

Encouraging Courage: Law's Response to Fear and Risk

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Our three papers provide a helpful review of the many things that can go wrong with our system for the protection of civil liberties under the pressures of war or other emergencies. Professor Winfield focuses on the U.S. Attorney General, the non-judicial officer from whom the public might expect the highest fidelity to the law and the constitution.¹ She offers a sobering perspective on the ways in which those expectations can be and have been disappointed. The star of her taxonomy, I take it, is the Leveler, who reaches an independent (and rights-protective!) view of the law and works to persuade the administration to respect it. Sadly, we have not had nearly as many Francis Biddles as we would wish for.

Professor Robin reminds us—or at least those of us who were unfortunate enough to have lived through the McCarthy era—that even those features of our system of which we are most proud can provide and indeed enhance opportunities for intimidation and the suppression of dissent: the diffusion of political authority through separation of powers and federalism, the rule of law as a set of formal constraints on the exercise of governmental authority, and a highly pluralistic civil society.² Diffusion of power does not eliminate it and may even increase the local discretion of those who administer it; constraints on governmental power leave more room for the exercise of private power; and even a constrained exercise of power, like the dog at the end of the leash, may intimidate those against whom it is directed and who depend on but distrust the constraint.

Professor Stone surveys major episodes in our history involving what subsequently came to be acknowledged as unnecessary suppressions of dissent and offers a somewhat more hopeful assessment.³ Noting some of our successes in mitigating such oppressions and in internalizing the lessons they teach, he suggests some ways in which we can improve the response both of government and civil society in future emergencies. Nonetheless, I take the message from his paper that the most important element of success lies be-

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1. 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).

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

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

yond formal arrangements and rules (necessary as they may be) in a “culture of civil liberties” for which all of us are responsible—not only the people who exercise authority and the media who report their doings, but the public at large through the institutions of civil society.

Skepticism about the judgment and motives of political leaders, even and perhaps especially in a democracy, has been a staple of political theory from the beginnings of our constitutional history. As I read these papers, particularly that of Professor Robin, I could not help but think of a couple of aphorisms that can be read to acknowledge and answer Professor Robin’s concerns. Churchill’s quip about democracy being the worst form of government except for all those others that have been tried so far, and Lord Acton’s dictum about power tending to corrupt and absolute power corrupting absolutely, support the view that diffusion of power is better on balance than the alternative. That depends, however, on the willingness and ability of supporters of civil liberties to take advantage of the opportunities offered to *them* by the diffusion of power.

The most challenging part of this analysis is trying to figure out more formal ways to prevent unnecessary restrictions on our liberties. Both Professor Sunstein’s keynote talk and Professor Stone’s paper offer recommendations for improvement in the legal sphere, and I suppose that some might judge their proposals modest in scope. Both place rather less reliance on the adoption of new substantive rules than on trusting the democratic/representative process itself, along with its traditional corrective of conscientious judicial review. On the democratic process side, Sunstein argues for judicial insistence on clear legislative authorization for executive restrictions on civil liberties. Stone argues for the adoption by Congress itself of internal rules that ensure (i) full deliberation and debate before adopting emergency measures that restrict civil liberties and/or (ii) a new opportunity to review the appropriateness of such measures by placing a time limit on their operation. The hope is that deliberation and debate in a legislative setting will exercise a moderating influence on the end result. I do not disagree with that hope by any means, but it too depends not only on the willingness of Congress to adopt such rules in advance and stick to them in the face of motions to suspend them, but also and more importantly on the courage of participants in the process to speak up when they have doubts or reservations. Both are dependent on habits and culture. Stone finds historical encouragement in the observation that Congress has generally balked at directly defying Supreme Court precedent protecting civil liberties. Indeed, one of the clearest recent examples of *direct* defiance by Congress was rights-protective and reinforces his point: after the Supreme Court had virtually gutted the Free Exercise clause in *Employment Division v. Smith*, the ritual peyote case,⁴

4. 494 U.S. 872 (1990) (holding that the Free Exercise clause of the First Amendment does not protect users of peyote in a religious ceremony from prosecution under a general, facially religion-neutral criminal law forbidding the use of nar-

