

# FEAR AND THE REGULATORY MODEL OF COUNTERTERRORISM

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In the aftermath of the terrorist attacks of September 11, two models of government response dominated public discussion. One model vests the criminal justice system with the authority to combat terrorism. The FBI and local authorities track down the terrorists; lawyers prosecute and defend them in courts; judges and juries try them; prisons await them. If terrorists or their associates reside abroad, American officials apply for extradition under existing treaties. Another model vests the military with the authority to combat terrorism. While the military pursues terrorists overseas, local officials exercise emergency powers to detain, search, and interrogate. The government does not so much punish the terrorists as disrupt their networks, harass their supporters, and defeat them on the field of battle. Authorities may use propaganda and censorship, and may abrogate civil liberties to a limited extent.

A third model of government response to terrorism has received less attention. This model views terrorist threats as risks to public health and safety, risks that call for a bureaucratic response. Unlike the military and law enforcement models, the third model, the regulatory model, focuses on the need for long-term reform of regulatory agencies, such as OSHA, EPA, and FDA.

Regulatory agencies have jurisdiction over countless activities vulnerable to, or related to, terrorist attacks, and they have increased their counterterrorist regulatory activity dramatically in the months since September 11. OSHA has issued guidelines for the handling of mail that potentially

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contains anthrax spores.<sup>1</sup> FAA is evaluating new security standards for airports.<sup>2</sup> Bank regulators have cracked down on financial institutions used by terrorists to launder money.<sup>3</sup> EPA and DOE have reappraised the security needs of utilities, factories, and shipping companies that handle hazardous materials.<sup>4</sup> FDA and CDC have taken a new look at the supplies of antibiotics and vaccines.<sup>5</sup>

Much regulatory activity, however, predates September 11. A recent GAO report describes earlier preparations undertaken by government agencies, focusing on coordination among federal agencies and with state and local agencies, and the development of response teams designed to contain an attack involving weapons of mass destruction.<sup>6</sup> GAO has paid less attention to more humdrum regulatory efforts to make workplaces, buildings, bridges, tunnels, dumps, and other locations more secure against terrorist attack, although the security of computer networks and air travel has received scrutiny.

The regulatory model, then, is not an innovation; it describes a longstanding element of the government's response to the threat of terrorism. It thus deserves more public and academic attention than it has received.<sup>7</sup> This Article examines the regulatory model, with special attention paid to the ways this model illuminates the problem of fear and mass panic provoked by terrorist attacks. I will emphasize the difference between using regulation to minimize *risks* that people fear, and using regulation to reduce *fear*. Both are difficult, but the

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1. See Occupational Health and Safety Admin., *Anthrax in the Workplace: Risk Reduction Matrix*, available at <http://www.osha.gov/bioterrorism/anthrax/matrix/index.html> (Nov. 26, 2001).

2. See *Largest U.S. Trade Association for Pilots Reacts to White House Aviation Security Plan*, PR NEWSWIRE ASSOCIATION, Sept. 27, 2001.

3. See Thomas P. Vartanian, *Sept. 11 Attacks Illustrated New Risks to Banking System*, AM. BANKER, Nov. 2, 2001, at 17.

4. See Heather Dewar, *When Chemical Safety Is a Matter of Security*, BALT. SUN, Oct. 17, 2001, at A1.

5. See Melody Petersen & Robert Pear, *U.S. Acts to Increase Supply of Drugs to Counter Anthrax*, N.Y. TIMES, Oct. 18, 2001, at A1.

6. See U.S. GEN. ACCOUNTING OFFICE, *COMBATING TERRORISM: SELECTED CHALLENGES AND RELATED RECOMMENDATIONS*, GAO-01-822 (2001).

7. Most academic work I have found takes for granted the military or law enforcement models. See, e.g., Yonah Alexander, *Terrorism in the Twenty-First Century: Threats and Responses*, 12 DEPAUL BUS. L.J. 59 (1999/2000); IAN O. LESSER ET AL., *COUNTERING THE NEW TERRORISM* (1999).

latter is more ambitious and offers the most hope for undermining the use of terror to achieve political objectives.

