

**THINKING CRITICALLY ABOUT THE WAR MODEL AND THE
CRIMINAL JUSTICE MODEL FOR COMBATING TERRORISM**

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Abstract

Both the war and criminal justice models are seen as too crude, particularly in their theory of deterrence, for responding to the problem of global terrorism. An alternative regulatory model is advanced that overlays the public health concepts of primary, secondary and tertiary prevention with the ideas of containment (of injustice) and enlargement (of justice). An interconnected web of controls might enable an overdetermined prevention of terrorism that, in spite of its redundancy, might be more cost-effective than the war or criminal justice models because the principle of responsiveness means parsimony in resort to coercive modalities of control

that are expensive. It is possible to have an evidence-based approach to regulating rare events like 9/11 terrorism by applying the principles of evidence-based regulation to micro-elements that are constitutive of macro-disasters. Viewed through this lens, support for the war on terrorism is not evidence-based but grounded in other public philosophies like retribution and arm-chair utilitarianism.

Reconsidering Deterrence

Both the war model for confronting a transnational problem and the criminal justice model share a central commitment to the deterrence doctrine. At the time of writing, US deterrence doctrine with the war on terrorism seems to be based on the idea that it can readily do to other “axis of evil” states what it has done to Afghanistan. Of course it can, but the issue is whether Iran, Iraq or North Korea really believes the US is willing to take the large military losses that would be needed to do an Afghanistan with them. That cynicism aside, of course there is an important role for deterrence in confronting terrorism. Indeed, I often say to my fellow criminologists that international relations theorists deploy more sophisticated models of deterrence than criminologists. This is because IR deterrence is more

dynamic compared to the static models that dominate criminology. This is criminology's legacy from Bentham: deterrence means statically projecting a probability \times severity of punishment that makes compliance rational. I favour a dynamic enforcement pyramid approach to deterrence that is more akin to IR thinking about deterrence and compellance.

But first I want to consider a psychological model of deterrence that is critical of both the criminal justice and IR models. This is Brehm and Brehm's (1981) theory of *Psychological Reactance*. It is a theory that is grounded empirically in a large number of psychological experiments. These studies show that when deterrent threats are escalated you get a deterrence curve with a positive slope as predicted by deterrence theory. But you also get a reactance or defiance curve with a negative slope. Escalating threat simultaneously delivers more deterrence and more defiance (on defiance theory, see Sherman, 1993). Whether deterrence "works" depends on the positive slope of the deterrence curve being steeper than the negative slope of the defiance curve. The net effect of escalating threat is formally the sum of these two curves.

What is especially interesting about the psychological reactance literature is that it also tells us some important things about the conditions where the deterrence curve will be steeper than the defiance curve. The experimental research suggests that deterrence is stronger than defiance when the freedom we seek to regulate is not very important to the target of deterrence. Hence if we think of a freedom that is not so critical to us, like the freedom to park our car wherever we like, defiance is minimal. We do not explode when we confront a sign that says “No parking 9am to 5 pm”. Because the defiance curve is minimal in slope here, deterrence of parking violations with fines works almost exactly as rational choice theory in economics predicts. If on the other hand, we are seeking to regulate a freedom as important to people as freedom of religion by throwing Christians to the lions, we may find as the Romans did, that because defiance is so great with such a freedom, Christianity actually grows as a result.

It seems to me possible that Osama bin Laden or Hammas have an intuitive understanding of this theory. Their game is perhaps not so different from that of martyrs like St Peter. It is to provoke deterrence that is engendered counterproductive by defiance. For bin Laden, it is to provoke a pan-

Islamic, not just a pan-Arab, consciousness of oppression of their freedom.

It is to portray the war on terrorism as another Christian crusade.

Reconsidering Justice

A second important empirical result from the psychological literature comes from Tom Tyler's (1990) work, for example in his book *Why People Obey the Law*. Tyler finds that criminal enforcement and other forms of social control work when they are administered in a way their targets perceive as procedurally fair. This research shows an amazing capacity of people to buckle under to social control that delivers really bad outcomes to them so long as the disastrous outcomes are dispensed through processes they accept as fair. Marrying these results to defiance theory, we might say that deterrence effects will exceed defiance effects when sanctions are seen as an outcome of fair procedures, a critical part of which is genuinely listening to the point of view of the other. I will come back to the importance of these results with the war on terrorism.

The dynamic theory of social control I favour is to be found in my book, *Restorative Justice and Responsive Regulation* (Braithwaite, 2002).

Figure 1 represents a responsive regulatory pyramid. It means you have a presumption in favour of starting at the base of the pyramid by trying dialogue and creative problem solving (which I call restorative justice) first. Then when that fails and fails again, you may be willing to escalate through a hierarchy of forms of deterrent justice. Then when deterrence fails you become willing to resort to incapacitative justice – incapacitating the terrorist by putting him in jail or killing him, for example. As you move up through escalated deterrence options to more incapacitative options, if a cooperative response is elicited you must deescalate your response. Here the explanatory and normative content of responsive regulation has a lot in common with Graduated Reduction In Tension (GRIT) theory in International Relations.

