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Law, Liberty, and the Pursuit of Terrorism

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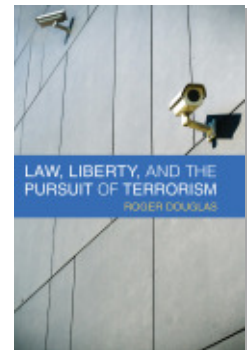
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ONE

The Specter of Terrorism

Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tends to be the difficult ones.

Donald H. Rumsfeld

Many of you may have seen recent press reporting about a . . . survey that found people are now much less concerned about terrorism than they were after the London bombings. The decrease in public concern about terrorism, at one level, is not surprising. Public attention spans are often short and Australians tend to have an optimistic perception of the security environment. Over the last five years, the issue of terrorism has rarely been far from centre-stage in the media, but Australia has not experienced a recent attack on its soil. So it is almost inevitable that a type of “terrorism fatigue,” if you will, would set in. Unfortunately, such complacency . . . makes us vulnerable.

Paul O'Sullivan, director-general of the Australian Security Intelligence Organization, 2006

Civil libertarian critiques of responses to terrorism frequently assume that counterterror polices are distorted by exaggerated assessments of the seriousness of the terrorist threat, especially in the aftermath of spectacular terrorist attacks. This conclusion is defended partly on the basis of theory and partly on the basis of evidence suggesting that estimates of the threat are unwarranted by what is known about its “true” magnitude and that this is particularly likely immediately following terrorist attacks. This chapter develops and examines these arguments. It concludes that they are cogent but not conclusive. They depend on the optimistic assumption that the objective terrorist threat will continue to be slight, and while that assumption may be warranted, one cannot be certain of it. While poll data yields evidence of cognitive error, it also yields evidence to suggest that the political salience of the threat is small, notwithstanding that the perceived risk remains high.

Sources of Misperception

When people form opinions about the risk of terrorist attacks, they necessarily do so in a state of considerable ignorance as to terrorists' intentions. They

are thrown back on a variety of cognitive shortcuts. One is known as “availability” (“the ease with which instances or associations can be brought to mind”).¹ Typically, frequent events are more available than infrequent ones, but what terrorism lacks in frequency is made up by its visibility, reinforced by television footage of the aftermath of terrorist attacks in foreign countries and by periodical replays of the collapsing towers in New York, the red London bus with its top sheared off, or the smoke billowing from the Taj Mahal hotel in Mumbai. Given the generally accepted trope that terrorists aim for drama, their success will be reflected in an overassessment of the risk they pose. Availability will be highest immediately following terrorist attacks on symbols with which one can identify, but memories are likely to persist long after the attack.

Perception of low-risk high-intensity threats is also likely to be distorted by worst-case fears (which become serious when compounded with failure to discount for improbability). Worst-case reasoning shares something in common with availability. Actual “very bad” cases stand out more than not-so-bad ones, and warnings of “worst cases” are likely to receive more publicity than warnings of minor attacks. Worst-case reasoning is aggravated by the difficulties most people have with probabilities. As probabilities decrease, people find it increasingly difficult to distinguish between the implications of small and very small probabilities, and they make their assessment of the danger on the basis of the nature of the threatened outcome rather than on its likelihood. Sunstein reports studies finding that perceptions of riskiness do not vary when the risk is $1/100,000$ rather than $1/1,000,000$ and that perceptions even vary little between risks of $1/650$, $1/6,300$, and $1/68,000$.² Assume that an honest and infallible oracle has helpfully provided the information that within a given country and a given period, there is a $1/1,000,000$ chance of a terrorist attack, which, if it takes place, will kill 100,000 people and cost \$500 billion in property damage. A coldhearted insurer would require a premium based on the value of a tenth of a life and aggregate premiums of a little more than \$500,000 to insure against the risk. But the risk assessor in the street would assess the risk at a considerably higher level. This suggests that perceptions of the threat of terrorism may be heavily influenced by remote possibilities of really serious attacks.

Moreover, even after controlling for the “objective” seriousness of the threat, people appear to be willing to pay far more to reduce the likelihood of a threat from 1 percent to zero than they are to reduce it from 2 to 1 percent. Where the threat also arouses a high level of emotion, the price people are willing to pay for its elimination is even higher, and it is also even less dependent on perceived probabilities.³ Given that terrorism involves low probabilities and that the threat is likely to arouse strong emotions, one would expect

that even small threats would be accompanied by willingness to make considerable sacrifices in order to minimise or eliminate the likelihood of their eventuating.

One interpretation of these findings is that they indicate that people are likely to overreact to low-probability high-cost threats. However, there are several problems with this analysis. First, the existence of overreaction is ultimately dependent on what the objective threat actually is. Availability considerations may affect the likelihood of a threat being overestimated rather than underestimated, but the extent to which it does so is ultimately dependent on whether the threat actually is large or small. To state the obvious, if someone who saw the first of the 9/11 attacks had fallen victim to availability reasoning and concluded that the risk of further attacks was much higher than they had previously thought, they would, in fact, have been correct, at least in relation to the next few hours. Second, the analysis assumes that if we know the likelihood of an event and its effects (measured in dollars and lives), we can determine its “expected value.” While we might have a good start at making such determinations, the analysis makes some arbitrary assumptions. It discounts emotions and their implications, a particularly egregious omission in an age where keeping a stiff upper lip is no longer *de rigueur*. That people are willing to pay a certain amount to halve a risk and three times that amount to eliminate it might seem irrational, but it might simply reflect awareness that the cost of halving a risk can be far more than double the cost of eliminating the risk altogether, coupled with a subjective preference for certainty.

There is no reason to assume that civil libertarians are immune to such biases. While infringements of civil liberties are often relatively invisible,⁴ availability and worst-case reasoning can be mobilised to support civil libertarian as well as authoritarian arguments. The left’s success in conflating anticommunism with McCarthyism highlights the use that can be made of highly visible threats to liberty (availability). Roach and Trotter have argued, “Claims of wrongful conviction are a potent political force; miscarriages of justice are public problems that can go to the top of the political agenda and command attention across the political spectrum.”⁵ Civil libertarian responses to repressive measures typically include what generally turn out to be exaggerated claims for what governments might do with added powers (worst-case reasoning). In short, we have some evidence of what Vermeule calls “libertarian panics.”⁶ However, the examples of the costs of repression tend to achieve visibility gradually and too late to make an impact on the passage of the legislation (if any) that prompts them.