### I. PRELIMINARIES: TERRORISM AND TERROR

[T]errorism [is] a distinctive mode of unconventional psychological warfare aimed ultimately at bringing about a climate of fear and collapse in an incumbent regime or target group.<sup>8</sup>

The regulatory model invites one to draw analogies between terrorism and other sources of risk. Manufacturing processes pose risks to workers; OSHA obliges employers to take health and safety precautions. Factory pollution creates health risks for nearby residents; EPA obliges factories to install scrubbers or clean up spills. If these analogies hold, then agencies should recognize that terrorism poses similar risks to the health and safety of American citizens. Although the terrorists themselves are often out of reach, agencies can require manufacturers, trucking companies, railroads, hazardous material storage facilities, airlines, and other businesses to take precautions that minimize the risks to consumers, workers, bystanders, and other individuals.

In some ways, these analogies are simple. OSHA's decision whether to regulate the handling of mail is similar to its decision whether to regulate the handling of hazardous chemicals. If the risk of contracting anthrax or another disease or injury from handling mail is high enough, and if employers do not have sufficient incentives to protect their employees, then OSHA might have reason to regulate mail rooms. The risk posed by terrorist attack is not in relevant respects different from the risk posed by dangerous machinery or pollution, and the appropriate regulatory response is well understood.

In other ways, however, the analogies are more complex. Although terrorist attacks can kill and injure thousands of people and cause immense damage to property, the essence of terrorism, as the name implies, is not destruction but terror. Destruction is a means to the end, and the end is a psychological effect. Terrorists use terrorism in order to demoralize the citizens and public officials of the target nation

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8. PAUL WILKINSON, *TERRORISM AND THE LIBERAL STATE* 114 (2d ed. 1986).

and to promote their own political goals. Because the terrorists' weapon is fear, the regulatory response to terrorism must make fear the object of special concern.

The central role of fear in the regulatory response to terrorist risks does not make the regulatory model false. Rather, it directs attention to existing regulatory activities that take special account of public fear. One thinks of the regulation of nuclear power plants, toxic waste dumps, carcinogenic pesticides, and air travel. Experience with the regulatory response to fear provoked by these activities provides insights that can be used in formulating a regulatory response to terrorism.

The remaining Parts of this Article discuss three areas of regulation that demand reappraisal in light of the threat of terrorism: cost-benefit analysis, regulatory interventions, and institutional reform.

## II. EVALUATING REGULATIONS USING COST-BENEFIT ANALYSIS

### *A. The Nature of Fear*

Fear is a complex psychological phenomenon, and it sits uneasily with the rational actor premises of standard accounts of risk regulation. One can, without fear, recognize a danger, appraise the risk, and take steps to minimize the risk; this is a purely cognitive response. But a person confronted by a danger frequently has an involuntary emotional reaction. The fearful person experiences a narrowing of attention toward the threat and a disagreeable feeling that he can alleviate only by yielding to the urge to flee.

Although the psychology of fear remains mysterious, some things about fear are relatively well understood.<sup>9</sup> First, a fearful person typically misperceives, or acts as though he misperceives, the magnitude of the risk. Fear interferes with normal Bayesian updating: one can feel fear about, and react disproportionately to, a threat that carries with it small probability of harm. People also treat different but equally

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9. For a discussion, with special attention to risk regulation and citations to the psychology literature, see Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 2002-06 (2001).

frightening risks as though they were the same.<sup>10</sup>

Second, a fearful person has, as observed above, a strong desire to withdraw from the threat. One can think of this desire more formally as a "hedonic cost" that people are willing to pay to avoid. From a normative, cost-benefit perspective, the existence of fear raises the question of whether the government should devote resources to eliminating or reducing fear on the ground that it constitutes a welfare loss. This possibility can be contrasted with the normal practice of using regulation to reduce risks to life, health, safety, and property, not to alleviate directly unpleasant mental states.

Third, fear is contagious: one person can become fearful upon observing that another person is fearful.<sup>11</sup> We talk of bank panics and food safety scares. Although it is rational to withdraw your money from an uninsured bank if other depositors are withdrawing their money, in a real bank panic people are frightened and anxious; they stop thinking clearly. Panics can have powerful psychological and physiological consequences: people fall ill when other people fall ill as a result of false beliefs about exposure to toxic agents.<sup>12</sup>

Each of these elements of fear has special consequences for the regulation of terrorist risks, and we discuss them in turn.

### *B. Fear as Risk Misperception*

Cost-benefit analysis uses what I will call, though mindful of the problems with this concept in probability theory, "objective" probabilities of harm. By this, I mean only that an agency calculates the benefit of a safety regulation using the actual decrease in risk caused by the regulation, rather than the public's perception of the decrease in risk. For example, if a safety device reduces the probability of a fatal automobile accident by one percent, but drivers believe that it reduces the probability by five percent, the agency would use the one percent figure.

