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# EMOTE CONTROL\*: THE SUBSTITUTION OF SYMBOL FOR SUBSTANCE IN FOREIGN POLICY AND INTERNATIONAL LAW

JULES LOBEL\*\* AND GEORGE LOEWENSTEIN\*\*\*

Man has within him a lust for hatred and destruction. In normal times this passion exists in a latent state, it emerges only in unusual circumstances; but it is a comparatively easy task to call it into play and raise it to the power of a collective psychosis.

Albert Einstein in undated letter to Sigmund Freud

## INTRODUCTION

In an essay titled *Economic Imperialism*, the economist Edward Lazear trumpets the many triumphs of the economics profession, including the influence of economic reasoning on other disciplines. Among these, law may well be the most prominent.<sup>1</sup> By “economic reasoning,” Lazear elaborates that “the individual or the firm is maximizing something, usually utility or profit.”<sup>2</sup> It is precisely this rationalistic cost-benefit aspect of economics that makes it so appealing to many legal thinkers. Law, too, prides itself on decision making based on reason and is premised on the assumption that benefits arise from a deliberative process.

Ironically, however, just as law seems on the verge of embracing its imperialistic conquerors, economics itself is starting to change in response to influences coming from without. Behavioral economics—the application of insights from psychology to economics—has established a solid footing within the larger discipline and is already exerting an influence on many of the disciplines to which the standard economic paradigm had only recently begun to be applied.<sup>3</sup> Law is no exception, with diverse work now being done in what has come to be called “behavioral law and economics.”

\* We thank Rosa Loewenstein for (accidentally) suggesting this title when she requested the means for replaying a scene from Cinderella. More substantively, we thank Sophie Freud, Sam Issacharoff, and Cass Sunstein for helpful comments, and Cathy Potter for help in editing and researching the manuscript.

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1. Edward P. Lazear, *Economic Imperialism*, 115 Q.J. ECON. 99 (2000).

2. *Id.* at 100.

3. For a discussion of the broad reach of economic ideas, see Lazear’s *Economic Imperialism*, *supra* note 1.

Much of behavioral economics leaves untouched the rationality that makes economics so appealing to legal scholars. The main thrust of behavioral economists has been to relax some of the patently unrealistic assumptions that economists make about human preferences—e.g., that people are selfish, that they care about outcomes exactly in proportion to their likelihood of occurring, or that they discount the future exponentially at a constant rate.<sup>4</sup> Arguably, one can relax any of these assumptions without abandoning the core idea that people maximize utility.

More recent developments, however, pose a more fundamental challenge to the foundational assumptions of economics. In contrast to the conventional approach in economics, which assumes that behavior is chosen to achieve well-defined goals, the new work suggests that human behavior is the product of at least two neural systems that operate according to different principles and often clash with one another.

In almost all of the new “dual system” perspectives that have been proposed by economists, one of the systems is well-approximated by the standard account of economic behavior. This is no coincidence; humans do, indeed, have the capacity to deliberate about the consequences of their behavior in a rational fashion, and these deliberations often influence, and sometimes even exert control over, behavior. We refer to this system as the “deliberative” system and to its influence on behavior as deliberative control over behavior.

Although there is less agreement about the exact nature of the other system, most dual process models are in agreement that, in contrast to the first system, which is reflective, the second is more *reflexive*<sup>5</sup> and is generally oriented toward basic, short-term ends—e.g., fight, flight, eating, and sex—rather than toward the systematic fulfillment of long-term goals. We refer to this second system as the affective or emotional system, and to its influence over behavior as “emote control” of behavior.

Although standard economics, as well as the economic approach to law, assumes that deliberative control of behavior is the norm (and, indeed, does not generally take account of affective influences), we will argue that emote control of behavior is the default. It is the default in part because, as we discuss, deliberation is comparatively slow and laborious process that has only limited influence over behavior.

4. For a discussion of the implications for law of relaxing many of these assumptions, see Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STANFORD L. REV.* 1471 (1998).

5. Matthew D. Lieberman, *Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach*, in *SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES* 44–67 (J.P. Forgas et al. eds., 2003), available at <http://www.scn.ucla.edu/pdf/SydneyDM.pdf>.

The purpose of this Article is to outline the basic elements of one particular dual system perspective and to trace out some of its implications. After discussing how emote control and deliberative control differ, and how they interact to determine behavior, we apply our theoretical framework to legal issues involving foreign policy, terrorism, and international law. We argue that in all of these areas the powerful influence of affect not only on the general public, but on politicians and judicial decision makers in particular, leads to a common pattern—a *substitution of symbol for substance*.

The substitution of symbol for substance occurs at two levels. First, it can be seen in the types of situations and stimuli that drive people to action—namely vivid symbols rather than rational arguments. Second, it can be seen in the types of actions that people take—specifically symbolic actions that are superficially satisfying as opposed to more substantive actions that are less immediately satisfying but actually more likely to produce desired long-term results.

## I. DELIBERATIVE AND EMOTE CONTROL OF BEHAVIOR

The idea that people do not always make decisions with an eye to consequences, though heretical for economists, is commonplace in psychology.<sup>6</sup> While acknowledging that deliberation is one important process that guides human behavior, philosophers, psychologists, and most recently psychologically minded economists have proposed a variety of dual process perspectives that view human behavior as the joint product of two qualitatively different processes.<sup>7</sup> The dual process account that we discuss

6. Indeed, there is a long history of psychologists explicitly rejecting the consequentialist perspective of economics. See Shira B. Lewin, *Economics and Psychology: Lessons for Our Own Day from the Early Twentieth Century*, 24 J. ECON. LITERATURE 1293–1323 (1996) for a review. Lewin notes that William James, for example, attacked adherents of hedonism, noting that they “‘obey a curiously narrow teleological superstition,’ for they assume without foundation that behavior always aims at the goal of maximum pleasure and minimum pain; but behavior is often impulsive, not goal-oriented.” *Id.* at 1299 (quoting 2 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 551 (1899)).

7. Many different dual-process models have been proposed with different labels: rule-based and associative, Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3 (1996); rational and experiential systems, Lee A. Kirkpatrick & Seymour Epstein, *Cognitive-Experiential Self-Theory and Subjective Probability: Further Evidence for Two Conceptual Systems*, 63 J. PERSONALITY & SOC. PSYCHOL. 534 (1992); reflective and reflexive, Matthew D. Lieberman et al., *Reflexion and Reflection: A Social Cognitive Neuroscience Approach to Attributional Inference*, in 34 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 199 (2002); deliberative and implementive systems, Peter M. Gollwitzer et al., *Planning and the Implementation of Goals*, in HANDBOOK OF SELF-REGULATION: RESEARCH, THEORY, AND APPLICATIONS 211–28 (Roy F. Baumeister & Kathleen D. Vohs eds., 2004); assessment and locomotion, Arie Kruglanski et al., *To “Do the Right Thing” or to “Just Do It”*: *Locomotion and Assessment as Distinct Self-Regulatory Imperatives*, 79 J. PERSONALITY & SOC. PSYCHOL. 793 (2000); and type I and type II processes, Daniel Kahneman & Shane Frederick,

here draws a distinction between deliberation and affective, or *emote control*, of behavior.<sup>8</sup>

Our conception of affect is adopted from psychologists with an interest in the evolutionary bases of behavior.<sup>9</sup> These psychologists view affects, such as anger, sadness, and fear, as “programs” that evolved to coordinate the various specialized neural systems of the human brain to solve important recurrent problems that we encountered in our evolutionary past. As Cosmides and Tooby describe it, “[w]hen a condition or situation of an evolutionarily recognizable kind is detected, a signal is sent out from the emotion program that activates the specific constellation of subprograms appropriate to solving the types of adaptive problems that were regularly embedded in that situation.”<sup>10</sup> An emotion, in this view, is not reducible to any one category of effects, such as those involving motivation or feeling states. Rather, it is a:

superordinate program whose function is to direct the activities and interactions of the subprograms governing perception; attention; inference; learning; memory; goal choice; . . . physiological reactions (e.g., heart rate, endocrine function, immune function, gamete release); . . . motor systems; . . . energy level and effort allocation . . . and so on.<sup>11</sup>

The emotion of fear, for example, produces a wide range of cognitive, perceptual, and motivational effects, including shifts in perception and attention, changes in goals, physiological effects, and effects on memory.<sup>12</sup> Because many of these affective responses evolved before humans existed as such, we share many of our affects with other animals, although their manifestation in humans may differ from that in other species.<sup>13</sup>

Perhaps uniquely among animals, however, humans have an additional capability—a qualitatively different process that guides human behavior. This is our ability to deliberate about the long-term consequences of our behavior. Whereas affective motivation tends to be lexicographic—driven by single, simple considerations—deliberative decision making is

*Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49 (Thomas Gilovich et al. eds., 2002).

8. The specific theoretical perspective described here draws heavily on George Loewenstein & Ted O’Donoghue, *Animal Spirits: Affective and Deliberative Influences on Economic Behavior* (Carnegie Mellon Univ., Working Paper, Apr. 29, 2004), available at <http://sds.hss.cmu.edu/faculty/Loewenstein/downloads/animalspirits.pdf>.

9. Leda Cosmides & John Tooby, *Evolutionary Psychology and the Emotions*, in *HANDBOOK OF EMOTIONS* 91 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000).

10. *Id.* at 92.

11. *Id.* at 93.

12. *Id.* at 94–95.

13. *Id.* at 94–97.

much more compensatory, resulting in a more balanced weighing of costs and benefits.

This capacity seems to be closely connected to a region of the human brain called the prefrontal cortex. As Jonathan Cohen writes:

the very fact that economic theory, contrived by the human mind, can describe optimal behavior provides *prima facie* evidence that human beings can conceive of optimal behavior, and therefore in principle may be capable of it. There is good reason to believe that this capability is closely related to the function of a particular brain structure: the prefrontal cortex (PFC). The PFC occupies one third of the neocortex, is one of the brain areas that has expanded most in humans relative to other primate species, and overwhelming neuroscientific evidence indicates that our higher cognitive faculties, including deliberative thought, abstract reasoning, problem solving, planning, social interaction and language all rely heavily on the functions of PFC. That is, the PFC may be a critical substrate for "homo economicus."<sup>14</sup>

The prefrontal cortex with its rational capabilities did not, however, replace the older brain systems but was almost literally added on top of them. As Massey comments:

Emotionality clearly preceded rationality in evolutionary sequence, and as rationality developed it did not replace emotionality as a basis for human interaction. Rather, rational abilities were gradually *added* to preexisting and simultaneously developing emotional capacities. Indeed, the neural anatomy essential for full rationality—the prefrontal cortex—is a very recent evolutionary innovation, emerging only in the last 150,000 years of a 6-million-year existence, representing only about 2.5 percent of humanity's total time on earth.<sup>15</sup>

Human behavior, therefore, including behavior that is relevant to law, is not under the sole control of either affect or deliberation but results from the interaction of these two qualitatively different processes—like a computer that has two different types of processors it can draw upon that process information in qualitatively different ways. Emote control is fast but is largely limited to operating according to evolved patterns. Deliberation is far more flexible—it can be applied to almost any type of task or problem one might encounter—but is comparatively slow and laborious. Deliberation involves what psychologists call "controlled processes" that involve

14. Jonathan Cohen, *The Vulcanization of the Human Brain: A Neural Perspective on Interactions Between Cognition and Emotion and Optimality in Decision Making*, J. ECON. PERSPS. (forthcoming) (citation omitted).

15. Douglas S. Massey, *A Brief History of Human Society: The Origin and Role of Emotion in Social Life*, 67 AM. SOC. REV. 1, 15 (2002).

step-by-step logic or computations and are often associated with a subjective feeling of effort.<sup>16</sup>

Emote control is the default mode, while deliberation is invoked in special circumstances. Deliberation occurs, for example, when a decision maker encounters a new situation that cannot be solved effectively through evolved or learned responses. Deliberation can also be evoked either by directive—e.g., by telling someone that they will be accountable for, or have to justify, their behavior<sup>17</sup>—or by the demand characteristics of a task. For example, several studies have found that people tend to evaluate decision options more affectively when they judge those options one at a time and more deliberatively when they make explicit choices between options.<sup>18</sup> Finally, deliberation can be invoked by affect—as first noted in a seminal article by Herbert Simon.<sup>19</sup> Moderate levels of fear, anger, or almost any form of negative affect serve as a warning to the deliberative system that something is wrong and that its capabilities are required. Somewhat perversely, however, as affect intensifies, it tends to assume control over behavior even as it triggers the deliberative system, so one may realize what the best course of action is, but find one's self behaving in a quite different fashion. As Kris Kirby eloquently expressed it, “[t]he trouble with self-control strategies is that we are least motivated to use

16. Walter Schneider & Richard M. Schiffrin, *Controlled and Automatic Human Information Processing: I. Detection, Search and Attention*, 84 *PSYCHOL. REV.* 1 (1977).

17. Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 *PSYCHOL. BULL.* 255 (1999).