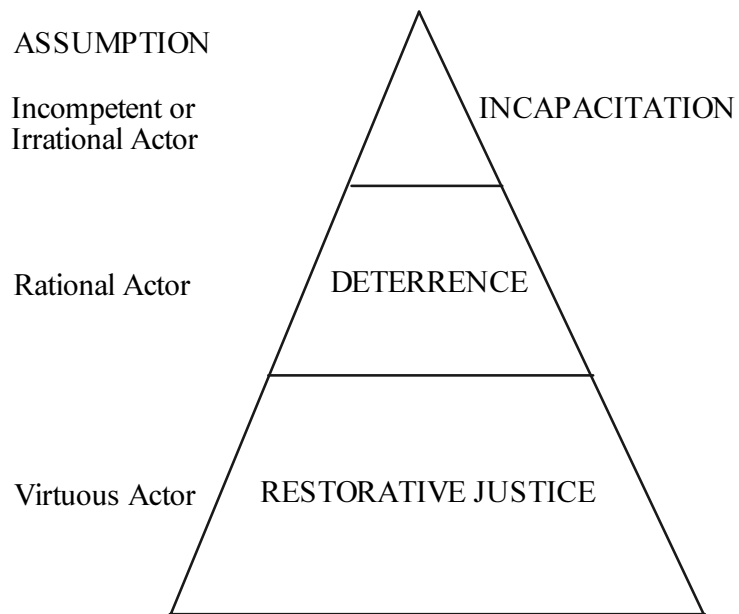


Figure 1: Toward an Integration of Restorative, Deterrent and Incapacitative
Justice

The presumptions of responsive regulatory theory are precisely the opposite of those expounded by Mr. Newt Gingrich during his 2002 speaking tour in Australia. Mr. Gingrich argued that the burden of proof is upon those who are against the war option with expanding the war on terrorism to new targets to come up with alternatives. Responsive regulatory theory imposes that burden on those who wish to escalate.

Following this line, my own view would not be to rule out the military option but to be more circumspect about it than the US has been since the collapse of the Soviet Union. So with the war on terrorism, when the Taliban announced that they were willing to negotiate with the US about handing Osama bin Laden and his leadership over to a third nation to be tried in a court of law, the responsive regulatory presumption is that it is morally right to take up such an offer. Even if one had the belief, as I did, that likely the offer was not sincere, one should still negotiate. The reason is that it is procedurally just to listen to the perspective of the other before escalating. Even when one feels 90 per cent certain that negotiations will fail, the arrogance of refusing to listen undermines the legitimacy of the war option. Grounded in procedural justice theory, the hypothesis here is that the Muslim world would be less resentful and defiant today about the war on terror if the US had negotiated in good faith before bombing Afghanistan.

Responsive regulatory theory assumes that all individual and collective actors have socially responsible selves, rational selves and irrational or incompetent selves (Figure 1). Moreover, it assumes that sophisticated diplomacy can often persuade actors to put their best self forward. This is

one of the reasons I will argue below that General George Marshall is my American hero of the American century. He had the ability to persuade as socially irresponsible an actor as Stalin to put his socially responsible self forward, to be trustworthy with him; Stalin in turn said that Marshall was one person in the West he did trust. Secondly, responsive regulatory theory assumes that when actors are being irrational or incompetent in their judgements it is possible for good diplomacy to persuade them to be susceptible to rational incentives like deterrent threats. The psychological evidence never ceases to amaze on the capacity of human beings to abandon one kind of self in favour of another that seemed utterly entrenched.

Regulating Those Who Harbour Terrorists

In the case of the Taliban, they were captured by bin Laden's ideology that just as God had helped the forces of Islam to defeat the Soviet Union, they would do so with the even greater power of the United States. The negotiating challenge for the US would have been to persuade the Taliban leadership that this belief was irrational, that American resolve in the wake of September 11 was much greater than Soviet resolve had been, that US public opinion would make it good politics to push on no matter what the

cost, that the warlord class in Afghanistan would not be united against the US in the way they were with the Soviet invasion, that the Soviets would not be supporting them against the US in the way the US, Pakistan, China, Egypt and Saudi Arabia supported them against the Soviets, and so on.

William Maley made the interesting point when I gave this presentation to a meeting of the Council on Security Cooperation in Asia and the Pacific that this would not have worked because the Taliban's socially responsible selves as well as their incompetent and irrational selves required them to honour their hospitality to bin Laden, that this obligation was intrinsic to their identity. Perhaps so. On the other hand, many Taliban later showed a startling capacity to defect and betray when they ultimately did see death as the inevitable alternative. Moreover, Maley argued that delay during negotiations would have undermined the confidence and resolve of the Northern Alliance to work with the Americans. William Maley would know better than I if these empirical claims are correct. If they are, they are the kind of arguments that should be considered in reluctantly overcoming the presumption in favour of negotiating. But as Jacquard (2002: 53) argues, it is hard to be sure of what was driving the Taliban's protection of bin Laden: "According to some, Osama bin Laden was in reality the true leader of the Taliban, and he had confirmed it by offering his daughter in

marriage to Mullah Omar. According to others, he had simply paid a high price for his security and was financing the secret drug laboratories that had been set up in Afghanistan.”

