

## Disaggregating Disasters

Lisa Grow Sun  
RonNell Andersen Jones



### ABSTRACT

In the years since the September 11 attacks, scholars and commentators have criticized the emergence of both legal developments and policy rhetoric that blur the lines between war and terrorism. Unrecognized, but equally as damaging to democratic ideals—and potentially more devastating in practical effect—is the expansion of this trend beyond the context of terrorism to a much wider field of nonwar emergencies. Indeed, in recent years, war and national security rhetoric has come to permeate the legal and policy conversations on a wide variety of natural and technological disasters. This melding of disaster and war for purposes of justifying exceptions to ordinary constitutional and democratic norms is particularly apparent in governmental restrictions on the flow of its communications in disasters, as limitations on information flow that might be warranted when there are thinking enemies (such as in times of war) are invoked in disaster scenarios lacking such thinking enemies. The extension of wartime transparency exceptionalism into nonthinking-enemy disasters—reflected in both legislation and official rhetoric—risks the illegitimate construction of enemies by government, the unwarranted transformation of public spaces into war zones from which the public can be more easily excluded, and the inappropriate reliance on notions of the “fog of war” to justify communication failures and overbroad access restrictions. Only by consciously disaggregating dissimilar forms of emergencies and removing the rhetoric of war from disaster decisionmaking can the government make appropriate determinations about the provision of information in times of community or national crisis.

### AUTHORS

Lisa Grow Sun and RonNell Andersen Jones are Associate Professors of Law, J. Reuben Clark Law School, Brigham Young University.

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## INTRODUCTION

In the years since the September 11 attacks on the United States, scholars and commentators have criticized the emergence of both legal developments and policy rhetoric that blur the lines between war and terrorism.<sup>1</sup> The argument—around which much of the most important constitutional dialogue of the last decade has revolved—is that this blurring inappropriately gives the government, and the executive branch in particular, too free a hand in creating and implementing measures that infringe upon civil liberties in the name of national security.<sup>2</sup> Scholars have rightly noted that nebulous labels like the “war on terror” often create unsound justifications for extralegal or extraconstitutional behaviors<sup>3</sup> that, even if legitimate in times of actual war, threaten to deteriorate core democratic values when stretched beyond their war-specific boundaries. The academic and social commentary on this question has been voluminous and heated.<sup>4</sup>

Unrecognized, but equally as damaging to democratic ideals—and potentially more devastating in practical effect—is the expansion of this trend beyond the context of terrorism to a much wider field of nonwar emergency situations featuring potential threats to citizens or calling upon government to engage in crisis management on their behalf. Although the constitutional and policy discussions have

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1. See, e.g., Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004) (detailing arguments against framing counterterrorism as war); Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 303 (2009) (arguing that war rhetoric is “rhetorical flourish” used to justify unconfined executive powers); Seth F. Kreimer, *Watching the Watchers: Surveillance, Transparency, and Political Freedom in the War on Terror*, 7 U. PA. J. CONST. L. 133, 162–64 (2004) (describing abuse of war rhetoric); Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1223 (2005) (criticizing how “war” has come to refer to an “abstract struggle against terrorism generally”).
  2. See, e.g., Heidi Kitrosser, *Symposium: It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1419 (2010) (noting the dangers involved in increased executive power during times of national emergency); Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 706 (2006) (“[T]he ‘global war on terror’ is being used to justify a near-dictatorial conception of presidential power.”); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 149 (2008) (“[T]he existence of war does not by itself give a President any power to act in derogation of constitutional rights.”).
  3. Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* 39, 46 (Mark Tushnet ed., 2005) (using the term “extra-constitutional” powers to mean those that are neither legal nor illegal).
  4. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1032 (2004) (criticizing abuses committed in the name of the “war on terrorism”); Levinson, *supra* note 2, at 706 (criticizing the Bush administration’s use of war rhetoric); Eric A. Posner, *Deference to the Executive in the United States After September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J.L. & PUB. POLY 213 (2012) (describing the dangers posed by the “deference thesis”).

failed to acknowledge this expansion, war and national security rhetoric has in recent years come to permeate the legal, policy, and scholarly conversations on a wide variety of nonwar emergencies and disasters. This melding of disaster and war for purposes of justifying exceptions to ordinary constitutional and democratic norms is particularly troubling in governmental restrictions on the flow of its communications in disasters, as limitations on information flow that might be warranted when there are thinking enemies (such as in times of war) could be relied upon in disaster scenarios lacking such thinking enemies. Exceptions to the government obligation of openness and transparency that emerged in the context of a true, calculating adversary may now be invoked in cases of hurricanes, oil spills, wildfires, and pandemics.

The consequences of this melding are grave. If government is permitted to invoke national security–like exceptions to justify a lack of information access, lack of disclosure, or lack of honesty in emergencies that are not a war with a thinking enemy but instead a disaster with a population victimized by natural hazards,<sup>5</sup> human error, or technological failing, it abandons its democratic obligations of openness without any of the legitimate justifications warranting deviation from those duties. More significantly, it robs individuals of potentially crucial information at a time when information may be most necessary and valuable.

This Article argues that a close investigation of recent trends reveals numerous ways in which the temptation to meld disaster and war may manifest itself in government information–flow policies, practices, and norms. It suggests that each of these constitutes a failure to distinguish thinking-enemy and nonthinking-enemy emergencies and can lead to overzealous squelching of governmental communications. Only by consciously disaggregating dissimilar forms of emergencies and removing the rhetoric of war from disaster decisionmaking can the government make appropriate determinations about the provision of information in times of community or national crisis.

Part I asserts the normative background position that—barring important reasons rooted in the protection of the nation and its people—accessibility, honesty, and disclosure are basic obligations of government. It summarizes the voluminous scholarship asserting the value of governmental openness and transparency, and adds a more specific analysis of the important reasons for maintaining

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5. This Article will use the term “natural” as a convenient shorthand for disasters caused by the intersection of natural hazards and human society. The term is not intended to deny or discount the critical human contribution to so-called natural disasters. See, e.g., John Schwartz, Obituaries, *Gilbert F. White, 94, Expert on Floods and Nature, Dies*, N.Y. TIMES, Oct. 7, 2006, <http://www.nytimes.com/2006/10/07/obituaries/07white.html> (recounting the conclusion of renowned geographer and floodplain-management expert Gilbert White that “[f]loods are ‘acts of god,’ but flood losses are largely acts of man”).

the background norm of transparency at times of disaster. Although competing values such as privacy, cost, and the need for candor in sensitive deliberations must, of course, be considered in formulating specific disaster information policies, subverting this background norm by importing wartime exceptionalism skews the balancing toward secrecy and impedes the careful weighing that appropriate policy formulation requires.

Part II describes the exception to transparency norms that arises in wartime, designed to keep sensitive information out of the hands of a thinking enemy who would exploit that information to do the country harm. It also briefly explores the objections that thoughtful constitutional scholars have raised to the expansion of this “war exceptionalism” to justify access and disclosure limitations in situations that are not true war but instead acts of terrorism.

Part III argues that the expansion of the inappropriate war analogy is broader than has heretofore been recognized. It sets forth evidence that the language and policy of wartime exceptionalism have crept into the fuller realm of disaster scenarios, in ways that are deeply problematic. This Part reveals recent governmental behaviors that illustrate the melding of disaster and war, including legislative exceptions to state open-meetings and open-records statutes and war rhetoric from executive officials and others at times of nonwar disasters.

Part IV critiques this development, setting forth reasons why a war dynamic featuring a thinking enemy that can exploit information should be considered categorically different from nonthinking-enemy disasters created by natural hazards, technological failure, or human error. It argues that the legal and rhetorical melding of dissimilar war and nonwar disasters risks the illegitimate construction of enemies by government, the unwarranted transformation of public spaces into war zones, and the inappropriate reliance on notions of the “fog of war” to justify communication failures and overbroad access restrictions.

Finally, this Article concludes by proposing the elimination of legal and policy determinations that erroneously appeal to a war analogy for a disaster scenario. It advocates new vigilance among executive officials and policy implementers in disaggregating disasters for purposes of information flow procedures and strategies.

## I. THE NORM OF TRANSPARENCY

This Article’s primary focus is the question of departures from the norm of governmental openness and transparency and the ways in which justifications for those departures have become increasingly slippery with the expansion of war rhetoric. However, it is useful as a starting point to articulate the “commonsense” and

arguably “obvious”<sup>6</sup> initial proposition that there is, in fact, value to such openness and transparency. Extensive recent scholarship has debated the appropriate definition of government transparency and the specific contours of the obligations that an open government should bear in light of a wide variety of countervailing interests.<sup>7</sup> Much of this discussion is beyond the scope of the present inquiry, which asks only whether the particular set of deviations from this norm that arise in a war or national security context are legitimately applied in the dissimilar contexts of other disasters. Whether the overall norm of transparency should be expanded, contracted, constitutionalized, legislated, or parsed more carefully, the core assertion remains that a democratic society both expects and benefits from an open and transparent flow of information from its government. Understanding what is lost when exceptions to this norm are enlarged—and determining whether exceptions that are crafted in the war context are warranted in nonwar emergencies—requires a foundational appreciation of the basic motivations for and advantages of transparent government.

Part I.A describes the philosophical, practical, and legal values most commonly asserted in the literature in support of transparency norms. Part I.B amplifies upon these theoretical and practical principles in the disaster context and suggests that the virtues of transparency may be enhanced and the need for openness may be more critical at these times.

### A. The Virtues of Transparency

Thirty-five years ago, Thomas Emerson published his groundbreaking article *Legal Foundations of the Right to Know*,<sup>8</sup> launching a sweeping modern academic dialogue<sup>9</sup> about the ways in which a system of free expression might necessarily encompass more than a “negative right to be free of government interferences”<sup>10</sup> and additionally embrace a concomitant “right in the public to obtain information from government sources necessary or proper for the citizen to perform his function as ultimate sovereign.”<sup>11</sup> Although his article is widely regarded as foundational in the literature, Emerson was not the first to argue that government

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6. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 894 (2006) (“The arguments in favor of transparency seem fairly commonsensical and perhaps even obvious.”).

7. See, e.g., *id.*; David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909 (2006).

8. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

9. See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 140 & n.40 (2006) (cataloging scholarship on the question).

10. Emerson, *supra* note 8, at 2.

11. *Id.* at 16.

openness, accessibility, and transparency were democratic mandates. He drew heavily upon the work of Alexander Meiklejohn,<sup>12</sup> whose focused view of the rationale for the First Amendment centered on the ability of citizens to receive and use information relevant to democratic self-governance<sup>13</sup> and who had argued that denial of information on public issues necessarily thwarts this core purpose.<sup>14</sup> Emerson also grounded his arguments about the “vital importance in a democratic society of the right to know” in statements from the Founders,<sup>15</sup> including Madison’s celebrated proclamation that “[a] popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. . . . And a people who mean to be their own governors, must arm themselves with the power knowledge gives.”<sup>16</sup> Indeed, although the contours and scope of necessary transparency remain abiding fodder for the legal academy, it is widely assumed that governmental transparency “is clearly among the pantheon of great political virtues,”<sup>17</sup> and scholars have articulated supporting justifications for this norm that range from the highly theoretical to the acutely practical.

Theoretical arguments are built heavily upon a foundation of liberal democratic theory,<sup>18</sup> with an emphasis on the ways in which clean flows of information reinforce governmental legitimacy, inform the consent of the governed, and sustain the rule of law. Many have noted that a free flow of information from government to the people in a democracy is a crucial precursor to the exercise of other core

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12. See *id.* at 4.

13. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57.

14. See, e.g., ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88–89 (Harper Collins Publishers 2000) (1948) (“The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life.”).

15. Emerson, *supra* note 8, at 1.

16. *Id.* (quoting Letter From James Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 WRITINGS OF JAMES MADISON 103 (G. Hurst ed., 1910)). Despite becoming the flagship citation for the proposition of governmental transparency, Madison’s “farce or tragedy” quotation may not actually have related to that topic. See Michael Doyle, *Misquoting Madison*, LEGAL AFF., Aug. 2002, at 16, 16–18 (suggesting Madison made the statement in the context of public school funding and not in the context of government transparency). Although the Founders’ commitment to transparency is the source of much debate, see, e.g., Martin E. Halstuk, *Policy of Secrecy—Pattern of Deception: What Federalist Leaders Thought About a Public Right to Know, 1794–98*, 7 COMM. L. & POL’Y 51, 53 (2002), founding-era statements of the virtues of governmental transparency are plentiful. See David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 118–34 (1977) (analyzing commentary on the subject at the time of the U.S. Constitution’s drafting).

17. Fenster, *supra* note 6, at 888.

18. See Seth F. Kreimer, *Rays of Sunlight in a Shadow “War”: FOIA, the Abuses of Anti-terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1144 (“It is common currency that transparency is a tonic to democratic legitimacy and to lawful government.”).

rights,<sup>19</sup> and that “[w]ithout meaningful information on government plans, performance, and officers, the ability to vote, speak, and organize around political causes becomes rather empty.”<sup>20</sup> Because secrecy, dishonesty, and lack of access to governmental decisionmaking rob individuals of full data on which to make core choices within their democracy, it in turn denies them “the ability to exercise their rights and liberties, to be free from the unjust and coercive exercise of power, and to understand the world around them.”<sup>21</sup> Core rights cannot be protected unless the conditions supporting the exercise of those rights are safeguarded,<sup>22</sup> and thus, as a starting proposition, information flow is crucial to the entire democratic enterprise.<sup>23</sup>

This tenet resonates within nearly every conception of democracy in Western political thought.<sup>24</sup> A contractual notion of democratic rule, focused on the sanctioning of government by the people, sees honest, transparent, communicative government as a prerequisite to informed consent of the governed<sup>25</sup> and as a vital ingredient of popular legitimacy.<sup>26</sup> Under the classic Rawlsian political liberalism, only a society offering full information on which individuals may base their decision to associate can generate governing institutions that are understood, legitimate, and just.<sup>27</sup> Modern contractarian scholars have similarly noted that because citizens cannot be “bound to collective decisions unless they have in some meaningful way consented,” the agreements that form the basis for those collective decisions must be free from “the inappropriate withholding of relevant information, or there is no real assent.”<sup>28</sup>

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19. See Roy Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COLUM. HUM. RTS. L. REV. 357, 364 (2011) (“There exists an almost inexhaustible series of cases in which the right to obtain information is necessary for the exercise of other political and human rights.”).
  20. Samaha, *supra* note 7, at 917–18. (arguing that “[o]nly the most modest understanding of the citizen’s role in politics”—an understanding that “could itself foreclose the government’s democratic legitimacy”—could be sustained without public information).
  21. Pozen, *supra* note 7, at 286 (arguing that government secrecy “threatens the project of collective self-determination” in a democracy).
  22. Peled & Rabin, *supra* note 19, at 363.
  23. Emerson, *supra* note 8, at 14 (arguing that “if democracy is to work,” “[t]he public, as sovereign, must have all information available in order to instruct its servants, the government”).
  24. For excellent summaries of the range of theoretical supports for a system of transparency, see generally Fenster, *supra* note 6, Pozen, *supra* note 7, and Samaha, *supra* note 7.
  25. See Fenster, *supra* note 6, at 897 (“Only to the extent that these laws gain the consent of the governed—which itself can only be freely given if the laws and their enforcement are public—will the political and administrative authorities that enact and enforce these laws be legitimate.”).
  26. See, e.g., Mark A. Chinen, *Secrecy and Democratic Decisions*, 27 QUINNIPIAC L. REV. 1, 3–4 (2009); Pozen, *supra* note 7, at 286.
  27. JOHN RAWLS, A THEORY OF JUSTICE 454 (1971); see also Fenster, *supra* note 6, at 896–97 (discussing Rawlsian views of transparency).
  28. Chinen, *supra* note 26, at 4–5.

Likewise, those who conceive of government as an agent or trustee—and public information as a good held in trust—describe government transparency as a foundational duty.<sup>29</sup> Sometimes, this position is asserted as a baldly proprietary one—that the “information held by public authorities is, in fact, the property of a state’s citizens and residents” and “[a]s such, citizens and residents are meant to enjoy free access to it.”<sup>30</sup> Other formulations are more theoretical—that transparency is required because government is a monopoly from which its citizen shareholders cannot readily exit, and thus citizens must rely more heavily on information flow as a source of control;<sup>31</sup> or because the tasks of collecting, gathering, and disseminating information are the core functions government is called upon to perform on behalf of its taxpaying citizenry;<sup>32</sup> or because secrecy simply “exacerbates the principal-agent problem inherent in representative democracy and opens the door to tyranny.”<sup>33</sup> Regardless of the precise formulation, the principle is largely the same: The people, for whom the government works, are owed a transparent government, and in the absence of it, a moral democracy cannot be sustained.

Other theorists center their arguments on the invaluable contributions transparency and governmental information flow make to deliberation on public affairs<sup>34</sup> and the attendant obligation of the government to offer clear and public justifications for all of its actions.<sup>35</sup> Recent deliberative-democracy scholarship draws heavily upon this so-called “publicity principle.”<sup>36</sup> Immanuel Kant’s foundational articulation of that principle is that the “transcendental formula of public law”—the test against which all government action must be measured to determine its morality and legitimacy—is simply whether the government would be willing to

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29. See Peled & Rabin, *supra* note 19, at 365–68 (describing arguments that the “Government and its officials” are “trustees” of information “for purposes related to the legitimate discharge of their duties of office” (quoting Austl. Law Reform Comm’n & Admin. Review Council, *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report 77, art. 4.9)); Samaha, *supra* note 7, at 918 (describing arguments that the executive branch “can be seen as agents of the public charged with acting for the public’s benefit”).
30. Peled & Rabin, *supra* note 19, at 365.
31. See Joseph E. Stiglitz, *On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life*, in *GLOBALIZING RIGHTS: THE OXFORD AMNESTY LECTURES 1999*, at 115, 127–28 (Matthew J. Gibney ed., 2003).
32. Harlan Cleveland, *Government Is Information (But Not Vice Versa)*, 46 *PUB. ADMIN. REV.* 605, 605 (1986) (arguing that “[g]overnment is information” and that “to consider government information policy is not far from considering the essence of government itself”).
33. Pozen, *supra* note 7, at 278.
34. See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 95–101 (1996); Fenster, *supra* note 6, at 897.
35. See JAMES G. MARCH & JOHAN P. OLSEN, *DEMOCRATIC GOVERNANCE* 146–48 (1995).
36. See, e.g., GUTMANN & THOMPSON, *supra* note 34, at 95–101; MARCH & OLSEN, *supra* note 35, at 146–48; Joshua Cohen, *Democracy and Liberty*, in *DELIBERATIVE DEMOCRACY* 185, 193 (Jon Elster ed., 1998).

make the action public: “All actions which relate to the right of other men are contrary to right and law, the maxim of which does not permit publicity,” and thus a policy is morally wrong if it could succeed only in secret.<sup>37</sup> Jeremy Bentham’s utilitarian iteration of the publicity principle conceives of publicity as the primary vehicle for the development of relationships of trust and accountability with government; as the people increase their knowledge of the government’s decisionmaking, they participate in meaningful conversation about those decisions and thereby generate “open and free policy.”<sup>38</sup> Modern deliberativists have underscored the principle of publicity both as a moral prerequisite and as a tool for democratic feedback, calling transparency a democratic requirement because of its role in fostering cooperative dialogue, “broadening . . . moral and political perspectives” of the people and their leaders, and enhancing respectful debate and open discussion.<sup>39</sup> In this view, openness of information from government is a primary criterion of a legitimate democracy because it requires officials to give reasons for decisions and respond to challenges to those reasons.<sup>40</sup> Put another way, in the absence of transparency, dialogue on matters of public concern can never truly be “uninhibited, robust, and wide-open,”<sup>41</sup> a core condition of liberal democracy.<sup>42</sup>

These theoretical justifications for demanding a flow of information from government run parallel to practical and instrumentalist arguments for government transparency.<sup>43</sup> Indeed, arguably the most powerful assertions of the need for transparency focus on the consequences of and incentives created by its absence.

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37. IMMANUEL KANT, *ETERNAL PEACE* (1795), reprinted in *THE PHILOSOPHY OF KANT: IMMANUEL KANT’S MORAL AND POLITICAL WRITINGS* 430, 470 (Carl J. Friedrich ed., 1949) (internal quotation marks omitted). For detailed discussions of Kant’s publicity principle, see Pozen, *supra* note 7, at 288–89, and GUTMANN & THOMPSON, *supra* note 34, at 95–105. Importantly, Kant’s principle is stated as a thought experiment rather than a mandate. *See id.* at 96. It would not dictate that all governmental decisionmaking actually be transparent, only that the government not take any action that it would not hypothetically be willing to have made public. *See id.* at 95–96, 100 (criticizing the approach as insufficient for these reasons).
38. *See* JEREMY BENTHAM, *POLITICAL TACTICS* 29–34 (Michael James et al. eds., Oxford Univ. Press 1999) (1843). For recent discussions of Bentham’s contributions to transparency theory, see Fenster, *supra* note 6, at 895–96.
39. GUTMANN & THOMPSON, *supra* note 34, at 100–01; *see also* Pozen, *supra* note 7, at 278 (“[B]y inhibiting input, oversight, and criticism within and outside government, secrecy and compartmentalization will often lead to lower-quality policies.”).
40. GUTMANN & THOMPSON, *supra* note 34, at 100–01.
41. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
42. Transparency’s ability to open policy conversations to wider deliberative scope has also been recognized as beneficial in creating efficiencies within and among governmental agencies. *See, e.g.*, Fenster, *supra* note 6, at 897, 900.
43. *See id.* at 902 (“The empirical, consequentialist claim for transparency views secrecy’s adverse effects on efficient and effective government as not only separate from, but for some, equal to, normative claims on behalf of liberal democratic values.”).

Louis Brandeis's oft-repeated observation that "[s]unlight is said to be the best of disinfectants"<sup>44</sup> highlights the critical role transparency plays in uncovering and preventing public corruption.<sup>45</sup> Citing human nature and real-world evidence of governmental laziness, abuses of authority, and corruption,<sup>46</sup> commentators have emphasized the tendencies of those in power to "pursue unpopular and unethical policies" in secret<sup>47</sup> or to "disclose information that makes the administration look public spirited, effective, and efficient, but withhold information to the contrary."<sup>48</sup> A background norm of transparency imposes significant costs on those who would threaten the rule of law, elevate "the power of government over the individual,"<sup>49</sup> or otherwise violate the public trust, and, equally importantly, puts the electorate in the position of dominance, as it is given the tools to monitor, police, punish, and deter such abuses.<sup>50</sup> While secrecy in official decisionmaking and lack of access to governmental information foster "mistrust,"<sup>51</sup> "ignorance[,] and suspicion,"<sup>52</sup> transparency permits real and meaningful oversight, cultivates confidence in public policy, and incentivizes public-serving actions by those in positions of authority.

