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DEVIANCE, RISK, AND LAW: REFLECTIONS ON THE DEMAND FOR THE PREVENTIVE DETENTION OF SUSPECTED TERRORISTS

JOSEPH MARGULIES*

Cognitive psychologists have long understood the tendency of people to make sense of what is new by analogy to what is old. They call this “analogical reasoning.”¹ I prefer the more familiar and less clunky phrase, “reasoning by analogy,” but the meaning is the same. Reasoning by analogy “allows us to apply knowledge we have from one domain to a new context and therefore to make inferences and judgments without starting from scratch.”² In addition, by framing our understanding of the novel in terms of the familiar, we conjure up images of a proper solution to new problems. “When our understanding of the source domain includes normative prescriptions and evaluations, [they] are applied analogically to suggest the right evaluation or course of action in the new situation.”³ This

* Clinical Professor, Northwestern University School of Law. In the interest of disclosing possible biases, I was counsel of record for the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), involving post-9/11 detentions of foreign nationals at Guantanamo, and *Munaf v. Geren*, 553 U.S. 674 (2008), involving post-9/11 detentions of U.S. citizens in Iraq. Presently, I am counsel of record for Abu Zubaydah, for whose interrogation the infamous “torture memos” were written. These were legal memos written by attorneys with the Office of Legal Counsel at the Department of Justice which wrongly concluded that torture, when ordered by the President in his capacity as Commander in Chief, would not violate domestic or international law. Zubaydah is often described as a candidate for preventive detention. An earlier version of this Article was presented at a symposium at Seton Hall University Law School. I am grateful to the participants for their helpful comments and to Sidney Tarrow, Albert Alschuler, Jonathan Simon, and Michael Sherry for their many suggestions. Thanks also to Sarah Grady and Zachary Dillon for their research assistance.

¹ See, e.g., NICHOLAS J. G. WINTER, DANGEROUS FRAMES: HOW IDEAS ABOUT RACE & GENDER SHAPE PUBLIC OPINION 4 (2008). Analogical reasoning is much discussed as a mode of judicial decisionmaking. See, e.g., Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

² See WINTER, *supra* note 1, at 4.

³ *Id.* at 4–5.

Article applies these insights to the present debate over preventive detention of alleged terrorists.

I. INTRODUCTION

The post-9/11 world has produced a call for the preventive detention of suspected terrorists, by which I mean a system of indefinite detention based solely on predictions of future dangerousness without regard to past conduct.⁴ Legal academics and journalists have spilled considerable ink exploring this topic, but almost no attempt has been made to place the call in its larger cultural context.⁵ This is regrettable since it amounts to reading only the last chapter of a long book then grumbling that events seem to have come upon us with so little explanation.⁶

⁴ See, e.g., JACK GOLDSMITH, BROOKINGS INST., LONG-TERM TERRORIST DETENTION AND OUR NATIONAL SECURITY COURT (2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf; Stephanie Cooper Blum, *The Why and How of Preventive Detention in the War on Terror*, 26 T.M. COOLEY L. REV. 51 (2009); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693 (2009); Stella Burch Elias, *Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 COLUM. HUM. RTS. L. REV. 99 (2009); Lindsey Graham & John McCain, *How to Handle the Guantanamo Detainees*, WALL ST. J., May 6, 2009, at A15, available at <http://online.wsj.com/article/SB124157680630090517.html>; Glenn Greenwald, *Victory on Preventive Detention Law: In Context*, SALON (Sept. 24, 2009), http://www.salon.com/news/opinion/glenn_greenwald/2009/09/24/detention; Joanne Mariner, *Criminal Justice Techniques Are Adequate to the Problem of Terrorism*, BOSTON REV. (Dec. 10, 2008), <http://bostonreview.net/BR34.1/mariner.php>. For a discussion of preventive detention pre-9/11, see Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 CRIM. L. & CRIMINOLOGY 771 (1998) (noting the increased call for a preventive state pre-9/11 and exploring its constitutional limits).

⁵ Most legal academics have been slow to examine post-9/11 policies in light of modern developments in criminology, just as they have been slow to give up the enormously popular myth that wartime repressions in this country are different in quality and kind from an imagined peacetime norm. For a critique of post-9/11 legal scholarship in this regard, see Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. LEGAL EDUC. 433 (2011). For legal scholarship that recognizes the cultural and legal link between the so-called Wars on Terror and Crime, see, e.g., Jonathan Simon, *Choosing Our Wars, Transforming Governance: Cancer, Crime, and Terror*, in RISK AND THE WAR ON TERROR 79 (Louise Amoore & Marieke de Goede eds., 2008); James Forman Jr., *Exporting Harshness: How the War on Crime Has Made the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010).

⁶ This inquiry is part of a larger project that examines the changes in American thought produced by the attacks of 9/11. See JOSEPH MARGULIES, *LIKE A SINGLE MIND: SEPTEMBER 11 AND THE ARC OF AMERICAN THOUGHT* (forthcoming 2013). It is also part of an effort to place post-9/11 legal developments in their broader cultural and political context and thereby diminish the narrow focus on law as an explanatory variable. For an extended discussion of this objective, see Margulies & Metcalf, *supra* note 5.

The loud clamor for preventive detention stands at the convergence of three powerful developments in contemporary American culture. The first is what my colleague, the historian Michael Sherry, calls “the punitive turn in American life,” which refers to the angry impulse over the past several decades to purge the community of undesirable elements by dramatically increasing the government’s power to monitor, exclude, restrain, and imprison those considered a threat.⁷ The second is a dangerous refinement of the concept of “security,” which has merged the cultural demand for the elimination of risk with the impassioned rhetoric of war.⁸ And the third development is a parallel turn in the law of criminal procedure. Over the past several decades, “[t]he call for protection *from* the state has been increasingly displaced by the demand for protection *by* the state.”⁹ Criminal procedure has steadily accommodated this demand, endorsing what the sociologist David Garland has branded “the criminology of the dangerous other.”¹⁰

Taken together, these developments have given rise to a distinct habit of the American mind, a characteristic way of understanding and responding to perceived deviance and risk. In contemporary American thought, a certain type of event triggers a corresponding collection of mental images and sets in motion increasingly familiar solutions, all of which Americans describe with a predictable set of tropes. Much of American society now gazes upon deviant behavior, sees only risk, and recognizes only one response, which it has summoned—and intensified—to meet the insatiable demands for security in a post-9/11 world.¹¹

⁷ Michael Sherry, *Dead or Alive: American Vengeance Goes Global*, 31 REV. INT’L STUD. 245, 258 (2005); MICHAEL SHERRY, GO DIRECTLY TO JAIL: THE PUNITIVE TURN IN AMERICAN LIFE (forthcoming 2013); see *infra* notes 14–75.

⁸ See *infra* notes 149–203.

⁹ DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 12 (2001).

¹⁰ *Id.* at 184; see *infra* notes 76–88. Naturally, these developments have encouraged and reinforced each other. A willingness to purge undesirables from the community makes it easier to imagine and attempt to create a world without risk. Zero tolerance for risk encourages judges and legislators to accept substantive claims that would have once been considered unimaginable. And a determination to conceive the rule of law as a system designed to protect society from the depravity of a subhuman predator makes draconian measures seem less foreign to American sensibilities. In the familiar way that cause becomes effect and effect becomes another cause, it is impossible to separate one development from another, but it is easy enough to see that related forces are at work and that they combine to produce the final condition.

¹¹ There is certainly nothing unusual in this. It is precisely what Bernard Bailyn had in mind when he described the very different set of ideas captured in the title of his most famous work:

[I]n the intense political heat of the decade after 1763, . . . ideas about the world and America’s place in it were fused into a comprehensive view, unique in its moral and intellectual appeal. It

In this way, the cultural demand for preventive detention of alleged terrorists has slid into the familiar and preexisting frames about risk and deviance. Because Americans know only one reaction to the problems of deviance and risk, they have enlisted them in response to the post-9/11 iteration. A belief that terrorism always reflects the act of an inherently malevolent disposition, for which no further explanation is possible or necessary, swims in the same stream as a similar view of serial sex offenders, juvenile super-predators, and other dangerous criminals. The conviction that American foreign policy cannot be blamed for terrorism and that it is heresy to suggest otherwise is merely an amplification of the belief that society cannot be blamed for criminal conduct. The mistrust of the criminal justice system, and particularly the certainty that the courts are too lenient and that “justice” is hamstrung by elaborate technicalities spun by liberal courts, elides easily into the belief that the courts cannot be trusted to preside over terrorism trials. And the view that any margin of error is too great when dealing with apocalyptic threats naturally produces a system constructed so that it cannot be allowed to fail.¹²

At the same time, the call for preventive detention is not simply the application of existing penological thought to the latest constructed crime wave. Terrorists (at least Islamic terrorists) are imagined as vastly more dangerous than any mere criminal and therefore wholly unsuited to the prosaic and quotidian machinery of the criminal justice system, a condition confirmed by the overheated rhetoric of war. In the popular imagination, war has always magnified threats and justified repression. Whatever stomach society may have for *peacetime* risk diminishes dramatically

is the development of this view to the point of overwhelming persuasiveness to the majority of American leaders and the meaning this view gave to the events of the time . . . that explains the origins of the American Revolution. For this peculiar configuration of ideas constituted in effect an intellectual switchboard wired so that certain combinations of events would activate a distinct set of signals—danger signals, indicating hidden impulses and the likely trajectory of events impelled by them.

BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 22–23 (1992).

¹² Throughout this piece, I repeatedly suggest that American thought is monolithic and that there is such a thing as American “society,” the views of which can be readily ascertained and neatly summarized. This is done only to avoid the repeated use of modifiers that signal substantial rather than universal agreement with the point being made. The punitive turn has been broadly accepted by a bipartisan segment of the American population and has given rise to what sociologists and political scientists call “a hegemonic discourse.” See, e.g., David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 23 (2007) (“Neoliberalism has, in short, become hegemonic as a mode of discourse and has pervasive effects on ways of thought and political-economic practices to the point where it has become incorporated into the commonsense way we interpret, live in, and understand the world.”). Naturally, this discourse is not universal, and a significant alternative can be heard, particularly in academia. But my concern is with the dominant narrative, and the reader will forgive me if I seem to treat it as the only one.

during war when any willingness to accept risk is attacked as dangerously foolhardy. The cultural response to 9/11 in general, and the call for preventive detention in particular, has thus intensified and sharpened the frames of risk and deviance that were borrowed from modern criminology.¹³

II. THE PUNITIVE TURN IN AMERICAN LIFE

The numbers are still sobering, notwithstanding their depressing familiarity. Approximately 2,300,000 people are in prison or jail—at least as of yearend 2009—more than every man, woman, and child in Detroit, San Francisco, and St. Paul combined.¹⁴ It is both the largest prison population and the highest incarceration rate in the world,¹⁵ and has been accommodated by an astounding growth in prison capacity: from 1985 to 2000, on average, a new state or federal prison opened in the United States every week.¹⁶ As of 2008, more than 41,000 men and women in the United

¹³ This also explains why the official response to 9/11, which so vehemently resists invocation of the criminal model, would nonetheless draw so heavily on modern criminological thought. Quite simply, this is how American society has learned to deal with problems of deviance and risk, regardless of whether the response is denominated crime-control or warfare. It is now what comes most naturally. For a similar, and eerily prescient, discussion of the use of the new penological tools and rhetoric in the setting of a war on terror, see Malcolm Feeley & Jonathan Simon, *Actuarial Justice: the Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* 193–96 (David Nelken ed., 1994) (comparing Israel's response to the first *intifada* with America's response to the growing "urban underclass").

¹⁴ See BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009, at 7 app. tbl.2 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf> [hereinafter CORRECTIONAL POPULATIONS, 2009]. With respect to the total prison population, there is at least some reason to hope. The total number of people incarcerated in 2009 fell by approximately 48,000, which was the first annual decline since the Bureau of Justice Statistics began reporting the data in 1980. *Id.* at tbl.1. The incarceration rate has declined steadily since the early 1980s. *Id.* Joseph Kennedy used this same rhetorical device more than ten years ago, pointing out that "we have more people under criminal justice supervision than we have living in Indiana, Washington, Missouri, Tennessee, Wisconsin, Maryland, or any one of thirty other states and that we currently have enough jail and prison capacity to incarcerate every woman, man, and child in Manhattan with room to spare." Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 832 (2000). Since then, the numbers have grown considerably.

¹⁵ ROY WALMSLEY, KING'S COLL. LONDON, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (8th ed. 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf. Though the United States clearly has the highest incarceration rate in the world, the total number of prisoners in China may be modestly higher than in the United States, depending on the number of people held by the Chinese government in "administrative detention." *Id.* at 3 tbl.2, 4 tbl.3.

¹⁶ MARC MAUER, SENTENCING PROJECT, RACE TO INCARCERATE 1–2 (2d ed. 2006).

States were serving life sentences without the possibility of parole.¹⁷ Another five million are on probation or parole—again, far more than any country in the world.¹⁸ And the racial impact of these numbers is even more dispiriting. African Americans are eight times more likely to be incarcerated than whites. As of 2004, over twelve percent of African-American males between the ages of twenty-five and twenty-nine were in custody.¹⁹ And for under-educated young black men, the incarceration rates are astounding: in 2000, nearly one in five African-American men under the age of forty-one who had not attended college was in prison or jail.²⁰ The extent to which incarceration has become part of the normal life experience for African-American men is simply staggering. As Bruce Western recently observed,

The criminal justice system has become so pervasive that we should count prisons and jails among the key institutions that shape the life course of recent birth cohorts of African American men. By the end of the 1990s, black men with little schooling were more likely to be in prison or jail than to be in a labor union or enrolled in a government welfare or training program. Black men born in the late 1960s were more likely, by 1999, to have served time in state or federal prison than to have obtained a four-year degree or served in the military. For non-college black men, a prison record had become twice as common as military service.²¹

The punitive turn has produced not only a great many more prisoners and prisons. It has also generated a fondness—in fact, an enthusiasm—for harsh conditions of confinement that was unthinkable only a few decades ago. Though prisons as a whole have become stunningly cruel places, this trend is perhaps best illustrated by the dramatic growth in supermax facilities. In 1984, only one prison in the United States fit the description of a supermax—the federal prison at Marion, Illinois, after the lockdown imposed in 1983.²² Twenty years later, there were supermax prisons in forty-four states holding approximately 25,000 inmates.²³ The Federal

¹⁷ Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010).

¹⁸ CORRECTIONAL POPULATIONS, 2009, *supra* note 14, at 2 tbl.1.

¹⁹ BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 3 (2006).

²⁰ *Id.* at 3, 16–17.

²¹ *Id.* at 31.

²² See Leena Kurki and Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 385 (2001).

²³ Lance Tapley, *The Worst of the Worst: Supermax Torture in America*, BOSTON REV., Nov./Dec. 2010, at 30. Counting the number of prisoners in supermax is often complicated by a lack of consensus on what constitutes a supermax facility. In Mears's research, 95% of supermax wardens agreed on the following definition: "A supermax is defined as a stand-alone unit or part of another facility and is designated for violent or disruptive inmates. It typically involves up to 23-hours per day, single-cell confinement for an indefinite period of time. Inmates in supermax housing have minimal contact with staff and other inmates."

Bureau of Prisons also operates a supermax at Florence, Colorado, which houses another 11,000 inmates, including a number who have been convicted of terrorist-related offenses.²⁴

Conditions at supermax prisons vary modestly from state to state and from states to the federal facility, but in general they are characterized by strict isolation and rigorously enforced, unrelenting control.²⁵ Supermax prisons have abandoned even the pretense that they are meant to rehabilitate or reform. The facility typically provides little or no programming, education, or counseling—nothing more than the barest constitutional minima.²⁶ Prisoners, who are routinely described as “the worst of the worst,”²⁷ spend nearly every minute of every day confined in a small cell made of concrete and steel. Norval Morris once described the cells at Tamms, the Illinois supermax, where conditions are representative:

Your cell measures ten feet by twelve feet. It is made of poured concrete with a steel door—no bars—just a lot of little holes, smaller than the tip of your finger, punched through it. You have a stainless steel toilet and sink built as a unit that would not be easy to destroy. There is a small window, high and narrow, that lets in a little outside light. There is a mirror made of polished metal, again tending to be indestructible. Your bunk or bed, or whatever you may call it, is also of poured concrete, an integral part of the cell, but you have a slim plastic foam mattress to put on it. There is a well-protected fluorescent light and a light switch. At night . . . , the light cannot be turned off entirely; it unrestrainedly gives out a dim light, bright enough for the guards to peer in at you. There is a small trapdoor, low down on the steel door to your cell, through which your food can be pushed to you.²⁸

Daniel P. Mears, *A Critical Look at Supermax Prisons*, 30 CORR. COMPENDIUM 6, 49 n.3 (2005).