Perhaps I was wrong to stick with this assumption. There is certainly a case for arguing that because the war went well for the US, William Maley was proved right by events in important ways. At the time of writing possibly as many as half al Qaeda’s operatives have been killed or captured by a combination of the war and around a thousand arrests around the globe. But it seems at this time that 90 per cent of the leadership circle have not been captured or killed including the two top leaders. There has been only one arrest of a person involved in planning September 11. Perhaps even a very slim chance of arresting the leadership by Taliban betrayal without the suffering, political, economic and moral costs of war was worth the try. Perhaps the war would have gone almost as well with a two week delay and perhaps its fall-out in the Muslim world would not have been so bad.

While bin Laden does seem to have miscalculated on the capacity of the Taliban to hold off a joint US-Northern Alliance attack, he does not seem to have miscalculated on this longer term objective of increasing the unity of

the Muslim world against the infidels. Even Iran and Iraq now have a more united front against the US. Sales of bin Laden's political and religious education tapes have skyrocketed in the Muslim world since September 11. Arguably it was raising consciousness of Muslim oppression by the West and their puppet regimes that was bin Laden's ultimate objective with the September 11 attacks and President Bush is helping to achieve this objective with his arrogant speeches myopically oriented to domestic US consumption.

Regulating Saddam Hussein

Let me clarify further how restorative and responsive regulatory theory would cause us to look at international relations in a different frame by considering the Gulf War. A widespread US view is that the failure of the Gulf War was one of failing to push on to Bagdad and capture Saddam Hussein. Restorative and responsive regulatory theory sees its failures in a very different way. First, the most critical failure was of the US Ambassador to Iraq failing to display a credible enforcement pyramid to Saddam Hussein *before* the invasion of Kuwait. It was not made clear to him that even though he was a valued ally against Iran, the US would not

respond to his invasion in the way it had earlier responded to the Indonesian invasion of East Timor - publicly disapproving but sitting on its hands. The US failed to make crystal clear in advance what it was in fact willing to do – escalate to whatever level of military force was necessary to reverse an invasion of Kuwait. It compensated for this failure with excessively precipitate escalation to a costly war. There was both insufficient inexorability and insufficient gradualism about US projection of deterrence through escalation. Then after the war there was insufficient de-escalation. In the immediate aftermath of the war, Mamoun Fandy's (1999) empirical study of the ideologies of Saudi dissidents, including Osama bin Laden, *Saudi Arabia and the Politics of Dissent*, showed that a common line was that the US orchestrated the Gulf War to secure military bases in Saudi Arabia. Fandy shows that such a ridiculous conspiracy theory was not taken seriously by ordinary Saudis in the early 1990s and the dissidents were politically marginal. However, 10 years on with the US bases still hovering in the holy places, more and more Saudis came to see the radicals as right after all, indeed as prophetic. So I am wanting to interpret the failure of US policy as not one of escalating further into Bagdad, but of failing to de-escalate out of Saudi Arabia once its just objective of reversing the invasion

had been achieved. So the Restorative and Responsive regulatory critique of the Gulf War is of:

1. Failure to project willingness to escalate to whatever level of force was necessary.
2. Excessively precipitate escalation
3. Insufficient de-escalation

Under-deterrence followed by over-deterrence followed by insufficient de-escalation of deterrence. What was true of the Bush I administration with the Gulf War was also true of Bush II with the war on terrorism.

Underreaction, in the form of gross incompetence in putting the pieces of the intelligence picture together, followed by overreaction, followed by a failure to demobilize from a virtual state of martial law to the restoration of normal democratic freedoms.

Containment and Enlargement

Enough of negative cases according to the theory. Heroes of the twentieth century by the lights of restorative and responsive regulatory theory are Nelson Mandela and General George Marshall. Mandela overcame the peaceniks in the ANC to take them into an armed struggle against Apartheid

that unfortunately was necessary. It included attacks on civilian targets such as the power grid, but he also counselled against attacks directed at killing civilians. His escalation was very gradual and oriented to bringing the hearts and minds of the rest of the world with his just cause. When he prevailed politically, he proffered restorative justice to his enemies through the Truth and Reconciliation Commission. His jailers sat beside him at his inauguration as President.

General George Marshall equally understood the need to overcome the resistance of US peaceniks during the late 1930s to project deterrence to Hitler. He led a reluctant US and his President to the view that it would have to build an army that could defeat Germany in a ground war in Northwestern Europe and project a capacity to do that – not just a capacity to defend itself through airpower (FDR’s late 1930s vision). It was Marshall who resisted Churchill’s “closing the circle” policy of 1942 – a bombing war plus scattered ground engagements at the periphery of Europe. Marshall saw the need for more decisive escalation to take some pressure off the Red Army by thrusting at the heart of Europe. Then after the war it was Marshall as Secretary of State who persuaded a punitive American people to learn from the mistakes of Versailles and heal Europe through the Marshall

Plan – the finest moment of the American century. Marshall - always more decisive in his support for escalation when that was what was needed and always more dramatic in his de-escalation than those around him.

