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*The Preventive State, Terrorists and Sexual Predators:
Countering the Threat of a New Outsider Jurisprudence*

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Eric S. Janus
Professor of Law

William Mitchell College of Law
875 Summit Avenue
St. Paul, Minnesota 55105-3076

www.wmitchell.edu
Direct: (651) 290-6345
E-mail: ejanus@wmitchell.edu

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**The Preventive State, Terrorists and Sexual Predators:
Countering the Threat of a New Outsider Jurisprudence**

Eric S. Janus*

Introduction

In this Article, I argue that two powerful streams of contemporary American public policy are converging on a single idea. Using a phrase coined by Professor Carol Steiker, we are at risk of becoming a “preventive state,” in which the paradigm of governmental social control has shifted from solving and punishing crimes that have been committed, to identifying “dangerous” people and depriving them of their liberty *before* they can do harm.¹

The impulse for prevention has taken its strongest form in two disparate areas: the anti-terrorism efforts since 9/11, and ongoing legislative innovations in the campaign against sexual violence. In both areas, the government has erected what Professor Oren Gross has called an “alternate system of justice”² in which the normal protections of our civil liberties are substantially degraded in order to make room for an aggressive preventive agenda.

The prevention of harm is, of course, a positive. Our law books are full of statutes intended to regulate risky behavior in order to prevent harm. Here, however, I am concerned

* Vice Dean for Academic Affairs and Professor of Law, William Mitchell College of Law. Many thanks to my wife, Carolyn Chalmers, for her support and guidance, to my colleague Professor Wayne Logan for his expert editorial contribution, to my research assistants Travis Thompson, for his tireless technical help with the manuscript, and Terri Port Wright, for her helpful comments.

¹ Carol Steiker, Foreword: The Limits of the Preventive State, 88 J. Crim. L. & Criminology 771, 774 (1998).

² Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 Yale L.J. 1011, 1018 (2003).

with a different type of prevention – what might be called radical prevention – that differs from routine prevention in two ways. First, radical prevention seeks to intervene where there is some sort of “propensity” or risk of *future* harm, whereas routine prevention responds to actual or attempted harm. Second, radical prevention operates by substantially curtailing people’s liberty *before* harm results, whereas in routine prevention individuals suffer deprivations of liberty only after actual harm is done or attempted.

The government’s efforts at radical prevention have, in the last half century, met with diminishing success, as the courts have erected some important constitutional bulwarks against excessive erosions of our liberty in the name of prevention. Historically, a central feature of our radically preventive laws has been their focus on “outsider” groups. This has allowed their attendant constraints on liberty to be viewed as exceptional, thus preserving the legitimacy of the “normal” constitutional order.³ But the civil rights revolution of the past all but eliminated the legitimate targeting of outsider groups. At the same time, the Supreme Court has recognized the fundamental nature of key aspects of liberty, and insisted that criminal sanctions be limited in a variety of ways, including that they be applied only to behavior that has a relatively close connection to harm. These developments have helped to keep radical prevention in check, even in the face of the terrorist threat.

The central thesis of this Article is that the sexual predator laws provide a model for undercutting these constitutional protections for liberty. The laws undercut these key bulwarks, and allow the establishment of an expansive alternate and degraded system of justice, in which radical prevention prevails at the expense of liberty. Sexual predator laws do this by re-introducing and re-legitimizing the concept of the degraded “other.” Membership in this outsider

³ Gross, *supra* note 2, at 1038.

group is then used to rationalize a degraded system of justice, in which the normal protections of the Constitution do not apply.

The Article proceeds as follows. First, I summarize the push for radical prevention that has followed the 9/11 terrorist attacks, noting that many of the proposals have been controversial because they are seen as curtailing civil liberties too broadly. Second, I sketch the push for prevention in the sexual predator legislation and note the nearly unanimous political support for these initiatives. Third, I survey the history of preventive legislation in the U.S. I suggest that prevention is not a new impulse in the law. To the contrary, it has been widespread, yet has been tempered by the application of constitutional principles that have curtailed the most radical forms of prevention. I then briefly examine the recent legislative initiative to update public health laws in response to the threat of bio-terrorism, which despite the understandable fear of communicable contagion, has been constrained by constitutional principles. Finally, I show that the sexual predator legislation affords a template for radical prevention that undercuts these limiting principles, thus containing the toxic seeds of a degraded system of justice that strongly weights prevention over liberty.