In the face of these philosophical and practical claims of the necessity of transparency in democratic government, the United States has, in the last half century, taken legal steps to embrace the norm of transparency both constitutionally and statutorily. It is far from true that complete transparency and right of access to government information is a widespread and fully established legal mandate.<sup>53</sup> Nevertheless, these constitutional and legislative developments remain significant

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44. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).
45. *See id.* at 101–08 (advocating for public disclosure of banking activities to protect investors); *see also* Stiglitz, *supra* note 31, at 13–15; Robert G. Vaughn, *Transparency in the Administration of Laws: The Relationship Between Differing Justifications for Transparency and Differing Views of Administrative Law*, 26 AM. U. INT'L L. REV. 969, 974 (2011) ("Information is necessary if citizens are to hold government officials and institutions legally [and politically] accountable for misconduct or error.").
46. This threat is particularly apparent within the executive branch. *See* Pozen, *supra* note 7, at 274 ("[D]eep secrecy in the United States government is much more likely to be an executive, rather than a congressional or judicial, phenomenon.").
47. *Id.* at 286.
48. Samaha, *supra* note 7, at 918–19.
49. Pozen, *supra* note 7, at 286; *see also id.* at 278 ("In the absence of perfect virtue, secrecy creates greater opportunities for officials to pursue personal or partisan gain, to engage in logrolling or horse trading, and to commit legal and ethical abuses.").
50. *See* Fenster, *supra* note 6, at 899 ("The most significant consequences [of transparency] flow from the public's increased ability to monitor government activity and hold officials, particularly incompetent and corrupt ones, accountable for their actions.").
51. Stiglitz, *supra* note 31, at 116.
52. Pozen, *supra* note 7, at 286.
53. *See, e.g.,* Samaha, *supra* note 7, at 910 ("American law has yet to reach a satisfying conclusion about public access to information on government operations."); *see also* Fenster, *supra* note 6, at 889 ("[T]ransparency's status as a legal obligation for government entities in the United States and as an individual right for American citizens is remarkably vague.").

as markers of the perceived legal value of promoting transparency and the modern social commitment to the norm, and they are accompanied by powerful statements of core principles that might inform discussions on deviations from that norm.

As a constitutional matter, as discussed above,<sup>54</sup> legal academics have argued persuasively that transparency, although not explicitly mandated by constitutional text, is a necessary and structurally consistent obligation to place upon government information holders and decisionmakers.<sup>55</sup> Scholars urging the constitutionalization of transparency norms have set forth arguments highlighting constitutional provisions that appear to presuppose or necessitate governmental communication with the electorate. Although a variety of such textual and structural arguments have been formulated,<sup>56</sup> the most prominent arguments are rooted in First Amendment values of the sort set forth by Emerson. In arguing that a constitutional “right to know” was an inevitable and inherent corollary to the First Amendment right to communicate, Emerson noted that transparency serves the same overarching purposes as speech rights generally.<sup>57</sup> And in the years immediately following Emerson’s explication of the right, the U.S. Supreme Court took at least some steps toward its recognition—announcing, for example, a First Amendment–based right of public access to criminal trials,<sup>58</sup> and developing, in the wake of this recognition, a doctrine of access that courts have extended to civil trials, jury selection, pretrial hearings, posttrial motions, and a variety of judicial records for which “logic and experience” dictate openness.<sup>59</sup>

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54. See *supra* notes 8–11 and accompanying text.

55. See Samaha, *supra* note 7, at 913 (arguing that “[d]emocratic governance is premised on some measure of public access to information about government operations” and “[l]aws aimed at regulating information access help achieve an acceptable measure of exposure, without jeopardizing executive efficacy or unduly relying on officials’ personal preferences,” so “these norms are good candidates for constitutionalization,” and referring to recently drafted national constitutions that adopt transparency as a constitutional right).

56. See, e.g., Pozen, *supra* note 7, at 295–96 (arguing that the Guarantee Clause and the provisions for elections of senators, representatives, and the president might support a constitutional norm of transparency). For a thorough investigation of textual, historical, structural, prudential, and doctrinal arguments in favor of and opposing a constitutional norm of transparency and access, see *id.* at 293–97.

57. See Emerson, *supra* note 8, at 2 (arguing that the freedom to obtain information is “essential to personal self-fulfillment,” “a significant method for seeking the truth,” “necessary for collective decision-making in a democratic society,” and “vital . . . for effectuating social change without resort to violence or undue coercion”).

58. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Court found that the expressly stated guarantees of freedom of speech, press, and petition imply an attendant right to government information, and that “an arbitrary interference with access to important information” violates the First Amendment. *Id.* at 583.

59. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982) (adopting “logic and experience” test); see also *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 691 (6th Cir. 2002) (citing cases applying the test to other proceedings).

Drawing heavily upon liberal democratic theory principles, the Court recognized the interest in “ensur[ing] that the individual citizen can effectively participate in and contribute to our republican system of self-government”<sup>60</sup> and emphasized that “a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”<sup>61</sup> First Amendment precepts, although applied only in particular settings to have come before the Court,<sup>62</sup> were nevertheless found to embody “not only ‘the principle that debate on public issues should be uninhibited, robust, and wide-open,’ . . . but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.”<sup>63</sup>

The legal groundswell for acknowledging the virtues of transparency and offering mechanisms for enforcing the norm has been seen legislatively, as well, in a large-scale statutory movement on both state and federal levels. In the wake of the 1953 publication of Harold Cross’s influential *The People’s Right to Know*,<sup>64</sup> concluding that “[c]itizens of a self-governing society must have the legal right to examine and investigate the conduct of its affairs,”<sup>65</sup> a freedom-of-information campaign of grand proportions ultimately produced a sweeping federal Freedom of Information Act (FOIA),<sup>66</sup> similar state information-access acts, and state sunshine laws calling for open meetings and open records in every state.<sup>67</sup> Legislative debate at the time of enactment<sup>68</sup> and the subsequent characterization of the legislation by courts<sup>69</sup> confirm an underlying set of assumptions about the

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60. *Globe Newspaper Co.*, 457 U.S. at 604.

61. *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (internal quotation marks omitted).

62. See Pozen, *supra* note 7, at 305 (noting that although “case law reflects cautious support for a publicly held right to know what the government is up to, . . . [c]ourts have never passed judgment on most pieces of our immense government secrecy system”).

63. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (citation omitted).

64. HAROLD L. CROSS, *THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS*, at xiii (1953) (arguing that free flow of information is a mandate of democracy and that, in its absence, “the citizens of a democracy have but changed their kings”).

65. *Id.* (emphasis omitted).

66. 5 U.S.C. § 552 (2006).

67. Emerson, *supra* note 8, at 15 (noting “the growing number of federal and state freedom of information laws, sunshine laws, and similar legislation”); Pozen, *supra* note 7, at 314 n.204 (“FOIA introduced a norm of open access to government documents that has commanded deep public loyalty, taken on a quasi-constitutional valence, and spawned a vast network of imitator laws at all levels of United States government and in democracies around the world.”).

68. See Fenster, *supra* note 6, at 898 (“The House of Representatives Report on the original legislation rested its conclusion about the necessity of a broader, more exacting public access law on the fact that ‘[a] democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies.’” (alteration in original) (quoting H.R. REP. NO. 89-1497, at 12 (1966))).

69. See, e.g., *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (calling the Freedom of Information Act (FOIA) “a structural necessity in a real democracy”).

need for and overwhelming benefits of governmental transparency.<sup>70</sup> The legislators who enacted FOIA and the judges called upon to apply it have rooted their decisions in foundational beliefs that openness and information flow are critical components of a democracy, the foundations of an informed electorate, and essential to achieving trust in and legitimacy of government.<sup>71</sup>

Taken together, the philosophical, practical, and legal expectations of transparency and governmental information flow in the United States buttress a position that these standards ought to be the guiding norms in government decisionmaking. Although the obligations are undoubtedly less than absolute, secrecy and withholding of accurate information should be the exception rather than the rule.

## B. Transparency in Disasters

The virtues of transparency persist in times of disaster, both because the general theoretical and practical justifications for a background norm of transparency are not altered by the existence of a disaster and because additional theoretical and practical reasons unique to the disaster context may heighten the need for transparency.

As a starting matter, the theoretical rationales for governmental transparency outlined in Part I.A above resonate within the disaster context. During disasters, the people rely on the representatives of their government to offer a clean flow of information as a fundamental of democratic rule. In fact, nearly all of the theoretical foundations for transparency in government—including the need for transparency in the exercise of core rights, the contractualist and trustee views of modern liberal democratic theory, and the deliberativist publicity principle—presuppose a citizenry actively engaged in information seeking. Indeed, one of the primary critiques of these theories has been that the participants in a democracy are actually more complacent, less engaged in communications with government, and less interested in gathering the information that government might provide.<sup>72</sup> However, there is strong evidence that citizens experiencing or threatened with immediate disaster do, in fact, actively consider multiple sources of information about the character of the harm and ways to reduce risk for themselves

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70. See Pozen, *supra* note 7, at 314–15 (noting that FOIA was “developed in response to dramatic government abuses,” and “grew out of widespread social movements,” and that, because its “enactment entrenched a dramatic normative shift in Americans’ expectations of government,” “the idea that [it] might nonetheless reflect or consolidate a constitutional norm has become increasingly familiar”).

71. See, e.g., Fenster, *supra* note 6, at 898 (citing legislative history demonstrating this commitment to transparency).

72. See, e.g., *id.* at 928–29.

and their families.<sup>73</sup> They behave as active decisionmakers and more closely parallel the idealized citizen envisioned by democratic theorists than do citizens in virtually any other context.<sup>74</sup>

Moreover, the theoretical support for transparency may even extend in the disaster context beyond the core rationales commonly asserted by transparency scholars. An additional, underappreciated rationale may be found in foundational concerns about the risks of information paternalism.<sup>75</sup> While one might view the “search for truth”<sup>76</sup> rationale for the First Amendment solely as a prohibition on government attempts to stifle individual citizens’ contributions to that search for truth, government information withholding predicated on the notion that the

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73. See, e.g., ROZ D. LASKER, N.Y. ACAD. OF MED., REDEFINING READINESS: TERRORISM PLANNING THROUGH THE EYES OF THE PUBLIC 19 (2004), available at <http://www.nyam.org> (describing the information demands of individuals facing disaster threats); Sweta Chakraborty, *The Challenge of Emergency Risk Communication: Lessons Learned in Trust and Risk Communication From the Volcanic Ash Crisis*, in GOVERNING DISASTERS: THE CHALLENGES OF EMERGENCY RISK REGULATION 80, 82 (Alberto Alemanno ed., 2011) (explaining that in disasters “[p]eople want the truth, even if it is worrisome” and they seek information so they can understand “what they are up against, in order to have the best chance of figuring out what to do”); Colleen Fitzpatrick & Dennis S. Mileti, *Public Risk Communication*, in DISASTERS, COLLECTIVE BEHAVIOR, AND SOCIAL ORGANIZATION 71, 74 (Russell R. Dynes & Kathleen J. Tierney eds., 1994) (citing empirical evidence that, during disasters, most people “do not passively await the arrival of more information,” but “actively seek out additional information” from other sources to try to verify accuracy of received information).
74. See, e.g., The Working Grp. on “Governance Dilemmas” in Bioterrorism Response, *Leading During Bioattacks and Epidemics With the Public’s Trust and Help*, 2 BIOSECURITY & BIOTERRORISM: BIODEFENSE STRATEGY, PRAC., & SCI. 25, 31 (2004) (explaining that, during disasters, citizens should be treated as “decision-makers who are interested in determining the nature of the danger and acting to reduce the chance of illness for themselves and loved ones”). Internationally, criminal prosecutions of government officials believed to have withheld information material to the public’s safety during recent disasters have underscored the intensity of the information-seeking desire during disasters and the public outrage that (even unintentional) information withholding engenders. Seven members of Italy’s prestigious National Commission for the Forecast and Prevention of Major Risks recently were found guilty of manslaughter for allegedly giving false reassurances to the public about swarm earthquake activity a week before L’Aquila’s devastating 6.3 magnitude earthquake claimed more than three hundred lives. Elisabetta Polovedo & Henry Fountain, *Italy Orders Jail Terms for 7 Who Didn’t Warn of Deadly Earthquake*, N.Y. TIMES, Oct. 22, 2012, <http://www.nytimes.com/2012/10/23/world/europe/italy-convicts-7-for-failure-to-warn-of-quake.html>. Similarly, in Chile, National Emergency Office staff are being prosecuted for criminal negligence after rescinding a tsunami warning in the aftermath of Chile’s February 27, 2010, earthquake; the tsunami ultimately killed more than 150 people. Denis McClean, *Chile Still Living With Quake Effects*, U.N. OFF. FOR DISASTER RISK REDUCTION (Feb. 27, 2012), <http://www.unisdr.org/archive/25366>.
75. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 8 (2004) (explaining, in the context of First Amendment speaker rights, that the idea that the First Amendment “furthers the day-to-day ‘search for truth’” is, at base, “an argument against government paternalism in the realm of ideas and information” and relies on the assumption “that it is better for each of us to decide [things in the realm of ideas and information] for ourselves than for government to decide them for us”).
76. *Id.*

public will use that information to form misguided beliefs also runs counter to the basic principle “that it is better for each of us to decide these things for ourselves than for government to decide them for us.”<sup>77</sup> Government is, of course, entitled to try to influence citizens’ beliefs and actions by persuasion, but not by outright information withholding or misrepresenting what is known.<sup>78</sup> While such information withholding does not itself violate the First Amendment, it can be seen as a government attempt to manipulate individual belief formation that strikes at the core of personal autonomy.<sup>79</sup> Such government deception and attempts at thought control reflect a basic lack of respect for its citizens, and undermine citizens’ self-determination and autonomous viewpoint development. Times of disaster have the potential to play a particularly important role in belief formation, as crises may force citizens to confront profound moral questions—questions central to individuals’ conception of their selves and notions of the so-called “good life”—such as the extent to which they are willing to prioritize small risks to their own safety over much greater risks to others. Government does its citizens no favors by shielding them from these profound moral dilemmas by attempting, for example, to downplay the real risks to them and their families.<sup>80</sup> Government decisionmakers should, instead, do their best to apprise citizens about the risks they face and then let citizens grapple with those fundamental moral quandaries.

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77. *Id.*

78. There is, of course, a fine line between information distortion, on the one hand, and information spin or framing that is an inseparable part of both communication and advocacy, on the other. At a minimum, however, calculated efforts to distort or withhold information in order to save people from themselves are inconsistent with the respect government owes its citizens. Moreover, while individual officials will no doubt confront difficult line-drawing problems in individual cases, explicating the basic principles that should guide government information policy will at least provide touchstones for that decisionmaking, even if those principles cannot definitively resolve every difficult case.

79. For a fuller exploration of the implications of secrecy for deontological ethics, see Paul Gowder, *Secrecy as Mystification of Power: Meaning and Ethics in the Security State*, 2 ISJLP 1 (2006). Gowder argues that “the self-determination of meaning” is essential to human autonomy and that government secrecy is a “mystification,” which “denies the freedom of another by deceiving that other into believing that a state which was chosen, and may be resisted, is actually natural and fixed.” *Id.* at 10–11 (citing KRISTANA ARP, *THE BONDS OF FREEDOM: SIMONE DE BEAUVOIR’S EXISTENTIALIST ETHICS* 115–16, 140 (2001)). Specifically he argues that “risk-secrecy,” when government knows of and conceals a risk to the public, deprives citizens of “the freedom to make meaningful and responsible choices” with regard to that risk and prevents citizens from identifying and understanding the consequences of choices made both by the government and by the citizens themselves. *Id.* at 13, 15.

80. Cf. Stacey Singer, *Worst TB Outbreak in 20 Years Kept Secret*, PALM BEACH POST, July 8, 2012, <http://www.palmbeachpost.com/news/news/state-regional/worst-tb-outbreakin-20-years-kept-secret/nPpLs> (recounting how Florida officials “made a conscious decision not to tell the public” about a particularly virulent tuberculosis outbreak, in part, because they didn’t want to give people “another reason [to] turn their backs on the homeless”).

Rather than circumventing citizens' consideration of deep moral issues by making those questions appear to be easier and less morally weighty than they are, government can, if necessary, forbid citizens from pursuing certain courses of action that it concludes undervalue the interests of others. Thus, while government is free to prohibit citizens from undertaking certain emergency protective measures (like evacuating a particular location or consuming a particular drug) and is free to bring government force to bear to enforce those prohibitions,<sup>81</sup> that coercive power should not usually include the power to manipulate or withhold information in an attempt to convince citizens of the wisdom of the government policy at issue.<sup>82</sup> Exercise of the latter power poses serious risks not only to individual autonomy but also to government accountability for its policy choices. Indeed, Senator Daniel Patrick Moynihan has argued that "secrecy is the ultimate form of regulation because the people don't even know they are being regulated."<sup>83</sup> Just as there is a strong preference for government restriction of action rather than speech,<sup>84</sup> there ought to be a strong preference for government restriction of action rather than information.

The practical justifications for transparency are likewise heightened in times of disaster. Although one's conceptualization of the dangers and risks of secrecy during disasters might be informed by one's conceptualization of the motives and capabilities of government, any view of government should call for transparency as a practical matter. If government is viewed as untrustworthy or inept, then transparency serves as a critical check on those in power and sunlight offers a disinfectant<sup>85</sup> to the poor choices that officials might make.<sup>86</sup> This is particularly important in the disaster context because of the broad discretion often granted to

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81. These government regulations of behavior should, of course, be rooted in empirical data rather than myth and should not indulge unfounded assumptions about typical postdisaster human behavior.

82. This argument parallels the fundamental notion in First Amendment jurisprudence that government is free to prohibit actions but not beliefs and that nonspeech restrictions are always preferable to speech-restrictive solutions. *See, e.g.*, STONE, *supra* note 75, at 545 (arguing that, rather than limiting free speech, the government should choose other nonspeech-related measures to advance national security).

83. John Podesta, *Need to Know: Governing in Secret*, in *THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 220, 227 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

84. *See supra* note 82.

85. *See* BRANDEIS, *supra* note 44, at 92.

86. It might be argued that later disclosure of government's actions after the danger has passed might suffice for these accountability purposes, revealing government missteps and policy choices with which the citizenry disagrees. However, given that individuals will have to make important real-time decisions about their safety and the safety of their property as the disaster unfolds, this context may present a uniquely compelling case for real-time information provision. Moreover, as the experience in Katrina demonstrates, official narratives of disaster can be remarkably persistent, and early control over the narrative can interfere with later attempts to hold officials accountable. *See infra* note 267 and accompanying text.

executive officials to respond to disasters.<sup>87</sup> Both legislative specificity and judicial oversight are often lacking in governmental disaster management,<sup>88</sup> making public scrutiny of and feedback to decisionmakers all the more critical.

If, on the other hand, one conceives of government as largely competent, well intended, and effective in disaster response, transparency is likewise crucial to its ongoing operations on behalf of the citizenry. One challenge faced by a well-intentioned government is to signal to its constituents that it is worthy of their trust<sup>89</sup> and ought to be obeyed.<sup>90</sup> Information withholding or manipulation in disasters threatens to undermine public trust in government,<sup>91</sup> which in turn will likely undermine public compliance with emergency response instructions.<sup>92</sup>

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87. See, e.g., 42 U.S.C. §§ 5170, 5170a (2006) (granting the president broad discretion to declare a “major disaster,” which then allows the president to divert the resources of any federal agency to respond to the disaster in almost any way the president sees fit). Most states also grant governors, local officials, or both broad discretionary authority to respond to disasters, including the power to suspend preexisting state laws that interfere with disaster response and to impose restrictions on movement. See, e.g., TEX. GOV. CODE ANN. §§ 418.014–418.018 (West 2012). Eric Posner and Adrian Vermeule have argued that given the necessity of broad executive discretion to respond to crises, “political constraints” imposed by public opinion, rather than “legal constraints,” are the true checks on executive power during crises. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 12–13 (2010). This political check cannot be effective without at least some degree of transparency.
88. See, e.g., sources cited *supra* note 87; 42 U.S.C. § 5148 (2006) (providing federal government immunity for any discretionary disaster decision made pursuant to the Stafford Act).
89. The definition of trust has been the subject of much scholarly debate, but as Professor Rebecca Bratspies concludes, “[e]ven without a clear definition, most scholars seem to agree that trust embodies a willingness to accept vulnerability under conditions of uncertainty.” Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575, 589 (2009).
90. See POSNER & VERMEULE, *supra* note 87, at 137, 145 (arguing that “well-motivated” executives can develop “mechanisms of executive signaling” to establish credibility with the public by “taking actions that are more costly for ill-motivated actors than for well-motivated ones,” such as committing to transparency).
91. After the Japanese government withheld risk information during the Fukushima crisis, see discussion *infra* note 94, a May 2011 poll “showed that more than eighty per cent of the population did not believe the government’s information about the nuclear crisis.” Evan Osnos, *The Fallout*, NEW YORKER, Oct. 17, 2011, at 46, 57–58. Preliminary empirical data from the Fukushima disaster suggests that the withholding of relevant disaster information from the public did, indeed, undermine trust in the Japanese national government. See Carola Hommerich, *Trust and Subjective Well-Being After the Great East Japan Earthquake, Tsunami and Nuclear Meltdown: Preliminary Results*, 21 INT’L J. JAPANESE SOC. 46, 49, 59 (2012) (arguing that, as expected, information withholding post-Fukushima likely “reduced trust” in the Japanese government’s ability to respond to the disaster, especially among those “personally affected by the disaster”).
92. A recent New York Academy of Medicine study of likely public reactions to a dirty bomb attack revealed that compliance with government disaster recommendations is highly dependent on the level of trust an individual feels in the government. See LASKER, *supra* note 73, at vii (“[P]eople are more likely to follow official instructions when they have a lot of trust in what officials tell them to do.”). Many survey participants reported that they were afraid that the government would affirmatively lie to them—or recommend response measures it knew were not in their best interest. See *id.* at 10. This effect was most pronounced in minority communities. See *id.* at 11; see also GEORGE J. ANNAS,

Reports on a variety of different disasters have suggested that withholding disaster-related information from the public, even for arguably good reasons, may undermine public trust in government institutions,<sup>93</sup> and that public anger and distrust is particularly likely when the information withheld from the public would have allowed individuals to make better, more informed decisions about their own safety.<sup>94</sup> At base, the public is likely to conclude that if the government cannot itself guarantee the citizens' safety during a disaster, it at least owes the public disclosure of the information it possesses so that citizens may make their own determinations about how best to ensure their own safety. In any event, a government wishing to serve the public with what it believes to be a proper recommendation in the wake of a natural or technological disaster and recognizing the vital need for voluntary compliance with that recommendation<sup>95</sup> should recognize that dishonesty or withholding of information undercuts public trust and compliance and that transparency is therefore essential.<sup>96</sup>

This is not to say, of course, that full transparency without exception would be either desirable or workable in the disaster context. As in all contexts, competing values<sup>97</sup> and concerns must be weighed in crafting individual laws and poli-

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WORST CASE BIOETHICS: DEATH, DISASTER, AND PUBLIC HEALTH 213 (2010) (“[T]he key to any effective response to a public health emergency is an informed public that trusts its government.”).