Through this theoretical lens I wish to see the containment theory of the Truman doctrine that incubated during the decade or so when Marshall was the most dominant influence on US strategy, and that was mostly sustained by all US Presidents until the fall of the Soviet Union, as basically right. It meant refusing to pull on a full scale war with the Soviet Union or China, even when the US had nuclear weapons and the Communists did not, but containing them from occupying new territory such as South Korea or Taiwan. Later it meant containing the spread of nuclear weapons through the Nuclear Non-Proliferation regime. In retrospect the accomplishments of nuclear non-proliferation are fairly remarkable, as were the accomplishments of deterring invasion of South Korea and Taiwan without a massive conflagration. Again it was Marshall as Defence Secretary during the Korean war who got the job of containment done, calming the megalomania of his commander, Douglas McArthur. The Truman doctrine was premised on a prudent patience. Containment would at times take bold resolve to deter expansion, but so long as totalitarianism was contained, in the long run

it would prove to have more internal contradictions than liberal market democracies. In the long run contained totalitarianism is more likely to self-destruct than contained democracy.

The genius of Marshall was not only that he had a clear vision of the strategic role of deterrence in a policy of containment, but that he also had a vision of what the Clinton administration later came to describe as enlargement – enlargement of the space on the globe secured by democratic institutions. But Marshall persuaded a level of US generosity toward the former fascist states that Clinton never persuaded the US to extend to the former Communist states. Since Marshall the US seems never to have got the balance so right between investment in containment and investment in enlargement. Dulles, Marshall's successor as US Secretary of State, embarked on many ill-conceived adventures in containment that in fact crushed the enlargement of democracy, especially in Latin America (for example the US-orchestrated Guatemalan coup of 1954). For all the foreign aid the West poured into the Middle East – most of it US weapons for Israel – Britain, France and the US failed massively to promote the enlargement of democracy in the Arab world and did much to bolster tyrannical puppets resented by the ordinary people of the region.. INSERT

The Torn Web of US Controls on Terrorism

This analysis of containment and enlargement failure is also true of US strategic response to the war on terrorism. The containment failures included US opposition to an anti-terrorism treaty during the 1990s that might have criminalized the funding of terrorist organizations, among a suite of useful containment measures, the abysmal intelligence failures and failures of target hardening against hijacking that allowed the September 11 attacks to succeed. Front-line managers of airline security – flight captains – were not even put on alert after intelligence of planned hijacks associated with al Qaeda were deemed serious enough to warrant distracting the President from his long summer holiday with a briefing. It was known that unlike the US security establishment from the time of Dulles and CIA Director Bush I, al Qaeda was palpably a learning organization, one that learned from its mistakes. The fact that it had failed to topple the World Trade Center once, that a previous attempt by Islamic extremists to topple the Eiffel Tower with a hijacked aircraft had failed, were no warrant for assuming it would continue to fail at such known objectives. When some elements of the intelligence establishment were reporting deep suspicious

over the flight training of certain characters who were actually known by other elements of US intelligence to be associated with al Qaeda, there was reason to believe that al Qaeda had not given up on its ambition of crashing aircraft into major public buildings in the US. Bush II was presented as a consummate delegator to a world amazed at the thought of even the new CEO of a large company or even the President of a university taking a full month's holiday six months into starting the job. While he was at the ranch something went wrong with this great system of delegation that future public enquiry will hopefully lay bare.

The enlargement failures related to the timidity in pushing for the enlargement of democratic sovereignty for the Palestinians, for enlarging opportunities for the bereft Muslims of the refugee camps of Pakistan and many other places that became breeding grounds for al Qaeda recruitment, for enlarging democracy in former Arab ally states like Iran under the Shah, Iraq before 1990, Afghanistan after the Soviet withdrawal and Saudi Arabia today. Bin Laden understands that in a world where the majority of refugees are now Muslims, providing practical support for a more just future for them, such as the schools he supported in Pakistan, the orphanages he funded for Muslim victims of the Bosnian war (Jacquard, 2002: 70) is a

good investment. A Saudi democracy might have integrated into its power structure many of the idealistic young Muslim men returning from victory against the Soviet Union in the Afghanistan war. Instead it treated them as dangerous elements, a threat to the total control of the Royal Family. Saudi institutions gave them no legitimate path to political voice, only the path of violent extremism. Most terrorism in the 20th century, after all, has ended with the integration of some terrorist leaders into democratic power structures – whether it is Northern Ireland terrorism, Israeli terrorism, South African terrorism, East Timorese terrorism, the terrorism of the Italian Red Brigades or of the Bader-Meinhof gang in Germany. British Prime Minister Blair showed the wisdom of this option when he released IRA terrorists from prison in 1998 so they could speak and vote when their political party decided whether to end armed struggle and support power sharing in Northern Ireland.

