthy, who would ultimately become objects of public contempt, and with no real payoff, since the "emergency" would prove evanescent. The Court would not be likely to lower the bar again.

Dennis also offers further support for the view that a behavioral approach to First Amendment problems involving the potential risks of speech offers real bite that is not necessarily available under a standard model of rationality. For, no matter how poorly regarded *Dennis* became, it was not an irrational decision. To the contrary, its approach was fully in keeping with a standard economic model of rationality. The Court's adoption of Learned Hand's probability-centered approach, which so closely resembled his celebrated economic formula for negligence in *United States v. Carroll Towing Co.*,[235] was a perfectly rational approach to "the probabilistic character of most types of harm caused by speech."[236] And while *Dennis* may have come to represent a hysterical response to Communist speech elicited by the hot passions of the Cold War, at the time the concern with subversive speech was hardly irrational.[237] Without the benefit of hindsight, *Dennis*'s sliding-scale approach may have been quite rational. And

234. *Cf.* Marc Rohr, *Grand Illusion? The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 3 (2002) ("The willingness of society, and its courts, to tolerate [advocacy of the commission of criminal acts] is likely to bear an inverse relationship to the perceived likelihood that such advocacy will, in fact, lead to serious harm.").

235. 159 F.2d 169 (2d Cir. 1947). *See, e.g.*, POSNER, *supra* note 141, at 65 n.9 (noting resemblance between the two tests).

236. POSNER, *supra* note 141, at 64 (emphasis omitted). Posner discusses clear and present danger in economic terms and argues, in that regard, that consistent with *Dennis*, it would be rational to consider the magnitude of the potential harm quite apart from any considerations of imminence. *Id.* at 64-65.

237. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 320 (1990) (stating that while retrospectively it appears that Americans' fear of Communist Party U.S.A. was greatly exaggerated, this was unclear in 1951); *cf.* POSNER, *supra* note 141, at 72 (arguing that hindsight fallacies arising from fact that "socialist agitation" of *Schenck* era amounted to little may have colored free speech jurisprudence, although outcome could not then have been known).

putting aside the fact that no harms in fact resulted from advocacy of domestic communism, is it not a reasonable cost-benefit view that speech may be restricted on the basis of the probability of the magnitude of harm irrespective of imminence, if the level of harm justifies it?[238]

A behavioral approach manages to dissolve this conflict between hindsight and foresight. Yes, *Dennis*'s approach may have been reasonable on the basis of the available information; so it is unfair to hold it up as an example of hysterical overreaction simply because one has the benefit of hindsight. But even *ex ante*, the methodology applied by a decision maker under conditions of uncertainty should be able to account for the predictable presence of cognitive illusions. The Court erred by watering down the clear and present danger test in *Dennis* not because it was wrong to be concerned about the subversive effects of Communism and the risks of espionage, a view that came to be the received wisdom in the post-McCarthy period, but because it failed to understand that even if its fears were not misplaced, they would be *predictably* overstated.

Thus, merely to criticize *Dennis* for seeing a risk where none materialized, without attending to the cognitive illusions that were likely to contribute to that mistake, is worse than unfair; it is an invitation to hubris. Ultimately, in an important sense, the problem with *Dennis* is not that the Court did not act rationally, although we may so conclude with the benefit of hindsight, but that it *did* act rationally. Or, more precisely, *Dennis* represented a misstep in the development of the law because, in crafting a test of this sort, the Court should have had in mind from the beginning the kind of *predictable* departures from sound risk and probability analysis that would be likely to erupt if judges attempted to apply a purely probabilistic test, untethered to any stricter requirements of immediacy, in times of perceived emergency. *Dennis* thus teaches us that any non-absolutist approach will be insufficiently protective if it does not assume up front the certainty that a "rational" approach will predictably and ineluctably lead to decisional errors, and if it does not attend carefully to the question of who conducts the analysis.

D. Raising the Barrier to Cognitive Illusions: Toward Brandenburg *and Its Progeny*

That the Supreme Court appeared to have learned its lesson from the denouement of McCarthyism and the postwar Red Scare became evident in the years following *Dennis*. Although the Court upheld various attempts to restrict communist activities, particularly those aimed at government employees,[239]

238. See ELY, *supra* note 222, at 108 for an example of such reasoning.

239. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 114-15 (1961) (upholding requirement that "Communist-action organizations" register with Attorney General and disclose information about its members and activities); Barenblatt v. United States, 360 U.S. 109, 126-34 (1959) (upholding contempt citation for witness who refused to answer questions about his past and present membership in Communist Party before congressional investigating committee); Am. Communications Ass'n v. Douds, 339 U.S. 382, 390-99 (1950) (upholding labor legislation prohibiting enforcement of representation rights of labor unions whose officials did not swear by affidavit that

cracks began to appear in the facade.[240] Most of these cases did not grapple with the risk analysis aspects of the clear and present danger test. In *Yates v. United States*,[241] however, the Court began to chip away at the approach it had taken in *Dennis*. In *Yates*, the Court overturned the convictions of several Communist Party members for conspiracy to violate the Smith Act. Although that statute's constitutionality had already been upheld in *Dennis*, in order to void the convictions here the Court employed the doctrine that statutes should be interpreted to avoid constitutional doubts. Justice Harlan concluded that the statute did not reach mere "doctrinal justification of forcible overthrow," as opposed to the conduct attacked in *Dennis*, which he characterized as involving "indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action."[242] In drawing the distinction, Justice Harlan effectively revived Justice Brandeis's focus on imminence: "That sort of advocacy [simple 'doctrinal justification of forcible overthrow'], even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*."[243] Justice Harlan also made clear that actual proscribable instances of "advocacy of action are so few and far between as to be almost completely overshadowed by the hundreds of instances" in which the speech was "so remote from action as to be almost wholly lacking in probative action."[244] By requiring a close link between advocacy and action,[245] *Yates* thus moved back from *Dennis*'s attempt to eliminate imminence from the clear and present danger test. As Gerald Gunther has observed, "Harlan claimed to be interpreting *Dennis*. In fact, [*Yates*] represented doctrinal evolution in a new direction."[246]

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they were not members of the Communist Party). For the story of the Warren Court's mixed record in the Cold War era, see LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 75-103, 135-56 (2000).

240. *See, e.g.*, Gibson v. Fla. Legislative Investigating Comm., 372 U.S. 539, 557-58 (1963) (invalidating contempt citation for witness who refused to answer questions before state investigating committee about whether certain members of the Communist Party were also members of the NAACP). Race was an important factor in the Supreme Court's changing approach to First Amendment problems in the domestic security context. *See, e.g.*, POWE, *supra* note 239, at 498 ("[I]n protecting the NAACP, the Court adopted methods that would shortly thereafter dismantle the outmoded domestic-security programs."). Indeed, the argument that concern over the geopolitical effect of international awareness of the United States' treatment of the race issue, particularly in strategically vital Third World countries, contributed to the liberal outcomes of the Warren Court suggests that the retreat from the speech-restrictive approach of cases such as *Dennis* was itself a Cold War strategy. *E.g.*, Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 89-111 (1988).

241. 354 U.S. 298 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

242. *Yates*, 354 U.S. at 321.

243. *Id.* at 321-22.

244. *Id.* at 327.

245. *See* Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 720 n.279 (interpreting Justice Harlan's opinion as requiring link between advocacy and action in the sense of being instructed to perform specific actions or being positively directed by speaker).

246. Gunther, *supra* note 190, at 753. Gunther argues that *Yates* represents a turn to Learned

In *Brandenburg v. Ohio*,[247] the Court not only came full circle from the *Dennis* approach to clear and present danger, but took the test still further. Here, the Court was not dealing with the same sort of political speech implicated in its earlier decisions; instead, this speech arose in the context of racial conflict. Brandenburg, an official in a Ku Klux Klan group, was convicted under Ohio's criminal syndicalism statute for his remarks at a Klan rally. Those remarks, while threatening in tone, did not really suggest the likelihood of imminent violence.[248] The Court noted that a similar statute's constitutionality had been upheld by the majority of the Court in *Whitney*, but concluded that "*Whitney* has been thoroughly discredited by later decisions."[249] The Court thus agreed with *Dennis* that the clear and present danger test was to be the operative test in illegal advocacy cases.[250] But its restatement signaled yet another sea change in the meaning of the test:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[251]

Brandenburg thus institutionalized a new version of the clear and present danger test carrying the following requirements: (1) the implicated speech must be aimed at inciting or producing (2) imminent lawless action, and (3) must be likely to incite or produce the lawless activity. This test marks a new and—so far—lasting high-water mark.[252] As scholars have observed, *Brandenburg* reached to Learned Hand's *Masses* test to limit proscribable speech to words actually inciting lawless action,[253] and combined them with the most protective

Hand's approach in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), which focused on whether the implicated speech was incitement rather than on whether the speech risked a particular outcome. Whether this is correct or not, that element would certainly resurface in *Brandenburg*. See *infra* note 253 and accompanying text.

247. 395 U.S. 444 (1969).

248. *See, e.g.*, *Brandenburg*, 395 U.S. at 446 (quoting defendant's speech in film of Ku Klux Klan rally, as reproduced in record: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken.").

249. *Id.* at 447 (citing *Dennis*, 341 U.S. at 507).

250. That fact was sufficient to provoke Justices Black and Douglas to limit their agreement with the Court to a pair of concurring opinions, agreeing with the result but arguing that, there should be "no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it." *Id.* at 454 (Douglas, J., concurring); *see also id.* at 449-50 (Black, J., concurring) (agreeing that clear and present danger doctrine should have no place in First Amendment).

251. *Id.* at 447.