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10. See George F. Loewenstein, Elke U. Weber, Christopher K. Hsee & Neil Welch, *Risk as Feelings*, 127 *PSYCHOL. BULL.* 267 (2001). For a discussion of the implications of "probability neglect" for law and public policy, see Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law* (2001) (unpublished manuscript, on file with author).

11. See Steven P. Schwartz, Paul E. White & Robert G. Hughes, *Environmental Threats, Communities and Hysteria*, 6 *J. PUB. HEALTH POL'Y* 58, 63-65 (1985).

12. See *id.*

The divergence between subjective and objective probabilities can cause trouble. If drivers do not learn the true effect of the safety device, they will drive too much or with insufficient care, possibly causing more fatalities than they caused prior to the regulation.<sup>13</sup> In relying on objective probabilities agencies assume that the latter closely enough approximate subjective probability estimates, or else that individuals will soon enough discover the truth as they acquire experience or respond to further regulatory efforts to disseminate information about objective risks. These assumptions are probably justified in normal cases by the difficulty of acquiring data about subjective probabilities and of formulating a regulatory response tailored to individuals' misperception of risks. But terrorist threats aggravate these problems and could force regulators to confront them head on. If the purpose of terrorism is to sow fear, then one of the main effects of successful terrorism will be widespread misperception about the dangerousness of airline travel, tall buildings, public spaces, and the other targets of terrorist attack. Terrorism, then, might call for a special regulatory response, one that takes greater account of public fear than ordinary regulation does. But what should this response be?

In principle, the response should resemble agencies' responses to other risks about which the public is persistently misinformed. Agencies often combat misinformation by providing information to the public or by compelling firms to provide information to the public. However, fear and misinformation are not the same thing. Fearful people with the correct information still act as though the probability of the dreaded risk is higher than it is.

Another possibility is for agencies to overregulate relative to objective risks. If people overestimate the risk of a terrorist attack on a building, then agencies should require buildings to install safety devices that would not be justified by a conventional cost-benefit analysis. But because people who fear a particular threat are insensitive to slight changes in the underlying probability of the harm, they might not change

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13. See Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105 (2000).

their behavior in the desired way.<sup>14</sup>

### C. *Fear as Harm*

In theory, cost-benefit analysis counts as a harm anything that people are willing to pay to avoid. In practice agencies restrict their focus to death, illness, injury, environmental degradation, and property loss. They do not treat the fear of an injury, or of a particularly bad kind of death or injury, as a harm in itself.<sup>15</sup> Yet, as I have argued, the experience of fear is a hedonic loss, and people are willing to pay money in order to reduce their feelings of fear and anxiety. Agencies' neglect of fear probably reflects the difficulty of acquiring reliable data about people's emotional reactions. This response is pragmatic; it has no theoretical basis in the normative underpinnings of cost-benefit analysis.

Because terrorism generates fear, and is intended to do so, it raises the question whether agencies should reconsider their neglect of the costs of fear. If so, how?

Initially, we must distinguish the fear that accompanies the harm itself and the fearful anticipation of the harm. A quick death while asleep involves no emotional trauma; a slow wasting illness does. For these reasons, one might want to treat the latter as worse, that is, as more costly, justifying stricter regulation of the harm-causing agent, than the first.<sup>16</sup> But I want to focus on the anticipatory fear caused by terrorism. After the attack on September 11, people feared traveling by airplane and occupying tall buildings more than they did before. The fear results in a hedonic loss and in costly adjustments, such as travel by automobile. Should regulations be designed to reduce this *ex ante* cost?

The answer depends, in part, on the sensitivity of fear to regulatory efforts to alleviate it. Greater airline safety regulation could reduce the risk of death and, at the same time, people's anticipatory fear. If so, the benefit of the *actual* reduction in fear should be added to the *expected* benefit of lives saved. The two benefits are not necessarily related. Visible but ineffectual regulations might reduce fear but not the risk of

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14. For more discussion of these problems, see *id.*

15. See Cass R. Sunstein, *Bad Deaths*, 14 J. RISK & UNCERTAINTY 259 (1997).

16. See *id.* at 268-69.

death, and invisible but effective regulations might reduce the risk of death but not the fear. The two potential benefits of a regulation, reduction of fear, reduction of injury and death, must be kept distinct.