An alternative argument contends that overestimation in risk perceptions is exaggerated because those with the capacity to influence perceptions have an interest in exaggerating the risk. Mueller provides considerable evidence

of patently untenable claims in relation to the post-2001 terrorist threat and argues that at least some of these claims were knowingly dishonest and that others reflected the makers' economic and personal interests. He contends that the success of some claimants in securing currency for their untenable claims accounts for why threat perceptions are exaggerated.⁷ Exaggerated claims do indeed seem to have been made. Whether they were made sincerely or insincerely is probably unknowable and is largely irrelevant to the question of whether they were misleading. What matters is whether exaggerated views are particularly likely to receive currency, and they may well have been. Mueller reports evidence to the effect that media were far more likely to report news suggesting that the threat was serious than news suggesting that it was not, thereby enhancing the availability of material consistent with terrorism as a serious threat. But threat entrepreneurs are not the only people in the business of threat perception. A comprehensive study of the social creation of the perception of the terrorist threat would also require an analysis of the role of civil libertarians in contributing to countervailing fears that freedoms were under threat.

How Serious Is the Threat?

National Experiences of Terrorism

Terrorist Attacks

To judge from the past, the threats posed by terrorism are manageable. Terrorist attacks occur, but they are rare; and when they occur, they rarely involve more than one death. However, far more devastating attacks do take place, and most of the deaths attributable to terrorism are attributable to a handful of attacks. If past patterns were to continue, terrorism would constitute a relatively trivial threat, even allowing for the rare devastating attacks.

While the United States has had a history of political violence and continues to have a relatively high homicide rate, terrorist attacks on American soil are exceptional. Paul Wilkinson estimated that there were only 20 terrorism-related deaths in the United States between 1985 and 1994.⁸ The 1995 Oklahoma bombing, in which 165 people were killed, represented an attack of a completely different order, but it was an exception. The Global Terrorism Database lists only 11 other fatal terrorist attacks during the years 1995–2000, resulting in a total of 12 deaths.

The 9/11 attacks were unparalleled in terms of both loss of life and economic loss, but despite apocalyptic fears, the post-9/11 period has been remarkably free of fatal terrorist attacks. One candidate for a terrorist attack was

the posting of letters laced with anthrax spores to various targets, including politicians and journalists,⁹ but the motive for this attack was unclear. Almost all attacks appear to have been the work of lone offenders or small groups. Two involved attacks on Jewish targets, apparently intended to express opposition to Israel and to US support for Israel.¹⁰ Others involved attacks on abortionists, Unitarians, the IRS, the media, and a military recruiting station, and involved only one or two deaths.¹¹ The 2009 massacre of 12 fellow soldiers and a civilian by a Muslim army psychiatrist was far more serious.

In a typical year, Americans are somewhat more at risk of being killed in terrorist attacks when outside the United States. Some of these deaths have been incidental to foreign terrorist attacks; others have targeted Americans. Some guidance as to the level of “foreign” attacks on US citizens is provided by the US State Department’s annual reports on global terrorism and the subsequent Country Reports on Terrorism and data from the National Counterterrorism Center but fatalities there attributed to “international terrorism” include attacks by international terrorists on targets located in the United States. Figures for 2001 reflect the 9/11 attacks. Since 2001, the number of such deaths from foreign attacks—27 (2002), 35 (2003), 56 (2005), 28 (2006), 19 (2007), 33 (2008), 9 (2009), and 15 (2010)—has far exceeded the number of terrorism-related deaths within the United States.¹²

Canada has experienced few lethal attacks since Laporte’s assassination in 1971. There were three fatal attacks on Turkish diplomats by Armenian terrorists in 1984–85, and the Global Terrorism Database lists two more attacks whose motivation is unclear.¹³ There is one dramatic exception to this record: in 1985, Sikh extremists placed bombs on Air India flights from Toronto and Vancouver. The flight from Toronto exploded over the Irish Sea, killing all 329 passengers and crew. That from Vancouver exploded after being unloaded, killing two baggage attendants.¹⁴ Since then, Canada has remained free of major terrorist attacks,¹⁵ and minor incidents noted by the Canadian Security Intelligence Service (CSIS) have involved property damage but no loss of life or physical injury.¹⁶ Canadians have, however, been killed in foreign attacks. Twenty-four Canadians died in the 9/11 attacks, two in the 2002 Bali bombings, and another two in the 2005 London bombings. A Canadian diplomat died in a 2006 suicide bombing in Afghanistan.¹⁷

Australia has not experienced a lethal domestic terrorist attack since 1980, when the Turkish consul general was assassinated in Sydney.¹⁸ However, Australians have suffered heavy casualties in foreign attacks. Of the 202 killed in the 2002 Bali bombings, 88 were Australians, as were four of the 20 killed in the 2005 Bali bombings. Fifteen Australians died in the 9/11 attacks. Three Australians were killed in the July 2009 attack on the Marriott Hotel in Jakarta.

Australians were also among those killed in the 2003 Riyadh attack (one), the 7 July 2005 London bombings (one), and two Iraq bombings.

New Zealand has experienced only two fatal terrorist attacks. In 1984, a caretaker was killed by a bomb left in the foyer of the Wellington Trades Hall, and the following year, a French agent planted two bombs intended to destroy the *Rainbow Warrior*, a ship that the organisation had been using to protest against French nuclear testing in the Pacific. After the first bomb, a photographer who had been on the dockside went on board to recover his photographic equipment before the *Rainbow Warrior* sank. He was killed when the second bomb exploded.¹⁹ The Global Terrorism Database lists only one fatal terrorist incident in New Zealand (involving an unknown assailant). There have been no post-9/11 attacks there. However, at least seven New Zealanders have been killed in foreign attacks: two in the World Trade Center, three in the 2002 Bali attacks, one in the 2005 London bombing, and one in the 2009 Jakarta attack.