²⁴ Tapley, *supra* note 23, at 30.

²⁵ For a discussion of the minor variations in conditions at supermax prisons, see Kurki & Morris, *supra* note 22, at 394–410. *See also, e.g.*, Ruiz v. Johnson, 37 F. Supp. 2d 855 (S.D. Tex. 1999) (describing supermax in Texas); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (describing conditions at Pelican Bay, in California); HUMAN RIGHTS WATCH, COLD STORAGE: SUPER-MAXIMUM SECURITY CONFINEMENT IN INDIANA (1997); HUMAN RIGHTS WATCH, RED ONION STATE PRISON: SUPER-MAXIMUM SECURITY CONFINEMENT IN VIRGINIA (1999).

²⁶ Kurki & Morris, *supra* note 22, at 407.

²⁷ *See, e.g.*, Laura LaFay, 7 *New Prisons Will Handle Growing Inmate Count*, VIRGINIAN-PILOT, Aug. 23, 1997, at A1 (“Red Onion, which will house 1,267 prisoners and employ about 400 people, has been designed for what Corrections Director Ron Angelone likes to call ‘the worst of the worst.’ ‘These are hardcore, violent, predatory individuals who are a risk to other individuals and to staff,’ he said.”); Cathy Frye, ‘Super Max’ Slated to House ‘Worst of Worst,’ ARK. DEMOCRAT-GAZETTE, Dec. 17, 1999, at 1A; Karen Grigsby Bates, *Moussaoui’s New Home: A Cell in Super Max Prison*, NAT’L PUB. RADIO (May 4, 2006), <http://www.npr.org/templates/story/story.php?storyId=5382725> (stating that the federal supermax at Florence “is designed to isolate what’s often described as the worst of the worst of the prison population”).

²⁸ Kurki & Morris, *supra* note 22, at 395.

Within this space, prisoners are deliberately confined so they cannot see or touch another human being. At Tamms, and only with great difficulty, they can communicate with other inmates by shouting through tiny spaces where the food trap meets imperfectly with the remainder of the steel door—an opportunity considered a design defect at Tamms and since remedied at other supermax prisons.²⁹ Prisoners average more than twenty-three hours a day in solitary confinement. They are allowed out of their cells a few hours a week for exercise—anywhere from one to five, depending on their disciplinary status—and never more than an hour a day.³⁰ They cannot leave their cells unless they are first heavily shackled and manacled, and only when escorted by several guards wearing riot gear and armor. Exercise, like everything in their lives, is an entirely solitary affair. At Tamms, they are brought to a concrete cage somewhat larger than their cell, “with a small grating high in the corner of the roof through which you can see the sky.” There is no exercise equipment, “but some prisoners are now allowed to have tough rubber handballs to throw against the walls of the yard.”³¹

Meanwhile, outside the prison walls, mass incarceration has been complemented by an elaborate system of social controls targeted at the populations considered mostly likely to place the rest of society at risk. Most felons lose their right to vote, in some cases for life, which makes them irrelevant to the electoral process.³² In addition, the modern penal system frequently also restricts their right to serve on a jury,³³ to live within

²⁹ *Id.* at 398.

³⁰ *Id.* at 395–96.

³¹ *Id.* at 395.

³² *See, e.g.*, OFFICE OF THE PARDON ATTORNEY, U.S. DEP’T OF JUST., FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 1 (2003), available at http://www.justice.gov/pardon/collateral_consequences.pdf [hereinafter OPA FEDERAL SUMMARY] (“The great majority of states impose some type of restriction on the ability of convicted felons to vote.”); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 50, 51 (Marc Mauer & Meda Chesney-Lind eds., 2002) (“Forty-eight states and the District of Columbia do not permit prison inmates to vote; thirty-two states disenfranchise felons on parole; and twenty-eight disenfranchise felons on probation. In addition, in thirteen states a felony conviction can result in disenfranchisement, generally for life, even after an offender has completed his or her sentence.”).

³³ OPA FEDERAL SUMMARY, *supra* note 32, at 2–3 (stating that a conviction in federal or state court of any crime punishable by more than one year prohibits an individual from serving on a federal grand or petit jury, absent a pardon); Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 297 (2006) (finding forty-seven states restrict an individual’s right to serve on a jury after a felony conviction).

designated locations or in public housing,³⁴ to travel or assemble within certain portions of a community,³⁵ to participate in most social welfare programs,³⁶ to receive college or small business loans,³⁷ and to work in various professions.³⁸ In the aggregate, the result of these policies is the near replication of the colonial state of “civil death,” a condition in which a person is deprived of all political, civil, and legal rights, except those he may enjoy when he is inevitably prosecuted again.³⁹ His status as a person with rights, in other words, operates only in connection with his conjoined status as an accused or convicted criminal.

³⁴ OPA FEDERAL SUMMARY, *supra* note 32, at 4 (stating that federal courts “may impose certain occupational restrictions as a condition of probation or supervised release”); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT*, at 15, 24 (“The Public Housing Assessment System, established by the federal government, creates financial incentives for public housing agencies to adopt strict admission and eviction standards to screen out individuals who engage in criminal behavior.”).

³⁵ For residence restriction of sex offenders, see HUMAN RIGHTS WATCH, *NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 100* (2007) (“At least 20 states have enacted laws that prohibit certain sex offenders from living within a specified distance of schools, daycare centers, parks, and other places where children congregate In addition, hundreds of municipalities (in states with and without residency restriction statutes) have also passed similar ordinances”). For restrictions on the right to move freely within a community, but not targeted at sex offenders alone, see generally KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* (2010). For related restrictions on the right to travel, see Travis, *supra* note 34, at 24 (“In 1992, Congress passed a law requiring states to revoke or suspend the drivers’ licenses of people convicted of drug felonies, or suffer the loss of 10 percent of the state’s federal highway funds.”).

³⁶ Travis, *supra* note 34, at 23 (noting that after welfare reform law was enacted in 1996, the federal government required states to “permanently bar individuals with drug-related felony convictions from receiving federally funded public assistance and food stamps during their lifetime”). Drug offenders may also be denied federal retirement benefits, Social Security, disability, and benefits for military service. Additionally, individuals convicted of drug-related and fraud-related felonies are permanently excluded from any federal health care program and certain state health care programs. See OPA FEDERAL SUMMARY, *supra* note 32, at 8–9.

³⁷ Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL’Y REV.* 153, 158 (1999); Travis, *supra* note 34, at 24 (“The Higher Education Act of 1998 suspends the eligibility for a student loan or other assistance for someone convicted of a drug-related offense.”).

³⁸ Felons are barred from a number of different professions, including most commonly employment that requires contact with children, health service positions, and security services. In some states, however, this prohibition has been extended to positions like acupuncturist and cosmetologist. Uggen, Manza & Thompson, *supra* note 33, at 298.

³⁹ See, e.g., *id.* at 296 (“[F]ormer felons must fulfill the *duties* of citizenship, but their conviction status effectively denies their *rights* to participate in social life.”); Travis, *supra* note 34, at 19 (“[T]hese punishments have become instruments of ‘social exclusion;’ they create a permanent diminution in social status of convicted offenders, a distancing between ‘us’ and ‘them.’”).

But many judges and communities have taken these steps still further and have embraced shaming ceremonies. Certain categories of ex-offenders are publicly identified, obligated to announce themselves to their community or their victims, or to wear distinctive clothing or brand themselves by certain activity.

Some municipalities, for example, publish offenders' names in newspapers or even on billboards, a disposition that is especially common for men convicted of soliciting prostitutes. Other jurisdictions broadcast the names of various types of offenders on community-access television channels. . . . Some judges order petty thieves to wear t-shirts announcing their crimes. Others achieve the same effect with brightly colored bracelets that read "DUI Convict," "I Write Bad Checks," and the like. One judge ordered a woman to wear a sign declaring "I am a convicted child molester."⁴⁰

These penalties seem to be limited only by official imagination. Some jurisdictions insist that offenders publicly debase themselves. They must stand in the local courthouse with a sign describing their offense, for example, or publicize their own convictions in a first-person narrative.⁴¹ "In Maryland, . . . juvenile offenders must apologize on their hands and knees and are released from confinement only if they persuade their victims that their remorse is sincere."⁴²

* * * *

The profligate cruelty of the criminal justice system is merely a *symptom* of the punitive turn in American life and not the condition itself. Like a fever, it is a sign that the body suffers from a dangerous malady. But no one should suppose it is the only symptom—the evidence for the punitive turn courses through nearly all of American society. And one

⁴⁰ Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 632 (1996) (internal citations omitted). Professor Kahan believes that shaming penalties represent a "feasible alternative to imprisonment for many offenses." *Id.* at 594. For a contrary view, see James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). Professor Whitman properly focuses on the harm of shaming penalties *to society*, rather than to the offender:

The most compelling arguments against such humiliation sanctions do not, in fact, involve the way they deal with the *offender* at all. . . . In the last analysis, we should think of shame sanctions as wrong because they involve a species of lynch justice, and a peculiarly disturbing species of lynch justice at that—a species of official lynch justice. The chief evil in public humiliation sanctions is that they involve an ugly, and politically dangerous, complicity between the state and the crowd. . . . They represent an unacceptable style of governance through their play on public psychology.

Id. at 1059. Or, as John McCain would later say in a distinctly post-9/11 context, "It's not about who they are. It's about who we are." 151 CONG. REC. S8792 (2005) (debate over National Defense Authorization Act for Fiscal Year 2006), *available at* http://www.fas.org/irp/congress/2005_cr/s072505.html.

⁴¹ Kahan, *supra* note 40, at 633.

⁴² *Id.* at 634.

place it is particularly apparent is in popular culture. At mid-century, deviance was consistently portrayed as the product of social conditions beyond the individual's control.⁴³ The highest social value was strict adherence to the rule of law, regardless of the outcome in a particular case,⁴⁴ and the purpose of the criminal justice system was to realign the offender with society.⁴⁵ Today, by contrast, deviance is depicted as the result of innate evil for which society bears no responsibility but suffers all the consequences, and which the criminal law naïvely protects.⁴⁶

The movies *12 Angry Men*,⁴⁷ released in 1957, and *To Kill a Mockingbird*,⁴⁸ released in 1962, for instance, signaled a reverence for the law rather than a cheap attachment to a particular outcome.⁴⁹ Atticus Finch, the hero of *To Kill a Mockingbird*, “evokes the heroic imagery of both individuals dedicated to the law and law itself as an heroic institution restraining the baser human instincts.”⁵⁰ The movie conceives the law as a protection against a mob mentality and as superior to the desires and fears of individuals.⁵¹ In the same way, *12 Angry Men* brings the American into the jury room and reveals the institution's “great practical and symbolic importance in the American system of justice.”⁵² Consistently, the media

⁴³ Nicole Rafter, *American Criminal Trial Films: An Overview of Their Development, 1930–2000*, 28 J.L. & SOC'Y 9, 15 (2001) (depicting film in the 1950s through the 1960s as a demonstration of America's reverence for the law). “[T]he classic courtroom movies present them as professional wizards and guardians of the country's sacred traditions.” *Id.*

⁴⁴ TIMOTHY O. LENZ, CHANGING IMAGES OF LAW IN FILM & TELEVISION CRIME STORIES 45–76 (2003).

⁴⁵ E.g., James D. Unnever & Francis T. Cullen, *The Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 AM. SOC'Y CRIMINOLOGY 99, 102 (2010) (“[I]n the 1960s, the public was more willing to confront crime with a two-prong approach: reduce the root causes of crime, such as poverty and unemployment, while providing offenders the opportunity to rehabilitate themselves. The lack of support for the death penalty is evidence of this less punitive approach toward crime.”).

⁴⁶ Francis T. Cullen et. al., *Public Opinion about Punishment and Corrections*, 27 CRIME & JUST. 1, 2 (2000) (“‘Get tough’ thinking and policies have replaced calls for more humanistic correctional practices, and their dominance appears unassailable.”).

⁴⁷ 12 ANGRY MEN (United Artists 1957).

⁴⁸ TO KILL A MOCKINGBIRD (Universal Pictures 1962).

⁴⁹ LENZ, *supra* note 44.

⁵⁰ *Id.* at 46; see also Maureen E. Markey, *Natural Law, Positive Law, and Conflicting Social Norms in Harper Lee's To Kill a Mockingbird*, 32 N.C. CENT. L. REV. 162, 190 (2010) (“Atticus shows great respect, even reverence, for the rule of law, the established legal code of this country as reflected in the Constitution.”).

⁵¹ Markey, *supra* note 50, at 191 (“His calm and steady rationalism and his absolute belief in his moral position enable him to calmly face down, with nothing more than a newspaper in his hand, a lynch mob who come to abduct his client.”).

⁵² LENZ, *supra* note 44, at 45.

separated sin from sinner. The 1939 film, *They Made Me a Criminal*,⁵³ for example, emphasized that criminals are a product of their environment.⁵⁴ And the 1937 film *Dead End*⁵⁵ and 1938 film *Angels with Dirty Faces*⁵⁶ gave humanizing portrayals of criminals in order to separate judgments of the person from the condemnation of the crime.⁵⁷

Beginning in the late 1960s, however, media portrayals began to change.⁵⁸ The relationship between the accused and society became oppositional. Instead of a desire to understand the criminal and help rehabilitate him, society began to view him as a plague that needed to be controlled. Clint Eastwood's *Dirty Harry*⁵⁹ in 1971 is prototypical. In the film, the law becomes a partner in crime. "The injustice is obvious: the law prevents a crazed killer from being convicted of anything."⁶⁰ Clint Eastwood throws away his badge and takes it upon himself to see that justice is done. The message is unmistakable: if the law gets in the way, we should throw it out.

This transformation—from law as the object of reverence in films like *To Kill a Mockingbird* to law as a hypertechnical obstacle to justice in films like *Dirty Harry*—is now essentially complete. Rare is the film or television series that presents law as anything other than an obstacle to the punitive impulse in American life.⁶¹ Representative in this vein is the contemporary Showtime series, *Dexter*, which features the serial killer as an unlikely protagonist. The show's hero, Dexter Morgan, works in a police

⁵³ THEY MADE ME A CRIMINAL (Warner Bros. Pictures 1939).

⁵⁴ LENZ, *supra* note 44, at 47 ("The title of *They Made Me a Criminal* (1939) actually describes one of the tenants of the liberal theory of criminology, the belief that criminals are made, not born, that crime is caused by nurture not nature.").

⁵⁵ DEAD END (Samuel Goldwyn Co. 1937).

⁵⁶ ANGELS WITH DIRTY FACES (Warner Bros. Pictures 1938).

⁵⁷ LENZ, *supra* note 44, at 48 ("The liberal message of this film is that individuals are basically good and that institutions . . . have a very important role to play in ensuring that individuals become productive, law-abiding citizens.").

⁵⁸ Joseph R. Dominick, *Crime and Law Enforcement on Prime-Time Television*, 37 PUB. OPINION Q. 241, 241 (1973) ("During the unrest of the late 1960s . . . [p]opular reaction ranged from an increased demand for law and order to a diminished respect for law enforcement, especially among young people."). By the 1990s, the transformation was all but complete. See Rafter, *supra* note 43, at 20 ("Reflecting actual criminal trials (such as those involving O.J. Simpson and the assailants of Rodney King), in which justice seemed to many to have gone astray, courtroom films of the nineties mistrusted the criminal justice system's ability to accomplish its mission.").

⁵⁹ DIRTY HARRY (Warner Bros. Pictures 1971).

⁶⁰ LENZ, *supra* note 44, at 111.

⁶¹ Rafter, *supra* note 43, at 20 (2001) ("Many began with the assumption that the system was broken beyond repair.").

station as a blood spatter analyst by day, but as a serial killer by night.⁶² He sees first-hand the repeated failures of the criminal justice system and actively works to keep his “targets” off the law enforcement radar so that the law does not interfere with his heroic brand of vigilante justice.⁶³ When the community finally discovers that a serial killer is killing only murderers, it dubs him the “dark avenger” and creates a comic book series and action figure after him.⁶⁴

Interestingly, Dexter never kills without first taking meticulous steps to ensure his target’s guilt. The criminals *look* normal, as though they were one of us. It is possible to be mistaken, therefore, and a liberal society cannot tolerate the cold-blooded murder of an innocent person. Before an audience will accept that justice must be done, Dexter must convince them of the target’s guilt. So, under the watchful eye of the television audience, he checks records and compares fingerprints. Once the audience has been dutifully reassured, Dexter may dispatch the victim with the vigilante justice that has come to define contemporary culture. In that way, the show introduces the dilemma of the monster hidden in our midst, and suggests that law enforcement, if unfettered by the law, can solve the problem accurately and quickly.

