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Symposium: Interdisciplinary Perspectives on Fear and Risk Perception in Times of Democratic Crisis

Foreword

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The terrorist attacks of September 11, 2001, the implementation of the USA PATRIOT ACT, and the government's indefinite detention of "enemy combatants" have all sparked renewed interest in the balance between security and liberty in times of crisis. Recently, legal scholars have debated topics ranging from the constitutionality and wisdom of the government's responses to terror to the appropriate roles for institutional actors and the public in national security decisions.¹ While these debates have contributed enormously to the public discussion that is the foundation of a democratic society, they have not completely captured the complexities of governmental responses to crisis. Thus far, the debate has focused primarily on legal doctrine and theory but such tools can only take us so far.

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1. See, e.g., Symposium, *The Changing Laws of War: Do We Need a New Legal Regime after September 11?*, 79 NOTRE DAME L. REV. 1183 (July 2004); Symposium, *Civil Liberties After September 11th: A Closer Look at Detention Powers*, 34 CONN. L. REV. 1143 (2002); Symposium, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 253; Symposium, *Emergency Power and Constitutionalism*, 2 INT'L J. CONST. L. 207 (Apr. 2004); Symposium, *Law and the War on Terrorism*, 25 HARV. J.L. & PUB. POL'Y 399 (2002); Symposium, *Terrorism and the Constitution: Civil Liberties in a New America*, 6 U. PA. J. CONST. L. 881 (May 2004).

Governmental responses to crisis are complex and influenced by many factors. Be it the executive branch, the legislature, or the courts, the government consists of individual decision makers who, like the public, are susceptible to powerful emotional and social forces. Just as fear, prejudice, and inaccuracies in risk perception increase public pressure on executive, legislative, and judicial officials to make politically expedient decisions, these psychological biases directly influence government decision makers themselves. This Symposium examines these underlying influences in order to bring greater understanding to our responses to democratic crises.

The articles and essays included or referenced in this volume discuss both the factors that affect decision making in times of crisis and their implications for law and democratic theory. Professor Cass Sunstein's keynote address, *Fear and Liberty*,² noted that psychological biases such as the availability heuristic and probability neglect can skew risk perception, leading to excessive public fear of national security risks and unreasonable curtailment of civil liberties.³ According to Sunstein, courts, which are typically responsible for protecting civil liberties, often lack sufficient information to assess whether national security concerns justify incursions on civil liberties.⁴ Nevertheless, he concluded that courts can still provide an essential safeguard against unreasonable infringements (1) by requiring that executive actions infringing civil liberties be clearly authorized by legislative enactments,⁵ (2) by carefully scrutinizing selective burdens on the civil liberties of identifiable minorities,⁶ and (3) by using strong presumptions rather than case-by-case balancing in constitutional adjudication.⁷

Professors Lee Epstein and Christina Wells presented papers discussing the role of courts in reviewing executive decisions in times of crisis. Examining the hypothesis that courts tend to defer more to the executive when the country is at war, Epstein and her colleagues conducted a study of all civil liberties cases from 1941 to 2001.⁸ While judicial deference has been a longstanding assumption in the legal community, Epstein et al.'s study is groundbreaking in its attempt to test that assumption empirically. Their results, which reveal that courts are less likely to uphold a civil liberties claim during wartime, are sure to inform future debate about the appropriate role of judges and other institutional actors in cases involving national security.

2. Professor Sunstein's remarks were based upon a forthcoming article and book chapter. See Cass R. Sunstein, *Fear and Security*, 71 SOC. RES. (forthcoming Winter 2004) (manuscript on file with the author); CASS R. SUNSTEIN, *THE LAWS OF FEAR* (forthcoming Mar. 2005).

3. Sunstein, *Fear and Security*, *supra* note 2, at 2.

4. *Id.*

5. *Id.* at 14-15.

6. *Id.* at 15-17.

7. *Id.* at 17-19.

8. Professor Epstein's presentation was based upon a forthcoming article. See Lee Epstein et al., *The Effect of War on the Supreme Court*, 79 N.Y.U. L. REV. (forthcoming 2004).

Professor Wells's article, the first presented in this volume, examines the role of courts from a psychological perspective.⁹ Specifically, she challenges the appropriateness of judicial deference by examining executive decision making in times of crisis. After reviewing several much-criticized government actions—such as the sedition prosecutions in World War I, the internment of Japanese-Americans in World War II, and the persecution of Communists during the Cold War—Professor Wells identifies an underlying pattern of skewed risk assessment by executive officials that is consistent with certain psychological biases. Positing that such skewed assessments are quite likely in times of crisis, she proposes that rigorous judicial review would provide a mechanism of accountability that would allow executive officials to counter the effects of psychological biases.