18. See Kathleen M. O'Connor et al., *What We Want to Do Versus What We Think We Should Do*, 15 *J. BEHAVIORAL DECISION MAKING* 403 (2002). As an example, Kahneman and Ritov asked people in one condition to evaluate the badness of two problems, one involving dying dolphins and the other involving farm workers with cancer. Some people were asked to evaluate the problems individually; they evaluated one or the other. Others evaluated the two problems simultaneously. Those asked to evaluate the problems one at a time rated the dolphin problems as worse, but when they evaluated them comparatively, most people rated the problem involving skin cancer in humans as worse. Dolphins, it seems, move people more at an emotional level, but at a more cognitive level, people know that they should care more about humans. See Daniel Kahneman & Ilana Ritov, *Determinants of Stated Willingness to Pay for Public Goods: A Study in the Headline Method*, 9 *J. RISK & UNCERTAINTY* 5 (1994). For an application to law, see David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 *COLUM. L. REV.* 1139 (2000). A similar result was found by Bazerman, White, and Loewenstein. They had people evaluate different outcomes of a negotiation to resolve a dispute over how to split some money. When people evaluated the outcomes one at a time, 90% rated a settlement that gave both parties \$500 as more desirable than one that gave themselves \$600 and the other party \$700. However, when they evaluated the two potential settlements side-by-side, 80% expressed a preference for the \$600/\$700 settlement that gave them more but was inequitable. One possible interpretation of this pattern is that people have a negative affective response to the inequality, but when forced to make a direct tradeoff between a settlement that is more lucrative and one that is more equitable, their deliberative side opts for the former. See Max H. Bazerman, George Loewenstein, & Sally Blount White, *Reversals of Preference in Allocation Decisions: Judging an Alternative Versus Choosing Among Alternatives*, 37 *ADMIN. SCI. Q.* 220 (1992).

19. Herbert A. Simon, *Motivational and Emotional Controls of Cognition*, 74 *PSYCHOL. REV.* 29–39 (1967).

them precisely at the times when we most need them.”<sup>20</sup> Although affect serves diverse essential functions, the same affective states that at low or moderate levels help people to survive can at higher levels produce suboptimal patterns of behavior. Extreme fear produces panic and immobilization rather than effective escape.<sup>21</sup> Uncontrolled anger toward another person can lead to behaviors, such as crimes of passion, that often end up doing the most damage to one’s self.

Not only is emote control the default mode, but even when the conditions are otherwise ripe for deliberation, deliberative control of behavior can be undermined by a variety of factors. First, because deliberation involves an exertion of mental effort, any factor, such as stress or exhaustion, that produces mental depletion will lead to a reduction of deliberation and a commensurate increase in emote control.<sup>22</sup> Thus, in one recent study, subjects who were classified as either a morning person or an evening person conducted a bargaining exercise with another person who was similarly classified.<sup>23</sup> For half the pairs, the exercise took place during a time of day that was close to the optimum for their circadian rhythm (e.g., in the morning for morning people); for the other half, it happened at a time when subjects could expect to be emotionally depleted and low in energy. The effects were dramatic. Almost all pairs who participated at their circadian peak achieved high joint gains from the exercise, but in almost all pairs who were off of their circadian optimum, bargaining broke down quickly, resulting in minimal gains for the subjects.

Second, because deliberation draws on scarce controlled processing, any factor that taxes the neural units responsible for deliberation will tend to undermine deliberation and encourage emote control of judgment and behavior. This point has been illustrated in numerous studies that examine the implications of “cognitive load” on subjects. In one classic study, for example, Shiv and Fedorkhin instructed subjects to keep either a 2-digit (low load) or 7-digit (high load) number in mind as they walked to a differ-

20. Kris N. Kirby & Barbarose Guastello, *Making Choices in Anticipation of Similar Future Choices Can Increase Self-Control*, 7 J. EXP. PSYCHOL.: APPLIED 154, 154 (2001).

21. Irving L. Janis, *Effects of Fear Arousal on Attitude Change: Recent Developments in Theory and Experimental Research*, in 3 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 166 (Leonard Berkowitz ed., 1967); Irving L. Janis & Howard Leventhal, *Human Reactions to Stress*, in HANDBOOK OF PERSONALITY THEORY AND RESEARCH (Edgar F. Borgatta & William W. Lambert eds., 1968).

22. For a very wide-ranging discussion of research and theory on this point, see ROY BAUMEISTER, TODD HEATHERTON & DIANNE TICE, *LOSING CONTROL: HOW AND WHY PEOPLE FAIL AT SELF-REGULATION* (1994).

23. Roxana M. Gonzalez & George Loewenstein, *Effects of Circadian Rhythm on Cooperation in an Experimental Game* (Carnegie Mellon Univ., Working Paper) (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=485442](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=485442).



ent room to continue the experiment.<sup>24</sup> On their way they encountered a table at which they were offered the choice between a serving of fruit salad or a piece of cake. Based on the idea that many subjects would be on diets, and that exerting self-control over behavior requires scarce cognitive resources, the authors predicted and found that subjects who were holding the long number in memory would be more likely to opt for the cake (63%) as compared with subjects who were holding the short number in memory (41%).<sup>25</sup>

Third, because deliberation is slow, deliberative processing takes time. Hence, any factor that imposes time pressure on a judgment or decision will tend to undermine deliberative processing. In one study that illustrates this point, Finucane et al. had subjects judge the risks and benefits of different technologies, such as nuclear power and cell phones, giving them either ample time or insufficient time (five seconds) to make judgments.<sup>26</sup> Ecologically, risks and benefits tend to be negatively correlated because greater risks are only tolerated when the benefits conferred are commensurate. However, based on prior work on what Slovic calls the "affect heuristic," the authors hypothesized and found that people tended to judge technologies with high benefits as low in risk and vice versa.<sup>27</sup> Technologies that elicit a negative reaction, such as nuclear power, are judged negatively on all dimensions; those that evoke a positive reaction, such as wind power, are judged positively on all dimensions. The key finding with respect to time delay, however, was that the correlation between people's judgments of risk and benefit were even more negative when people made these judgments under time pressure. With sufficient time to think, they were to some extent able to correct their gut-level response.<sup>28</sup>

Affect and deliberation are not, of course, independent processes. There is, for example, good evidence that affective inputs are essential to deliberative decision making. People with brain injuries that interrupt the flow of affective signals to the prefrontal cortex have trouble making decisions, and, when they do, they often make bad decisions.<sup>29</sup> Likewise, experiments in which people are robbed of affective inputs into decision

24. Baba Shiv & Alexander Fedorikhin, *Heart and Mind in Conflict: The Interplay of Affect and Cognition in Consumer Decision Making*, 26 J. CONSUMER RES. 278, 282 (1999).

25. *Id.* at 285.

26. Melissa L. Finucane et al., *The Affect Heuristic in Judgments of Risks and Benefits*, in THE PERCEPTION OF RISK 413, 420 (Paul Slovic ed., 2000).

27. *Id.* at 420; Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 7, at 397.

28. Finucane et al., *supra* note 26, at 420.

29. ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994).

making find that people tend to make poorer decisions<sup>30</sup>—at least for choices in which “gut feel” should obviously play a role, such as between different dishes at a restaurant.<sup>31</sup> Indeed, even in the domain of law, there seem to be situations in which raw feelings of “outrage” lead to more reasonable and systematic judgments than more deliberately chosen monetary levels of punitive damages.<sup>32</sup>

Affect can also distort and disrupt deliberative processing in various ways. Under the sway of powerful emotions, people are ready to believe almost anything. People who are desperately ill, or whose children are ill, are often ready to embrace quack remedies, contrary to all scientific evidence. And people who feel attacked will be ready to believe almost anything about their enemies. For example, many Arabs believe that the World Trade Center attacks were a Jewish conspiracy, and many Iraqis believe that the roadside bombs that kill so many civilians and soldiers are actually the work of Americans. The disparate perceptions of blacks and whites regarding the O.J. Simpson case likewise probably stemmed in part from powerful underlying emotions.

In sum, human decision making does not seem adequately described by the unitary decision model that dominates economics. Instead, it can usefully be described as the outcome of interactions between two qualitatively different processes, one involving a deliberative response to the anticipated consequences of a decision, and the other involving a more reflexive response to emotions experienced at the time of decision making. This poses a serious challenge to economics and to the economic account of law, both of which focus almost exclusively on the deliberative dimension of behavior.<sup>33</sup>

30. Timothy D. Wilson et al., *Introspecting About Reasons Can Reduce Post-Choice Satisfaction*, 19 PERSONALITY & SOC. PSYCHOL. BULL. 331 (1993); Timothy D. Wilson & Jonathan W. Schooler, *Thinking Too Much: Introspection Can Reduce the Quality of Preferences and Decisions*, 60 J. PERSONALITY & SOC. PSYCHOL. 181 (1991).

31. Murray G. Millar & Abraham Tesser, *Effects of Affective and Cognitive Focus on the Attitude-Behavior Relation*, 51 J. PERSONALITY & SOC. PSYCHOL. 270–76 (1986).

32. Daniel Kahneman, David Schkade & Cass R. Sunstein, *Shared Outrage and Erratic Awards: The Psychology of Punitive Damages*, 16 J. RISK & UNCERTAINTY 49 (1998).

33. Perhaps part of the reason that social scientists have tended to underappreciate the role played by emotions in behavior and to exaggerate the role of deliberation is that people generally tend to make this mistake. Part of the reason is that emote control invokes automatic, affective processes that are “cognitively inaccessible”; deliberation, in contrast, relies on cognitive processes that are accessible to some degree. Another contributing factor may be the tendency for people who are in “hot” affective states tend to underappreciate the extent to which their preferences and behavioral inclinations are influenced by their affective state; they typically believe that they are behaving more dispassionately than they actually are. People who are in cold states—who are not affectively aroused—on the other hand, tend to underestimate the extent to which being in an affective state would influence their perceptions and behavior. See George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 272 (1996).

## II. CHARACTERISTICS OF EMOTE CONTROL

Why should economists, or legal academics who draw on economics, care about the details of how the brain makes decisions? What does it matter if economic behavior is the product of one system or two? As Milton Friedman famously argued, economics should not be concerned with underlying process.<sup>34</sup> Utility maximization implies not that people explicitly deliberate about the costs and benefits of alternative options for behavior, but only that they behave *as if* they do.

This would be a valid argument if behavior was, in fact, well explained by the traditional model, but it is not. In fact, the affective processes that drive human behavior often propel people in directions very different from those that would be dictated by deliberation. The distinction between deliberative and emote control of behavior matters exactly because these two different modes lead to different attitudes and behavior.

Affect and deliberation diverge because the two systems respond to different stimuli and to the same stimuli in different ways. Consider, for example, the case of a dieter who encounters an available snack. On the one hand, the sight of the snack serves as a reminder of the diet, triggering a deliberate intention to resist the temptation. On the other hand, the sight of the snack is likely to trigger neural programs that motivate eating when food is readily available—especially food with high fat content. In cases such as this, affect and deliberation can propel behavior in opposite direc-

By the same token, people tend to exaggerate the role of deliberative decision making in their own behavior. When asked to introspect about the causes of their behavior, however, most people report that their actions are the product of deliberative decisions, Phillip Pettit, *Decision Theory and Folk Psychology*, in FOUNDATIONS OF DECISION THEORY: ISSUES AND ADVANCES (Michael Bacharach & Susan Hurley eds., 1991), even when this is demonstrably not the case. For example, research by Robert Zajonc and his colleagues has found that people tend to like things they are exposed to repeatedly—a phenomenon they term the “mere exposure effect.” Robert B. Zajonc, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL. MONOGRAPH SUPPLEMENT 1 (1968). However, because people are unaware of the effect, when their preferences are experimentally influenced through differential exposure, and they are asked to explain their tastes, they readily generate attribute-based explanations for their own preferences. See Robert B. Zajonc & Hazel Markus, *Affective and Cognitive Factors in Preferences*, 9 J. CONSUMER RES. 123 (1982). A subject might decide that he likes polygon number three, for example, not because he viewed it twelve times, but due to its geometric symmetry. In other research, a “split-brain” patient whose right hemisphere could interpret language but not speak, and whose left hemisphere could speak but was instructed to wave his hand by showing the word “wave” on the left part of a visual screen, which only the right hemisphere processed. JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* (1996). The left hemisphere saw the right hand waving but was unaware of the instructions that had been given to the right hemisphere (because the cross-hemisphere connections were severed). When the patient was asked why he waved, the left hemisphere invariably came up with a plausible explanation, such as “I saw somebody I knew and waved at them.” See MICHAEL S. GAZZANIGA & JOSEPH LEDOUX, *THE INTEGRATED MIND* 146–51 (1978).

34. Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3–43 (1953).

tions. As another example, many people experience intense fear when they fly even though they recognize that the risks are minuscule, and little fear while driving, even though they recognize that driving is far more dangerous than flying. To understand these and other situations in which emote control and deliberative control of behavior clash, we need a better understanding of what factors have a differential impact on affect and deliberation. Fortunately, prior research has identified several such factors.

**Temporal proximity:** The case of the dieter illustrates one of the most important factors that produce a divergence of emote and deliberative control of behavior: temporal proximity. Immediate emotions are highly tuned to temporal proximity; affective systems kick in when rewards and punishments are immediate but not when they are remote. Deliberation is, in contrast, much less sensitive to immediacy.

In a study that demonstrates this effect, McClure et al. scanned subjects' brains using fMRI<sup>35</sup> while they made choices between earlier/smaller and larger/later money rewards.<sup>36</sup> Some of the choices were between money amounts that would be received that day and larger amounts that would be delayed by two or four weeks. Other choices were between money amounts that were all delayed—e.g., \$5 in two weeks versus \$7 in four weeks. The authors predicted and found that all decisions activated areas of the brain that are commonly associated with analytical operations such as mathematical calculations.<sup>37</sup> However, when one of the alternatives of a choice was immediate, additional brain regions came into play, specifically regions that are commonly associated with affective processing, including those associated with the midbrain dopamine system and the paralimbic cortex. Furthermore, for choices that did include an option for immediate gratification, the relative engagement of the two systems significantly predicted subjects' choices, with greater relative fronto-parietal activity when subjects chose longer-term options and greater relative affective activity when subjects chose the shorter-term options.<sup>38</sup>

The passage of time is important not only prospectively, but also retrospectively. Just as the affective system tends to overweigh prospective costs and benefits that are imminent or immediate, it tends to exaggerate the importance of events that have happened in the very recent past. This is

35. fMRI is functional magnetic resonance imaging, a technique used to monitor patterns of brain activation.