Partly the returning veterans from Afghanistan were treated as dangerous in Saudi Arabia because they had already been created as dangerous elements thanks to the cynical way the US, France, Egypt, Pakistan and others fostered Islamic fundamentalism as a threat to the pre-1989 Soviet Union. John Cooley's (2000) detailed account in *Unholy Wars* of the relationship

between the US intelligence establishment and fundamentalist Islam as “a strange love affair that went disastrously wrong” is compelling on this. An example was the fact that several of the 1993 World Trade Centre bombers had received CIA training, used a chemical formula for the huge bomb taught in CIA manuals, versions of which were found in the possession of some of the conspirators (Cooley, 2000: 223, 243). During the Afghan war against the Soviets between 1979 and 1989, the CIA and the Pakistani military institutionalised training in terrorism and financed the propaganda of Islamic proponents of suicidal martyrdom. After the Soviets were defeated, these CIA-trained fundamentalists fanned out to create homicidal havoc in a dozen Muslim nations from the Sudan to Indonesia, in the Phillipines, France, the United States, Chechnya, Bosnia, Kosovo, Kashmir, across Africa and Central Asia, and more (Cooley, 2000; Jacquard, 2002). US encouragement of terrorism in one era that comes back to bite the United States in another era is not a new phenomenon. The Nixon administration’s CIA urged its Australian counterpart to refuse to hand over to the Australian Attorney General its files on the encouragement of Australian terrorist training camps of the fascist Ustacia for Croatians wishing to destabilize the Communist yet tolerantly multicultural Yugoslavian regime of Tito. The stand-off was resolved in a famous

incident in 1973 when the democratically elected Attorney-General was forced to institute a raid on his own security organization to seize the files. The US has also allowed terrorist training camps to flourish on its territory. The CIA organized a 1985 terrorist bombing in Beirut that was rather like the Oklahoma City bombing, though not as widely reported. CIA involvement was revealed years later by the same team at the *Washington Post* that broke Watergate. It was a truck bomb outside a mosque designed to murder the maximum number of people as they left. 80 were killed, 250 were wounded, mostly women and children. A Muslim cleric believed by the CIA to be a dangerous character was the main target, but he was untouched (Chomsky, 2001: 44). From the time of the Dulles brothers, a large number of terrorist incidents were sponsored by the CIA in Latin America. White House staffer, Colonel Oliver North, organized funding for the Nicaraguan terrorist group, the Contras, by selling arms to elements of the “Axis of Evil” in Iran. Swapping aid to the Contras for arms to Iran was laundered by the CIA through the Arab bank widely used to fund terrorist organizations, the Bank of Credit and Commerce International (BCCI). This same bank was used to launder money by other sometime US allies of the 1980s, Saddam Hussein and Manuel Noriega, by drug lords laundering money from illegal arms trading and for covert nuclear programs.

The US has not only protected but funded terrorists who have sought to bomb and assassinate the political leaders of other nations, such as Fidel Castro. Indeed, the Reagan administration set a new benchmark by directly bombing the home of Libyan leader Ghadaffi, though it only succeeded in murdering his baby child. Political assassination, even when it delivers a short-run benefit, has been repeatedly proven to be a long-run counterproductive strategy in the modern world. There would likely be peace in Palestine today if after the assassination of Prime Minister Rabin, the new Israeli Prime Minister Peres had not ordered the assassination of Yahya Ayyash, known as “the bombmaker”. His assassination was reciprocated with a devastating round of Hamas suicide bombings in February-March 1996 that killed more than 50 Israelis (Quandt, 2001). This allowed Benjamin Netanyahu to present himself as Mr. Security and defeat Peres, who had until his ill-conceived assassination had been way ahead in the polls. It was Netanyahu’s provocations that then unravelled the peace process. The biggest tear in the US web of controls against terrorism was therefore more than its undermining of the efforts of other states in the late 20th century to negotiate an anti-terrorism treaty, it was that it actively promoted terrorism in this era, it actively used the same banks that should

have been targeted by international cooperation to target the financing of terrorism, it actively undermined the rule of international law through foreign political assassinations.

At the same time as the US state undermined the fundamentals of global containment of terrorism, it neglected enlargement, becoming in the late twentieth century the wealthy nation that devoted the smallest proportion of its GDP to foreign aid. The nation that in Marshall's era had wooed the UN to New York could no longer afford its membership dues. A Marshall plan for Afghanistan a decade ago may have helped preserve their long-suffering people from totalitarianism, Talibanism, tribal warlordism, terrorism and targeting by American bombs. But America had changed: George W. Bush was elected on a platform of opposition to the kind of nation building in the world's Afghanistans that won George Marshall his Nobel Peace Prize.

When security is threatened it is natural to prioritise containment over enlargement. But that is a mistake because enlargement makes containment easier. Fortunately, in not all aspects of the war on terrorism has the US privileged containment over enlargement. A nice case in point is the work

of the Financial Action Task Force, which promulgates national policies to combat the money-laundering that is a lifeblood of terrorist organizations. In its early years the FATF gradually expanded a so-called “white list” of states coming into compliance with its anti-money-laundering policies. The shift to sanctioning an unfortunately labelled “black list” of non-complying states was accelerated by September 11. But this “black listing” could be more effective because it built on the foundations of years of expanding “white listing”. Enlargement of the regime was a platform for the containment of money laundering in rogue states.