The United Kingdom's experience has been different. In Northern Ireland, terrorism has been a real threat for much of its history, culminating in a 30-year war that began in 1969 and peaked in 1972, when 467 died in Northern Ireland as a result of violence associated with the conflict over whether Northern Ireland was to remain part of the United Kingdom. Of those that died, 321 were civilians, with the remainder being soldiers (103), members of the Ulster Defence Regiment (26), and police (17). Between 1969 and 1994 (after which the annual death rate fell sharply), there were 3,159 terrorism-related deaths in Northern Ireland. Most of the casualties (2,216) were civilians; the others were soldiers in the British Army (445), members of the Ulster Defence Regiment or its successor (197), or members of the Royal Ulster Constabulary (194) or the Royal Ulster Constabulary Reserve (101).²⁰ Civilian casualties included both Catholics and Protestants, in proportions roughly similar to their proportion of the population.²¹ Between 1995 and 2000, there were another 131 terrorism-related deaths, and 121 of the dead were civilians (including 38 members of Republican or loyalist paramilitaries).²² The post-9/11 period coincided with a continuing decline in Irish violence. According to one source, there were 16 conflict-related deaths in Northern Ireland in 2001, 11 in 2002, 10 in 2003, 4 in 2004, 8 in 2005, 3 in 2006, 2 in 2007, and none in 2008.²³ There were at least three conflict-related deaths in 2009.

Northern Ireland bore the brunt of the conflict, but there were frequent attacks on targets in England (most of which were not lethal). Among the casualties were English politicians, including the secretary of state for Northern Ireland who was killed by a car bomb in 1979.²⁴ Less-discriminating bombings caused considerable civilian casualties and included the 1974 bombings

of two pubs in Birmingham, which took at least 21 lives; bombings earlier that year that killed 17; and a 1994 bombing at Warrington, which killed two.²⁵ According to the Global Terrorism Database, Irish Republican groups were responsible for 51 fatal terrorist attacks on the British mainland (173 deaths) between 1971 and 1980, 32 (135 deaths) between 1971 and 1980, 12 (39 deaths) between 1981 and 1990, and 7 (10 deaths) between 1991 and 2000.

By comparison, the United Kingdom's experience of other forms of political violence has been mild. There have, however, been several lethal terrorist attacks. In addition to attacks by Irish groups, the Global Terrorism Database lists 29 other fatal terrorist attacks between 1971 and 2001, each typically involving a single death. Twelve took place between 1971 and 1980, causing a total of 16 deaths.²⁶ In the following decade, there were 13 attacks, causing a total of 14 deaths (excluding those caused by the destruction of a plane over Lockerbie, Scotland, which killed 270 people). Between 1991 and 2001, there were four attacks, with five deaths. More than half the attacks were by unknown groups or people.²⁷ Of the rest, all but a handful were associated with a variety of Arabic and Islamic groups. In addition, a siege at the Iranian embassy in London ended with the death of five of the six hostage takers and one of the hostages.²⁸

The post-9/11 period has seen one major terrorist attack and a number of attacks causing one or more deaths. The gravest attack occurred on 7 July 2005 and involved the coordinated bombing of three London trains and a bus, in which 56 people (including the four bombers) were killed. Those responsible were British nationals who were sympathetic towards but acting independently of al-Qaeda.

United Kingdom nationals have also been the victims of overseas attacks. Sixty-seven British citizens were among those killed in the 9/11 attack.²⁹ Twenty-four British citizens were among those killed in the October 2002 Bali bombings, and Britons were among those killed in the 12 May 2003 attack on three Saudi Arabian residential compounds.³⁰ In November 2003, there was a suicide attack on the British consulate and the Istanbul branch of the HSBC, with 33 killed, including the British consul and two other British citizens. Al-Qaeda gunmen killed a British cameraman in an attack on a BBC news crew in June 2004 and killed a British national living in Riyadh in September 2004. British citizens were also the victims of an attack in Iraq (October 2004) and the explosion of a car bomb in Qatar (2005).³¹

Thwarted Plans

Thwarted plans provide an ambiguous guide to the threat posed by terrorism. On one hand, they indicate that the threat is reduced by the diligence of secu-

rity services, the police, and the public. On the other, they suggest that even in countries that have been largely free from terrorist attacks, this is not through want of would-be terrorists. It seems unrealistic to treat thwarted attacks as irrelevant to the dimensions of the terrorist threat.

In each of the five countries, police and security agencies claim to have frustrated terrorist attacks. Federal Bureau of Investigation statistics relating to terrorist incidents within the United States between 12 September 2001 and 31 December 2005 suggest that the FBI prevented almost as many terrorist attacks as actually took place (21 compared with 27) but that the attacks would not have involved many casualties had they taken place. The prevented attacks were typically acts of domestic terrorists, a majority of which involved right-wing extremists.³² A study of the period 2001–2011 concluded that there had been at least 30 foiled attacks involving “international terrorism,” some of which would have involved considerable loss of life if executed.³³ Several of these involved threats to aircraft and were detected only when the offender was in the process of trying to cause an on-flight explosion. Richard Reid managed to board a Paris-Miami flight with explosives packed into the soles of his shoes and was overpowered while attempting to detonate the explosives.³⁴ More recently, Umar Farouk Abdulmutallab attempted to destroy an aircraft carrying 290 passengers and crew. According to an FBI agent’s affidavit, Abdulmutallab succeeded in setting off an explosion sufficient to set his pants and the wall of the aircraft on fire. The fire was extinguished, and Abdulmutallab was subdued.³⁵ In 2010, two bombs placed on cargo flights bound for the United States were intercepted en route, after the Saudi government had received and communicated details of the bombers’ plans.

Most of the other thwarted conspiracies involved plans for bomb attacks on buildings and in public places. In 2010, a would-be car bomber was arrested after the vehicle he abandoned had attracted the attention of a suspicious bystander.³⁶ Most of the other foiled attacks were identified at a much earlier stage, sometimes well before the offender had taken any steps to acquire the bomb, other than those done with the knowledge of the police.³⁷

A former director-general of the United Kingdom Security Service reported that between 2001 and 2007, the United Kingdom

 faced 15 serious plots and many smaller ones. The plots were of varying complexity and sophistication, and most involved a network of people overseas as well as people based in the UK. We detected and thwarted, with police, a dozen of them.³⁸

Plots that were not thwarted by the police included the 7/7 attacks, the attempted 21 July attack (which failed as a result of a manufacturing error by the

bomb makers), and Richard Reid's attempt to destroy an aircraft. The most impressive police success was the frustration of a 2006 conspiracy to blow up a number of flights from London Heathrow Airport to North American destinations, a legacy of which is limits on the right of passengers to bring fluid containers aboard aircraft.³⁹ Two planned bomb attacks failed only because the bombs failed to explode.⁴⁰ Several planned bomb attacks were frustrated after having been discovered by British and Pakistani intelligence.⁴¹