I. The Push for Radical Prevention to Combat Terrorism

Since the terrorist attacks of September 11, 2001, the federal government has adopted an aggressive policy of prevention in dealing with terrorism. The overall theme of the response is clearly articulated in President Bush's doctrine of pre-emption. As his National Security Advisor Condoleezza Rice put it, we have the right to attack and make war before the "smoking gun

becomes a mushroom cloud.”⁴ Or, to quote the President himself, we need to destroy the threat to our nation “before it fully materializes.”⁵

The theme of pre-emption carries, in turn, from international relations to the prevention of individual acts of terrorism. Professor Robert Chesney identifies a “sharp change” following 9/11 in the government’s adoption of a “prevention paradigm” in its criminal justice efforts to combat terrorism: “[T]he overriding priority of the Department [of Justice] since 9/11 is to prevent attacks before they occur using all available tools.”⁶ This has produced “significant internal incentive [for prosecutors] to expand their capacity for prevention.”⁷

The major legislative response to the 9/11 attacks was the USA PATRIOT Act, passed in 2001. The Act incorporates the notion of prevention in numerous provisions. It pushes the line for criminal prosecution far from actual harm, allowing the surveillance and criminalization of otherwise legitimate acts of non-violent political dissent as potentially “dangerous” behavior.⁸ The law expands the government’s ability to intrude on the private lives of citizens, authorizing expansive interception of electronic communication and government access to library and book sale records.⁹

4 CNN.com/Inside Politics, Top Bush Officials Push Case Against Saddam (Sept. 8, 2002), available at <http://www.cnn.com/2002/ALLPOLITICS/09/08/iraq.debate/>.

5 CNN.com/Inside Politics, Bush Pledges to Make America Safer (July 20, 2004), available at <http://www.cnn.com/2004/ALLPOLITICS/07/20/bush.iowa/>.

6 Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 Harv. J. Legis. (forthcoming 2005), available at <http://ssrn.com/abstract=587442> (last visited Oct. 8, 2004).

7 Chesney, *supra* note 6.

8 Raneta Lawson Mack & Michael J. Kelly, *Equal Justice in the Balance* 141 (2004).

9 Lawson Mack & Kelly, *supra* note 8, at 131-32.

In its response to the terrorist attacks of 9/11, the government has confined hundreds of non-citizens, and even several citizens, as “enemy combatants,” a vaguely defined category that functions to remove almost all of the conventional protections of the criminal law.¹⁰ The stated purpose is not to punish for a crime, but to prevent future harm, and to gather intelligence.¹¹ Even beyond the PATRIOT Act, massive and intrusive surveillance schemes have been proposed, in which citizens are to watch each other,¹² and even appliance repair technicians and plumbers will be encouraged to watch for signs of terrorism (and sexual predation) in the homes they visit.¹³ The super-secrecy of such governmental endeavors, in turn, has prompted criticisms that First Amendment rights of free speech and access to information are being curtailed.¹⁴

Despite the powerful rhetoric emanating from the highest levels of government, and the searing sense of vulnerability induced by the terrorist attacks, the push for prevention has met with resistance. Although the PATRIOT Act was passed overwhelmingly, and without any significant debate, Congress imposed a sunset provision on its terms, in recognition that its extreme provisions would be appropriate (if at all) only in the extraordinary times of extreme

¹⁰ Lawson Mack & Kelly, *supra* note 8, at 3.

¹¹ Chesney, *supra* note 6.

¹² Lawson Mack & Kelly, *supra* note 8, at 3, 150.

¹³ St. Petersburg Times Online, Civil Rights Groups Warn Against Tipster Training, July 9, 2004, at http://www.sptimes.com/2004/07/09/news_pf/State/Civil_rights_groups_w.shtml.

¹⁴ See, e.g., Interview by Brook Gladstone with Lucy Dalglish, Executive Director, Reporter’s Committee, New York, New York (Sept. 24, 2004), available at http://www.wnyc.org/onthemedial/transcripts/transcripts_092404_homefront.html (last visited Oct. 8, 2004); Ann W. O’Neill, Watchdog Challenges Secrecy In U.S. Court; Miami Docketing System Keeps Sensitive Cases Out of Public Eye; Practice Violates Free Speech, Access Rights, Group Charges, Sun-Sentinel (Ft. Lauderdale, Fla.), Jan. 8, 2004, at 1A.