There is, however, a complication. Fear of a risk appears often to diminish with time and continued exposure to the risk. People do not fear death by automobile accident as much as they fear less frequent kinds of deaths, apparently because they have become psychologically accustomed to this risk. If people can also become psychologically accustomed to small risks of anthrax infection or deaths in other kinds of terrorist attacks, then it might seem wrong to incorporate the fear into the cost-benefit analysis. Costly, visible, intrusive regulation might be justified in the short term by fear, but not in the long term in light of people's capacity to adjust.

This is an attractive possibility, that over time terrorism will stop causing fear, and is no more special than an industrial accident. If so, it calls for no special regulatory response.

#### D. *Fear and Contagion*

I have observed that terrorists aim to spread fear, but they are not so much interested in creating low-level anxiety as creating mass panic and confusion. A recent editorial in a medical journal points out that biological and chemical weapons have limited destructive potential: "[T]he purpose of these weapons is to wreak destruction via psychological means, by inducing fear, confusion, and uncertainty in everyday life. . . . It is customary to expect large scale panic if such weapons are ever effectively deployed or thought to be deployed."<sup>17</sup> The authors provide examples of such panics in the wake of the anthrax scare, where groups of people, primed by their anxiety about anthrax, would fall ill after being exposed to a harmless substance mistakenly thought to be a biological agent.<sup>18</sup> The psychological literature contains many descriptions of similar incidents in which numerous people fall ill after being exposed as a group to a substance mistakenly thought to be

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17. Simon Wessely, Kenneth Craig Hyams & Robert Bartholomew, *Psychological Implications of Chemical and Biological Weapons*, 323 BRIT. MED. J. 878, 878 (2001).

18. *See id.*



dangerous.<sup>19</sup>

Some authors argue that governments aggravate the risks of panic by taking visible or unusual steps to combat the underlying risks of harm. Individuals are more likely to panic if they see government agents wearing protective suits, or chemical weapons detectors in subway stations.<sup>20</sup> More generally, one might argue that the risk of panic should act as a multiplier in any cost-benefit analysis: err on the side of regulation because a limited harm, such as a single death from anthrax, could provoke a large-scale panic in which people fall ill, degrade antibiotics as a result of overuse, deplete stockpiles of drugs, avoid public spaces, and refuse to open their mail. The benefits side of a cost-benefit analysis should include avoidance of mass panics as well as the material harms that might provoke them.

All of these suggestions, however, founder on the ambiguity of the phenomenon of panic. We do not know whether chemical weapons detectors would make people more prone to panic, because of false alarms, or less prone to panic, because of the enhanced safety against a remote but terrifying risk. And we have no way of choosing the proper multiplier, because we do not know the probability that a relatively small harm will provoke a mass panic.

Still, regulators' experiences with panics suggest some common-sense precautions. Most important is a rapid response to the terrorist attack and the dissemination of information about the nature of the threat.

### III. REGULATORY INSTRUMENTS FOR COMBATING TERROR

So far, I have assumed that regulators must take fear as a given and regulate against terrorism in a way that is sensitive to people's fears about terrorist risks. The argument above concluded that regulators might need to deviate from standard cost-benefit practice and take account of the hedonic cost of fear, the insensitivity of fear to objective probabilities, and the danger of mass panic.

Now, I ask whether regulators can pursue a more direct

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19. See, e.g., Schwartz, White & Hughes, *supra* note 11.

20. See Wesseley, Hyams & Bartholomew, *supra* note 17, at 878.

course of action: regulate in a way that reduces fear rather than respects it. If people stop fearing terrorist risks more than the other risks of modern life, then terrorist risks become susceptible to standard regulatory practices. The option of reducing fear has many attractions, if it is possible: it reduces the hedonic cost of fear, closes the gap between subjective and objective probabilities, and decreases the risk of mass panic. Ordinary cost-benefit practice, focusing on death, injury, and property damage, and assuming knowledge of objective risks, would apply to regulation of terrorist risk, as it already does for many other risks. Most important, terrorism would lose some of its value to terrorists.