36. Samuel M. McClure, David I. Laibson, George Loewenstein & Jonathan D. Cohen, *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, 306 SCIENCE 503 (2004) [hereinafter McClure et al.]. Monetary rewards took the form of Amazon.com gift certificates.

37. Specifically, the lateral prefrontal cortex and posterior parietal cortex.

38. McClure et al., *supra* note 36.

one reason why we often observe a kind of “sorting out” as events move into the past. In the middle of the situation—in the heat of the moment—we lose perspective and often overreact to things that are unimportant just because they are immediate. As events recede into the past, however, and the passions of the moment diminish, one typically gains a more evenhanded perspective, much as one learns which buildings in a city are tallest only after driving to the periphery. Affect, as discussed earlier, is inherently myopic; it lacks a long-term temporal perspective and effectively gets caught up in the “heat of the moment.” Deliberation can be powerfully swayed by affect in the short-term, but in the long-term, it tends to adopt a more evenhanded perspective.

**Adaptation:** In Jon Krakauer’s modern classic *Into Thin Air*, the author recounts the extreme shock he experienced the first time he encountered a climber’s dead body on Mount Everest.<sup>39</sup> However, when he encountered a second body shortly thereafter, his reaction already was much diminished: “the first body had left me badly shaken for several hours; the shock of encountering the second wore off almost immediately.”<sup>40</sup> Krakauer’s dramatically different reaction to the first and second bodies illustrates an important feature of many affective subsystems; they are sensitive to changes in things—to situations that appear to be new—but adapt to ongoing or repeated stimuli. The deliberative system, in contrast, is typically much more sensitive to levels—to ongoing, stable situations. At a cognitive level, Krakauer was aware that the second body was equivalent to the first—both were horrible—but at an emotional level, he reacted strongly to the first and only mildly to the second.<sup>41</sup>

There are good reasons for the affective system to adapt to ongoing stimuli. Affective processes serve important motivational and regulatory functions. We did not evolve to be happy; we evolved to survive and reproduce, and affective systems are designed to serve that purpose.<sup>42</sup> Negative affective states put us on notice that something is wrong and motivate us to change. Positive affective states provide immediate reward when we rectify whatever is wrong. Thus, for example, when our body temperature drops, blood flow is progressively reduced to peripheral regions of the

39. JONATHAN KRAKAUER, *INTO THIN AIR* (1997).

40. *Id.* at 107.

41. Adaptation is a common theme in historical accounts of atrocities. See, e.g., CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1993); JONATHAN GLOVER, *HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY* (2000).

42. See, e.g., Luis Rayo & Gary S. Becker, *Evolutionary Efficiency and Happiness* (Chicago Graduate Sch. of Bus., Working Paper, draft of Jan. 2005), available at <http://home.uchicago.edu/~gbecker/RayoBeckerLSE1.pdf>.

body, heart rate tends to decrease, and our brains instigate emotional programs designed to motivate us to seek out warmth. We experience discomfort, and almost anything that raises our body temperature becomes pleasurable—a process called “alliesthesia.” It takes deliberation to resist these influences, to recognize that we need to jump into the cold pool to get exercise or that we should keep jogging on a hot day.

**Vividness:** A third important property of the affective system is that it is highly attuned to visual imagery, whereas the deliberative system is much more keyed in to the logic of costs and benefits.

In a series of studies that illustrate the impact of vividness, Small and Loewenstein examined a phenomenon that Thomas Schelling labeled the “identifiable victim effect.”<sup>43</sup> The paradigmatic illustration of the identifiable victim effect and its often absurd consequences is the case of Jessica McClure, an eighteen-month-old who fell into a well in Texas in 1987 and received an outpouring of sympathy, including donations totaling more than \$700,000.<sup>44</sup>

The identifiable victim effect is difficult to demonstrate empirically because, if one shows that people are more responsive to identified victims, it may be the specific characteristics of the victim, rather than identification per se, that make the difference. Small and Loewenstein got around this problem by, in effect, identifying victims without providing any information about them. In the first of a series of studies examining the phenomenon, they assigned each member of a group of research participants a number and gave each \$10. Based on a drawing of numbers, half of the participants, the “victims,” were then made to return the money. Participants who had retained the \$10 were then given the opportunity to share their money with one of those who had lost their money. In the identifiable condition, the potential giver *first* drew the number of one victim from a bag, then decided how much to give to that victim (knowing, however, that she would never learn the actual identity of the victim). In the unidentifiable condition, in contrast, the potential giver decided how much to give just *before* drawing the victim’s number. Donations were about twice as large, on average, in the identifiable condition as in the unidentifiable condition, despite the fact that “identifying” the victims provided no information about them.<sup>45</sup> Follow-up research, in which people were given the

43. Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5 (2003); T.C. Schelling, *The Life You Save May Be Your Own*, in PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS 127 (Samuel B. Chase, Jr., ed., 1968).

44. Small & Loewenstein, *supra* note 43, at 5.

45. *Id.* at 7–11.

opportunity to donate money to the charitable organization Habitat for Humanity, revealed a similar effect in a more naturalistic setting.

**Categorization:** A fourth important property of emotive control is its sensitivity to mental categories. Categorization is an automatic process. Whenever we encounter a person or an object, we immediately and automatically classify it. We classify things not only according to *what* they are—e.g., a book, a person, or a dog, but, perhaps even more immediately, we classify things according to whether they are good or bad. Diverse research shows that people can often identify their affective reaction to something (whether they like it or not) more rapidly than they can even say what it is.<sup>46</sup> The human brain affectively tags virtually all objects and concepts, and these affective tags are brought to mind effortlessly and automatically when we encounter objects and concepts.<sup>47</sup> Such affective reactions to things can be dissociated from memory for details of those things, with the former often being better. For example, we often remember whether we liked or disliked a particular person, book, or movie without being able to remember any other details.<sup>48</sup>

From the perspective of law and social policy, one of the most important forms of categorization is the distinction between “us” and “them.”<sup>49</sup> People react much more strongly to positive or negative outcomes experienced by those whom they consider to be part of their own group than to those whom they consider to be outside their own group (except perhaps when it comes to emotions such as anger). However, exactly what constitutes one’s group, i.e. “us,” can be quite arbitrary and hence context dependent. Thus, for example, even though Yucca Mountain, the federal government’s proposed high-level nuclear waste repository, is right on the border with California and closer to many California population centers

46. Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 154 (1980); Robert B. Zajonc, *On the Primacy of Affect*, 39 AM. PSYCHOLOGIST 117 (1984); Robert B. Zajonc, *Emotions*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 591–632 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

47. See, e.g., Russel H. Fazio et al., *On the Automatic Activation of Attitudes*, 50 J. PERSONALITY & SOC. PSYCHOL. 229 (1986); Anthony G. Greenwald et al., *Unconscious Processing of Dichoptically Masked Words*, 17 MEMORY & COGNITION 35 (1989); Anthony G. Greenwald, *New Look 3: Unconscious Cognition Reclaimed*, 47 AM. PSYCHOLOGIST 766 (1992); John A. Bargh et al., *The Automatic Evaluation Effect: Unconditional Automatic Attitude Activation with a Pronunciation Task*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 104 (1996); Dirk Hermans, Jan De Houwer & Paul Eelen, *Evaluative Decision Latencies Mediated by Induced Affective States*, 34 BEHAV. RES. & THERAPY 483 (1996); David A. Houston & Russell H. Fazio, *Biased Processing as a Function of Attitude Accessibility: Making Objective Judgments Subjectively*, 7 SOC. COGNITION 51 (1989).

48. John A. Bargh, *Automatic and Conscious Processing of Social Information*, in 3 HANDBOOK OF SOCIAL COGNITION 1, 33–37 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984).

49. See DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003).

than to population centers in Nevada, the citizens of Nevada were far more upset about the nuclear waste's placement than were the citizens of California.<sup>50</sup> Because social categories are so arbitrary, they can also be easily manipulated by those with an agenda, as demagogues well understand. Almost any social classification, whether it be along the lines of religion, social class, or nation, can be made into a fault line if it is highlighted in an evocative fashion.<sup>51</sup>

In sum, emote control is generally much more sensitive to the specific timing of outcomes (especially to the distinction between immediate and delayed) than is deliberative control, and emote control is also more sensitive to repetition, vividness, and often arbitrary categorization than is deliberation. These are a few of the most important factors that drive a wedge between anticipated and immediate affect—between deliberative and emote control of behavior.

### III. FOREIGN POLICY AND INTERNATIONAL LAW

War is the quintessential issue where immediate emotion and passions hold sway, often at the expense of an evaluation of long-term consequences. Our legal system has long recognized this tendency and attempts to provide constitutional and statutory safeguards to ensure that a decision to go to war be made deliberately and not impulsively.

The Constitution gives the power to authorize war to Congress. The Framers chose so for a number of reasons, several of which are particularly relevant for this Article. They realized that decisions to go to war would often be driven by immediate passions and emotions, which might run contrary to the long-term national interest. The Framers believed that immediate emotions might particularly affect the executive branch's decision making about whether to go to war. James Madison wrote that "war is in fact the true nurse of executive aggrandizement," because "[t]he strongest passions and most dangerous weaknesses of the human breast: ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace."<sup>52</sup> Clearly a significant concern motivating the Framers was that the executive might act on emotional impulse, without calculating or adequately considering the long-term consequences.

50. Even more absurdly, in part due to the qualms of these Nevada residents, large amounts of high-level nuclear waste are currently stored in much more primitive and dangerous storage facilities surrounding nuclear reactors, many of them close to population centers.

51. Moses Shayo, *Nation, Class and Redistribution, Applying Social Identity Research to Political Economy* (2005) (unpublished Ph.D. dissertation, Princeton University) (on file with authors).

52. JAMES MADISON, *Helvidius No. 4*, in 6 WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906); see also THE FEDERALIST NO. 4 (John Jay).



Of course, although it was hoped that the president would only decide to go to war after careful deliberation, the possibility that the president would act rashly and without sufficient consideration of the national interest was too strong to ignore, and therefore a check had to be placed on executive power.

To ensure that immediate emotions or purely personal ambition did not draw us into war, the Constitution charges Congress with the power to declare war. As Justice Story wrote, the decision to go to war is so potentially "critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation."<sup>53</sup> That the constitutional framework was designed to permit reflection on long-term consequences can be seen in comments of critical Framers such as James Wilson, who wrote that the constitutional "system will not hurry us into war" and was designed to ensure "that nothing but our national interest can draw us into a war."<sup>54</sup> The metaphor Thomas Jefferson evoked, that the War Declaration Clause was designed to chain "the Dog of war," suggests the same point: that the animalistic, automatic barking of dogs at any sign of disturbance would be restrained by rational thought.<sup>55</sup> As one scholar has expressed it, the Framers intended that congressional authorization would slow the process to insure a pause, a "sober second thought," before the nation plunged into war.<sup>56</sup> Only when there was no time for deliberation or reflection, when the nation had to repel a sudden attack, could the president use force unilaterally.

The original constitutional framework was thus premised on a clear dichotomy between situations in which "emote control" would essentially take over, and the president could act almost automatically, and those that required the deliberation of Congress. The language "repel sudden attacks," used at the Constitutional Convention, clearly suggested the dichotomy. When another person suddenly attacks you, there is no time for controlled deliberation; you act immediately, automatically, and reflexively to block

53. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1166, at 60 (1833).

54. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (1836); see also 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 50 (1826) ("[T]he power of declaring war . . . is wisely confided to the legislature of the Union, and the presumption is, that nothing short of a strong case deeply affecting our essential rights . . . will ever prevail upon Congress to declare war.").

55. THOMAS JEFFERSON, *A Letter to James Madison*, in 15 THE PAPERS OF THOMAS JEFFERSON 397 (Julian P. Boyd ed., 1958) ("We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.").

56. JOHN HART ELY, WAR & RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 4 (1993).

the punch or to otherwise act in self-defense. In all other situations involving American use of force, the Framers assumed that the slow and controlled process of Congressional deliberation as to the consequences for the nation, both long-term and immediate, would apply.

This original constitutional understanding broke down in the last half of the twentieth century, as presidents asserted broad war powers and Congress generally abdicated its responsibility to carefully consider decisions to go to war. In most cases, Congress simply did nothing, and the president acted unilaterally.<sup>57</sup> The constitutional requirement of deliberation by “the successive reviews of all the councils of the nation” simply failed to operate.

In other cases, such as the enactment of the Gulf of Tonkin Resolution, which was taken to have authorized the Vietnam War, Congress acted “with great speed and in the heat of emotion” to accord the president broad authority to do virtually anything.<sup>58</sup> The passage of that Resolution and the resulting legal and political struggle over the constitutionality of the war in Vietnam illustrate some of the mechanisms by which emote control operates either as a substitute or often as an underpinning for what appears to be deliberative, consequentialist decision making.

In early August 1964, the Johnson Administration claimed that North Vietnamese patrol boats attacked the American destroyers *Turner Joy* and the *Maddux* in separate incidents in the Gulf of Tonkin. U.S. warplanes almost immediately retaliated by bombing four North Vietnamese patrol boat bases, and on August 7th, Congress enacted the Gulf of Tonkin Resolution, which explicitly accorded the president the power “to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.”<sup>59</sup> By the time various presidents had finished using force in defense of South Vietnam, the American war in Southeast Asia had become the longest in our history, the second most expensive monetarily, and had cost almost 58,000 American lives.