More recently, another series presents a different solution to a similar problem. In *The Event*, an alien race has reached the United States with an unknown and therefore potentially dangerous agenda. Unfortunately for us, they look and act exactly as we do, except that they do not age. The government is keeping a small number of them captive, without criminal charges, until they may uncover the remainder.⁶⁵ One of the major figures in the show is an unscrupulous lawyer who spouts the rhetoric of rights and the rule of law. But she in fact is an alien who plans a revolution against the United States. The symbolism is obvious. “They” are aliens who, though they look like us, are fundamentally different and intend our destruction. To be safe, we must detain them indefinitely, without charges, while we take the steps necessary to protect the community. But they have hijacked the law, and have begun to use our rights to destroy us. We must

⁶² *Dexter* (Showtime television broadcast); see *Watch Dexter on Showtime: America’s Favorite Serial Killer*, <http://www.sho.com/site/dexter/about.do> (last visited Jan. 29, 2011).

⁶³ *Id.* (“When he’s not helping the homicide division solve murders, he satisfies his dark desires by hunting and killing bad guys who slip through the justice system.”).

⁶⁴ *Dexter, Episode Guide: Season 2 Episode 5: The Dark Defender*, <http://www.sho.com/site/dexter/episodes.do?seriesid=323&seasonid=2&episodeid=130352> (last visited Jan. 29, 2011).

⁶⁵ *The Event: I Haven’t Told You Everything* (NBC television broadcast Sept. 20, 2010).

be vigilant and recognize that the law was meant for us and not for them.⁶⁶ It is the modern morality tale for preventive detention.

And then, of course, there is the much-commented upon FOX Television series *24*, where Jack Bauer tortured a new prisoner every week, always to brilliant effect. During its seven-year run, *24* was wildly popular. Websites now call for Jack Bauer as president,⁶⁷ even though in the course of a single season (that is, a single cinematic day), Bauer tortured his brother, shot his boss, and executed a prisoner so he could retrieve a piece of information the prisoner had swallowed. A number of observers have asked how or whether *24*, with its relentless normalization of torture, may have affected American culture.⁶⁸ The conservative Heritage Foundation, for instance, hosted an event in June 2006 entitled, “*24* and America’s Image in Fighting Terrorism: Fact, Fiction, or Does it Matter?” Rush Limbaugh moderated and Michael Chertoff, the Secretary of Homeland Security, appeared as one of the panelists.⁶⁹ Though the change may not be attributable to *24* alone, it is certainly the case that 9/11 marked a turning point in the cultural portrayal of torture. Even in the most punitive moments of the last quarter of the twentieth century, torture was invariably presented in popular culture as a tool used by the demonic other against the (usually) American hero. After 9/11, however, torture became part of the American hero’s arsenal. Before, the cultural message was that America would prevail despite torture. Today, by contrast, the message is that America would prevail because of torture.⁷⁰

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⁶⁶ See *The Event: To Keep Us Safe* (NBC television broadcast Sept. 27, 2010).

⁶⁷ For example, in January 2010, a Facebook page entitled “Jack Bauer for President” was created, inviting “everyone who thinks we would be better off if Jack Bauer were President of the United States” to join. FACEBOOK, <http://www.facebook.com/pages/Jack-Bauer-For-President/268683864258?sk=info> (last visited Apr. 5, 2011); see also JACK BAUER FOR PRESIDENT: TERRORISM AND POLITICS IN *24* (Richard Minter ed., 2008).

⁶⁸ See, e.g., Dennis Broe, *Fox and Its Friends: Global Commodification and the New Cold War*, 43 CINEMA J. 97 (2004); Steven Keslowitz, *The Simpsons, 24 and the Law: How Homer Simpson and Jack Bauer Influence Congressional Lawmaking and Judicial Reasoning*, 29 CARDOZO L. REV. 2787 (2008).

⁶⁹ See *24 and America’s Image in Fighting Terrorism: Fact, Fiction, or Does it Matter?* HERITAGE FOUNDATION (June 23, 2006), <http://www.heritage.org/events/2006/06/24-and-americas-image-in-fighting-terrorism-fact-fiction-or-does-it-matter>.

⁷⁰ “From 2002 through 2005, the Parents Television Council counted 624 torture scenes in prime time, a six-fold increase. UCLA’s Television Violence Monitoring Project reports ‘torture on TV shows is significantly higher than it was five years ago and the characters who torture have changed. It used to be that only villains on television tortured. Today, ‘good guy’ and heroic American characters torture—and this torture is depicted as necessary, effective and even patriotic.’” Maura Moynihan, *Torture Chic: Why Is the Media Glorifying Inhumane, Sadistic Behavior?*, ALTERNET (Feb. 3, 2009), <http://www.alternet.org/story/424739>.

Scholars have advanced an impressive set of explanations for the punitive turn in the United States. Political, sociological, racial, and economic imperatives have all figured in the literature.⁷¹ The answer is undoubtedly complex; no major shift in American culture could possibly owe its genesis to a single factor. Some explanations are more compelling than others. Conservative writers, for instance, have suggested that dramatically harsher sentences can be traced to legitimate public outcry over a sharp increase in crime.⁷² But the data do not bear this out. As Katherine Beckett has shown, public concern about crime and safety came *after* elites began to press it as an issue; in some instances only after crime rates had begun to decline. This suggests the “crisis” was, like most social crises, constructed.⁷³ But legitimate debates over causes should not obscure

⁷¹ See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 8 (2007) (“[M]ass incarceration is an inevitable effect of reshaping political authority around crime.”); Sherry, *supra* note 7, at 249–54 (canvassing various explanations but maintaining that “the core of the urge to imprison was fear of a newly jobless marauding underclass . . .”); Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 221 (2001) (discussing explanations “rooted in three distinct theoretical traditions in contemporary sociology: Political Economy, Cultural Interpretation, and Governmental Rationalities”); Unnever & Cullen, *supra* note 45, at 101, 119 (examining three explanations for the punitive turn, “the escalating crime-distrust model, the moral decline model, and the racial-animus model,” and concluding that “one of the most salient and consistent predictors of American punitiveness is racial animus”).

⁷² KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 55–61 (1997).

⁷³ *Id.* at 56–57; see also Stuart A. Scheingold, *Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State*, 23 LAW & SOC. INQUIRY 857 (1998). Researchers have long recognized that the perception of crime is shaped much more by crime reporting than by the actual incidence of criminal behavior. See, e.g., F. James Davis, *Crime News in Colorado Newspapers*, 57 AM. J. SOC. 325 (1952). For an early and influential discussion of deviance as a socially constructed category, see HOWARD BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 7–18 (1963). Sadly, the gap between reality and reporting continues to distort criminal justice policy, as alarmist accounts continue to create the perception of peril. For a discussion of this in the context of juvenile crime, see, e.g., Ernestine S. Gray, *Media—Don’t Believe the Hype*, 14 STAN. L. & POL’Y REV. 45, 47 (2003) (“Clearly, the amount and quality of coverage by the media given to issue of juvenile crime by the media does not reflect the reality of juvenile crime.”); Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from an Ideological Battleground*, 11 FED. SENT’G REP. 260 (1999) (“In the middle of the largest sustained decline in violent crime in 30 years, these predictions of a ‘coming storm’ [of juvenile violence] suggest that the Holy War about juvenile justice was neither wholly nor mainly a reaction to levels of crime in the streets.”). The constructionist literature is voluminous. For a survey of the literature and an attempt to lend it some empirical support, see THEODORE SASSON, CRIME TALK: HOW CITIZENS CONSTRUCT A SOCIAL PROBLEM (1995).

broad consensus over the phenomenon itself.⁷⁴ No one credibly doubts that American society has become distinctly more punitive in the past four decades,⁷⁵ and that the punitive turn has included a major change in the explanation for deviant behavior, which has in turn fundamentally altered what is regarded as the state's proper response. As never before, an obsession with controlling deviance by eliminating risk dominates American culture.

III. THE NEW PENOLOGY

It is not my goal to critique the punitive turn in American life. That has been amply and ably done by the authors cited in the notes. My interest is in the connection between the punitive turn and the demand for preventive detention. To that end, it is enough to note that the punitive turn represents two linked developments in American thought. The first is the recurring creation in the public mind of the monster-criminal, a beast beyond redemption or reform that is innately hostile to the community. And the second is a dramatic decline in the faith of the rehabilitative ideal as the proper response to this beast.⁷⁶ The former has changed who and what we imagine the deviant to be, while the latter has changed how society should respond. In the last several decades, and especially since the early 1980s, the criminal has been reimagined from one of us—a person for whom society bears some responsibility and who must therefore be reformed and rehabilitated—to one of them—a monster who must be separated from us and whose behavior must be monitored and controlled. Society's responsibility is not to reform, since that is impossible. Crime, and particularly violent crime, is inevitable, since criminals are irredeemable.⁷⁷

⁷⁴ See, e.g., GARLAND, *supra* note 9, at 2 (“We still do not really know how we got from there to here and why the crime control future—which is the present we now inhabit—turned out to be so different from the one that was widely expected a generation ago.”); SIMON, *supra* note 71, at 25 (“The question of causation is fascinating but ultimately less important than the question of what the ‘war on crime’ actually does to American democracy, our government and legal system, and the open society we have historically enjoyed.”).

⁷⁵ See, e.g., Cullen, *supra* note 46, at 28–31 (reviewing literature and opinion polling to document this shift).

⁷⁶ Ironically, the earliest attacks on the rehabilitative ideal came from the political left, which attacked the idea of rehabilitation as simply another constructed political category, and therefore an illegitimate form of state control and a subterfuge for enforced conformity. See, e.g., FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 32–59 (1981); AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971).

⁷⁷ Jonathan Simon has described the convergence of these two ideas in the context of the criminal justice response to sex offenders:

In response to the criminal as beast, modern criminal justice policy has burdened itself with the Sisyphean task of controlling the uncontrollable. The problem is not crime per se, which has declined steadily over the last two decades, but the image of crime in the public mind. Because the monster does not walk the street so much as haunt the imagination, he casually shrugs off the pathetic attempts at social control repeatedly fired at him by an anxious state. Nothing in the arsenal of the modern state can solve the problem of a mythical beast. Like dragons, he disappears only when people stop believing that he exists.⁷⁸ But having created him, politicians and pundits find it hard to let him go. The state is left, therefore, with the challenge of feigning control, which requires the creation of ever more repressive, ever more draconian systems of supervision and management, all with an eye to reassuring a frightened population that the monster, though still at large, can at least be kept at bay.⁷⁹

So explains what has been called the new penology, in which the faith that the offender is one of us has given way to the belief that he is not; the goal that he be reformed has given way to the certainty that reform is impossible; and the ambition that he eventually be returned to society has given way to the conviction that society is much better off without him.⁸⁰

The new generation of sex offender laws represents a shift toward the new penology combined with a strong appeal to populist punitiveness. This takes the form of managerialism . . . combined with gestures of identification with populist sentiments evoked by sex crimes. The new penology is generally agnostic toward treatment. *The goal is waste management.* Populist punitiveness is exceedingly hostile toward medicalization. The result is an important transformation of the sex offender from the most obvious example of crime as disease back to an earlier conception of crime as monstrosity. Sex offenders are our modern-day monsters, producing tidal waves of public demand.

Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL., PUB. POL'Y, & L. 452, 456 (1998) (emphasis added). Simon is aware of his penchant for "perhaps overstated" polemics. See SIMON, *supra* note 71, at 4 (recognizing that the title claim of the book—"that the American elite are 'governing through crime'—is polemical, and perhaps overstated").

⁷⁸ For an account of the life cycle of the dangerous sex offender in the public imagination, see PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998).

⁷⁹ See generally ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter trans., Sage Publications 1992) (1986); SIMON, *supra* note 71, at 238 ("The federal government and at least some states, including highly visible ones like Florida, Texas, and California, have begun to make rituals of reassurance a primary government activity."); Ulrich Beck, *The Terrorist Threat: World Risk Society Revisited*, 19 THEORY, CULTURE & SOC'Y 39 (2002) ("The hidden central issue in world risk society is *how to feign control over the uncontrollable.*") (emphasis added).

⁸⁰ See, e.g., GARLAND, *supra* note 9, at 1–16; Albert Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003); Malcolm M. Feeley & Jonathan Simon, *The New*

The dominant goal of penal policy has shifted from social welfare to social control.⁸¹ The “master plan” of the new penology calls for the identification, management, and control of those who would do the community harm.⁸² And because the harm the dangerous super-predator would do is imagined to be apocalyptic, society cannot wait for the harm to occur. Instead, it must act today, and impose its rule based not on completed conduct but on future risk.⁸³ In the new penology, the role of the state in dealing with dangerous crime is not simply to punish what was done, but to prevent what may yet occur.⁸⁴ The bloodless sciences of risk management and actuarial assessment achieve special prominence.⁸⁵ And because society must attempt to manage risks of nearly unimaginable magnitude, it must make assessments based on predictions of group behavior. Anything else is dangerously inefficient. People are relevant not for who they are, but for the group to which they belong, and thus for the calculated risk they pose.⁸⁶ In the new penology, the individual is an afterthought.

In service of this aspiration, the entire architecture of modern criminology has been steadily reconfigured. Prison has been recast in the American mind from “a mechanism of reform and rehabilitation” to “a means of incapacitation and punishment that satisfies popular demands for public safety and harsh retribution.”⁸⁷ A dissatisfaction with “experts,” whose views are derided as naïve and anachronistic, has left a vacuum that is increasingly filled by a populist and bipartisan demand for ever-more

Penology: Notes on the Emerging Strategy of Corrections and Its Implications, 30 CRIMINOLOGY 449 (1992).

⁸¹ BECKETT, *supra* note 72, at 10. Beckett credits Craig Reinerman for this turn of phrase. See Craig Reinerman, *The Social Construction of an Alcohol Problem: The Case of Mothers Against Drunk Drivers and Social Control in the 1980s*, 17 THEORY & SOC’Y 91 (1988).

⁸² See STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* 13–39 (1985).

⁸³ See Clifford Shearing, *Punishment and the Changing Face of Governance*, 3 PUNISHMENT & SOC’Y 203 (2001).

⁸⁴ See CLIVE NORRIS & GARY ARMSTRONG, *THE MAXIMUM SURVEILLANCE SOCIETY: THE RISE OF CCTV* 25 (1999).

⁸⁵ See, e.g., Pat O’Malley, *Risk and Responsibility*, in FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT 189, 194 (Andrew Barry, Thomas Osborne & Nikolas Rose eds., 1996) (stating that the actuarial focus on amoral categories rather than individuals is taken as a source of efficiency which reduces opposition).

⁸⁶ E.g., Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 LAW & SOC’Y REV. 771, 773 (1988) (“Actuarial practices are emerging as a dominant force because they further intensify the effectiveness of power set into motion by the rise of the disciplines.”).

⁸⁷ GARLAND, *supra* note 9, at 14.

repressive punishments.⁸⁸ The crime victim speaks with unique authority while the law is subjected to particular scorn. Sanctions are too weak, procedures are too technical, and public security is needlessly sacrificed in favor of criminals' "rights."

Representative in this vein is the tragic rise and fall of the juvenile "super-predator." Violent juvenile crime rose precipitously in the mid 1980s, which triggered a sudden and widespread alarm. In 1995, the conservative scholar James Q. Wilson wrote, "we are terrified by the prospect of innocent people being gunned down at random, without warning, and almost without motive, by youngsters who afterwards show us the blank, unremorseful face of a feral, pre-social being."⁸⁹ But it was Wilson's former student, former Princeton criminologist John DiIulio, who gets the credit for coming up with the "super-predator" moniker. In a much-cited article in the *Weekly Standard*, he expressed dismay at a "youth crime wave" of "horrific proportions from coast to coast."⁹⁰ But these were not "normal" criminals, DiIulio said. They were "hardened, remorseless" predators with "absolutely no respect for human life," more dangerous than the most vicious adult criminals, who "make even the leaders of the Bloods and Crips . . . look tame by comparison."⁹¹ And just to dispel all doubt, DiIulio assured us he was no timid naïf:

I will still waltz backwards, notebook in hand and alone, into any adult maximum-security cellblock full of killers, rapists, and muggers. But a few years ago, I forswore research inside juvenile lock-ups. The buzz of impulsive violence, the vacant stares and smiles, and the remorseless eyes were at once too frightening and too depressing⁹²

But as bad as matters had become, DiIulio insisted it was about to get much worse. "[W]hat is really frightening everyone," he said, "is not what's happening now but what's just around the corner—namely, a sharp increase in the number of super crime-prone young males." On the horizon, DiIulio foresaw "tens of thousands" of "juvenile super-predators," a tidal wave of violence and mayhem "that hasn't yet begun to crest":⁹³

⁸⁸ See, e.g., Franklin Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 252–56 (1996).