Congress sought (albeit with only partial success) to correct this decision by adopting the Religious Freedom Restoration Act.⁵

On the judicial review side, Sunstein argues for particular judicial vigilance toward *discriminatory* restrictions on civil liberties, on the premise that even-handed restrictions are harder to sell to the majority and, therefore, more likely to represent considered judgments about necessity. Stone argues simply for less judicial deference toward risk assessments made by the government, and for the adoption of some bright-line protections that are not subject to shrinkage in emergencies. This too depends on rights-minded Justices having the courage of their convictions while the historical record shows a tendency (though not, as he points out, a perfectly consistent one) toward deference to political judgments in emergency settings. The point is, as others have also argued,⁶ that in emphasizing the Court's frequent deference to the executive in mid-crisis, we may fail to appreciate the value of the less deferential decisions handed down after the crisis has abated.

In terms of formulating standards of review, the best example of judicial courage lies in the freedom of speech arena, which is in fact the focus of all three papers. *Brandenburg v. Ohio*⁷ represents the gratifying result of reflection on the various failures that our speakers discuss. It applies the means-ends analysis to which the Court has traditionally subjected civil liberties protections that are cast by the constitution in unqualified language—a sufficiently important governmental interest can justify restrictions to the extent necessary to protect that interest—but it strengthens the protection by disapproving one governmental objective even in emergencies, namely the suppression of ideas as such. The 1960s, when *Brandenburg* was decided, wit-

cotic drugs). While the law was not cast as an emergency measure, it may not be too much of a stretch to connect it with the “war on drugs” and its attendant encroachments on the rights of criminal suspects.

5. Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (current version at 42 U.S.C. § 2000-bb to bb-4 (2000)) (requiring any governmental agency to justify a burden on the exercise of religion—not excluding facially neutral, general criminal laws such as that in *Smith*—as the least restrictive means of protecting a compelling governmental interest). The Supreme Court, in turn, held that RFRA exceeded Congress's powers under the Fourteenth Amendment as applied to the States. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress thereupon amended RFRA to apply only to federal governmental agencies, Religious Land Use and Institutionalized Person Act of 2000, Pub. L. No. 106-274, § 7(a)-(b), 114 Stat. 803 (codified as amended at 42 U.S.C. §§ 2000bb-2 to -3 (2000)), over which it has general legislative authority.

6. See, e.g., David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Time of Crisis*, 101 MICH. L. REV. 2565, 2571-77 (2003).

7. 395 U.S. 444 (1969). The case involved prosecution of participants in a Ku Klux Klan rally under a statute making it a crime merely to advocate the use of violence. While the particular advocacy was directed against minorities historically victimized by prejudice in our society, the principle of the decision has been applied to protect their own advocacy as well.

nessed both an unpopular war abroad and an often unruly social revolution at home; but I suppose it is worth noting that major elements of the social revolution—in particular that part which gave rise to the specific incident in *Brandenburg*, the elimination of racial segregation in public life—were at least encouraged, if not produced, by the Court's own decisions.

My sense is that the concept of *Brandenburg* is holding with respect to freedom of expression in the current “war on terror.” While the administration's rhetoric has sought to discredit and presumably to intimidate dissent as disloyal, they appear to have been careful not to cross the legal line in a formal way. The other major civil liberties issues generated by this emergency have yet to be fully resolved by the Supreme Court, although the lower courts appear so far to be willing to challenge the more controversial legislative and executive acts.⁸ The Court has now begun to address several cases challenging the administration's indefinite detentions of persons—including U.S. citizens—whom it characterizes as “enemy combatants.” Its decisions of June 2004 sustained the detainees' claims to the right to notice and a meaningful opportunity to be heard by a neutral decision maker on the factual grounds for their detention, but left most other issues, both procedural and substantive, unresolved.⁹ The most complex case involved a U.S. citizen captured in Afghanistan, allegedly fighting for the Taliban, who claimed both that he was not an “enemy combatant” and that in any event the government lacked authority to detain a U.S. citizen on such grounds.¹⁰ While eight Justices essentially agreed on the right to be heard, a bare majority held that Congress could constitutionally, and had actually, authorized the indefinite detention of a citizen, and that the process for determining the underlying facts could be weighted in the government's favor for security reasons, at least by relaxing the otherwise applicable rules of evidence and burden of persuasion.¹¹ There

8. See the review of lower court cases in Cole, *supra* note 6, at 2577-85.

9. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. (2004).