Criminologists are inclined to think that the criminal justice model is superior for combating terrorism to the war model. There is something in this. Criminologists believe it is better to nab organizational criminals alive than dead. Then when we arrest them we let them know that the system will go easier on them, perhaps keep them out of jail altogether, if they provide evidence useful for catching bigger fish in the organization than themselves. With Islamic terrorist organizations the more important evidence about bigger fish might relate to financiers of the networks. Al Qaeda cell leaders or the people they answer to may be fungible operatives who are as undeterrable as bin Laden himself in their willingness to die for their cause.

It is likely, however, that many of the wealthy Saudi businessmen who seem to be among the funders of Al Qaeda would be exquisitely susceptible to deterrence even if only by naming and shaming them, because of their dependence on trading with the West for their wealth. With warlordism more generally in the contemporary world, World Bank regression analyses suggest that the existence of diasporas of wealthy funders in the West explains why war persists in some parts of the world more than others (Collier, 2000). So wealthy US funders of the IRA and the protestant paramilitary organizations were one reason for the persistence of terrorism in Northern Ireland. Suicide bombers are often not only motivated by the embrace of their God in death as martyrs, but also by generous payments to the struggling families they leave behind. Herein lies further appeal of a criminal justice model that moves up organizations to deter financing of terrorism.

The Public Health Model

That said, I would not want to push too hard for the superiority of a criminal justice model over a war model. It may be that there is more appeal in the ideal of the public health model of integrating primary prevention (e.g. clean

water for all), secondary prevention (vaccinating targeted at-risk groups) and tertiary prevention (treatment of those already ill). This approach to problems of violence has been developed by James Gilligan (2001: 14-17). Then it might be attractive to overlay the US strategic ideals of containment and enlargement that I have found manifest in the diplomacy of George Marshall. An attraction of this overlay is that it helps us look more broadly than just at how we respond to terrorists once they have become terrorists (tertiary containment). Containment is bound to have more attraction than enlargement if we only consider how to respond to existing terrorists. This will cause us to over-invest in containment and under-invest in enlargement. As we have seen, enlargement of democracy, of the sphere of social justice, or freedom from poverty, liberation from the refugee camps, may be the most important forms of primary prevention of terrorism. The imbalance between investment in primary prevention and tertiary prevention by containment was well illustrated by the proposed 2002 Bush administration increase in the defence budget to fight the war on terrorism which, if it goes through, will give the US defence spending greater than all the rest of the world's nations combined; the *increase* alone would be greater than the *total* expenditure of all the world's nations on foreign aid. Enlargement (democratic "nation building") only seems expensive when we forget this

comparison of the costs of foreign aid to build democracies in comparison to the costs of over-investment in coercive control, and forget how the Marshall Plan was a sound long-term investment for the US economy because it fuelled a long boom of US exports to Europe and Japan.

Secondary prevention suffers under-investment as well under the war model of the Bush administration – for example there is under-investment in preventive diplomacy and enhancing capability for other forms of secondary prevention such as R & D on target hardening on preventable problems like aircraft hijacking (e.g. more secure doors to cockpits) and rupture of nuclear power plants. Preventive diplomacy was also needed in the 1940s when Stalin cynically exploited US sensitivities on the Jewish question by supporting the creation of a Jewish state in a way that forcibly uprooted huge numbers of Palestinians, a way designed to destabilize Western influence in the Arab world. Any one of a number of such forms of secondary prevention might have prevented September 11. This is the theme of redundant or overdetermined controls to which I will return in the concluding pages of this essay.

As we move from tertiary to secondary to primary prevention we move in a direction that makes enlargement more important in the balance between enlargement and containment. But even with tertiary prevention, enlargement can be more important than containment. Most Americans believe that the bombing of Serbia was responsible for the fall of Mr. Milosevic. Most Serbian opponents of Milosevic believe the bombing made their job harder. These opposition groups may be more in touch with Serbian realities than American thinking. Milosevic was not overthrown during or after the bombing, but later by the progressive enlargement of a Yugoslavian democracy movement led by NGOs, students and other young people from below who became more and more fearless in their campaigning in universities, schools, workplaces and ultimately on the streets to win the hearts and minds of surging masses of Serbs. The triumph was not of American bombs but was akin to the triumph of people power in the Phillipines against Marcos in the 1980s and of the people of Eastern and Central Europe against communist states in 1989. International NGOs played useful roles in supporting the Serbian NGOs; dollars from the West flowing to those NGOs were also important. But it was indigenous Serbian politics that ultimately prised open the contradictions of Milosevic's totalitarianism, causing the military to switch allegiance from the tyrant to

the people, as containment theory predicts democratic patience will one day bring.

Sadly the impatience of Western democracies often causes them to do the opposite. We have supported warlords when they fought the enemies of the West even when those warlords crushed indigenous democracy movements and even when they supported themselves by trafficking drugs into the West. In *New and Old Wars*, Mary Kaldor (1999) suggests that in late modern conditions the path to democratic transition for wartorn states is to identify “islands of civility” that always exist in such states and build out from them. Let us hope that is what the US does in Afghanistan now rather than assisting a new set of warlords to expand their sway and re-establish drug empires. In Israel today the short-term hope of peace from Sharon or Arafat is feeble; the long-term prospects of building peace and democracy in Palestine from the peace movements on both sides joining hands are profound.