93. See sources cited *supra* note 91; see also NAT'L RESEARCH COUNCIL, DAM AND LEVEE SAFETY AND COMMUNITY RESILIENCE: A VISION FOR FUTURE PRACTICE 124 (2012) (arguing that withholding dam and levee safety information, even for national security or other reasons, “may ultimately do more harm than good,” by, inter alia, decreasing public “[t]rust in dam and levee owners and government agencies”); sources cited *infra* note 266; cf. Edgar Jones et al., *Public Panic and Morale: Second World War Civilian Responses Reexamined in the Light of the Current Anti-terrorist Campaign*, 9 J. RISK RES. 57, 63 (2006) (noting that during World War II, public trust in government and news media in the United Kingdom “was undermined” by overly positive stories and propaganda when those information distortions were exposed).
94. In Fukushima's aftermath, many of those fleeing the areas closest to the crippled plant took refuge in an area where government-modeled data predicted the fallout plume would travel. Because that modeling data was not disclosed to the public, many evacuees unknowingly put themselves in harm's way, “prompt[ing] one local mayor to accuse the government of murder.” See Osnos, *supra* note 91, at 59.
95. Former Senator Sam Nunn, after portraying the president in *Dark Winter* (a 2001 smallpox simulation exercise), concluded, “There is no force on earth strong enough to get Americans to do something that they do not believe is in their own best interests and that of their families.” ANNAS, *supra* note 92, at 228.
96. Bratspies, *supra* note 89, at 606, 623 (identifying transparency—including effective risk communication and public participation in decisionmaking—as a key component of “regulatory trust,” or social trust in the “administrative” context).
97. Even the most ardent transparency proponents have not proposed absolutism and have conceded that conflicting values temper the utility, feasibility, and legitimacy of government access and transparency. See, e.g., Emerson, *supra* note 8, at 4 (“[I]t is impossible to give absolute constitutional protection to the right to obtain information under all circumstances.”). Transparency scholars note that government openness is costly and inefficient, can raise privacy concerns and undermine

cies, and this Article does not purport to answer with specificity all transparency questions that might arise with relation to disaster decisionmaking. Government may also face disaster-specific barriers to information flow, including legitimate concerns about how much information can be effectively communicated and absorbed, limitations brought about by compromised communications infrastructure, and concerns about diverting resources from problem solving and response to information gathering and communication. Nonetheless, this Article seeks to demonstrate that the strong background norm of transparency translates into the disaster context and that the importation of wartime exceptionalism threatens to subvert that norm in the ways described in Part II below. This melding of war and disaster skews the balancing toward secrecy and obscures the array of other interests that should be more carefully considered in formulating disaster information policy.

## II. WAR EXCEPTIONALISM

### A. The Thinking Enemy

Notwithstanding the strong background norm of governmental information flow and the solid status of transparency as a democratic prerequisite, one clear exception to these principles has been almost uniformly embraced. It takes the form of what might be labeled war exceptionalism.

Both the enforcement of positive limitations on private speech and cessation of the government obligations of information flow and transparency have been recognized as necessary and appropriate when designed to thwart the purposeful exploitation of the information by a thinking enemy who is a current or potential wartime threat.<sup>98</sup> Although, as discussed below, the scope of these exceptions has

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thoughtful deliberation, and may facilitate rent seeking and other harmful behaviors. *See, e.g.*, Fenster, *supra* note 6, at 902–10 (describing transparency’s limitations, including its tendency to “raise the fiscal costs of government,” to impose “prohibitive logistical problems and expenditures,” to “infringe upon the privacy interests of individuals who give personal information to the government,” and to “harm[] government decisionmaking by adversely affecting the ability of government officials to deliberate over policy matters outside of the public eye”); Samaha, *supra* note 7, at 922 (“Unfettered access to government information will cripple the state’s public-regarding efforts as much as anything else,” because “[o]penness exposes not just waste, fraud, and abuse, but also . . . candid advice, intimately private information, and trade secrets” and because “[a] rule of full disclosure might also prompt officials to sanitize the public record as it is created”).

98. *See, e.g.*, *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) (“The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.”).

been hotly debated, and concerns over their inappropriate invocation run deep,<sup>99</sup> even the most ardent proponents of government accessibility and transparency acknowledge at least the “very narrow”<sup>100</sup> brand of war exceptionalism that calls for “sensitive national security data”<sup>101</sup> to be kept secret from the public so as to ensure that it is also kept secret from enemies “with [an] intent to injure the United States.”<sup>102</sup>

Although perhaps once partially grounded in the now-rejected position that the First Amendment justified restrictions on communications in the name of preserving public morale and eliminating dissent that even potentially hindered a war effort,<sup>103</sup> the primary and enduring rationale for wartime exceptionalism of the government’s information-disclosure obligations is that some information might be used by “evildoers”<sup>104</sup> with a calculated desire to take advantage of public information in an ongoing destructive scheme.<sup>105</sup> As a theoretical matter, it is widely acknowledged that the presence of a potentially information-exploiting thinking enemy tilts the transparency scales because “forced disclosure creates a nation that is more susceptible to security breaches and less able to enforce its own laws” by giving thinking enemies “greater access to information that could be used to threaten the health and safety of the public.”<sup>106</sup> Thus, notwithstanding the virtues

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99. See, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 107 (2006) (arguing that “[g]overnment agencies frequently classify material not because it contains secrets that would endanger the nation if revealed to the public but because publication would embarrass the agency by revealing its mistakes or would provide helpful information to a rival agency” and that this “[o]verclassification creates a culture of secrecy that inhibits the production and flow of information to which the public should be entitled”); STONE, *supra* note 75, at 546–47 (arguing that national security “[o]fficials who can mask their decisions behind a screen of self-invoked secrecy are sure to abuse their authority” and that there exists a pathologically “excessive restriction of civil liberties in wartime”).

100. Emerson, *supra* note 8, at 17.

101. *Id.* (arguing that the limitation should extend only to information about “tactical military movements, design of weapons, operation of espionage or counterespionage, and similar matters”).

102. *Id.* at 18.

103. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

104. Fenster, *supra* note 6, at 906.

105. See Ackerman, *supra* note 1, at 1889 (“[T]ightened restrictions on access to hitherto-public information and facilities . . . [are] precisely the sorts of restrictions that may significantly reduce the risk of a second strike.” (quoting Laurence H. Tribe & Patrick O. Gudridge, *The Anti-emergency Constitution*, 113 YALE L.J. 1801, 1830 (2004))).

106. Fenster, *supra* note 6, at 906; see also Samaha, *supra* note 7, at 922 (explaining, as a reason why “[u]nfettered access to government information” is untenable and not public-serving, that “[o]penness exposes not just waste, fraud, and abuse, but also battle plans, [and] law enforcement sources”); Pozen, *supra* note 7, at 304 (discussing the ways in which “executive branch secrecy in the

of transparency, secrecy proves “valuable for concealing plans and vulnerabilities from adversaries, acting quickly and decisively against threats, protecting sources and methods of intelligence gathering, and investigating and enforcing the law against violators.”<sup>107</sup> Intentional withholding of information that is motivated by these concerns is thought to be even more public-serving and democracy-enhancing than governmental transparency and access, as it is the only clear mechanism for protecting the nation from the thinking, adaptive enemy who would take advantage of public information flow to do the nation and its people harm.<sup>108</sup>

This war exceptionalism, condoning secrecy in the interest of protecting the nation from a thinking enemy, has been incorporated doctrinally into common law, legislative, and constitutional schemes that otherwise carry a strong presumption of access and transparency.<sup>109</sup>

The Supreme Court has made clear that even as to the fundamental individual liberties associated with freedom of speech and in the context of deeply disfavored prior restraints on the press, war exceptionalism justifies limitations on military information that could be exploited by those who would harm national security<sup>110</sup> or that would “surely result in direct, immediate, and irreparable damage to our Nation or its people.”<sup>111</sup> In overcoming the ordinary free speech norms, the doctrine focuses on the existence of the third-party adversary and the uses to which that adversary would put the information.

A parallel exceptionalism, likewise focused on this adversarial national security risk, is well established in the statutory and other legal obligations of governmental access and transparency. From the time of the nation’s founding, the duty of the government to reveal information to the public and provide access to otherwise public documents and places has been tempered by a recognized need to protect national security from ill-intended information exploiters.<sup>112</sup> At the Virginia ratifying convention in 1788, George Mason said, “[i]n matters relative to

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service of national defense, will be tolerated to a significant degree” in order to keep the country safe from enemy actions).

107. Pozen, *supra* note 7, at 277.

108. See Fenster, *supra* note 6, at 906; see also STONE, *supra* note 75, at 9 (cataloging reasons government might want to suppress free speech during wartime, including possible “disclos[ure of] information that is useful to the enemy”).

109. For a discussion of these common law, legislative, and constitutional schemes, see *supra* notes 53–71 and accompanying text.

110. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (“No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”).

111. *N.Y. Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

112. See, e.g., THE FEDERALIST NO. 70, at 345 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (listing “secrecy[] and dispatch” among the executive branch qualities that are critical to conducting war).

military operations, and foreign negotiations, secrecy [is] necessary sometimes.”<sup>113</sup> As legal constructs have developed to ensure transparency and access, this exceptionalism has been enshrined within them, establishing exemptions that trump the transparency norm when a thinking enemy exists. Notably, FOIA has an explicit national defense exception,<sup>114</sup> informed by pre-existing executive schemes for classification of national security information that were plainly designed to thwart thinking-enemy exploitation.<sup>115</sup> Other FOIA exceptions may also be invoked to prevent thinking-enemy use of information about investigations and intelligence operations.<sup>116</sup> This statutory recognition that “public disclosure is not always in the public interest,”<sup>117</sup> reflects an uncontroverted commitment to “allow[ing] the Government to protect from the scrutiny of this Nation’s enemies classes of information that warrant protection.”<sup>118</sup>

The law of access and attendant doctrines of press freedom likewise have been limited by the constraints of war and the existence of a calculating adversary in the national security realm.<sup>119</sup> Media access to war zones may constitutionally be restricted,<sup>120</sup> and exceptions to the courtroom openness mandated by

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113. *Halperin v. CIA*, 629 F.2d 144, 155 (D.C. Cir. 1980) (quoting 3 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 326 (rev. ed. 1966)); *id.* at 160 (“Our survey of historical evidence persuades us that secrecy of intelligence efforts, including expenditures, was a practice of General Washington during the War for Independence,” that the framers “intended Congress and the President to have discretion to maintain” such secrets, and that they implemented this exceptionalism by statute); *see also N.Y. Times Co.*, 403 U.S. at 728 (“[S]uccessful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy.”).
114. *See* 5 U.S.C. 552(b)(1)(A)–(B) (2006) (“[FOIA] does not apply to matters that are . . . (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order . . .”).
115. *See, e.g.*, Exec. Order No. 10,501, 18 Fed. Reg. 7049, 7051 (Nov. 5, 1953) (citing, as examples of classifiable material, information that would harm U.S. defense interests if disclosed because an enemy could exploit the information to harm the country).
116. Some exemptions for law enforcement records are designed to prevent exploitation of information by wrongdoers. *See, e.g.*, 5 U.S.C. § 552(b)(7)(A), (E)–(F) (exempting “records or information compiled for law enforcement purposes,” when they “could reasonably be expected to interfere with enforcement proceedings,” when they would reveal law enforcement techniques that create a risk of “circumvention of the law,” and when they “could reasonably be expected to endanger the life or physical safety of any individual”). Additionally, FOIA exempts documents “specifically exempted from disclosure by [another] statute,” *id.* § 552(b)(3), which incorporates numerous war- and intelligence-based nondisclosure statutes.
117. *CIA v. Sims*, 471 U.S. 159, 167 (1985).
118. *Id.* at 183 (Marshall, J., concurring).
119. For thorough examinations of war exceptionalism involving the press, see generally JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* (1999), STONE, *supra* note 75, and David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49 (2006).
120. *See, e.g.*, *Flynt v. Rumsfeld*, 355 F.3d 697, 703 (D.C. Cir. 2004) (rejecting the assertion of publisher Larry Flynt that there exists a “First Amendment right for legitimate press representatives to travel

*Richmond Newspapers, Inc. v. Virginia*<sup>121</sup> are recognized, when secrecy is necessary to protect technology and methods of intelligence gathering from thinking enemies and to thereby retain their usefulness to the national defense.<sup>122</sup> The so-called state secrets doctrine establishes an evidentiary privilege to conceal information exploitable by enemies<sup>123</sup> and bars suits entirely when the main issue is a state secret<sup>124</sup> of that nature. In such cases, transparency is transformed from a government obligation to a matter “beyond judicial scrutiny,”<sup>125</sup> in the name of protecting the citizenry. Although the application of the doctrine is rightly limited to information that would in fact create this harm to national security, “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.”<sup>126</sup>

## B. War Exceptionalism in Terror

Although war exceptionalism in its narrowest form is largely uncontroversial, in the years since the September 11, 2001, attacks on the United States, it has become a topic of vehement debate, as scholars, civil libertarians, and media organizations have criticized the government for what has been described as an unjustifiable, pretextual, and undemocratic expansion of the exception to the “war on terror.”<sup>127</sup> Critics have charged that governmental constrictions on the appli-

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with the military” and to be “facilitated by the military in their reporting efforts during combat, subject only to reasonable security and safety restrictions”).

121. 488 U.S. 555 (1980).

122. See *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (“It may be possible to satisfy the court . . . that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”); *Fitzgibbon v. CIA*, 911 F.2d 755, 763 (D.C. Cir. 1990) (reasoning that the disclosure of intelligence methods could enable hostile governments to manipulate domestic intelligence gathering).

123. In *Reynolds*, the Supreme Court formally recognized the “state secrets” evidentiary privilege to conceal information, the revelation of which would threaten military or diplomatic interests of the nation. *Reynolds*, 345 U.S. at 10.

124. See *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (dismissing a suit against the Central Intelligence Agency (CIA) for breach of contract to provide financial and other support in exchange for espionage services because “the very subject matter of the action . . . was a matter of state secret” (quoting *Reynolds*, 345 U.S. at 11 n.26)).

125. *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981) (dismissing a suit to compel the U.S. Navy to prepare an Environmental Impact Statement regarding a military facility where it might store nuclear weapons because “[d]ue to national security reasons,” the Navy could not admit or deny its plans).

126. *Reynolds*, 345 U.S. at 11.

127. William Zolla II, *The War at Home: Rising Tensions Between Our Civil Liberties and Our National Security*, CBA REC., Feb./Mar. 2003, at 32, 32 (noting that a “broad coalition” of critics “contend that the Government’s zealous pursuit of terrorists is being waged with little regard for the rights of accused suspects or their families, and largely beyond the view of the public”); see also Bill Carter & Felicity Barringer, *In Patriotic Time, Dissent Is Muted: Debate Grows Over Balancing Security and Free Speech*,

cation of FOIA,<sup>128</sup> increased classification of documents,<sup>129</sup> and U.S. Department of Homeland Security measures calling for governmental secrecy in the name of combatting terrorism<sup>130</sup> all inappropriately shift the balance away from transparency. They have likewise condemned secrecy that prevents public scrutiny or constitutional challenge of other counterterrorism measures, including government invocations of war exceptionalism in its refusal to reveal facts related to exercises of the Patriot Act<sup>131</sup> surveillance powers,<sup>132</sup> torture and interrogation techniques,<sup>133</sup> the names of detainees believed to be connected to terror attacks, and other information on alleged enemy combatants.<sup>134</sup> Similarly, many have

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N.Y. TIMES, Sept. 28, 2001, at A1 (voicing concern that the post-September 11 climate tempered free speech and giving examples of many who criticized the government and the negative consequences that followed).

129. See, e.g., Jane E. Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006) (criticizing the Bush administration's use of FOIA exceptions to keep information confidential); Timothy W. Maier, *Bush Team Thumbs Its Nose at FOIA*, INSIGHT, Apr. 29, 2002, at 20 (criticizing former Attorney General Ashcroft's post-September 11 FOIA memorandum to agencies, which has been described as encouraging agencies "to be more aggressive in denying FOIA requests and not be concerned about going to court").
129. See, e.g., Derigan A. Silver, *National Security and the Press: The Government's Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & POL'Y 447, 449–50 (2008) (documenting and criticizing increased classification after September 11).
130. Created in November 2002 to protect against and respond to terrorist attacks and natural disasters, the U.S. Department of Homeland Security was given statutory power over "critical infrastructure information," 6 U.S.C. § 133(e)(1) (2006), and "the protection and maintenance of the confidentiality of such information." *Id.* § 133(e)(2)(D). A new statutory exemption from FOIA for infrastructure information was also enacted. See Silver, *supra* note 129, at 449–50 (criticizing the creation of "additional exemptions to the federal Freedom of Information Act (FOIA) for critical infrastructure information").
131. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).
132. See, e.g., Kreimer, *supra* note 18, at 1168–69 (criticizing the potential for new government surveillance powers under the Patriot Act to violate individual rights and the Bush administration's "gambit of passive resistance" in response to Patriot Act FOIA requests).
133. See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html> (reporting the existence of "black sites" where the United States detains terror suspects, which "depend[] on . . . keeping even basic information about the system secret from the public"); see also Mark Mazzetti, *CIA Was Urged to Keep Interrogation Videotapes*, N.Y. TIMES, Dec. 8, 2007, <http://www.nytimes.com/2007/12/08/washington/08intel.html> (reporting the destruction of hundreds of hours of video recording of the interrogations of Al Qaeda operatives).
134. Editorial, *Why Not Disclose?*, WASH. POST, Oct. 31, 2001, at A26 ("The Department of Justice continues to resist legitimate requests for information regarding the 1,017 people it acknowledges having detained in its investigation of the Sept. 11 attacks on the World Trade Center and Pentagon. Civil liberties and other groups have been reduced to filing a request for the data under the Freedom of Information Act."); see also Kreimer, *supra* note 18, at 1166 (criticizing government redaction of the names of Guantanamo detainees being held as enemy combatants and charging that refusal to release

balked at access restrictions under which ordinary presumptions of openness in hearings and trials have been overcome by government assertions of “war on terror” concerns.<sup>135</sup>

Thus, critics charge that, in the context of terror, war exceptionalism has been stretched beyond its proper application to a true war against an opposing nation state to create an unjustified culture of secrecy that is inconsistent with democratic norms and good government.<sup>136</sup> A central concern about war-on-terror secrecy is that the secrecy has shrouded from public view violations of both constitutional rights and international human rights.<sup>137</sup> This concern has been compounded by accusations that terrorists would not actually be able to exploit much of the information that has been withheld and by related accusations that the asserted thinking-enemy justification is a mere pretext for more nefarious motivations, such as avoiding embarrassment to the government and limiting public scrutiny of, and government accountability for, key policy decisions.<sup>138</sup>

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the names “hinder[ed] efforts to evaluate the fairness of the proceedings and the plausibility of the charges”).

135. See, e.g., Paul Haridakis, *Citizen Access and Government Secrecy*, 25 ST. LOUIS U. PUB. L. REV. 3, 19–21 (2006) (criticizing closure of presumptively open deportation hearings and access restrictions on trials).
136. See, e.g., STONE, *supra* note 75, at 556 (“An even more troubling free speech issue arising out of the ‘war’ on terrorism concerns the Bush administration’s obsession with secrecy.”); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 373 (2010) (noting the Bush administration maintained that the threat of terrorism required “operating in secret and sometimes ‘work[ing] . . . the dark side’ to fight the forces of evil” (alterations in original) (quoting Dan Froomkin, *Cheney’s ‘Dark Side’ Is Showing*, WASH. POST WHITE HOUSE WATCH (Nov. 7, 2005, 1:21 PM), <http://www.washingtonpost.com/wp-dyn/content/blog/2005/11/07/BL2005110700793.html>)); Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM, *supra* note 83, at 47, 50–51 (arguing that the war on terror “provides more potential justifications for secrecy” because the war has no obvious end, and the enemy is not well defined and may strike anywhere “in myriad ways”); Podesta, *supra* note 83, at 225–26 (arguing that “legitimate desire for operational security” has become “an excuse for sweeping policies that deny public access to information and public understanding of policymaking” and weaken “our democratic institutions”).
137. Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1073 (2008) (criticizing horrendous mistreatment of prisoners in “secret U.S. detention facilities around the world”); Bob Herbert, *Who Are We?*, N.Y. TIMES, June 23, 2009, at A25 (criticizing both President Obama’s and President Bush’s efforts to conceal previous abuses).
138. See, e.g., Mark E. Brandon, *War and the American Constitutional Order*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY, *supra* note 3, at 20 (noting that secrecy “bleeds” and “expands beyond the realm necessary for sustaining successful military operations”); Kitrosser, *supra* note 2, at 1419 (arguing that “the presidency’s structural capacity for secrecy” can easily defeat accountability, particularly post-9/11); Podesta, *supra* note 83, at 231 (“[T]he government is concealing important actions with only the most convoluted connections to the war against terrorism.”); *id.* at 225–28 (arguing that the government does so to prevent democratic accountability).