By 2005, the Royal Canadian Mounted Police had reportedly "disrupted" at least half a dozen 'national-level' terrorist groups," but details are lacking.⁴² The only foiled attack on Canada that gave rise to a criminal prosecution involved plans to bomb a number of targets in the Toronto area. The plans came to the notice of the authorities well before any serious steps had been taken to implement them.⁴³

In December 2001, Singapore authorities uncovered plans by Jemaah Islamiyah to attack a number of targets, including the Australian High Commission.⁴⁴ Australian authorities have also successfully prosecuted a number of people on the basis of planned acts of terrorism. As in Canada, the police and security services were aware of the plans from an early stage.⁴⁵ New Zealand police claimed to have foiled a terrorist conspiracy in 2007, but the solicitor-general concluded that New Zealand law could not support terrorism charges, given the facts alleged against the arrestees. After years of wrangling about the admissibility of surveillance evidence, firearms charges against 13 remaining defendants were dropped as unsustainable. One defendant died. In 2012, four were charged with firearms offences and involvement in an organised criminal group. The jury convicted on the firearms offences but could not agree on the criminal organisation charges.⁴⁶

Drawing conclusions from thwarted attacks is difficult. In relation to some international plots, few details have emerged. Far more material has emerged from criminal trials, but the implications of the material are unclear. In several cases, the circumstances indicate that it was only good luck, incompetence, or both that frustrated the plan. This was clearly the case in relation to two attempts to destroy aircraft, and there can be little doubt that those responsible for leaving car bombs in London and New York intended that they explode. In other trials, the implications of the facts are more ambiguous. Typically, the trials indicate that the defendants were people who probably would have been pleased if their plans had come to fruition; but they also highlight massive gaps between intentions and capacities and indicate that the relevant terrorists were sometimes more attracted to the thought of violence than to its actual execution.⁴⁷ One of the 7/7 conspirators decided against being a suicide bomber and abandoned his bomb in some wayside bushes. Some of the To-

ronto conspirators and Abdul Kadir, one of the conspirators plotting to blow up John F. Kennedy International Airport in New York, seem to have been anxious to minimise civilian casualties. Parties to conspiracies sometimes drifted away without coconspirators being particularly concerned. The trials suggest the possibility that if left to their own devices, the terrorists might simply have decided to abandon their plans. The police, understandably, decided not to find out.

Assessing the Risk

If reasoning by induction was sound logic, we could conclude that the risk of a terrorist attack causing one or more deaths in a particular year and in a particular large city in one of the five countries is very small and that the risk of a major attack is tiny. We also have grounds for believing that the size of the risk may be partly due to the vigilance of counterterrorist forces, coupled with fortuitous mistakes on the part of would-be terrorists. But rejoicing in good news is something we regard with natural suspicion, borne of ancestral fears of the price of hubris.

Out of deference to the gods, some qualifications are in order. First, if terrorism is treated from an internationalist perspective, the picture is far less rosy. In Iraq and Afghanistan in particular, terrorist activity has been and continues to be a problem, partly attributable to policies pursued by liberal democratic governments in response to the perceived threat of terrorism. (It is also attributable to decisions made by terrorists.)

Second, one cannot necessarily extrapolate from the past to the future. A theme of many surveys of the recent history of terrorism is its fluidity. A popular paradigm emphasises waves of terrorism, perhaps as many as four since the 1970s.⁴⁸ A methodologically sophisticated time-series study has identified “breaks” in patterns of terrorism, with 9/11 representing one such break.⁴⁹ Other studies highlight the degree to which the demographic and social attributes of terrorists⁵⁰ and the nature of terrorism can vary even within relatively short periods.⁵¹ This is not surprising, since terrorist groups are likely to react to counterterrorism moves and other changes to their environment by adopting different strategies.⁵² Sometimes, changes are for the good, but in countries where the terrorist threat borders on nonexistent, substantial change can only be for the worse.

Third, even if the dynamics of terrorism were stable over time, experience cannot provide a reliable guide to the likelihood of extremely rare events, except in the sense that it will suggest that they will continue to be extremely rare. The effect of this is that it may be impossible to know whether the risk of, say, a terrorist nuclear attack on a given large city in a given year is 1/100

or 1/10,000. Yet a difference of this magnitude has important implications for determining whether and what precautions should be taken against this possibility.

These problems are not altogether insuperable. Intelligence agencies, media organisations, journalists, and other researchers may be able to detect changes that foreshadow possible changes to the risk of terrorist attacks, and laypeople may be able to make some informed guesses based on accessible information. For instance, the 9/11 attacks did not entirely come as a bolt from the blue. But for reasons discussed here, estimates of the parameters of terrorist threats are likely to be vague. This can be demonstrated by insurers' apparent inability to estimate the likelihood and magnitude of catastrophic attacks and by the vagueness of government specifications of the dimensions of the threat.

Insurers

If anyone can dispassionately assess the risk posed by terrorism, it ought to be the insurance industry. Moreover, if risks can be calculated with some precision, it should be possible to charge premiums that would-be insureds are prepared to pay, especially if it is true that laypeople tend to overestimate the risk of terrorism. Up to a point, these assumptions have been borne out. However, especially in the aftermath of 9/11, insurers have tended to require special terrorism insurance for at least some lines of cover. For other lines, risk aversion on the part of insurers has meant that premiums have been set at a level that has limited the take-up of such insurance. Uncertainty associated with the danger of some forms of terrorist attack has prompted insurers to refuse cover for damage occasioned by such attacks. Problems associated with the underprovision of affordable terrorism insurance have prompted government intervention in numerous countries, including the United Kingdom, the United States, and Australia, but not Canada and New Zealand.