Table 2: Tying Together the Strands of a Web of Controls to Prevent Terrorism

	Enlargement	
Containment		
	Marshall Plan, global	A global peace
	democratic institution	movement that builds
	building, reform of the	the consciences of
Primary Prevention	IMF/development	citizens who reject
	banks, a West	violence
	committed to social	
	justice and dignity for	
	the Muslim world.	
		Financial Action Task
		Force
	Preventive diplomacy.	

Secondary Prevention

Preventing the living of lives in refugee camps.

Nuclear Non-Proliferation, Biological Weapons treaties

Target hardening (eg airlines, anthrax vaccines)

Tertiary Prevention

UK releases IRA terrorists from prison to vote on power sharing in N. Ireland.

Intelligence cooperation on terrorism that leads to arrests.

Mujahedeen returning from fighting Soviets in Afghanistan (e.g. bin Laden) given a seat at the table of a Saudi democracy.

International Criminal Court.

So my prescription is to be reluctant to embrace a war on terrorism, but diligent at weaving a web of controls against terrorism and firm in our resolve to escalate up an enforcement pyramid until terrorism stops once it has broken out. This means tertiary containment delivering a ceasefire that is just a platform for the other forms of containment and enlargement in the other five boxes in Figure 2. Instead of a war on terrorism, the prescription is for a balance of primary, secondary and tertiary prevention of terrorism with each of these levels encompassing a balance of containment of violence and enlargement of democratic institutions of non-violence. With an effective web of controls against terrorism, each strand in the web might be easily broken, but when the strands of the web are tied together to produce an effective and mutually reinforcing redundancy of control, the risks to our persons from terrorism can continue to be kept way below the risks of common crime and a long way below those of corporate crime. Even with all the progress that has been made with nuclear safety regulation, a bigger Chernobyl remains a greater practical risk to the world than nuclear terrorism. With a tightly woven web of controls against terrorism, it can become a very much lower risk.

With international security threats of all kinds, if a nation like the US makes the six-fold investment in an appropriate web of controls, it might find that halving its military spending would be responsible. There is not much prospect, for example, that Australia could mobilize half the non-US world to attack America in retaliation for its trade policies, so having a defence budget half that of the rest of the world ought to be adequate deterrent. Besides, rumour in Canberra is that if we ever did fly the aircraft we bought from the US against Uncle Sam, there is a little man in Fairfax, Virginia, who with a key-stroke would cause all our planes to drop into the sea!

Being Evidence-Based on Big and Small Problems

As I was finishing this paper, I enjoyed an interesting presentation from Peter Wilkinson of the British Health and Safety Executive on the Safety Case approach to off-shore oil rig safety. The safety case idea is a responsive regulation approach to which I am attracted: instead of command and control inspection of oil rigs for compliance with rules, the company is asked to prepare a safety case on how it will manage the specific set of safety risks that confront a single rig - given the particular oceanographic

and oil/gas production contingencies it confronts. Once approved by the state regulator it is an offence for the company not to comply with the requirements of its own safety case. My question was that with occupational health and safety we have a lot of evidence now that command and control inspections of factories and mines to secure compliance with rules does improve workplace safety, so is it responsible to abandon this in favour of a safety case regime in the absence of evidence that it will work better? Peter Wilkinson's answer was that the disasters we try to prevent on off-shore oil rigs are rare events such as surviving a "hundred year wave." It follows that we can never have a credible evidence base for making such a policy shift. But as my RegNet colleague Andrew Hopkins pointed out, in a world where some airlines, some rail operators, some coal mines and some nuclear power plants around the world adopt a safety case approach and others do not, it is possible to do systematic empirical research on the efficacy of the innovation with matched controls where the outcomes are not major disasters but smaller events that are known to be elements of disasters – like separation failures with aircraft, derailments, coal mine roof fall injuries, SCRAMS (automated shut-downs of nuclear power plants). In other words, part of what regulatory research is about is assessing whether policies will work with big problems by being systematically evidence-based

about how effective the policies are with smaller problems that are elements of the bigger problems.

The most dangerous characters in the world are those who respond to the what works conundrum with big problems by substituting an ideological commitment to a totalising theory like rational choice as a guide to what to do. Of course, most practitioners of international relations are not theoretically myopic in this way. They are students of history who analyse what has happened in the past in crises with some features in common with the *sui generis* crisis that today confronts us. Then they “think in time” about how circumstances are different today than they were then, about how features of the current crisis might cause quite a different outcome than occurred with the like crisis from the past (Neustadt and May, 1986). Understanding the ebb and flow of history helps us to be wise; it does not enable us to be rigorous scientists of international relations.