252. *See* Anthony Lewis, *Freedom of Speech and Incitement Against Democracy* (noting profound change since *Debs*, and suggesting that "[i]t is unthinkable now that anyone would be sent to prison for speaking critically of official policy, whether or not in wartime"), *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 3, 4 (Francine Kershman Hazan & David Kretzmer eds., 2000).

253. *See* Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917) (distinguishing between

elements of the *Abrams* and *Whitney* interpretations of the clear and present danger test, to produce "the most speech-protective standard yet evolved by the Supreme Court."[254]

By taking such a protective approach, *Brandenburg* can be read as the culmination of an evolution of this area of First Amendment jurisprudence toward a test that serves a prophylactic function with regard to standard and predictable cognitive illusions that are likely to distort the factfinder's analysis of the risk of illegal advocacy.[255] The early versions of the test began the process by focusing on the risk-analysis aspects of free speech jurisprudence. But by allowing the factfinder to perform a more or less uncabined risk analysis, they did not serve to preclude convictions in the face of impassioned juries examining speech that elicited cognitive illusions such as the availability heuristic or probability neglect. *Abrams* and *Whitney* tightened the test by focusing on imminence, thus further cabining the factfinder's role; but as *Dennis* demonstrated, even that test was not enough to stave off distorted perceptions of risk. *Yates* refocused on imminence, and began the task of insuring against the future recrudescence of a *Dennis*-like test by drawing a narrow boundary around the kinds of speech that would be subject to a risk-analyzing balancing test at all. Finally, *Brandenburg* raised the bar against cognitive illusions still higher by combining the two elements to provide a strict test that looks to both the nature of the speech *and* the likelihood that any harm that results will be both imminent and closely related to the speech.[256]

That solution has, so far, turned out to be a lasting one, not subject to the backsliding witnessed in *Dennis*.[257] To be sure, the passionate, if distorted, view of potential risks resulting from speech that arises in moments like the current one may yet prove stronger than any judicial formulation.[258] But if this Article's

words as "triggers of action" rather than "keys of persuasion" in setting boundaries of unprotected speech).

254. Gunther, *supra* note 190, at 755.

255. *Cf.* Darren Bush, *The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1129 (2000) (discussing how Supreme Court First Amendment cases are inconsistent with economic theory and market-based ideology because they "assume that the audience suffers from high informational barriers and is irrational (i.e., unable to calculate the actual net marginal benefit of revolution)").

256. *Cf.* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 453-56 (1985) (arguing that one purpose of strict First Amendment tests is to craft rules, especially in times of relative peace, that serve as a hard bulwark against speech-repressive tendencies at times of great stress and urgency, when courts would otherwise be unlikely to protect it).

257. *See, e.g.*, Hess v. Indiana, 414 U.S. 105, 107-09 (1973) (reversing conviction for disorderly conduct of individual who shouted, "We'll take the fucking street later," on grounds that words were not intended or likely to produce *imminent* disorder).

258. This is the fear voiced by Justice Douglas, who in his concurrence in *Brandenburg* observed—correctly, as we have seen—that the test's history "aroused" "great misgivings" by revealing that it would not prevent impassioned fact finders, including "judges so wedded to the status quo that critical analysis ma[kes] them nervous," from permitting conviction in inappropriate cases. *Brandenburg*, 395 U.S. at 454 (Douglas, J., concurring). For a prediction that is chilling in the present circumstances, but as yet unwarranted, see Larry Alexander, *Incitement and Freedom of Speech*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY, *supra* note 252, 101, 118. Alexander

thesis is correct, then it is less surprising that *Brandenburg* and its development have helped disturb the long historical pattern of speech repression in times of political emergency—a fact that, although it is rarely remarked on as such, *is* both surprising and significant.[259]

One objection that might be advanced to this picture is that any connection between the development of the clear and present danger test and the cognitive illusions described above, such as the availability heuristic, is fortuitous. The clear and present danger test, this objection would run, does not directly address itself to those concerns: while the imminence requirement tightens the finding needed for a conviction, it still leaves a form of risk analysis in place. Thus, the straitened risk analysis it prescribes could still be applied by a decision maker subject to all of these cognitive shortcomings.

That intuitively attractive criticism is less well-placed than it may seem. By focusing on imminence, the *Brandenburg* version of the test departs significantly from the kind of straightforward probabilistic test that might be expected under dominant theories of rationality. It is simply more difficult to conduct a distorted analysis of risk when, by demanding imminence, the test will generally require a jury to balance its passionate assessment of risk with the actual outcome—which, as Justice Harlan noted in *Yates*, rarely involves violence.[260] Even where violence does result, the imminence requirement ties the speech so closely, temporally speaking, to the result in time that a successful conviction will be rare.[261] As Vincent Blasi observes, the imminence requirement has been proved to be justifiable on pragmatic grounds:

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predicts,

> A wave of Oklahoma City-like bombings by militia groups could conceivably usher in a new era of a *Dennis*-like constitutional test. Only a principle stronger than the *Brandenburg* compromise could possibly prevent such a change. On the other hand, one wonders whether any liberal principle, no matter how absolute and pure, could effectively save civil liberties in such perilous times.

Id.; see also William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 630-31 (2002) (arguing that "judges will introduce their own cognitive biases into the evolution of public policy, whatever the ostensible standard of review").

259. *But see* Rohr, *supra* note 234, at 3 (arguing that *Brandenburg* test has "ultimately proven, in actual practice, to be far less protective of speech than its literal wording would have suggested").

260. *See Lawrence*, *supra* note 165, at 1347. Lawrence notes:

> [W]herever consequentialist considerations enter into the free expression calculus, the court must act with awareness of the high risks posed by subjective evaluations of harm. The evaluation of harm is made more objective when it looks to specific instances of imminent harm rather than to those that are general instances of potential long-range harm. This is the direction taken by the "direct incitement" test. We may criticize *Brandenburg* for maintaining a consequentialist focus. Nonetheless, the *Brandenburg* Court's consequentialism is superior to the *Dennis* Court's.

Id.

261. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (noting, in case involving boycott of white-owned businesses in Mississippi, that while some violence ensued after boycott leader's threat that "necks would be broken," such violence occurred at a sufficient removal in time from speech that result did not fall within *Brandenburg*'s scope).

> "The life of the law has not been logic; it has been experience." And experience tells us that the power to punish speech will be abused, as Holmes certainly believed it had been in *Abrams*, if all the prosecution must show is a plausible scenario of eventual harm. Absent a demanding causation rule such as an imminence test, a rule so demanding that it permits a reviewing court to declare an asserted causal connection downright implausible, de facto convictions for sedition are too likely to occur.[262]

Moreover, to the extent that Justice Brandeis's formulation of the test in *Whitney* is still present in any application of the test, the test further limits the fact-finder to instances in which "the evil apprehended is relatively serious"—specifically, instances involving the threat of "serious injury to the State."[263] Thus, trivial violence will also fall outside the scope of the test.

Furthermore, that the test does not speak to the specific cognitive illusions at issue, but instead rings them round with factual requirements that are difficult to meet, in a sense may be viewed as beneficial from the standpoint of behavioral analysis rather than as evidence of a deficiency. Cognitive biases are not easy to counteract directly; thus, strategies are needed that cabin those tendencies, even if they do not and cannot attack them frontally. Just as the courts have arguably evolved indirect strategies to counteract the hindsight bias in the area of tort liability, such as allowing a defense of compliance with *ex ante* norms and excluding evidence of subsequent remedial measures,[264] so the evolution of the clear and present danger test may be seen as the evolution of "second-best strategies that are sensitive to the consequences of biased judgment[]" for the First Amendment.[265]

A second current that has run through this discussion has been the equally important question of which institutional actor—legislators, jurors, judges, or some combination—should be assigned responsibility for making the risk

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262. Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1359 (quoting HOLMES, *supra* note 163, at 1).

263. *Whitney*, 274 U.S. at 377 (Brandeis, J. concurring)

264. *See generally* Rachlinski, *supra* note 15 (discussing judicial rules that take advantage of specific opportunities to avoid bias).

265. *See id.* at 111-12. Rachlinski states:

> Generic debiasing strategies are unlikely to be available, and the courts do not use them. Instead they have developed mechanisms for taking advantage of specific circumstances that allow them to reduce the influence of the hindsight bias. In those cases in which the bias cannot be avoided, the courts have pursued sensible second-best strategies that are sensitive to the consequences of biased judgments for both economics and justice.

Id.; *see also* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1161 (1982). Redish analogizes to Churchill's famous comment about democracy:

> [T]he clear and present danger test is worst method for determining the degree of constitutional protection of unlawful advocacy, except for all the other ways. . . . [W]hile the clear and present danger test is unfortunately subject to potential abuse in its application, no other suggested means of resolving the conflict inherent in regulating unlawful advocacy does a better job.

Id.

assessment, no matter how restricted that assessment may be by the formulation of the legal rule. Although that controversy plays no part in *Brandenburg*, it recurs throughout the earlier history in cases such as *Gitlow*, *Whitney*, and *Dennis*. Because any of these actors may be subject to cognitive illusions in the context of illegal advocacy, as the widespread and common reaction to September 11's events among elite and popular audiences alike suggests, there is no ideal solution to this problem. But not all of these actors are necessarily subject to the same degree of bias in each situation, and direct or indirect debiasing strategies may be effective to different degrees when applied to each.