The events of 9/11 demonstrated the resilience of the insurance industry. Despite the unprecedented losses, the insurance industry met its legal obligations,⁵³ and perhaps even more surprisingly, the price of insurance company stock recovered to close to where it had been prior to the attack. However, the immediate lesson that insurance companies derived from the attack was that it was no longer wise to treat losses due to terror as simply another type of loss. Post-9/11 commercial property insurance policies excluded coverage for terror-related losses.⁵⁴ The supply of terrorism insurance almost dried up, and while it began to recover, take-up was slow.⁵⁵ Insurers were less concerned by the threat of noncommercial losses. In at least some OECD coun-

tries, the terms of personal lines of insurance have not been changed to exclude terrorism risks.⁵⁶

The history of terrorism insurance points to a number of conclusions. First, even now, insurance companies regard some insured risks as insignificantly affected by threatened terrorism.⁵⁷ Second, there is evidence that, in some respects, commercial terrorism risks are sufficiently predictable for a competitive terrorism insurance market to have emerged in the United States. Premiums have declined: they accounted for 10 percent of all premiums paid for commercial property insurance in early 2003, but by late 2004, they had fallen to 4 percent, where they have remained. For some insureds, premiums may be as little as 0.02 percent of the value of their insured property.⁵⁸ Take-up rates rose substantially between early 2003 and late 2004, from about a quarter of all insured businesses to around half, and they were close to 60 percent by 2006.⁵⁹ However, terrorism insurance was less available, more expensive, and often capped, where the relevant premises were located in high-risk areas.⁶⁰

Third, governments in many countries have been persuaded that the problems of risk determination require special legislation aimed at placing some of the risk of exceptional attacks on governments. The United Kingdom passed such legislation following massive property damage caused by attacks on property by the IRA, and the United States and Australia did so following the 9/11 attacks. In the latter two countries, the legislation was and is subject to sunset clauses, but it has not been allowed to expire.⁶¹

Fourth, the ongoing problems surrounding the determination of premiums point to a perception on the part of risk assessors that the terrorism risk is serious but, to a considerable extent, incapable of precise calculation. While suggesting that insurers' strategies for risk assessment and risk management have become more sophisticated, an OECD report on insurance against terrorism risk points out that calculating the likely costs of attacks on particular targets requires access to a vast amount of information if it is to be of value and that such calculations are of little assistance in the absence of information about the likelihood of a particular target being attacked.⁶²

Fifth, the difficulties surrounding decisions in relation to the provision of terrorism insurance not only reflect the difficulty of determining the likelihood and likely severity of terrorist attacks; they also reflect features of the risk, which means that insurers may find it harder to manage a series of terrorist attacks than a series of natural disasters whose aggregate effects may be as disastrous. In particular, the different kinds of risks associated with major terrorist attacks may be highly correlated, involving claims against different lines of insurance. Liabilities for terrorism-related losses may accrue at the

very time that the attack has led to a loss of financial confidence, thereby reducing the value of insurers' assets. Also, given the proclivities of some terrorist groups, there may have been a series of simultaneous attacks.⁶³ This means that the determination of what to offer and at what price is harder than the determination of the likelihood and likely severity of possible terrorist attacks, but this suggests, in turn, that insofar as insurers in a free⁶⁴ market do offer terrorism insurance, they consider that it is nonetheless possible to make plausible estimates of the likelihood and likely severity of the risk of terrorism, along with the hazards introduced by correlated risks.

Sixth, insurers are reluctant to provide coverage against the risk of chemical, biological, radiological, and nuclear (CBRN) weapons. Private insurers regard these risks as uninsurable and exclude them from coverage. Some government schemes exclude some or all CBRN risks from their statutory compensation schemes. Germany excludes all CBRN risks. Australia excludes damage attributable to radiation or nuclear attack. Belgium permits coverage for loss due to nuclear bombs to be excluded from coverage.⁶⁵ US terrorism legislation does not preclude compensation for CBRN risks, but it does not require insurers to offer insurance against such hazards for states that approve CBRN exclusion clauses.⁶⁶ Many states also allow exclusion of losses indirectly flowing from such attacks, such as losses caused by fire.⁶⁷ The United States provides for partial coverage. The United Kingdom, France, Spain, and the Netherlands provide general coverage, even for CBRN risks.⁶⁸ CBRN incidents may also be covered indirectly. Several jurisdictions provide set ceilings on the government's exposure.⁶⁹

Finally, premium setting and its analogues highlight the degree to which the risk of terrorism is geographically contingent. In the United States, location is a major determinant of premiums.⁷⁰ In Australia, the premiums payable by insurers to the Australian Reinsurance Pool Corporation vary sharply according to whether the business is located in the central business district (CBD) of a city of more than 1 million people, elsewhere in a large city or anywhere in a city of more than 100,000 people, or elsewhere in Australia. Since 2003, premiums payable as a percentage of underlying premiums have been 12 percent for CBD premises, 4 percent for premises in other urban areas, and 2 percent for premises elsewhere.⁷¹ The stability of those contributions also suggests an assessment that the risk of attack has remained relatively constant.⁷²

Terrorism insurers are the only group to have attempted to attach numbers to the threat of terrorism. Implicit in their numbers is the conclusion that terrorism poses little threat to commercial property, other than property located in the CBDs of large and medium-sized cities, and that there is a nontrivial but

incalculable threat posed by CBRN attacks—which is more or less the conclusion to be drawn from past experience.

Government Fears

When it comes to assessing the risks of terrorism, governments enjoy several advantages over laypeople. They have access to far more data, some of which they may be able to keep secret from the public. They also have access to skilled analysts. However, governments may have political reasons for deliberately exaggerating the threat, and a mixture of availability, the seduction of worst-case scenarios, and institutional cultures may also lead governments astray.

Space does not permit a detailed analysis here of government perceptions or of what underlay them, and in any case, disentangling the influences of political calculation and self-deception would be extremely difficult. Goldsmith's account of the "threat matrix" presented each day to the president highlights the degree to which those responsible for the country's security were (and may still be) daily confronted with pages of threats distilled from billions of intercepted phone calls and e-mail messages, including numerous plans for CBRN attacks. Self-evidently, none of these eventuated, but those exposed to the daily reports admit to being terrified by what they encountered, notwithstanding that none of the threats has yet been put into practice.⁷³ Low-probability threats were to be treated as certainties, and Goldsmith sympathised, but not to the point of accepting the logic of this analysis.⁷⁴ Dame Elizabeth Manningham-Buller has highlighted similar problems of information overload during her term as director of the United Kingdom's MI5 and was also concerned about the possibility that al-Qaeda might have and use CBRN weapons.⁷⁵ Mueller is less forgiving, and his examples of the use of funds ostensibly intended for security suggest either that members of Congress were not particularly concerned about the dangers posed by terrorism or—if they were—that their concern was not sufficient to persuade them to resist pork-barrel temptations.⁷⁶

Publicly, governments are concerned about the threat. But the most striking feature of their descriptions of the threat is not that they are clearly misleading; it is that they have tended to be so vague as to be almost unfalsifiable. Here, I shall examine three sets of sources: speeches in support of counterterrorism legislation; colour-coded terrorism alerts; and reports from security services. Speeches justifying counterterrorism legislation naturally referred to the evils of terrorism and the need to combat it, but there is little to suggest that they could not have been written by intelligent laypeople with no ac-

cess to such restricted information as the government might have had in its possession.