Moreover, critics argue that restricting information flow to the public to prevent that information from reaching enemy hands involves serious tradeoffs because, in contrast to a traditional war—or at least all of the traditional wars that the United States has fought against foreign enemies, which have been fought almost entirely away from American soil—noncombatant citizens have an important role to play in both terrorism prevention and response.<sup>139</sup>

Yet, while this debate has raged on, critics that have condemned the extension of wartime transparency exceptionalism to terror have failed to recognize that this expansion has actually been far more sweeping. While this uproar over the invocation of wartime transparency exceptionalism in terror has been occurring, government decisionmakers have likewise engaged in an unacknowledged expansion of this exceptionalism to the realm of natural and technological disasters. This expansion is all the more incongruous and troubling because disasters are even more obviously dissimilar to war than is terror. War and terrorism at least share the core commonality of a thinking enemy. Conversely, and importantly, the heretofore unrecognized expansion of war exceptionalism to nonterror disasters, described in the next Part, lacks even this commonality.

### III. THE MELDING OF WAR AND DISASTER

The bleed of wartime secrecy justifications beyond the terrorism context and into the even less analogous disaster context has come about through several subtle but significant means. One is legislative, as classic wartime exceptionalism in the realm of transparency has been extended in state sunshine laws not just to terrorism, but to nonthinking-enemy disasters, as well. Beyond this, the rhetoric of war has also been making steady inroads into both official and public discourse about natural and technological disasters.<sup>140</sup> This Part reveals how the tempta-

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139. See, e.g., STEPHEN FLYNN, *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* 17 (2007) (arguing that the “deeply embedded culture within the national defense and federal law enforcement communities that embraces secrecy and prevents public disclosure of information” is a “paternalistic[.]” mistake that undermines the role of “everyday citizens . . . as potential allies in advancing our security”). Depriving citizens of information hamstringing their ability to participate in terrorism prevention and response and may ultimately increase the country’s vulnerability. See *id.* Additionally, critics argue that restricting public information about critical infrastructure vulnerabilities because that information might be exploitable by terrorists can severely hamper a community’s ability to prepare for and respond to other types of hazards, such as dam failure. See, e.g., NAT’L RESEARCH COUNCIL, *supra* note 93, at 5, 40 (reporting, in the context of dam and levee safety, that existing limitations on information, motivated by terrorism fears, “restrict access to information critical to public risk awareness, mitigation, preparedness, response, recovery, and community capacity for adaptation”).

140. Indeed, Professor Bruce Ackerman, one of the most vocal opponents of the war on terror, has advocated countering the framing of terrorism as “war” by creating a “third way,” between terrorism as crime and terrorism as war, the “state of emergency,” modeled on the nation’s longstanding

tion to meld disaster and war has taken hold, first, in the open meetings and records laws of many states and, second, in the public narrative of disaster.

### A. State Sunshine Law Exemptions

The events of September 11 spurred a wave of legislative activity creating new exceptions to state open meetings and records laws. This expansion of longstanding wartime exceptionalism to cover the country's new enemies—terrorists—also swept within its ambit other types of disasters, as many of these new state sunshine law exceptions apply by their terms to both terrorism and other categories of disasters.

Even before September 11, a fair number of states had passed exceptions to their state open meetings laws,<sup>141</sup> exempting from state open-meeting requirements matters generally related to emergencies or public safety threats, whether

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experience with emergency declarations for natural disasters such as hurricanes and epidemics. Ackerman, *supra* note 1, at 1873, 1904. This solution is far less persuasive, however, if the disaster-model for Ackerman's third way has itself been infused with the rhetoric of war.

141. *See, e.g.*, Act of July 18, 1988, ch. 419, § 1, 66 Del. Laws 869, 869 (1988) (codified at DEL. CODE ANN. tit. 29, § 10004(g)(3) (2003)); Act of June 2, 1975, H.B. No. 126, § 1, 1975 Haw. Sess. Laws 364, 364–66 (codified at HAW. REV. STAT. ANN. §§ 92–4, 92–5(a)(6), 92–8 (LexisNexis 2012)); Act of June 2, 2000, Pub. Act No. 91-0730, § 5, 2000 Ill. Laws 1074, 1075 (codified at 5 ILL. COMP. STAT. ANN. 120/2(c)(8) (West 2005 & Supp. 2012)); Act of Aug. 5, 1976, Act No. 665, § 1, 1976 La. Acts 1719, 1720–21 (codified at LA. REV. STAT. ANN. §§ 42:16, 42:17(A)(5) (Supp. 2012)); Act of Nov. 19, 1981, Act No. 21, § 1, 1982 La. Acts 2151, 2152 (codified at LA. REV. STAT. ANN. § 42:18(A)(6) (Supp. 2012)); Act of May 24, 1991, ch. 655, § 1, 1991 Md. Laws 3506, 3517–18 (codified at MD. CODE ANN., STATE GOV'T § 10-508(a)(10) (LexisNexis 2009)); Act of Mar. 31, 1981, ch. 456, § 1, 1981 Miss. Laws 1052, 1052–53 (codified at MISS. CODE ANN. § 25-41-7(4)(f) (2012)); Act of Apr. 21, 1975, ch. 491, § 3, 1975 Mont. Laws 1300, 1301–2 (codified at MONT. CODE ANN. § 2-3-112 (2011)); Act of May 27, 1975, L.B. 325, 1975 Neb. Laws 670, 671 (codified at NEB. REV. STAT. § 84-1410(1)(b) (2008)); Act of Oct. 21, 1975, ch. 231, 1975 N.J. Laws 957, 960–61 (codified at N.J. STAT. ANN. § 10:4-12(b)(6) (West 2002 & Supp. 2012)); Act Effective Jan. 1, 1977, ch. 330, § 2, 1976 R.I. Pub. Laws 1509, 1511 (codified at R.I. GEN LAWS § 42-46-5(a)(3) (2007)); Act of July 18, 1978, No. 593, § 8, 1978 S.C. Acts 1736, 1740 (codified at S.C. CODE ANN. § 30-4-70(a)(3) (2007)); Act of May 22, 1993, ch. 268, § 1, 1993 Tex. Gen. Laws 583, 590 (codified at TEX. GOV'T CODE ANN. § 551.076(1) (West 2012)); Act of Mar. 2, 1977, ch. 180, § 5, 1977 Utah Laws 732, 734 (codified at UTAH CODE ANN. § 52-4-205(1)(f) (LexisNexis 2010 & Supp. 2012)); Act of Apr. 23, 1973, No. 78, § 2, 1973 Vt. Acts & Resolves 218, 220 (codified at VT. STAT. ANN. tit. 1, § 313(a)(5) (2010 & Supp. 2012)). A few pre-September 11 open meeting law exceptions use broad national security language. *See, e.g.*, Open Public Meetings Act of 1971, ch. 250, § 11, 1971 Wash. Sess. Laws 1113, 1116 (codified at WASH. REV. CODE ANN. § 42.30.110(1)(a) (West Supp. 2012)) (allowing “executive sessions during a regular or special meeting to consider matters affecting national security”). While these exemptions would probably not have been construed to cover either natural hazards such as pandemics or hurricanes or technological disasters a decade ago, the post-September 11 reconceptualization of natural hazards and technological disasters as national security threats suggests that those exemptions might be construed, today, to cover those types of emergencies.

the threats arose from terrorism, accidents, or causes that are more natural.<sup>142</sup> Prior to September 11, a handful of states had also passed exceptions to their open records laws for records, the disclosure of which could endanger public safety, regardless of the nature of the associated threat.<sup>143</sup>

The attacks of September 11 unleashed a flurry of state legislative activity enacting new exemptions to state sunshine laws for information related to emergencies and public safety threats. Much of the impetus for limiting public access to information relating to emergencies, and to public safety more generally, was clearly post-September 11 fear that terrorists would exploit the public availability of such information to hone in on identified weaknesses in public security and public infrastructure or otherwise identify potential targets. However, while these laws were presumably aimed primarily at the terrorism thinking-enemy dynamic, the exceptions as written and adopted actually expand wartime transparency exceptionalism not only to terrorism but also to a wide variety of nonthinking-enemy disasters, as the language of many of the exceptions is broad enough to cover both types of contingencies.

Nearly twenty states, for example, passed new open meetings exceptions with language that appears to allow invocation of the exception in both terrorism and nonthinking-enemy disaster situations.<sup>144</sup> Many of these new open-meeting

142. Some of these exceptions are quite broad in terms of the substantive content that can be considered during the closed meeting, but limit invocation of the exception to times of emergency. For example, Louisiana's open meeting law permits a public body to hold a closed executive meeting in "[c]ases of extraordinary emergency, which shall be limited to natural disaster, threat of epidemic, civil disturbances, suppression of insurrections, the repelling of invasions, or other matters of similar magnitude." LA. REV. STAT. ANN. §§ 42:16, 42:17(A)(5). Other state exceptions, in contrast, exempt only certain narrow matters from open meeting requirements, but allow closed sessions outside of an immediate emergency. The South Carolina law, for example, allows closed meetings for "[d]iscussion regarding the development of security personnel or devices." S.C. CODE ANN. § 30-4-70(a)(3) (2007).

143. *See, e.g.*, Open Records Act, ch. 187, § 7, 1984 Kansas Sess. Laws 969, 974-75 (codified at KAN. STAT. ANN. § 45-221(a)(12) (2002)); Act of Aug. 11, 1977, ch. 933, § 1, 1977 N.Y. Laws, ch. 933, 1, 1-2 (codified at N.Y. PUB. OFF. LAW § 87(2)(f) (McKinney 2008)); Act of May 5, 1979, ch. 202, § 1, 1979 R.I. Pub. Laws 782, 783-85 (codified at R.I. GEN. LAWS § 38-2-2(5)(i)(j) (2011)).

144. Many of these open meeting exceptions apply only when relatively specific threats are discussed or when government infrastructure and security protocol are analyzed. *See, e.g.*, Act of Mar. 14, 2005, No. 2005-40, § 7, 2005 Ala. Acts 55, 61-62 (codified at ALA. CODE § 36-25A-7(a)(4) (LexisNexis Supp. 2011)); Act of Mar. 27, 2003, Act 763, §§ 2-3, 2003 Ark. Acts 2487, 2489-91 (codified at ARK. CODE ANN. §§ 25-19-105(b)(15), 25-19-106(c)(6)(A) (Supp. 2011)); Act Effective July 12, 2002, ch. 175, § 2, 2002 Cal. Stat. 816, 823-24 (codified at CAL. GOV'T CODE § 54956.5 (West 2010)); Act of Apr. 12, 2002, ch. 86, § 7, 2002 Colo. Sess. Laws 236, 238 (codified at COLO. REV. STAT. § 24-6-402(3)(a)(IV) (2012)); Act of July 3, 2002, ch. 354, § 1, 73 Del. Laws 997, 997-98 (codified at DEL. CODE ANN. tit. 29, § 10002(l)(17a)); DEL. CODE ANN. tit. 29, § 10004(b)(6); Act of Mar. 4, 2002, ch. 62, § 1, 2002 Idaho Sess. Laws 132, 132-33 (codified at IDAHO CODE ANN. § 9-340B(4)(b) (Supp. 2012)); IDAHO CODE ANN. § 67-2345(1)(d) (Supp. 2012); Act of May 20, 2004, ch. 177, § 2, 2004 Kan. Sess. Laws 1805, 1811-12 (codified at KAN. STAT. ANN. §

exceptions follow a common post-September 11 practice of allowing executive sessions, or closed meetings, whenever a nonpublic or confidential record will be discussed.<sup>145</sup> These statutes could be quite expansive in practice, because a similar number of states also passed exceptions to their state open records laws for records related to public safety threats, whether those threats are posed by terrorism or some other type of disaster.<sup>146</sup> Thus, many of these laws now allow closed meetings

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75-4319(b)(13) (Supp. 2011)); Act of May 29, 2004, ch. 290, § 18, 2004 Minn. Laws 1482 (codified at MINN. STAT. ANN. § 13D.05(3)(d) (West 2005)); Act of May 17, 2002, ch. 222, §§ 222:2-3, 2002 N.H. Laws 329, 330 (codified at N.H. REV. STAT. ANN. § 91-A:3(II)(i), (III) (Supp. 2012)); S.B. No. 395, ch. 175, § 1, 2003 Okla. Sess. Laws 687, 687-89 (codified at OKLA. STAT. ANN. tit. 25, § 307(B)(9) (West 2008)); H.B. 2425, ch. 524, § 4, 2003 Or. Laws 1758, 1765-66 (codified at OR. REV. STAT. § 192.660(2)(f), (m) (2011)); Act of Feb. 14, 2008, No. 2008-3, 2008 Pa. Laws 6, 18-25 (codified at 65 PA. STAT. ANN. § 67.708(b)(2) (West 2010)). Other states appear to authorize broader exceptions to open meetings, even when officials only discuss, more generally, public health and welfare or emergency response plans. *See, e.g.*, Act of June 6, 2002, ch. 36, § 1, 2002 Alaska Sess. Laws, ch. 36, 1-2 (codified at ALASKA STAT. § 40.25.120(a)(10) (2010)); ALASKA STAT. § 44.62.310(c)(4) (2010); Act of June 13, 2002, Pub. Act No. 02-133, § 1, 2002 Conn. Acts 868, 868-72 (Reg. Sess.) (codified at CONN. GEN. STAT. ANN. § 1-210(b)(19) (West 2007)); CONN. GEN. STAT. ANN. § 1-200(6)(E); Act of Dec. 10, 2001, ch. 2001-361, § 2, 2002 Fla. Laws 31, 32 (codified at FLA. STAT. ANN. § 286.0113(1) (West 2009)); FLA. STAT. ANN. § 119.071(3)(a) (West 2008); Act of July 1, 2009, ch. 28, § 18, 2009 Mass. Acts 557, 562 (codified at MASS. ANN. LAWS ch. 30A, § 21(a)(4) (LexisNexis Supp. 2012)); Act of Mar. 29, 2002, No. 130, 2002 Mich. Pub. Acts 389, 392 (codified at MICH. COMP. LAWS § 15.243(1)(y) (West 2004)); MICH. COMP. LAWS ANN. § 15.268(h); Act of Mar. 20, 2003, ch. 385, § 1, 2003 N.D. Laws 1343, 1343 (codified at N.D. CENT. CODE § 44-04-24(1), (2) (2007)); N.D. CENT. CODE § 44-04-19.2(1); Act of Mar. 20, 2002, Sub. S.B. No. 184, § 1, 2002 Ohio Laws 1742, 1746-47 (codified at OHIO REV. CODE ANN. § 121.22(G)(6) (West Supp. 2012)).

145. *See, e.g.*, N.D. CENT. CODE § 44-04-19.2(1) (2007) (authorizing a “governing body” to “hold an executive session to consider or discuss closed or confidential records”).

146. Act of Mar. 15, 2005 § 4, 2005 Ala. Acts at 60-61 (codified at ALA. CODE § 36-25A-4 (2001)); Act of June 6, 2002 § 1, 2002 Alaska Sess. Laws, ch. 36 at 1-2 (codified at ALASKA STAT. § 40.25.120(a)(10) (2010)); Act of Mar. 27, 2003 § 2, 2003 Ark. Acts at 2489-91 (codified at ARK. CODE ANN. § 25-19-105(b)(18) (West 2002)); Act of Apr. 12, 2002 § 9, 2002 Colo. Sess. Laws at 239 (codified at COLO. REV. STAT. § 24-72-204(2)(a)(VIII)(A) (2012)); Act of June 13, 2002 § 1, 2002 Conn. Acts at 869-72 (Reg. Sess.) (codified at CONN. GEN. STAT. § 1-210(b)(19)(i), (iv)-(viii) (2007)); Act of July 3, 2002 § 1, 2001 Del. Laws at 997-98 (codified at DEL. CODE ANN. tit. 29, § 10002(g)(17a) (West 2003)); Act of Dec. 10, 2001 § 2, 2002 Fla. Laws at 32 (codified at FLA. STAT. ANN. § 119.071(3)(a) (West 2008)); Act of Mar. 4, 2002 § 1, 2002 Idaho Sess. Laws at 132-33 (codified at IDAHO CODE ANN. § 9-340B(4)(b) (West 2010)); Act of Apr. 22, 2002, ch. 1117, § 53, 2002 Iowa Acts 234, 234-35 (codified at IOWA CODE ANN. § 22.7(45) (West 2010)); Act of Apr. 12, 2006, ch. 1054, § 2, 2006 Iowa Acts 144, 144-45 (codified at IOWA CODE ANN. § 22.7(50) (West 2010)); S.B. 240, ch. 3, § 1, 2002 Md. Laws 23, 24-25 (codified at MD. CODE ANN., STATE GOV'T § 10-618(j) (LexisNexis 2009)); Act of Sept. 5, 2002, ch. 313, § 1, 2002 Mass. Acts 1055, 1055 (codified at MASS. GEN. LAWS ch. 4, § 7(26)(n) (LexisNexis 2011)); Act of May 1, 2002, No. 130, 2002 Mich. Pub. Acts 389, 392 (codified at MICH. COMP. LAWS ANN. § 15.243(1)(y) (West 2004)); Act of May 17, 2002 § 222:4, 2002 N.H. Laws at 330 (codified at N.H. REV. STAT. ANN. § 91-A:5(VI) (West 2001)); S.B. 990, No. 2001-500, § 3.1, 2001 N.C. Sess. Laws 3020, 3020-21 (codified at N.C. GEN. STAT. § 132-1.6 (2011)); Act of Mar. 20, 2003 § 1, 2003 N.D. Laws at 1343-44 (codified at N.D. CENT. CODE § 44-04-24(1), (2) (2007)); H.B. 2425 § 1, 2003 Or. Laws at 1758-60 (codified at OR. REV. STAT. § 192.501(18), (23)); Act of June 4,

in virtually any imaginable disaster scenario because many security plans and emergency response measures have been deemed nonpublic records. The public or press also cannot later access those same records.<sup>147</sup>

The conflation of war, terrorism, and other disasters for purposes of public information policy—a phenomenon accelerated and solidified by September 11—obscures the important distinctions between thinking- and nonthinking-enemy situations. Moreover, equating terrorism and nonthinking-enemy disasters in state sunshine laws provides both political and legal cover for state decisionmakers who are inclined to conceal disaster information from the public.<sup>148</sup>

### B. Disaster as War: War Rhetoric and the Public Narrative of Disaster

The temptation to meld disaster and war has manifested itself, not only in the expansion of wartime exceptionalism in state sunshine laws to nonthinking-enemy

2002, No. 339, § 17, 2002 S.C. Acts 3673 (codified at S.C. CODE ANN. § 30-4-20(c) (2011)); Act Effective Mar. 19, 2009, ch. 10, § 1, 2009 S.D. Sess. Laws 69, 71, 76 (codified at S.D. CODIFIED LAWS § 1-27-1.5(8),(9),(17),(23) (2004)); H.B. No. 9, ch. 1312, § 3, 2003 Tex. Gen. Laws 4809, 4813-15 (codified at TEX. GOV'T CODE ANN. §§ 418.176-418.183 (West 2012)); Act of Jan. 31, 2008, ch. 3, § 199, 2008 Utah Laws 229, 232 (codified at UTAH CODE ANN. § 63G-2-305(48) (LexisNexis 2011)); H. 457, Pub. Act No. 63, sec. 29, § 317(c), 2003 Vt. Acts & Resolves 280 (codified at VT. STAT. ANN. tit. 1, § 317(c)(32) (LexisNexis 2010)); Act of Apr. 12, 2004, ch. 690, 2004 Va. Act 997, 998 (codified at VA. CODE ANN. § 2.2-3705.2(2)-(4) (2011)); H.B. 3009, ch. 108, § 1, 2003 W. Va. Acts 983, 985-86 (codified at W. VA. CODE § 29B-1-4(a)(9)-(16) (LexisNexis 2012)).

147. Some states did pass terrorism-specific open-meeting exceptions. *See, e.g.*, Act of Mar. 20, 2006, Pub. L. No. 101-2006, § 3, 2006 Ind. Acts 1844, 1846-47 (codified at IND. CODE ANN. § 5-14-1.5-6.1(b)(13) (LexisNexis 2006)); Act of June 7, 2004, § A, 2004 Mo. Legis. Serv. 869 (West) (codified at MO. ANN. STAT. § 610.021(18) (West 2006)). In addition, some states passed terrorism-specific open-records exceptions. *See, e.g.*, S.B. 1167, ch. 118, § 1, 2003 Ariz. Sess. Laws 455 (codified at ARIZ. REV. STAT. ANN. § 39-126 (2011)); Act of Apr. 8, 2003, ch. 288, § 1, 2003 N.M. Laws 2649, 2649-50 (codified at N.M. STAT. ANN. § 14-2-1(A)(7) (LexisNexis 2003)).
148. Of course, many of the executives—such as governors and mayors—who are charged with making decisions during disasters are not constrained by open-meetings laws in the first instance because individual decisionmakers (as opposed to public decisionmaking bodies such as agencies) are typically not covered by sunshine laws. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 10-502(h)(3)(i) (LexisNexis 2009) (excluding from the definition of “public body” “any single member entity”); *id.* § 10-505 (requiring that “a public body shall meet in open session”). Nonetheless, the state’s open meetings laws provide an important background legal framework that is likely to influence official views about the propriety and desirability of public disclosure of potentially worrisome disaster data. Another potential limitation on the reach of these new sunshine law exceptions is that many state open-meeting laws prohibit state agencies from taking final action during the closed executive sessions authorized by the statute. *See, e.g.*, IOWA CODE ANN. § 21.5(3) (West 2010) (requiring that “[f]inal action by any governmental body on any matter shall be taken in an open session”). However, some states do not include such a prohibition, *see, e.g.*, N.J. STAT. ANN. § 10:4-15(a) (West 2002) (allowing actions taken in closed meetings to be valid unless challenged in court within forty-five days after the action has been made public), and—in any event—agencies are generally free to do all of their deliberations during the closed sessions and then to simply announce their binding decision, without further discussion, in a subsequent open meeting.

disasters, but also in the framing of the public narrative of those disasters. Indeed, war rhetoric today plays an increasingly prominent role in the narrative of both natural and technological disaster response.<sup>149</sup>

The connection between natural disaster and war is not new. Federal disaster management in the United States had its roots in civil defense,<sup>150</sup> and early federal disaster programs were the purview of defense-related organizations such as the Office of Civil Defense of the Department of Defense.<sup>151</sup> Moreover, the earliest disaster sociological research was funded by the federal government during the Cold War—when the threat of nuclear attack weighed heavily on the American psyche—in the hope that understanding public response to natural disasters could yield important insights for understanding potential civilian response to nuclear attack.<sup>152</sup> Over time, however, this initial impetus seems to have been turned on its head: Rather than looking to natural disasters to understand and frame how citizens might react to a war emergency, such as nuclear attack, both the press and policymakers have begun drawing on war rhetoric to understand and frame natural disasters.<sup>153</sup>

When Hurricane Katrina struck on August 29, 2005, just four short years after the September 11 attacks and two and a half years after the Federal Emergency Management Agency (FEMA) was engulfed in the sprawling national se-

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149. A few scholars, most of them outside of the law, have noted the expansion of war rhetoric into a particular disaster realm. *See, e.g.,* ANNAS, *supra* note 92, at 219 (public health emergencies); Leslie E. Gerwin, *Planning for Pandemic: A New Model for Governing Public Health Emergencies*, 37 AM. J.L. & MED. 128, 138 (2011) (public health emergencies); Timothy Ingalsbee, *The War on Wildfire: Firefighting and the Militarization of Forest Fire Management*, in THE WILDFIRE READER: A CENTURY OF FAILED FOREST POLICY 262, 262 (George Wuertner ed., 2006) (wildfire); Kathleen Tierney & Christine Bevc, *Disaster as War: Militarism and the Social Construction of Disaster in New Orleans*, in THE SOCIOLOGY OF KATRINA: PERSPECTIVES ON A MODERN CATASTROPHE 35, 35–36 (David L. Brunnsma et al. eds., 2007) (describing framing of Hurricane Katrina as war). This Article, however, is the first to make a comprehensive assessment of the role of war rhetoric in the public narrative of a wide array of natural and technological disasters, as well as its implications for disaster information flow.