Over time, the courts' response to this problem has been an increasing willingness to hold up both legislators' and juries' determinations to close scrutiny.[266] Compared to the early majorities' willingness to defer to the legislature's initial risk determination that certain categories of speech were dangerous, and their unwillingness to disturb the jury's evaluation once the question had been put to them, the courts have increasingly performed the analysis for themselves—not the *only* analysis, because often a first-order determination will have been made by the legislature or jury, but a careful second look.[267] Learned Hand's objection to this solution—that judges, up to and including the Supreme Court, "have not shown themselves wholly immune from the 'herd instinct' and what seems 'immediate and direct' to-day may seem very remote next year even though the circumstances surrounding the utterance be unchanged"[268]—is surely correct. Behavioral analysis confirms what we already know: judges can be biased too.[269] But the increasing "testness" of the clear and present danger test, its evolution toward a formula in *Brandenburg* that contains increasingly concretized requirements that are less easily distorted by cognitive illusions, bears a greater approximation to the test Hand hoped would be adopted, one that is "qualitative . . . , conventional, difficult to evade.[270] Judges have experience applying such tests, and may be less likely to shake off such fetters than a jury making that determination alone and given the usual discretion that reviewing courts apply to jury verdicts.[271] That this institutional

266. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

267. This growing arrogation of judicial power to determine First Amendment issues, which recurs throughout First Amendment law, is not without concerns of its own. For a discussion of some such concerns, see Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) and Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761 (1986).

268. Gunther, *supra* note 190, at 770.

269. *See, e.g.*, Guthrie, *supra* note 120, at 782-83 (discussing how empirical studies show that professionals suffer cognitive illusions); Thaler, *supra* note 120, at 90 (concluding that experts are not immune to cognitive illusions).

270. Gunther, *supra* note 190, at 770.

271. *Cf.* W. Kip Viscusi, *Do Judges Do Better?*, (arguing that judges "should be less prone to the kinds of biases and risk-decision errors exhibited by the populace more generally"), *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 186, 186-87 (Cass R. Sunstein et al., eds., 2002). Moreover, even if lower courts fail in this duty, they are still subject to appellate review—and "[t]he Supreme Court has made plain that it will not blindly accept a lower court's determination that speech is punishable

role assignment need not, under behavioral analysis, point unfailingly to the courts will become evident in the next section.

In sum, by tracing the history of the clear and present danger test through the lens of behavioral analysis, we may be able to discern what is, in effect, a response (conscious or unconscious) to the now-classic problems of cognitive distortion in the area of risk analysis. That the law might evolve in accordance with some value or other is not in itself surprising; that is, of course, the main insight—though certainly not an uncontroversial one—of law and economics. This analysis suggests that the rise of the modern clear and present danger test may be fruitfully analyzed as an evolution of First Amendment jurisprudence to account for and guard against the problems revealed by behavioral analysis.[272]

This account helps explain why, although the legal and policy response to September 11 has been so draconian in its potential incursion on certain civil liberties, the First Amendment has been largely unmolested. Although the fears and passions of the days following September 11 have naturally faded somewhat in time, those passions were the guiding force of public opinion for weeks, if not months. It is already difficult to recall just how certain another attack seemed, and just how fragile conditions were perceived to be. Conditions were ripe for prosecutors to charge that heated political speech could lay the tinder for a future conflagration—and for willing juries to agree.[273] It was, and is, surely the case that "[n]o terrorist attack has ever been as available to Americans as the attacks of September 11."[274]

The *Brandenburg* test was made for just such a moment. As deep as the attacks cut, the internalized constitutional culture of the First Amendment arguably cut still deeper—not only for judges, but for legislators and citizens too.[275] The concern expressed by Justice Brennan that the government "has proven unable to prevent itself from repeating the error" of curtailing civil

'incitement,' and not protected, albeit spirited, advocacy." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-10, at 849 n.58 (2d ed. 1988) (discussing *Claiborne Hardware*, *see supra* note 261).

272. See *supra* note 27 for Rachlinski's and Issacharoff's comments on the law's apparent adaptations to cognitive illusions of judgment.

273. *See, e.g.*, C.K. "Pete" Rowland, *Psychological Perspectives on Juror Reactions to the September 11 Attacks*, 69 DEF. COUNS. J. 180, 181 (2002) (predicting, in context of personal injury cases rather than cases directly related to September 11, that jurors "will be significantly more prone to punish defendants who they perceive as behaving with wanton disregard for safety than they would have been before September 11"); Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1230 (2002) (noting "[t]he familiarity of the targets and the blanket media coverage of the attacks"); *see also* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L.J. 1011, 1039-41 (2003) (noting effects of cognitive shortcomings such as availability heuristic in driving demand for extraordinary government actions in wake of September 11 attacks).

274. *Responding to Terrorism*, *supra* note 273, at 1230.

275. *See* Goldsmith & Sunstein, *supra* note 3, at 1230 (arguing that changes in legal and social culture led to "trend towards [greater] civil liberty protections during wartime" that is evident in relatively reduced incursions on civil liberties evident in government's response to September 11).

liberties "when the next crisis came along" thus seems overstated.[276] In this instance, at least, the development and broad acceptance of a protective approach to speech, one which raised high barriers against the cognitive shortcomings that attend the popular passions of a moment of crisis, rendered heightened speech regulation unacceptable at just the moment that no other constitutional incursion seemed implausible.[277] In this area, at least, the law became a safeguard against cognitive shortcomings rather than their servant.[278]

IV. A DEPARTURE FROM THE IMPLICATIONS OF BEHAVIORAL ANALYSIS: COMMERCIAL SPEECH

Although behavioral analysis of the clear and present danger test serves to confirm the wisdom of the evolution of that doctrine, the same result does not obtain from a behavioral analysis of other areas of First Amendment jurisprudence. In some doctrinal areas, behavioral analysis may suggest that the courts' implicit acceptance of classical models of rationality has led it down doctrinal paths that are not suitable to the real world of human decision-making.

One such area is the doctrine of commercial speech. As the following discussion suggests, commercial speech jurisprudence has moved steadily toward a speech-protective approach that has erased the distinction between commercial speech and other categories of speech. Although, according to the prevailing test, the government may regulate "misleading" speech, the Court has in recent years receded from the sort of paternalistic view that permits much regulation under this heading. That doctrinal movement is grounded on the belief that consumers are as capable of rationally evaluating and responding to commercial speech as they are to political or other categories of speech.

Behavioral analysis suggests otherwise. Consumers who read or watch commercial speech are subject to pervasive cognitive illusions. Indeed, as this section shows, over the same period of time in which the Court moved toward a more speech-permissive view of commercial speech, propelled by the view that consumers are capable of rationally analyzing advertising and other such speech, the advertising industry has taken advantage of its own store of psychological research into marketing and advertising to ensure that consumers will be deprived of the fullest use of their powers of ratiocination. Moreover, some high-risk products, such as tobacco, are highly addictive and thus still less likely

276. *See* William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Securities Crises*, 18 Isr. Y.B. Hum. Rts. 11, 11 (1988).

277. This arguably confirms the wisdom of Vincent Blasi's recommendation. *See* Blasi, *supra* note 256 at 454-56 (strict First Amendment rules created in peace-time will keep First Amendment protections intact in times of crises).

278. *See* HIRSCH, *supra* note 140, at 77-78. Hirsch explains:

> [R]ecognition of the universality of bounded rationality suggests the possibility of *extending* paternalism: Lawmakers may, where necessary, *self*-paternalize, protecting themselves from their own perceived irrationality, just as they do for others. . . Lawmakers, creating substantive rules to govern others and *process rules* to govern themselves, can [protect themselves from their own irrationality].

Id.

to permit "rational" consumer choice. Nor are informational strategies designed to counter the effects of commercial speech an adequate response. While current behavioral treatments of commercial speech have focused on how tort liability might be altered to respond to the preference-distorting effects of commercial speech involving such products, this section suggests that behavioral analysis counsels a more speech-restrictive approach than the one toward which the Court is moving.[279]

A. The Development of Commercial Speech Doctrine

Commercial speech was initially entitled to no constitutional protection at all.[280] In *Valentine v. Chrestensen*,[281] the Court held that the First Amendment imposed no "restraint on government as respects purely commercial advertising."[282] But in 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[283] the Court reversed its longstanding rule and held that commercial speech was entitled to at least intermediate protection under the First Amendment.[284] The speech at issue was a regulation restricting pharmacists from distributing information about prescription drug prices.[285] Writing for the Court, Justice Blackmun argued that even "speech which does no more than propose a commercial transaction" is not so removed from the exposition of ideas as to fall outside the scope of the First Amendment.[286]

Justice Blackmun advanced two constitutional values that justified protecting commercial speech.[287] First, both individuals and society at large have "a strong interest in the free flow of commercial information."[288] As he stated in a subsequent case, "Advertising, though entirely commercial, may often carry information of import to significant issues of the day."[289] Thus, protecting commercial speech safeguards the essential role that "the free flow of

279. Law and economics itself does not necessarily disagree with this prescription. *See, e.g.*, POSNER, *supra* note 141, at 86 (arguing for limitations on free speech in advertising and defamation cases where truth of speech cannot be identified through market competition). A behavioral analysis approach offers its own perspective, however, focusing on consumer behavior rather than overall market phenomena.

280. *See* MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 14-62 (2001) (offering history of development of commercial speech doctrine and arguing for more permissive approach to regulation of commercial speech).

281. 316 U.S. 52 (1942), *overruled by* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

282. *Valentine*, 316 U.S. at 54; *see also* Breard v. Alexandria, 341 U.S. 622, 637-38 (1951) (upholding restriction on door-to-door solicitation of magazine subscriptions).

283. 425 U.S. 748 (1976).

284. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

285. *Id.* at 752.

286. *Id.* at 763, 772 n.24 (citation omitted).

287. *See* Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 8 (2000) (discussing Blackmun's holding in *Virginia State Board of Pharmacy*).

288. *Va. State Bd. of Pharmacy*, 425 U.S. at 763-64.

289. Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977).

information" plays in a democratic society.[290] Second, commercial speech serves to ensure "the proper allocation of resources in a free enterprise system."[291] "'The efficient allocation of resources depends upon informed consumer choices,' which in turn requires the free circulation of commercial information."[292]

The Court took a sternly anti-paternalistic approach, arguing that the challenged law "rest[ed] in large measure on the advantages of [citizens'] being kept in ignorance.[293] In contrast to paternalism, it proposed a model based on a model of the rational consumer,[294] suggesting that one may "assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[295] Thus, from its inception, the Court's new commercial speech doctrine assumed that the dangers of commercial speech would be significantly counterbalanced by consumers' ability to make rational decisions if exposed to *more* commercial speech. But the Court did enter a small caveat, suggesting that there should be no constitutional problem with regulations that dealt with "deceptive or misleading" commercial speech.[296]

The modern test for commercial speech was set out by the Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[297] There, the Court broke the test into two parts. If the speech in question is unlawful or misleading, it is entitled to no special constitutional protection at all.[298] If it is lawful and non-misleading, the Court applies a three-pronged test, asking: (1) whether the government interest in regulation is "substantial"; (2) whether the regulation "directly" advances the governmental interest; and (3) whether the regulation is tailored to the government interest.[299] The regulation need only offer a "reasonable" fit between the government's ends and its chosen means.[300] Thus, the *Central Hudson* test is "essentially a watered-down version of the compelling interest test."[301]

290. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

291. *Id*.

292. Post, *supra* note 287, at 8-9 (quoting Friedman v. Rogers, 440 U.S. 1, 9 (1979)).

293. *Va. State Bd. of Pharmacy*, 425 U.S. at 769. *But see* Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1238 (1988) (arguing that price advertising ban in *Virginia State Board of Pharmacy* was not paternalistic).

294. *See, e.g.*, Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addictions, and the Implications for Commercial Speech*, 25 SEATTLE U.L. REV. 377, 383 (2001) ("[T]he Supreme Court's commercial speech jurisprudence reflects the assumption that the rational consumer, as the Court conceives of 'rational,' is the norm.").

295. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

296. *Id.* at 771.

297. 447 U.S. 557 (1980).

298. *Cent. Hudson*, 447 U.S. at 566.

299. *Id*.

300. Bd. of Trustees of SUNY v. Fox, 492 U.S. 469, 480 (1989).

301. FARBER, *supra* note 23, at 157.

In recent years, a number of members of the Court have advocated tightening the constitutional scrutiny of commercial speech, even where it deals with high-risk products such as liquor and tobacco. In *44 Liquormart, Inc. v. Rhode Island,*[302] for example, the Court invalidated a state statute that prohibited advertising the price of alcoholic beverages, save for price tags or signs not visible from the street. The Court's plurality opinion agreed that the state may "protect consumers from misleading, deceptive, or aggressive sales practices,"[303] but may not enact blanket bans on the dissemination of truthful and non-misleading commercial speech.[304] Despite its acknowledgement that the state had a substantial interest in promoting temperance, and that the regulation might achieve that interest by artificially maintaining high prices by its ban on price advertising, the Court rejected that speculative argument "when the State takes aim at accurate commercial information for paternalistic ends."[305] Other cases have also displayed an increasingly speech-permissive approach to commercial speech.[306] In short, while the Court has maintained the *Central Hudson* test, its application of that test has been increasingly strict.

While he has not commanded a majority for his view, Justice Thomas has been a forceful advocate for this permissive view of commercial speech. He has argued that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible."[307] Calling to mind the debate in clear and present danger doctrine over who should be entrusted with decision-making responsibility, Justice Thomas criticized *Central Hudson*'s "substantial governmental interest" test, asserting that the requirement "apparently requires judges to delineate those situations in which citizens cannot be trusted with information, and invites judges to decide whether they themselves think that consumption of a product is harmful enough that it *should* be discouraged."[308] The test, he suggested, "appl[ies] [the] contradictory premises" that "informed adults are the best judges of their own interests, and that they are not."[309] In *44 Liquormart*, he argued that "there is no philosophical or historical basis for asserting that commercial speech is of lower value than non-commercial

302. 517 U.S. 484 (1996).

303. *44 Liquormart*, 517 U.S. at 501.

304. *Id.*

305. *Id.* at 507.

306. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 561 (2001) (invalidating advertising regulations governing outdoor advertising of tobacco and certain point-of-sale advertising within 1,000 feet of public playgrounds or elementary or secondary schools, while permitting regulations barring use of self-service tobacco displays and requiring that tobacco products be placed out of consumers' reach); Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173, 190-95 (1999) (invalidating federal law prohibiting radio and television broadcasters from carrying advertisements about privately operated commercial casino gambling); Rubin v. Coors Brewing Co., 514 U.S. 476, 488-89 (1995) (invalidating federal law prohibiting beer labels from displaying alcohol content on grounds that overall regulatory scheme was irrational).

307. *44 Liquormart*, 517 U.S. at 526 (Thomas, J., concurring) (citation omitted).

308. *Id.* at 527-28.

309. *Id.*

speech."[310] In Lorillard Tobacco, a recent case involving regulations on tobacco advertising that purported to be aimed at preventing youth smoking, Justice Thomas went further, stating "I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech."[311] Thus, any asserted government interest "in keeping people ignorant by suppressing expression is per se illegitimate and can no more justify regulation of commercial speech than it can justify regulation of non-commercial speech."[312]

Thus, commercial speech doctrine has moved progressively from an approach permissive of regulation to one that is increasingly restrictive. The Court has advanced an autonomy-based view of commercial speech that holds that individuals are perfectly capable of rationally receiving and evaluating commercial information, and that nothing will prevent them from looking after their own best interests. To be sure, the *Central Hudson* test allows regulation of "misleading" speech.[313] But the Court's application of that restriction has, with one exception,[314] remained in disuse.[315]

B. Cognitive Illusions and Commercial Speech

Behavioral analysis calls into question the rationality assumption that has driven the Court's recent commercial speech jurisprudence. In particular, it offers a countering perspective to Justice Thomas's forceful advocacy of that approach. In a series of articles dealing with the phenomenon of "market manipulation," Professors Hanson and Kysar have presented voluminous evidence of the effects of cognitive distortions on consumer preference, many of them quite intentionally evoked by sophisticated marketing techniques.[316]

310. *Id.* at 522.

311. *Lorillard*, 533 U.S. at 575 (Thomas, J. concurring) (citation omitted).

312. *Id.* (citation omitted).

313. *Cent. Hudson*, 447 U.S. at 564, 566.

314. *See Friedman*, 440 U.S. at 15 (upholding Texas statute prohibiting practice of optometry under "any trade name" as permissible restriction of misleading advertising, since trade names could be used to mislead public).

315. *See, e.g.*, Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation, 512 U.S. 136, 144-49 (1994) (rejecting claim that attorney's accurate description of herself as a certified public accountant is inherently misleading); Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 102-06 (1990) (rejecting argument that description of lawyers as "certified" or "specialists" in particular fields was "inherently misleading"); *Bates*, 433 U.S. at 372-75 (rejecting claim that price advertising of routine legal services was sufficiently "inherently misleading" to justify prohibition).

316. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259, 266-381 (2000) [hereinafter Hanson & Kysar, *Response*] (analyzing debate regarding policy implications of market manipulation by tobacco companies and responding to criticism of theory of imposing enterprise liability on such companies); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1553-71 (1999) [hereinafter Hanson & Kysar, *Evidence*] (arguing for several features of enterprise liability to prevent market manipulation by tobacco companies); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 722-743 (1999) [hereinafter Hanson & Kysar, *Problem*] (identifying problem of market manipulation by manufacturers who, conscious or not, capitalize on consumers' cognitive biases for own economic gain). *But see* James A. Henderson & Jeffrey J.

Although their articles are in the service of an argument for enterprise liability,[317] they also yield insights for the First Amendment's assumptions about consumers' reception of commercial speech.

I will not rehearse here the substantial literature on cognitive illusions surveyed in Section II, and from which Hanson and Kysar draw a substantial part of their argument, though it is worth noting that their own survey identifies still further aspects of behavioral research that may suggest problems for the model of rational decision-making.[318] The upshot of this discussion, however, is that, once the judgment-distorting effects of common behavioral traits are acknowledged, "it becomes inevitable that manufacturers will exploit these . . . effects in a way that maximizes manufacturer profits."[319] A key insight of behavioral analysis for the consumer market, they therefore suggest, is that "individuals are vulnerable to manipulation by those in a position to influence the decisionmaking context."[320]

Thus, scholars who argue against evidence of consumer underestimation of risks by objecting that behavioral studies manipulated preferences through the framing effect fail to see that "*manufacturers* can take advantage of such manipulability."[321] For example, manufacturers may emphasize the ways in which negative outcomes from the use of potentially hazardous products are avoidable, even though a substantial number of accidents may be inevitable, taking advantage of individuals' optimistic bias.[322] And the availability bias, which played such an important role in analyzing the clear and present danger test, plays a part here too: manufacturers may "maximiz[e] the frequency and intensity of advertisements," for example.[323] In sum, "[m]anufacturers will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits."[324]

Rachlinski, *Product-Related Risk and Cognitive Biases: The Shortcomings of Enterprise Liability*, 6 ROGER WILLIAMS U. L. REV. 213, 218 (2000) (criticizing Hanson and Kysar based on their failure to qualitatively assess problems of market manipulation, to identify current legal mechanisms available to protect consumers from manipulation, and to recognize that while some cognitive processes cause consumers to underestimate risk, other processes lead consumers to overestimate their risk from particular products).

317. *See, e.g.*, Hanson & Kysar, *Response, supra* note 316, at 266-83 (outlining argument for enterprise liability).

318. *See generally* Hanson & Kysar, *Problem*, *supra* note 316, at 643-93 (questioning basic principle of utility theory and suggesting other influences affecting individual choice).

319. *Id.* at 724.

320. Hanson & Kysar, *Evidence*, *supra* note 316, at 1426.

321. Hanson & Kysar, *Problem*, *supra* note 316 at 725 (criticizing W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK (1992)).