When the British home secretary moved the second reading of the Terrorism Bill in 1999, his speech addressed the evils of terrorism, the deaths and injuries it had caused in the United Kingdom, and recent examples of terrorism in the United Kingdom and abroad. His justification for the legislation was not that there was a known threat of a known magnitude but that one could not say there was no threat.⁷⁷ Post-9/11 speeches treat the 9/11 attacks as heralding a new paradigm, such that the threat must be treated as far more serious than it had previously been. In the House Judiciary Committee's deliberations on what became the USA Patriot Act, Chairman Sensenbrenner argued that "our lives were changed forever," but he was not sure how. His analysis of the problem posed by terrorism emphasised uncertainty: "We are uncertain who the enemy is. We are more uncertain than ever before about the next move of the enemy. Because of this uncertainty, we have had to change the way we think about the safety and security of our country and its people."⁷⁸ Introducing Bill C-36 on 10 October 2001, the Canadian minister of justice and attorney general justified the legislative package on the grounds that "[t]he world changed on September 11 in a way that changed our collective sense of safety and security."⁷⁹

The New Zealand minister for foreign affairs and trade considered that "[t]errorism has become the greatest contemporary threat to the world's peace, prosperity, and security."⁸⁰ Less apocalyptically, the Australian attorney-general admitted that there was "no known specific threat of terrorism in Australia at present," but he justified his government's much more wide-ranging package of bills on the grounds that

since September 11 there has been a profound shift in the international security environment. This has meant that Australia's profile has risen and our interests abroad face a higher level of terrorist threat. . . . Terrorism has the potential to destroy lives, devastate communities and threaten the national and global economy.⁸¹

These speeches were given within months of 9/11, at a time when one would expect governments still to be coming to grips with the devastating attacks. But there is little to suggest that governments subsequently developed a significantly more accurate assessment of the threat. A crude measure of government threat assessments is provided by the much-mocked color-coded alert systems. The United States defined "threat conditions" by reference to a five-color hierarchy: green for low, blue for guarded, yellow for elevated, orange for high, and red for severe. The codes were determined by the attorney

general in consultation with officials of the Department of Homeland Security and could be assigned generally or for particular areas or sectors. They reflected both the likelihood and gravity of threats. Assignment of a threat level had implications for measures that must be taken to meet the threat. However, the presidential directive establishing the advisory system did not specify criteria for determining whether a given threat should be placed in a given category.⁸²

The United States changed its assessed threat level on numerous occasions in the early years of its operation. More recently, the level became more stable and more particularised.⁸³ It began at yellow on 12 March 2002, increased to orange on 10 September, and was lowered to yellow on 24 September. It was raised to orange on 7 February 2003 and lowered to yellow on 27 February, increased to orange on 19 March and lowered to yellow on 16 April, raised to orange on 20 May and lowered to yellow on 30 May, and increased to orange on 21 December. On 9 January 2004, it was lowered to yellow, where it has generally stayed. However, between 1 August and 10 November 2004, it was orange for the financial services sectors in New York City, northern New Jersey, and Washington, DC; and between 7 July and 12 August 2005, it was orange for mass transit. On 10 August 2006, following discovery of the Heathrow plot, it was raised to red for flights from the United Kingdom to the United States and to orange for other US or US-bound flights. Three days later, the red threat was lowered to orange, where it stayed until 2010, when colour-coded threat warnings were abandoned.

Since 2006, the United Kingdom Home Office has used a five-tier ranking: critical (an attack is expected imminently), severe (an attack is highly likely), substantial (an attack is a strong possibility), moderate (an attack is possible but not likely), and low (an attack is unlikely). All probabilities are probabilities of attacks in the near future.⁸⁴ These assessments lend themselves to falsification. If the risk is “critical” for a long period but no attacks occur, the risk has been overestimated, although the significance of this will depend on whether the overestimation is a result of the success of the police and others in frustrating what would otherwise have been a terrorist attack.

British threat levels have fluctuated. Since 1 August 2006, when the level was severe, it has changed to critical (10 August), severe (13 August), critical (30 June 2007), severe (4 July), substantial (20 July 2009), severe (22 January 2010), and substantial (24 September 2010).⁸⁵ In one case, threat assessments under an earlier system involved a kind of “false negative”: shortly before the 7/7 attacks in 2005, the threat level was lowered (under an earlier model) to “medium.”⁸⁶ At times, these forecasts have constituted “true positives”: the United Kingdom has experienced several attempted attacks during periods when the risk has been assessed as high or critical. But there have also been

false positives: there have been periods lasting for months during which attacks have been forecast as imminent and have never come to pass. There have been no cases of true negatives: forecasts of peace that were coupled with peace.

The Australian National Counter-Terrorism Alert System uses four measures to communicate the threat level (low, medium, high, and extreme) and provides for the possibility of alert levels tailored to risks posed to particular locations. A “medium” alert means no more than an assessment that an attack could occur.⁸⁷ Since 2001, the threat of a domestic terrorist attack has been classed as medium.⁸⁸ Threats of attacks on Australian targets overseas and on UK, US, and Israeli targets in Australia have been ranked as high.⁸⁹

Colour coding is crude, given that risks are typically to particular targets rather than to particular countries. Given that the US system was, at most, an ordinal measure of the seriousness of the risk, it is difficult to know whether “yellow” alert is an overestimate of the “true” risk. That the measure has fluctuated while actual attacks have not tells little about the reliability of the government measure, since the absence of forecast attacks may reflect that awareness of the danger enabled governments to head off attacks. (It may also reflect that fears turned out to be misplaced.)