Yet the possibility of such consequences clearly was not considered at the time. The Gulf of Tonkin Resolution passed the House of Representatives with virtually no discussion and unanimously by a vote of 416–0, and the Resolution passed by a nearly unanimous vote in the Senate, with only

57. *Id.* at 49.

58. *Id.* at 19 (citing 116 Cong. Rec. 15,409 (1970) (statement of Professor Alexander M. Bickel et al.)).

59. Pub. L. No. 88-408, 78 Stat. 384 (1964).

Senators Morse and Gruening dissenting.<sup>60</sup> The contrast to the lengthy Congressional debates that preceded each incremental grant of authority given to President John Adams to wage the undeclared and limited war with France in the late 1790s and the seventeen days of Congressional deliberation that resulted in the declaration of the War of 1812 could not be starker.<sup>61</sup> In 1964, not only the Congressional but the nation's response to the purported North Vietnamese attack was highly emotional, immediate, vivid, and automatic as well as popular with the public: the only two Senators who voted against the Gulf of Tonkin Resolution were defeated in their next election campaigns.<sup>62</sup>

Despite the explicit language of the Gulf of Tonkin Resolution, senators and congressmen later denied that they understood the consequences of voting for it. For example, Senator William Fulbright, Chair of the Foreign Relations Committee and the administration's floor manager for the Resolution, later claimed that he had been "unaware of the significance of the measure" and that its passage "must stand as the only instance in the nation's history in which Congress authorized war without knowing that it was doing so."<sup>63</sup>

One explanation for this later recantation is mere cynical political calculation. Having voted on the Resolution for calculated political reasons, Fulbright and others scrambled for cover once the war went sour. In addition, some like Fulbright legitimately felt duped by the Johnson Administration. Yet Fulbright clearly hit on a phenomenon that many people later felt: while the language of the Resolution was clear and while he clearly understood that language (and indeed opposed an amendment to delete or limit the broad authorization), in a profounder sense emotive control had taken over in response to the immediate crisis, so that Congress had indeed not considered the significance or potential consequences of enacting the Resolution. Even those senators who had expressed reservations about the consequences of what they were doing overrode those doubts with the emo-

60. 110 Cong. Rec. 18,470-71, 18,555 (1964); ELY, *supra* note 56, at 19.

61. See GEOFFREY PERRET, *A COUNTRY MADE BY WAR: FROM THE REVOLUTION TO VIETNAM—THE STORY OF AMERICA'S RISE TO POWER 105-06* (1989), noting that deliberation for the declaration of the War of 1812 lasted for seventeen days. See also ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801*, at 90-96 (1966), detailing the lengthy sequence of congressional acts escalating U.S. action against France.

62. ELY, *supra* note 56, at 19.

63. J. William Fulbright, *The Legislator as Educator*, 57 FOREIGN AFF. 719, 725 (1979) (emphasis omitted).

tional, gut feeling that they had to support the president and not exercise their independent judgment.<sup>64</sup>

These problems with the Gulf of Tonkin Resolution led some to later question whether the Vietnam War had been constitutionally authorized. However, as scholars such as John Hart Ely have argued, Congress' failure to consider the potential consequences of what it was voting on cannot be used to justify legally depriving the president of the constitutional authority that was indeed granted by the Resolution.<sup>65</sup> Irrespective of the constitutionality of the Vietnam War in particular, such superficial, impulsive, and emotional consideration of a decision to authorize warfare is contrary to the purpose of the constitutional allocation of war power to Congress, namely to ensure considered, careful deliberation of such grave decisions.

The lack of deliberate Congressional decision making over decisions to use force in such disparate places as Korea, Vietnam, Cuba, and the Dominican Republic resulted from a profound sense of crisis that pervaded post-World War II America. As Arthur Schlesinger wrote:

[T]he belief that the world was greatly endangered by the spread of communism had generated a profound conviction of crisis in the United States; and the conviction of crisis had generated a foreign policy that placed the separation of powers prescribed by the American Constitution under unprecedented and at times unbearable strain.<sup>66</sup>

Schlesinger describes this sense of crisis in psychological terms as bordering on neurosis, as engendering "delusions," and as a foreign policy "under the hypnosis of crisis."<sup>67</sup> Indeed, Fulbright himself had argued just three years before the Gulf of Tonkin Resolution that traditional democratic separation of powers principles had to yield to the need for strong executive power to meet the new situation and to ensure "survival" in a world of "aggressive totalitarianism."<sup>68</sup>

This sense of crisis muddled or even collapsed the temporal framework that, as we have seen, underlies the division of war powers under the Constitution. The president's power to use military force was carefully limited temporally to repelling sudden attacks that required an immediate, almost automatic response in the absence of time for deliberation. By the late-twentieth century, however, some were advocating a liberalization of

64. See, for example, the statement of Senator George Aiken "I feel that I, an American citizen, can do no less than support the President in his capacity as leader of our nation." 110 Cong. Rec. 18,457 (1964).

65. ELY, *supra* note 56, at 21.

66. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 163 (1973).

67. *Id.* at 164.

68. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 7 (1961).

the concept of "sudden attack" to include all threats to national security based on the rationale that the interdependence of the twentieth-century world meant that any such threat might "impinge directly upon the nation's security."<sup>69</sup> The development of nuclear weapons and consequent possibility of imminent annihilation, in particular, led some commentators to argue that it was no longer appropriate "to distinguish between the emergency powers of the Executive and the nonemergency policy prerogatives of the legislature."<sup>70</sup> Careful deliberation was perceived of as an outmoded luxury in a world confronted by perpetual crisis. To avert annihilation, decisions needed to be made in minutes, not days. These tendencies favored emotive control over the more deliberative processes contemplated by the Constitution.

The national trauma caused by the Vietnam War led Congress to attempt to reassert its authority and responsibility in order to bring deliberate decision making back into decisions to use force against another country. In 1973, Congress enacted the War Powers Resolution, which sought to limit the Commander in Chief's powers by restoring the offensive defensive distinction central to maintaining the boundary line between war and peace.<sup>71</sup> Section 2 of the Resolution permits the Commander in Chief to introduce armed forces into hostilities only where there has been an "attack upon the United States, its territories or possessions, or its armed forces."<sup>72</sup> However, that section is merely hortatory, with no enforcement.<sup>73</sup> The Resolution's main attempt to limit executive power is temporal and procedural. Congress tried to restrict the president's use of troops in hostile situations by placing a cap of sixty days on the period during which the president can deploy armed forces without congressional permission.<sup>74</sup>

Congress recognized, moreover, that powerful emotional factors drove most of its members to prefer not to vote on whether to authorize American use of military force, so as to avoid opposing a president who claims that

69. Dep't of State, Office of the Legal Advisor, *The Legality of United States Participation in the Defense of Vietnam*, 75 YALE L.J. 1085, 1101 (1965); WILLIAM P. ROGERS, *Congress, The President, and the War Powers*, 59 CAL. L. REV. 1194, 1197 (1971).

70. Yonkel Goldstein, *The Failure of Constitutional Controls over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1546 (1988).

71. S. REP. NO. 93-220, at 21 (1973) (stating that war and peace in the American constitutional system are separate and distinct and that the purpose of the bill is to restore that distinction); *id.* at 3 (citing Bickel for the proposition that restoring the balance in war powers is "one of line-drawing, of separating one thing from another").

72. 50 U.S.C. § 1541(c) (2000).

73. John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988); Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1335-36 (1984).

74. 50 U.S.C. § 1544(b). The president could extend the authority for one thirty-day period, after which it would automatically terminate. *Id.*

armed force is needed and to abjure responsibility for a Vietnam-like debacle. Therefore, faithful to the constitutional scheme, the War Powers Resolution required affirmative Congressional approval of force. If Congress simply refused to vote or could not muster sufficient institutional willpower to vote, the president was required to withdraw the troops.<sup>75</sup>

In addition, the War Powers Resolution specifically rejected the view that subsequent Congressional votes approving funds to continue a war counted as authorization of the war.<sup>76</sup> It did so based on the position expressed by some courts and many members of Congress that legislators are emotionally forced to vote for appropriations: not to do so would abandon the troops in the field. As Senator George McGovern put it when voting for appropriations to continue the Vietnam War: "It involves more the throwing of a rope to a man in the water. We may have cause to question how he got there, but he is there, he is a human being, he is our friend and a member of our family."<sup>77</sup>

The explanation is actually irrational, because cutting off appropriations means that any sane president would withdraw the troops rather than leave them to fight defenseless, but the immediate appeal of the "support our troops" argument usually outweighs any rational consideration of the merits of voting for or against funding. In any event, the War Powers Resolution was designed to force considered, deliberate Congressional consideration of whether military force was used and therefore proscribed techniques, such as authorization through appropriations, in which emotional appeals to immediate concerns would steamroll consideration of long-term consequences.

Virtually all observers now recognize the War Powers Resolution to have been a failure.<sup>78</sup> Every president since Nixon has violated the Resolu-

75. *Id.*

76. *Id.* § 1547(a)(1).

77. 112 Cong. Rec. 4404, 4409 (1966).

78. See, e.g., ELY, *supra* note 56, at 49 ("[T]he War Powers Resolution has not worked."); Thomas M. Franck, *Rethinking War Powers: By Law or by "Thaumaturgic Invocation"?*, 83 AM. J. INT'L L. 766, 768 (1989) ("It is sobering and instructive to examine the extent of this failure and its causes."); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 770 (1997) ("Moreover, Congress has no motive to try to stop the President from initiating conflict (as the failure of Congress to respond to presidential disregard of the War Powers Resolution illustrates."); Ronald J. Seivert, *Campbell v. Clinton and the Continuing Effort to Reassert Congress' Predominant Constitutional Authority to Commence, or Prevent, War*, 105 DICK. L. REV. 157, 166 (2001) ("Those who thought the War Powers Resolution might be a panacea that would halt military adventurism and permit Congress to resume control over foreign affairs were soon disappointed."); Patrick D. Robbins, Comment, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U.L. REV. 141, 144 (1988) ("[T]his Comment argues that the failure of the executive, legislature, and judiciary to apply the War Powers Resolution in any meaningful way and the near certain unconstitutionality of some of its provisions have rendered the law a dead letter.").

tion, often repeatedly. Congress has generally acquiesced in such executive violations. No president has ever filed a report starting the sixty-day clock, despite repeated executive introduction of armed forces into hostile situations in Southeast Asia, Iran, Lebanon, Central America, Grenada, Libya, the Persian Gulf, Yugoslavia, and Bosnia.<sup>79</sup> Congress has challenged this noncompliance only once, without a decisive result.<sup>80</sup> The judiciary has refused to adjudicate claims challenging executive action as violative of the Resolution, holding that a challenge by over 100 Congressmen to the armed presence in the Persian Gulf during the 1980s was nonjusticiable, as was a similar challenge to President Clinton's air war against Yugoslavia in 1997.<sup>81</sup>

The Bush Administration did seek and obtain Congressional authorization for the Afghanistan military campaign and the war against Iraq. These two examples do not disprove the general practice since 1973: where the president is able to use a deeply emotional issue, which can be portrayed as immediate, to justify war, he can convince Congress and may even request Congressional authorization. Where Congressional authorization may not be forthcoming, such as for Clinton's air strikes on Serbia in Kosovo or the continuous bombing of Iraq during the Clinton and Bush Administrations prior to the March 2003 attack on Iraq, the administration will not involve Congress, Congress will not object, and the courts will not intervene.

Indeed, the war against Iraq illustrates problems of executive and congressional decision making paralleling those that surfaced with the Gulf of Tonkin Resolution. In Iraq, as in Vietnam, the House and Senate voted overwhelmingly to authorize war despite dubious evidence as to the reasons for the war and despite skepticism of some members of Congress.<sup>82</sup> Again, as in Vietnam, the compelling argument for many members of Congress was not based on an evaluation of the anticipated consequences of the war in Iraq, but instead on the perceived immediate necessity to accord the president broad power to deal with an evil force in the world that threatens our very survival.<sup>83</sup> Indeed many, including John Kerry, claimed that they

79. Ely, *supra* note 73, at 1381 & n.8.

80. The one occasion was the Lebanon crisis, when Congress negotiated a "compromise" with the Reagan Administration permitting troops to remain in Lebanon for eighteen months. *Id.* at 1381; Michael J. Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 *LOY. L.A. L. REV.* 657, 667 (1984).

81. *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

82. 148 Cong. Rec. H7739-799, S10284-342 (2002).

83. See, for example, the statement of Rep. John Linder:

voted to give the president authority but assumed that he would use that authority wisely, an argument reminiscent of Fulbright's ex post explanation of his vote on the Tonkin Resolution.<sup>84</sup> Most ominously, the terrorist threat has raised the crisis mentality to a new level, exceeding even that of the Cold War, in which the need to repel potential threats before they materialize eliminates whatever vestige of the distinction between self-defensive and offensive action that survived the Cold War.

The refusal of Democratic and Republican presidents to abide by the War Powers Resolution, and the over-reliance on emotional appeals to decide whether to go to war, illustrates that the war powers problem is deeply rooted in human psychology, not particular ideologies. The failure of the War Powers Resolution requires not merely technocratic or policy reforms, but rather new types of mechanisms that are grounded in a more thoroughgoing understanding of the role of emotion in human decision making.

The war against terrorism also illustrates the effect of affect or emote control on governmental policy and law. The tragic, vivid, and compelling events of September 11 set in motion an emotional reaction by both governmental officials and the population that overwhelmed any rational or objective assessment of either the risks terrorists present or the policy choices to confront terrorism.