322. *Id.* at 729-31.

323. *Id.* at 731; Paul H. Rubin, *How Humans Make Political Decisions*, 41 JURIMETRICS J. 337, 343 (2001); *see also* Sarah C. Haan, Note, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281, 1300 (2000) (highlighting persuasive effects humor plays in advertising); Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895, 901 (1994) (summarizing dual purpose of advertising as serving to effectuate persuasive communication and serving to inform customers of product safety).

324. Hanson and Kysar, *Problem, supra* note 316, at 743. *See generally* Note, *The Elephant in the*

Hanson and Kysar provide significant evidence suggesting that their thesis is in fact borne out by research into manufacturers' conduct.[325] Product manufacturers fuel an annual market of $8 billion a year for the study of consumer behavior,[326] drawing on a wide range of sophisticated psychological research,[327] including the behavioral analysis research that is at the heart of this Article.[328] For example, food product manufacturers take advantage of framing effects by labeling their product as 75 percent fat-free rather than 25 percent fat, a description of precisely the same product that nonetheless increases food sales.[329] Drug manufacturers pitch their products with general reassurances that products are safe, creating positive affective responses that downplay the vigilance individual consumers might want to pay to drug advertisements.[330] Notwithstanding the informational justification for commercial speech, drug promotion material advertised to physicians rarely actually contains content of educational value.[331] Other advertisements are pitched specifically to consumers' fears, and thus capitalize on the risk-analysis problems discussed above.[332]

The nature of some products provides additional reasons to think consumers will not be capable of perfectly rational decision-making. Visceral reactions caused by such factors as drug addiction will "cause people to behave contrary to their own long-term self-interest, often with full awareness that they are doing so."[333] It is hardly surprising that marketers of products such as cigarettes have long been successful at using a host of preference-manipulation techniques.[334] A simple example of the framing effect's use in cigarette marketing is the marketing of so-called "light" cigarettes.[335] The marketing of

Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity, 116 Harv. L. Rev. 1161 (2003) (examining government's role in regulating nutrition in light of private sector advertising and behavioral eating suggestion).

325. Hanson and Kysar, *Evidence, supra* note 316, at 1439-62.

326. *Id.* at 1429.

327. *See id.* at 1435-36 (noting some consumer behavior research derives from operant conditioning, cognitive learning theory, cultural anthropology, and socialization theory).

328. *See id.* at 1439 & n.77 (giving example of textbook on consumer behavior that contained section on heuristics).

329. *Id.* at 1451.

330. Hanson & Kysar, *Evidence*, *supra* note 316, at 1456.

331. *Id.* at 1458.

332. *See id.* at 1463 (discussing marketing of firearms that emphasizes women's fears with respect to "personal protection and home defense") (citation omitted).

333. Hanson & Kysar, *Problem, supra* note 316, at 683 (citing George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 J. ORG. BEHAV. & HUM. DECISION PROCESSES 272, 289 (1996)).

334. *See, e.g.*, Daniel Romer & Patrick Jamieson, *Advertising, Smoker Imagery, and the Diffusion of Smoking Behavior* (finding that dramatic decline in risk perception that characterizes later adolescent period is result of widespread diffusion of favorable images of smoking and positive feelings about the experience), *in* SMOKING: RISK, PERCEPTION, & POLICY 127, 127-28 (Paul Slovic ed., 2001); John Slade, *Marketing Policies* (discussing tobacco product advertising and marketing practices), *in* REGULATING TOBACCO 72, 72-95 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

335. Hanson & Kysar, *Evidence, supra* note 316, at 1507.

smoking also benefits from the availability heuristic, which teaches that people will systematically underestimate the risk of products whose negative outcomes are routine and rarely subject to vivid media coverage.[336]

C. The Implications of Cognitive Biases for Commercial Speech Jurisprudence

The research summarized above suggests not only that a panoply of cognitive traits may distort consumer preferences and their ability to carefully evaluate marketing information, but that manufacturers have devoted massive resources to taking advantage of this very fact. This research has significant implications for the governing justifications for a speech-permissive approach to commercial speech.

Since *Virginia State Board of Pharmacy*, the Supreme Court's speech-protective approach to commercial speech has been founded on the theory that consumers are capable of rational choices about product purchases.[337] Thus, informed consumer choices require "the free flow of commercial information."[338] As Hanson and Kysar note, however, "it is naive to presume that consumers can rationally process all the information necessary to optimize their purchases."[339] Manufacturers are well aware of the means that are most effective in affecting people's ability to make meaningful "informed consumer choices," and do their best to manipulate these choices through a host of judgment-distorting, preference-framing techniques.

Furthermore, the very description of "commercial information" is dubious. A great deal of commercial speech is not designed to convey information, but to evoke affective responses. "Lifestyle" advertising sends a message of sorts, by signaling that people who want to fit a particular image—young, hip, virile, affluent, and so forth—should use a particular product, but that message is more emotional than informational.[340] Indeed, marketing insights of which advertisers are well aware suggest a trend *away* from informational advertising. Advertisers "believe that the ease with which an advertisement can be mentally processed is key to its persuasiveness," and thus that "an advertisement should minimize information about product attributes."[341]

One response to the distorting effects of commercial speech is that counter-information will serve to negate those effects; hence Justice Blackmun's view that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[342] That view, too, is of questionable

336. *Id.* at 1514.

337. *See* Haan, *supra* note 323, at 1284 (noting that "the quarter century since *Virginia Pharmacy* made the rational consumer theory part of First Amendment doctrine").

338. *Va. State Bd. of Pharmacy*, 425 U.S. at 763-65.

339. Hanson & Kysar, *Evidence, supra* note 316, at 1454.

340. *See Va. State Bd. of Pharmacy*, 425 U.S. at 774-75 (Burger, J. concurring) (discussing how advertising may prey upon a public susceptible to alluring appeals and misleading promises).

341. Haan, *supra* note 323, at 1297.

342. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

accuracy in the arena of commercial speech. First of all, manufacturers may actually coordinate their efforts, and thus reduce any likelihood that counterspeech from competitor B will balance the distorting effects of manufacturer A's marketing.[343] Furthermore, even absent coordination, there are strong disincentives for manufacturers to advertise products' safety, since that approach tends to backfire by evoking the potential of the product to cause harm. Thus, safety-oriented advertising may improve a manufacturer's brand as against competitors, while reducing demand for the product as a whole.[344]

Nor is it a sufficient response to argue that full disclosure of potential product risks will cure consumers of irrational decision-making. As Jeremy Fraiberg and Michael Trebilcock note, "information failures are not always easily remedied merely through the provision of additional information."[345] Both the volume of typical information disclosures, such as those provided with drug advertisements, and their technical nature make it difficult for the consumer either to absorb the information or to select and discriminate among disclosures, increasing the likelihood they will be ignored altogether. Information disclosure is thus a poor safeguard against cognitive bias in consumer decision-making.[346]

Finally, as noted above, debiasing strategies are often ineffective. Even in the best circumstances, they may be either costly or ineffective or both. In other circumstances, the variability of the environment or the lack of knowledge about actual outcomes may make debiasing impossible.[347] Consequently, faith in the powers of commercial counter-speech, including government and private efforts to balance advertisers' speech with health and safety-oriented counter-advertising campaigns, may be unavailing.[348]

Thus, behavioral analysis raises serious concerns about the prevailing

343. *See* Hanson & Kysar, *Response*, *supra* note 316, at 363 (recounting examples of cases of industry coordination to manipulate consumer preferences and downplay the concerns raised by risky products).

344. *See id.* at 337-38 (discussing disincentives to advertising a product's safety).

345. Jeremy D. Fraiberg & Michael J. Trebilcock, *Risk Regulation: Technocratic and Democratic Tools for Regulatory Reform*, 43 MCGILL L.J. 835, 839 (1998).

346. *See* Baruch Fischhoff, *Need to Know: Analytical and Psychological Criteria*, 6 ROGER WILLIAMS U. L. REV. 55, 58 (2000) ("[S]aying everything may have little more practical value than saying nothing. Unless the list [of disclosures] is fortuitously short, such a 'core dump' violates the norms of communication by failing to focus on what the audience most needs to know and can process in a limited time."); Fraiberg & Trebilcock, *supra* note 345, at 839 ("[E]ven assuming that perfect information were made available to all consumers, the time, energy and skill required to process such information entail additional costs."); Henderson & Rachlinski, *supra* note 316, at 227 ("[C]ognitive psychology suggests that manufacturers can remain immune from liability by placing warnings on products while simultaneously undermining the effect of these warnings."); *see also* Caroline E. Mayer, *Why Won't We Read the Manual?; Stupid Question, Perhaps, but Manufacturers Have Heard Stupider*, WASH. POST, May 26, 2002, at H1 (noting conclusion of consumer experts that customers often fail to read product manuals).

347. Hanson & Kysar, *Problem*, *supra* note 316, at 692.

348. *See, e.g.*, Romer & Jamieson, *supra* note 334, at 154 (citing research that "anticigarette advertising ha[s] not been successful in countering the favorable images of smoking cultivated by cigarette advertising").

justifications for the Supreme Court's speech-permissive approach to commercial speech.[349] These concerns should not be overstated: particularly in an increasingly media-savvy society, there are grounds to believe that manufacturers' efforts will not always be successful.[350] Nevertheless, the pervasiveness of advertisers' efforts to shape or create consumer preferences, and their expertise in the manipulation of cognitive shortcomings to achieve these goals, suggests there may be reasons to treat government decisions to regulate this speech with far greater deference than is accorded when dealing with other varieties of First Amendment activity.

