

# LET'S NOT PANIC OVER MORAL PANIC

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One of the basic questions facing democratic institutions is how to make decisions that not only tend to our short term interests, but also reflect long term considerations. This is a difficult task, as a great deal of research finds that shorter-term considerations – for both behavioral and institutional reasons tend to trump longer term societal values that are focused on the future. Within these broader concerns a particularly important question has been generating the attention of a great number of scholars and practitioners: How to respond to immediate crises – such as 9/11 or the BP oil spill – in ways that reflect thoughtful, deliberative planning rather than “knee jerk” responses that might, inadvertently, create even greater challenges. This tendency to respond to a crisis that is on the policy agenda has been found to negatively impact environment, security concerns and economic planning concerns.

How then, might democratic decision making be initiated during times of moral panics? This policy brief addresses these questions by drawing on literature within legal studies and philosophy that have been given less attention than students of the policy process.

## MORAL PANIC

The ability of democracies to make decisions in line with the long-term interests of its citizens is vulnerable to intense, short term shift in public opinion. There are few shifts more radical than those experienced by societies in the throes of moral panic, which has been defined as “a form of collective action in which the public, the media and political actors mutually escalate a pattern of intense and disproportionate concern in response to a perceived social threat.”<sup>1</sup>

What distinguishes a moral panic from a straightforward change in morality or a pragmatic attempt to deal with a social problem, is the chasm that lies between the perception of the threat and reality. Moral Panics are also relatively short lived – their span is measured in months at most.

Prominent issues that have sparked instances of moral panic include: Drug and alcohol use, human trafficking, AIDS, and the 9.11 terrorist attack in NYC.<sup>2</sup> Some of these instances created a long trail of institutional and legislative reforms in the US.<sup>3</sup> It is only natural to worry that these amendments, hastily patched together under the whip of moral panic and without an appropriate empirical basis or the full consideration of decision makers, harm human rights, social efficiency, or any other good, without actually addressing any important issue.<sup>4</sup>

In 1996 TWA flight 800 crashed, killing all 230 people on board.<sup>5</sup> 95% of the wreckage was recovered, and although none of the evidence indicated foul play, the public outcry following the crash quickly led to heightened security measures at airports all across the United States. There were indications that officials did not believe the airplane crashed due to terrorism; but under threat of public opinion, they pretended to take the rumors seriously. The White House Commission on Aviation, Safety and Security was established immediately after the crash, and within a month of its initial report, the president signed most of its recommendations into law. The estimated cost of implementation is an annual sum of \$6 billion.

Alas, these new measures may have not saved anyone. We know that flying is far less dangerous than driving, it is, in fact, the safest mode of transport.<sup>6</sup> By making flights more expensive and thus less attractive, these measures added incentives for people to avoid flying.

This is a classic example of an event triggering a moral panic, which then starts a chain of events ending in legislation and regulation that are either not beneficial or quite harmful (in terms of economic efficiency if not human lives). We can identify two elements that will be crucial to our analysis: 1. the problem of faulty information - the public misperceived terror as the cause of the crash; and 2. the problem of public influence – officials acting according to public pressure though they actually had access to correct information. Any institution designed to relieve these issues would need to both have better access to information and be insulated enough from public pressure to allow it to act on its superior information.

## WHAT CAN BE DONE ABOUT MORAL PANICS?

Drawing on legal scholarly traditions, I suggest a few possible institutional policies designed to avoid the harmful effects of moral panics. None of my proposals will be described in great detail. The intention is rather to outline some basic possible reforms. These are in no way mutually exclusive, but rather complementary attempts to address the dual problem of faulty information and vulnerability to public pressure.