150. Tierney & Bevc, *supra* note 149, at 35–36 (“Present-day institutions and policies related to disaster management were originally rooted in Cold War civil protection challenges, especially those associated with the threat of a nuclear attack.”). In some respects, disaster management as a field did not make a complete break from civil defense until the 1990s. *See id.* at 36.

151. *See id.*

152. *See* Kathleen Tierney et al., *Metaphors Matter: Disaster Myths, Media Frames, and Their Consequences in Hurricane Katrina*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 57–58 (2006); Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1137 (2011).

153. For detailed discussions of the use of war rhetoric after Hurricane Katrina, see Tierney & Bevc, *supra* note 149, and Tierney et al., *supra* note 152. The evidence of Katrina “war zone” rhetoric presented in this Part also draws on evidence compiled by one of the Article’s coauthors in an earlier article addressing the effects of the disaster myth of looting and violence on U.S. disaster law and policy. *See* Sun, *supra* note 152, at 1133, 1141.

curity bureaucracy of the new Department of Homeland Security,<sup>154</sup> war rhetoric quickly emerged as a powerful driver of both public perception of the disaster and official decisionmaking.<sup>155</sup> Indeed, war was one of the most consistently employed narratives of post-Katrina New Orleans.<sup>156</sup>

The war described by officials and the media was not a war against nature, as one might expect, but a war waged by Katrina's victims against their would-be rescuers and fellow survivors.<sup>157</sup> This war rhetoric was built on official and media reports of widespread chaos, anarchy, and violent crime directed at both rescuers and other survivors in post-Katrina New Orleans, reports that turned out to be either greatly exaggerated or, in some cases, completely false.<sup>158</sup> Early in the coverage of Katrina, reports began "characteriz[ing] the events in New Orleans as the equivalent of war—and, more specifically, the urban insurgency the U.S. military [] face[d] in Iraq [at the time]."<sup>159</sup> The lead news story in the *Los Angeles Times* reported National Guard troops taking "positions on rooftops, scanning for snipers and armed mobs as seething crowds of refugees milled below, desperate to flee" while "[g]unfire crackled in the distance."<sup>160</sup> In a similar vein, the title of one prominent article in the *Washington Post* proclaimed: "Troops Back From Iraq Find Another War Zone; In New Orleans, It's Like Baghdad on a Bad Day."<sup>161</sup> The article went on to report that "just the smell and feel of a war zone in the city put the soldiers on edge."<sup>162</sup> Describing the National Guard's deployment in New Orleans, CNN's Wolf Blitzer reported that "eight convoys and troops are on the ground at last in a place being described as a lawless, deadly war zone."<sup>163</sup> ABC News Online reported shootings outside the Superdome and declared New Orleans a "war zone."<sup>164</sup>

154. The Federal Emergency Management Agency (FEMA) became part of DHS on March 1, 2003.

155. See Tierney & Bevc, *supra* note 149, at 41.

156. *Id.*; see also Tierney et al., *supra* note 152, at 57–58.

157. See *id.*; Sun, *supra* note 152, at 1133. General Russell Honoré, commander of the federal military response in Katrina, also pronounced the hurricane itself "an enemy that pulled a 'classic military maneuver,' speeding toward land with overwhelming force" and destroying infrastructure. Tierney & Bevc, *supra* note 149, at 44 (citation omitted). "Thus, nature itself was recast as an 'intelligent enemy' like al-Qaeda bent on exploiting weaknesses in the nation's defenses." *Id.*

158. See generally Tierney & Bevc, *supra* note 149; Sun, *supra* note 152.

159. Tierney & Bevc, *supra* note 149, at 41.

160. Ellen Barry et al., *New Orleans Slides Into Chaos; U.S. Scrambles to Send Troops*, L.A. TIMES, Sept. 2, 2005, at A1.

161. Ann Scott Tyson, *Troops Back From Iraq Find Another War Zone; In New Orleans, It's Like Baghdad on a Bad Day*, WASH. POST, Sept. 6, 2005, at A10.

162. *Id.*

163. Jaime Omar Yassin, *Demonizing the Victims of Katrina*, EXTRA, Nov.–Dec. 2005, <http://www.fair.org/index.php?page=2793> (remarks of Wolf Blitzer).

164. *Troops Told 'Shoot to Kill' in New Orleans*, ABC NEWS ONLINE (Sept. 2, 2005, 4:25 PM), <http://www.abc.net.au/news/2005-09-02/troops-told-shoot-to-kill-in-new-orleans/2094678> [hereinafter *Shoot to Kill*].

War rhetoric not only infused media reporting about Katrina but also shaped public officials' characterization of the disaster and the appropriate—that is, military—response. Shortly after Katrina made landfall, FEMA Director Michael Brown advised President George W. Bush to invoke the Insurrection Act, which would allow the president to federalize the National Guard and invest law enforcement authority in both federalized national guard troops and active-duty federal military, because reports of “shootings and looting” suggested that the security situation in New Orleans was “spiraling out of control” and Brown wanted “active-duty troops that are ready, willing and able to kill in that area.”<sup>165</sup> Louisiana Governor Kathleen Blanco likewise lauded the combat training of the National Guard troops deployed to post-Katrina New Orleans, noting that their skills would be put to good use in the “battle” for New Orleans' chaotic streets:

These troops are fresh back from Iraq, well trained, experienced, battle-tested and under my orders to restore order in the streets. They have M-16s and they are locked and loaded. These troops know how to shoot and kill and they are more than willing to do so if necessary and I expect they will.<sup>166</sup>

Katrina war rhetoric continued to influence policy debates about appropriate emergency powers for natural disasters long after the floodwaters had subsided and many newspapers had retracted their early Katrina reporting, admitting that reports of violence by Katrina survivors and shooting at would-be rescuers were greatly exaggerated.<sup>167</sup> Two weeks after the hurricane, President Bush argued that Katrina vividly illustrated the need for “a broader role for the armed forces” in responding to natural catastrophes on the scale of Katrina.<sup>168</sup> Likewise, the chairman of the Senate Armed Services Committee, Senator John Warner, urged Defense Secretary Donald Rumsfeld to “conduct a thorough review of the entire legal framework governing a President's power to use the regular armed forces to restore public order in . . . situations involving a large-scale, protracted emergency like [Katrina].”<sup>169</sup>

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165. S. REP. NO. 109-322, at 515 (2006) (quoting Interview with Michael Brown, Former Director, FEMA (Feb. 23, 2006)).

166. *Shoot to Kill*, *supra* note 164.

167. See sources cited *supra* note 158.

168. President George W. Bush, Address to the Nation on Hurricane Katrina Recovery From New Orleans, Louisiana (Sept. 15, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/09/20050915-8.html>.

169. Letter From Senator John Warner to Donald Rumsfeld, U.S. Sec'y of Def. (Sept. 14, 2005) (on file with author).

This rhetoric culminated in October 2006 in a successful call to amend the Insurrection Act to clarify (or arguably expand) the president's ability to use the military to quell public disorder after natural disasters.<sup>170</sup> The amendments conferred power on the president to invest federal military with law enforcement powers to respond to "domestic violence" that results from a "natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident."<sup>171</sup>

Katrina is not the only natural disaster realm in which the rhetoric of war and national security has made significant inroads in shaping the public narrative of disaster. War rhetoric has also been gaining momentum in the planning for public health emergencies such as pandemics. As with disasters more generally, the rhetorical connection between public health and war is not entirely new. Scholars and commentators have, for some time, both noted and criticized the use of war rhetoric (such as Nixon's "War on Cancer") in medicine, in general,<sup>172</sup> and public health, in particular.<sup>173</sup>

The events of September 11 and the anthrax attacks later that same year accelerated the evolution of a "new paradigm" identifying infectious disease outbreaks not merely as public health challenges, but as critical national security threats.<sup>174</sup> While this paradigm shift has been driven largely by the federal government's heavy emphasis on preparing the country for bioterrorism,<sup>175</sup> naturally occurring disease outbreaks are increasingly viewed through this same national security lens. The current White House website page for Homeland Security, for example, proclaims the expansion of national security threats to include "high-consequence, nontraditional threats," including naturally occurring pandemic disease: "Attacks using improvised nuclear devices or biological weapons, as

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170. See Sun, *supra* note 152, at 1163. The Insurrection Act amendments were promptly repealed because of opposition from state governors to expanded federal control of state National Guard units. See *id.*

171. *Id.* at 1165.

172. See, e.g., Ann Mongoven, *The War on Disease and the War on Terror: A Dangerous Metaphorical Nexus?*, 15 CAMBRIDGE Q. HEALTHCARE ETHICS 403, 409 (2006).

173. See *id.* at 404, 407 (summarizing dangers of framing medicine "as a war against disease"—particularly as the kind of "total, holy war against a demonic enemy"—including the "implicit[] defin[ition] of patients as enemies and their bodies as battlefields").

174. GARY CECCHINE & MELINDA MOORE, NAT'L DEF. RESEARCH INST., INFECTIOUS DISEASE AND NATIONAL SECURITY: STRATEGIC INFORMATION NEEDS 30 (2006) (explaining that "a new paradigm linking infectious disease to national security was already evolving during the 1990s, and it became more of a priority after the terror events of September and October 2001" and concluding that "[r]ecent U.S. policy initiatives clearly recognize the relationship between infectious disease—both deliberate and naturally occurring threats—and national security, and seek to operationalize responses to these new threats").

175. ANNAS, *supra* note 92, at 211.

well as outbreaks of a pandemic disease, pose a serious and increasing national security risk.”<sup>176</sup>

The rhetoric of militarism and war has, not surprisingly, been part and parcel of both official and media descriptions of this new national security threat.<sup>177</sup> The post–September 11 national security model of pandemic response imagines the need for aggressive, highly coercive measures such as mandatory quarantine and vaccination enforced against citizens not only by local police, who are likely to be quickly overwhelmed by the task, but by the military.<sup>178</sup> Thus, in October 2005, President Bush called on Congress to give the executive authority to use the U.S. military to enforce quarantines in American communities experiencing bird flu outbreaks.<sup>179</sup> Despite the relatively limited effects of both avian and swine flu in the United States,<sup>180</sup> the press reported both a “war on bird flu”<sup>181</sup> and a subsequent “war on swine flu.”<sup>182</sup> The 2007 bird flu simulation exercises sponsored by

176. *Homeland Security*, WHITE HOUSE, <http://www.whitehouse.gov/issues/homeland-security> (last visited Mar. 11, 2013).

177. One could imagine, of course, a national security framework in which at least some threats could be analyzed outside of the context of war and military mobilization, but as the war on terror demonstrates, national security and war are currently deeply entwined. Alternatively, security could also be reconceptualized as a broader concept, which extends beyond third-party threats to physical safety. See, e.g., Mariano-Florentino Cuéllar, “Securing” the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953, 76 U. CHI. L. REV. 587, 596 (2009) (describing the “flexible” notion of security promoted by the Roosevelt administration and embodied in the expansive mandate of the Federal Security Agency, which “blur[red] the distinctions between social services, economic security, health regulation, and geostrategic national security”); cf. WORLD HEALTH ORG., A SAFER FUTURE: GLOBAL PUBLIC HEALTH SECURITY IN THE 21ST CENTURY (2007) (suggesting adoption of a “public health security” framework, which appears to be a self-conscious attempt to reshape the idea of security by focusing on human thriving).

178. ANNAS, *supra* note 92, at 219 (“It is a destructive and counterproductive post-9/11 myth that countering a pandemic requires public health officials to revert to pre-World War I tactics of forced quarantine and mandatory physical examinations and vaccinations. Just as many national leaders argued that the public must barter its civil liberties for safety from terrorist attacks, so public health officials have argued that health is best protected by adopting the national security metaphor. 2001 is the excuse, but 1918 is the model.”).

179. *Bush Pushes for Military to Quarantine Avian Flu Breakout*, FOXNEWS.COM (Oct. 5, 2005), <http://www.foxnews.com/story/0,2933,171230,00.html>.

180. See, e.g., *H5N1 Avian Flu (H5N1 Bird Flu)*, FLU.GOV, [http://www.flu.gov/about\\_the\\_flu/h5n1/index.html](http://www.flu.gov/about_the_flu/h5n1/index.html) (last visited Mar. 11, 2013) (noting that “there have be no reported [H5N1 infections] in birds, poultry, or people in the United States”); Richard Knox, *Flu Pandemic Much Milder Than Expected*, NPR.ORG (Dec. 8, 2009, 12:58 AM), <http://www.npr.org/templates/story/story.php?storyId=121184706> (quantifying ways in which the swine flu pandemic in the United States was “much milder” than expected).

181. See, e.g., Donald G. McNeil, Jr., *In War on Bird Flu, U.N. Looks to Recruit Killer Army*, N.Y. TIMES, Jan. 29, 2006, at A4.

182. See, e.g., Elizabeth Landau, *At CDC, War Against Flu Doesn’t Stop*, CNN (May 2, 2009), [http://articles.cnn.com/2009-05-02/health/swine.flu.inside.cdc\\_1\\_vaccine-for-swine-flu-cdc-s-influenza-division-h1n1](http://articles.cnn.com/2009-05-02/health/swine.flu.inside.cdc_1_vaccine-for-swine-flu-cdc-s-influenza-division-h1n1) (discussing “war” against swine flu).

the Center for Disease Control were designed by a “retired general who spent 34 years running war games for the Pentagon”<sup>183</sup> and hailed by the press as “war games.”<sup>184</sup>

Wildfires are another type of natural disaster for which war rhetoric is commonly employed. Firefighters “battle” individual fires<sup>185</sup> and wage “war on wildfire,”<sup>186</sup> more generally. As one critic has noted, “the discourse of [wildland] fire management is thoroughly tainted with war metaphors[] [f]rom terms such as ‘initial *attack*’ to the foundational concept of ‘*firefighting*.’”<sup>187</sup> During the 2012 summer wildfire season that ravaged many western states, Tom Harbour, Director of Fire and Aviation Management at the U.S. Forest Service, explained that, at least “in a sense,” “fire is war.”<sup>188</sup> News reports of the summer fires described local incident commanders “[h]oled up in makeshift war rooms . . . spend[ing] nearly every waking hour . . . trying to plot their next move.”<sup>189</sup>

Moreover, war rhetoric has also spread beyond natural disasters to technological disasters and accidents. Indeed, war rhetoric permeated the official response to the BP oil spill. President Obama declared the spill “an assault on our shores,” and pledged to “fight back with everything that we’ve got.”<sup>190</sup> The President also repeatedly invoked battle imagery to describe the spill response,<sup>191</sup> and

183. Donald G. McNeil, Jr., *In a Daylong Drill, an Agency Tries to Prepare for a Real Outbreak of Avian Flu*, N.Y. TIMES, Feb. 1, 2007, at A14. War rhetoric was also a common feature of UK news reporting of the avian flu threat. See Nelya Koteyko et al., *The Dead Parrot and the Dying Swan: The Role of Metaphor Scenarios in UK Press Coverage of Avian Flu in the UK in 2005–2006*, 23 METAPHOR & SYMBOL 242, 247 (2008) (describing how, as the threat of avian flu became more serious in Europe, experts and the U.K. media used “war” metaphors to characterize the disease’s advance).

184. See, e.g., David Brown, *In Drill, CDC Practices for Influenza Pandemic*, WASH. POST, Feb. 4, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/03/AR2007020301120.html>.

185. See, e.g., Ingalsbee, *supra* note 149, at 267.

186. See, e.g., *id.* at 262.

187. *Id.* at 281 (arguing for the creation of a “new narrative” of fire management, free of war metaphors); see also *id.* at 262 (“The federal government conducts wildland fire suppression through a militaristic paradigm—as fire ‘fighting’ in a ‘war on wildfire.’”).

188. John Miller & Susan Montoya Bryan, *‘War Room’ Type Effort Places Firefighting Assets*, YAHOO! NEWS (June 29, 2012), <http://news.yahoo.com/war-room-type-effort-places-firefighting-assets-081359002.html>.

189. *Id.*

190. President Barack Obama, Remarks at Naval Air Station Pensacola in Pensacola, Fla. (June 15, 2010).

191. See, e.g., President Barack Obama, Remarks Honoring the 2010 Super Bowl Champion New Orleans Saints (Aug. 9, 2010) (“But what is clear is that the battle to stop the oil from flowing into the Gulf is just about over.”); Obama, *supra* note 190 (“[W]e’re now battling the worst economic-environmental disaster in American history.”); President Barack Obama, Remarks at Carnegie Mellon University in Pittsburgh, Pa. (June 2, 2010) (“[W]e’re waging this battle [against the oil spill] every minute of every day.”).

described his proposed response as “our battle plan . . . going forward.”<sup>192</sup> U.S. Coast Guard Admiral Thad Allen, the National Incident Commander for the federal BP spill response, described the growing spill as “a war, . . . an insidious war, because it’s attacking . . . four states one at a time, and it comes from different directions depending on the weather.”<sup>193</sup> State and local officials also declared war on the spill. Louisiana Governor Bobby Jindal announced, “We are absolutely in a war to protect our way of life.”<sup>194</sup> Likewise, Plaquemines Parish President Billy Nungesser described the spill response as a “war.”<sup>195</sup>

The official response to the spill was also punctuated by the invocation of violent, affect-rich<sup>196</sup> language, such as President Obama’s announcement that he was determining “whose ass to kick”<sup>197</sup> and Interior Secretary Ken Salazar’s assertion that the Obama administration’s “job” was “to keep the boot on the neck of British Petroleum.”<sup>198</sup> Secretary Salazar also twice “used the imagery of a Wild West bar fight to describe how the administration was dealing with” BP.<sup>199</sup>

#### IV. WAR, DISASTERS, AND SECRECY

The legal and rhetorical melding of war and disaster described in Part III presents real, concrete risks to government openness and press access during disasters, and thus to effective and appropriate disaster planning and response. The rhetoric of war frames public discourse about appropriate disaster management and justifies measures like information withholding that would otherwise clearly appear troubling.<sup>200</sup> The statutory extension of wartime transparency exceptionalism to cover

192. President Barack Obama, Address to the Nation on the Oil Spill in the Gulf of Mexico (June 15, 2010).

193. Jack Date, *National Incident Commander on BP Oil Spill: “It’s an Insidious War,”* ABC NEWS (June 6, 2010), <http://abcnews.go.com/ThisWeek/national-incident-commander-bp-oil-spill-insidious-war/story?id=10840145>. Allen also invoked the language of terrorism to describe the spill, noting that “[t]his spill is keeping everybody hostage.” CARL SAFINA, *A SEA IN FLAMES: THE DEEPWATER HORIZON OIL BLOWOUT* 126 (2011).

194. Press Release, Louisiana Governor’s Office of Homeland Security and Emergency Preparedness, Governor Jindal: We Are in a War Against This Oil, Need Real Results (June 16, 2010), <http://emergency.louisiana.gov/Releases/06162010-governor.html>.

195. Harry R. Weber, *AP Enterprise: Spill Bound BP, Feds Together, Spill Allied Feds and BP*, TOPEKA CAP.J., Aug. 22, 2010, at 10.

196. See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 66 (2002).

197. Weber, *supra* note 195.

198. Mike Soraghan, *Tough-Talking Admin Officials Keep ‘Boot on Neck’ of BP*, N.Y. TIMES, May 3, 2010, <http://www.nytimes.com/gwire/2010/05/03/03greenwire-tough-talking-admin-officials-keep-boot-on-nec-20483.html>.

199. See *id.*

200. For a general discussion of the ways that metaphors can create new “social realities,” “guide . . . future action,” and justify “policy change and political and economic action,” see GEORGE LAKOFF &

nonthinking-enemy disasters, in turn, provides legal cover for the lack of transparency that the war framing both suggests and legitimizes.

Of course, not all war melding and war rhetoric is created equal in terms of the harm it may generate. Conceptualizing disaster as war is in some respects less problematic than conceptualizing counterterrorism as war. In contrast to the war on terror, most disasters (whether pandemics, hurricanes, or earthquakes) will come to an end, as will their immediate consequences, so—absent a prolonged sequence of truly catastrophic events—the disaster-as-war is unlikely to devolve into a never-ending conflict against a vague and shifting threat. Moreover, disaster wars are considerably less likely than the war on terror to open the door to “real wars”<sup>201</sup> of the traditional kind.

