Extraordinary Solutions

Jonathan Weinblatt

Terrorism is a crime that traditional theories of criminal justice often cannot explain. Establishing punishment for criminal actions is typically a means to deterrence, incapacitation, or a combination of these principles. Through deterrence, the penalty for a crime must be such that it outweighs any estimated gain to the potential criminal, so that he does not attempt the crime. Incapacitation is founded on the notion of precluding crime without appealing to the rational calculation of the individual. Incapacitation is an expensive endeavor, and deterrence is generally a more cost-effective way to combat crime. Each of these theories usually plays a role in setting criminal punishment, but due to the unique nature of terrorism, it is not clear that either is a valid response. First, I consider how deterrence works and whether it is even an option when dealing with terrorism. Second, I examine how deterrence or alternate enforcement measures can be administered. Finally, I analyze how early sanctions may be imposed before the actual commission of a terrorist attack, and how this differs from sanctions for other crimes.

In order to understand the efficacy of deterrence, one must assume the mindset of the person about to commit the crime. In other words, proper deterrence demands an accurate understanding of the criminal's potential payoff as well as his chances of success versus failure. If the individual estimates that he will gain $1,000,000 by committing the act, then the sanction against the act multiplied by the probability of detection must have a perceived value greater than or equal to $1,000,000 in the mind of the potential criminal. It is assumed that this individual will examine the likelihood that he will be caught, calculate the expected penalty, and thereby conclude that he will not benefit from committing the crime.

One method of determining the appropriate punishment or enforcement against a crime is through a utilitarian calculation of costs and benefits. Steven Shavell presents a theory on establishing sanctions so as to maximize social welfare. He recognizes that deterrence is dependent on the psychology of the criminal actor and offers a corresponding explanation for devising the probability and magnitude of sanctions. He notes that, to a risk-averse individual, increasing the

magnitude of sanctions for a crime will have a more substantial deterrent effect than increasing the probability of sanctions to the same degree (Shavell 479-480). In the case of terrorism, I believe that an individual prepared to commit an act of terror is only sensitive to the risk of being caught before commission of the act and completely insensitive to the risk of being punished ex post facto, no matter how severe the sanction. The primary objective of the terrorist is to inflict a great deal of damage, and self-interested sentiments are only secondarily important. Therefore, the likelihood of early detection is the most important concern to a terrorist who is deciding when, where and how to commit his crime. Setting high punishments for terror would have little if any deterrent effect. The appropriate enforcement mechanism against terrorism must focus heavily on increasing the probability of detection before the act and disregard an increase in the magnitude of sanctions. Increasing the probability of detection likely means increasing expenditure on law enforcement personnel and equipment. Unfortunately, this option entails a higher cost and does not guarantee that the terrorist will not strike in another area, but should ultimately be more effective in reducing harm.

Deterrence theory in criminal law consists of using incentives and disincentives to dissuade crime. In a study of terrorism through law and economics, Nuno Garoupa, Jonathan Klick and Francesco Parisi point out that much governmental policy towards the IRA and ETA, two prominent organizations that have committed acts of terror, presupposes that terrorists do care about the magnitude of punishment (2). Simply because government policy believes that the magnitude of punishment is important, however, does not mean that it is in fact the case. If a terrorist cares even a little about the magnitude of sanctions he would face if apprehended, then deterrence can have a role in enforcement against terror. A rational calculation of the expected punishment of terrorism would multiply the probability of detection by the consideration given to the weight of punishment. But if a terrorist gives zero weight to the magnitude of sanctions because he does not care about being punished, then the product of the magnitude and probability of sanctions equals zero in terms of the deterrent effect. In this calculation, the terrorist is not risk-neutral but risk-ignorant and the anti-terror effort to deter the terrorist is ineffective.

Another facet of deterrence theory involves the use of marginal deterrence to impose greater sanctions when the likelihood or magnitude of harm is amplified. Shavell explains that marginal

deterrence can dissuade a more harmful act when the individual is examining different courses of action (518-519). Just as with ordinary deterrence, marginal deterrence assumes that the prospective criminal considers the possibility that he will face some degree of sanctions. As previously noted, this may or may not be the case for terrorism. Marginal deterrence also requires that the penalty for an attempted crime be much less severe than for a completed crime (Garoupa, Klick and Parisi 16). This method is meant to promote an individual's reconsideration of the crime before completion, but it may have the adverse effect of reducing the magnitude of the expected sanction against a terrorist attack. Of course, fear of this adverse effect assumes that terrorists are responsive to the magnitude of sanctions, but that must be presupposed if marginal deterrence is to have any efficacy at all.