### THE LEGISLATIVE RESPONSE:

Elected legislative bodies are especially vulnerable to the pressures raised by moral panics, mainly because their members feel compelled to respond to mass demands for legislation in order to keep their seats.<sup>7</sup>

A serious candidate for a delaying institution can be adapted from Timur Kuran & Cass R. Sunstein treatment of a phenomena akin to moral panic:<sup>8</sup> they suggest creating a risk oversight committee which will be “entrusted with compiling information about a wide range of risk levels and empowered to set priorities.” It would “... operate as a check on short-term pressures by putting particular concerns in a broader context”. This committee’s essential function would be “to prevent myopic, unduly quick, and poorly reasoned responses, not to insulate risk regulation from evolving social values.”<sup>9</sup> In other words, in order to operate as a check on the short term pressures of moral panics, a committee with authority over budgets and important statutes would be created, its role would be to put super salient concerns in the context of a wider range of priorities and to also serve as a delay mechanism. Notice that the authors emphasize that the committee is to remain sensitive to evolving social values, yet in order to create reasonable decisions according to evolving values, they must be put in a wider context. The committee is trying to assert rationality on the legislature.

#### THE ADMINISTRATIVE RESPONSE:

Since it is both unelected and thus less responsive to shifts in public opinion, and comprised of experts which makes it less vulnerable to misinformation – the administrative branch might be in a better position to weather moral panic storms than elected officials. This ability is limited in two senses. The first is that obviously all measures adopted by the administrative branch must be consistent with laws passed by the legislature and with the regulations of the executive. Thus elected officials (who are sensitive to moral panics) can undermine any administrative attempt to create more rational policies (or to prevent irrational policies from being implemented). The second is - that conditioned on their relationship with the legislature, administrative agencies actually do respond to public opinion, and can be swayed by moral panics.<sup>10</sup>

Sunstein and Timur suggest that including peer review practices as an integral part of administrative policy design procedures will, “identify and correct misperception spread through availability cascades.” Well informed outsiders scrutinizing policies before they are implemented can help solve the information problem, and can also be useful as a delaying tactic. Though this procedure is quite important in battling longer term availability cascades, it seems to be less important in addressing moral panics – which are intense, short lived, cascades. Indeed, even if the administrative branch was extremely vulnerable to moral panics (which it’s likely not) it would not represent a danger equal to that of the legislature or the executive.

## THE JUDICIAL RESPONSE:

My argument is that the judiciary is the most appropriate institution for safeguarding liberal democracies in times of moral panic. This is because of its unique relationship to public opinion, its ability to use experts (using the products of the legislature's risk assessing committee and administrative peer review experts, as well as academics), and its ability to review executive, administrative, and legislative acts.

Though steps -- such as awarding life tenure and creating budgetary independence -- are usually taken to ensure that the judiciary is not directly pressured by public opinion, the evidence still convincingly suggests that the court still regularly decides in line with public opinion. The literature presents two causal pathways between public opinion and court behavior. The first is branded as the strategic behavior approach. Justices care about the legitimacy of the courts. Thus, when they are confronted with public opinion that is distinctly different than their own preferred outcome, they modify their position in order to protect institutional legitimacy and effectiveness.<sup>11</sup> The second is named the attitudinal approach. Here the judges are seen as part of society, as individuals influenced by the same forces that shape public opinion. Thus, the link between public opinion and judicial behaviors arise from the force of shared social forces that shape the preferences of both the public and the judiciary. The observable lagged responsiveness to public opinion is explained under the attitudinal model not as strategic calculation, but as actual changes in the preferences of individual judges.<sup>12</sup>

Yet, unlike the speedy, high bandwidth feedback between public opinion and the legislature, the courts seem to take their leisure in adjusting their views. For example, different studies find that the United States Supreme Court responds to shifts in public opinion with a lag of at least one year behind congress.<sup>13</sup> This attribute effectively creates a state where the court reacts to long term changes in public opinion, but completely avoids extreme short term shifts -- such as those created by moral panics. This means that the judiciary is an institution already inclined to avoid the pitfalls described above. It has relative immunity to extreme, short term shifts in public opinion, it has an ability to bring in relevant experts and its responsiveness to long term shifts in public mores makes it sensitive to people's long term preferences.

