

22ND ANNUAL EDWARD V. SPARER SYMPOSIUM

TERRORISM AND THE CONSTITUTION: CIVIL LIBERTIES IN A NEW AMERICA

FOREWORD

Susan J. Feathers and Michael Cooke***

He who sacrifices freedom for security is neither free nor secure.
—Benjamin Franklin

The 22nd Annual Edward V. Sparer Symposium, *Terrorism and the Constitution: Civil Liberties in a New America*, which was held on March 6, 2003 at the University of Pennsylvania Law School, honors its namesake Edward V. Sparer, former Professor of Law and Social Policy at the University of Pennsylvania. Sparer, a pioneering poverty lawyer, dedicated his life to serving the underrepresented and empowering the poor and oppressed members of our society.

In 1963, Sparer founded Mobilization for Youth Services, the first neighborhood legal services program. Two years later, he established the Columbia Center on Social Welfare, Policy and the Law, the first national support center to appear before the United States Supreme Court. As a litigator, Professor Sparer helped shape the public policy agenda in welfare and civil rights for an entire era. Until his untimely death in 1983, he remained active in the struggle for civil rights and legal services and served as a mentor, teacher, and advisor to countless numbers of poverty law attorneys and students.

Sparer's legacy continues. Indeed, he developed a resilient and enduring model for public interest lawyers. Indeed, he conceived of a comprehensive agenda for poverty lawyers that combined direct legal services with impact litigation and client empowerment. He understood that enduring social change could only be achieved by challenging the institutional structures that create and maintain poverty.

* Director, Public Service Program, University of Pennsylvania Law School. In addition to hosting the Annual Edward V. Sparer Symposium, Penn Law School's Public Service Program coordinates the mandatory pro bono requirement, the Public Interest Scholars Program, and public interest programming at the Law School. For more information about the Program, please visit www.law.upenn.edu.

** Program Fellow, Public Service Program, University of Pennsylvania Law School.

Sparer's vision of public interest law as part of a larger transformative movement for social change, is as timely in 2004 as it was in the 1960s. There can be no doubt that following the troubling aftermath of 9/11, the U.S. government has rebalanced security, liberty and free expression interests in ways that contravene constitutional and human rights. Indeed, within three months of 9/11, the expanded role of the government led to the racial and ethnic profiling of thousands of men of Middle Eastern heritage; military detention of U.S. citizens without access to counsel; and limited public access to important health, safety, and environment information. These actions have raised major concerns about human rights for migrants, asylum seekers, political activists, and the media.

Responding to these concerns lawyers from a wide range of organizations including the Center for Constitutional Rights, the American Civil Liberties Union, and Amnesty International have litigated numerous challenges to government attempts to restrict civil liberties including cases challenging the constitutionality of the USA PATRIOT Act, the executive detention of citizens, and the treatment of refugees seeking asylum.

Kim Scheppelle's article, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, discusses the traditional concept of the state of exception and then compares it to the situation in the post-9/11 United States. As Scheppelle demonstrates, the state of exception "has referred to the situation in which a state is confronted by a mortal threat and responds by doing things that would never be justifiable in normal times, given the working principles of that state."¹ Traditionally, the state of exception is most dramatically pronounced right after the triggering event and then gradually recedes over time. Scheppelle argues that in this case, "[i]nstead of declining over time, the number of efforts to claim exception . . . has in fact *increased* over time as the shock of 9/11 fades."² She examines two areas in which the administration has been the most aggressive in claiming exception. The first is the domestic arena where, she argues, the administration has consistently and methodically taken action to ease the constraints the Constitution imposes on criminal investigations and prosecutions. The other area Scheppelle examines is that of foreign policy, where she contends that the United States has relentlessly stretched the bounds of international law in order to achieve its policy objectives. Finally, Scheppelle observes that the United States' European allies have responded to the crisis of terrorism very differ-

¹ Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1004 (2004).

² *Id.* at 1051.

ently. She posits that this is because their experience with fascism has left them highly sensitive to threats to the rule of law.

Michael Wishnie has contributed an article entitled, *State and Local Police Enforcement of Immigration Laws*, which is highly critical of the current administration's efforts to involve state and local law enforcement agencies in the investigation and prosecution of immigration offenses. Wishnie argues that the administration's determination that state and local police possess the "inherent authority" under federal law to make immigration arrests has no basis in law. He asserts that the FBI's use of the NCIC database to disseminate immigration status information to state and local police is also unlawful. Finally, he contends that the involvement of state and local law enforcement agencies in the enforcement of federal immigration law will exacerbate problems of racial profiling and selective enforcement.

Carl Tobias's article, *Punishment and the War on Terrorism*, critiques President Bush's unilateral executive order to create military tribunals and to detain thousands suspected of terrorism following the 9/11 attacks. His executive order concomitantly contravenes separation of powers, infringes on the civil liberties of detainees, and flouts established international law. A cost-benefit analysis suggests that the regimes' adverse impacts, particularly on civil liberties, far outweigh their miniscule viability. The author recommends that the Bush administration implement mechanisms which recify the harmful effects of prolonged detention and deploy a more finely calibrated evaluation which attempts to maximize national security, civil liberties, and separation of powers. In addition, Congress should consider eliminating or curtailing those aspects of the USA PATRIOT Act that govern detentions.

We hope that these articles as well as the presentations given by participants in the 22nd Annual Edward V. Sparer Symposium will inform and inspire future generations of civil rights lawyers to preserve our core liberties and values after 9/11, and will stand out as the true defenders of democracy.