Governments also publish more-precise information. The United Kingdom Security Service appears to have concluded that al-Qaeda and its associates constitute the only serious international terrorist threat to the United Kingdom. It has reported a steady increase in the number of people tracked by the service, from 250 in 2001 to 2,000 in 2007, by which time the service was also tracking 200 networks. The service explained that while this increase is partly due to increased capacities, it is also attributable to a growth in the numbers involved in Islamist extremism.⁹⁰

Concerns about terrorism are the “top” or “major” priority of the Canadian Security Intelligence Service. Its public report for 2002 indicated concerns about the possibility that CBRN weapons could be acquired or used by terrorist groups, reporting that “as a result of the Afghan war, new information has come to light indicating that Osama Bin Laden’s search for CBRN weapons was even more assiduous, and in some respects had progressed further, than previously believed.”⁹¹ The CSIS’s concern was primarily with the danger posed by al-Qaeda and people associated with it. The problems posed by terrorism were exacerbated by technological advances—which facilitated travel, communication, money transfers, and encryption—and by the evolving nature of terrorism. The report noted that much terrorist-related activity within Canada seemed to be related to attempts to mobilise economic and political support for groups engaged in foreign conflicts and that coercive fundraising within immigrant communities was a problem. Similar themes were

expressed in subsequent reports, although the 2003 report concluded that the threat had increased and that “emerging terrorist threats and tactics have become more lethal.”⁹²

The Australian Security Intelligence Organisation (ASIO) also regards counterterrorism as its dominant concern. Al-Qaeda had regarded Australia as a target even before 9/11 and continued to do so, but ASIO was also particularly concerned by the activities of Jemaah Islamiyah, which had been linked with plans to attack Western targets in Singapore, including the Australian High Commission, and which had been responsible for the 2002 Bali bombings. However, in its 2002–3 report to parliament, it also reported that raids on Australians associated with Jemaah Islamiyah yielded no evidence of cells or of planned attacks or the wherewithal to conduct them. Like Canada, its reports express concerns about the possibility of terrorists gaining access to CBRN weapons. Following the Madrid and London bombings, reports noted the emergence of homegrown groups, observing that while “autonomy imposes certain operational constraints on groups, it also makes detection by security agencies more difficult.”⁹³

The annual reports of the New Zealand Security Intelligence Service (NZSIS) suggest that the service was generally optimistic, while naturally reluctant to conclude that there was no terrorist threat to New Zealand. In the aftermath of 9/11, the NZSIS concluded that “there is no evidence of a serious terrorist threat against New Zealand,” but it added that “there is no room for complacency.”⁹⁴ By 2004, it was concerned that al-Qaeda’s mutation from a centralised organisation into an “inspirational force” meant that it was harder to assess the nature of the al-Qaeda threat and that there was a potential threat from New Zealand supporters of “Islamic extremist causes.”⁹⁵ These concerns were reiterated in the NZSIS’s 2005 report, with the 7 July London bombings confirming the danger of attacks from local groups. However, the NZSIS was not aware of any specific terrorist threat.⁹⁶ Its 2006 report concluded that the risk of an attack on New Zealand or on New Zealand interests remained low (“possible, but it is not expected”), but it once more warned of the dangers of radicalisation and the speed at which it could take place.⁹⁷ The NZSIS’s 2008 report does not attempt to specify the threat with any degree of precision.

We might like the parameters of the threat specified with a greater degree of precision, but in an address to the Risk Management Institution of Australia, Australia’s director-general of security, Paul O’Sullivan, argued that if so, we are doomed to frustration.

[I]n addition to understanding, and dealing with, present risks—of which, only some are known—we need to anticipate future risks. History holds valuable insights, but ultimately provides unreliable testimony concerning

the possibilities of the future. And the gravity of the present—our immediate horizon—creates powerful biases that will always prove difficult to overcome. Risk managers will look to statistics. But . . . “terrorism does not follow simple statistical patterns.” And a threshold event like September 11 somewhat defies the statistical framework informing risk analysis, because it embodies such a radical asymmetry between probability and consequence.⁹⁸

Vagueness is inescapable. So is error. Indeed, if governments accurately assess an increase in the threat level, they may well have the information to enable them to thwart the plot, in which case its threat is diminished. If there is a plot and governments do not know of it, they will underestimate the threat and may well be shown to have done so.

Public Perceptions of the Risk of Attacks

There is a vast body of survey data bearing on public perceptions of the threat of terrorism. In numerous polls since the 9/11 attacks, Americans have been asked how likely it is that there will be further acts of terrorism in the United States over the next several weeks. Another series of polls asked about the likelihood of another terrorist attack within the next few months. Table 1 reports the distributions of answers to these polls. Variants include references to “major” or “deadly” attacks, to the likelihood of such attacks within longer periods, and to the likelihood of attacks within particular communities. Outside the United States, polls tapping fears of terrorism are far rarer but are sufficient to enable limited cross-national comparison. Response categories are typically “very likely,” “somewhat likely,” “not very likely,” “not at all likely,” and “don’t know” or “not sure.”

The series of polls tapping fears of attacks within the next few weeks and the next few months show similar trends. In the immediate aftermath of the 9/11 attacks, most Americans considered that further attacks were either very or somewhat likely. By December 2001, fears were evaporating, and between 2002 and 2009, they declined yet further, only to rise back to 2002 levels in the aftermath of the attempted 2009 Christmas Day bombing. However, fears may also rise in response to attacks on terrorist targets: the killing of Osama bin Laden was reflected in a sharp increase in the percentage of respondents who feared a terrorist attack within the next few weeks.

The polls suggest that respondents correctly assess the likelihood of attacks as smaller when the relevant period is relatively short. This is consistent with other poll data that suggest that the perceived likelihood of terrorist attacks when people are asked about the likelihood of attacks within the

next year, few years, or, a fortiori, the next five years. US data also suggest that people correctly rank the likelihood of a terrorist attack in their community over the next few weeks as far lower than the likelihood of an attack within the United States. In November 2001, 23 percent ranked the likelihood of local attacks as very or somewhat likely, but the figures were lower in subsequent polls, with the relevant percentages ranging between 10 percent (August 2009) and 17 percent (July 2002, May 2010).

These figures suggest that aggregate responses are “rational” in the sense that perceived likelihoods vary according to the time within which the attack might take place and the breadth of the area in which the attack might take place. But the data also suggest that these variations make far less impact than they ought to. The likelihood of an attack within weeks should be about one-third of the likelihood of an attack within months, which should, in turn, be about one-fourth of the likelihood of an attack within a year. The likelihood of an attack in a random American’s community will be only a tiny fraction of the likelihood of an attack somewhere in the United States.

