

ACCEPTABLE AND UNACCEPTABLE RISK: ANTICIPATION AND ACCOUNTABILITY[†]

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Much of what has been discussed during this Symposium has focused on the financial consequences of risk and who is responsible for paying the financial consequences if risk is not handled properly. I would like to take a step back for just a second and talk about government's responsibility to potentially avoid risk, and speak to it not in terms of the dollar amount that could result, but trying to avoid those hazards in the first place.

A premise for my remarks is the lack of a framework for government to make the kinds of decisions that would lead to prevention of risk.

There have been discussions of the financial structures that we put in place, such as the FDIC and other regulatory schemes. For example, in terms of preventing 9/11 or Hurricane Katrina, I am not certain that government has the structure or the framework at the federal or state level, or really for that matter at the city level, that would truly compel a government to make decisions based on risk, accept responsibility, and be held accountable for those decisions.

Where would government look to create such a framework? How might it begin that process? I think it is interesting that both tort law and insurance law may provide a good starting point for creating a framework in which one would consciously think about what risks we face, how reasonable or unreasonable they are, and what risks we should try to eliminate, minimize or tell the public we just frankly are not capable of handling.

From a negative viewpoint, tort law essentially looks back at risk. It asks the question at the time the event occurred, was the risk reasonable or unreasonable? The tort concept is really designed to protect people from unreasonable risk, but it is usually determined after the fact. I think it is part of the problem that Philip Howard has with the current system. It is usually determined after a trial in which a jury determines whether a set of circumstances created unreasonable risk.

[†] Adapted from a speech given at the Risk and Responsibility Symposium, Drake University Law School, Sept. 7, 2007.

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They have a framework in that system through jury instructions that tells them a little bit how they are to come to that conclusion. They are to look at whether the conduct of an individual created a risk of causing harm.

All of that is based in the structuring of the tort system. It is in the framework that essentially says we are going to make a specific determination of acceptable and unacceptable risk, and we are going to determine in the face of unacceptable risk what kind of responsibility or accountability one must have.

In insurance, we take a prospective look at risk. We think something in the future could potentially happen to me or society, and we next consider how we are going to minimize the impact of that risk?

We know that there is really no event, contingent or unknown, that we cannot insure, unless of course it is against public policy or prohibited by law. Therefore, the whole range of possible human conduct is available for conversation in terms of a prospective look at risk. We know that insurance companies basically go out and contract with people to cover certain risks. They make sure the insured understands in advance what will not be covered. The exclusions in a policy then become very important, because at that point everything is finalized in a contract.

There are two systems for evaluating risk—the system that looks at a series of factors to create a determination of whether a risk is reasonable or unreasonable, and a system in which if you know you are not going to cover a particular risk, you have some affirmative responsibility to disclose it. Those systems could create a framework for a government, whether it is a federal, state, or local government, to determine how to prevent major problems or catastrophes in this country or to notify people in advance what risks we cannot be protected against.

That framework should not initially take into consideration budget or political concerns. Instead, those considerations ought to take place after the framework is put in place.

What an interesting conversation it would be if Governor Pawlenty of Minnesota had said, “You know, we have looked at our bridges. We have judged this bridge to be a fifty out of one hundred and twenty, or whatever the point system was, and we are taking no steps to either stop the traffic or fix the bridge.”

That would have been an interesting conversation the governor would have had with the people of Minnesota, and it would have been interesting to see their reaction. Would they have stopped traveling over that bridge?

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I suspect not given the traffic flows. They may very well have demanded action of some sort in repairing that bridge.

In this framework, I think we can create a direct line of responsibility and accountability. Philip is absolutely right—when the bridge falls down, there may be engineers who lose their jobs, but the governor is not necessarily going to lose his job immediately. He may lose it at the next election, but he does not lose it immediately.

Once you have a framework that determines reasonable or unreasonable risk, at that point one needs to rank those determinations and develop a direct line of accountability. You determine whether you are in fact going to make efforts to prevent or mitigate the risk, and then you make the decision in the face of not mitigating or eliminating the risk of how you are going to disclose that to the public. That is a much different system than we have today.

Let us think about 9/11. There were substantial problems within government because we did not have a framework to assess, prevent, and mitigate risk.

We had an intelligence system with silos. They were gathering intelligence, but they were not sharing it with anyone. Maybe some individuals knew that the hijackers were in the country; some may have known their ties to terrorist organizations, and others may have known that they were taking flying lessons, but no one—because of the nature of our intelligence system—put those pieces together.

The country had communication gaps in which people who had information and who had a responsibility to provide information failed to do so. We clearly had a failure of our immigration system and our border system because some of the hijackers had expired visas. We obviously did not have tight airport security or a general appreciation that this type of terrorist attack could happen.

If there had been a framework in place that would require the government to assess reasonable and unreasonable risk, the events prior to 9/11 clearly would have been an unreasonable risk that we would have been able to identify. We would have been able to know that there were terrorist attacks in other countries, that there had been terrorist attacks on and against Americans in other countries, and it was simply a matter of time before someone tried to do something in America. We knew that there were in fact some events at the World Trade Center previous to 9/11. But because we did not have that framework in place, and because we did

not have anything that required government to determine what was a reasonable or unreasonable risk, with no direct line of accountability, things fell through the cracks.

Our response to 9/11 is interesting. We did not establish a framework that requires us to take a look at the most severe risks that we face. If we had such a framework today, we would not necessarily be talking about airport security or small vials of liquid. Instead, we would be deeply concerned about our borders and about the threat of a nuclear bomb in our cities. We would be most concerned about these problems because these are by far the most significant risks we face.

If we indeed have a million people crossing our borders, and we do not know who they are and when they are crossing over, and we have no control of them as they cross over, we surely do not know what they are carrying across the border. It would only take a suitcase full of this material to cause great harm. This is an issue of evaluating risk. This is a framework that does not exist today, and it will not exist unless we make it part of the political dialogue.

If we had such a framework, then we would know that these are the risks that we absolutely need to avoid. The question at that point is, what would we do? The first thing we would do is make sure the borders are secure, because if a suitcase full of this material comes into the country, we have to deal with it. We would put measures in place to know precisely the location of this material around the world so that it could be adequately secured.

In terms of risk, we ought to be initiating a dialogue about creating a framework and a structure that convinces government officials to actually determine what reasonable or unreasonable risks we should face, the most significant risk we face, and how to deal with those risks.

Think about this: What government official, with all the knowledge that we now know from the 9/11 Commission, was held responsible for 9/11? Who lost his job? Who was fired? No one. Because, in my view, there is not a framework and structure to properly evaluate risk of personal security—not financial security, but personal security.

People mention budget considerations when discussing this topic. That is what some governments are trying to address when they establish and develop a budget for a results mechanism, which we have started in the State of Iowa. It is hard to get the bureaucracy to understand and appreciate this budgeting for results, but it does in fact require that every

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dollar we spend be tied to a specific goal, and those goals have to be ranked—they have to be listed in a way that allows officials to determine the priority of those goals.

In the face of what we now know about our infrastructure, and in the face of what we now know about homeland security, there really does need to be a kind of discussion at the federal level so that Americans know precisely what decisions are being made relative to the federal budget, why those decisions are being made, and the results we expect from the investments that we make with our federal budget. If we had such a system, I suspect that the priorities would change. I suspect that there would be greater priority on avoiding those rather significant substantial risks. That is my belief.