⁸⁹ James Q. Wilson, *Crime and Public Policy*, in CRIME 489, 492 (James Q. Wilson and Joan Petersilia eds., 1995).

⁹⁰ John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior—sex, drugs, money—are their own immediate rewards. Nothing else matters to them. So for as long as their youthful energies hold out, they will do what comes “naturally”: murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.⁹⁴

Fast on the heels of this article was the best-seller, *Body Count: Moral Poverty . . . and How to Win America's War Against Crime and Drugs*, co-authored by DiIulio, William Bennett, who headed the Office of Drug Policy under the first President Bush, and John Walters, who had been Bennett's assistant and later became Executive Director of the Council on Crime in America.⁹⁵ Expanding on the arguments DiIulio had made in the *Weekly Standard*, the authors warned that “America is now home to thickening ranks of juvenile ‘super-predators’—radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create communal disorders.”⁹⁶

To account for this new monster, DiIulio seized on what he called “a conservative theory of the root causes of crime”—that is, “moral poverty”:⁹⁷

Moral poverty is the poverty of being without loving, capable, responsible adults who teach you right from wrong. It is the poverty of being without parents and other authorities who habituate you to feel joy at others' joy, pain at others' pain, happiness when you do right, and remorse when you do wrong. It is the poverty of growing up in the virtual absence of people who teach morality by their own everyday example and who insist that you follow suit.⁹⁸

Violent juvenile crime, in other words, had nothing to do with the ready availability of guns or crack cocaine. It had nothing to do with the collapse of inner-city infrastructures, economies, or support services. Society bore no responsibility for creating the social conditions that contributed to the breakdown of families, including the ravages caused by the War on Drugs. In fact, violent juvenile crime had nothing to do with anything for which society could conceivably be responsible. It was simply

⁹⁴ *Id.*

⁹⁵ WILLIAM BENNETT, JOHN J. DI IULIO JR., & JOHN WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST POVERTY AND DRUGS* (1996).

⁹⁶ *Id.* at 27.

⁹⁷ DiIulio, *supra* note 90.

⁹⁸ *Id.*

a matter of personal moral failure. Children “are most likely to become criminally depraved when they are morally deprived.”⁹⁹

Though widely attacked by other scholars, the idea of the super-predator proved irresistible to the popular and political imagination. Politicians and pundits enthusiastically embraced the idea that violent crime was caused by the offender’s moral poverty and not society’s amoral indifference or immoral neglect. Yet if it was *their* fault, it was nonetheless *our* crisis. The problem was foisted upon a blameless society, which now could only hope to manage and control it. And it was “a monster of a problem,” the *Washington Times* warned.¹⁰⁰ “The super-predator is upon us. The super-predator is a boy, a preteen and teen, who murders, rapes, robs, assaults, does and deals in deadly drugs, joins gangs with guns, terrorizes neighborhoods and sees no relationship between right and wrong These boys are not so much demoralized as unmoralized.”¹⁰¹ They are “far more dangerous” than ‘normal’ criminals.”¹⁰² In fact, they “may be the biggest, baddest generation of criminals any society has ever known.”¹⁰³ The media wrung its hands in apocalyptic worry. A *TIME* headline predicted “[a] [t]eenage [t]imebomb,”¹⁰⁴ and *U.S. News and World Report* fretted that “it may take an even greater bloodbath to force effective crime solutions to the top of the nation’s agenda.”¹⁰⁵ “The tsunami is coming,” Susan Estrich wrote in a 1996 column for *USA Today*. “Juvenile crime is going up and getting worse.”¹⁰⁶

Simply in the nature of things, a crisis imagined as worse than all that came before it will induce a skepticism about existing solutions—haven’t

⁹⁹ *Id.*

¹⁰⁰ Suzanne Fields, *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23.

¹⁰¹ *Id.*; see also, e.g., Sharon Mack, *The Age of the Super Predator: Mainers Say Soaring Juvenile Crime Portends Need for System Overhaul*, BANGOR DAILY NEWS (Maine), Apr. 24, 1996 (“The Super Predator, Portland Police Chief Mike Chitwood explains, is a male, 14 to 17 years old, with no remorse and no fear. He is young and heartless and has no sense of the future.”); Warren Richey, *Teen Crime Trend Puts Them Behind Adult Bars*, CHRISTIAN SCI. MONITOR, June 2, 1997, at 4 (“America is being threatened by a growing cadre of cold-blooded teens called ‘superpredators.’”).

¹⁰² Editorial, *The Psychological Side of Lawlessness and the Central Role of Incarceration*, TAMPA TRIB., Aug. 5, 1997, at 6.

¹⁰³ Gene Koprowski, *The Rise of the Teen Super-Predator*, WASH. TIMES, Oct. 23, 1996, at A17.

¹⁰⁴ Richard Zogling, *Now for the Bad News: A Teenage Timebomb*, TIME, Jan. 15, 1996, at 52.

¹⁰⁵ Ted Gest & Victoria Pope, *Crime Time Bomb*, U.S. NEWS & WORLD REP., Mar. 17, 1996, at 28.

¹⁰⁶ STEVE MACEK, *URBAN NIGHTMARES: THE MEDIA, THE RIGHT, AND THE MORAL PANIC OVER THE CITY 109* (2006).

they already failed?—and a corresponding call for radical remedies.¹⁰⁷ So it was with the super-predator. As one Chicago prosecutor put it, the juvenile code “was written at a time when kids were knocking over outhouses, not killing people. We’re looking at a whole new breed here.” The sentiment was widespread. A Brooklyn D.A. said the juvenile laws “were written at a time when kids were throwing spitballs Now they’re committing murders.” And the chief prosecutor in San Diego lamented, “Our juvenile justice system was created at a time of more ‘*Leave it to Beaver*’ type crimes, less sophisticated and not incredibly violent. But what we see now . . . is kids who are real predators.”¹⁰⁸

In this way, the image of the super-predator—a tidal wave that could not be stopped but might be controlled—triggered a call for tougher juvenile laws, to which states responded with gusto. What changed in this call was not the offender, but how society viewed and responded to him. In keeping with the new penology, statutes “that had stressed ‘rehabilitation’ and ‘the best interests of the child’ were rewritten to emphasize ‘punishment’ and ‘the protection of the public.’”¹⁰⁹ At the same time, the American fondness for policy-by-sound-bite produced the catchy phrase, “adult time for adult crime.”¹¹⁰ Between 1990 and 1996, forty states amended their laws to allow more children to be prosecuted as adults. Between 1996 and 1999, forty-three states relaxed their transfer laws, most acting for the second time in only a few years.¹¹¹ In 1998 alone, 200,000

¹⁰⁷ Alas, it is ever thus, as the sociologist Edward Shils observed during the McCarthy era:

In the United States the rule of law is deeply rooted in the interests of institutions and in a powerful tradition. Alongside of it, however, runs a current of thought and sentiment, a disposition towards ideological enthusiasm and political passions, which proclaim great crises and announce their disbelief in the capacities of ordinary institutions and their leaders to resolve them.

EDWARD SHILS, *THE TORMENT OF SECRECY* 161 (Arcturus Books 1974) (1956).

¹⁰⁸ The three preceding quotes are taken from David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 641 (2001). Of course, the halcyon days of spitballs and outhouses never existed. A close study of the juvenile code in Chicago, for instance, shows it was written with an eye to all manner of juvenile delinquent, and that early twentieth-century legislators were no more indifferent to the risk of violent juvenile crime than we are today. *Id.* at 648–49.

¹⁰⁹ *Id.* at 642 (quoting MELISSA SICKMUND ET AL., U.S. DEP’T OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE* 30 (1997)).

¹¹⁰ See, e.g., Scott M. Fincher, *Juvenile Crime Law Signed*, CHI. TRIB., June 12, 1996, at M3 (“Legislation requiring ‘adult time’ for ‘adult crime’ was signed into law Tuesday.”); Joe Davidson, *Clinton, Dole Getting Tough on Violent Juvenile Crime*, WALL ST. J., Aug. 22, 1996, at A16 (describing Dole’s campaign against juvenile delinquency).

¹¹¹ *Id.* at 643.

children were prosecuted as adults in the United States.¹¹² Defending this trend, Florida Congressman Bill McCollum, when asked whether it was really necessary for a federal law that would have allowed thirteen-year-olds to be prosecuted as adults, insisted, “They’re the predators out there. They’re not children anymore. They’re the most violent criminals on the face of the earth.”¹¹³

Of course, the super-predator was a myth. The predicted explosion in juvenile crime never materialized. By the time DiIulio coined the term, juvenile crime rates had already begun to fall, and continued to decline every year from 1994 to 2004. After two years of modest increases in violent juvenile crime in 2005 and 2006, rates again began to fall and the most recent data, published by the Department of Justice in December 2009, places juvenile violent crime rates at lower levels than at any point throughout the 1990s.¹¹⁴ And as crime rates fell, the super-predator theory seemed increasingly far-fetched. In 2001, the Surgeon General issued a massive report on juvenile violence that exhaustively surveyed the available evidence.¹¹⁵ Addressing themselves to the idea of the super-predator, the authors concluded “there is no evidence that the young people involved in

¹¹² *Id.* (citing AMNESTY INT’L, BETRAYING THE YOUNG: HUMAN RIGHTS VIOLATIONS AGAINST CHILDREN IN THE US JUSTICE SYSTEM (1998), available at <http://www.amnesty.org/en/library/info/AMR51/060/1998>).

¹¹³ *Morning Edition* (National Public Radio broadcast June 25, 1996).

¹¹⁴ CHARLES PUZZANCHERA, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, JUVENILE ARRESTS 2008, at 3 (2009), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf>. There were, of course, variations within offense categories, and rates for robbery showed a significant increase.

The number of juvenile arrests in 2008 for forcible rape was less than in any year since at least 1980, and the number of juvenile aggravated assault arrests in 2008 was less than in any year since 1988. In contrast, after also falling to a relatively low level in 2004, juvenile arrests for murder increased each year from 2005 to 2007, then declined 5% in 2008. However, juvenile arrests for robbery increased more than 46% since 2004.

Id. at 4. Still, overall arrest rates for juveniles have fallen significantly, and with the exception of robbery, from 1999 to 2008 rates for juveniles fell even more than the rates for adults in every category of violent or serious offense. *Id.* For discussions and debunking of the super-predator myth, see, e.g., FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 3–16 (1998); Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent’s Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159 (2000); Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL’Y 483 (2009); Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 WAKE FOREST L. REV. 727 (1998).

¹¹⁵ U.S. DEP’T OF HEALTH & HUMAN SERVS., YOUTH VIOLENCE: A REPORT OF THE SURGEON GENERAL (2001), available at <http://www.surgeongeneral.gov/library/youthviolence/toc.html>.

violence during the peak years of the early 1990s were more frequent or more vicious offenders than youth in earlier years.”¹¹⁶

Meanwhile, scholars who promoted the idea of the super-predator admitted their mistake and expressed their regrets. DiIulio, for instance, while praying at Mass on Palm Sunday in 1996, experienced an “epiphany—a conversion of heart, a conversion of mind.”¹¹⁷ In a flash, he said he suddenly understood that the solution for juvenile crime was treatment and prevention rather than incarceration and control. “God had given me a Rolodex, good will and a passion that was sometimes misdirected,” he said, “and I knew that for the rest of my life I would work on prevention, on helping bring caring, responsible adults to wrap their arms around these kids.”¹¹⁸ In a commentary for the *Wall Street Journal*, he complained of “Washington’s dangerously deluded dogmas about crime . . . including the belief that most juvenile criminals are violent ‘super-predators’ who can be stopped by the threat of long, hard prison terms.”¹¹⁹ And when asked about his theory, all he could say was, “[t]hank God we were wrong.”¹²⁰

* * * *

The juvenile super-predator has gradually disappeared from the public imagination. Yet he left an indelible mark, and not simply in the legal damage he caused—statutory and jurisprudential wreckage that has endured long after the ostensible justification has passed. The more important effect of the super-predator fiasco was to reinforce the contemporary habit of the American mind, the distinctive way of creating, understanding, and responding to a perceived crisis of deviance and risk.¹²¹ And so it was that when one beast vanished and another reappeared, society “knew” what must be done. Like the marauding teen, the serial sexual predator is a monster beyond comprehension or reform. “Chronic sexual predators have

¹¹⁶ *Id.* at 5. The authors said the rise in juvenile violence “resulted primarily from a relatively sudden change in the social environment—the introduction of guns into violent exchanges among youths. The violence epidemic was, in essence, the result of a change in the presence and type of weapon used, which increased the lethality of violent incidents.” *Id.* at 44.

¹¹⁷ Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19.

¹¹⁸ *Id.*

¹¹⁹ John J. DiIulio Jr., *Jail Alone Won’t Stop Juvenile Super-Predators*, WALL ST. J., June 11, 1997, at A23.

¹²⁰ Becker, *supra* note 117.

¹²¹ Though he wrote about the new penology in the context of racial profiling, I believe William Rose meant the same thing when he referred to “a new way of talking about danger.” See William Rose, *Crimes of Color: Risk, Profiling, and the Contemporary Racialization of Social Control*, 16 INT’L J. POL., CULTURE & SOC’Y 179, 185 (2002).

crossed an osmotic membrane,” one prolific commentator about the matter has observed; “They can’t step back to the other side—our side. And they don’t want to . . . [W]e have but one choice. Call them monsters and isolate them.”¹²²

Like the juvenile super-predator, the sexual predator is imagined as trapped in a pre-socialized state. His emotional and psychological development is permanently stunted, frozen at a time that leaves him forever dedicated to his own personal gratification. He cannot be rehabilitated because he “cannot return to a state that never existed.”¹²³ And he cannot be cured, because he is not sick. He is simply evil, and society must not confuse one with the other.¹²⁴ “When it comes to the sexual sadist, psychiatric diagnoses won’t protect us. Appeasement endangers us. Rehabilitation is a joke.” The only safe solution is long-term incarceration; “no-parole life sentences for certain sex crimes . . . offer our only hope against an epidemic of sexual violence that threatens to pollute our society beyond the possibility of its own rehabilitation.”¹²⁵

In an important respect, however, the sexual predator is even more dangerous than his juvenile counterpart. While the juvenile super-predator was a new “breed” of criminal, a “feral, pre-social being,” at least in theory he could, like any wild beast, be captured and imprisoned. But the sexual predator is more cunning, more devious, and therefore more difficult to monitor and control.¹²⁶ He can look and act just like “us,” and can stalk the malls, the schoolyards, and, worst of all, the Internet with impunity, luring

¹²² Andrew Vachss, *Sex Predators Can’t Be Saved*, N.Y. TIMES, Jan. 5, 1993, at A15; see also John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y. L. SCH. L. REV. 31 (2008).

¹²³ Vachss, *supra* note 122.

¹²⁴ Andrew Vachss, *What We Must Do . . . to Protect Our Children*, PARADE MAG., July 14, 2002, at 5.

¹²⁵ Vachss, *supra* note 122; see also Andrew Vachss, *How to Handle Sexual Predators*, WORLD & I, Aug. 1993, available at http://vachss.com/av_dispatches/disp_9308_a.html (“There is an old saying about monsters that we ought to heed: You don’t know where they’re going, but you can always tell where they’ve been. Once an offender has shown us he has clearly embarked on the predator’s bloody road, it is our responsibility to make that road a dead end.”).

¹²⁶ Consider, for instance, the remarks of Congressman McCollum in support of the Sexual Offender Tracking and Identification Act of 1996: “It is well recognized that sexual predators are remarkably clever and persistently transient. The offenders are not confined within state lines, and neither should our efforts to keep track of them.” Mona Lynch, *Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 545 (2002) (quoting 142 CONG. REC. H11130 (daily ed. Sept. 25, 1996) (statement of Rep. Betsy McCollum)).

impressionable children and lonely women with a façade of normalcy.¹²⁷ The juvenile super-predator is a savage beast, dangerous but containable, but the sexual predator is a diabolical fiend, clever and elusive.¹²⁸

And this perceived difference has given the response to the sexual predator a characteristic form. We treated the juvenile super-predator as an adult, but generally no worse—warehousing him in the same place and the same way. But the sexual predator inspires a sense of disgust and depravity.¹²⁹ We fear infection—that he will slip beyond the bounds of “them” and contaminate “us.” He is imagined not simply as a monster, but as a deadly virus that must be permanently quarantined. His presence must be announced, his location known, his movement recorded. Speaking in support of the Sexual Offender Tracking and Identification Act of 1996, for instance, Joe Biden, then a Democratic Senator from Delaware, said, “We now seek to build a system where all movements of sexually violent and child offenders can be tracked and we will go a long way toward the day when none of these predators will fall between the cracks.”¹³⁰ A Louisiana version of the ubiquitous community notification statute required the released offender to mail details about his record to his neighbors. In urban areas, this meant everyone within a three-block area. In Oregon, as a condition of parole, an ex-convict was required to post a sign on his front door that read, “Dangerous Sex Offender—No Children Allowed.”¹³¹ In many other jurisdictions, he may not live within shouting distance of the parks, schools, and playgrounds where he habitually trolls for victims.¹³² Instead, he must be isolated and contained, like a disease.