These concerns were given an explicit airing by the Supreme Court in its recent opinion in *Thompson v. Western States Medical Center*.[351] This case presented a challenge to FDA enforcement of a provision of the Food and Drug Administration Modernization Act of 1997,[352] which exempted compounded drugs from FDA approval requirements if the drug providers refrained from advertising or promoting certain compounded drugs.[353] Writing for the Court, Justice O'Connor scoffed at the notion that the government could restrict the advertising on the basis of "an interest in prohibiting the sale of compounded drugs to 'patients who may not clearly need them.'"[354] Although the Court concluded that this justification had not been advanced by the government and so could not serve as a basis for upholding the constitutionality of the provision, it argued that "a fear that advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway . . . would fail to justify the restrictions."[355] Quoting *Virginia Board of Pharmacy*, the Court rejected the proposition that "the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making

349. Indeed, some lower court decisions have demonstrated a decidedly different approach to issues of commercial or market-oriented speech than that taken by the Supreme Court. *See* Lorillard Tobacco Co. v. Reilly, 84 F. Supp. 2d 180, 187 (D. Mass.) (noting that tobacco advertising not only influences consumers' brand preferences but also plays role in amount of smoking), *aff'd in part, rev'd in part sub nom.*, Consol. Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2000), *aff'd in part, rev'd in part sub nom.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); *In re* Number Nine Visual Tech. Corp. Secs. Litig., 51 F. Supp. 2d 1, 20 (D. Mass. 1999) ("[I]t is hardly surprising that markets sometimes fail to exhibit perfectly wealth-maximizing behavior, given the plethora of evidence from cognitive psychologists and decision theorists suggesting that humans frequently behave in nonrational ways, and that these 'cognitive biases' are largely incapable of being unlearned."); Perez v. Wyeth Lab., Inc., 734 A.2d 1245, 1247 (N.J. 1999) (stating that when "mass marketing of prescription drugs seeks to influence a patient's choice of a drug, a pharmaceutical manufacturer that makes direct claims to consumers for the efficacy of its product should not be unqualifiedly relieved of a duty to provide proper warnings of the dangers or side effects of the product").

350. *See, e.g.*, Henderson & Rachlinski, *supra* note 316, at 230 (noting "several good reasons to suppose that manipulating consumer risk perceptions is extremely difficult, despite the influence cognitive biases have on these estimates").

351. 535 U.S.357 (2002).

352. 21 U.S.C. § 353a (2000).

353. *Thompson*, 535 U.S. at 360.

354. *Id.* at 373 (quoting *id.* at 379 (Breyer, J., dissenting)).

355. *Id*. at 358.

bad decisions with the information."[356]

If this section accurately describes the real-world context in which advertising for consumer goods operates, however, the Court was far too dismissive of such a justification for regulation of commercial speech. As Justice Breyer argued in dissent, "There is considerable evidence that consumer oriented advertising will create strong consumer-driven demand for a particular drug."[357] And advertisers' efforts to boost this demand, which run to expenditures of over $1.3 billion annually,[358] may lead to a commensurate increase in prescriptions, even of unnecessary drugs.[359] "[T]hose individual risks added together can significantly affect the public health. At least, the FDA and Congress could reasonably reach that conclusion."[360]

Thus, there are significant reasons to conclude that the Court's speech-protective approach to commercial speech is flawed, given the empirical and psychological research showing the preference-altering effects of that speech. There may be other justifications for this approach. For example, it may be too difficult to distinguish between commercial and non-commercial speech, or between different kinds of commercial speech that raise different levels of concern about preference-distorting effects.[361] Additionally, one may mount a normative challenge to any approach, however empirically justified, that permits government to actively shape consumer preferences.[362] Certainly I find the possibility of an increased skepticism about commercial speech and its effects contrary to my own preferences and intuitions, and worry about its spillover effects to other areas of First Amendment doctrine, such as the regulation of hate speech and pornography.[363] But the standard justification for permitting widely unregulated commercial speech—the assumption that consumers act rationally—is wanting.

One solution to this problem (if it has been properly identified as such) is to put teeth into the "misleading speech" prong of commercial speech doctrine, and apply that test's deprivation of full constitutional protection for misleading speech with more vigor than the courts have displayed thus far. That solution raises concerns of its own, since it leaves a highly subjective justification for

356. *Id.* at 359 (citing *Virginia Bd. of Pharmacy*, 425 U.S. at 770).

357. *Thompson*, 535 U.S. at 383 (Breyer, J., dissenting).

358. *Id.*

359. *Id.*

360. *Id.* at 384.

361. *See, e.g.*, Post, *supra* note 287, at 5-7 (discussing definitional problems in area of commercial speech, and distinguishing between different kinds of commercial communications).

362. *See, e.g.*, Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 93 (2002) (asking, "To what extent should the government be able to restrict truthful advertising in order to manipulate behavior, or does our right to be left alone limit such power?").

363. *See* Horwitz, *supra* note 21, at 452 (arguing against regulation of both); *see also* Redish, *supra* note 280, at 44 ("[T]he deliberation rationale is simultaneously over- and under-inclusive as an explanation for a rigid dichotomy between commercial and non-commercial speech.").

speech regulation in the hands of public officials.[364] But leaving the ghost of a "misleading speech" exception in place is not an answer either, but an evasion. The courts have been reluctant to probe the limits of the "false and misleading speech" exception, particularly the possibility of regulating misleading but otherwise true commercial speech.[365] But it is precisely this variety of speech—*misleading* commercial speech, not false advertising—that should raise the greatest concerns for prospective regulators. As commercial speech has become less a vehicle for the direct transmission of information, and more a vehicle for the transmission of images, symbols, and the sending of signals about the "lifestyle" to which a product is supposed to correspond, more commercial speech has become broadly "misleading" even as it becomes more difficult to judge the truth or falsity of that speech.[366] *If* the regulation of commercial speech is to serve the function of guarding against the significant effects that advertising can have on consumers, then a bolder hand should be taken against misleading speech, and a broader understanding of that term should be encouraged.

At present, the trend is decidedly away from a vigorous governmental or judicial enforcement of regulations barring false or misleading speech.[367] In response to cases such as *Thompson v. Western States Medical Center*, for example, the Food and Drug Administration recently issued a notice and request for comments asking whether "its regulations, guidances, policies, and practices continue to comply with the governing First Amendment case law."[368] Even this foreshadowing of future government reticence to pursue regulation of false and misleading speech, however, leaves room for hope that future regulatory approaches to government restrictions on false and misleading commercial speech might learn from behavioral analysis scholarship: The comment also asks such questions as whether the FDA could "sustain a position that certain promotional speech about drugs is inherently misleading," whether there is a basis for distinguishing between speech aimed at consumers and at "learned

364. *See, e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1219 (1983). Shiffrin observed,

> Misleading speech is a half-breed, true in form and even in effect for many, but false in the impressions it creates for others. All language misleads some people to some extent. How many are too many and how much is too much are questions of policy and degree. The distinction between the true and the misleading is normative.

Id.

365. *See* Piety, *supra* note 294, at 391 ("[T]he limits of the exception for regulation of advertising that is misleading have not been tested nor pushed much thus far.").

366. *See id.* (discussing difficulty of testing advertising for its "truth").

367. *But see* Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002) (rejecting Nike's argument that it was insulated by First Amendment from liability for allegedly false and misleading statements made in the course of defending its labor practices). Suffice it to say that my arguments here do not support this ill-considered ruling, particularly given that the public statements made by Nike in this case hardly fell within the categories of commercial speech that I argue above are most likely to give rise to cognitive illusions.

368. *See, e.g.*, *Request for Comment on First Amendment Issues*, 67 Fed. Reg. 34,942, 34,942 (May 16, 2002).

intermediaries," whether the FDA's position is "consistent with empirical research on the effects of [drug-related] advertisements, and whether there is "any evidence as to which types of warnings consumers follow or disregard."[369] If these questions are more than a fig-leaf for an eventual clawback from current regulatory approaches, they ought to be given a serious airing.

A behavioral analysis of commercial speech also raises interesting issues about the other theme touched on in this Article: the question of institutional choice—who should be assigned the responsibility for assessing the risk of harm from speech. Commercial speech suggests a different institutional assignment outcome than that suggested by illegal advocacy. Judges, juries, and legislators all received information about the terrorist attacks on September 11, the Red Scare, and the Cold War in much the same way, and all suffered from the same biases. Assigning judges with primary responsibility for the risk analysis implicit in the clear and present danger test was a sensible second-best outcome, given the likelihood that judges can at least apply formalist tests in a more dependable manner than juries.

But the judgment-distorting effects of commercial speech are not exogenous to the context in which they are presented. The preference-distorting effects of commercial speech depend on its frequency and pervasiveness, its elicitation of affective responses such as craving and addiction, and its targeting to susceptible consumers in niche markets. None of those aspects are present in the clinical context of regulatory consideration of the same speech.[370] Thus, leaving aside potential public choice concerns or questions concerning regulators' own cognitive shortcomings,[371] it may be entirely appropriate to leave the issue to legislators and regulators.[372] Behavioral analysis may thus lead to divergent institutional assignments in different First Amendment contexts.[373]

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369. *Id.* at 34,943-44.

370. *See* Sunstein, *supra* note 29, at 146 ("One of the chief advantages of bureaucracy, at least in principle, is that it can ensure that judgments will be based on facts rather than intuitions, in such a way as to reduce the problems introduced by biases and heuristics.").

371. *See, e.g.*, Stephen J. Choi and Adam J. Pritchard, *Behavioral Economics and the SEC*, University of Michigan, John M. Olin Center for Law & Economics, Working Paper No. 03-002, March 20, 2003, *available at* http://www.law.umich.edu/centersandprograms/olin/papers.htm (discussing potential behavioral shortcomings of Securities and Exchange Commission).