It is difficult to generalize regarding terrorists and their motivations before the commission of a terrorist attack. It is likely that certain terrorists are responsive to potential sanctions while others are not. In the specific case of a suicide bomber, the terrorist is impervious to personal punishment because he brings the highest form of criminal punishment upon himself. This ultimate sacrifice is an indication that no sanction exists that is sufficient to deter completion of such a mission, which has value greater than the life of the individual. This feature of terrorism makes it difficult to identify incentives and disincentives that could be used in influencing the decision of a terrorist before he acts. Generally, a suicide bomber maintains a religious belief that he will be rewarded as a martyr in the afterlife, and religious convictions are nearly impossible to reason against. A closer study of different terrorist groups may provide more insight into the calculations made by each organization and hence the motivations affecting the individuals therein. To reiterate, an understanding of the unusual psychology of the terrorist is crucial to determining the best course of action against him.

Another potential problem with direct deterrence of the terrorist lies with the defiant response that legal sanctions elicit. Braithwaite explains the psychological principle that an escalation in the threat of sanctions produces increased deterrence but also increased defiance. He notes that deterrence is the prominent response when the sanction threatens a freedom that is not so critical to the subject, but that defiance is stronger when the sanction impinges upon a freedom of action that is desperately desired (Braithwaite 4-5). Many terrorist acts are motivated by fundamental political beliefs. ETA is

committed to fighting for Basque independence from Spain, the IRA engaged in violent acts in the name of defending Catholic Irish nationalist interests, and al-Qaeda is driven to attack Western influence in the Muslim world. Potential terrorists from these groups and others are wholly committed to the cause and have been known to react with defiance to any attempt to deter them. Braithwaite further explains that fundamentalist figures like Osama bin Laden try to paint the US War on Terror as a war against Islam, thereby evoking widespread defiance among Muslim populations of the Middle East. Since deterrence of terror requires severe sanctions against many personal freedoms, it is already likely to produce some defiance effects. But if terror organizations like al-Qaeda can compound defiance of anti-terror measures, then an escalation in deterrence power may not be worth the corresponding resulting backlash.

If individual deterrence is not an option against terror, then law enforcement agencies must resort to other methods of preventing terror. Put simply, if the threat of punishment is insufficient to deter terrorism, then the law must forcibly stop those who would attempt to perpetrate it. Incapacitation could take the form of imprisonment or preemptive attack on a terrorist cell. Shavell describes incapacitation as a broad range of actions that are totally distinct from deterrence in both application and effects (533). He points out that optimal incapacitation depends on the degree of harm that the crime would cause rather than the probability that the culprit will be apprehended. Determining the extent of incapacitation involves a utilitarian calculation of its costs compared to the harm prevented. Incapacitation measures can reasonably be adopted until the point at which enforcement entails a greater cost than non-enforcement. Unlike deterrence, incapacitation does not rest upon the terrorist's responsiveness to the threat of punishment. Therefore, incapacitation can serve as a more successful method of terrorism prevention in many circumstances.

Although incapacitation is often a better alternative than law enforcement deterrence, it is not the only alternative. Paul Robinson argues that social and moral controls are more powerful than criminal sanctions in eliciting compliance with societal rules (612). Robinson makes this statement with regard to criminal law in general, but his theory may be most salient when considering the motivations behind terrorism and the sanctions against it. For reasons previously mentioned, strict deterrence is uncertain to have a direct effect on the actions of a prospective terrorist. Deterrence constitutes an appeal to the self-

interest of the would-be criminal. The reasons behind the act of terror, however, are most importantly a function of social and moral upbringing rather than a self-interested desire for personal gain. The terrorist will not comply with a societal rule against terror solely due to an appeal to his self-interest. No matter whether the terrorist is prepared to attack others in a foreign country or in his own country, he has little or no responsiveness to legal sanctions. Robinson argues that criminal law is essential to building moral principles, but in the cases of the IRA, ETA or al-Qaeda, terror attacks are driven by non-mainstream political or religious ideologies that do not give credence to official laws. Only when the political system is universally seen as legitimate will it be able to provide moral values to the population. Therefore, political legitimacy is a necessary condition for spreading a moral value against terrorism.