10. *Hamdi*, 124 S. Ct. 2633.

11. *Id.* Justice O'Connor's opinion for the four-Justice plurality argued that the “uncommon potential [of proceedings to determine combatant status] to burden the Executive at a time of ongoing military conflict” could justify relaxation of the otherwise applicable exclusionary rules of evidence (hearsay, for example) and a shifting of the burden of persuasion to the detainee once the government introduces “credible evidence” against him, *id.* at 2649; and she indicated that it was possible for such proceedings to be held by a military tribunal, *id.* at 2651. Justice Thomas's dissent agreed with the government on all essential points, *id.* at 2674-85 (Thomas, J., dissenting); he would presumably vote, in a subsequent challenge to ensuing hearings on due process grounds, to sustain at least the kind of modifications suggested by the plurality. Justice Souter disagreed that Congress had authorized such detentions, but did not reach any of the constitutional questions, agreeing only that Hamdi was entitled to a hearing. *Id.* at 2652-60 (Souter, J., concurring in part and dissenting in part). Justice Scalia, in dissent, argued that unless Congress has exercised its power to suspend the writ of habeas corpus, the government could only institute criminal proceed-

is much in the decisions, therefore, for both civil libertarians and proponents of wartime executive powers to complain about.

While the Supreme Court has found qualifications on the scope of our constitutionally enumerated civil rights to be implicit in the laconic text, many more recent national and international human rights documents expressly incorporate similar qualifications into the very statements of rights, presumably in order to keep the exceptions from swallowing the rule. An increasing body of comparative literature is studying the actual application of these instruments to see if they have succeeded in controlling governmental discretion.¹² In the European Convention on Human Rights, for example,

ings against the citizen or release him. *Id.* at 2661-74 (Scalia, J., dissenting). Ultimately, the government chose to avoid the hearing by accepting an agreement with Hamdi to allow him to renounce his citizenship and return to his native Saudi Arabia. See Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant,'* N.Y. TIMES, Sept. 23, 2004, at 1A.

In a second case, *Rasul v. Bush*, 124 S. Ct. 2686 (2004), the Court held that non-citizen detainees at a facility like the Guantanamo Naval Base in Cuba, which by a lease agreement with Cuba is subject indefinitely to the plenary and exclusive jurisdiction of the United States, are entitled to challenge the grounds for their detention in habeas corpus proceedings before a U.S. court. The Court did not address the procedure to be followed in such hearings, but on remand the District Court held that petitioners had a right to counsel, including the right to unmonitored attorney-client conversations, but subjected counsel to security clearance, strict confidentiality and non-disclosure requirements, and a duty to disclose to the Government information received from the client regarding future events that threaten national security or involve immediate violence. *Al Odah v. United States*, No. CIV.A. 02-828, 2004 WL 2358254 (D.D.C. Oct. 20, 2004). After the Supreme Court's decisions, the government established Combatant Status Review Tribunals at Guantanamo for the remaining detainees which appear to take the *Hamdi* plurality's suggestions a step further by denying the right even to consult law-trained counsel. See, e.g., Charlie Savage, *Detainees Fail to Win over Hearings, Four Found to Be Enemy Combatants*, BOSTON GLOBE, Aug. 14, 2004, at A2. It remains to be seen whether the district court's ruling in *Al Odah* will also apply to the military tribunal proceedings

A third case, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), was dismissed because the habeas corpus petition was filed in the wrong court.

