

Fear and Risk in “Times of Crisis”: The Media’s Challenge

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With five to ten minutes to comment at the very end of an intellectually exhilarating two-day symposium, I am quite frankly tempted to say “You know, they’ve all got a point,” and leave it at that. But this has been an important discussion, and in this comment I’d like to at least try to make a small contribution to it. Let me begin by very briefly reviewing some of the central theses we have explored here at the conference:

- Fear is a particularly powerful emotion that can cloud rationality and distort decision making by individuals and groups.¹
- This emotion can, and indeed, has been repeatedly exploited by national political leaders in “times of crisis” to shape political agendas and to justify encroachments on civil liberties that likely would not otherwise be acceptable in a democratic society.² More than a half century later, McCarthyism still provides a salient example.³
- Fear and the repression it can inspire cascade through both the formal institutions of government and the informal institutions of civil society.⁴ Black-listing, after all, was not an act of the government.⁵
- So natural, pervasive, and consistent is this tendency that institutional correctives are appropriate to prevent the excessive sacrifice of individual liberties.⁶

Professor Stone rightly observes that while Congress has a role, our constitutional democracy relies heavily on independent courts to constrain the executive.⁷ But our system of checks and balances does not always work as envisioned by the Framers. Indeed, as Professor Wells admonishes, our courts are often the most deferential to government when they should be the most criti-

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

2. *Id.*

3. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

4. Wells, *supra* note 1, at 925-29.

5. Martin H. Redish & Christopher R. McFadden, *HUAC, The Hollywood Ten, and The First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669 (2001).

6. Wells, *supra* note 1, at 935-48.

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

cal.⁸ Such are the darkest moments of our constitutional history—*Korematsu v. United States*⁹ being, of course, the classic example.¹⁰ The democratic crisis contemplated at this symposium, then, is the ease with which fear can be exploited to the detriment of civil liberties and substantive democratic dialogue on issues of national and international importance.

I agree that all of this is a problem and that institutional reforms, such as those proposed by Professor Stone, are important.¹¹ One such reform is hardly a reform at all: the bolder exercise of congressional power. The Senate should insist in its confirmation proceedings that sensitive positions affecting security, such as the Attorney General, are held by people of balance—“levelers,” as Professor Winfield describes them, rather than “extreme-aggressors.”¹² A more novel and perhaps helpful reform is the peace-time drafting of protocols for the exercise of extraordinary executive powers when crises do arise, but ones that are limited by sunset provisions. Both suggestions have much to offer.

Professor Robin reminds us, however, that such reforms need to reach beyond government to civil society as well.¹³ By civil society, he refers to the various associations that constitute our quasi-public life, that sphere between purely private and purely public activities.¹⁴ Schools, churches, civic groups, political organizations, and workplaces are all conduits through which fear is socially amplified for political, and often repressive, purposes.¹⁵ From violent

8. Wells, *supra* note 1, at 903.

9. 324 U.S. 885 (1945).

10. David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-based Decision-making by Individualized Discretion*, 56 FLA. L. REV. 483, 516-17 (2004).

11. Stone, *supra* note 7, at 1141-44.

12. 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).

13. Corey Robin, *Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear*, 69 MO. L. REV. 1061, 1082-83 (2004).

14. *Id.* at 8; see also LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 227-28 (1999) (“Civil society is distinct from ‘society’ in general in that it involves citizens acting collectively in a public sphere to express their interests, passions, and ideas, to exchange information, to achieve mutual goals, to make demands on the state, and to hold state officials accountable.”); Peter J. Spiro, *The Citizenship Dilemma*, 51 STANFORD L. REV. 597, 625 (1999) (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)) (“Civil society comprehends all associational activities of nongovernmental description, including churches, schools, places of employment, clubs, and other group affiliations.”).