As with the juvenile super-predator, the state and federal legislatures responded enthusiastically to the perceived crisis of sexual predators. Sentences for convicted sex offenders have increased dramatically. California passed a “one strike” law in 1994, which mandated a twenty-five-year sentence, with a minimum of fifteen years to be served prior to parole eligibility, for certain types of sex offenses.¹³³ It followed this in 1996 with a law calling for non-voluntary chemical castration of child

¹²⁷ See, e.g., Andrew Vachss, *If We Really Want to Keep Our Children Safe . . .*, PARADE MAG., May 2, 1999, at 5 (“Predatory pedophiles are experts at camouflage. Virtually all of their approaches to children are made under a benign guise—offering ‘friendship’ or ‘understanding.’ For every child molester who leaps out of a van wearing a ski mask to grab a victim, there are thousands whose weapons are deception and guile.”).

¹²⁸ See, e.g., JENKINS, *supra* note 78, at 189–214.

¹²⁹ Lynch, *supra* note 126, at 538–54.

¹³⁰ *Id.* at 553 (quoting 142 CONG. REC. S3421 (daily ed. Apr. 16, 1996) (statement of Sen. Joseph Biden)).

¹³¹ JENKINS, *supra* note 78, at 200.

¹³² *Id.* at 200–01.

¹³³ CAL. PENAL CODE § 667.61 (West 2011).

molesters, which is mandatory after the second conviction and discretionary after the first, where discretion resides with the sentencing judge.¹³⁴ A number of states followed suit and passed similar laws permitting chemical castration for some sex offenders.¹³⁵ In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, named for a child abducted in Minnesota in 1989.¹³⁶ The law provided that federal money would be withheld from states that did not have sex offender registration systems in place.¹³⁷ All states now have such systems.¹³⁸ Two years later, Congress passed Megan's Law, named for a child killed by a repeat sex offender in New Jersey.¹³⁹ Megan's Law amended the Wetterling Act to require that states also establish a community notification system.¹⁴⁰ Though these approaches vary somewhat from state to state, they all require that sex offenders provide their whereabouts to law enforcement, and sometimes to the broader community. Many of these statutes forbid sex offenders from living within a specified distance of places where children might gather, including parks, schools, malls, skating rinks, swimming pools, etc.¹⁴¹ And finally, a number of states and the federal government have passed legislation allowing for the continued confinement of certain sex offenders even after they complete their sentence.¹⁴²

Not surprisingly, the response to the sexual marauder has been no more grounded in reality than the earlier response to the juvenile super-predator. To begin with, and contrary to the image that haunts the popular imagination, the largest number of sex offenders—and the overwhelming majority of offenders who abuse children—are not strangers who leap from

¹³⁴ *Id.* § 645.

¹³⁵ See Lynch, *supra* note 126, at 536.

¹³⁶ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2006).

¹³⁷ *Id.* § 14071(g)(2).

¹³⁸ HUMAN RIGHTS WATCH, *supra* note 35, at 2.

¹³⁹ Pam Lynchner Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. § 14072 (2006).

¹⁴⁰ *Id.* § 14071 (amended 1996).

¹⁴¹ See, e.g., ARK. CODE ANN. § 5-14-128(a) (West 2009) (forbidding certain sex offenders from residing within 2,000 feet of schools, public parks, youth centers, or daycare facilities); FLA. STAT. ANN. § 947.1405(7)(a)(2) (West 2010) (imposing residence restriction on sex offenders whose victims were under the age of eighteen); S.D. CODIFIED LAWS § 22-24B-23 (2010) (forbidding sex offenders from living within a "community safety zone").

¹⁴² See, e.g., KAN. STAT. ANN. § 59-29a01 (Supp. 2003). These provisions survived due process challenges. *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997). In *United States v. Comstock*, the Court held that Congress had authority under the Necessary and Proper Clause to enact a federal version of this statute. 130 S. Ct. 1949, 1954 (2010); see U.S. CONST. art. I, § 8, cl. 18.

behind the bushes or prowl on the Internet, but family members, friends, and acquaintances.¹⁴³ Tracking strangers who move from state to state, or forcing sex offenders to announce their presence to the community, may make for good television but has very little to do with sound criminal justice policy. In addition, and once again contrary to the accepted wisdom, the recidivism rates for sex offenders are actually quite low. Most studies show that approximately 3–5% of sex offenders are rearrested for a new sex offense within three years of their release, and even fewer are reconvicted.¹⁴⁴ And finally, the reliable prediction that a particular person will reoffend—the ostensible foundation for preventive detention regimes—is simply beyond the expertise of modern science. As one researcher recently put it, “clinical predictions of future dangerousness, including sexual recidivism, are notoriously subjective and prone to bias and are frequently wrong.”¹⁴⁵ None of this seems to matter, however, and public thought continues to dwell on the monster believed to be in our midst.

* * * *

The response to both the juvenile super-predator and the sexual predator reveals a now-distinctive habit of mind. The marauder prompts images of subhuman deviance and apocalyptic risk. A blameless society faces imminent destruction and demands immediate protection. Politicians respond with the tools that have become most familiar—punishment and control. And the pattern described for these particular beasts is merely representative. The overlapping response to the “epidemics” of drugs¹⁴⁶ and gang violence¹⁴⁷ has been much the same. Together, they illustrate

¹⁴³ See CHARLES PATRICK EWING, *JUSTICE PERVERTED: SEX OFFENSE LAW, PSYCHOLOGY, AND PUBLIC POLICY* xvi–vii (2011). According to the 2004 National Crime Victimization Survey, compiled by the Department of Justice, approximately a quarter of rapes and sexual assaults against adult women were committed by strangers. For children, “strangers were the perpetrators in only 3.0 percent of the cases involving girls 0 to 5 years old, 4.8 percent of those involving girls 6 to 11, 10 percent of those involving girls 12 to 17, 3.5 percent of those involving boys 0 to 5, 4.6 percent of those involving boys 6 to 11, and 7.6 percent of those involving boys 12 to 17.” *Id.* at xvii.

¹⁴⁴ *Id.* at 33–35.

¹⁴⁵ *Id.* at 35–36.

¹⁴⁶ See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 824 (2002) (upholding suspicionless, warrantless drug testing of all students engaged in competitive extracurricular activities based in part on “the nationwide epidemic of drug use”); Katherine Beckett, *Setting the Public Agenda: “Street Crime” and Drug Use in American Politics*, 41 *SOC. PROBS.* 425 (1994); Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and the Media in the Making of a Drug Scare*, 16 *CONTEMP. DRUG PROBS.* 535 (1989).

¹⁴⁷ See, e.g., Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 *LAW & SOC’Y REV.* 531, 540 (1997) (“The term ‘gang banger’ invokes an image of violent young black men who are involved in activities such as drug dealing and prostitution.”); Erik Luna, *The Models of*

how contemporary American society has come to understand deviance and what it now demands in order to eliminate all risk.¹⁴⁸

IV. THE PUNITIVE TURN IN CRIMINAL PROCEDURE

The punitive turn in American life has been greatly facilitated by a parallel shift in the law of criminal procedure. Over the past several decades, the Supreme Court has steadily reoriented the doctrine to favor conservative approaches to deviance and risk.¹⁴⁹ At the risk of oversimplification, one can imagine criminal procedure operating at two poles. At one pole, criminal procedure can be conceived as the deliberate imposition of state power into the lives of those present within the community, either by surveillance, arrest, prosecution, or other forms of social control. But the people who may suffer from this imposition of state power are not only part of the community, they are presumptively innocent, and therefore presumptively free to go about their affairs. Because the exercise of state power has the inherent potential for oppression and arbitrariness, to the detriment of these rights, it must be cabined. At the other pole, it is also possible to conceive of criminal procedure as a protection against lawlessness. It exists as an essential prerogative of the state—viz., the power to make and enforce those rules which are necessary to maintain order and protect the public from the threat represented by criminals, who have shown by their conduct to be outside the community entitled to the state's protection. It adopts a distinctly adversarial stance toward the criminal element, with no pretense that they are "like us."¹⁵⁰

Criminal Procedure, 2 BUFF. CRIM. L. REV. 389, 391 (1999) (discussing Chicago's gang loitering ordinance to illustrate the tendency of criminal procedure doctrine to "heed the apocalyptic call and disregard the bedrock precedents of the past to suppress the alleged crisis of the present").

¹⁴⁸ Indeed, at a more general level, the punitive response is not confined to criminology. Daniel Rodgers has recently shown how the steps leading up to the Welfare Reform Act of 1996 followed much the same pattern: the demonization of the poor, who were exclusively to blame for their poverty, and who must be punished by removing the incentives in welfare which encourage them to remain impoverished. See DANIEL T. RODGERS, *AGE OF FRACTURE* 201–09 (2011).

¹⁴⁹ See, e.g., Louis Bilionis, *Criminal Justice After the Conservative Reformation*, 94 GEO. L.J. 1347, 1347 (2006) ("Social, cultural, political, and legal forces called for a conservative redirection in criminal justice. The Court heeded the call.").

¹⁵⁰ This model is akin to Herbert Packer's vision of criminal procedure as the contest between due process and crime control. See HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). There is a distinct sense in which Packer's model is not useful to the new penology, since he clearly anticipated that the criminal process would be used to investigate, prosecute, and punish wrongdoers for past crimes rather than to prevent the commission of future crimes. See *id.*; see also Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983).

It should be immediately apparent that these two conceptions will lead to dramatically different legal regimes. In the former, an aggressive constabulary is seen as the potential source of totalitarian abuse; in the latter, it is the obvious answer to social chaos. In one, law enforcement is a problem to be restrained; in the other, it is a solution to be unleashed. And in the past fifty years, the unmistakable trend in the doctrine has been to favor the second vision over the first. Notwithstanding occasional outliers like *Florida v. J.L.*¹⁵¹ or *Kyllo v. United States*,¹⁵² the Court has proven remarkably willing to accommodate, and advance, the punitive turn in American culture. Since the late 1960s, the Court has steadily expanded the power of the government to monitor, stop, arrest, interrogate, and imprison people suspected of criminal behavior, to keep them there for extended periods, and to continue their detention indefinitely, even after their sentences have ended.¹⁵³

These developments have been the subject of endless commentary, which I do not repeat here.¹⁵⁴ My discussion assumes a basic familiarity with the doctrine and focuses instead on the close relationship between the developing jurisprudence and the broader cultural preference for the punitive turn.¹⁵⁵ Though it is dangerous to reduce this entire trend to a

¹⁵¹ 529 U.S. 266, 266 (2000) (finding that police may not stop and frisk a person “solely from a call made from an unknown location by an unknown caller” that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun”). Still, the Court left open the possibility that a different tip involving a greater risk of harm—perhaps that a Muslim-looking woman was at a bus stop wearing a burqa and carrying a bomb—might be enough. *Id.* at 273–74.

¹⁵² 533 U.S. 27, 29, 40 (2001) (“[T]he use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment.”).

¹⁵³ For an argument that cases like *Kyllo* and *J.L.* were not outliers but rather a part of a countertrend against the “conservative reformation” of the ‘80s and ‘90s, see Louis D. Bilionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law*, 52 UCLA L. REV. 979, 1032 (2005). From the perspective of five additional years, Dean Bilionis’s prediction seems to have been premature.

¹⁵⁴ For a discussion of the literature, see Arenella, *supra* note 150, at 185–97. Much of this literature contrasts the Warren Court with the Burger and Rehnquist Courts and concludes the former was not as radically liberal, and the latter not as radically conservative, as they are often portrayed. See, e.g., Yale Kamisar, *The Warren Court (Was it Really so Defense-Minded?)*, *the Burger Court (Is it Really so Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T* 62, 62–91 (Vincent Blasi ed., 1983). My interest is in the overall trend of the doctrine and its accommodation of the punitive turn rather than a comparison of one Court to another.

¹⁵⁵ For a discussion of how the law shapes the popular imagination by conferring legitimacy on cultural trends, see, e.g., MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 3 (1991) (“This legalization of popular culture is both cause and consequence of our increasing tendency to look to law as an expression of the few values that are widely shared in our society: liberty, equality, and the ideal of justice

single sentiment, I suggest it represents the triumph of the view expressed by then-Justice Rehnquist in *Illinois v. Gates*, the 1984 decision which replaced the *Aguilar–Spinelli* two-pronged test for probable cause based on an informant’s tip with a more flexible and deferential inquiry into “the totality of the circumstances.”¹⁵⁶ By itself, the decision is simply part of the overall trend, vesting more authority in local law enforcement and imposing corresponding limits on both the magistrate who is asked to issue a warrant and the judge who is called to review it.¹⁵⁷ But far more important was Justice Rehnquist’s observation, apropos of nothing, that the *Aguilar–Spinelli* test poorly served “*the most basic function of any government,*” which, he said, was “to provide for the security of the individual and of his property.”¹⁵⁸

This language, lifted from Justice White’s dissent in *Miranda v. Arizona*,¹⁵⁹ reflects a dramatic shift in judicial thinking. Certainly the view it expresses is not self-evident; one could just as easily say, for instance, that “the most basic function of any government” is to provide for the *welfare* of its members, or to guarantee the *rights* of its members, or to ensure the *liberty* of its members. Any one of these formulations could provide for the security of individuals and their property but nonetheless lead to a set of rules that would tend to protect against the encroachments of law enforcement. One could likewise say that “the most basic function of any government” is to promote a free and open society. This too could provide for the security of individuals and their property but would again suggest a different and more limited role for the machinery of law enforcement. Instead, Justice Rehnquist elevated security to a uniquely privileged status, which in turn leads to a set of rules that tend to permit and facilitate rather than cabin and restrain the state. The point, of course, is not that one view is conclusively superior to another or that this orientation will

under law Legality, to a great extent, has become a touchstone for legitimacy.”); JUDITH SHKLAR, *LEGALISM I* (1964) (defining legalism as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”); Margulies & Metcalf, *supra* note 5, at 456–57.

¹⁵⁶ 462 U.S. 213, 214 (1983).

¹⁵⁷ *Id.* at 236.

¹⁵⁸ *Id.* at 237 (emphasis added) (quoting *Miranda v. Arizona*, 384 U.S. 436, 539 (1966) (White, J. dissenting)).

¹⁵⁹ 384 U.S. at 539 (White, J., dissenting). Justice White cited *Lanzetta v. New Jersey* where the Court struck down as unconstitutionally vague a New Jersey statute which had criminalized membership in “a gang.” 306 U.S. 451, 458 (1939), (“The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.”). The Court noted the statute had been construed by the state court, which, in dicta, wrote that “[t]he primary function of government . . . is to render security to its subjects.” *Id.* at 455.

necessarily lead to a different result in every case, but simply that Justice Rehnquist's view represents a striking victory for the punitive turn.¹⁶⁰

This victory has found expression throughout the doctrine. For instance, the Court has steadily expanded the universe of allowable police investigation by shrinking the reach of the Fourth Amendment. In *Katz v. United States*, the 1967 landmark decision, the Court struck down the warrantless electronic surveillance of a phone booth used by Katz for his interstate gambling.¹⁶¹ *Katz* was a structural decision that reflected a suspicion of law enforcement and a preference for judicial oversight in order to ensure a free and open society. As the Court noted, the FBI agents in *Katz* acted with undeniable restraint:

They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.¹⁶²

In addition, the agents relied on the prior Supreme Court decision in *Olmstead v. United States*, which held that electronic surveillance without trespass and without seizure of tangible property did not violate the Fourth Amendment.¹⁶³

The Court in *Katz* was unmoved:

[T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized.¹⁶⁴

To some, this no doubt seemed like a triumph of form over substance, the needless elevation of legal technicalities that frustrated the reasonable, good faith efforts of zealous and creative law enforcement. To the Court in

¹⁶⁰ Compare 1 WILLIAM BLACKSTONE, COMMENTARIES *124 (stating that the goal of society is "to protect individuals in the enjoyment of . . . rights . . . which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities"). I am grateful to my colleague Al Alschuler for bringing this to my attention.

¹⁶¹ 389 U.S. 347, 359 (1967).

¹⁶² *Id.* at 354.

¹⁶³ *Id.* at 352 (citing *Olmstead v. United States*, 277 U.S. 438, 457, 464 (1928)).

¹⁶⁴ *Id.* at 356.