12. To mention just a few of the most recently published studies: For a survey of emergency provisions in national constitutions see Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 33 ISRAEL Y.B. ON HUM. RTS. 13 (2003), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=475583. A critical review of recent models from Canada, Europe, and South Africa, with recommendations for change in the American approach, is found in Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004). Skepticism toward harsh measures based on earlier European experience is expressed by Jeremie J. Wattellier, Note, *Comparative Legal Responses to Terrorism: Lessons from Europe*, 27 HASTINGS INT'L & COMP. L. REV. 397 (2004). On the situation under international law, see, for example, Rosa E. Brooks, *War Everywhere: Human Rights, National Security, and the Law of Armed Conflict in the Age of Terrorism*, 153 U. PA. L. REV.

there are provisions relating both to freedom of speech and to its derogation in time of emergency.¹³ These provisions contain some of the elements that Stone and Sunstein recommend (with support from the Supreme Court's decisions) for the American law, although the generalized derogation for emergencies has not been generally approved by American scholars. Article 10 of the Convention deals with freedom of expression.¹⁴ Its second paragraph specifically authorizes restrictions on the freedom, with two principal requirements: first, that the restrictions be "*prescribed by law*," and second, that they be "*necessary in a democratic society*" in furtherance of specified interests including national security.¹⁵ Article 15 deals with measures derogating from certain obligations under the Convention (including freedom of speech) "[i]n time of war or other public emergency threatening the life of the nation," but only when "strictly required by the exigencies of the situation."¹⁶

Two related cases decided on the same day by the European Court of Human Rights under Article 10 are particularly worthy of mention here.¹⁷ Both involve criminal convictions for publishing articles critical of Turkey's treatment of Kurds during a violent uprising in that country's Kurdish region. In the first, the publisher of a weekly journal had been convicted for publishing letters to the editor which were considered to be incitements to violence.¹⁸ The Court found that "the content of the letters must be seen as *capable of inciting* to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities."¹⁹ In holding that the conviction did not violate Article 10, the court found that the letters "communicated to the reader . . . that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor."²⁰ In the second case, in which an author had been convicted for "spreading separatist propaganda,"²¹ the court ultimately found the article to be in "the form of a political speech."²² Although the writer's style was "virulent" and his criticism of the government was "acerbic,"²³ the court held that the conviction violated Article 10 because the speech "does not encourage the

(forthcoming 2004), *draft available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=476021.

13. European Convention for Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

14. *Id.* at art. 10.

15. *Id.* (emphasis added).

16. *Id.* at art. 15.

17. *Sürek v. Turkey*, 1999-IV Eur. Ct. H.R. 353 (1999); *Ceylan v. Turkey*, 1999-IV Eur. Ct. H.R. 25 (1999).

18. *Sürek*, 1999-IV Eur. Ct. H.R. at 362-64.

19. *Id.* at 384, para. 62.

20. *Id.*

21. *Ceylan*, 1999-IV Eur. Ct. H.R. at 35, para. 18.

22. *Id.* at 39, para. 33.

23. *Id.*

use of violence or armed resistance or insurrection.”²⁴ One of the judges, dissenting in the first case²⁵ and concurring in the second²⁶ on the justifiability of punishment, nicely illustrates the value of being informed about how other legal systems are dealing with essentially similar problems. He criticized the majority’s formulation of the issue as whether the language encourages the use of violence, and specifically cited *Brandenburg*’s “clear and present danger” test as a persuasive model for application of those provisions of the Convention.²⁷ While the judge’s opinion shows a bit of uncertainty about how the pre-*Brandenburg* cases relate to *Brandenburg* itself,²⁸ it gets the conclusion right: that suppression should require not only advocacy of unlawful action but also an imminent likelihood under the circumstances that the addressees will respond accordingly. It is likely that the majority’s substantive view was driven not by the abstract language of Article 10’s exceptions clause, but simply by a generally accepted view among the States Parties to the Convention about when advocacy of violence can properly be suppressed.²⁹

The cases under Article 15 so far have involved other civil liberties issues, especially those governing detention and treatment of persons suspected of terrorist activities. Three formal declarations of derogation under Article 15 have been subjected to review, all in response to widespread terrorist activity: Ireland’s in 1957³⁰ and the U.K.’s in the 1970s³¹ and 1980s,³² both

24. *Id.* at 40, paras. 36, 38.