Although recent terrorist attacks bring the problem of public fear to the center of attention, the American government has had to deal with public fear long before September 11. Franklin Roosevelt's warning, "the only thing we have to fear is fear itself,"<sup>21</sup> was provoked by bank panics and the terrors of poverty and disorder during the Great Depression. Growing public awareness of cancer stoked people's fears about environmental degradation and the safety of food. The AIDS epidemic, reports of the Ebola virus, and mad cow disease all caused minor panics. Many people fear everyday activities such as driving, flying, and walking through an unfamiliar neighborhood that has a high crime rate. During the Cold War, people feared nuclear annihilation. And recently, although all but forgotten, many feared that nuclear power plants, electrical grids, airplanes, and the banking system would self-destruct on midnight of December 31, 1999, all victims of the so-called millennium bug.<sup>22</sup> In these and many other cases, public officials have had to struggle with public fear as well as the underlying threat to health and safety. A brief survey of their strategies will be helpful.

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21. Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), in *AMERICAN RHETORICAL DISCOURSE* 720, 720 (Ronald F. Reid ed., 1998).

22. *Year 2000 Computer Problem: Did the World Overreact, and What Did We Learn?*, Joint Hearing Before the Subcomm. on Gov't Mgmt., Info., and Tech. of the House Comm. on Gov't Reform, and the Subcomm. on Tech. of the House Comm. on Sci., 106th Cong. (2001).

### A. Information

I observed that people gripped by fear misestimate risks, so informing them of the magnitude of risks might have little benefit, as long as they remain fearful. Yet fear itself sometimes declines when authorities distribute information about the risks involved. Fears about Y2K diminished as the public learned that the functioning of airplanes, nuclear power plants, and electrical grids does not depend on chronological clocks, or that these systems can be fixed, and, further, that fixes can be easily tested by turning the clocks ahead. Learning that a risk is small, or smaller than everyday risks to which one is accustomed, can calm a person.

But there are limits to the value of information. First, authorities do not always have the relevant information, and the disclosure that they do not have the information can cause people to panic. The anthrax panic resulted, in part, from the government's ignorance about the source of the anthrax letters and its initial confusion about the technological grade of the samples.

Second, authorities often have limited information that is consistent with dangers that are greater than those already feared by the public. If the government reveals this information, panic might result; but if the government does not reveal this information and it later comes out, the government's credibility will decline. Government officials knew early on that highly processed anthrax can be used to kill thousands of people, but they chose not to stress this fact in order to avoid a panic.

Third, the government can reveal information only if the public trusts it.<sup>23</sup> But how does the government maintain its credibility?

### B. Maintaining Credibility

There are two main ways of maintaining and enhancing credibility. The first is signaling, through which the government official subjects himself to a cost if his statements turn out to be false. The head of the FAA alleviated concerns

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23. See Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk Assessment Battlefield*, 1997 U. CHI. LEGAL F. 59.

about aircraft safety during the Y2K scare by promising to board a flight that would be in the air at midnight, December 31, 1999.<sup>24</sup> People reasoned that if this official did not believe her own statements, she would not take the flight.

The second way of maintaining or enhancing credibility is to be repeatedly correct, and consistent. Certain agencies in the U.S. government have excellent reputations for truthfulness, including the National Transportation Safety Board and the Centers for Disease Control. They established this reputation by being right again and again, and by resisting political pressures to stretch the truth. During the Y2K scare, government officials gave consistent stories, and it was important that their stories were also consistent with the views of most independent experts.

Establishing credibility, however, is not always easy. Signaling requires that the official know the truth, and also that he has an opportunity to place his life or his political future on the line. President Bush tried to send a signal by refusing, or implying that he refused, to be tested for anthrax; but unfortunately his statements were ambiguous, and in any event nobody thought he was likely to have been exposed to anthrax spores.

Being consistently right is also possible only if the official has the relevant information and is highly competent. Political leaders are not experts and are not always careful when they speak, so they can end up contradicting themselves and each other, as we have seen during the anthrax scare. Different agencies have jurisdiction over an event, and because they have different experts, different procedures, different standards of proof, and are subject to varying political pressures, they do not always make consistent statements. We have seen the CDC, congressional leaders, the head of the Office of Homeland Security, military officials, the FBI, and unnamed officials make different statements about the potency of the anthrax spores found in various locations. Because not everyone can be right, everyone's credibility suffers.

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24. Stephen Barr & Rajiv Chandrasekaran, *A Dec. 31 Forecast: Mostly Empty Skies; Few Want to Party in the Air*, WASH. POST, Nov. 17, 1999, at A1.