First, the September 11 attacks were repeatedly viewed as presenting a "new" situation, thereby triggering a stronger emotional reaction than the

Mr. Speaker, what cannot be disputed today is that peace and freedom are the ends to which we now seek our means. President Bush has demonstrated the courage to lead and to draw a line in the sand. Now is the time for Congress to support his leadership. I am proud to join a broad bipartisan coalition of Members by standing up to tyranny and oppression and opposition to freedom by voting no on this amendment. By rejecting this spurious amendment we will ensure that America's promise to uphold the rule of law and to protect the peace-loving people of the world actually has meaning.

148 Cong. Rec. H7741-42 (2002) (statement of Rep. Linder).

84. See, for example, John Kerry's statement in the presidential debate of September 30, 2004: And from the beginning, I did vote to give the authority, because I thought Saddam Hussein was a threat, and I did accept that intelligence.

But I also laid out a very strict series of things we needed to do in order to proceed from a position of strength. Then the president, in fact, promised them. He went to Cincinnati and he gave a speech in which he said, "We will plan carefully. We will proceed cautiously. We will not make war inevitable. We will go with our allies."

He didn't do any of those things. They didn't do the planning.

Kerry, however, voted against an amendment that would have legally required the president to get the consent of our allies at the United Nations, choosing, just as Fulbright had forty years earlier, to give the president a broad authorization and rely on presidential promises instead of limiting the president's authority. Commission on Presidential Debates, *2004 Debate Transcript* (Sept. 30, 2004), available at <http://debates.org/pages/trans2004a.html>.



emotions occasioned by an equivalent or even stronger danger that is experienced as ongoing and “not new.” In contrast, locating September 11 as a particular heinous incident in the ongoing war against terrorism (which government officials have been waging for at least two decades) would undoubtedly have focused dialogue in a more deliberative mode of response. However, in the immediate aftermath of the September 11 attacks, government officials, the media, and academics focused on this “new” paradigm now confronting the United States. As President Bush argued after September 11: “In the new world we have entered, the path to peace and security is the path of action.”<sup>85</sup> President Bush returned to that refrain in a February 7, 2002, order stating that the “war against terrorism ushers in a new paradigm . . . ushered in not by us, but by terrorists.”<sup>86</sup>

It is questionable whether the September 11 attacks really were “new.”<sup>87</sup> Certainly, the scale of the destruction was on a dramatically higher order than the attacks of the 1980s and 90s against targets as diverse as the World Trade Center, U.S. embassies, airlines, etc. But merely because the level of destruction was substantially greater than prior attacks does not make the situation new.

The perception of the September 11 attacks as ushering in a new era was a powerful emotional motivation for changes in legal doctrine that might not survive rational scrutiny. That the United States is facing a new situation has been utilized to justify (a) changing international legal rules on the use of force to permit preemptive self-defense;<sup>88</sup> (b) not applying the Geneva Conventions to alleged terrorists;<sup>89</sup> (c) detaining people without charges or trial; and (d) a very narrow definition of torture permitting coercive interrogation for the purpose of obtaining vital information from alleged terrorists. Although each of these changes has been the subject of rational debate and discourse, the perception that the problem of terrorism was in some sense “new”, encouraged an affective response to the problem that discouraged and distorted rational debate. Had the problem been

85. NAT'L SEC. COUNCIL, NATIONAL SECURITY STRATEGY OF THE UNITED STATES, Introduction (2002) [hereinafter NATIONAL SECURITY STRATEGY], available at <http://www.whitehouse.gov/nsc/nss.pdf>.

86. Memorandum from President George W. Bush, Subject: Humane Treatment of al Qaeda and Taliban Detainees, Point 1 (Feb. 7 2002) [hereinafter Humane Treatment Memo], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf>.

87. See SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? (Mary L. Dudziak ed., 2003).

88. NATIONAL SECURITY STRATEGY, *supra* note 85, at 6.

89. See Memorandum from Alberto Gonzalez, to President George W. Bush, Subject: Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002) (“In my judgment this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners . . .”); see also Humane Treatment Memo, *supra* note 86, point 1 ([T]he “new paradigm . . . requires new thinking in the law of war.”).

viewed in a more historical context, in contrast, deliberative processes could have potentially exerted a larger influence on the actions that ensued.

Second, affective responses to the threat of terrorism were certainly heightened by the powerful visual imagery that the September 11 attacks afforded—e.g., the footage of planes hitting the World Trade Center that was shown with numbing repetitiveness in the days following the attack. As discussed in the last section, it is well-documented that people tend to exaggerate small risks that engage strong emotions. For example, people are willing to spend more money countering terrorists' threats than promoting highway safety, although the latter would undoubtedly statistically save more lives.

In the terrorism context, Cass Sunstein has discussed one aspect of this phenomenon that he terms "probability neglect," a problem exacerbated when emotions are intensively engaged.<sup>90</sup> Probability neglect occurs when people overreact to minor risks, particularly when those risks trigger strong emotions. People in these circumstances focus on the bad outcome itself, irrespective of the fact that it is very unlikely to occur. Sunstein argues:

The conclusion is that many people will pay a significant amount to avoid a small probability of a hazard that is affectively-laden—and that when strong emotions are involved, the amount that they will pay will not vary greatly with changes in probability. In the context of terrorism, the implication is clear. The risks associated with terrorist attacks are highly likely to trigger strong emotions, in part because of the sheer vividness of the bad outcome and the associated levels of outrage and fear. It follows that even if the likelihood of an attack is extremely low, people will be willing to pay a great deal to avoid it.<sup>91</sup>

When strong emotions are involved, Sunstein shows, people often pay little attention to the objective probability of the risks they face and react similarly to a risk that has a 1% chance of occurring and a risk that has a .001% chance of eventuating.

In the case of terrorism, such probability neglect can distort policy. The imposition of time-consuming screening procedures at airports may lead more people to drive rather than fly. Because flying is safer than driving, even assuming a steady rate of terrorists attack, on balance more people might die as a result of exaggerated antiterrorism precautions. Similarly, the exaggeration of risk because of vivid emotional reaction

90. Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 122 (2003).

91. *Id.* at 124.

might lead the population and the government to discard or reverse civil liberties when the nature of the risk may not warrant such action.

The problem of vivid, emotional miscalculation of risk is particularly acute in the antiterrorism context, since fear is a particularly strong emotion, impervious to deliberate calculation. As Edmund Burke once observed, “[n]o passion so effectually robs the mind of all its powers of acting and reasoning as fear.”<sup>92</sup>

Third, the emotionality of the response to terrorism in the aftermath of the September 11 attacks was exacerbated by the factor of temporal immediacy. The fact that the terrorist attack was sudden and unpredictable produced the type of immediacy that evokes emotional decision making. For example, within a few months of the September 11 attacks, Congress enacted the USA PATRIOT Act containing significant restrictions of the liberties of American citizens and rights of aliens.<sup>93</sup> The PATRIOT Act was rushed through Congress with great speed and an almost complete lack of informed discourse, based on the notion that the crisis required immediate action.<sup>94</sup> The Act is both complex and voluminous.<sup>95</sup> Yet the Act was not read by key members of Congress prior to its passage.<sup>96</sup> The committee process and floor debate were bypassed; the asserted reason was that Congress had to act quickly to thwart terrorist attacks believed to be impending.<sup>97</sup>

The enactment of the Patriot Act, like virtually all policy or legislative initiatives, had elements of rational discourse as well as appeals to emotion. Thus, the inclusion of sunset provisions in the Patriot Act was a thoughtful, deliberative response to the legislators’ insight that the bill was being ushered through in the heat of emotion to address a vivid, immediate crisis. Whatever its limitations, the point here is not to criticize the Act, nor legislators for reacting emotionally. Rather, it is to show that immediate re-

92. EDMUND BURKE, A PHILOSOPHICAL ENQUIRY INTO THE ORIGIN OF OUR IDEAS OF THE SUBLIME AND BEAUTIFUL 57 (James T. Boulton ed., rev. ed., Basil Blackwell Ltd. 1987) (1958).

93. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

94. Winston P. Nagan & Craig Hammer, *Patriotism, Nationalism and the War on Terror: A Mild Plea in Avoidance*, 56 FLA. L. REV. 933, 948 (2004).

95. The USA PATRIOT Act is 131 pages long.

96. See Elizabeth A. Palmer, *Terrorism Bill's Sparse Paper Trail May Cause Legal Vulnerabilities*, 59 CONG. Q. WKLY. 2533, 2534 (2001) (reporting that many of the lawmakers who voted for the USA PATRIOT Act never had a chance to read to the final version before the bill was passed); cf. 147 CONG. REC. S10,991 (2001) (statement of Sen. Leahy) (“We expedited the legislative process in the Judiciary Committee to consider the [Bush] Administration’s proposals. In daily news conferences prior to the original passage of the USA [PATRIOT] Act, the Attorney General [John Ashcroft] referred to the need for such prompt consideration.”).

97. Nagan & Hammer, *supra* note 94, at 948; *Administration’s Draft Anti-Terrorism Act of 2001: Hearing Before House Comm. on the Judiciary*, 107th Cong. (2001).

sponses to emotional crises are often not adequately informed by deliberative decision making.

Similarly, executive decisions to use force to retaliate against terrorist attacks over the past two decades have been made in the heat of the moment and appear to reflect an emotional hostility rather than a deliberative judgment as to the best long-term strategy for dealing with terrorism. The Reagan Administration's 1986 retaliatory strike against Libya and the Clinton Administration's 1998 strikes against Afghanistan and Sudan after the embassy bombings each occurred within weeks or days of United States identification of the perpetrator. As a former Middle East terrorism analyst for the U.S. Defense Department has noted:

With emotions still raw, U.S. officials may have opted for the tool of hostility that reflected their current mindset; in contrast, if the perpetrators of the attacks were not identified until years or months later, it is possible that U.S. decision makers, removed from the anger of the moment, might have selected less aggressive measures to achieve accountability and bring the terrorists to justice.<sup>98</sup>

Or as former National Security Advisor Brent Scowcroft expressed it, "you have to strike when the situation is hot."<sup>99</sup>

The need to act quickly to respond to terrorist threats, even in the absence of factual clarity, has been defended by various administrations. President Reagan's Secretary of State George Schultz argued in 1984 that the United States must be ready to use military force to fight terrorism and retaliate for terrorist attacks even before all the facts are known.<sup>100</sup> Similarly, former legal advisor Abraham Sofaer claimed that in the interest of national security, the United States must use force when responding to terrorism, even if our claims cannot "be proved in a real court or in the court of public opinion."<sup>101</sup> Although the United Nations Charter attempts to limit the unilateral use of military power to cases of clear self-defense, Schultz argued that "we do not have the luxury of waiting until all the ambiguities have disappeared."<sup>102</sup>

98. Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 FLETCHER F. WORLD AFF. 17, 23 (2002); see also Michele L. Malvesti, *Explaining the United States Decision to Strike Back at Terrorists*, 13 TERRORISM & POL. VIOLENCE 85, 94, 96 (2001) (explaining government decisions to order retaliatory air strikes in the "heat of the moment").

99. John Lancaster, *Compromising Positions*, WASH. POST MAG., July 9, 2000, at 22 (quoting Brent Scowcroft, National Security Advisor to President George Bush, Sr.).

100. See *Excerpts from Shultz's Address on International Terrorism*, N.Y. TIMES, Oct. 26, 1984, at A12.

101. Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 101 (1989).

102. George Shultz, *Low-Intensity Warfare: The Challenge of Ambiguity*, 25 I.L.M. 204, 205 (1986).

Moreover, the short-term satisfaction of retaliatory military action against terrorists often is outweighed by the long-term consequences. The 1986 air strikes against Libya underscore the dangers of military retaliation. Although many observers claim that Libyan-sponsored terrorism declined after the United States' raid of Tripoli, our government concluded otherwise. United States officials have determined that the 1988 destruction of Pan Am Flight 103 over Lockerbie, Scotland, was Libya's response to the Tripoli raid, and that, in the words of a former counterterrorism official, "we [had] just set up the next round of terrorism."<sup>103</sup> Thus, after the Lockerbie tragedy, the United States government shifted its strategy and focused on diplomacy and law enforcement. That effort took much longer but eventually resulted in Libya turning over its agents involved in the bombing for prosecution. As former CIA Director James Woolsey has stated, an effective response to terrorism is often "at odds with its being prompt."<sup>104</sup>

Most ominously, the war against terror has led to a distortion of the temporal component of decision making, so that potential threats that ordinarily and historically were treated as allowing time for negotiation, deliberation, and defensive preparation are now perceived as if they are imminent and require immediate action.

For example, historically, international law did not permit a nation to use force against another unless it was being attacked or was in imminent danger of attack by the other.<sup>105</sup> The concept of anticipatory self-defense was thus tethered to the existence of an imminent threat. In a direct challenge to international law, the Bush Administration's National Security Strategy adopted a policy of preemptive military action in response to emerging or potential threats that does not meet the old standard of imminence.<sup>106</sup> The new policy requires that "we must adapt the concept of imminent threat" to meet the greater threat posed by terrorists.<sup>107</sup> Although

103. Andrew Marshall, *Strike First, Ask Questions Later: U.S. Policy Is Now to Hit Terrorists Hard, Without Any Legal Niceties*, INDEPENDENT (London), Aug. 30, 1998, at 13; see also Richard J. Newman et al., *America Fights Back: Clinton Raises the Stakes in the War Against Terrorism*, U.S. NEWS & WORLD REP., Aug. 31, 1998, at 38-39 ("The bombing of Pan Am Flight 103 in 1988 is widely believed to have been an act of revenge for the U.S. bombing of Libya in 1986 . . .").

104. *Counterterrorism Policy Before the Judiciary Committee of the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of James Woolsey, Director, CIA), available at 1998 WL 564420.