Professors Tracey George and Robert Pushaw offered divergent responses to the presentations by Professors Epstein and Wells. George supports a more rigorous review of executive decision making and argues that legal scholars should look outside the law to understand its complexities. Examination of “other disciplines, methodologies, and [the law of other] countries,” she explains, would provide legal scholars with more sophisticated tools of analysis.¹⁰ Professor Pushaw also acknowledges the contributions that interdisciplinary work can make to understanding and predicting executive and judicial behavior in times of crisis; however, he questions whether rigorous judicial review can actually rein in executive decision making. Instead, Pushaw posits that there are occasions in which the courts should defer to a more fully-informed and flexible executive regardless of the psychological or political pressures that might skew decision making.¹¹

The next series of essays by Professors Paul Slovic, Neal Feigenson et al., and Rachel Moran focuses primarily on the role of emotion in risk perception and the impact of emotion on law and public policy. Discussing individual perceptions of risk, Professor Slovic argues that while the strong “visceral emotion of fear” can profoundly influence judgments and behaviors involving risk, more subtle and often unconscious feelings known collectively as “affect” can exert equally profound influence. Understanding the cognitive interplay between affect and reason, he claims, is essential for improving decision making in the face of risk.¹² For example, the imagery associated with terrorism may lead the public to overestimate its risk while underestimating the likelihood of more common but less vivid and familiar dangers.

Professor Feigenson and his colleagues discuss the influence of group identity on individual risk perception.¹³ Noting, for example, “that Americans are less worried about genetically engineered food but more worried about nuclear power

9. Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903 (2004).

10. Tracey E. George, *Other Discipline, Methodologies, and Countries: Studying Courts and Crisis*, 69 MO. L. REV. 951 (2004).

11. Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959 (2004).

12. Paul Slovic, *What's Fear Got to Do with It? It's Affect We Need to Worry About*, 69 MO. L. REV. 971 (2004).

13. Neal Feigenson et al., *Perceptions of Terrorism and Disease Risks: A Cross-national Comparison*, 69 MO. L. REV. 991 (2004).

than western Europeans are,” Feigenson et al. argue that national differences influence the perception of risk from certain dangers. As described in their article, they found that U.S. and Canadian citizens responded differently to the risks of terrorism and SARS. Further, the degree to which participants identified with their country correlated with some of their risk perceptions and judgments. The findings inform a variety of public policy issues, from how governments manipulate risk information to how they can improve communication with their citizens about potential risks.

Professor Moran takes her discussion of emotion in a different direction by focusing on several dimensions of fear and their relevance to law and legal process. She argues that fear is a complex phenomenon experienced on many levels—i.e., “as a private experience, as an interpersonal communication, and as a public event.”¹⁴ Eschewing pure information-processing (i.e., rational risk assessment) accounts of fear, which she largely associates with Professor Sunstein, Moran argues that the expression of that emotion in its many forms has far more relevance to law and legal process than rational risk assessment and that this complex phenomenon of emotion plays a vital role in both public and private life.

Commenting on these presentations, Professor Chris Guthrie explores the disparity between emotions evoked in anticipation of a threatened event and those that occur after threats are actually realized.¹⁵ Relying on psychological research demonstrating that we tend to overestimate the impact of negative events on our emotions, he suggests that public policy makers should anticipate our tendency to overestimate such impacts when making policy.

In his response, Professor Henry Chambers builds on Moran’s assessment that fear defies a simple information-processing definition.¹⁶ For example, because race can affect an individual’s perception of risk, public policy prescriptions based upon a pure-information processing model may fail to capture important segments of society. Finally, Professor Thom Lambert critiques two aspects of the essays by Slovic and Feigenson et al. He suggests that their arguments tend to “hastily adopt ‘non-rational’ explanations for otherwise rational behavior” and to “advocate [for] inappropriately paternalistic government policies.”¹⁷

A final series of essays by Professors Corey Robin, Betty Winfield, and Geof Stone examines fear and risk assessment through the lens of history. Professor Robin’s essay “examines the use of fear as an instrument of political repression.”¹⁸ He begins by noting that most philosophers believe doctrines such as separation of powers, federalism, and the rule of law are necessary checks against government tyranny. However, using the McCarthy era as a case study, Robin

14. Rachel F. Moran, *Fear: A Story in Three Parts*, 69 MO. L. REV. 1013 (2004).

15. Chris Guthrie, *Risk Realization, Emotion, and Policymaking*, 69 MO. L. REV. 1039 (2004).

16. Henry L. Chambers, Jr., *Fear, Irrationality, and Risk Perception*, 69 MO. L. REV. 1047 (2004).

17. Thomas A. Lambert, *Two Mistakes Behavioralists Make: A Response to Professors Feigenson et al. and Professor Slovic*, 69 MO. L. REV. 1053 (2004).