372. *See Thompson*, 535 U.S. at 389 (Breyer, J., dissenting) ("[A]n overly rigid 'commercial speech' doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections."). Indeed, the same argument has been made on explicitly political grounds. For example, Shiffrin argues,

> Although no one supposes the FTC is infallible, we have significantly less doubt about government's capacity to define truth when it moves against a deceptive advertiser who makes an allegedly false statement about its own or another's product, than we do when the government moves against a source that has no profit motive in the sale of a product.

Shiffrin, *supra* note 364, at 1265.

373. *See Thompson*, 535 U.S. at 389 (Breyer, J., dissenting) ("In my view, the Constitution demands a more lenient application, an application that reflects the need for distinctions among contexts, forms of regulation, and forms of speech, and which, in particular, clearly distinguishes between 'commercial speech' and other forms of speech demanding stricter constitutional

V. OBJECTIONS, IMPLICATIONS, AND FUTURE DIRECTIONS

This Article has presented an admittedly tentative account of First Amendment law as seen through the lens of behavioral analysis. It suggests that there is something lacking in the standard model of individual actors as capable of rational thought and able to engage in risk analysis and other decision-making activities in ways that respond to and suit their own best interests. That model is pervasive throughout a great deal of law and legal scholarship, and it is present too in First Amendment doctrine. But it is a flawed and incomplete model, one that does not properly account for the real world of decision making, in which individuals are subject to a wide array of cognitive practices and tics that may distort their judgment and lead to faulty decisions.

Under this model, we must ask two questions. First, how well do the tests that have developed in First Amendment doctrine account for and guard against these predictable cognitive illusions? Second, in any given area, which institutional actor should be assigned the ultimate decision-making role? As this Article suggests, the answers to these questions sometimes reinforce, and sometimes counsel against, the jurisprudence as it stands; and they do not always recommend the assignment of the decision-making role to the same institutional actor.

Thus, while the evolution of the clear and present danger test can be seen as a story about the slow erection of an effective, if second-best, safeguard against the likelihood that the availability heuristic and other traits will distort risk analysis, the law of commercial speech has evolved away from an accurate model of the individual's capacity to sort through the factual claims, emotional appeals, and other snares of commercial speech, and toward an inaccurate picture of the "rational" consumer. And while assigning the decision-making role to judges, rather than assigning that role primarily to jurors or legislators, may be a sensible approach to the clear and present danger test, it is not necessarily the best approach in commercial speech, where there are fewer concerns about the judgment-distorting effects of commercial speech when it is viewed clinically by administrative agencies and legislators.

That behavioral analysis suggests a particularistic, context-rich approach to First Amendment doctrine does not present a sacrifice of certainty; First Amendment doctrine is already a hodgepodge of tests and approaches. Behavioral analysis may bring—to use a by-now fraught term—greater rationality to First Amendment law.

What potential objections might be posed to such an approach? One such set of objections is the general criticisms levied against behavioral analysis, and particularly its application to the law.[374] For example, some critics have asked

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374. They are canvassed, and a response is offered, in Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000), on which this paragraph draws heavily. *See also* Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 L. & SOC'Y REV. 973, 985 (2000) (arguing that legal scholars cannot simply use behavioral science in place of standard

whether behavioral analysis is generally applicable outside the laboratory environment in which most such studies are carried out.[375] That concern can be answered with some certainty: attempts to apply behavioral analysis to various fields, including law, have produced strong confirmatory data.[376]

Critics have also suggested that, because behavioral analysis has revealed such a wide range of heuristics and biases, sometimes conflicting ones, without a clear set of guidelines for their application, it is likely to lead only to "conflicting signals" and indeterminate predictions.[377] That criticism is not entirely fair. First, behavioral analysis is complex because human decisions are complex. As long as these phenomena are present, legal scholars must pay attention to them: "ignoring complexity leads only to overly simplistic analysis."[378] Second, just as it has always been too simplistic to argue in the field of statutory interpretation that the existence of opposing interpretive canons renders their use entirely inconsistent and unpredictable,[379] so this criticism of the profusion of biases and

microeconomics). For a recent, sustained criticism of behavioral analysis of law, see Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002) [hereinafter Mitchell, *Taking Behavioralism Seriously*]. Although Mitchell raises a number of serious criticisms of behavioral analysis of law, he also emphasizes that his "criticisms . . . should not be understood as a rejection of the psychological analysis of law. This article arises from a strong belief in the utility of psychological and other empirical research for legal analysis . . . ." *Id.* at 1937. Rather, his criticisms are directed at "qualify[ing] legal decision theory rather than reject[ing] it and . . . point[ing] out areas in need of further investigation and consideration." *Id.* at 1937-38; *see also* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, *passim* (2002) (arguing that review of evidence on situational and empirical variability in rational behavior reveals that behavioral law and economics' assumption of uniformly imperfect rationality is no more plausible than law and economics' assumption of uniformly perfect rationality).

375. *See, e.g.*, Eskridge & Ferejohn, *supra* note 258, at 632 (stating that many biases and heuristics remain untested in real-world government settings); Mitchell, *Taking Behavioralism Seriously*, *supra* note 374, at 1975 (noting that "psychological realism" of this research must still be assessed to determine whether processes operative in these tasks are likely to be operative on other experimental and real world tasks); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 490 (2002) ("Psychological papers for the most part reflect outcomes of controlled studies in laboratory settings, and there is no way of knowing how these results will translate into the real world of agency decisionmaking.").

376. *See* Eskridge & Ferejohn, *supra* note 258, at 743 (comparing judge and jury punitive damage awards to experimental data).

377. *See, e.g.*, Farber, *supra* note 128, at 301 (discussing normative puzzle); Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717 (2000) (concluding that behavioral decision theory is more helpful in illustrating limitations of narrow conception of human behavior in legal analysis than at creating positive or normative theory of law). Eskridge and Ferejohn describe how "demonstrated cognitive biases have grown like weeds in a vacant lot. As documented biases have multiplied, it has become harder to reach conclusions from them. In any given institutional setting, there will be several potentially applicable—and potentially cross-cutting—biases." Eskridge & Ferejohn, *supra* note 258, at 633.

378. Rachlinski, *supra* note 374, at 748.

379. *See, e.g.*, Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Constructed*, 3 VAND. L. REV. 395, 401 (1950). For discussion with reference to the voluminous literature, see WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION, STATUTES AND THE CREATION OF PUBLIC POLICY 912-17 (3d ed.

heuristics is too shallow. As with the interpretive canons, the application of biases and heuristics "must depend upon context."[380] Different biases "can be classified into typologies of cognitive errors and social influences,"[381] and are likely to apply in different situations; thus, they should serve not as trumps, but as tools whose applicability and usefulness will vary according to circumstances. In any event, behavioral analysis is in its infancy, and is already well under way toward developing an overarching theory of human decision-making, guided by a few central principles.[382]

Another set of criticisms argues that, even if behavioral analysis is accurate, it may not be able to provide much insight or accuracy when applied to the law, whether descriptively or prescriptively. It is certainly fair to caution that behaviorally based solutions to legal problems may carry their own set of problems.[383] And in some cases, as this Article's treatment of the clear and present danger test suggests, behavioral analysis may offer no more than a new basis for justifying existing rules; the law may *already* have evolved in a way that is sensitive to behavioral concerns.[384] But this criticism is a far cry from a blanket refutation of behavioral analysis's value to law. Any approach that improves our understanding of actual decision-making processes should have some payoff for our understanding of the legal environment, even if it is a tentative and incomplete one.[385]

Finally, assuming that behavioral analysis has some merit, *and* that it has useful applications to the law, what of the topic of this Article? What benefits can be yielded by bringing a behavioral approach to the First Amendment? An important criticism that has been leveled against behavioral analysis of law generally,[386] and that could be employed against the thesis that behavioral analysis has something to offer First Amendment jurisprudence in particular, is that behavioral analysis fails to provide a basis for any normative conclusions

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380. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 370 (2000).

381. Seidenfeld, *supra* note 375, at 495.

382. Eskridge & Ferejohn, *supra* note 258, at 750-52.

383. *See* Thomas S. Ulen, *The Growing Pains of Behavioral Law and Economics*, 51 VAND. L. REV. 1747, 1756-57 (1998) (noting that in some circumstances, bench trials or rulemaking by administrative agencies may be preferable to entrusting decisions to juries, but noting that "public law solutions have their own problems," including the array of standard public choice problems that may lead to suboptimal decisions by agencies and legislators).

384. *See, e.g.*, Rachlinski, *supra* note 374, at 754 (stating that because decision makers develop procedures to reduce unwanted consequences of their members' cognitive limitations, it is likely that legal system has already incorporated cognitive illusions).

385. *See* Farber, *supra* note 128, at 303 ("[I]t may be more fruitful in the long run . . . to define the project [of behavioral analysis of law] as deepening the understanding of legal problems through using the models and methods of the social sciences.").

386. *See, e.g.*, Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1734 (1998) (arguing that insights from behavioral law have not been operationalized into effective forms of proposed regulation); Samuel Issacharoff, *The Difficult Path From Observation to Prescription*, 77 N.Y.U. L. REV. 36 (2002) [hereinafter Issacharoff, *Difficult Path*] (concluding that empiricism itself does not generate normative conclusions).

about legal rules. Behavioral analysis provides a deeper empirical understanding of human reasoning and decision making and illuminates the ways in which cognitive shortcomings leave us short of achieving our goals, but it provides no independent basis for determining what those goals ought to be.[387]

This criticism certainly holds substantial truth for a behavioral analysis of the First Amendment. In particular, behavioral analysis of the ways in which we analyze the risk of harm cannot provide a definitive answer to three questions: (1) What constitutes the "harm" against which speech regulations are directed? (2) What sorts of harm are subject to permissible regulation of speech, at whatever level of scrutiny? (3) What is the acceptable level of risk of harm, if any, at which it is permissible to regulate speech?