TABLE 1. Summary of Polls Relating to the Perceived Likelihood of Terrorist Acts within the United States

Date	#	V	Sw	NT	N	Dk	Date	#	V	Sw	NT	N	Dk
Oct 01	(1)	40	45	10	13	2	8 Oct 01	(1)	46	39	8	3	4
Nov 01	(1)	24	50	16	6	4	25–28 Oct	(1)	53	35	8	2	2
Dec 01	(1)	17	55	27	8	3							
2002	(5)	14	44	29	10	3	2002	(9)	27	45	19	5	3
2003	(5)	13	45	30	10	2	2003	(4)	17	48	19	5	3
2004	(3)	10	39	36	13	2	2004	(4)	19	47	23	7	4
2005	(4)	9	37	39	13	2	2005	(1)	9	43	35	7	6
2006	(4)†	12	38	37	10	2	2006	(3)	14	44	30	9	4
2007	(5)†	10	31	9	17	2	2007	(4)	15	37	33	12	4
2008	(3)*	8	26	40	21	7	2008	(2)	8	33	40	16	3
2009	(2)†	10	27	39	22	2	2009	(3)	8	30	41	18	4
2010	(2)*	14	38	36	14	2	2010	(4)	20	40	28	10	4
May 11	(1)*	26	42	23	6	2	2011	(2)	15	41	31	11	2
							Apr 12	(1)	10	27	37	20	6
							2013	(2)	20	39	28	9	5

Source: www.pollingreport.com/terror.htm; <http://www.pollingreport.com/terror2.htm>, <http://www.pollingreport.com/terror6.htm>.

Note: Polls conducted in the United States questioning the perceived likelihood of an attack within (a) the next several weeks, and (b) the next few months. Reported probabilities are: very likely; somewhat likely; not too likely; not at all likely, and don’t know or unsure. Cells report row percentages. Individual polls are cited for 2001. For other years, poll results are averaged. The number of polls for each year is listed in parentheses in the column headed “#.”

Left-hand side: How likely is it that there will be further acts of terrorism in the United States over the next several weeks? Very likely, somewhat likely, not too likely, or not at all likely? (*USA Today*/Gallup; and CNN/Opinion Research (*)).

Right-hand side: How likely do you think it is that there will be another terrorist attack in the United States within the next few months? Very likely, somewhat likely, not too likely, or not at all likely? (CBS).

The distributions of responses suggest that Americans have overestimated the risks they face from terrorism, which is what one would expect, given availability and well-documented responses to low-probability high-cost events. Moreover, poll data suggest a particular tendency to overestimate the likelihood of CBRN attacks. Immediately after 9/11, 68 percent of respondents thought that an attack within the next 10 years by terrorists possessing nuclear or biological weapons was very likely or somewhat likely.⁹⁹ Two-thirds of respondents thought that terrorist groups currently had access to nuclear weapons, and 47 percent thought that terrorists would detonate a nuclear bomb in the United States within 10 years.¹⁰⁰ Respondents to a 2007 poll were asked, “How would you rate the likelihood of each of the following happening as a terrorist attack in the United States?” (the number of respondents ranking each scenario as very or somewhat likely is given in parentheses):

- A suicide bomber in a shopping mall (82 percent)
- A chemical attack using a poison gas (70 percent)
- A biochemical attack using diseases such as anthrax or small pox (69 percent)
- An attack on a nuclear power station (62 percent)
- Another attack using airplanes like 9/11 (48 percent)
- A nuclear bomb exploding in a city (42 percent)¹⁰¹

Cross-national comparisons suggest that UK respondents rate the likelihood of domestic terrorist attacks as high. In March 2004, most respondents thought that it was almost certain (28 percent) or very likely (29 percent) that there would be a major terrorist attack within the next two or three years. Their pessimism was borne out by the London bombings the following year. In the aftermath of the 7/7 bombings, 9 out of 10 respondents thought that a further terrorist attack was almost certain (45 percent) or very likely (47 percent). In a poll conducted 18 months later, 54 percent considered that there would probably be another attack on the scale of the 7/7 attacks, and another 20 percent considered that an attack would be thwarted by the activities of the police and security service. Only 7 percent thought that there would not be an attack. In response to a 2010 poll in which American, British, and Canadian respondents were asked about the likelihood of a terrorist attack in the next year, British respondents were far more likely than Americans to consider an attack to be very likely (30 percent compared to 14 percent).

In two 2003 polls, only 12 percent of Canadians thought that a terrorist attack within the coming year was very likely. But in 2005 and 2006 polls, sizeable majorities thought that the likelihood of an act of terrorism within the next few years was either very likely (24 percent in 2005, 32 percent in 2006)

or likely (38 and 39 percent).¹⁰² By 2010, only 5 percent of Canadians thought that it was very likely that there would be a terrorist attack within the next year, and 54 percent thought that an attack was either not too likely or not likely at all.¹⁰³

A series of surveys of Canadian business executives indicated that, on average, they saw the likelihood of a major terrorist attack within the next 12 months as between 0.12 (September 2002) and 0.24 (July 2005). By comparison, probabilities for the United States were 0.27 and 0.50, and the July 2005 probability for the United Kingdom was 0.42.¹⁰⁴ Given the limitation to serious acts of terrorism within a year, the Canadian executives seem to have been more apprehensive than randomly selected Canadians but, like randomly selected Canadians, less pessimistic than UK respondents.

In January 2003, Australians ranked the likelihood of a domestic attack within the following 12 months as high (18 percent as very likely, 35 percent as likely), but these figures had fallen sharply by 2007 (4 percent as very likely, 30 percent as likely).¹⁰⁵ However, in a 2009 poll, 12 percent strongly agreed and 43 percent agreed that acts of terrorism in Australia will be part of life in the future.¹⁰⁶

The United Kingdom figures stand out. They suggest that UK respondents may be more pessimistic about the likelihood of terrorist attacks on their country than are Americans, notwithstanding the United Kingdom's much smaller population. The Canadian and Australian figures are consistent with what one would expect on the basis of the two countries' prior experiences of domestic terrorism, but insofar as a country's vulnerability to terrorist attacks is a function of population, they may actually overstate the relative risk of attacks in the two countries. If so, this would not be surprising. Images of terrorist attacks in the United States and the United Kingdom will probably have influenced Canadians' and Australians' perceptions of the risks of domestic terrorism. After all, they have no domestic images to draw on (although Australian fears may have been influenced by the Bali bombings).