1967, however, it was simply adherence to the constitutional requirement “that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police.”¹⁶⁵

Yet the test that emerged from *Katz* was articulated by Justice Harlan in concurrence: a search occurred only if the petitioner exhibited an expectation of privacy that society was prepared to recognize as reasonable.¹⁶⁶ The inherent subjectivity of this inquiry has allowed the Court to accommodate the punitive turn by gradually shrinking the area protected by the Fourth Amendment. Thus, the police may conduct a warrantless search of privately owned fields adjacent to one’s home even if the owner has taken special steps to prevent the public from trespassing unlawfully on the land.¹⁶⁷ They may search structures close to the home but beyond the curtilage, even if the owner has taken elaborate precautions to ensure the privacy of those structures.¹⁶⁸ They may search structures within the curtilage, even if they cannot be seen from the street, so long as they may be seen by a plane flying overhead.¹⁶⁹ And they may search structures within the curtilage that cannot be seen from the street, and cannot be seen from a plane flying overhead, so long as they can be seen from a low-flying helicopter.¹⁷⁰ They may not, however, ascertain the content of one’s home without a warrant unless they do so by the use of an officer’s unenhanced senses.¹⁷¹

Just as the police have greater latitude to search, they have greater authority to arrest. In *Atwater v. City of Lago Vista*, the Court held that police could make a custodial arrest for any offense, even one for which the maximum penalty did not include the possibility of incarceration.¹⁷² This, of course, entitles the police to conduct a warrantless search incident to the arrest¹⁷³ and to conduct a warrantless inventory search of any impounded vehicle.¹⁷⁴ A number of municipalities tried to limit *Atwater* by making it a violation of state law to arrest a person for a fine-only offense. But in *Virginia v. Moore*, the Court held that an officer who violates such a law

¹⁶⁵ *Id.* at 357 (quoting *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963)).

¹⁶⁶ *Id.* at 361 (Harlan, J., concurring).

¹⁶⁷ *Oliver v. United States*, 466 U.S. 170, 175–77 (1984).

¹⁶⁸ *United States v. Dunn*, 480 U.S. 294, 302–03 (1987).

¹⁶⁹ *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

¹⁷⁰ *Florida v. Riley*, 488 U.S. 445, 450–51 (1989).

¹⁷¹ *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

¹⁷² 532 U.S. 318, 354 (2001).

¹⁷³ *Chimel v. California*, 395 U.S. 752, 755–56 (1969).

¹⁷⁴ *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976).

does not also violate the Fourth Amendment, which means a person may be arrested and jailed for a fine-only offense even if the arrest is illegal.¹⁷⁵

Though *Atwater* and *Moore* dramatically expanded the state's power to arrest (and therefore to search), that authority was at least restrained by the requirement that the arrest be based on probable cause. But of course, since *Terry v. Ohio*, the police have been allowed to stop and frisk a person based only on a lesser showing of reasonable suspicion.¹⁷⁶ In *Terry*, the Court struggled to strike a workable balance between the interests of the state in effective law enforcement and the interest of the individual in personal liberty.¹⁷⁷ Ultimately, the Court held that an officer may stop a person if he can articulate something more than a bare hunch that criminal activity is afoot, and may frisk him if he has a reasonable concern for his safety.¹⁷⁸ As with *Katz*, however, the Court in subsequent cases has given *Terry* an expansive reading. Innocent explanations for "suspicious" behavior are waved off, and sinister explanations are accepted based on the ostensibly superior judgment of experienced police officers.¹⁷⁹ This accounts for cases like *Illinois v. Wardlow*, where the Court held that running away at the sight of an officer in a high-crime neighborhood, without more, is grounds for a *Terry* stop.¹⁸⁰ In addition, the Court has applied *Terry* in circumstances quite beyond its original justification, including, for instance, the seizure and intrusive search of foreign nationals at the border.¹⁸¹

In much the same way, the protections extended to an accused during police interrogations have been gradually whittled away. In *Miranda v. Arizona*, the Court held that a custodial interrogation had to be preceded by a set of warnings lest the interrogation run afoul of the privilege against self-incrimination.¹⁸² Since that decision, the Court has steadily narrowed its scope by: taking a crabbed reading of "custody" and "interrogation";¹⁸³

¹⁷⁵ 128 S. Ct. 1598, 1607 (2008). Certainly, a state could limit *Atwater* by directing that a violation of state law required dismissal of the underlying offense, which could provide a remedy even in the absence of the Fourth Amendment. The law in *Moore*, however, was not of this character. See VA. CODE. ANN. § 19.2-74 (2004).

¹⁷⁶ 392 U.S. 1, 27 (1968).

¹⁷⁷ See *id.* at 22–27.

¹⁷⁸ *Id.* at 27.

¹⁷⁹ See, e.g., *United States v. Arvizu*, 534 U.S. 266, 277 (2002) ("A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct."); *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (finding reasonable suspicion based on decision of bystander to run from police in a high-crime neighborhood).

¹⁸⁰ See *Wardlow*, 528 U.S. at 124–25.

¹⁸¹ *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985).

¹⁸² 384 U.S. 436, 444 (1966).

¹⁸³ See, e.g., *Yarborough v. Alvarado*, 541 U.S. 652, 666–67 (2004) (age and experience with law enforcement should not be taken into account to determine when a person is considered in custody); *Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (questions asked by an

ruling that it does not prohibit most forms of police trickery;¹⁸⁴ and holding that it does not apply either to impeachment or to questioning that protects “public safety.”¹⁸⁵ And in *United States v. Patane*, a plurality found that a *Miranda* violation does not prevent the admission of subsequently-seized physical evidence located as a product of the unlawful statement.¹⁸⁶ It is not for nothing that the late Chief Justice Rehnquist, when he upheld *Miranda* in *Dickerson v. United States*, was able to ignore his long-standing criticism of the 1966 landmark decision with the jaunty but accurate assessment that intervening cases had substantially lessened its impact.¹⁸⁷ Far better, therefore, to leave the case as a symbol of American commitment to due process even though it has been all but stripped of its potency.¹⁸⁸

Just as the Court has gradually made it easier for the police to stop, frisk, arrest, search, and interrogate, they have also made it easier for prosecutors to convict. For instance, even when a search is conducted without a warrant, the many exceptions to the Warrant Clause—hot pursuit,¹⁸⁹ plain view,¹⁹⁰ automobiles,¹⁹¹ checkpoints,¹⁹² “special needs,”¹⁹³

undercover officer posing as a cellmate do not constitute an interrogation sufficient to trigger *Miranda*); *Rhode Island v. Innis*, 446 U.S. 291, 301–02 (1980) (a conversation between officers in earshot of a suspect does not constitute an interrogation because “police surely cannot be held accountable for the unforeseeable results of their words or actions”); *Oregon v. Mathiason*, 429 U.S. 492, 494–95 (1977) (no *Miranda* warnings are required when a suspect is told he is not under arrest).

¹⁸⁴ *E.g.*, *Frazier v. Cupp*, 394 U.S. 731, 738–39 (1969) (an officer’s false statement about evidence against a suspect did not render his subsequent confession coerced).

¹⁸⁵ *New York v. Quarles*, 467 U.S. 649, 655–56 (1984) (“[T]here is a ‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence, and the availability of that exception does not depend upon the motivation of the individual officers involved.”); *Harris v. New York*, 401 U.S. 222, 224 (1971) (holding that *Miranda* does not bar the use of coerced statements for impeachment purposes, so long as those statements are deemed trustworthy).

¹⁸⁶ 542 U.S. 630, 633–34 (2004).

¹⁸⁷ 530 U.S. 428, 443 (2000).

¹⁸⁸ *Id.* at 444.

¹⁸⁹ *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.”).

¹⁹⁰ *Horton v. California*, 496 U.S. 128, 142 (1990) (holding that if lawfully present, police may seize evidence in plain view, without a warrant, if incriminating character is immediately apparent).

¹⁹¹ *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

¹⁹² *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (explaining that checkpoint stops do not require individualized suspicion in order to pass constitutional muster); *Mich. Dep’t State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that the state’s interest in preventing drunk driving outweighs intrusion upon an individual motorist who is stopped at checkpoint).

exigent circumstances,¹⁹⁴ border crossings,¹⁹⁵ inventory searches,¹⁹⁶ etc.—make it a good bet the search will be upheld. And even if it is not, the increasing resistance to the exclusionary rule means the evidence is not likely to be suppressed.¹⁹⁷ In the same spirit, the Court has held that remarkably punitive sentences do not constitute cruel and unusual punishment under the Eighth Amendment.¹⁹⁸ To be sure, the Court in *Graham v. Florida* recently put at least some limit on these developments, but one should recall the question presented in *Graham*—viz., whether, consistent with the Eighth Amendment, a juvenile who did not kill may nonetheless be sentenced to spend the rest of his life in prison without the

¹⁹³ *Bd. of Educ. Indep. Sch. Dist. No. 92 Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 825, 835 (2002) (upholding warrantless drug testing of all students involved in extracurricular activities, regardless of whether there was a history of a serious drug problem in the school); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649, 657, 664–65 (1995) (upholding suspicionless and warrantless drug testing of student athletes because such students had decreased expectation of privacy, the search was unobtrusive, and drugs were a problem at the school).

¹⁹⁴ *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (“[L]aw enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.”); *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (“[A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.”).

¹⁹⁵ *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (law enforcement may, without a warrant, “remove, disassemble, and reassemble a vehicle’s fuel tank” when that search occurs at the border); *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (“[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.”).

¹⁹⁶ *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (“Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit.”); *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976) (“[I]nventories pursuant to standard police procedures are reasonable.”).

¹⁹⁷ *Herring v. United States*, 129 S. Ct. 695, 698 (2009) (when police error, though unconstitutional, is “isolated negligence attenuated from the arrest,” no exclusion is required); *Murray v. United States*, 487 U.S. 533, 537 (1988) (no exclusion if police can show independent source); *United States v. Leon*, 468 U.S. 897, 922 (1984) (no exclusion if police acted in good faith); *Nix v. Williams*, 467 U.S. 431, 444 (1984) (no exclusion if police can establish inevitable discovery).

¹⁹⁸ *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991) (no constitutional objection to sentence of life in prison without the possibility of parole for possession of cocaine); *Hutto v. Davis*, 454 U.S. 370, 370–71, 374–75 (1982) (no constitutional problem in forty-year sentence and \$20,000 fine for possession and distribution of nine ounces of marijuana); *Rummel v. Estelle*, 445 U.S. 263, 266, 285 (1980) (no constitutional problem with sentence of life in prison for obtaining \$120.75 by false pretenses under the “three strikes” law).

possibility of parole.¹⁹⁹ The mere fact that the question arose shows the extent to which the punitive turn has taken hold in American sentencing.

And finally, the Court has approved at least some preventive detention regimes. In *United States v. Salerno*, for instance, the Court upheld the Bail Reform Act, which authorizes preventive detention prior to trial.²⁰⁰ In *Kansas v. Hendricks*²⁰¹ and *Kansas v. Crane*,²⁰² the Court upheld a statute authorizing indefinite, involuntary detention of sex offenders who have completed their sentences but continue to find it difficult to control their sexual impulses. And in *United States v. Comstock*, the Court held that Congress had authority under the Necessary and Proper Clause to enact a federal version of this statute.²⁰³

In the final analysis, criminal procedure doctrine illustrates quite well the continuing cross-pollination between law and culture. As American thought has taken a punitive turn, the doctrine has steadily accommodated the growing clamor for public safety. And as the Court has repeatedly justified its doctrinal shifts by emphasizing the need for public safety, it has helped to create the very cultural demand it seeks to satisfy. The result is a kind of dialectic, where increased demand for punitive sanctions is used to justify changes in the doctrine, and changes in the doctrine create space for increasingly punitive sanctions. It is not a one-way ratchet, of course, and matters do not spiral endlessly toward only one outcome, but for the last forty years they have certainly moved in one direction far more easily than the other.

¹⁹⁹ 30 S. Ct. 2011, 2017–18 (2010).

²⁰⁰ 481 U.S. 739, 741 (1987).

²⁰¹ 521 U.S. 346 (1997).

²⁰² 534 U.S. 407 (2002).

²⁰³ 130 S. Ct. 1949, 1954 (2010) (applying U.S. CONST. art. I, § 8, cl. 18). It would certainly be a mistake to suggest that cases like *Salerno* and *Hendricks* resolve the present debate over preventive detention. In *Salerno*, for instance, the indicted defendant faced the prospect of an imminent prosecution, which mitigated the impact of the statute and eliminated the risk of indefinite detention without legal process. See 481 U.S. at 747. And in *Hendricks* and *Crane*, the statute under review applied to prisoners who had already been convicted of a sexual assault and who, because of a diagnosed condition, found it difficult to control their conduct. *Crane*, 534 U.S. at 410; *Hendricks*, 521 U.S. at 352. The call for preventive detention of suspected terrorists, however, takes these developments a step further. Today, the suggestion is advanced that detention could be based solely on predictions about future dangerousness, and for which past conduct and the petitioner's mental state may be relevant but are not essential to the Government's case. In this sense, the call for preventive detention of suspected terrorists is really a demand for *anticipatory* detention—detention purely in anticipation of what the person may do, without regard to what he may have done in the past, and without regard to his ability to restrain himself.

V. PREVENTIVE DETENTION OF SUSPECTED TERRORISTS

The foregoing, which provides a snapshot of the punitive turn in American thought, is meant to capture the American state of mind—at least with respect to deviance and risk—when the planes struck the buildings.

A. THE TERRORIST AS SUPER-PREDATOR

Within days of the attacks of 9/11, an image of the Islamic terrorist began to emerge that was built from the same rhetorical resources that Americans have successfully employed for the past several decades to construct a never-ending series of super-predators. The terrorists, like any predator, were inherently malevolent. The “attacks of September 11,” John Ashcroft told the House Committee on the Judiciary, “drew a bright line of demarcation between the civil and the savage.”²⁰⁴ There is no understanding them, for they are simply evil. “We are in a conflict between good and evil,” President Bush said, “and America will call evil by its name.”²⁰⁵ More beast than man, terrorists live on the “hunted margin”²⁰⁶ of mankind and have rejected “those values that separate us from animals—compassion, tolerance, mercy.”²⁰⁷ They are “parasites,”²⁰⁸ a “scourge,”²⁰⁹ an “evil and inhuman group of men,”²¹⁰ who spread their “cancer,”²¹¹ their “spawn,”²¹² throughout the civilized world.

Sadly, this was not simply the language of politicians or the right. In 2002, Alan Dershowitz published *Why Terrorism Works*.²¹³ Terrorism works, he wrote, “because its perpetrators believe that by murdering innocent civilians they will succeed in attracting the attention of the world

²⁰⁴ Attorney General John Ashcroft, Testimony Before the House Committee on the Judiciary, 107th Cong. (Sept. 24, 2001), *available at* 2001 WL 1132414.

²⁰⁵ President George W. Bush, Commencement Address at the United States Military Academy at West Point (June 1, 2002) (transcript available at <http://www.nytimes.com/2002/06/01/international/02PTEX-WEB.html>).

²⁰⁶ President George W. Bush, Remarks at the Chief Executive Officers Summit in Shanghai (Oct. 20, 2001).

²⁰⁷ U.S. Ambassador Howard H. Baker, Jr., Remarks at Japanese Observance Ceremony for Victims of Terrorism in the U.S. (Sept. 23, 2001).

²⁰⁸ President George W. Bush, Statement Before the 56th Regular Session of the UN General Assembly (Nov. 10, 2001).

²⁰⁹ *CNN Interview on Anti-Terrorism Campaign* (CNN television broadcast Sept. 16, 2001) (statement of U.S. Secretary of State Colin Powell).

²¹⁰ U.S. Ambassador Howard H. Baker, Jr., Remarks at Japanese Observance Ceremony for Victims of Terrorism in the U.S. (Sept. 23, 2001).

²¹¹ Admiral Dennis Blair, Office of the U.S. Commander-in-Chief, Pacific Command, *Taking Back Our World from Osama bin Laden*, GLOBAL SECURITY (Oct. 23, 2001), <http://www.globalsecurity.org/military/library/news/2001/11/mil-011101-usia07.htm>.

²¹² *Id.*

²¹³ ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* (2002).

to their perceived grievances.”²¹⁴ Since that is what terrorists want, society must not give it to them: We must commit ourselves *never to try to understand or eliminate its alleged root causes*, but rather to place it beyond the pale of dialogue and negotiation.”²¹⁵ These are not people with whom you can negotiate. Instead,

they are like cunning beasts of prey: we cannot reason with them, but we can—if we work at it—outsmart them, set traps for them, cage them, or kill them. The difference is, of course, that they are much smarter than the most cunning of beasts. Indeed, we must operate on the assumption that they are as smart as we are, but more determined, more single-minded, more ruthless, and less constrained by morality, decency, and legality.²¹⁶

In a few short sentences, Dershowitz adopts the tropes of the criminal as superhuman predator—less than human, but so much more dangerous.