15. Robin, *supra* note 13, at 1083-92. Whether workplaces are aspects of civil society is a hotly debated issue. Compare DIAMOND, *supra* note 14 (civil society “excludes individual and family life, inward-looking group activity (recreation, entertainment, religious worship, or spirituality) and . . . the profit-making enterprise of individual business firms, and political efforts to take control of the State”) with

cross-burnings of the Ku Klux Klan to less violent but equally effective black-listing, ostracism, humiliation, and degradation, civil society can prove more repressive than government itself.¹⁶ Thanks to the availability heuristic and other cognitive quirks, fear can move through such informal institutions to shape public attitudes and behavior as quickly as a fire through brush in the heat of summer.¹⁷

Integral to this civil society is the public forum created by the media, particularly the news media. Because both the formal structures of government and the informal structures of civil society turn to this forum for information, the media have the capacity to operationalize manipulative fear, or, more constructively, to check its distortion with the corrective lens of perspective.

In this sense, the media bear a special responsibility in times of crisis to fill what journalists often call the watchdog function.¹⁸ Recognizing this responsibility, the Founders gave freedom of the press its constitutional status, to foster the robust exchange of ideas and opinions necessary to democratic governance.¹⁹ This constitutional guarantee further enhances democracy by assuring that government remains accountable to a properly informed public.

I am a former journalist, and so while I do admit to some bias, I think it is fair to say that the media have done a fairly good job in fulfilling their constitutional, democracy-enhancing function over time. This may be one of the reasons that the country has been able to learn from its past excesses, as Professor Stone so wisely reminds us.²⁰ Among other things, the media have provided an evolving national conscience that has not let us forget that it was fundamentally wrong for the Palmer Red Raiders to flout warrant requirements in their frenetic midnight round-ups of aliens and alleged sympathizers,²¹ for the government to intern more than one hundred thousand Japanese-Americans during World War II without any suggestion of individualized wrong-doing,²² and for the gov-

CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 105-24 (2003) ("Because they engage diverse individuals in regular, ongoing, cooperative activity and enable individuals to get to know each other and to care about each other, workplaces are particularly well-suited to foster deliberation, social capital, civic skills, and simple empathy across lines of social division.") Robin takes the broader view, and so do I. See generally Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. (forthcoming 2005).

16. Robin, *supra* note 13, at 1083-92.

17. See SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 123-30 (1993).

18. See, e.g., J. EDWARD GERALD, NEWS OF CRIME: COURTS AND PRESS IN CONFLICT 115 (1983) (describing watchdog role of journalists).

19. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

20. Stone, *supra* note 7, at 1152-53.

21. Winfield, *supra* note 12, at 1107.

22. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

ernment to shield its Vietnam War decision-making process by suppressing the Pentagon Papers.²³

Now, I do not mean to lionize the press. Clearly its history has been marked with darker—make that yellower—moments, when newspapers were little more than vehicles for the ideological preferences of their owners, men like William Randolph Hearst and Joseph Pulitzer.²⁴ Even the mainstream media have succumbed to such abuses, as we are reminded by Professor Robin's vivid example of Sylvia Bernstein's front page photograph in the Washington Post under the headline "Red Party 'Hard Core' in Capital, Velde Says."²⁵ But I would submit that these are the exception rather than the rule, and that the media have always had the depth and diversity, the resilience to return to their more noble role.

Today, however, this capacity is threatened by the unprecedented ways in which fear is used to manipulate public opinion in "times of crisis." The media, after all, are important instruments through which such strategies are implemented; in the age of instantaneous worldwide communication, they are arguably the most significant instruments.

In my view, these threats are both structural and operational, and in the interest of time, I want to highlight three of them before offering a few suggestions by which they might be addressed.

First a structural threat: the rapidly diminishing diversity of the field. Contraction of media ownership has led to fewer news voices across media, which of course makes the remaining players that much more influential, and vital to the capacity of the media to either perform or surrender their constitutional and democratic role. To make matters worse, the contraction in outlets comes at a time of converging media technologies. A decade ago, twenty companies controlled half of the nation's newspapers, twenty controlled magazines, eleven controlled book publishing, and four controlled motion pictures.²⁶ As of 2000, all of these numbers were down significantly: fourteen dominant companies controlled half or more of the daily newspapers, three controlled magazines, three controlled television, six controlled book publishing, and four controlled motion picture production.²⁷ Put another way, in 2000, despite more than twenty-five thousand outlets in the United States, twenty-three corporations

23. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (effectively rejecting government's assertion that publication of Pentagon Papers, top secret military documents, would damage the Nation's security during a period of armed conflict).