Nevertheless, the disaster-as-war paradigm<sup>202</sup> has important real-world consequences that should not be ignored. As essayist Susan Sontag argued, war metaphors may be particularly dangerous when society is less likely to recognize that war is, indeed, just a metaphor—an incomplete representation of reality, and one with “powerful consequences.”<sup>203</sup> As with the war on terror, the heavy involvement of the military in much disaster response<sup>204</sup> and the historic pedigree of disasters as potential “states of exception,”<sup>205</sup> outside of the normal legal structure, create a serious risk that policymakers, and even the public, will forget—at least for truly catastrophic disasters—that war is merely metaphorical.

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MARK JOHNSON, *METAPHORS WE LIVE BY* 156 (2d ed. 2003). *See also* Koteyko et al., *supra* note 183, at 244 (arguing that “[d]iscourse metaphors frame and organize our shared narratives of politics,” are “embedded in discursive formations and networks of power,” are “constitutive of certain views of the world, of society, and how things work,” and “can have important implications for how policies are formulated as apparently natural and sensible responses to the issue in question”); *id.* at 258 (noting that “[m]etaphors construct, or frame views of reality, which can be used in policy making and planning” (citation omitted)).

201. BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 15 (2006) (arguing that the war on terror “makes it easier for the president to fight real wars against real countries”).
202. *See* Tierney & Bevc, *supra* note 149.
203. *See* Susan Sontag, *Real Battles and Empty Metaphors*, N.Y. TIMES, Sept. 10, 2002, at A25.
204. The relationship between war rhetoric and the role of the military in disaster response is, no doubt, a complicated one. Over time, war rhetoric may increase the military’s involvement in disaster response, as enlisting the military will seem the obvious and natural choice when confronting a disaster framed as a war, and the increased visibility of the military during disasters may then, in turn, fuel disaster war rhetoric and confirm the plausibility of the military metaphor. Nonetheless, conceiving of disasters as war is not the only (or even, perhaps, the most important) driver of the military’s expansive role in disaster response. The military’s capacity to rapidly mobilize and deploy the requisite manpower and equipment for disaster response on short notice—and the absence of any comparable civilian institution—explains much of the country’s current reliance on the military in times of disaster.
205. *See, e.g.*, KRISTIAN CEDERVALL LAUTA, *EXCEPTIONS AND NORMS: THE LAW ON NATURAL DISASTERS* 63–94 (2012) (situating natural disasters in the historical tradition of “states of exception”).

Moreover, for purposes of information policy, in particular, the melding of war and disaster is even more troubling than the melding of war and terrorism, because while the thinking-enemy rationale for war transparency exceptionalism has at least some currency in the context of terror, it has no application to natural or technological disasters. Beyond the “reflexive secrecy” that war rhetoric may spawn,<sup>206</sup> the bleed of war rhetoric into disasters may encourage the construction of enemies from whom information can justifiably be withheld, the transformation of public spaces into war zones from which interested citizens and press can be more easily excluded, and the reliance on notions of the “fog of war” to justify communication failures and overbroad restrictions on access to affected locales. Each of these phenomena exacerbates and gives heightened expression to temptations toward secrecy and restricting information and access that already exist during disasters.

Indeed, war framing aside, there is a wide spectrum of potential governmental motivations for withholding or distorting information or otherwise impeding public access to disaster information. On one end of the spectrum are particularly malicious motivations that are driven by self-interest rather than any notion of the public good. Such motivations might include face-saving efforts (including attempts to cover up or minimize the extent of a disaster), blame-deflection impulses, power grabs (perhaps justified by exaggerating a disaster’s scope), attempts to minimize liability risk to the government or private tortfeasors, other political aims, and general public-relations or image-enhancement goals. On the other end of the spectrum are more benevolent motivations for information failures—motivations rooted in an impulse, however misguided, to serve the public good and ensure greater public safety. Such motivations might include fear that providing information prematurely to the public will cause confusion or chaos, fear that full information about the risks at hand might cause people to panic (and, for example, engage in irrational or unsafe flight from the area or unnecessary and risky counterhealth measures), or fear of “warning fatigue” (caused by public perception that officials have repeatedly “cried wolf” when warning about impending disasters).<sup>207</sup>

In the middle of these two extremes are some arguably neutral governmental motivations—neither malicious nor benevolent—that nevertheless produce the failed information-flow outcomes. Most of these involve governments that neither selfishly served their own political or public relations purposes nor acted

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206. Mongoven, *supra* note 172, at 411 (noting that “war mentalities can generate reflexive secrecy” but that Singapore reacted to SARS by publicizing cases rather than suppressing them, as China did).

207. See discussion *infra* Part IV.A.1.

out of particular concern for the public, but instead simply lacked the communicative competencies to offer a useful and accurate flow of disaster information. Among these explanations are disorganization, lack of planning and preparedness, and the communication of less-than-useful information, often because it is provided in a format that is difficult for ordinary citizens to decipher.

It may well be the case that, in any given instance, it is impossible to concretely determine which of these motivations are driving a failure of government transparency—and it is probable that the more benevolent justifications might be invoked as pretext for decisions made more maliciously. But the larger point remains: Government, both at its best and at its worst, finds itself with the temptation to restrict information flow at times of disaster.

#### A. War Enemies

The prevalence of war rhetoric in disasters may exacerbate many of these already-existing temptations toward secrecy during disasters by building on preexisting fears about public reaction to disasters to identify the public (or segments of the public) as “enemies” from whom information can reasonably be withheld for the greater good. Every war requires an enemy, and disasters-as-war are no exception. Indeed, Schmittian notions of the state of exception are undergirded by the friend/foe distinction.<sup>208</sup> Thus, the expansion of war rhetoric into nonwar disasters spurs and perpetuates the hunt for enemies and justifies *enemy construction* when clear enemies are otherwise lacking. Those constructed enemies may then stand in for the thinking enemy of war and terrorism, suggesting that disasters are thinking-enemy situations like war and terrorism that may justify withholding disaster information from the public (or even distorting that information) to prevent its exploitation by the enemy.<sup>209</sup>

Subpart A.1 identifies likely candidates for enemy construction during disasters. Potential candidates for illegitimate enemy construction include (1) the

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208. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 39 (George Schwab trans., Chicago Press 2007) (1932) (“[I]n the orientation toward the possible extreme case of an actual battle against a real enemy, the political entity is essential, and it is the decisive entity for the friend-or-enemy grouping; and in this (and not in any kind of absolutist sense), it is sovereign.”).

209. There is, of course, a bit of a chicken-and-egg problem with war rhetoric and enemy construction: Does disaster-war rhetoric cause enemy construction or does society employ war rhetoric because enemies have already been identified? The relationship between war rhetoric and enemy construction is probably best viewed as a mutually reinforcing cycle, in which war rhetoric encourages the hunt for enemies and the identification of enemies, in turn, entrenches the rhetoric of war. There are, of course, also a myriad of reasons for enemy construction (many of which parallel the self-interested motivations for secrecy) that are not about secrecy per se, including, for example, blaming victims and justifying power grabs.

“panicking public” at large; (2) the “worried well” and other arguable bystanders who consume resources needed by those who are more at risk; (3) the “overly complacent” who are disinclined to comply with government orders to, for example, evacuate; (4) “dissenters” or “impeders” who disagree with the government’s chosen response or who might otherwise get in the way of that response; and (5) the allegedly “lawless” who go beyond mere noncompliance to outright law violation and even violence.<sup>210</sup>

As Subpart A.2 below demonstrates, this kind of enemy construction to justify information withholding is troubling for a wide array of reasons. First, these potential enemies lack the characteristics of the thinking enemies of war and terror and should not be equated with thinking enemies for purposes of information policy. Second, much of this enemy construction builds on fears about typical human reaction to disaster that are largely unfounded and grounded in myth rather than empirical evidence. Third, even to the extent that the governmental fears are warranted, withholding information is likely to be counterproductive, subverting the very goals the government purportedly seeks to achieve. Fourth, enemy construction risks becoming a vicious cycle in which the existence of enemies justifies government information control and the government then uses that measure of information control to further vilify and construct enemies. Finally,

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210. Of course, framing war as disaster may encourage and legitimate construction of many different enemies—including such obvious candidates as nature, *see, e.g.*, Ingalsbee, *supra* note 149, at 281 (arguing that “although we call it *firefighting*, we are not really fighting fires; we are fighting *forests*” and that “[w]e are not making war on wildfire; we are making war on *wildlands*”); *id.* at 263 (noting that “each successfully contained and controlled fire offers only a fleeting victory over an ‘enemy’ that returns year after year with escalating power and fury”), the hazard itself (e.g., oil), *see supra* notes 190–195 and accompanying text, and, during at least some disasters, the tortfeasors responsible for the harm, *see supra* notes 197–199 and accompanying text (detailing the Obama administration’s identification of BP as the enemy). Construction of these types of enemies is likely to be problematic for a number of reasons. For example, treating disasters as a war against nature may obscure the human contribution to disasters and may encourage society to focus on disaster mitigation measures that attempt to control or subjugate nature rather than those measures that respect natural forces and try to limit population growth in the most dangerous locales. *Cf.* Ingalsbee, *supra* note 149, at 263–64 (arguing that “[w]ildland firefighting strikes a resonant chord in the American people because it epitomizes the Western Enlightenment’s crusade to control and exploit nature and it continually reenacts the uniquely American experience of conquering the western frontier and all the wild forces of nature” and that the “warfare on wildfire” prevents the American public from embracing “[a] vision of human communities that can live safely and sustainably with wildland fire”). However, the implications for government openness are not as immediately apparent, unless the tortfeasor can reasonably be accused of purposefully trying to inflict further harm and could exploit information about the disaster to increase that harm. However, this kind of enemy construction, too, is likely to bleed into the construction of enemies that are more clearly troubling from the perspective of sound disaster information policy. Additionally, while this Article focuses on the categories of constructed enemies enumerated in the text, there are likely other potential candidates for enemy construction who might indirectly, but not intentionally, cause others harm, such as those who have been exposed or infected during a pandemic. *See* ANNAS, *supra* note 92, at 214–15.

the segments of the population most likely to be singled out as “enemies” are poor, minority communities and individuals.

## 1. Potential Candidates for Enemy Construction

### a. The “Panicking Public”

An obvious candidate for enemy construction during disasters is what might be called the “panicking public.” One of the most common (or at least most commonly articulated)<sup>211</sup> government motivations for secrecy and delay of information dissemination during disasters is based on official fears that full, immediate information will cause the public to panic—to react in overzealous, frenzied, or unruly ways that themselves can cause significant harm.<sup>212</sup> Panic might include, for example, irrational or unsafe flight from an area or unnecessary and risky counterhealth measures (like dosing with iodine to stave off nonexistent or very low radiation risks).<sup>213</sup>

Examples of governments withholding information or otherwise downplaying disaster risks to avoid public panic abound in both natural and technological disasters.<sup>214</sup> Government disaster communication to the public often takes the form of evacuation orders, which reflect an official judgment about the levels of risk facing different segments of the population, as well as about the effectiveness of evacuation in mitigating that risk. Disaster sociologists have repeatedly observed that officials sometimes delay calls for evacuation because they fear that an evacuation order will cause people to panic.<sup>215</sup>

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211. It may be the case, of course, that officials withholding information cite panic as a public justification for their actions in order to disguise their true, more malicious intention (such as face saving). Similarly, constructing the “panicking public” as a disaster wartime enemy may allow officials to disguise their true self-interested motivations.

212. *See infra* notes 248–252 and sources cited therein (discussing the meaning of panic).

213. *See id.*

214. HENRY W. FISCHER, III, *RESPONSE TO DISASTER: FACT VERSUS FICTION AND ITS PERPETUATION: THE SOCIOLOGY OF DISASTER* 120 (3d ed. 2008) (recounting sociological study finding that “[i]nformation about danger which should be disseminated to the public to facilitate their evacuation is often withheld ‘because of a fear that people will panic’” (citation omitted)). The 1918 flu pandemic is one of the most notorious historical examples of information suppression during disasters to control panic. *See* JOHN M. BARRY, *THE GREAT INFLUENZA: THE EPIC STORY OF THE DEADLIEST PLAGUE IN HISTORY* 336–39 (2004) (detailing press acquiescence in government downplaying of flu risk and the severity of the pandemic to avoid panic).

215. *See, e.g.,* FISCHER, *supra* note 214, at 50 (“Evacuations are sometimes delayed, until it is deemed absolutely necessary, because officials do not want to cause an unnecessary panic.”); Joseph Scanlon, *Unwelcome Irritant or Useful Ally?: The Mass Media in Emergencies*, in *HANDBOOK OF DISASTER RESEARCH* 413, 416 (Havidán Rodríguez et al. eds., 2007) (suggesting that one common misconception about disasters is that “officials must be careful about issuing warnings because of the

Similarly, state requests for a presidential declaration of emergency or disaster serve not only to trigger the legal framework for federal disaster response but also to communicate to the public the scope and seriousness of the disaster and its resulting harm. During the Three Mile Island (TMI) nuclear incident, the state of Pennsylvania reportedly delayed requesting a federal disaster declaration because of federal fears that the declaration would signal the seriousness of the crisis and create panic. According to a Pennsylvania state official, one of President Carter's advisors initially recommended that Pennsylvania Governor Richard Thornburgh refrain from asking for a presidential disaster declaration for the TMI incident because "the mere statement that the President has declared this area an emergency and disaster area would trigger a substantial panic."<sup>216</sup> Indeed, the public risk communication model for the TMI disaster was apparently based on the principle that it is "much harder to 'unscare' people than to scare them."<sup>217</sup>

More recently, in the aftermath of the March 2011 earthquake and tsunami in Japan, the Japanese government initially withheld from the public government-generated predictions about the likely path of the fallout plume.<sup>218</sup> Goshi Hosono, the minister leading the response, explained that the Japanese leadership was reluctant to share the information because they were "afraid of triggering a panic."<sup>219</sup>

### b. The "Worried Well"

Another disaster-as-war enemy the government might identify during an emergency is the overreacting citizen who hoards or consumes disaster response resources, at the expense of those who are more directly and immediately at risk

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danger of panic"); John H. Sorensen & Dennis S. Mileti, *Decision-Making Uncertainties in Emergency Warning System Organizations*, 5 INT'L J. MASS EMERGENCIES & DISASTERS 33, 51 (1987) (noting that "[w]arning decisions can be influenced by a decision-maker's perception of adverse public consequences of ordering an evacuation" and that "[t]ypical concerns" include fear "that people will panic and be hurt or killed").

216. JOHN G. KEMENY ET AL., REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND 124 (1979).

217. Roger E. Kasperson et al., *The Social Amplification of Risk: A Conceptual Framework*, 8 RISK ANALYSIS 177, 184 (1988).

218. Norimitsu Onishi & Martin Fackler, *Japan Held Nuclear Data, Leaving Evacuees in Peril*, N.Y. TIMES, Aug. 9, 2011, at A1.

219. Osnos, *supra* note 91, at 59; *see also* Onishi & Fackler, *supra* note 218 ("Mr. Hosono, the minister charged with dealing with the nuclear crisis, has said that certain information, including the Speedi data, had been withheld for fear of 'creating a panic.'"). Of course, there were likely other government motivations for the information withholding at play as well. *See id.* (describing other possible reasons for withholding, including the government's desire to limit expensive and difficult evacuations).

during the disaster. Indeed, one of the stronger rationales for allowing government to withhold risk information—or even to affirmatively manipulate information about risk levels to different population segments—is the fear that people who are at lower risk will consume response resources needed by those who are most at risk. In the public health context, for example, emergency planners often refer to the “worried well,”<sup>220</sup> who might hoard supplies of the antiviral drug Tamiflu<sup>®</sup> during an influenza pandemic or a powerful antibiotic such as Cipro<sup>®</sup> during an anthrax scare.

The term “worried well” is itself somewhat misleading because it implies that people who are not at any risk at all (who are well) will unnecessarily consume response resources. In many disaster situations, however, the “worried well” category will be blurry at best; the question will instead be one of relative risk. Moreover, this situation arises not only in the context of public health emergencies but in many other kinds of disasters for which evacuations are necessary. Returning to the TMI example, the governor recommended that 3500 pregnant women and children within five miles of the plant evacuate.<sup>221</sup> The public, however, self-evacuated in numbers far exceeding these recommendations: Some 200,000 people evacuated.<sup>222</sup> This so-called “shadow evacuation”—self-evacuation beyond the limits of official evacuation orders—of 200,000 residents who were at lesser risk than the pregnant women and children within five miles of the plant significantly delayed and impeded the evacuation of some of those most at risk by clogging the roads with traffic.<sup>223</sup> Additionally, traffic might impede not only evacuation of the public but also arrival of emergency responders (such as ambulances and firefighters) at a disaster scene. In these scenarios, transportation resources and road access, rather than drugs and medical resources, are the response resources potentially being hoarded by those who are less at risk.

Faced with such a possibility, a government official might decide to distort information about risk in order to assure that limited response resources reach those most in need. For example, she might publicly announce that there is vir-

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220. See, e.g., CTR. FOR DISEASE CONTROL & PREVENTION, CRISIS AND EMERGENCY RISK COMMUNICATION 13 (2002).

221. See *Three Mile Island: A Chronology*, WASH. POST, Mar. 28, 1989, <http://www.washingtonpost.com/wp-srv/national/longterm/tmi/stories/chrono032889.htm>.

222. See *id.*

223. See Michael Doyle, *Urban Mass Evacuation in the United States*, in *URBANIZATION, POLICING AND SECURITY: GLOBAL PERSPECTIVES* 195, 198 (Gary Corder et al. eds., 2010) (describing how shadow evacuation during the Three Mile Island (TMI) incident caused such massive traffic jams that some “who were supposed to evacuate turn[ed] around and return[ed] home”); see also *id.* (describing severe traffic jams during the 2005 Hurricane Rita evacuation caused by shadow evacuation).

tually no risk at all to those outside the five-mile evacuation radius, even if that is not the case.<sup>224</sup> In a health scare, she might choose to underplay the risk to people in certain geographic areas or with certain health characteristics or to overplay the risks associated with treatment (such as an experimental vaccine) in order to discourage those at lower risk from hoarding treatment resources. When these actions are challenged, she may justify her information withholding choices by employing the rhetoric of disaster-wars to suggest that these worried well were enemies of those truly at risk and that distorting information was an appropriate mechanism for responding to that threat.

### c. The “Overly Complacent”

Another potential candidate for enemy construction in disasters framed as war are a group that might be called the “overly complacent”—those who are reticent to comply with government recommendations because they are not convinced the risks warrant protective action. The primary information flow tool government might be tempted to employ in the war against the overly complacent is likely to be overplaying the relevant risks in its communications with the public to encourage compliance. For example, a local official who believes that an evacuation is necessary might exaggerate the probability or likely magnitude of a hurricane to spur recalcitrant citizens to comply with her evacuation order.

Alternatively, the government might be inclined to deny the public information in the form of evacuation orders during a current disaster because it fears that, if an order turns out to be unnecessary, people will become more complacent and less likely to comply with an evacuation order the next time one is issued. This “warning fatigue” could potentially be a serious problem especially for dense urban areas where the long evacuation times required to evacuate large popula-

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224. One might contend that some version of this type of information distortion played out in the lead up to Hurricane Ike in 2008. Officials wanted to ensure that residents of Galveston, Texas, which was likely to be hardest hit by Ike, could evacuate, and they thus encouraged residents in nearby Houston to shelter in place to avoid traffic congestion that would impede the evacuation of Galveston and other low-lying areas. *Houston Told to “Hunker Down” for Big Ike*, CBS NEWS (Feb. 11, 2009, 2:21 PM), [http://www.cbsnews.com/2100-201\\_162-4438395.html](http://www.cbsnews.com/2100-201_162-4438395.html) (noting that authorities hoped to avoid the “panic” that accompanied Hurricane Rita in 2005 when evacuation orders “sent millions scurrying in fright and caused a monumental traffic jam”). While the government officials did not say that Houston residents were not at risk, they arguably downplayed the likely severity of the storm in Houston when they urged Houston residents to “hunker down,” rather than evacuate, explaining that “[t]he winds will blow and they’ll howl and we’ll get a lot of rain, but if you lose power and need to leave, you can do that later.” *Id.* Perhaps a more forthright approach would have been to explain clearly to Houston residents that, while Ike would likely do serious damage in Houston, it posed far greater risks to Galveston residents and Houston residents needed to stay off the roads to speed Galveston’s evacuation.

tions mean that evacuations must be called relatively far in advance, before—for example—a hurricane’s path is known<sup>225</sup> or the danger at a nuclear facility in trouble can be carefully judged.

#### d. The “Dissenters” or “Impeders”

During wartime, those who criticize or oppose government actions are often cast as disloyal enemies of the state.<sup>226</sup> The same tendency to expect people to “rally ‘round the flag” during disaster wars may result in the construction of enemies out of those who publicly question or disparage the government’s chosen response measures, or even those who simply seek to subject that response to public scrutiny by exposing what is actually occurring. In the aftermath of the BP oil spill, for instance, the federal government implied that at least some of those who wanted access to affected beaches sought access, not just to document the extent and effects of the spill and the use of dispersants (to which many objected), but to impede the response and damage the boom being constructed to contain and trap oil. Indeed, Thad Allen, who employed a wide array of war rhetoric in leading the federal response to the spill, identified as potential enemies in the fight not just the oil but those who might vandalize the boom or otherwise impede the governmental response.<sup>227</sup> This enemy construction helped justify access restrictions that stonewalled those who wanted more information about damaged beaches, the use of dispersants, and other controversial response measures. This category of constructed enemies may also include the press, who may be accused of physically obstructing response efforts by their mere presence. CNN reporter Anderson Cooper protested government restrictions on media access to the BP spill response, arguing that journalists are “not the enemy here” and that journalists had no desire to impede or “disrupt[] relief efforts.”<sup>228</sup>

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225. See Eva Regnier, *Public Evacuation Decisions and Hurricane Track Uncertainty*, 54 MGMT. SCI. 16, 17 (2008) (quantifying the hurricane forecasting errors associated with the increased evacuation lead times required for “major population centers” and discussing the associated “false alarm rates”); Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 BYU L. REV. 2157, 2167.

226. See STONE, *supra* note 75, at 13.

227. See *infra* note 303 and accompanying text. By this time, the slide from BP as enemy to dissenting civilians as potential enemies was already underway.

228. *Anderson Cooper 360 Degrees: The Spill and Transparency* (CNN television broadcast July 1, 2010).