## A NEW TYPE OF JUDICIAL REVIEW POWER

But under what conceivable power can the courts intervene with government actions made during times of moral panic? Unlike the other branches, the judiciary is not

directly involved with policies, but rather requires a case to be brought to it. If the constitutionality of an act is questionable, then appellate and supreme courts can operate as usual. But many cases of moral panic have nothing to do with constitutionality; our hitchhiking scenario and the TWA plane crash are fine examples. It is clearly constitutional for the legislature to make a practice illegal or add more security regulations, but as we've described above – it still poses a problem. Even cases where the policy falls within the purview of constitutional review, the willingness of courts to examine primary legislation might be insufficient due to strategic behavior guided by its dependence on the other branches of government. Another problem is in countries where constitutional review is very lengthy (such as United States) which makes any constructional judicial review process of short term moral panics moot. These arguments point towards a need for a different judicial review power which can be brought into play quickly, and be simpler for the courts to implement in light of their strategic behavior.

I would like to suggest, that for such cases where the constitutionality of the decision is not questionable or where the court chooses not to engage on the level of constitutionality, the courts should adopt a new type of legal claim: `law/act passed under conditions of moral panic. This legal claim should include the following counterpart remedies:

1. `Kicking the can` - instructing the legislator or the executive to postpone their decision for a few months, or if already passed, to repeat the legislative process after that time.
2. Sunset clause - in certain cases the courts can impose a strict time limit on the law, requiring the legislature to go through the motions again after a stated period.

This toolkit will allow the court to tailor responses to a given situation – both substantively and strategically. For example, the kicking the can remedy, which is both more dramatic in the sense that it reverses an existing statute or executive order and more efficient because they prevent 100% of the potential harm, would seem fitting in less urgent events such as the hitchhiking scenario. But if we think back to 9/11, it is unimaginable that any court would be willing or able to tell the government to postpone the passing of the Patriot act for a few months. In these cases it would seem much more plausible for the courts to write in a sunset clause in the law. These powers can also be the tool of choice for courts in cases of constitutional potential because they represent a milder confrontation with the executive and legislature.

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<sup>1</sup> Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *Law & Contemp. Probs.*, 125 (2009).

<sup>2</sup> See David Garland, *On the concept of moral panic*, 4 *Crime, Media, Culture*, 13-16, 25 (2008); Erich Goode & Nachman Ben-Yehuda, *Moral panics: The social construction of deviance* 153 (2010).

<sup>3</sup> See Garland, *supra* note 2, at 16; Goode & Ben-Yehuda, *supra* note 4, at 169.

<sup>4</sup> See Mary Maguire & Jennie Kaufman Singer, *A false sense of security: Moral panic driven sex offender legislation*, 19 *Critical Criminology* (2011).

<sup>5</sup> The example is taken from Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683 (1999).

<sup>6</sup> See *id.*, at 702.

<sup>7</sup> See discussion above.

<sup>8</sup> The article treats the subject of availability cascades, which are defined as a “self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.” See Kuran & Sunstein, *supra* note 33.. Moral panics are a subtype of availability cascades, see Scott, *supra* note 3.. Cass R Sunstein, *Laws of fear: Beyond the precautionary principle* 98 § 6 (2005).

<sup>9</sup> Kuran & Sunstein, *supra* note 33.

<sup>10</sup> Julia Rabinovich, *Administrative Responsiveness to Public Opinion* (2008).

<sup>11</sup> See Micheal W Giles, et al., *The Supreme Court in American democracy: Unraveling the linkages between public opinion and judicial decision making*, 70 *The Journal of Politics* (2008).

<sup>12</sup> See William Mishler & Reginald S Sheehan, *Public opinion, the attitudinal model, and supreme court decision making: A micro-analytic perspective*, 58 (1996).

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<sup>13</sup> See Kevin T McGuire & James A Stimson, The least dangerous branch revisited: New evidence on Supreme Court responsiveness to public preferences, 66 *Journal of Politics* (2004).