### C. *Reassurance*

Officials reassure the public by telling it that there is little to worry about if one takes precautions, and the government has matters in control. Reassurance differs from information disclosure by involving an evaluative component: these are the facts, and they are not that bad. The power to reassure is subtle, and there is little to say about it at an abstract level.

Unfortunately, the power to reassure cannot be bureaucratized. Franklin Roosevelt had charisma, and was able to reassure the American public during the Great Depression and World War II. Mayor Giuliani has been reassuring because he seems highly competent, very much informed about the facts, candid, and emotionally involved. He has also put himself in harm's way. For calming the public, leadership counts more than regulation.

Reassurance can also conflict with information disclosure and maintaining credibility. Officials early in the anthrax scare sought to reassure the public with optimistic assessments of the extent of the danger; when the anthrax attack turned out to be more extensive and harder to control than first reported, the public was disillusioned. The officials lost credibility and sowed confusion about the nature of the threat. If the facts do not offer grounds for reassurance, or the public understands the threat as well as officials do, official reassurance might not be possible.

### D. *Delay and Adjustment*

People have become accustomed to the risk posed by automobile and air travel, x-rays, various drugs, and vaccines. A large literature on why people fear some risks more than others shows that people fear new risks more than old risks.<sup>25</sup> When people spend a lot of time exposed to a risk, they put it out of their mind.

If there is a lag between the emergence of a new risk and people's adjustment to it, then the best policy will sometimes be to do nothing, and wait for people to adjust. This policy is not exactly do-nothingism, for it involves a special political

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25. See HOWARD MARGOLIS, *DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES* (1997).

skill, that of resisting calls for excessive or counterproductive measures before adjustment has occurred.<sup>26</sup> We do not want officials to craft policy based on misperceptions caused by the public's fear of a new risk; we would prefer officials to resist political pressure and do nothing until the fear diminishes on its own.

### *E. Coercion*

Finally, government can respond to the misperceptions of a fearful public by coercing it. I mean by this that government can interfere with "irrational" responses to terrorist threat when these responses have harmful external effects. Consider, for example, panicked buying of Cipro and other antibiotics in response to the anthrax threat. In one sense, the individuals who buy Cipro are irrational because the risk that they are infected with anthrax is more remote than risks against which the same individuals do not take precautions. In another sense, buying Cipro is a psychologically compelling mechanism for coping with fear. But in either event, stockpiling Cipro poses a threat to the public health if not enough is left for people who are infected; also, if the purchasers ingest Cipro, its antibiotic properties will degrade. A logical response is to more strictly regulate the distribution of Cipro.

One problem with coercion is that it does not alleviate the psychological harm of fear. As a result, people continue to suffer an intrinsic harm, and their risk misperceptions might find outlets in other areas, such as purchasing gas masks that have no effect or refusing to open their mail. Another problem with coercion is that it is politically unpopular. That is the topic of Part IV.

### *F. An Example*

Consider the proposal that the entire U.S. population be vaccinated against smallpox. Experts are critical of the proposal because (1) the risk that terrorists have obtained, or will obtain, smallpox samples is very small; (2) the cost of developing an adequate supply of a vaccine is very high; (3) the existing vaccine, and especially diluted or newly developed versions,

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26. See Clark McCauley, *Terrorism, Research and Public Policy: An Overview*, in *TERRORISM RESEARCH AND PUBLIC POLICY* 126, 137-39 (Clark McCauley ed., 1991).

can have severe side effects; and (4) a smallpox outbreak, while causing severe harm, could be contained through standard public health measures like isolation and limited vaccination of people in the affected area.<sup>27</sup> Further, one can add that (a) the fear of smallpox might wane over time, and so people will stop taking unnecessary precautions; (b) the fears of a vaccinated population might be displaced to another threat, like nerve gas, with no gain in psychological well-being; (c) more limited forms of regulation, such as information disclosure or the creation of safe rooms (as in Israel), might eliminate some unnecessary or ineffective precautions.