24. See BEN PROCTOR, *WILLIAM RANDOLPH HEARST: THE EARLY YEARS, 1863-1910*, at 115-34 (1998) (discussing the era of "yellow journalism," and how William Randolph Hearst and Joseph Pulitzer used their newspapers to further their personal agendas).

25. Robin, *supra* note 13, at 1066.

26. Kerri Smith, *The FCC Under Attack*, 2003 DUKE L. & TECH. REV. 19, *9 (2003).

27. *Id.*

controlled most of the business in daily newspapers, magazines, television, books, and motion pictures.²⁸

While I am not an economist, I can certainly recognize that this is a function of the market's insatiable appetite for acquisition and therefore, in my view, an appropriate area for governmental regulation.²⁹ Regulatory needs may change over time, and indeed, in announcing its controversial 2002 media ownership rules the FCC said it hopes that concentrating ownership will unleash a new creativity that is better adapted to today's markets and technologies.³⁰ But it may also make a bad situation worse. Consider the following:

According to Capitol Broadcasting, if the . . . media ownership rules take affect, one owner buying all VHF stations could control 51 television stations in the largest 21 markets or 310 stations in the bottom 177 markets. One owner buying all UHF stations could control 244 stations in the top 117 markets or 383 stations in . . . every market except New York and Los Angeles.³¹

That's about two stations per market. Media consolidation may be good for business, but it's hard to imagine what could be worse for a democracy that depends on a diversity of viewpoints.³² As these numbers suggest, consolidation and convergence enhance the capacity of the media to serve as agents of fear-mongering and to stifle dissent and criticism through lack of meaningful access.

28. *Id.*

29. See STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 5-8 (5th ed. 2002) (discussing market failure as a proper basis for regulation).

30. See 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,621-24 (2003) (statement of Chairman Michael K. Powell). The Third Circuit has upheld the authority of the FCC to promulgate the rules, but said several of its key provisions were not adequately supported by the record. As of this writing, the case is on remand to the agency for further proceedings. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

31. Smith, *supra* note 26, at *10.

32. For a sampling of the vast scholarly criticism of the FCC's proposed relaxation of the media ownership rules, see, for example, Symposium, *Regulating Media Competition: The Development and Implications of the FCC's New Broadcast Ownership Rules*, 53 AM. U. L. REV. 531 (2004); Cheryl Leanza & Harold Feld, *More than "a Toaster with Pictures": Defending Media Ownership Limits*, COMM. LAW. (Am. Bar Ass'n, Forum on Communication Law), Fall 2003, at 12; Daniel C. Moore, Note, *Double Crossed: Why the Newspaper/Broadcast Cross-Ownership Ban Remains Necessary in the Public Interest*, 88 MINN. L. REV. 1697 (2004); see generally C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839 (2002).

There is also a practical effect of this consolidation and convergence within newsrooms that gives rise to my other two concerns. The first concern is the chilling effect on aggressive reporting. With fewer employers, there is greater pressure on reporters to conform to corporate goals, to bow to personal career goals, and to back away from the harder questions, from criticism of the government and other elites.³³ When there were more outlets in which a journalist could work, the competition and diversity of the field provided a shield that made it possible for journalists to ask harder questions and to publish harder-hitting stories. In a consolidated and converged environment, a journalist may be more tempted to ask herself, "Is this worth my job?" and perhaps back off the questions that really need to be asked and answered for the larger public good.