Behavioral analysis may, in fact, have practical contributions to make with respect to the first and third questions. For example, critical race theorists have drawn on the psychological literature to develop a deeper understanding of the harms that ensue from racist speech.[388] Understanding the psychological harms wreaked by racist speech may thus contribute significantly to a normative theory in favor of regulating that speech; conversely, a deeper understanding of the cognitive shortcomings that afflict the prosecutors, judges and juries charged with enforcing hate speech laws may provide ammunition *against* hate speech regulation. Similarly, behavioral analysis can offer some guidance to the level of risk of harm at which speech may be regulated, since it can suggest the ways in which decision makers will overshoot the goal under the influence of cognitive shortcomings such as the availability heuristic and its resultant biases.

Nonetheless, it is surely true that behavioral analysis ultimately helps us understand our normative positions better, but cannot tell us what those positions should be. If behavioral analysis tells us that hate speech causes harm, it cannot tell us whether that harm should be addressed by the law. If it tells us that decision makers are likely to perform a flawed probability analysis when determining what risk of harm speech presents, it cannot tell us what level of risk is acceptable—a strong risk of imminent harm, a weak risk of significant future harm, or some other formula. In asking the crucial "what" and "why" questions presented by the First Amendment—what is harmful speech, what speech may be regulated, and why—behavioral analysis can never replace the normative analysis that is the province of First Amendment theory.[389]

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387. *See, e.g.*, Issacharoff, *Difficult Path*, *supra* note 386, at 45 ("It may be that the empirical backbone of behavioral economics lends itself more fully to understanding where the law has arrived, as opposed to the distinct terrain of where the law *ought* to be that is the claimed mantle of theoretically-based approaches.").

388. *See, e.g.*, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT, chs. 2-4 (Mari J. Matsuda et al. eds., 1993) (considering victim's perspective on racist speech and regulation of and tort action for racist speech).

389. *See* Frederick Schauer, *Speech, Behaviour and the Interdependence of Fact and Value*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY, *supra* note 252, 43, 46 ("The claim about the harmlessness of speech is a staple of public libertarian rhetoric . . . . But the truth of this claim is dependent on the conception of harm it employs."); *id.* at 55 (arguing that because we still must decide what level of probability of harm resulting from speech justifies calling that speech the

But behavioral analysis can nevertheless enrich our understanding of these questions. Even if it cannot answer the ultimate normative questions that the First Amendment poses, it can still sharpen our understanding of the "what" questions—what constitutes harm, given our understanding of how people actually react to psychological stimuli. And behavioral analysis can help us a great deal with the question of *how*—given a normative conclusion about what speech is properly subject to restriction, and a view on what level of risk of harm will justify that restriction, *how* do we go about meeting these goals? As this Article has shown, behavioral analysis has a great deal to say about our tendency to overestimate the risk of harm when subjected to vivid examples, about how we might structure tests to ensure a more accurate risk analysis, and about which institution can best make the determination given the presence of cognitive illusions.[390] In an important, practical sense, then, behavioral analysis can supply an underpinning for at least one normative theory of constitutional law and its emanation in such judicially crafted constitutional rules as the *Brandenburg* test: that constitutional law must pre-commit us to prophylactic measures that will restrict our ability to engage in a short-sided and cognitively limited balancing of constitutional freedoms against overestimated possibilities of harm.[391]

In short, a reasonable response to the contention that behavioral analysis leaves important normative questions unanswered is that this flaw is far from fatal. Normative and empirical questions of law are *always* interdependent, even when this connection goes unacknowledged. Normative theories of law, including free speech, often float on a raft of assumptions about human nature and human decision making, without a grounding in a clearer empirical understanding of human judgment and institutional analysis. As such, they will either operate from erroneous suppositions or, even if correct in some sense, will be unlikely to supply workable solutions. Normative theories of the First Amendment can thus still learn from behavioral analysis, which may inform or correct those underlying assumptions. Too many practical questions remain unanswered to neglect the insights that behavioral analysis may supply.

This Article itself provides at least the beginnings of an answer to some of those questions. Behavioral analysis can serve as an instructive guide to First Amendment jurisprudence, laying bare the overconfidence in human rationality that undergirds so much of the current doctrine and suggesting ways in which the

"cause" of the harm, "it is no longer so easy to separate the empirical question of the effect of speech from the normative policy question of what, if anything, to do about such an effect if it does exist").

390. *Cf.* HASTIE & DAWES, *supra* note 45, at 2-3. Hastie and Dawes state, as their goal,

> We will attempt to detail pernicious modes of thought in order to provide advice about how to improve choices. We will not suggest what your goals, preferences, or aspirations ought to be when making these choices. . . . Our emphasis is on *how*, not what, but we do not wish to derogate the importance of *what* is chosen or of values.

Id.

391. For general literature on precommitment and constitutionalism, see JON ELSTER, ULYSSES AND THE SIRENS (1979), STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY (1995), and JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001).

law has evolved usefully or poorly. Sometimes it is a recipe for change, or at least for a cautious approach to current doctrine; at other times, it may bolster our confidence in the merit of that doctrine.

Beyond this, let me suggest two potentially contradictory arguments in favor of a behavioralist approach to the First Amendment. First, an instrumental, empirically-based account of the First Amendment robs us of our complacent reliance on the old standby of general normative justifications for First Amendment law—democracy, self-expression, and so forth. And justifiably so. Richard Posner pertinently remarks:

> Constitutional scholarship, including the scholarship of free speech, is preoccupied on the one hand with Supreme Court decisions that are notably lacking in an empirical dimension and on the other hand with normative theories of free speech that have no empirical dimension either. Vast as the literature is, very little of it is concerned with the kind of empirical questions raised by this paper. This should be a source of concern to anyone who believes that the instrumental approach to free speech should have a role to play in the formation of public policy.[392]

Not everyone may agree that instrumental approaches to free speech are justifiable. (I do.) But the train has already left the station on that issue. Normative theorists of free speech rarely rest completely on that basis alone, but quickly raise the usual host of explicitly policy-oriented concerns—slippery slope arguments, arguments about whether particular doctrines actually serve deliberative democracy, and an endless series of other arguments about what works and what doesn't, what will result from particular tests and what won't. As long as instrumental arguments about free speech are in play, then, it makes sense to add a new player to the game. The law of free speech is, in the final analysis, about making decisions under uncertainty. Behavioral analysis helps us understand better how to go about making those decisions. Furthermore, free speech is never an abstract; at some point it must be institutionalized and operationalized. An entirely different set of questions therefore arise about institutional choice; and normative theories of free speech do not always even address those questions, let alone answer them. Behavioral analysis both reminds us of the importance and complexity of institutional choice, and provides some tools to help answer the question of who decides.

VI. CONCLUSION

As this Article has suggested, there is no shortage of overarching theories that purport to address free speech doctrine from on high. What we need now are new *facts*, and new *questions*. We need a stronger factual understanding of how individuals actually evaluate speech: when they are likely to overestimate the risk of harm resulting from speech, and when they are likely to be unduly

392. Richard A. Posner, *The Speech Market and the Legacy of* Schenck, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 121, 151 (Lee C. Bollinger & Geoffrey C. Stone eds., 2002).

susceptible to cognitive failings that short-circuit their ability to rationally evaluate advertisements and other commercial come-ons. And we need to stop theorizing about First Amendment law under the settled institutional assumption that the judiciary is always the body assigned primary responsibility for making determinations about the risk of particular speech acts, and begin to ask whether different institutions should be charged with this responsibility under different circumstances.

Although it is not a panacea, behavioral analysis supplies the beginnings of the new facts and new questions that First Amendment theory and doctrine demand. As this Article has suggested, in some cases, such as that of illegal advocacy doctrine, behavioral analysis confirms the direction the courts have already taken, while offering a new positive analysis of why the courts acted the way they did. In others, such as commercial speech doctrine, behavioral analysis suggests that the courts have departed from what we know about real-world decision-making, to the potentially serious detriment of consumers.

Finally, and more fancifully, the behavioral analysis set forth in this Article offers one last virtue. Even if one rejects this instrumental approach to free speech—or *any* instrumental approach to free speech—a behavioral analysis approach to the First Amendment may still be worthwhile because it provides us with a new metaphor. The law is, of course, rich with metaphor, and nowhere is that more true than in First Amendment law.[393] These metaphors sometimes enrich our understanding of an area of law, and sometimes arrest it. Legal scholars have spent decades now arguing that the "marketplace of ideas" metaphor fails to reflect the reality of the imperfect market for speech, or adamantly defending the marketplace ideal.[394] At some point, we find that a paradigm-setting metaphor has obscured our understanding of reality, or has become played out, or has absurdly become more important than the idea it is supposed to crystallize. Then we may hunger for new, arresting tropes to help rearrange and unsettle our assumptions.

Thinking of the First Amendment as risk analysis is one such candidate. Whatever ends it may lead to, it may at least awaken in us a thirst to think anew about some old problems in free speech jurisprudence.[395]

393. *See generally* David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986) (addressing role of metaphor in First Amendment and arguing that a number of areas of First Amendment jurisprudence are full of creative misreadings of language of earlier decisions). Cole argues, in particular, that Holmes' *Abrams* dissent and Brandeis' *Whitney* concurrence engaged in "rhetorical misreading" of the clear and present danger test. *Id.* at 382; *see also* Paul Horwitz, *Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 OSGOODE HALL L.J. 101, 117-18 (2000) (discussing dangers and benefits of metaphor in judicial language).

394. *See* Horwitz, *supra* note 393 at 118 (discussing dangers and benefits of metaphor in judicial language).

395. *Cf.* Rachlinski & Farina, *supra* note 77, at 615 (noting, in context of administrative law, that cognitive psychology approach "offers a new set of metaphors for understanding the vulnerabilities, and the capabilities, of public policymaking processes").