Whether through deterrence, incapacitation or political reform, there is not necessarily one correct answer to dealing with all forms of terrorism. John Braithwaite presents the notion of a responsive regulatory pyramid for determining the appropriate criminal justice action (6-7). He argues for a fluid system of escalation from restorative justice to deterrence and finally to incapacitation depending on the responses encountered. Braithwaite focuses not on the consequential effects of each method, but rather on the appropriateness of each course of action. He believes that if the response is correctly suited to the stimulus, a beneficial result will follow. Braithwaite notes that this hypothesis is more in line with international relations theory than with standard criminal justice logic, but he believes that it is a valuable tactic when dealing with a hostile terrorist entity.

To illustrate his point, Braithwaite presents the case of US relations with the Taliban in Afghanistan after the 9/11 attacks. Although the Taliban offered to negotiate with the US over Osama bin Laden, the US rejected this option and proceeded to war. Braithwaite argues that one must always begin with dialogue at the restorative justice stage of the pyramid before proceeding upward to deterrence, and certainly before undertaking a war of incapacitation (8). He notes that this step must be attempted even if one knows it will not succeed. Such willingness to engage in dialogue, he argues, may have mitigated Muslim antipathy toward the US following the invasion of Afghanistan. Braithwaite's paper, which was written in 2002, shows great foresight regarding current US problems in the Middle East. His message concerning restorative justice as a preliminary stage

of regulation could have future utilitarian value in facilitating the United States' War on Terror.

Braithwaite's argument is subject to some challenges. This argument for dialogue before an escalation of force appears more relevant when discussing negotiations with a foreign nation, and it seems to take a naïve view of terrorism. Would such a method work even when the enemy has no desire for discussion and is not concerned with the legal conventions of war? Braithwaite believes that responsive regulatory theory can compel even the otherwise irrational actor to respond to rational incentives (9). This is contrary to standard deterrence theory, which requires that the target of deterrence be rational and self-interested. It is unclear whether Braithwaite's method can be effective in preventing acts of terrorism when applied to discussion with the individual himself, but his point may be more valid with regard to a terrorist organization.

It is unlikely that an individual who is prepared to inflict harm on others, and possibly on himself, will listen to the voice of reason, but dialogue with the larger group that commissioned the individual may provide insight toward averting such an attack. Although the ideology that drives the individual terrorist emanates from the leadership of the terrorist group, the organizational heads are less extreme than their espousal of violence suggests. The leader of a terrorist group will never put himself in a position of danger, but instead subjects marginal lives to the risks of capture or death. These leaders preach the good of the mission over the life of the individual and yet never sacrifice their own lives. But in this hypocrisy lies a kernel of rationality that can be motivated by appeals to self-interest.

It is important to think in terms of a terrorist organization because it is rare that an individual would commit an act of terror without the financial and moral support of a larger group. There are those who benefit from acts of terror and those who facilitate it. At times, these two groups are one and the same. Sometimes the terrorist's family is compensated ex post facto for the accomplishment of the goal, and this support may be a motivating factor in the terrorist's initial agreement to undertake the attack. Many terrorists are selected because they are in a position of financial despair. These candidates might rationally choose terrorism as the best means to support their families. Cutting off this pipeline could impact this rationality and have a deterrent effect on terrorism. Israel, a country that frequently deals with acts of terror, has laws that prohibit the

dispensing of funds to the family of a suicide bomber and that permit the demolition of property owned by the immediate family of a terrorist (Garoupa, Klick and Parisi 27). Such provisions seek not only to discourage terrorism as a means to support one's family, but also to encourage family members to warn their relatives of such negative consequences. This broadening of the examination of terrorism reveals opportunities for incentives and disincentives that were not otherwise evident.

The other secondary group responsible for terrorism consists of the providers of weaponry and plans for the attacks. This backstage authority renders the terrorist attacker a mere puppet. While the terrorist sacrifices his life or at least his freedom in achieving his goal, the organization gives up very little in accomplishing its objective. Garoupa, Klick and Parisi take note of both active supporters of terror and those who could deter terror but do not, constituting crimes of commission and omission, respectively (4). Even when direct deterrence is ineffective, secondary deterrence can play a role whenever there are rational motivations behind the act. Unlike the direct terrorist, the guiding organization can be motivated by the magnitude of sanctions, whether monetary or otherwise. Although the terrorist himself may have nothing to lose, those higher up in the organization enjoy many privileges that could be taken away. Braithwaite suggests that wealthy Saudi businessmen who may fund al-Qaeda would be particularly susceptible to any deterrence that threatens their material interest in global trade (26). Financiers of terror never sacrifice their own status or life in terrorist operations, so they are quite different from the suicide bomber who shows no sensitivity to severe punishment. However, these individuals are likely to alter their behavior if they too have disincentives to continue funding terrorism.