This is not mere speculation. A 2000 survey by the Pew Research Center and the Columbia Journalism Review demonstrated that 25 percent of local and national journalists have intentionally avoided newsworthy stories, the same number "have softened the tone of stories to benefit the interests of their news organizations," and 41 percent have done both.³⁴ Other forms of self-censorship are more visible, such as Clear Channel's widely reported list of 160 songs it deemed inappropriate after September 11th, among them anti-violence songs such as John Lennon's "Imagine" and Peter, Paul, and Mary's recording of "Blowin' in the Wind."³⁵ And who can forget the public flogging the Dixie Chicks took for daring to criticize the war in Iraq.³⁶

This chilling effect enhances the power of institutional sources, who at the highest and most significant levels can shut down a reporter—or in a consolidated market, an entire news outlet—if the reporter asks the wrong questions or publishes the wrong stories. To be sure, the current administration is not the first to punish hostile journalists in this way, but it is certainly the most recent. And thanks in part to consolidation and convergence, it may be the most effective in chilling criticism. In my view, this is an institutional problem that the media need to address if they are going to play a meaningful constitutional and democratic role in an era of consolidation and convergence.

I do not suggest that I have all of the answers to this difficult problem. I can say, however, that a critical component of the answer is the recognition that

33. This pressure can be formal, in the form of directives from management about how certain stories are to be reported. *See, e.g.*, *OUTFOXED: RUPERT MURDOCH'S WAR ON JOURNALISM* (The Disinformation Company, 2004). It can also be informal in the form of subtle newsroom norms of self-censorship. *Id.* *See also infra* note 34 and accompanying text.

34. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, *SELF-CENSORSHIP: HOW OFTEN AND WHY* (Apr. 30, 2000), available at <http://peoplepress.org/reports/display.php3?ReportID=39>.

35. *See, e.g.*, Jeff Sharlet, *War of the Worlds I: Big World: How Clear Channel Programs America*, *HARPER'S MAG.*, Dec. 2003.

36. *See, e.g.*, Associated Press, *Dixie Chicks' Singer Still Outspoken*, *TORONTO STAR*, Nov. 24, 2003, at E03.

civic responsibility must be a part of a publisher's bottom line, that good business need not give way to these obligations. To the contrary, the fulfillment of the media's constitutional responsibility is good for business because it brings readers conflict, prominence, and impact, all primary news values.³⁷ While a generation ago Simon and Garfunkel may have found themselves longing for Joe Dimaggio,³⁸ today I miss Kate Graham.³⁹

Finally, contraction and convergence also have the effect of shrinking what journalists call the "news hole." That is, there is less space for news, thus making the space that is available that much more precious. This has many effects in terms of shaping news judgment and content delivery, but one of them is to squeeze the capacity of journalists to provide context to stories—that is, the background necessary to understand a story. As we have heard time and again during this conference, perspective is a crucial safeguard against the distorting effect of fear. While space and consumer patience may be thin, it is during times of crisis that the media's capacity to provide context becomes most important. This is part of the challenge of risk communication.⁴⁰ Editors need to insist on this perspective rather than trying to cut it out if the story still reads, and reporters need to learn how to write about it effectively as well as compellingly.

None of these challenges is easy. Institutional reform never is. But I would submit that they are challenges that must be met if the media are to play their constitutional and democratic role in informing the public on matters of significance, in keeping governmental actors and other elites accountable, and—in the end—in managing the problem of fear and risk in times of crisis. Indeed, in my view, the failure to do so is the democratic crisis that is to be most feared.

37. BRIAN S. BROOKS ET AL., *THE MISSOURI GROUP, NEWS REPORTING AND WRITING* 5-6 (8th ed. 2005).

38. See Paul Simon & Art Garfunkel, *Mrs. Robinson*, on *THE GRADUATE SOUNDTRACK* (Columbia Records 1967) ("Where have you gone, Joe Dimaggio? A nation turns its lonely eyes to you"). The lyrics may be found at http://www.songfta.com/songs/X0031_mrsrobinson.html (last visited Oct. 2, 2004).

39. Haynes Johnson, *Appreciation: Katharine Graham: A Great Newspaper Owner*, *AM. JOURNALISM REV.* (Sept. 2001), at 35 (Katherine Graham became an icon in American journalism because of her willingness as a publisher to support her flagship newspaper, *The Washington Post*, in aggressive reporting "in the face of unremitting pressure from the highest governmental offices."); see generally David A. Anderson, *Freedom of the Press*, 80 *TEX. L. REV.* 429, 474-77 (2002).

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