### e. The “Lawless”

As the events during Katrina demonstrate, government might engage in the construction of at least some disaster victims as lawless enemies of public order and the public good. Indeed, public officials played a critical role in the vilifying of Katrina survivors and in survivors’ public construction as a wartime enemy. It was Governor Blanco whose inflammatory comments suggested that troops on the ground in New Orleans would shoot to kill.<sup>229</sup> It was New Orleans Mayor Ray Nagin who told Oprah Winfrey on national television that hurricane survivors had plunged into an “almost animalistic state” after “five days watching dead bodies, watching hooligans killing people [and] raping people.”<sup>230</sup> And it was New Orleans Police Department Superintendent Edwin P. Compass who announced to the world that “little babies [were] getting raped” in the Superdome.<sup>231</sup> Aside from the effect characterizing New Orleans as a war zone may have had on press access,<sup>232</sup> this construction of purportedly “lawless” enemies did not result in information withholding during Katrina, but similar enemy construction in a future disaster might well be invoked to rationalize even more serious restrictions on disaster information flow.

## 2. Critiques of Enemy Construction

### a. Constructed Disaster Enemies Are Categorically Different From Wartime Thinking Enemies

The thinking nature of the war enemy—and that enemy’s ongoing tactical desire to exploit public information to do the country further harm—is critical to the legitimacy of the war exception to government transparency. Constructed disaster enemies will almost always lack these fundamental characteristics and are thus categorically different from wartime enemies. Accordingly, the construction and invocation of these “enemies” should not be sufficient to justify importing wartime transparency exceptionalism into these other disaster contexts.

The “panicking public” enemy is easiest to distinguish from the thinking enemy of terrorism. Indeed, the rationale for withholding information to stave off panic identifies the public not as a thinking enemy who will exploit

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229. See *supra* note 166 and accompanying text.

230. Brian Thevenot, *Myth-Making in New Orleans*, AM. JOURNALISM REV., Dec. 2005–Jan. 2006, [http://www.ajr.org/article\\_printable.asp?id=3998](http://www.ajr.org/article_printable.asp?id=3998) (internal quotation marks omitted).

231. *Oprah Reports*, OPRAH.COM (Sept. 6, 2005), [http://www.oprah.com/slideshow/oprahshow/oprahshow1\\_ss\\_20050906/2](http://www.oprah.com/slideshow/oprahshow/oprahshow1_ss_20050906/2).

232. See *infra* notes 279–287 and accompanying text.

government disaster information to do further harm but instead as a foolish and irrational (even unthinking) enemy whose poor response to disaster information unintentionally exacerbates their own risk. The primary justification, then, for information control to tamp down panic rests on a paternalistic notion that, if people are going to be their own worst enemies and act in ways that increase their exposure to harm during disasters, government should protect the public from its own flawed impulses by manipulating the public understanding of the situation.

In the face of the substantial uncertainty that many disasters create, there often will be little reason to think that official decisionmaking is superior to individual weighing of the risks. However, even if official decisionmaking is more likely to get it “right” than individual decisionmaking, there is something particularly offensive about distorting or withholding information in order to manipulate people’s disaster response choices. As outlined in Part I, information paternalism—by which government seeks to influence individual belief formation by restricting information it deems harmful—evinces a clear lack of respect for citizens and interferes with both individual autonomy and government accountability.<sup>233</sup>

While government-imposed restrictions on taking certain protective actions would also infringe on people’s autonomy, at least citizens would then be in a position to understand and protest those restrictions and hold officials accountable. Information restrictions or distortions, in contrast, interfere in a more fundamental way with people’s decisionmaking and ability to hold their leaders accountable.<sup>234</sup> Indeed, outside of the emergency context, information withholding is not generally viewed as an appropriate response to differing views about the proper response to risk. Both the general principles of the Freedom of Information Act,<sup>235</sup> and the more specific mandates of the Emergency Planning and Community-Right-to-Know Act,<sup>236</sup> reflect a commitment to public disclosure of risks that communities face.<sup>237</sup>

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233. See *supra* notes 75–84 and accompanying text; cf. ANNAS, *supra* note 92, at 217 (arguing that it is “wrong and dangerous” in a public health emergency “for our government to treat its citizens either as enemies to be controlled by force or children to be pacified with platitudes”).

234. Moreover, paternalism in the face of risks that can quite easily be quantified (and for which rationality may more easily be judged), seems quite different as a practical—if not a moral—matter than attempted paternalism in the face of true uncertainty when government can hardly purport to have a full and accurate understanding of what is best for its citizens.

235. 5 U.S.C. § 552 (2006).

236. 42 U.S.C. §§ 11001–11050 (2006).

237. See, e.g., *id.* § 11023(h) (mandating that toxic chemical “release forms” required by the statute be available to the public to inform “citizens of communities surrounding covered facilities” about toxic chemical releases in their area).

The worried well (who may be considered a subset of the panicking public) arguably have more in common with the thinking enemy of war and terrorism than the panicking public at large because their actions may selfishly compromise the safety of others as they hoard or consume resources needed by those most at risk. Because of this potential risk to others, the worried well deserve separate consideration as potential enemies whose existence might justify information suppression, as the rationales for doing so extend beyond paternalism.

At least two factors, however, distinguish the worried well from the prototypical thinking enemy of war or terrorism. First, they differ radically from the thinking enemy in how they use information. In contrast to a terrorist who exploits government information about public vulnerabilities to plan a second attack, the worried well would not be exploiting the government information to do further planned harm with that specific information. In most situations, the worried well do not actually wield government-provided information as a weapon in and of itself. Rather, the government would be withholding or distorting information, not to prevent its exploitation, but to keep people in the dark about their own circumstances and risk in hopes that they would be dissuaded from overreacting and unnecessarily consuming limited resources. The analytical difference between a terrorist who uses information about a structural vulnerability in a power grid to plan a deliberate attack on that structure and a citizen using that same information to decide to hoard generators is a difference in kind, not merely of degree. It is a difference that makes the war analogy, and the information-flow exceptionalism that accompanies it, inapt.

Second, and relatedly, intentions can and should matter. The worried well lack any kind of specific intent to do other disaster victims harm (even if they are aware that their actions may make it more difficult for others to avoid harm). When they consume response resources, they usually do so out of a genuine belief that those actions are (or at least may be) necessary to keep themselves and their families safe. The rhetoric of the war on terror has already gone a considerable distance in erasing the moral significance of intent in the identification of enemies.<sup>238</sup> As Professor Ann Mongoven has argued in the context of the “War on Disease”:

Contemporary political rhetoric on terrorism provides an explicit metaphorical bridge for the implicit . . . conceptual leap from conceiving of medicine as war to conceiving of diseased persons as the enemy. In the wake of 9/11, President Bush proclaimed that any nation or person harboring terrorists would themselves be considered terrorists. What

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238. See Mongoven, *supra* note 172, at 414.

is notable about the statement is its lack of intent. The president did not say “anyone who knowingly or willingly harbors terrorists will themselves be considered terrorists.”<sup>239</sup>

Disaster war rhetoric that builds on this rhetoric likewise threatens to obscure the importance of intent in defining true enemies.

Intentionality matters both as a moral matter and because government usually has more tools at its disposal—beyond information control—to prevent harm caused unintentionally than harm caused intentionally. For example, government is unlikely to be successful, at least in the short term, in persuading or educating terrorists to abandon their goals. In the case of the worried well, however, both before and during the disaster, government can educate the public about the risks that might be confronted. It can take other planning measures—publicized to the public—to reassure the public that communities will be in a good position to deal effectively with disasters and resulting shortages. When these other information-friendly avenues exist, government should not be allowed to resort to information control to achieve its ends. If stronger measures are still needed, the government can regulate the community-harming behavior itself rather than patronizingly assuming that this behavior necessarily will result from an honest flow of information. It can set up roadblocks to prevent early evacuation from areas not truly at risk. It can seize supplies of vaccine or needed medicines or implement other restrictions to prevent hoarding.<sup>240</sup>

This same basic analysis applies to both the “overly complacent” and “dis-senters” who, to the extent they do harm to others (by, for example, endangering first responders who attempt to rescue those who failed to comply with evacuation orders), do so unintentionally and do not wield public information as a weapon to harm others.

Thus, the “lawless” who resort to looting and violence after disasters are the only constructed enemy who may truly resemble the thinking enemy of war and terrorism.<sup>241</sup> They might, for example, exploit information about what neighborhoods are most affected by the disaster to decide which homes to target. However, as the next Subpart will demonstrate, the assumption that lawlessness will be a major problem after most disasters is without empirical support.

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239. *Id.* at 410–11.

240. *See* discussion *supra* Part I.B. Government decisionmakers (and their constituents) should, however, be skeptical of claims that such measures are appropriate, absent demonstrated, verified need.

241. Law enforcement-transparency exceptions, also premised on thinking-enemy notions, may be relevant in cases of postdisaster crime, just as they are in other criminal contexts. *See supra* note 116.

### b. Enemy Construction Rests on Faulty Empirical Assumptions

In addition to suggesting falsely that enemies akin to thinking enemies lurk in the shadows of every disaster, disaster enemy construction typically rests on a number of faulty empirical assumptions, including the assumptions that those experiencing disaster will panic and engage in antisocial, criminal behavior.

No one disputes that many disaster survivors will experience fear. Nevertheless, leading disaster sociologists long ago concluded that the belief that panic is a common reaction to disasters is a “disaster myth”—a widely held misconception about postdisaster human behavior.<sup>242</sup> Indeed, even though disaster panic is apparently presupposed by even preeminent transparency scholars,<sup>243</sup> sociologists contend that the finding that postdisaster “panic is rare” is one of “the most robust conclusions” to emerge from more than fifty years of disaster sociological research.<sup>244</sup> “Regardless of whether the hazard is dramatic or mundane, whether there is a low or high body-count, or whether the threat is acute or chronic, social scientists agree that ‘panic’ explains little that is important about how people, in collectivities, respond to disaster.”<sup>245</sup> Thus far, this finding appears to hold true across the spectrum of disasters, including natural disasters, technological disasters, and even terrorist events,<sup>246</sup> although no one has systematically studied potential differences between the likelihood of panic across categories of disaster.<sup>247</sup>

Despite this apparently robust sociological consensus, any discussion of the potential for panic in response to disasters is complicated by ambiguity in the term “panic” and lack of clarity about its precise contours.<sup>248</sup> Even among sociol-

242. See E.L. Quarantelli & Russell R. Dynes, *When Disaster Strikes (It Isn't Much Like What You've Heard & Read About)*, PSYCHOL. TODAY, Feb. 1972, at 66, 67–68; see also Sun, *supra* note 152, at 1134–35 (describing disaster myths identified by sociologists).

243. See Pozen, *supra* note 7, at 283 (noting that Center for Disease Control and Prevention “officials may conclude it is better” to suppress information about the very existence of a new disease outbreak because revealing the virus “would risk creating widespread panic and stigmatizing those who have contracted it”).

244. Lee Clarke & Caron Chess, *Elites and Panic: Move to Fear Than Fear Itself*, 87 SOC. FORCES 993, 993 (2008) (pointing to research “on supper club fires, airplane crashes, epidemics, hurricanes and so on”).

245. *Id.* (citation omitted).

246. *Id.* at 994; see also William L. Waugh, Jr., *Terrorism as Disaster*, in HANDBOOK OF DISASTER RESEARCH, *supra* note 215, at 400 (noting that there was “no panic” at Chernobyl, during the 1995 Tokyo subway sarin attack, or during “the World Trade Center collapses” (citations omitted)).

247. Clarke & Chess, *supra* note 244, at 994–95 (acknowledging that, while the distinction between types of disasters has been questioned, it “has not yet been obliterated” and suggesting that “[w]e would . . . benefit from a thorough assessment of the occurrence and conditions of panic in ‘natural’ and ‘technological’ disasters”).

248. In the legal scholarship on emergency powers, the debate about panic after September 11 has focused on the potential for “political panic,” in which reactions to disasters—primarily, if not exclusively, terrorist attacks—generate sufficient levels of anxiety among the public or political officials (or both)

ogists there has been substantial disagreement about exactly what panic means. E.L. Quarantelli, one of the seminal scholars of disaster sociology, has explained that the term panic has typically been used to describe either “extreme and groundless fear,”<sup>249</sup> or “flight behavior . . . marked by the setting aside of everyday social norms.”<sup>250</sup> Moreover, he notes that panic is often characterized as “irrational” and “maladaptive,” on the one hand, or associated with “ruthless competition,” predominantly “selfish behavior” and “breakdown” of the social order, on the other.<sup>251</sup> Of course, these are two quite different conceptions of panic, whether applied to flight or some other postdisaster behavior: one focused on irrational behavior, presumably as measured against some objective standard, the other focused on antisocial behavior that violates everyday social norms.<sup>252</sup>

In any event, sociologists continue to insist that their research findings bear out the conclusion that panic is rare, regardless of which definition is at play. Does this sociological research, then, provide support for the conclusion that, for example, people will not react “irrationally” to disasters? The notion of irrationality is, of course, a contested concept that requires adoption of some standard by

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that government adopts and implements policies that overweight security at the expense of civil liberties. See ACKERMAN, *supra* note 201, at 1–2 (arguing that cycles of panic after terrorist attacks will create intense demand for counterterrorism mechanisms that restrict civil liberties). In contrast, Eric Posner and Adrian Vermeule have disputed the political “panic thesis,” Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY, *supra* note 3, at 72—that “during an emergency people panic, and when they panic they support policies that are unwise and excessive,” *id.* at 57. They argue that fear can have both positive and negative effects on decisionmaking, that fear is unlikely to have much effect on “policy during emergencies” (at least not more than during normal times), and that, in any event, any negative effects of fear on decisionmaking cannot be effectively mitigated, *id.* at 72–73.

This notion of “political panic” appears to have more in common with the sociological notion of “moral panic,” than with the kind of panic with which sociologists and this Article are most concerned: the panic often believed to characterize people’s immediate, individual reactions to seek safety in the aftermath of disasters. The concept of “political panic” does not, however, precisely track the sociological concept of “moral panic,” because sociologists usually limit moral panics to threats to “values or a sense of propriety,” rather than threats to physical safety. See Clarke & Chess, *supra* note 244, at 996. Interestingly, at least one legal scholar who advocates the need to protect against post-terrorist political panic also suggests the likelihood of at least some garden-variety panic of the kind sociologists dispute. ACKERMAN, *supra* note 201, at 1 (“In speaking of panic, I don’t wish to conjure images of frantic people pointlessly running about—although there will be some of that.”).

249. E.L. Quarantelli, *Panic, Sociology of*, in 20 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 11,020, 11,021 (Neil J. Smelser & Paul B. Baltes eds., 2001).

250. *Id.*

251. *Id.* at 11,021–22.

252. See Clarke & Chess, *supra* note 244, at 997–98. Lee Clarke, another prominent expert on panic, has abandoned the definition of panic as an “excessive feeling of alarm or fear . . . leading to extravagant or injudicious efforts to secure safety,” *id.* at 996, and now defines panic as “a breakdown in social order, a breaking of social bonds, as a result of some fear, which itself creates more danger,” *id.* at 998.

which rationality is to be judged,<sup>253</sup> and none of the sociological studies of panic appear to make any kind of close analysis of the rationality of particular survivors' actions, as judged against some precise conception of real risk.<sup>254</sup> Moreover, behavioral psychology has long argued that everyday decisionmaking—particularly in the face of risk and uncertainty—can, and often does, deviate substantially from models of “rational” decisionmaking. Such decisionmaking is often driven by heuristics—mental shortcuts that substitute easy questions about a risk (like how salient a risk is) for harder judgments about the actual likelihood that a risk will come to pass.<sup>255</sup> Nevertheless, even when heuristics are arguably in play, it may be unfair to label the public's protective actions in a disaster “irrational.”<sup>256</sup>

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253. *See id.* at 997–98 (rejecting “[t]he ‘perceived risk-real risk’ dichotomy”).

254. *Cf.* Quarantelli, *supra* note 249, at 11,021 (suggesting that researchers often consider “rational” behavior to be behavior “where the means-ends relationships are in balance or where the end result is a positive one” and arguing that disaster behavior is usually “very meaningful and far from most conceptions of irrationality”).

255. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 98 (2011). For example, some types of risk are particularly “dread” (often because they are manmade, involuntary, and risk irreparable, irreversible harm) and, when confronted with such dread risk, people sometimes engage in what Cass Sunstein has labeled “probability neglect.” *See* Sunstein, *supra* note 196, at 62–63. That is, when confronted with the question of how to respond to such risks, “people tend to focus on” the terrible outcome and neglect to consider the (often low) probability that the dread event will actually occur. *See id.*

256. Dan Kahan and others argue, for instance, that the influence of emotion on risk assessment may reflect, not irrationality, but culturally informed “expressive appraisals” of the risks at issue. *See* Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 741 (2008). Moreover, even aside from the cultural critique, it is often difficult to judge in any kind of objective, quantitative manner whether disaster victims responded rationally to the so-called “real risks.” Consider, for example, the “shadow evacuation” during the TMI incident of some 200,000 people for whom the government had declined to recommend evacuation. *See supra* notes 221–223 and accompanying text. The government decisionmakers who issued the evacuation orders were making recommendations under conditions of real uncertainty—no one really knew what was happening in the plant or what the risks truly were. In the academic world, how one should make decisions when confronting true uncertainty is the subject of much divisive debate. While some advocate continued attempts to rely on cost-benefit analysis (and thus continued attempts to quantify the likelihood and harm of different possible scenarios), others advocate applying something more like the precautionary principle, which often involves some measure of risk aversion to the worst case scenario. *See* Cass R. Sunstein, *Irreversible and Catastrophic*, 91 CORNELL L. REV. 841, 893 (2006) (developing a “Catastrophic Harm Precautionary Principle” that “is best understood to embody a form of risk aversion for the most dangerous risks”). Given this kind of divide in the academic community, it is hardly surprising that members of the public will have differing assessments of the proper way to react, and may—in the face of uncertainty and incomplete information—focus on the worst-case scenario (rather than its probability) and decide that evacuation is the best course. Additionally, given that official disaster decisionmakers also employ heuristics and are often as prone to decisionmaking biases as the general public, there is little reason to assume that official decisions are more likely to be more rational than individual decisions made by members of the general public or that individual choices to defy government recommendations are necessarily irrational.

Once distilled, the sociological conclusions seem to amount to findings that, despite the fear, time pressures, and other stressors, observations of disaster survivors suggest that they are not substantially less able postdisaster to make “reasoned,” thinking decisions than they are in nondisaster circumstances.<sup>257</sup> Those experiencing disaster are not given to “precipitate and unreasoning behaviour” unlikely to serve their own interests.<sup>258</sup> In many respects, then, disaster decisionmaking and behavior may be more similar to everyday decisionmaking and behavior than it is different.<sup>259</sup> The research of sociologists who focus on panic as the breakdown of social norms also points in this direction. As Lee Clarke expressed it, “The rules of behavior in extreme situations . . . are not much different from rules of ordinary life.”<sup>260</sup>

Of course, if the norms of disaster behavior largely parallel those of everyday life, one would expect to see some altruism but also adherence to a preexisting hierarchy of loyalties (for example, to family, friends, neighbors, acquaintances, and strangers). Empirical evidence suggests that survivors of some kinds of disasters (particularly natural disasters) create a kind of altruistic community in which preexisting social conflicts are suspended for a time to focus on the needs of the community in the immediate aftermath of disaster; indeed, selfless behavior is often observed in disaster’s aftermath.<sup>261</sup> Yet, ongoing adherence to loyalty hierarchies in disaster situations is probably to be expected, particularly if allegiances to the various groups conflict. Moreover, individual disaster survivors may not carefully consider how their own actions—if aggregated across many similarly

257. Quarantelli’s assessment that “irrational” panic behavior “is often contrasted with the *assumed* rationality of most other behavior,” may be read as an implicit endorsement of this more limited conclusion, that disaster behavior is not much different from “normal” behavior, which may be flawed in a variety of ways. Quarantelli, *supra* note 249, at 11,021 (emphasis added).

258. Jones et al., *supra* note 93, at 70 (citing Thomas A. Glass & Monica Schoch-Spana, *Bioterrorism and the People: How to Vaccinate a City Against Panic*, 34 CLINICAL INFECTIOUS DISEASES 217, 218 (2002)).

259. This conclusion is generally consistent with the view of Posner and Vermeule that fear’s effect on decisionmaking may be either good or bad, *see* Posner & Vermeule, *supra* note 248, at 77, and that “there is no reason to think that the fear-inspired decisions are likely to be worse,” *id.*, although their view appears less grounded in empirical observational evidence and more in a hypothetical analysis of the likely effects of fear on decisionmaking, *id.* Of course, even this more limited conclusion from the sociological research is open to attack on the grounds that the studies do not and cannot provide any complete, controlled comparison of everyday and disaster decisionmaking.

260. Press Release, Am. Sociological Ass’n, In Disasters, Panic Is Rare; Altruism Dominates (Aug. 7, 2002), <http://www2.asanet.org/media/panic.html>.

261. *See* J. Steven Picou et al., *Disaster, Litigation, and the Corrosive Community*, 82 SOC. FORCES 1493, 1495 (2004). This does not necessarily appear to be true of all kinds of disasters, at least not in the medium to long run. Over time, for example, the reaction to technological disasters is often the creation of a more “corrosive community” as conflict about legal liability creates community stress and division. *Id.* at 1496.

situated individuals—could impede those at greater risk from accessing the resources they need. Thus, some behavior of the worried well, such as drug hoarding during a pandemic, might well be expected. Indeed, the phenomenon of “shadow evacuation” well beyond the limits of official evacuation orders has been documented in many different disasters.<sup>262</sup>

Nevertheless, the amount of antisocial behavior in the aftermath of disasters tends to be greatly exaggerated. In particular, as Katrina illustrates, the disaster myth that violence and looting are common human reactions to disaster often takes hold in the wake of disasters.<sup>263</sup> The empirical evidence confirms, however, that antisocial behavior is rare, outlier behavior, and that postdisaster looting and violence are atypical and relatively rare.<sup>264</sup> Additionally, much of what might be characterized as antisocial behavior (short of criminal activity) or panic in the wake of disasters—such as disobeying government orders to evacuate or shelter in place—is easily explainable on other grounds. People disobey government instructions for reasons other than panic or clear antisocial aims. For example, in a New York Academy of Medicine study of likely public reactions to a dirty bomb attack, the vast majority of those who reported that they would likely defy a “shelter-in-place” recommendation did so because they prioritized attempting to ensure the safety of their children and others dependent on their care.<sup>265</sup>

While no one can say for sure how the public will react to any particular disaster, particularly an unprecedented event, the alleged danger posed by enemies that government will be tempted to construct to justify information withholding will usually lack a strong basis in empirical fact.