This rhetoric became somewhat more concrete, if no less hyperbolic, once it could be directed at actual people. When the first prisoners arrived at Guantanamo, senior Administration officials promptly described them as “among the most dangerous, best trained vicious killers on the face of the earth.”²¹⁷ They were “the worst of a very bad lot,”²¹⁸ and “very dangerous people,” who “would gnaw hydraulic lines in the back of a C-17 to bring it down.”²¹⁹ Hyperbolic foolishness like this has proven remarkably durable. “Those men who are at Gitmo are the meanest, nastiest killers in the world,” fulminated Republican Congressman Chris Chambliss of Georgia in 2009, speaking in opposition to the President’s plan to close Guantanamo.²²⁰ “Every single one of them wakes up every day thinking of ways they can kill and harm Americans, both our soldiers as well as individuals.”²²¹ Representative Chambliss did not trifle himself with the fact that the Obama Administration has cleared the majority of prisoners at

²¹⁴ *Id.* at 24.

²¹⁵ *Id.* at 24–25.

²¹⁶ *Id.* at 182.

²¹⁷ Donald Rumsfeld, U.S. Sec’y of Defense, Press Briefing en route to Guantanamo Bay (Jan. 27, 2002) (transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2320>).

²¹⁸ Tim Gold & Don Van Natta, Jr., *U.S. Said to Overstate Value of Guantanamo Detainees*, N.Y. TIMES, June 21, 2004, at A1 (quoting Vice President Dick Cheney).

²¹⁹ General Richard Myers, Department of Defense News Briefing (Jan. 11, 2002) (transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2031>).

²²⁰ 155 CONG. REC. S11,145 (Nov. 5, 2009).

²²¹ *Id.*

the base for release.²²² Like any ideology, these beliefs are fast becoming impervious to fact.

Of course, the essential counterpoint to evil is innocence. Just as post-9/11 rhetoric described the terrorist in the familiar language of the modern criminal super-predator, it invoked the innocence of American society to fend off any heretical suggestion that U.S. foreign policy could have contributed, even remotely, to the attacks. In his first address to Congress after the attacks, President Bush famously pronounced the answer to the question, “Why?” “They hate what they see right here in this Chamber, a democratically elected government They hate our freedoms, our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.”²²³ “They can’t stand what America stands for,” he said later.²²⁴ “It must bother them greatly to know we’re such a free and wonderful place—a place where all religions can flourish; a place where women are free; a place where children can be educated. It must grate on them greatly.”²²⁵ And on the day of the attacks, Bush said, “America was targeted for attack because we’re the brightest beacon for freedom and opportunity in the world.”²²⁶

This rhetoric has been exhaustively critiqued. In particular, the social construction of the evil Islamic terrorist and innocent American victim has been thoroughly reprised in the post-9/11 literature, and need not be repeated here.²²⁷ Typically, this literature suggests that the image of the terrorist draws its rhetorical inspiration solely from the demonization of prior wartime enemies. As Richard Jackson put it:

At its most basic level, the discursive construction of the depersonalized and dehumanized ‘enemy other’ can be seen in the commonly used derogatory terms that soldiers of every generation have employed. ‘Hun’, ‘Japs’, ‘gooks’, ‘rag-heads’ and ‘skinnies’ are the means by which fellow human beings—who are also husbands, sons, brothers, friends—are discursively transformed into a hateful and loathsome ‘other’ who can be killed and abused without remorse or regret. The term ‘terrorist’ is

²²² U.S. DEPT. OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE ii (2010).

²²³ 147 CONG. REC. 17,457 (Sept. 20, 2001).

²²⁴ President George Bush, Remarks to the U.S. Attorneys Conference (Nov. 29, 2001), (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011129-12.html>).

²²⁵ *Id.*

²²⁶ President George Bush, Address to the Nation (Sep. 11, 2001) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html>).

²²⁷ See, e.g., Gabe Mythen & Sandra Walklate, *Criminology and Terrorism*, 46 BRIT. J. CRIMINOLOGY 379 (2006); Timothy Recuber, *The Terrorist as Folk Devil and Mass Commodity: Moral Panics, Risk, and Consumer Culture*, 2009 J. INST. INT’L STUD. 158 (2009).

simply the latest manifestation of this discursive process—today’s ‘terrorists’ are the new ‘gooks.’²²⁸

But this analogy is doubly flawed: on the one hand, it ignores virtually all changes in American thought since the early 1970s, and on the other hand, it suggests that wartime demonization is *sui generis*, and entirely unrelated to the vilification of others that has marred so much of American history. In these respects, the analogy is not so much mistaken as it is incomplete. The latter of these flaws—the failure to recognize the connection between wartime and peacetime demonization—is beyond the scope of this Article.²²⁹ My concern is with the former—the failure to take account of recent changes in American thought.

The 9/11 attackers were non-state actors who committed an enormous crime, and despite the great rhetorical effort to construct them as warriors—despite, for instance, the attempt to denominate their conduct as an act of war—the fact is that the terrorist does not easily fit into the public image of an enemy soldier. Quite simply, it takes a creative imagination to see al Qaeda as the same as the German, Japanese, Korean, or North Vietnamese armies. What does it *mean*, therefore, to say, as Jackson does, that terrorists are “the new” “gooks” or “Japs” or “Huns”? Americans cannot readily identify Islamic terrorists with Japanese or German soldiers, and for good reason—they are not remotely the same. Nor does the “War on Terror” fit the popular understanding of war, as many have noted. These differences are not inconsequential. On the contrary, they are at the heart of the confusion in American post-9/11 policy—whether and to what extent “war” is a useful or even intelligible paradigm for the challenge of trans-national terrorism perpetrated by Islamic terrorists. While policymakers spar over this question, Americans make sense of the Islamic terrorist by analogy to *what he has been rhetorically constructed to be*—viz., not some modern day enemy soldier, but as the latest, and by far the most dangerous iteration of a lurking, apocalyptic danger posed by a subhuman predator that threatens to overwhelm the American public, and for which the American public demands the prompt elimination of all risk.

B. TERROR, RISK, AND PREVENTIVE DETENTION

Thus, the image of the terrorist was built from the same rhetorical resources that had previously been used to build the monster-criminal. The new beast, even more than his predecessors, was imagined to create a risk of indescribable danger, and therefore demanded an even more

²²⁸ RICHARD JACKSON, *WRITING THE WAR ON TERRORISM: LANGUAGE, POLITICS, AND COUNTER-TERRORISM* 60 (2005).

²²⁹ The topic is discussed in Margulies & Metcalf, *supra* note 5, at 435–37.

comprehensive response—a response even more likely to eliminate all risk. In that way, the cultural aversion to risk that dominates criminal justice policy has also come to dominate the debate over preventive detention.²³⁰ The rhetoric reveals the same explosive, populist insistence that all risk be eliminated and all danger prevented. Yet in key respects, the preventive detention debate is even more irrational, more hyperbolic, since partisans can invoke more than a merely metaphoric war on crime. The cultural hostility to risk, already elevated in the new penology, is amplified still more by the notion that the country is at war, and that *this* beast is truly the worst of the worst. It is in this explosive context that policymakers have been debating preventive detention.

Though academics and journalists had been debating the merits of a post-9/11 preventive detention regime for years, the idea received its most prominent endorsement in May 2009 when President Obama, in his only major speech on national security, included it as an option for the road ahead.²³¹ Speaking at the National Archives, and invoking the mythical power of the Constitution, the Declaration of Independence, and the Bill of Rights, Obama said the Bush Administration “went off course” when it made “a series of hasty decisions” that “established an ad hoc legal approach for fighting terrorism . . . that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass.”²³² To correct these mistakes, Obama said he had made “dramatic changes” that represented “a new direction from the last eight years,” and that his approach to terrorism, unlike that of his predecessor, was faithful to “our most fundamental values. . . [to] liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality, and dignity around the world.”²³³ These changes, he vowed, would allow us to resume our timeless “American journey . . . ‘to form a more perfect union.’”²³⁴

²³⁰ For an excellent account of risk management in the context of Israeli counterterrorism policies, including the use of preventive detention, see Mimi Azjenstadt & Barak Ariel, *Terrorism and Risk Management: The Israeli Case*, 10 PUNISHMENT & SOC’Y 355 (2008). For a criticism of risk management approaches in British counterterrorism, see John Lea, *Terrorism, Crime, and the Collapse of Civil Liberties*, Paper presented at the Criminology Society, Middlesex University (April 2005), available at <http://www.bunker8.pwp.blueyonder.co.uk/misc/terror.htm>.

²³¹ See President Barack Obama, Remarks on National Security at the National Archives (May 21, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereinafter Remarks of the President]).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

Obama's speech left a powerful impression that his Administration had reclaimed America's moral standing, ending the abuses of a shameful past and returning to our foundational principles.²³⁵ Lost in the comforting rhetoric, however, were the policy details, which included—for the first time in U.S. history—support for a preventive detention regime. In outlining how his administration would deal with the prisoners at Guantanamo, Obama divided them into five categories: those who would be prosecuted in federal court, those who would be prosecuted before military commissions, those who would be released to their home countries, those who would be repatriated to another country, and those who would be preventively detained.²³⁶ With respect to the fifth category, he said:

Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here—this is the toughest single issue that we will face. We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. . . . Let me repeat: I am not going to release individuals who endanger the American people.²³⁷

In that way, the idea that depriving a person of his liberty—perhaps for the rest of his life—not because of what he may have done, but because of what he may yet do, and simply to avoid the risk of an adverse outcome at trial, was smothered in the reassuring twaddle about American “values.”

This cultural aversion to risk resurfaced late in 2009, when Attorney General Holder announced that the alleged 9/11 conspirators held at Guantanamo would be prosecuted in federal court. The announcement touched off an intense backlash on the political right that was awash in the tropes of war and risk. The *Wall Street Journal* said Holder “has invited grave and needless security risks by tempting jihadists the world over to strike Manhattan while the trial is in session.”²³⁸ Charles Krauthammer

²³⁵ For an analysis of this speech as symbolic political rhetoric, see Margulies & Metcalf, *supra* note 5, at 467–68.

²³⁶ Remarks of the President, *supra* note 231. Since Obama's speech, and as of the end of 2010, one Guantanamo prisoner has been prosecuted in federal court (Ahmed Ghailani, whose case is discussed *infra* at notes 248–268); three have been prosecuted before military commissions (Omar Khadr, Bilal al Qosi, and Noor Uthman Muhamad, all of whom pleaded guilty and will be released in a few years). Since Guantanamo opened, approximately 600 prisoners have been released or repatriated. The remainder—approximately 170—remain at Guantanamo. DEPT. OF JUSTICE, *supra* note 222, at 5–6; see also Carol J. Williams, *The Guantanamo Puzzle; The Case of a Former Soldier Raises More Questions About the Prison's Future*, L.A. TIMES, Nov. 3, 2010, at A9.

²³⁷ Remarks of the President, *supra* note 231.

²³⁸ Editorial, *KSM Hits Manhattan—Again*, WALL ST. J., Nov. 14, 2009, at A14.

said the “trial will be a security nightmare and a terror threat to New York—what better propaganda-by-deed than blowing up the entire courtroom, making [Khalid Sheik Mohammed] a martyr and making the judge, jury and spectators into fresh victims?”²³⁹ Republican Representative Peter King of New York attacked the decision as “not only misguided but extremely dangerous,”²⁴⁰ and Representative Lamar Smith of Texas, the highest ranking Republican on the House Judiciary Committee, accused the administration of placing “the rights of terrorists over the rights of Americans to be safe and secure.”²⁴¹

Human Events thought an attack on the trial itself was unlikely. “Smart terrorists—and it is critically important that we realize the degree of sophistication and cunning many of these men possess—are not going to attack the trial or prison in order to break the defendants out.” Instead, they will target

schools, hospitals, and churches that they will take down and hold hostage for release of their compatriots. . . . If you live in a town where school children are held hostage, raped and murdered, perhaps in Westchester County, New Jersey, or Long Island, or another more remote location, ask yourself, are you . . . personally willing to accept the risk?²⁴²

Many commentators also dwelt on the prospect that “one or more of these detainees could be acquitted, which would be a mockery of justice.”²⁴³ “The possibility that Khalid Sheik Mohammed and his co-conspirators could be found ‘not guilty’ due to some legal technicality just blocks from Ground Zero should give every American pause,” House Republican leader John Boehner said.²⁴⁴

Responding to this criticism, Holder adopted the unfortunate position of all but guaranteeing that the prisoners prosecuted in federal court would be duly convicted. “I would not have authorized the prosecution of these cases,” he said, “unless I was confident that our outcome would be a successful one.”²⁴⁵ Whatever else the rule of law might imply, it certainly means the state ought not to be able to guarantee a particular outcome in advance. Observers quickly seized on his language. Charles Krauthammer,

²³⁹ Charles Krauthammer, *New York Travesty*, CHI. TRIB., Nov. 23, 2009, at C14.

²⁴⁰ *GOP Blasts Terrorism Trial Decision*, UNITED PRESS INT’L (Nov. 13, 2009), http://www.upi.com/Top_News/US/2009/11/13/GOP-blasts-terrorism-trial-decision/UPI-93971258171262/.

²⁴¹ *Id.*

²⁴² Gordon Cucullu, *Terrorists on Trial in NYC Is an Unacceptable Risk*, HUMAN EVENTS ONLINE (Nov. 15, 2009), <http://www.humanevents.com/article.php?id=34439>.

²⁴³ Editorial, *KSM Hits Manhattan—Again*, *supra* note 238.

²⁴⁴ *GOP Blasts Trial Decision*, *supra* note 240.

²⁴⁵ Attorney General Eric Holder, Press Briefing on Trials for Terror Detainees (MSNBC television broadcast Nov. 13, 2009).

for instance, mused, “Doesn’t the presumption of innocence, er, presume that prosecutorial failure—acquittal, hung jury—is an option? By undermining that presumption, Holder is undermining the fairness of the trial, the demonstration of which is the alleged rationale for putting on this show in the first place.”²⁴⁶ This criticism was misdirected; every trial lawyer makes assessments about the probable outcome of an upcoming trial, and prosecutors often assess their likelihood of success as quite high. What is significant in Holder’s remark was not that he predicted success, but that all participants in the conversation shared the view that an acquittal would have completely de-legitimized the process. The entire debate, in other words, assumed an unwillingness to countenance the risk of an adverse outcome. No result could satisfy the punitive turn in American life unless the risk to society was zero.²⁴⁷

All of this heated rhetoric about risk converged in the furor surrounding the outcome of the Ahmed Ghailani trial. A federal grand jury in the Southern District of New York had indicted Ghailani for his alleged role in the 1998 al Qaeda bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania.²⁴⁸ The simultaneous explosions killed nearly three hundred people, including more than two hundred innocent civilians.²⁴⁹ After five days of deliberations, the jury acquitted Ghailani of all counts but one, convicting him of a single count of conspiracy to destroy government buildings and property.²⁵⁰

Four of Ghailani’s co-conspirators had been captured shortly after the bombing. They had been brought to New York by the FBI, where they were prosecuted in the Southern District, convicted, and sentenced to life in prison.²⁵¹ Ghailani, by contrast, was arrested July 24, 2004 in Pakistan.²⁵² Rather than bring him to the United States to face prosecution, he was

²⁴⁶ Krauthammer, *supra* note 239; see also Robert Stein, *The Trouble with the 9/11 Trial*, MODERATE VOICE (Nov. 14, 2009), <http://themoderatevoice.com/53040/the-trouble-with-the-911-trial/>.

²⁴⁷ In response to this criticism, the Obama Administration later reversed itself. On Attorney General Holder announced that the 9/11 defendants would be tried before military commissions held at Guantanamo. See Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 4, 2011, at A1.

²⁴⁸ United States v. bin Laden, S(9) 98 Cr. 1023 (LBS) (S.D.N.Y. 1998), available at <http://news.findlaw.com/hdocs/docs/binladen/usbinladen1.pdf>.

²⁴⁹ Benjamin Weiser, *Detainee Acquitted on Most Counts in ‘98 Bombings*, N.Y. TIMES, Nov. 17, 2010, at A1.

²⁵⁰ Ghailani was acquitted of four other counts of conspiracy, including conspiring to kill Americans and to use weapons of mass destruction. *Id.*

²⁵¹ *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 101–02 (2d Cir. 2008) (affirming the life sentences imposed upon three of the four defendants and noting that the fourth withdrew his appeal before it reached the Second Circuit).