105. The traditional formulation of the historic tenet of international law is contained in a letter by Secretary of State Daniel Webster in response to the Caroline incident: "It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation." Daniel Webster, *A Letter to Henry Fox*, in 1 BRITISH DOCUMENTS ON FOREIGN AFFAIRS: REPORTS AND PAPERS FROM THE FOREIGN OFFICE CONFIDENTIAL PRINT (PART I, SERIES C) 153, 159 (Kenneth Bourne & D. Cameron Watt eds., 1986).

106. NATIONAL SECURITY STRATEGY, *supra* note 85, at 15.

107. *Id.*

the administration claimed that “we will always proceed deliberately,” expanding the notion of imminence will inevitably strengthen the hand of emote control, encouraging the use of force where traditional international law might have favored other approaches. Despite the National Security Strategy’s promise to weigh the consequences of using force, rendering the decision time sensitive will inevitably distort that weighing process. The War on Terrorism’s recreation and escalation of the Cold War’s permanent and pervasive sense of crisis and emergency thus threatens to overwhelm such international legal categories as defensive/offensive actions or imminent/future threat, which are designed to promote reasoned, deliberative decision making.

The Bush Administration’s first test of its new preemptive strategy in Iraq highlights its dangers. The administration’s preemptory dismissal of the factual investigation of the team of United Nations inspections in favor of its own speculative and ultimately erroneous convictions that Iraq had weapons of mass destruction, combined with its clear failure to adequately consider the actual risks attendant to invading Iraq, underlines the risk of action that is not informed by calculated deliberation.

#### IV. OTHER APPLICATIONS

As first noted in Part I, emote control leads to a substitution of symbol for substance at two levels. First, people tend to *respond* more strongly to symbols than to the substance of issues. Specifically, emote control typically produces an overreaction to certain types of problems—chiefly those that affect people closely associated with us, that are proximate in time and space, that are recent and perceived of as new (i.e., prior to adaptation), and that are vividly described and easy to visualize. By the same token, it can produce under-reaction to problems characterized by the opposite end of the continuum for each of these attributes. Second, people will tend to support and advocate for symbolic “feel good” responses to problems rather than substantive long-term solutions. Both of these patterns can be seen not only in foreign policy, but also in almost every area of politics and law.

***Environmental law and policy:*** In the area of environmental law and regulation, for example, people’s sympathetic reactions have little to do with the actual urgency of problems. As many commentators have noted, people tend to respond powerfully to the plight of large, cute animals—“charismatic megafauna”—that are easy to visualize and to anthropomorphize. For example, the media costs for covering three whales trapped on

polar ice in the winter of 1988 exceeded six million dollars.<sup>108</sup> The whales were given names, and there was widespread rejoicing when Siku and Poutu swam to apparent freedom and grief when baby Bone sank beneath the chilly waters and died. The ridiculousness of the attention and support these whales received, while perhaps manifest on the face of it, is only highlighted by the observation that, during the same period, many more whales were being hunted around the globe and were dying from all sorts of human-made causes, including the collapse of worldwide fisheries, which received nowhere near the same degree of attention.

Visual imagery plays an important, albeit not necessarily rational, role in shaping policy with regard to endangered species. In the 1970s, a multi-million-dollar media campaign in the United States showed hunters in Newfoundland clubbing newborn baby harp seals to death in the yearly cull. Baby seals were being cruelly sacrificed to satisfy a voracious and frivolous demand for fur coats. Harp seals were identified as an endangered species; clubbing was denounced as cruel; seal coats disappeared from the fashion runways and the streets, and public outcry was such that the United States Congress urged Canada to reassess its policy of permitting the slaughter of baby seals. Public attention ultimately shifted to other causes; pictures of bloody baby seals disappeared from the newspapers and televisions of Americans. As the attention of the media shifted, scientists felt comfortable asserting that harp seals are not endangered (on the contrary, without the yearly cull, overpopulation would be a problem) and the yearly seal cull continues in Newfoundland, out of the public spotlight.<sup>109</sup>

Arbitrary categories are also important when it comes to environmental attitudes. Deer (evoking memories of Bambi) fall into the category of “good” animals for many Americans. Deer are not an endangered species. In the northeastern United States, a mushrooming deer population not only poses dangers for motorists and a nuisance for gardeners, it also places an unsustainable pressure on the ecosystem—a pressure that ultimately translates into deer starving to death, or seriously weakened, succumbing to disease. Nonetheless, efforts to manage the deer population in the northeastern United States regularly and predictably stimulate controversy and intense opposition.<sup>110</sup> By contrast, wolves and grizzly bears, both species

108. Captain Paul Watson, *Free Keiko, Free Lolita, Free Corky*, OCEAN REALM, Summer 1999, available at [http://www.seashepherd.org/essays/ocean\\_realm\\_sum99.html](http://www.seashepherd.org/essays/ocean_realm_sum99.html).

109. Bryce Muir, *In Defense of Canadian Seal Hunting*, N.Y. TIMES, May 21, 1977, at 20.

110. David Kocieniewski, *Audubon Group Advocates Deer Hunting*, N.Y. TIMES, Mar. 15, 2005, at 4; *Letters to the Editor: Who's Afraid of a Few White-Tailed Deer?*, N.Y. TIMES, Mar. 27, 2005, at 10.

that truly were endangered, elicited considerably less support and more ambiguity.<sup>111</sup>

Adaptation and temporal proximity also play an important role in shaping environmental policy. The Exxon Valdez oil spill in Prince William Sound in 1989 was one of the worst environmental disasters in American history, inciting a nationwide public protest, a massive volunteer effort to assist in clean up, and the passage of the Oil Pollution Act in August of 1990.<sup>112</sup> Responses to subsequent massive oil spills, such as that caused by the grounding of the *New Carissa* in Coos Bay off the coast of Oregon,<sup>113</sup> have been much more subdued and localized. The first disaster sparked widespread and vociferous response, coupled with a demand for legislation. Later disasters barely made the national news. Moreover, the Oil Pollution Act of 1990 offers a prime example of symbol over substance. The act itself focuses on establishing responsibility for spills and defining (large) fines; substantive preventive measures are vague at best.<sup>114</sup> Indeed, a decade after the debacle, Exxon had yet to pay the punitive damages determined in the case and was challenging the provision of the 1990 law that forbade the specific tanker involved in the spill from ever returning to Alaska—a provision of the law that in itself is certainly symbolic rather than substantive.<sup>115</sup> And finally, adaptation and a lack of temporal proximity undoubtedly play a role in the lack of world (and especially United States) mobilization to deal with the problem of global warming, which is arguably the greatest single threat to humanity (as well as other species). Unlike whales trapped in the ice, global warming is a slowly developing problem with few if any immediately identifiable victims.<sup>116</sup>

111. Kirk Johnson, *Wolf's Future in Wyoming, as Predator of Fragile Species, Is in Court's Hands*, N.Y. TIMES, Feb. 5, 2005, at A9; Andrew C. Revkin, *Rules on Gray Wolf May Soon Ease*, N.Y. TIMES, July 3, 2000, at A10; Associated Press, *Northwest: Oregon: A Reprieve For Wolves*, N.Y. TIMES, Feb. 2, 2005, at A15.

112. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

113. McGraw Hill Higher Education, *Environmental Global Issues Map: New Carissa Oil Spill on the Oregon Coast* (Mar. 1999), at [http://www.mhhe.com/biosci/pae/es\\_map/articles/article\\_29.mhtml](http://www.mhhe.com/biosci/pae/es_map/articles/article_29.mhtml). This oil spill never made the front page of the *New York Times*; only a few brief articles addressed it. The issue was finally put to bed as a "troublesome freighter." See also the grounding of the tanker *Jessica* that endangered the Galapagos Islands in 2001. Charles Darwin Foundation, Inc., *What's New: Galapagos National Park Press Release Galapagos Oil Spill* (Jan. 17, 2001), at <http://www.galapagos.org/whatsnew/oilspill.html>; Eli Sanders, *Alaska Oil Spill Takes Toll On Animals and Fisheries*, N.Y. TIMES, Dec. 30, 2004, at 21.

114. 33 U.S.C. § 2702 *et seq.* (2000). See <http://www.epa.gov/oilspill/opakeys.htm> for the provisions of the act.

115. Sam Howe Verhovek, *Across 10 Years, Exxon Valdez Casts a Shadow*, N.Y. TIMES, Mar. 6, 1999, at A1.

116. See generally *Nuclear Power: An exchange*, N.Y. REV. BOOKS, Nov. 15, 2001, at 63 (discussing that the specter of Chernobyl and Three Mile Island is probably distorting U.S. energy policy in a fashion that promotes not only global warming but also war. Nuclear power produces 19% of our



**Drug policy:** Emote control can also be seen in policies and legislation involving drugs. In 1973 the New York State legislature, under pressure from then Governor Nelson A. Rockefeller, passed a set of draconian antidrug laws, including mandatory prison sentences for the possession and sale of drugs. Prison populations and the proportion of state funding spent on prisons skyrocketed. In 1977, a committee assessed results and concluded that the laws were a dismal failure. Nonetheless, in 1986 in the context of election campaigning and growing public concern over drugs, particularly crack cocaine, and drug-related crimes, Congress adopted similar harsh antidrug measures, including mandatory minimum sentences and prescribing the death penalty for some cases. During the height of the drug wars, penalties for drug-related crimes, and especially those involving crack cocaine, were escalated up to the point where they were completely out of proportion to other types of offenses—e.g., 100 times as severe for crack cocaine as for powdered cocaine. The prisons rapidly filled and then expanded, bursting with prisoners who posed very little objective risk to society. The enactment of mandatory minimum sentencing for drug users caused the Federal Bureau of Prisons budget to increase by more than 1,350%, from \$220 million in 1986 to about \$3.19 billion in 1997.<sup>117</sup> Fifty-five percent of all federal drug defendants are low-level offenders, such as “mules” or street dealers. Only 11% are classified as high-level dealers, and, according to the U.S. Sentencing Commission, only 5.5% of federal crack defendants are considered high-level crack dealers.<sup>118</sup> In one not unrepresentative case, a twenty-four-year-old first-time offender received a mandatory minimum sentence of fifty-five years because he carried a handgun to two \$250 marijuana deals. The judge in the case called on President Bush to commute the sentence “to something that is more in accord with just and rational punishment,” recommending a sentence of “no more than 18 years in prison, the average sentence that the jurors in this case recommended.”<sup>119</sup> The plea fell on deaf ears.

electricity with no release of atmospheric pollution or carbon dioxide, and no fatalities, to date, in the United States or Western Europe. Meanwhile, wars fought over oil have killed hundreds of thousands.).

117. DEP'T OF JUSTICE, BUDGET TREND DATA 1975 THROUGH THE PRESIDENT'S 2003 REQUEST TO THE CONGRESS 110–11 (2002), available at [http://www.usdoj.gov/jmd/budgetsummary/btd/-1975\\_2002/2002/html/page109-112.htm](http://www.usdoj.gov/jmd/budgetsummary/btd/-1975_2002/2002/html/page109-112.htm); OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY, 1997: FY 1998 BUDGET SUMMARY (Feb. 1997), available at <http://www.ncjrs.org/htm/bop.htm>.

118. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY tbl. 18, at 170 (Feb. 1995).

119. Laurie P. Cohen, *Judge Criticizes Sentencing Law After Setting a 55-Year Term*, WALL ST. J., Nov. 17, 2004, at A5.

Decades after the implementation of these draconian drug laws, with terrorism foremost on the minds of the public, there was barely any mention of the drug problem in the most recent presidential race. The large numbers of people who remain incarcerated for crimes that society no longer seemed particularly concerned about were out of sight and hence largely out of mind—the flip side of emote control.

**Racial discrimination:** In December 2002, then Senate Republican leader Trent Lott made the mistake of remarking that the country would not have had all “these problems” over all these years had Strom Thurmond been elected president in 1948. Lott’s implicit endorsement of Thurmond’s racist policies (Thurmond had run as a Dixiecrat, openly segregationist) unleashed a torrent of protest, and, despite Lott’s repeated apologies, he was forced to resign as the Senate Republican leader.<sup>120</sup> Lott’s comments had made him a symbol of our nation’s history of racial problems.

But, in substance, his resignation as Republican leader changed nothing. Senator Bill Frist replaced Lott as Senate Republican leader, and, although Frist’s public persona was considerably more appealing than Lott’s, his voting record on issues concerning civil rights and racial minorities was virtually identical to his predecessor.<sup>121</sup>

The elevation of symbol over substance can be seen not only in the Lott affair, but also in the American legal system’s response to overcoming and eradicating racism. Professor Kimberlé Williams Crenshaw has written that prior to the civil rights reform of the 1950s and 60s, blacks experienced two forms of oppression, “symbolic and material.”<sup>122</sup> To her, symbolic segregation referred to the formal denial of social and political equity to all blacks, regardless of their accomplishments. Material subordination defined the broader structural, sociological, economic, and psychological discrimination that limited the life choices of blacks within all spheres of

120. Nick Anderson, *Lott Resigns His Post as Senate GOP Leader*, L.A. TIMES, Dec. 21, 2002, at 1.

121. See Jim Lobe, *Politics-U.S., Resignation, Race and the Republicans*, INTER PRESS SERVICE NEWS AGENCY, Dec. 23, 2002, available at <http://domino.ips.org/ips/eng.NSF/vwWEB-Main-View?SearchView&Query=%28jim+lobe%29++and+Y%2E2002x+and+M%2E12x+and+D%2E23x&SearchMax=100&SearchOrder=3>; *A Sorry Lott*, NATION, Jan. 13, 2003, at 3 (discussing Trent Lott and the Republican record on race relations by noting that the NAACP, National Hispanic Leadership Agenda, and people for the American Way gave Frist an almost identical rating on civil rights as Lott); James Ridgeway, *Mondo Washington*, VILLAGE VOICE, Jan. 14, 2003, at 31 (citing Kim Gandy, President of National Organization for Women, who said, “[f]ew senators have worse voting record on civil rights than Trent Lott, but Bill Frist is one of them”); *Hardball* (MSNBC television broadcast Jan. 9, 2003) (Conservative Senator Rick Santorum said that Frist “has pointed out to me on many occasions, that his voting record is more conservative than mine.”).

122. Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377 (1988).

American society. Although the legal system has been able to a significant degree to remove most formal barriers and symbolic manifestations of racism—not an insubstantial feat—the legal response to segregation has not fundamentally affected the disparate material conditions between the races and in important respects legitimates and perpetuates the substantial disparities that continue to persist.

The legal mechanisms that the Supreme Court has utilized to both outlaw *de jure*, formal, and “symbolic” racial discrimination yet at the same time perpetuate structural social and economic substantive inequality demonstrates the tension between emotional and rational reactions in a field that usually prides itself as the paragon of rational decision making. The two main legal mechanisms that the Court has used in recent years to insulate substantive disparities is the intent doctrine and the doctrine of race neutrality that strictly scrutinizes any racial classification, including those affording affirmative action for blacks and other minority groups. The intent doctrine requires that racial discrimination claims brought pursuant to the equal protection clause of the Constitution must prove that the discrimination was intentionally caused and not simply the effect of government policies.<sup>123</sup> The Court has offered a number of rational reasons for its focus on intent and not effect. For example, the Court has argued that a test that did not focus on a state actor’s intent, but rather on the effect of a governmental action that burdens one race substantially more than another, could invalidate a whole range of tax, welfare, public service, or criminal statutes and would thus cause too dramatic a change in our legal landscape.<sup>124</sup> An alternative account, however, suggested by our discussion in this Article, is that these judicial decisions are consistent with and may be influenced by emotional reactions to race and racism rather than more rational deliberations about how to best address the substantive problem of racial disparities.

For example, the Court’s focus on an invidious intentional perpetrator of discrimination and not on evidence of statistical discrimination is consistent with the social science research that people react more strongly to specific instances than to abstractions. Although in the race cases the victim is always specific, the intent doctrine focuses the Court’s decision on an identifiable bad actor, as opposed to a statistical abstraction. For example, in *McCleskey v. Kemp*, a black man facing the death penalty argued that his sentence violated the equal protection clause because statistics showed that murderers who killed whites were fare more likely to receive the death

123. *Washington v. Davis*, 426 U.S. 229 (1976).

124. *See, e.g., id.*; *McCleskey v. Kemp*, 481 U.S. 279 (1987).

penalty than similarly situated murderers whose victims happened to be black.<sup>125</sup> The Court rejected McCleskey's claim in large part because he could not prove that the prosecutors and jury in his case acted with a discriminatory motive.<sup>126</sup> Although the Court assumed that the statistical study that McCleskey had introduced was valid and that it demonstrated that a statistical risk of racial bias entered into capital sentencing decisions in Georgia, McCleskey would have to demonstrate that the decision in his case was specifically influenced by race. This he could not show.<sup>127</sup> Indeed, the Court cited McCleskey's expert (who conducted the study) who testified that "[m]odels that are developed talk about the effect on the average. They do not depict the experience of a single individual."<sup>128</sup>

As Justice Brennan observed in dissent, the majority decision that McCleskey must demonstrate that race affected the particular decision making in his case is erroneous in that the usual standard is whether the death penalty was "imposed under [circumstances] that create an substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."<sup>129</sup> But, of course foreseeing of risk does require a focus on statistics and the system as a whole. The Court's focus on imposing liability only where there is a concrete victim and concrete perpetrator who can be clearly identified is consistent with a societal reluctance to take action to counter discrimination unless there is a strong emotional, and not just rational, impetus for such action.

The substitution of symbol for substance when it comes to race is not only evident in law but can be seen in a wide range of affirmative action policies. These tend to focus on late-stage solutions, such as increasing admittance to universities and professional schools rather than attempting to increase equality of opportunity at earlier stages of education where it would be most likely to make a difference. Local financing of school districts, which naturally leads to the lowest level of spending on education for those who are already at greatest disadvantage, is the most obvious manifestation of an overall policy that emphasizes symbol over substance—indeed that, at a substantive level, actually exacerbates the problem.

125. *McCleskey*, 481 U.S. at 290.

126. *Id.* at 292–93.

127. *See id.* at 290 n.7.

128. *See id.* at 290 n.11.

129. *Id.* at 322–23.

## V. POLICY PERSPECTIVES

Acting on passions is often a good thing. At the individual level, passions provide many of life's greatest sources of pleasure. To ignore their call would lead to an unfulfilling life. At the national level, passions can result in mass mobilization for desirable ends, such as defeating Nazism, sending a man to the moon, or helping victims of natural disasters such as the 2004 tsunami in the Indian Ocean. Ironically, therefore, the same fickleness of public attention can have implications that are quite the opposite of those that apply to war. Whereas in the case of war one often needs to put the brakes on public passions, in cases where society faces real sustained challenges but people's attention spans are short, one has to be ready to act on short notice and in dramatic ways.

Global warming provides a perfect illustration. Environmental improvement takes sustained efforts and often requires long-term sacrifices, but public attention to environmental issues is often short-lived, responding to dramatic events and then dissipating. For example, the city of Donora, Pennsylvania, endured half a century of ever-worsening pollution that threatened the health of its occupants, culminating in a "killer smog" that sent occupants indoors and killed a large number of people in the space of a few days.<sup>130</sup> The Donora "killer smog" incident directly resulted in the Pennsylvania Clean Air Act in 1955 and was cited in the congressional debates of the federal Clean Air Act in 1970.<sup>131</sup> Given fickle public concern about long-term problems and the tendency to adapt to even the worst conditions, policymakers may need to be ready to act quickly when such windows of opportunity present themselves. As Anthony Downs writes:

Ironically, the cause of ecologists would therefore benefit from an environmental disaster like a "killer smog" that would choke thousands to death in a few days. . . . Yet even the most powerful symbols lose their impact if they are constantly repeated. The piteous sight of an oil-soaked seagull or a dead soldier pales after it has been viewed even a dozen times.<sup>132</sup>

The short-lived nature of emotional reactions is exacerbated by the fact that the very problems that people react to may be the ones that are the most visible rather than the most serious. As Downs continues, "[m]oreover, some of the worst environmental threats come from forms of pollution that are invisible. Thus, our propensity to focus attention on what is most visi-

130. David Templeton, *Donora's Doomsday Message*, PITTSBURGH POST-GAZETTE, Oct. 29, 1998, at F1.

131. *Id.*

132. Anthony Downs, *Up and Down with Ecology—the "Issue-Attention" Cycle*, 28 PUB. INT. 38, 46-47 (1972).

ble may cause us to clean up the pollution we can easily perceive while ignoring more dangerous but hidden threats.”<sup>133</sup>

Yet the very same emotional response that can lead to effective action on environmental problems when harnessed by savvy policymakers may also result in a rush to war or a counterterrorism response that discards civil liberties. Just as acting on one’s passions at the individual level can lead to the “morning after” syndrome where one wonders who that crazy person was the previous night who did all those stupid things, emote control can produce “hangovers” at the national level.<sup>134</sup> The internment of Japanese after Pearl Harbor, McCarthyism, the Vietnam war—in fact, many of our nation’s biggest mistakes—have been actions taken under the thrall of powerful emotions such as fear and rage. World War I is a salient example for Europeans.

Emote control is a critical component of human decision making and cannot simply be banished. But is there any way to selectively avoid those actions that are likely to lead to regrets? Are there legal and policy mechanisms that are helpful in reducing some of the problematic features of emote control?

This Article suggests three basic policy proposals. The first is that courts and policymakers use caution in evaluating arguments premised upon vivid, dramatic, and potentially devastating future risks with the understanding that it is exactly such vivid, nightmarish scenarios that are likely to evoke emotional responses that will distort deliberative analysis. It is therefore precisely in response to terrifying scenarios that the greatest need exists for courts and policymakers to engage in a careful review of the facts and weighing of alternative options.

For example, a recent *New York Times* editorial argues that:

The post-9/11 world involves two competing nightmares. One imagines another terrorist attack that occurs because authorities fail to respond to signs of danger. The other is about innocent people who are arrested by mistake and held indefinitely because authorities are too frightened, or embarrassed, to admit their errors. We have to be equally vigilant against both.<sup>135</sup>

Yet we know that there is both historical and psychological evidence that people are not equally vigilant about both risks of error, particularly

133. *Id.* at 47.

134. For a seminal early discussion of this point, see Irving Janis’ *Victims of Groupthink*, which identifies a phenomenon that Janis calls “hypervigilance” that is closely related to what we have been calling emote control. IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* (1972).

135. Editorial, *Guilty Until Proven Innocent*, N.Y. TIMES, Apr. 12, 2005, at A20.

when the doomsday attack has very vivid imagery associated with it and the risk of detaining innocent people is directed mainly towards aliens who evoke little emotional sympathy.<sup>136</sup>

In academic and policymaking circles, the potentially destructive nightmare scenario set against the backdrop of September 11 has been invoked to suggest discarding or modifying the traditional rules regarding attacking other nations, prosecuting and detaining suspected terrorists, the treatment of prisoners, and the torturing of suspected terrorists. In each of these areas, the magnitude and unpredictability of the threat has led many to conclude that the traditional deliberation and careful fact-finding rules need rethinking. Professor Ruth Wedgwood articulates a broadly held view that:

We tolerate multiple acts of individual and social violence as the cost of safeguarding our privacy and liberty, demanding that the government meet an extraordinary standard of proof before it can claim any power over our person, acting with retrospective rather than anticipatory glance. But now the stakes seem different. We are not accustomed to losing thousands of lives in the blink of an eye and the view of a camera. We are not used to the malevolent leverage that lets a handful of men multiply their destructive power through the ordinary instruments of transport and commerce. The deliberate temperance and incompleteness of criminal law enforcement seem inadequate to the emergency, when the threat to innocent life has multiplied by orders of magnitude.<sup>137</sup>

Wedgwood's conclusion makes a certain intuitive sense. Yet, her argument could be turned on its head. It could be argued that it is precisely when society confronts such a "threat to innocent life . . . multiplied by orders of magnitude" that careful deliberation—which is widely agreed to be the most effective mode of problem solving—is most important. And, hence, it is all the more tragic that it is in exactly such situations that emotive control of decision making is likely to be most pervasive. Therefore our first broad policy conclusion is that, contrary to the intuitive perspective reached by many academics and policymakers, careful deliberative process is most important in deciding to go to war or responding to international threats precisely at those times when it is most likely to be discarded. We should therefore be very cautious about accepting arguments that call for short-circuiting ordinary processes of decision making in these circum-

136. COLE, *supra* note 49.

137. Ruth Wedgwood, *The Law's Response to September 11*, 16 ETHICS & INT'L AFF. (2002), available at <http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/97#wedgewood>.

stances because those arguments usually ignore or downplay the heightened role of passions in decision making.<sup>138</sup>

Our second conclusion is that legal process solutions must recognize and counteract the role of emote control to be effective. Legal process is a preferred method of both lawyers and policymakers to introduce rational decision making into areas in which we know that passions have a major influence. Thus the Constitution's Framers sought to reduce the rule of passions in the decision to go to war by providing that only Congress could initiate war. Yet the history of war making over the past half century illustrates the difficulty of imposing legal process on decisions so laden with immediate, emotional inputs. It suggests that the legal process school's ambitious effort to resolve conflict through rational process may be flawed. Legal process must be keyed more precisely to overcome the emotional reactions that distort that process.

Legal process has figured prominently in some legal scholars' attempt to mediate the tension between the government's need to forestall a future terrorist disaster and the protection of civil liberties. For example, Professor Alan Dershowitz has suggested that we permit the executive to torture terrorism suspects who may have information that could prevent a future terrorist attack, but only after following legal process and requiring the government to obtain a "torture warrant" from a judge.<sup>139</sup> Viewed from the perspective of the psychological framework presented in this Article, such a proposal is hopelessly flawed: if the government informs a judge that unless he or she issues such a warrant without delay, a terrorist attack may not be averted, most courts would feel tremendous pressure to grant the warrant. Given the evidence that we tend to undervalue future consequences in comparison to immediate, vivid consequences, the longer-term costs for the rule of law of granting such a warrant will be overly discounted. As one commentator has noted, "the intangible and abstract nature

138. At the height of the stock market frenzy of the late 1990s, many commentators argued that new developments such as the internet had created a "new era" in which the old rules of market valuation no longer applied. In an article in *Money* magazine in 1999, reporter Jason Zweig confronted this question. He asked "It seems to me there are only two possibilities: This really is a 'new era,' in which the price of a stock will never again matter and value funds will never recover. Or it's not a new era after all, in which case value funds will eventually come back and overpriced stocks will be revealed for the risky gambles they really are." Zweig then "cornered David Dreman [an investment fund manager] on this point," who responded: "[o]kay, the probability that this really is a new era is not zero. . . . But I would say that it's about as probable as my jumping out of an airplane at 20,000 feet without a parachute and surviving." Jason Zweig, *Don't Sell Value Short*, MONEY, June 1999, at 92.

139. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 141, 158-63 (2002).



of such future costs, in comparison with the very tangible pending catastrophe, exacerbates this defect in our risk assessment."<sup>140</sup>

Moreover, judges are subject to the same passions of nationalism and fear that affect other policymakers; the history of judges overruling emergency requests from the executive is sparse. Chief Justice Rehnquist has noted that the Supreme Court has almost always upheld executive actions of dubious constitutionality during wartime. Only after the war is over and the passions of nationalist fervor have cooled have the courts played an independent role.<sup>141</sup> The recent case of the special Foreign Intelligence Surveillance Act ("FISA") courts established to approve orders authorizing the United States government's electronic surveillance of an "agent of a foreign power" provides support for skepticism about the potential for courts to act as a brake on the passions. In its twenty-five-year history, the Court has rejected a government application for a special electronic surveillance order only once,<sup>142</sup> and that one case was promptly overturned by a special appeals court.<sup>143</sup>

In recognition that the normal legal process/separation of powers reliance on either judicial decision making or legislative process is flawed in time of emergency, another prominent legal scholar, Bruce Ackerman, has relied on the notion of supermajority approval of emergency actions. Ackerman's proposal is to allow the declaration of a state emergency providing the executive with extraordinary emergency powers, but introducing a political check—the "supermajoritarian escalator"—designed to preclude "permanent" emergencies.<sup>144</sup> Ackerman's proposal would permit the emergency to continue for two to three months upon a majority vote of Congress. Thereafter, however, an escalating supermajority would be required to continue the emergency: a 60% vote of Congress to extend the emergency two more months, a 70% vote required for the next two months, and an 80% vote thereafter.<sup>145</sup>

140. Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1500 (2004).

141. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 225 (1998). The Supreme Court's recent decisions in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rasul v. Bush*, 124 S. Ct. 2686 (2004), could be viewed as exceptions to that general proposition, but undoubtedly those decisions stem from the vague and permanent nature of the war on terrorism. Had those cases come to the Court in the immediate aftermath of September 11, the decisions may well have been different.

142. David Hardin, *The Fuss over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment*, 71 GEO. WASH. L. REV. 291, 314 (2003).

143. *In re Sealed Case*, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002).

144. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

145. *Id.* at 1047–49.

Ackerman's solution was inspired by the South Africa Constitution, and some other constitutions, which also impose supermajoritarian rules for the authorization of emergencies.<sup>146</sup> Constitutional supermajority provisions do have a function of checking the emotional passions that might override reasoned judgment, because presumably those passions would be less likely to affect the supermajority than a mere majority.<sup>147</sup> Nevertheless, while a supermajority is less likely than a simple majority to yield to irrational impulses, it is not immune from such temptations. "Hence, a constitutional requirement of a qualified majority does not by itself provide much of a protection against the people's propensity to collective weakness of will."<sup>148</sup> Moreover, as Professor David Cole has noted, Ackerman's broad process approach fails to grapple with the difficult substantive question of what emergency powers the government should be permitted to exercise for the duration of the emergency.<sup>149</sup> Ackerman's proposal, at best, only limits an emergency's duration.

For process to work, it requires a mechanism that might counteract the nationalistic emotions that color deliberative discourse. For decisions to go to war, a Madisonian process solution does suggest itself from both scientific and historical experience. Throughout the Federalist Papers, and particularly in Federalist No. 10, Madison views the greatest danger to democratic governments as the problem of a "faction . . . who are united and actuated by some *common impulse of passion*."<sup>150</sup>

146. Oren Gross, *Providing for the Unexpected: Constitutional Emergency Provisions*, 33 *ISR. YB HUM. RTS.* 13, 31 n.95 (2004) (citing provision in constitutions of Greece, Germany, South Africa, and India).

147. See John Elster, *Intertemporal Choice and Political Thought*, in *CHOICE OVER TIME* 35 (George Loewenstein & Jon Elster eds., 1992). A key feature of constitutions, according to Elster is their resistance to the emotions of the moment. Most constitutions require supermajorities to change, and in federal systems a qualified majority of states often have to give consent. Perhaps even more importantly, constitutions impose delays that prevent changes from being made on short notice. In some cases, successive parliaments have to rule in favor of the change, and in others, there is a time delay between when change can be proposed and when it is actually voted on. As Elster writes:

In the heat of passion or under the influence of some immediate temptation, an individual can deviate from prudent plans formed in advance or do things that he will later regret. Groups of individuals, such as voters or members of a political assembly, are no less prone to such irrational behavior. Sometimes, aggregate irrationality is simply the sum of irrational individual responses to the same external situation; at other times, passionate factions may form by interaction effects and crowd psychology. Whatever their origin, collective fits of passion can be extremely destructive in their effects. Inflamed majorities have violated the rights of minorities, spent money they did not have, and declared war for no good reason.

*Id.* at 39–40. Time delays, according to this argument, provide a kind of "cooling-off period" such that long-term changes to the system will not be effectuated in the heat of the moment.

148. *Id.* at 40.

149. David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 *YALE L.J.* 1753, 1756 (2004).

150. FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

A Madisonian cure to the problem of passions controlling decisions is to “[e]xtend the sphere” in which a decision is to be made, to include a “greater variety of parties and interests [that] make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”<sup>151</sup> “The influence of factious leaders may kindle a flame within their particular states but will be unable to spread a general conflagration through the other states.”<sup>152</sup>

The Madisonian solution is available and already functioning to address decisions to go to war. The United Nations Security Council “extends the sphere” of decision making, providing some check against passions such as nationalism and fear that feed the impulse to go to war and to which American legislators and judges are not immune. Other nations are less likely to share those passions. Therefore the U.N. Charter’s requirement that the Security Council approve all uses of force except those that are taken in response to an armed attack could be an effective check against impulsive, emotional decision making.

One argument against the Security Council process is that the U.N. Charter permits any of the five permanent members of the Council (United States, Britain, France, Russia, China) to veto a decision to use force, and that therefore U.S. interests could be blocked by any one nation. Whatever the validity of the critique, it does not apply where a substantial bloc of countries on the Security Council oppose the use of force. For example, before the recent Iraq invasion, it was clear that a *majority* of the permanent Security Council members (France, China, and Russia) opposed the United States and British request for authorization of force against Iraq. Moreover, the U.S./British proposal would not have received even the required majority of the entire Council of fifteen member states. In that situation, both the U.N. Charter and the theory proposed here counsel against going to war.

Finally, process is not enough; making deliberative decisions requires the weighing of substantive values.<sup>153</sup> The dynamics of emotive control skew those substantive value choices, particularly in situations when passions run high. In the international arena there exist a set of well-established legal and moral rules and principles that reflect decades if not centuries of human experience as guideposts to decision making. Such moral and legal principles as Just War Theory developed in the middle ages by theologians, and the United Nations Charter, the Geneva Convention, and the Conven-

151. *Id.* at 78.

152. *Id.* at 79.

153. Cole, *supra* note 149, at 1757–58.

tion Against Torture ought to provide, at minimum, warning signs to the population and government officials to determine if their decision making is being skewed by emotional factors.<sup>154</sup> Just as Alcoholics Anonymous has a check list of questions designed to determine if a person's drinking is so impulsive as to require intervention, so, too, international law has a series of questions that, at minimum, should raise a warning flag that impulse and not reason is behind a decision to go to war. Those questions are (a) is the planned use of force in response to an attack or imminent attack by another nation; (b) has the international organization or at least the critical regional organizations approved the use of force; and (c) have all alternative mechanisms for resolving the conflict been exhausted. Policymakers should take these questions seriously, and where, as in the recent case of the invasion of Iraq the answers to these questions are negative, government officials should reconsider their decision to use force. This policy recommendation would require a clear shift in both public and governmental thinking, as the war in Iraq illustrates. In the run-up to that war, there appears to have been almost no discussion of international legal principles by policymakers, the media, or society in general.

#### CONCLUSION

Our goal in this Article has been threefold. First, we challenge the fundamental assumptions of economics and law that decision making is solely the product of rational, deliberate processes that entail a careful weighing of costs and benefits. Rather we start from the premise that decision making represents the interaction of two qualitatively different neural processes—emote control and deliberation—that often clash, producing results at odds with those predicted by traditional economic or legal models. This Article represents a first, and hence necessarily speculative and tentative, attempt to apply what is known about the interaction of affect and deliberation in human behavior to the analysis of foreign policy, terrorism, and international law. We hope that this is not the final word on the topic, but that these ideas will stimulate further academic research on, and discussion of, the role of affect in these important areas of national life.

Affect transforms people in fundamental ways. The same person in different affective states is, it could be argued, more different when it comes to attitudes and behavior than different people who are in neutral

154. Geneva Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 75 U.N.T.S. 135; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Nov. 26, 1987, EUROP. T.S. No. 126, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm>.

states. Because society is composed of individuals who are subject to affective influences, and because societal-level events often trigger similar affective reactions in many people, societies can similarly be transformed by collective affective states. Depending on the nature of these affective states, they can produce extremes of behavior, from outpourings of sympathy to remarkable indifference in the face of widespread misery to extremes of aggression coupled with lack of concern about personal risk. Thus, citizens *should* be afraid to begin wars, but national pride, fear, or even the passion of abstract principles can put people into a bellicose state of mind that renders them insensitive to the risk of death or injury.

The second major theme of this Article is that a major function of law should be to augment deliberative control of behavior in exactly the types of situations—those characterized by intense affect—when it is most needed but least likely to exert an influence. Yet it is precisely in those situations of perceived crisis that many legal scholars and courts urge the abandonment of those legal processes designed to promote deliberative judgment. These courts and legal thinkers emphasize the need for speed and decisiveness in times of perceived crisis but ignore the increased danger of decision making based on short-term passions and not careful consideration of consequences.

A perception or modification of crisis thus can lead to an abandonment of legal norms that have been developed through decades or centuries of experience. For example, as the development and proliferation of “weapons of mass destruction” have increased the potential speed and destructiveness of interactions between nations or of individuals intent on aggression, it is common to argue that we are in a “new era” in which the old rules of international law no longer apply. Although there may, occasionally, be merit to such arguments, we would argue that belief that we are living in a new era is often itself the product of powerful emotions such as anger and fear, and is typically overblown. In fact, one could argue (as we do), that it is exactly when the magnitude of potential threats multiplies that there is the greatest need for careful deliberation about strategy. Facing adversaries who are capable of unleashing mass destruction is the wrong time to implement the kinds of symbolic solutions that are the common product of emotive control.

One might think that as civilization advances, emotive control of behavior would weaken. We, as a society, have greater information available, more advanced technology, and higher levels of education than any society in the past. Shouldn't these forces gradually lead to a diminution of emotive control? Unfortunately, the answer is anything but obvious. New technolo-

gies do enhance our ability to figure out what is best for us, both as individuals and as a society, but other developments actually accentuate the influence of emote control. For example, due to advancements in technology, the information we receive from the media is delivered in ever-more vivid form. Whereas in the past, people received their news by word of mouth or in writing, most people now receive their news and information from multisensory media—predominantly television. Television pictures project not only into the home, but in automobiles, at workplaces, and even on the screens that have recently begun to sprout in elevators. Moreover, competition between different media outlets seems to promote the delivery of quick, easily digestible “sound bites” or “talking points” with little accompanying analysis. Big picture thinking, or even simply thinking out the long-term consequences of different actions, seems increasingly to be a thing of the past. The competition for scarce attention has led to similar developments throughout society—e.g., instant messaging as a replacement for more leisurely composed letters. Even Supreme Court arguments have been truncated—from days or hours to half an hour.

Third, and finally, analyzing the role affect plays in decision making leads to understanding the specific legal processes that will counteract the effectual distortion of the deliberative process. It is unrealistic to think that legal process can provide a viable solution, as Professor Dershowitz does in proposing the issuance by courts of torture warrants prior to the executive’s use of torture. For such solutions assume that courts will engage in deliberative decision making, an assumption that has often proven faulty in times of grave national crisis. Instead, legal processes must be designed to overcome the particular passions that skew deliberation. For example, where nationalist passions overcome reason, national legal process would inevitably be affected. Therefore, a solution that relies on an international legal process is more likely to reintroduce deliberative mechanisms into decision making.

People have always been controlled by their emotions and always will be. As the opening quote from Einstein suggests, people with an agenda have always been able to manipulate the populace by pulling emotional levers. Joseph Goebbels understood, perhaps better than any other twentieth-century political figure, the powerful pull that emotional, rather than intellectual, arguments had in swaying mass sentiment. He argued that:

[t]here was no point in seeking to convert the intellectuals. For intellectuals would never be converted and would anyway always yield to the stronger, and this will always be “the man in the street.” Arguments must therefore be crude, clear and forcible, and appeal to emotions and in-

instincts, not the intellect. Truth was unimportant and entirely subordinate to tactics and psychology.<sup>155</sup>

The use of affect to manipulate the man in the street is, of course, not exclusive to fascists. It is a time-tested tactic that has been used by left and right alike. Nor do we believe that an understanding of the role of affect in foreign policy, terrorism and international law tends to support policies advocated by people at one end of the political spectrum or the other, contrary to any such perception that our choice of examples may have produced. To allay such an impression, we have deliberately illustrated our points with examples in which both Democratic and Republican administrations have used emotional appeals to justify going to war. Indeed, emotional appeals can be made by pacifists as well as hawks. Virtually all policy discussions contain some mix of appeal to both the rational and the emotional. The purpose of this Article is to point out some of the problematic characteristics of emotive control and to suggest some mechanisms that could bolster the influence of deliberation.

While the importance of emotive control in individual psychology has remained relatively unchanged over time, the science of psychology is constantly improving, including an ever-better understanding of how people can be manipulated by triggering their emotions. Law should gain insight from the advances in the science of psychology and counteract these trends. Law must keep deliberative control in the picture, especially at times of high affect when it is needed the most.

155. Mark Danner, *The Secret Way to War; The Downing Street Memo*, NEW YORK REVIEW OF BOOKS, June 9, 2005, at 70, 73–74.