In medicine we would rather go to a physician with the skills of a good clinician, who can pull apart what is different about our set of symptoms from the classic set in the textbook, than go to a good medical researcher. At the same time, we might not want the textbook to be written by doctors

who spend all their time seeing patients. For this task we want experts who immerse themselves in the mountains of literature on the theory of disease and the research evidence on how to control it. We want the textbook to be evidence-based, while we want our doctor to be diagnostically detective-like in the skills she deploys to come up with a treatment for our particularistic symptoms and medical history. Like oil-rigs that blow up, we only die once. But the difference is that there are millions of deaths each year for evidence-based medicine to study scientifically. Even so, Hopkins' argument is that we can have the benefits of a dual track diagnostic and evidence-based regulatory policy by building our evidence base on more micro incidents that are credibly constitutive of macro disasters. While we need the detective work of the intelligence community to diagnose specific threats of nuclear terrorism, we can also study systematically whether nuclear plants with safety case regimes have lower incidence of unaccounted loss of nuclear materials than command and control regimes. Figure 2 finds an important place for both in a prudent web of regulatory controls. The art of intelligence itself should be guided by an evidence-base on what kind of micro intelligence analytics are more likely to connect the diagnostic dots and which kinds recurrently fail to illuminate the bigger picture. We want creative intelligence analysts who look at the same phenomenon through

many different analytic lenses, who can see it as many different things at once. But we also want analysts who know from the literature on evidence-based intelligence that certain analytic lenses promoted by intelligence charlatans recurrently distort the truth in knowable ways.

The web of controls idea is that we make up for the inferiority of a micro evidence-base for macro problems by greater redundancy in the web of controls than we might put in place when the inferential jumps required from our evidence base are smaller. To make these abstractions more concrete, let me summarize the set of empirical claims about the conditions for micro regulatory success that I here seek to deploy to the big *sui generis* problem of 9/11 style global terrorism (citing the micro regulatory research where I make a more detailed case for each claim).

1. Success in reducing risk is more likely from an integrated web of regulatory controls that is redundantly responsive to the multiple explanatory theories grasped as relevant to the control problem. It is less likely with a singular control strategy based on a single theory (Braithwaite, 1993; Braithwaite and Drahos, 2000: especially chapter 23).

2. Intelligence experts tend to be charlatans undisciplined by evidence sufficiently decisive to refute their most erroneous analyses. Just as we need physicians who do contextually wise detective work grounded in a reading of texts written by scholars with the best grasp of the theory and systematic evidence to test it, so we need terrorism intelligence that is literate in its responsiveness to regulatory theory/evidence at the same time as it is artful in its detective work (Braithwaite, 1993).
3. Responsive regulation that is dynamic tends to control risks more effectively than static command and control regulation (such the Benthamite deterrence of setting static expected punishments that exceed average expected benefits) (Ayres and Braithwaite, 1992; Braithwaite, 2002; especially chapters 1, 2 and 4).
4. In international affairs, top-down preventive diplomacy works in limited but important ways in forestalling armed conflict (Touval and Zartman, 1985, 1989). In resolution of more micro forms of violence (eg school and workplace bullying/sexual harassment),

top-down preventive diplomacy works much better when it is complemented by bottom-up restorative justice (Braithwaite, 2002: Chapter 3). Therefore, we might improve our effectiveness in responding to global terrorism by complementing Camp-David-style elite preventive diplomacy over Palestine with bottom-up restorative justice in refugee camps that links ever-widening islands of civility there to ever-widening islands of civility in Israel (Kaldor, 1999; Braithwaite, 2002: Chapter 6).

5. In addition to the embrace of diplomacy that prevents armed conflict, states of course should eschew diplomacy that provokes it – as I have alleged the US and the Soviet Union each did in the Middle East in an attempt to embroil the other and their allies in armed conflict with third parties including terrorists. These terrorists then came back to bite the short-sighted states that enabled their original terrorist provocations – bin Laden being an example. This means turning away from the politics of the Muslim world being recurrently humiliated as playthings of major powers, a politics of dignity and respect for the social justice claims of the Muslim world.

6. Webs of controls are best when they conceive justice as holistic (Braithwaite, 2002: 150-158). Social justice for blacks in South Africa creates the conditions for the restorative justice of the Truth and Reconciliation Commission (Tutu, 1999). Procedural justice prevents violence (Tyler, 1990; Braithwaite 2002); restorative justice creates superior conditions of procedural justice (Barnes, 1999). This means theorising enlargement of democracy as enlargement of justice as non-domination (Pettit, 1997). This normative theory can be refined by iterative adjustment to the explanatory theory that domination induces defiance (often accompanied by violence) (Braithwaite and Parker, 1999; Braithwaite and Pettit, 2000).

Conclusion

In the end, though, the theory of how to design webs of regulatory containment and enlargement in my previous research is less persuasive than reflecting upon the failures of Bush I in the Gulf War and Bush II in the War on Terrorism as failures of under-reaction, followed by coercive over-

reaction, followed by a failure to deescalate by decisively substituting investment in containment with investment in enlargement. Reflect finally on the contrast of the American regulatory praxis of George Marshall: contestation of under-reaction to Hitler before World War II, prudent advocacy of escalated containment that prevented successful invasions of South Korea and Taiwan a decade later, and the visionary deescalation of a Marshall Plan that enlarged democracy and justice as a response to the cruellest injustice the world has seen. Marshall was not without flaws, such as his complicity in following the Nazis into the bombing of civilian populations on a shocking scale, even if less shocking than under Churchill's preferences. And it is impossible to love the introspective general as much as Mandela's more contagious compassion. Yet humanity owes Marshall no less homage.

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