But one must ask a further question, which is whether limited forms of regulation falling short of universal vaccination would calm public fears, thus making people subjectively better off, less anxious, and less prone to taking irrational precautions. Stubborn anxiety-provoked misperception about the current risks might cause people to avoid public spaces, purchase gas masks, move to isolated areas, and take other costly or ineffective precautions. In addition, the hedonic cost of anxiety is a harm worth eliminating if vaccination is not too costly and has the desired psychological effect. Finally, even a limited outbreak of smallpox could cause a mass panic, leading to paralysis of the government and the economy. For better or worse, the U.S. government is headed toward universal vaccination.<sup>28</sup>

#### IV. BUREAUCRATIC REFORM?

##### A. *Government Vulnerability To Fear*

Most experts argue that risk regulators should discount the public's inaccurate views and issue scientifically responsible regulations; risks should be evaluated by objective criteria and not public fears. Although this position is more attractive than the contrary view that the public's views are more correct than scientists', it does overlook the problem of public resistance. In implicitly assuming that officials have free rein to regulate, it

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27. See Carol Vinzant, *Scar Search; Amid Smallpox Fear, Many Seek Signs of Childhood Shots*, WASH. POST, Nov. 20, 2001, at F1.

28. David Brown, *U.S. Wants the Smallpox Virus Preserved for Further Research*, WASH. POST, Nov. 17, 2001, at A9.

overlooks that in a democracy the public is in the saddle. When the public is terrified, elected officials gallop.

This problem is distinct from the concern that public officials will, when afraid, make the same errors that the public does. If this is true, then the game is up, though there might be institutional mechanisms for ensuring that cooler heads have authority during mass panics.

On the problem of government deference to public fear, or even politicians' stirring up of public fears for political gain, the record is not reassuring. Regulatory responses to nuclear power, toxic waste dumps, pesticide use, and biotechnology are often driven more by public fear than scientific understanding.<sup>29</sup>

For similar reasons, a democratic government is particularly vulnerable to fear spread by terrorism. If the public panics, officials who do not panic must still, to some extent, implement policy that the public wants. Yet there are grounds for hope. If terrorism can be normalized, brought into line with the other threats of modern life, and treated like these other objects of government regulation, then people might not react to it irrationally. One attraction of the regulatory model of counterterrorism, compared to the military model and the law enforcement model, is that it seeks to normalize the risk of terrorism. If it succeeds, then it might make terrorism less terrifying for citizens, and less valuable for terrorists.

### *B. Institutional Reform: A Counterterrorism Regulatory Agency?*

Either a special government agency or existing agencies must enact regulations to reduce the risk of terrorist attacks or the resulting harm. Indeed, agencies are already doing this; some examples were given in the introduction. But agencies must also adjust. Because terrorists constantly change their strategies in order to keep the public off guard, agencies must respond more quickly than they are accustomed to, and this might mean that procedural protections and judicial oversight should be limited. In addition, because terrorists are more concerned with sowing fear than causing harm, agencies must pay special

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29. For several examples, see Timur Kuran and Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 583, 691-703 (1999).



attention to the psychology of fear.

Currently, jurisdiction over terrorist risks is divided among many government agencies. The division of labor creates worries about the ability of agencies to regulate terrorist risks. The proper regulation of ventilation systems in office buildings could depend on regulations of the use of vaccines and antibiotics, and yet institutional rivalries or simply the cost of coordination might prevent OSHA, FDA, and CDC from effective cooperation. There is nothing new about the interdependence of the agencies and the overlap of jurisdictions, but the terrorist threat, because terrorists are always searching for new vulnerabilities, heightens concerns about bureaucratic efficiency.

At the same time, a new "counterterrorism agency" vested with authority over all activities that are susceptible to terrorist risks would require radical changes in the current administrative structure, with dubious returns. Conflicts would not be eliminated but displaced. OSHA regulates ventilation in work-places already; if a new agency started regulating ventilation in workplaces likely to be subject to terrorist attacks, and not others, OSHA's job would be enormously complicated.

At this early stage in the war on terrorism, then, it might make sense to create a centralized agency that has the power to intervene in the rulemaking of other agencies, to fund research, to coordinate regulatory activities, to sift intelligence, and to publicize the government's counterterrorist activities. The bureaucracy had been inching toward this solution even before the September 11 attack. The attack finally produced the Office of Homeland Security, the "focal point" or administrative center long recommended by GAO.<sup>30</sup> But many difficult questions remain. The Office currently has little formal power. Should it have the authority to direct agencies to issue needed regulations? Should terror-related regulations be subject to less judicial review, given their time sensitive nature? Should they be shielded from information disclosure rules? Here we see, as we have seen in the law enforcement context, the possibility that traditions of open government might need to yield to the exigencies of security. These questions, and many others, will need to be worked out as experience accumulates.

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30. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 6.