²⁵² United States v. Ghailani, 686 F. Supp. 2d 279, 284 (S.D.N.Y. 2009).

detained and interrogated by the CIA at undisclosed “black sites” as part of the Bush Administration’s “enhanced interrogation program.” In September 2006, the CIA relinquished custody of him and thirteen other so-called high value detainees to the Department of Defense, which held them at Guantanamo.²⁵³ Ghailani was the first (and so far, the only) CIA and Guantanamo detainee to be tried in civilian court.²⁵⁴ Further complicating the issue was Judge Lewis Kaplan’s pretrial ruling that an important prosecution witness could not testify because the Government had learned the man’s identity through Ghailani’s conceded involuntary statements made during admittedly abusive interrogations.²⁵⁵

The Ghailani verdict was immediately denounced in terms that resonate perfectly with the punitive turn. Conservatives attacked the Obama Administration for its reckless decision to expose the country to the risk of an adverse outcome. Republican Senator Mitch McConnell said he, “like most Americans, wondered why we would even take the chance” of trying Ghailani in a civilian court.²⁵⁶ Liz Cheney, the daughter of the former Vice President and member of the advocacy group, KEEP AMERICA SAFE, considered it inexcusable to be “roll[ing] the dice in a time of war.”²⁵⁷ And Jennifer Rubin, writing in *Commentary Magazine*, called the entire trial “part of a stunt by the Obama administration.”²⁵⁸ Other commentators focused on the failure of the verdict to send an unambiguous signal of the community’s outrage, as though only a verdict in favor of the government on every count could possibly satisfy the blood-lust of the American people. Peter King, for instance, the incoming

²⁵³ See *id.* One of the so-called high value detainees transferred to Department of Defense custody with Ghailani was Abu Zubaydah. As I mentioned, and in the interest of full disclosure, I represent Zubaydah. See *supra* note *.

²⁵⁴ Warren Richey, *Ghailani Verdict Could Signal an End to Civilian Terror Trials*, CHRISTIAN SCI. MONITOR (Nov. 17, 2010), <http://www.csmonitor.com/USA/Justice/2010/1117/Ghailani-verdict-could-signal-an-end-to-civilian-terror-trials>.

²⁵⁵ United States v. Ghailani, No. S10 98 Crim. 1023(LAK), 2010 WL 4006381, at *1 (Oct. 6, 2010). As Judge Kaplan’s order notes, the Government asked that the court “assume for purposes of deciding the motion that everything Ghailani said from the minute he arrive[d] in CIA custody till the minute he [got] to Guantanamo at least is coerced[.]” *Id.* at *1 n.1; see also Daphne Eviatar, *Liz Cheney & Co. Have Little Faith in U.S. Law*, HUFFINGTON POST (Oct. 8, 2010), http://www.huffingtonpost.com/daphne-eviatar/critics-of-ghailani-rulin_b_755611.html.

²⁵⁶ Senator Mitch McConnell, Statement Before the U.S. Senate (Nov. 18, 2010) (transcript available at http://mccconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=d0dda13f-9e94-485e-8c3d-78c213bbfb8d).

²⁵⁷ Liz Cheney, *Statement on Ghailani Verdict*, KEEP AMERICA SAFE, http://www.keepamericasafe.com/?page_id=6398 (last visited Nov. 30, 2010).

²⁵⁸ Jennifer Rubin, *The Ghailani Debacle*, COMMENTARY MAG. (Nov. 17, 2010), <http://www.commentarymagazine.com/blogs/index.php/rubin/381533>.

Chairman of the House Homeland Security Subcommittee, called the verdict, for which Ghailani will be sentenced to a minimum of twenty years and a maximum of life imprisonment, “a total miscarriage of justice.”²⁵⁹ Cheney said it sent a dangerous signal of “weakness in a time of war.”²⁶⁰

To be sure, some writers quite properly pointed out that the function of a trial is “to guarantee fairness, not convictions.”²⁶¹ Writing in the *New Yorker*, for instance, Amy Davidson said, “[o]ur legal system is not a machine for producing the maximum number of convictions, regardless of the law.”²⁶² Others ventured that we had only ourselves to blame for the Ghailani verdict. Focusing on the impact of Judge Kaplan’s pretrial ruling, the Center for Constitutional Rights said, “If anyone is unsatisfied with Ghailani’s acquittal on 284 counts, they should blame the CIA agents who tortured him.”²⁶³ And some criticized the previous administration for mishandling the case at an earlier stage.²⁶⁴ But these voices were largely drowned out by a chorus of condemnation, an angry indignation that Obama had “rolled the dice,”²⁶⁵ and that Ghailani would not get his just desserts.

More importantly, however, is the outcome that dared not speak its name: that Ghailani could have been given a fair trial, and if acquitted, released and repatriated. The very prospect left conservatives quaking with rage and liberals shaking in fear. Even Judge Kaplan, in his order granting the defense motion in limine to prevent the testimony of the key prosecution witness, reassured himself and the public that, if Ghailani were

²⁵⁹ John McCormack, *Peter King Rips Obama on Ghailani Verdict*, WKLY. STANDARD (Nov. 17, 2010), http://www.weeklystandard.com/blogs/peter-king-rips-obama-ghailani-verdict_518137.html.

²⁶⁰ Cheney, *supra* note 257. In general, conservatives struck a tone of angry disappointment. See generally Michael Gerson, *Holder’s Gitmo Mess*, WASH. POST, Nov. 19, 2010, at A23; Ed Morrissey, *Time for Holder to Go*, HOTAIR (Nov. 18, 2010), <http://hotair.com/archives/2010/11/18/time-for-holder-to-go/>; Charlie Savage, *Terror Verdict Tests Obama’s Strategy on Trials*, N.Y. TIMES (Nov. 19, 2010), http://www.nytimes.com/2010/11/19/nyregion/19detainees.html?pagewanted=2&_r=1.

²⁶¹ David Cole, *A Fair Trial, Without Torture’s Taint*, N.Y. TIMES (Nov. 19, 2010), <http://www.nytimes.com/roomfordebate/2010/11/18/prosecuting-terrorists-in-federal-court/a-fair-trial-without-tortures-taint>.

²⁶² Amy Davidson, *The Ghailani Verdict*, NEW YORKER (Nov. 17, 2010), <http://www.newyorker.com/online/blogs/cloread/2010/11/the-ghailani-verdict.html>.

²⁶³ Center for Constitutional Rights, Center for Constitutional Rights Responds to Ghailani Verdict (Nov. 17, 2010), available at <http://ccrjustice.org/newsroom/press-releases/center-constitutional-rights-responds-ghailani-verdict>.

²⁶⁴ Scott Horton, *The Verdict on Ghailani*, HARPER’S MAG. (Nov. 18, 2010, 12:03 PM), <http://www.harpers.org/archive/2010/11/hbc-90007816>. Horton also pointed out that Ghailani may not have been subject to trial by military commission, since the Government’s allegations related to a 1998 bombing and predated the U.S. entry into the war. *Id.*

²⁶⁵ Cheney, *supra* note 257.

to be acquitted as a result of his ruling, he could still be held as an enemy combatant at Guantanamo.²⁶⁶ The prospect that the United States would have to endure the risk that even a single alleged terrorist would be released proved too much for American culture to contemplate.²⁶⁷

And in this climate, calls for preventive detention have predictably resurfaced. Why take any risk? Why expose the country's legal system to the calumny it endured after the Ghailani verdict? Why incur the cost and effort? Far better that Ghailani and others at Guantanamo simply be detained, without regard to what they may have done, or what the government can prove they have done, in the past. So argue Jack Goldsmith and Ben Wittes, longtime champions of preventive detention, who declare that in light of the verdict, preventive detention "now makes more sense than trial in any forum for a dwindling group of Guantanamo detainees whose prosecutions are more trouble and risk than they're worth."²⁶⁸

In this risk-averse spirit, Congress, in the waning days of 2010, effectively eliminated the President's ability to transfer Guantanamo prisoners to the custody of another country or bring them to the United States for any purpose, including prosecution.²⁶⁹ This legislation, which expires in a year, is awash in the rhetoric of the new penology, but is especially noteworthy for its novel insistence that the rest of the world assume the same posture. To begin with, Congress specified that no Department of Defense funds may be used to transfer any prisoner to another country unless the Secretary of Defense certifies to Congress that the receiving state "is not a designated state sponsor of terrorism or a

²⁶⁶ *United States v. Ghailani*, No. S10 98 Crim. 1023, 2010 WL 4006381, at *1 (S.D.N.Y. Oct. 6, 2010).

²⁶⁷ Concurring in a recent per curiam decision that denied habeas relief to a Guantanamo prisoner, Judge Lawrence Silberman of the D.C. Circuit elaborated on what he perceived as the difference between the run of the mine criminal case and a case involving a Guantanamo detainee:

In the typical criminal case, a good judge will vote to overturn a conviction if the prosecutor lacked sufficient evidence, even when the judge is virtually certain that the defendant committed the crime. That can mean that a thoroughly bad person is released onto our streets, but I need not explain why our criminal justice system treats that risk as one we all believe, or should believe, is justified. When we are dealing with detainees, candor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an order releasing a detainee who is likely to return to terrorism.

Esmail v. Obama, No. 10-5282, 2011 WL 1327701, at *3 (D.C. Cir. Apr. 8, 2011) (Silberman, J., concurring).

²⁶⁸ Benjamin Wittes & Jack Goldsmith, *Skip the Trials for Terrorists*, WASH. POST, Nov. 19, 2010, at A21.

²⁶⁹ National Defense Authorization Act, H.R. 6523, 111th Cong. (2010), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr6523eh/pdf/BILLS-111hr6523eh.pdf>.

designated foreign terrorist organization,” maintains “effective control” over any facility in which the prisoner might be detained, and is not “facing a threat that is likely to substantially affect its ability to exercise control over the individual.”²⁷⁰

But these conditions, all of which bear on whether the receiving state can securely imprison the monsters at Guantanamo, do not exhaust the requirements imposed by Congress. Before a transfer may take place, the receiving state must agree “to take effective steps to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future,” must show that it has *already* taken steps “to ensure that the individual cannot engage or re-engage in any terrorist activity,” and must agree “to share *any* information with the United States that (A) is related to the individual or any associates of the individual; and (B) could affect the security of the United States, its citizens, or its allies.”²⁷¹ And even if all these conditions have been met, no transfer is allowed if any prisoner who was previously transferred to the receiving state “subsequently engaged in any terrorist activity.”²⁷² In short, the receiving state must guarantee, in advance, that the person to be transferred will never pose *any risk* to “the security of the United States, its citizens, or its allies.”²⁷³ No such guarantee is possible, of course, unless the person remains at Guantanamo—which is precisely the purpose of the legislation. And even if the guarantee is made, it counts for naught if *any* prisoner previously released to the state engaged in *any* “terrorist activity.”²⁷⁴

Congress apparently assumes no other country can be sufficiently punitive to satisfy the security interests of the United States. As dangerous as this assumption may be, it is even more astounding that Congress should make the same assumption about security conditions within the United States. And yet it apparently did. In the same legislation, Congress prohibited the use of Defense Department funds to bring a prisoner at Guantanamo to the United States for any reason, including prosecution.²⁷⁵ Congress also barred the use of funds to modify any mainland site for Guantanamo prisoners, which nixes the Obama Administration’s plan to reconfigure the unused prison at Thomson, Illinois.²⁷⁶ In addition, Congress demanded that the Secretary of Defense, by April 1, 2011, report to Congress “on the merits, costs, and risks of using any proposed facility in

²⁷⁰ *Id.* at 530.

²⁷¹ *Id.* (emphasis added).

²⁷² *Id.* at 531.

²⁷³ *Id.* at 530.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 531.

²⁷⁶ *Id.* at 532.

the United States, its territories, or possessions” to house Guantanamo prisoners.²⁷⁷ The report must include, *inter alia*, a “discussion of any potential risks to any community in the vicinity of any such proposed facility, the measures that could be taken to mitigate such risks, and the likely cost to the Department of Defense of implementing such measures,” as well as “modifications” that may be necessary “to ensure that any detainee transferred from Guantanamo Bay to such facility could not come into contact with any other individual, including any other person detained at such facility, that is not approved for such contact by the Department of Defense.”²⁷⁸

Shortly after the legislation passed, the media reported that President Obama was considering a new executive order that would create a periodic review process for the four-dozen Guantanamo prisoners who cannot be tried but who are thought by the Administration to be too dangerous to release.²⁷⁹ It was not clear from these reports, however, whether the President would claim the power to hold people based solely on predictions of future dangerousness—that is, whether he would create a preventive detention regime as I have described it—or whether detentions at Guantanamo would continue to be based on proof of past wrongdoing. In response to these reports, the *Washington Post* assumed he intended a preventive detention regime, cheered that it was a step in the right direction, but asked “[w]hat about the next 48?”²⁸⁰ Pointing out that the United States now seems to be operating against the Taliban and al Qaeda in Waziristan, an area outside any recognized war zone, the *Post* wondered what would happen in the “likely” event that the government captures new suspects who cannot be tried “because of a lack of admissible evidence Would the administration simply let the captives go, even though intelligence reports indicate that they pose a threat?”²⁸¹ The prospect was literally inconceivable to the *Post*, which favors a statute that would allow such suspects to be detained indefinitely based on nothing more than the “threat” of future harm.²⁸² It bears noting that under the current state of the law,

²⁷⁷ *Id.* at 533.

²⁷⁸ *Id.* at 534.

²⁷⁹ See, e.g., Peter Finn & Anne E. Kornblut, *White House May Challenge Bill's Guantanamo Provisions*, WASH. POST, Jan. 4, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/03/AR2011010305636.html> (“The administration is also planning to issue an executive order that would formalize indefinite detention without trial for some detainees at the U.S. military prison, but allow those detainees and their lawyers to continue to challenge the basis for continued incarceration on a regular basis.”).

²⁸⁰ Editorial, *The New Detainee Dilemma*, WASH. POST, Dec. 26, 2010, at A26.

²⁸¹ *Id.*

²⁸² The *Post* editorial was particularly muddled. For one thing, it wrongly asserted that the new legislation would bar the Administration from prosecuting newly arrested suspects

such a suspect would not have a right to challenge his detention in habeas unless he were a United States citizen or, if a foreign national, he were brought to the United States or Guantanamo.²⁸³

On March 7, 2011, President Obama issued his much-anticipated executive order.²⁸⁴ Dodging a bullet, this order *did not* establish a preventive detention regime as I have used the term. Instead, it directed the creation of a regular review process for those prisoners who the Administration believes may be subject to indefinite detention, including those who cannot be prosecuted. Those prisoners, however, may still seek a writ of habeas corpus to challenge the lawfulness of their detention.²⁸⁵ Such a challenge obligates the government to establish the legal and factual basis for continued detention, which requires proof about the past rather than predictions about the future. And notably, nothing in the order empowers the United States to detain people who have prevailed in habeas. The Order, therefore, does not alter or enlarge the existing bases upon which the United States may detain prisoners. That is, it did not purport to allow detention based solely on predictions of future dangerousness.

VI. CONCLUSION

And so captures the current state of play. Otherwise responsible observers call for a statute that would allow the United States to detain suspects captured anywhere in the world, for as long as the “War on Terror” may last, without regard to what they may have done in the past, and based on no other proof than classified “intelligence reports” that they “pose a

in federal court. *Id.* In fact, however, the legislation only applies to prisoners at Guantanamo; nothing in the law would prevent the Administration from bringing a newly arrested suspect to the United States for trial. At least, not yet. In addition, and more importantly, the *Post* argued that preventive detention would be acceptable if it were authorized by statute but that in the absence of a statute it would violate the rule of law. *Id.* To the *Post*, in other words, the rule of law is whatever Congress says it is. This is a singularly mechanical view and would no doubt come as a surprise to students of history who had always imagined that, for instance, the Alien and Sedition Acts from the close of the eighteenth century, the Espionage and Sedition Acts enacted during the First World War, and the law which criminalized resistance to the internment of the Japanese during the Second World War had been noteworthy derogations from the rule of law.

²⁸³ Compare *Munaf v. Geren*, 553 U.S. 674, 679 (2008) (finding that U.S. citizens detained by the United States may invoke the habeas statute to challenge their detention, regardless of where they are held), with *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010) (holding that federal courts have no jurisdiction to entertain a challenge to detention of a foreign national held by the United States at Bagram Air Base in Afghanistan).

²⁸⁴ Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2007) (Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for the Use of Military Force).

²⁸⁵ *Id.* § 1(a)–(b).

threat.” By merging the overheated rhetoric of “war” with the new penology’s understanding of deviance and risk, American society has set itself on a quest for the Holy Grail—a risk management solution to terror, a solution which demands nothing of us and imposes all burdens on them. And this, we suppose, will help us win the war.