### c. Information Withholding Is Counterproductive

Even if government were entirely correct in its assumptions that the public was likely either to panic and overreact or to be overly complacent in the face of disaster, the denial, omission, or manipulation of information is precisely the wrong way either to avoid public panic or to ensure compliance with official recommendations. Indeed, such information withholding is likely to backfire and subvert the government’s alleged goals.

Some sociologists have suggested, for example, that by withholding information, government may, in fact, spur panic where little would otherwise have

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262. See Doyle, *supra* note 223, at 198 (documenting instances of shadow evacuation).

263. See generally Sun, *supra* note 152, and sources cited therein.

264. See *id.* at 1140–48.

265. See LASKER, *supra* note 73, at 33.

existed.<sup>266</sup> Moreover, as Part I detailed, withholding disaster information from the public tends to undermine public trust, which in turn undermines public compliance with government disaster recommendations.<sup>267</sup>

Social science also suggests that the best remedy for potential problems such as “warning fatigue” is more public information, rather than less. Thus far, studies of the “cry-wolf” problem have demonstrated that “false alarm[s] that lead[] to the public taking a protective action such as evacuating” do not significantly affect compliance rates with future warnings so long as “the bases for the warning and reasons for the ‘miss’ are told to the public in question and understood by them.”<sup>268</sup> That is, if the public understands why the false alarm occurred—and the uncertainty public officials faced when deciding whether to issue that warning—the false alarm will not significantly lower future warning compliance.<sup>269</sup> These findings suggest that more information, in the form of adequate explanations *ex ante* of the uncertainty surrounding warnings and of the reasons the threat did not materialize *ex post*, is likely to be the best antidote for warning fatigue.

#### d. Enemy Construction Risks a Vicious Cycle

As the events during Katrina demonstrate, the relationship between government control of information and enemy construction can run in two directions. First, government—as described above—can use enemy construction to justify information withholding. Second, as Katrina illustrates, the government can attempt to use whatever control over information it has to shape the public narrative of disaster in order to construct enemies. Official overplaying of the risks of postdisaster violence—itsself a form of information distortion—was key to the demonization of Katrina survivors and their construction as a wartime enemy.<sup>270</sup> Moreover, while the media were, without doubt, key propagators of the wartime imagery of Katrina, restrictions on journalists attempting to document

266. See BARRY, *supra* note 214, at 336 (describing how, during the 1918 flu epidemic “the more officials tried to control [public fear] with half-truths and outright lies, the more the terror spread”); Clarke & Chess, *supra* note 244, at 1001–03 (citing 2001 anthrax incident); Glass & Schoch-Spana, *supra* note 258, at 218 (arguing that, “to the extent it exists,” panic in disasters may be “iatrogenic,” spurred by emergency measures (like suppressing information) meant to contain it).

267. See *supra* notes 91–96 and accompanying text.

268. John H. Sorenson & Barbara Vogt Sorenson, *Community Processes: Warning and Evacuation*, in HANDBOOK OF DISASTER RESEARCH, *supra* note 215, at 196–97; see also Sorenson & Mileti, *supra* note 215, at 51 (finding “little research evidence” of the “cry-wolf syndrome”). But see Randolph Burnside, Op-Ed., *The ‘Cry Wolf’ Danger*, N.Y. TIMES, Sept. 6, 2012, <http://www.nytimes.com/roomfordebate/2011/08/29/what-did-we-learn-from-irene/the-cry-wolf-effect-after-hurricane-irene> (arguing that “crying wolf syndrome is very real and can blind people to real threats”).

269. See Sorenson & Sorenson, *supra* note 268, at 196–97.

270. See *supra* notes 229–231 and accompanying text.

clashes between security forces and alleged looters<sup>271</sup> may nonetheless have helped government officials perpetuate this narrative of Katrina survivors as aggressive enemies of public order, rather than victims. Similarly, attempts by the federal government to prevent the press from taking pictures of the bodies of Katrina's victims helped suppress information that might have countered the notion that the citizens of New Orleans were aggressors and enemies rather than victims.<sup>272</sup>

This phenomenon suggests the possibility of a vicious cycle in which information control aids enemy construction, and the constructed enemies can then be invoked to justify further information control and withholding. Thus, government attempts to manipulate information to create new enemies warrant both heightened skepticism and heightened concern.

One might question, of course, how effective the government will be at this (or any) attempt to control disaster information flow and shape the public narrative of the disaster. Without doubt, the government faces numerous obstacles to effective information control. First, the government is not monolithic and, despite frequent attempts to centralize control of public risk communication during disasters, conflicting messages from different levels of government, or different agencies, or even different officials within one agency, are quite likely, especially if an official is deviating from predisaster planning guidance about particular risks. Second, with the advent of the internet, social media, and ubiquitous cell phone cameras, other communicators can now access and distribute firsthand information that the government might once have controlled. Third, while some kinds of disasters are quite opaque in terms of the public's ability to gauge their own risks (such as a potential meltdown inside a damaged nuclear power plant), others are more transparent, and the public will be able to compare the government's information message to their own experiences. All of these arguments suggest that, at most, the government can hope to delay, rather than completely prevent, the dissemination of truthful information about risk.

Nonetheless, the persistence of the early reporting vilifying Katrina survivors suggests that early perceptions of a disaster may have remarkable staying power. There is also good reason to think, for instance, that the president has a powerful first-mover advantage in framing an ongoing disaster. As Justice Jackson once wrote, in an emergency, the "drama, magnitude, and finality [of the president's] decisions so far overshadow any others that almost alone he fills the

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271. See *supra* note 135 and accompanying text.

272. See *infra* notes 286–288 and accompanying text.

public eye and ear.”<sup>273</sup> The same may be true of some charismatic governors at the state level. Additionally, while social media could well prove to be a game changer in more transparent disasters in which connectivity is maintained, the Japanese earthquake and tsunami serve as a poignant reminder that, even today, disasters can devastate communication infrastructure and that, for those most affected, radio is often the only effective channel for public communication that remains.<sup>274</sup>

#### e. Enemy Construction Targets the Poor and Minorities

Finally, as the experience of Hurricane Katrina suggests, the segments of the population most likely to be singled out as “enemies” during a disaster are poor minority communities and individuals. The identification of enemies is likely to follow predictable paths, influenced by both racial and class prejudice.<sup>275</sup> Indeed, enemy construction is likely to be the most powerful, persuasive, and compelling as a justification for information withholding when the enemy is a clearly delineated, “well-defined” “other”<sup>276</sup>—an other that unambiguously excludes most of the affected population.<sup>277</sup> Additionally, vulnerable groups are particularly likely to be constructed as enemies because they are often the most distrustful of government and thus the most likely to question and resist compli-

273. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

274. See Izumi Aizu, *Japan: In the Aftermath of the Tsunami*, in GLOBAL INFORMATION SOCIETY WATCH 156, 156–57 (Alan Finlay ed., 2011), available at [http://giswatch.org/sites/default/files/gisw\\_-\\_japan.pdf](http://giswatch.org/sites/default/files/gisw_-_japan.pdf) (describing how the hardest-hit areas became “information black holes” for periods ranging from a week to more than a month).

275. Cf. Sun, *supra* note 152, at 1149 (discussing the possible role that class and racial prejudice played in the public’s willingness to credit reports of widespread post-Katrina violence in New Orleans).

276. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1037 (2003).

277. *Id.* (arguing that “in times of crisis, when emotions run high, the dialectic of ‘us–them’ . . . allows people to vent fear and anger in the face of (actual or perceived) danger and to direct negative emotional energies toward groups or individuals clearly identified as different”). Experience in Katrina and other disasters bears out this conclusion. See, e.g., Gerwin, *supra* note 149, at 136 (“The history of government response to serious threats of disease has frequently included narratives about majorities marginalizing minority populations and government derogating the rights . . . of the marginalized populations.”); see also *id.* at 138 (quoting BARRY, *supra* note 214, at 394–95 for the proposition that blaming “the poor for their own suffering” gave the elite during the 1918 flu pandemic “some feeling of control, some feeling that the world still made sense”). In the aftermath of Katrina, for example, the New Orleanians who were constructed as enemies—looters and criminals—were overwhelmingly poor and black. See, e.g., RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 39–49 (2009) (describing media portrayals of black Katrina survivors “looting,” while white survivors were portrayed as “finding” food).

ance with government recommendations.<sup>278</sup> This result is particularly troubling given that the impacts of disaster are already typically concentrated on poor and minority populations,<sup>279</sup> who may then also be both demonized and deprived of information about the very substantial risks they face.

## B. War Zones

In addition to encouraging enemy construction, the rhetoric of war encourages and justifies public officials' transformation of disaster-affected public spaces into war zones where information is controlled and from which the public and press are partially or wholly excluded. While there is little doubt that areas ravaged by disaster can resemble a war zone—a place where there is both devastation and ongoing danger—and that some access restrictions are justified by genuine safety concerns, labeling domestic disaster sites as “war zones” tends to suggest to the official mind that they have both unfettered power and compelling justification to close such areas to public scrutiny. This war mentality may embolden public officials in adopting overbroad limitations on access to the area, and the war framing may help disguise other, less public-serving motivations for such access limitations. Limited public and press access to disaster sites, in turn, limits public information about the incident, response measures taken to manage the disaster, and the ongoing risks to public safety. This “war zone” transformation has been observed in the aftermath of Katrina, during wildfires, and in the response to the BP oil spill.

The repeated identification of post-Katrina New Orleans as a “war zone,”<sup>280</sup> and the heavy military and police presence that rhetoric justified, likely contributed to restrictions on journalists' ability to observe and document the official response, as well as the terrible human toll of the disaster. At least some journalists in post-Katrina New Orleans encountered official resistance from both military and law enforcement personnel to their attempts to cover the Katrina disaster and the bungled governmental response. NBC News anchor Brian Williams, for example, reported that a sergeant prevented him from photographing a National Guard unit “taking up positions outside a Brooks Brothers on the edge of the

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278. LASKER, *supra* note 73, at ii (describing higher levels of distrust of disaster information among African Americans, Hispanics, and lower-income individuals).

279. *See, e.g.*, DANIEL A. FARBER ET AL., *DISASTER LAW AND POLICY* 204 (2d ed. 2010) (describing how disasters expose the social vulnerabilities of racial minorities and the poor and magnify social injustice).

280. *See supra* notes 161–164 and accompanying text.

[French] Quarter.”<sup>281</sup> Williams later protested that he could not imagine any justification for preventing him from “reporting in a calm and heavily defended American city.”<sup>282</sup> Williams also recounted how an “out of town” police officer who “apparently . . . thought reporters were encroaching on the scene” of a post-Katrina fire, “raised the muzzle of her weapon and aimed it at members of the media . . . obvious members of the media . . . armed only with notepads.”<sup>283</sup> Even after the New Orleans Convention Center and Superdome were secured, journalists reported that the National Guard refused journalists access to those shelters.<sup>284</sup>

Moreover, much like Pentagon attempts to restrict media photographs of “flag-draped caskets returning from Iraq,”<sup>285</sup> FEMA attempted to dissuade journalists from photographing the bodies of Katrina victims, thereby discouraging journalists from capturing and conveying the full impact of the storm.<sup>286</sup> Some Louisiana officials may have taken this policy further,<sup>287</sup> as one Washington Post reporter described overhearing a “sergeant from a state agency telling a camera crew allowed on a boat in a flooded area near downtown New Orleans: ‘If we catch you photographing one body, we’re going to bring you back in and throw you off the boat.’”<sup>288</sup> This apparent attempt to downplay the true human cost of the disaster on those left behind in New Orleans, while overplaying the violence of Katrina survivors and constructing post-Katrina New Orleanians as lawless enemies of public order, is in some respects the most pernicious combination imaginable, as it both minimizes the suffering of victims (thus minimizing government responsibility) and implicitly blames the victims themselves for whatever suffering did occur.

Wildfires provide other examples of the transformation of public areas affected by disaster into disaster war zones to which public access is limited. The wildfire war zones, from which members of the press are often excluded and residents may be forcibly evacuated, can extend well beyond those areas directly affected by the fire.<sup>289</sup> During the 2002 Biscuit Fire in southern Oregon, “[t]he entire Siskiyou National Forest—over 17,000 square miles—was closed to the

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281. Brian Williams, *Daily Nightly: Predicting Disaster*, MSNBC.COM (Sept. 7, 2005, 4:30 PM), <http://www.msnbc.msn.com/id/9216831>.

282. Howard Kurtz, *Standing in the Way of a Good Story*, WASH. POST, Sept. 9, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/08/AR2005090802121.html>.

283. Williams, *supra* note 281.

284. *See* Kurtz, *supra* note 282.

285. *Id.*

286. *See id.*

287. *See id.*

288. *Id.*

289. Ingalsbee, *supra* note 149, at 278.

public.”<sup>290</sup> As one former firefighter and longtime observer of federal firefighting policy observed:

Armed federal agents, at times even supplemented with actual military personnel, enforce the [sweeping] closures to ensure that members of the public or the press do not infiltrate into fire camps or combat zones. Much as occurred on the Grenada invasion and the Gulf War, reporters are herded around fires in official press pools. . . . In this militarized situation of highly restricted access and tightly controlled information, the public is utterly dependent on the government’s version of events.<sup>291</sup>

Restrictions on media access to several wildfires raging in the western United States during the summer of 2012 are illustrative of these concerns. During the June 2012 High Park Fire west of Fort Collins, Colorado, Larimer County Sheriff Jeff Smith—who said that firefighters’ efforts in his county were not a “single battle” but a long “campaign”<sup>292</sup>—prevented journalists from accessing evacuated areas for eleven days, a restriction that reports described as “unusual . . . even for this state, where local officials have extensive powers at fire scenes and journalists are usually kept miles from the flames.”<sup>293</sup> Elsewhere, in Washoe County, Nevada, a photojournalist documenting a local “brush fire . . . was roughed up, handcuffed and cited for obstruction.”<sup>294</sup>

The response to the BP oil spill was also marked by the transformation of public beachfront and waters into war zones where public access was sharply curtailed. The New York Times reported that “[j]ournalists struggling to document the impact of the oil rig explosion have repeatedly found themselves turned away from public areas affected by the spill, and not only by BP and its contractors, but by local law enforcement, the Coast Guard and government officials.”<sup>295</sup> Indeed, while many access restrictions and gags on speaking with BP employees may have

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290. *Id.* (“Citizens could not set foot anywhere on the forest, even on areas several miles away from the wildfire or any suppression activities.”).

291. Timothy Ingalsbee, *The War on Wildfire: Firefighting and the Militarization of Forestry*, FIRE-ECOLOGY.ORG, [http://www.fire-ecology.org/research/war\\_on\\_wildfire.htm](http://www.fire-ecology.org/research/war_on_wildfire.htm) (last visited Mar. 11, 2013).

292. Joey Bunch & Kieran Nicholson, *Colorado Wildfire: High Park Fire Hits 58,770 Acres Even As Winds Calm*, DENVER POST (June 19, 2012, 5:13 AM), [http://www.denverpost.com/recommended/ci\\_20886632](http://www.denverpost.com/recommended/ci_20886632).

293. Dan Elliott, *Public to Get First Close Look at Big Colorado Wildfire*, AP BIG STORY (June 20, 2012, 6:01 AM), <http://bigstory.ap.org/article/law-enforcement-restricts-media-wildfire-coverage>.

294. *Id.*

295. Jeremy W. Peters, *Efforts to Limit the Flow of Spill News*, N.Y. TIMES, June 9, 2010, at A20.

originated with BP, ample evidence suggests that local officials were often complicit with BP in enforcing these restrictions.<sup>296</sup>

The Coast Guard itself, moreover, established a sixty-five-foot “safety zone,” making it a federal felony to come within sixty-five feet of a boom or “oil spill response operations” without explicit authorization from the Coast Guard.<sup>297</sup> An Associated Press reporter noted the parallels to embedded reporters covering military campaigns in Afghanistan, explaining that “[t]here is a continued effort to keep control over the access . . . [a]nd even in places where the government is cooperating with us to provide access, it’s still a problem because it’s still access obtained through the government.”<sup>298</sup> It is difficult to escape the conclusion that the notion that the country was at war—at times with the oil, at times with BP, and at times with intermeddlers like the press who might impede the official response operations—emboldened government officials to limit the public’s ability to witness and document both the scope of the harm and any flaws in the government response. Indeed, Admiral Thad Allen explicitly used the rhetoric of war to justify the overreaching access restrictions.<sup>299</sup>

### C. The “Fog of War”

During disasters, public officials have frequently invoked the “fog of war” to characterize the difficulties of obtaining accurate and complete real-time information as a disaster unfolds. For example, Gregory Jaczko, Chairman of the U.S. Nuclear Regulatory Commission, described the lack of accurate information at the height of the Fukushima crisis as the “fog of war.”<sup>300</sup> While there are indeed some similarities between the challenges of obtaining full, accurate, timely infor-

296. *See, e.g., id.* (describing how a local sheriff informed reporters to whom a BP contractor refused beach access that “news media had to fill out paperwork and then be escorted by a BP official to get access to the beach”).

297. *See* Press Release, U.S. Gov’t, Coast Guard Establishes 20-Meter Safety Zone Around All Deepwater Horizon Protective Boom; Operations (June 30, 2010), <http://www.restorethegulf.gov/release/2010/06/30/coast-guard-establishes-20-meter-safety-zone-around-all-deepwater-horizon-protect>. The restrictions on boom access were modified after journalist protests. *See* Press Release, Nat’l Press Photographers Ass’n, Coast Guard Lifts Boom Ban; Announces New Media Procedures (July 13, 2010), <https://nppa.org/news/875>.

298. Peters, *supra* note 295 (quoting Michael Oreskes, Senior Managing Editor at the Associated Press).

299. *See infra* note 303 and accompanying text.

300. Brian Wingfield, *Fukushima Disaster Left U.S. NRC Confused, Documents Show*, BLOOMBERG NEWS, Feb. 27, 2012, <http://www.businessweek.com/news/2012-02-27/fukushima-disaster-left-u-s-nrc-confused-documents-show.html> (“The transcripts highlight what Jaczko called the ‘fog of war’ as the agency responded to the world’s worst nuclear disaster in 25 years. The agency’s information about developments, provided by local officials, news media and Tokyo Electric Power Co., owner of Fukushima Dai-Ichi, created a chaotic environment where details weren’t always accurate.”).

mation during wars and during disasters, invoking the “fog of war” during disasters can disguise the fact that at least some disaster communication difficulties are caused by inadequate predisaster preparation<sup>301</sup> and can quickly become an excuse for delaying the conveyance of existing (albeit incomplete) information,<sup>302</sup> or for being sloppy about tailoring access limitations to the true exigencies at hand. In one notable instance, Admiral Thad Allen, who led the federal response to the BP spill, implicitly acknowledged that the restrictions imposed on public access to damaged beaches and waters—including making it a federal felony to be near a boom—were overbroad and confusing, but then explained that “[t]hings happen in the fog of war.”<sup>303</sup>

### CONCLUSION

As demonstrated above, the expansion of wartime transparency exceptionalism is more extensive than has previously been appreciated, and its invocation in nonthinking-enemy disasters carries with it ramifications that are, as a practical and theoretical matter, as serious, if not more serious, than those that have been the exclusive focus of our constitutional dialogue on war exceptionalism for the last decade. The melding of war and disaster, reflected in both legislation and official rhetoric, leads the government to construct enemies from whom it can justifiably withhold information, to transform public spaces into war zones from

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301. Cf. Laurie A. Johnson & Robert B. Olshansky, *Recovery of the Whole Community* (unpublished manuscript), available at [https://www.riskinstitute.org/peri/images/file/symposiums/Community\\_Recovery\\_from\\_Disaster/introduction-day1.pdf](https://www.riskinstitute.org/peri/images/file/symposiums/Community_Recovery_from_Disaster/introduction-day1.pdf) (suggesting postdisaster planning as an antidote to the “fog of war” that occurs “during an emergency and the early days following a disaster” because “actions often must happen fast [sic] than information flows”).
302. See, e.g., CHRISTOPHER COOPER & ROBERT BLOCK, *DISASTER: HURRICANE KATRINA AND THE FAILURE OF HOMELAND SECURITY* 131–33 (2007) (suggesting that during the Katrina disaster, Matthew Broderick, a “retired Marine brigadier general” who served as Director of the Homeland Security Operations Center (HSOC) during the catastrophe and was one of the White House’s chief advisors, was so wary of “‘the fog of war’ and the unreliability of first reports” that he delayed conveying key information about the failure of New Orleans’ flood control system to the White House because the reports (which “included eye-witness information, ground details with multiple corroborating sources, and even facts gathered specifically by people reporting directly to the HSOC”) did not meet his “rigorous standard” for confirmation); Joe Hagan & Joseph T. Hallinan, *Why Levee Breaches in New Orleans Were Late-Breaking News*, WALL ST. J., Sept. 12, 2005, [http://online.wsj.com/public/article/SB112649152397237699-8\\_20060912.html](http://online.wsj.com/public/article/SB112649152397237699-8_20060912.html) (quoting, as explanation for the Army Corps of Engineers’ delay in disseminating information about breaches of New Orleans’ flood control system, the assertion of Corp spokesman John Rickey that “the ‘fog of war’ and ‘massive logistical problems with communications in the hours after the storm hit’ created some confusion”).
303. SAFINA, *supra* note 193 at 277. Other than citing the “fog of war,” Allen did not explain why the federal government chose to criminalize proximity to the booms rather than creating a narrower prohibition on vandalizing or otherwise damaging the booms. *Id.* at 276–77.

which citizens and press can be more easily excluded, and to invoke “fog of war” excuses for communication failures. The aggregation of war with these dissimilar disasters that lack a thinking enemy is particularly troubling because it subverts the background norm of transparency that should exist during disasters and is likely to distract from or overshadow the more careful and nuanced balancing of other competing values that might warrant narrower exceptions to this norm.

Now is the time to use this new awareness of the conflation of war and disaster to critically assess the tone and language used to convey disaster information and policy, the care with which legislative exceptions to transparency are crafted, the common treatment of disparate types of events in emergency power legislation more generally, and the structure of agencies and entities with responsibilities during these critical times.