18. Corey Robin, *Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear*, 69 MO. L. REV. 1061 (2004).

argues that these very checks on government tyranny often contribute to fear that leads to political repression, a term he defines as the attempt to ensure that “the powerful are obeyed.”¹⁹ He also argues that social pluralism further contributes to fear and repression by allowing social and political elites to pit groups against one another.

Professor Betty Winfield surveys the United States Attorney General’s role in repressing civil liberties during times of crisis.²⁰ Reviewing policy decisions from World War I, World War II and the Vietnam War, she identifies and discusses four models of attorneys general, ranging from those who aggressively infringed civil liberties to those who attempted to rein in executive incursions on such liberties. Against the backdrop of these four models, Winfield examines Attorney General John Ashcroft’s role in the war against terror and finds him most like past attorneys general who exploited crisis to expand executive power.

Responding to Robin and Winfield and anticipating the final essay by Geof Stone, Professor Bill Fisch notes initially that “many things . . . can go wrong with our system under the pressures of war or other emergencies.”²¹ The challenge, he argues, is in finding ways to “prevent that breakdown.” Using Sunstein’s and Stone’s proposals as examples, Fisch suggests that “encouraging courage” may be our best response to fear. Professor Richard Reuben comments on the entire Symposium by discussing the role of the media in preventing the breakdown of civil liberties.²² Arguing that the media have traditionally served a “constitutional, democracy-enhancing function,” he notes with trepidation the structural and operational obstacles that threaten the media’s traditional role as a watchdog and suggests that reform may be necessary.

Concluding this Symposium issue, Professor Geof Stone examines our country’s historical susceptibility to “war fever,” which has led to excessive caution and undue curtailment of civil liberties.²³ While suggesting that we can “do better,” he also acknowledges that our response to potential threats has improved over time. Finally, Stone offers several concrete actions by which the public, Congress, and the executive branch can improve decision making in times of crisis.

This Symposium attempts to expand the scope of inquiry into executive action by considering the influence of fear and other emotions on risk assessment and response in times of crisis. This inquiry promises to be of considerable importance for some time. Congress is considering new legislation expanding ex-

19. *Id.*

20. Betty Houchin Winfield, “*To Support and Defend the Constitution of the United States Against All Enemies, Foreign and Domestic*”: *Four Types of Attorneys General and Wartime Stress*, 69 MO. L. REV. 1095 (2004).

21. William B. Fisch, *Encouraging Courage: Law’s Response to Fear and Risk*, 69 MO. L. REV. 1115 (2004).

22. Richard C. Reuben, *Fear and Risk in “Times of Crisis”: The Media’s Challenge*, 69 MO. L. REV. 1123 (2004).

23. Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131 (2004).

ecutive law enforcement powers.²⁴ Courts are weighing in on the legality of executive and legislative actions in response to crisis.²⁵ As the debate regarding the wisdom of such actions continues, we would do well to broaden our focus to include a discussion of the multitude of factors that may affect decision making.

24. See, e.g., Tools to Fight Terrorism Act of 2004, S. 2679, 108th Cong. (2004), in 150 CONG. REC. S9819, S9840-51 (Sept. 28, 2004).

25. See, e.g., Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (holding that due process required the United States government to give citizen held as an enemy combatant meaningful opportunity to contest factual basis for his detention); Humanitarian Law Project v. United States Dep't of Justice, 352 F.3d 382 (9th Cir. 2003) (finding that statute criminalizing provision of material support to terrorists was unconstitutionally vague), *opinion vacated and rehearing en banc granted* 382 F.3d 1154 (9th Cir. 2004); Ctr. For Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (upholding government decision to withhold identities of persons detained by the government immediately after the September 11th attacks); Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004) (finding that "national security letter" provision of the USA PATRIOT Act violated the First and Fourth Amendments to the Constitution).