25. *Sürek*, 1999-IV Eur. Ct. H.R. at 394-95 (Bonello, J., dissenting in part).

26. *Ceylan*, 1999-IV Eur. Ct. H.R. at 45-46 (Bonello, J., concurring).

27. *Sürek*, 1999-IV Eur. Ct. H.R. at 394-95 (Bonello, J., dissenting in part); *Ceylan*, 1999-IV Eur. Ct. H.R. at 45-46 (Bonello, J., concurring).

28. He quotes approvingly, as if it were of a piece with the *Brandenburg* formula, a passage from Justice Brandeis’s concurrence in *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444 (1969), which supports the suppression of advocacy as such, so long as what is advocated is immediate action—a position clearly rejected in *Brandenburg*.

29. The opinions do not attempt to ground their interpretations of the exceptions provision of Article 10 on a consensus of domestic positions of States Parties, but it is well known, for example, that many European countries are less protective of hate speech than is the United States, either on the theory of incitement to disorder or on simple disapproval of such speech. See, e.g., Alessandro Pizzorusso, *The Constitutional Treatment of Hate Speech*, General Report to the XVth Congress of the International Academy of Comparative Law, Brisbane (July 2002), available at <http://www.ddp.unipi.it/dipartimento/seminari/brisbane/Brisbane-IV.C.1-general.pdf>; Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003).

30. *Lawless v. Republic of Ireland*, 3 Eur. Ct. H.R. (ser. A) at 27 (1960-61).

31. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 1 (1978).

32. *Brannigan and McBride v. United Kingdom*, 258 Eur. Ct. H.R. (ser. A) at 29 (1993).

based on the activities of the Irish Republican Army in Northern Ireland; and that of Turkey in 1990, based on the activities of Kurdish nationalists.³³ All three declarations were found by the court to be reasonable on the facts stated, applying a deferential standard giving the state a “wide margin of appreciation” in finding an emergency threatening “the life of [the] nation.”³⁴ In the Irish and British cases, the court found the particular practices complained of—specifically, extended detention without judicial supervision—to be justified by the derogations.³⁵ In the Turkish case, the court found that such detentions were not justified, both because they were longer (up to 14 days as distinguished from 7 days in the British case)³⁶ and because (again by contrast with the British cases) the conditions of detention lacked appropriate safeguards against the commission of non-derogable violations such as torture.³⁷ One might speculate whether a domestic court applying a similar constitutional text would tend to be more deferential toward its own government,³⁸ and observe that the language of the provisions does not clearly preclude such interpretation. Nonetheless, the decision is some evidence that such express limits can be helpful.

The answer to fear, simply if not simplistically put, is courage. While we persist in believing that courage in public life is more likely found in an open society in which dissent is not suppressed and the rule of law prevails, there are no formal guarantees of that result. The modest improvements in our system proposed by Professors Stone and Sunstein are worth a try to improve the odds, if we can bring ourselves to make them.

33. *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260.

34. *See, e.g., Ireland*, 25 Eur. Ct. H.R. at 78-79, para. 207.

35. *Lawless*, 3 Eur. Ct. H.R. (ser. A) at 27; *Ireland*, 25 Eur. Ct. H.R. (ser. A) at 1; *Brannigan*, 258 Eur. Ct. H.R. (ser. A) at 29.

36. The contrast between these detentions and the indefinite ones asserted by the United States in the current crisis seems dramatic, but the American claims are premised on an international conflict, whereas the European cases assume an essentially domestic crisis.

37. *Askoy*, 1996-VI Eur. Ct. H.R. 2260.

38. In the context of American discussions arising out of the current crisis, and in light of American judicial experience, it has been argued that “constitutionalizing” emergency exceptions would not guarantee judicial enforcement of real limitations, and that the best way to deal with emergencies is to treat them as extraconstitutional and beyond judicial control. *See* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.