Like many other crimes perpetrated by groups of individuals, terrorism requires a great deal of trust among members of an organization. One way to combat terror is to undermine the trust necessary for a cooperative relationship. This can be accomplished with the use of plea-bargaining and leniency agreements when dealing with captured terrorist conspirators as a means to form rifts within the organization (Garoupa, Klick and Parisi 14). While the intense indoctrination within most terrorist groups makes members more difficult to turn than other criminals, even a small breakdown in collective trust could have a drastic effect on the effectiveness of the group. If a member of a terrorist unit can be subverted, this can cast suspicion on all members of the organization

and even undermine the trust of those who provide moral and financial support to the group.

Another important aspect of the punishment of terrorism is the determination of when liability can be administered. Paul Robinson examines a case of theft to study basic human intuitions about when during an attempted crime liability should be significant. He found that most subjects do not assign heavy liability until the point of "dangerous proximity," the fifth of six stages toward criminal action when the offense is likely to be completed successfully (Robinson 625-627). Robinson notes that this finding is consistent with the common law legal test for liability. The two initial stages before the crime is complete consist of the thought of the offense without any action and the very basic planning stage. There is never a penalty for simply thinking about committing a crime, but some legal systems would assign "inchoate liability" for a substantial degree of planning towards a criminal act (Robinson 622). Robinson's study found that only 27% of respondents deemed punishment appropriate in this second stage leading up to the theft (629). I wonder whether this late determination of liability would change for the crime of terrorism in support of strong sanctions at a much earlier stage in planning the crime. Support for or opposition to the USA PATRIOT Act, for example, may provide an indication of popular sentiments about imposing sanctions at a very early stage when there is the potential for terrorism.

A study of intuitions about terrorism should elicit a judgment of severe liability even early in the planning process. Because the expected harm of terrorism is much greater than the harm caused by theft, a high sanction should be imposed against terrorism at a much earlier stage than against theft. At an early stage the chance of the crime being completed is fairly low, while at the point of "dangerous proximity" it is a near certainty. To balance the harmful effects of theft versus terrorism, the sanction at a given stage must be much higher for terrorism than for theft. If instead the sanction is held constant, then it must be imposed for terrorism at a much earlier stage of planning, when the probability of completion is significantly lower. This view is a hybrid of Shavell's separate arguments regarding deterrence sanctions and incapacitative sanctions. While combining the two may seem inconsistent from a legal perspective, it makes perfect sense from a utilitarian standpoint.

In large part, terrorism is difficult to eliminate in the world today due to the unusual psychology inherent in a terrorist attack. Law enforcement officials do not think like terrorists and may find

it hard to understand the motives and influences behind an attack. Different from most other crimes, terrorism is rarely undertaken for self-interested reasons, at least not at the individual level. Therefore, a terrorist is usually a poor candidate for deterrence. Nonetheless, even though deterrence may not be able to dissuade the terrorist who is wholly committed to his mission, there are many other individuals with influence on the commission of terror who are responsive to legal sanctions. Wealthy sponsors of terror or relatives of potential terrorists would certainly be deterred by economic or criminal penalties. Even where deterrence fails, incapacitation is a costly but viable option. But beyond these basic methods, alternate strategies such as Robinson's moral and social controls or Braithwaite's responsive regulation offer new ways to stop terrorism before its motivation manifests. Because it causes great harm, terrorism requires steeper sanctions and earlier enforcement than other crimes. Even traditional methods of punishment can be adapted to suit the abnormal terrorist psyche. Terrorism is not an ordinary crime, so we cannot rely upon ordinary measures to curb its commission.

BIBLIOGRAPHY

Braithwaite, John Bradford. "Thinking Critically About the War Model and the Criminal Justice Model for Combating Terrorism." 2002. <http://ssrn.com/abstract=330500>

Garoupa, Nuno M., Klick, Jonathan and Parisi, Francesco. "A Law and Economics Perspective on Terrorism." Public Choice. 2006. Vol. 128. 147-168. <http://ssrn.com/abstract=800705>

Robinson, Paul H. "Testing Lay Institutions of Justice: How and Why?" Hofstra Law Review. 2000. Vol. 28. No. 3. 611-634.

Shavell, Steven. Foundations of Economic Analysis of Law. Cambridge, MA: The Belknap Press of Harvard University Press, 2004.