peril.¹⁵ Popular opposition to its liberty-curtailling provisions forced the Attorney General to campaign across the country for its renewal.¹⁶ More than 350 cities and four states have passed resolutions calling for reform of the Act,¹⁷ and federal courts have struck down parts of the Act's surveillance provisions as violative of the First and Fourth Amendments.¹⁸ The most extreme proposals for widespread surveillance have met with broad public rejection,¹⁹ and the Supreme Court itself has now condemned the view that the detention of "enemy combatants" is totally beyond the reach of the courts.²⁰

Perhaps the concern over these provisions arises from an abstract preference for liberty. More likely, though, it is that such intrusions implicate *our own liberty*. For the most part, these post-9/11 enactments have been laws of general applicability. With a few key exceptions, they do not *explicitly* target groups by race or ethnicity.²¹ Thus, as the public reads these laws (especially those relating to information gathering), at least some can see their own liberty at stake.

¹⁵ Lawson Mack & Kelly, *supra* note 8, at 118.

¹⁶ Lawson Mack & Kelly, *supra* note 8, at 152-53.

¹⁷ List of Communities That Have Passed Resolutions, American Civil Liberties Union, available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (last visited Oct. 8, 2004).

¹⁸ See, e.g., *Doe v. Ashcroft*, No. 04 Civ. 2614(VM), 2004 WL 2185571, at *1 (S.D.N.Y. 2004).

¹⁹ Lawson Mack & Kelly, *supra* note 8, at 3.

²⁰ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); see also *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (holding that non-citizens held at Guantanamo Bay can challenge their "enemy combatant" status in U.S. civilian courts).

²¹ Karen C Timlin, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 Cal. L. Rev. 1173, 1184 (2004); see also Lawson Mack & Kelly, *supra* note 8, at 73.

At the same time, the pressure to link terrorism with Muslims and Middle Eastern males is exceedingly strong. This is clearly reflected in the patterns of arrests and interrogations after 9/11.²² The tension between the ideal of no ethnic-profiling, and the seemingly intuitive stereotyping of the “other” produces an unstable equilibrium that is ripe for destabilization. As Minnesota’s Republican Governor Tim Pawlenty put it recently, “[e]levating political correctness over homeland security concerns is not a good plan.”²³ It is clear that the balance between liberty and security is close to equipoise – and the President’s call for pre-emption expresses the public’s powerful desire for security.²⁴

II. The Push for Radical Prevention to Combat Sexual Violence

Sexual predator laws evolved out of a felt need to address a basic problem: how are we to prevent criminal acts by dangerous individuals who “cannot be linked to plans to commit a particular harmful act,”²⁵ and thus cannot be criminally prosecuted. This is, of course, the same question that is being asked in the anti-terrorism context.

Sexual predator laws have adopted a new and legally aggressive approach to controlling the risk of sexual violence. Arising out of a combination of social forces, the laws reflect both a new consciousness about the seriousness of sexual violence, and a public frustration with the limited effectiveness of conventional approaches. Sexual predator laws take two forms.

22 See Timlin, *supra* note 21.

23 Rochelle Olson et al., *Pawlenty Wants Easier Access To Immigrant Data*, *Star Tribune* (Minneapolis), Sept. 1, 2004, at A1.

24 National Public Radio, *NPR News Special Report: The NPR/Kaiser/Kennedy School Poll on Civil Liberties* (Nov. 30, 2001), available at www.npr.org/news/special/civillibertiespoll/011130.poll.html.

25 Chesney, *supra* note 6.

Commitment laws are aimed at sex offenders who are completing their prison sentences, but are judged “too dangerous” to be released.²⁶ The laws are limited to offenders who not only pose a risk of future sexual harm, but also have some form of “mental disorder.” Like conventional mental illness commitment laws, the predator laws are deemed civil not criminal in nature.²⁷ Confinement is not in prisons, but in secure treatment facilities. Commitments are for an indeterminate period, ending only when the individual is no longer dangerous. In practice, however, committed sex offenders are very rarely discharged from these treatment facilities.²⁸ The primary, articulated purpose for these laws is incapacitation--prevention of future sexual violence by means of direct physical constraint. Treatment is identified as an additional purpose.²⁹

The second type of sexual predator law is commonly referred to as Megan’s Law. Although varying from state to state, these laws require released sex offenders to register with local authorities, and adopt some form of community notification regarding the presence, and sometimes the level of risk, of offenders in the community.³⁰

26 Eric S. Janus & Nancy Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 *Behav. Sci. & L.* 343 (2000). A “first generation” of sex offender commitment laws flourished beginning the late 1930’s after Minnesota’s “sex psychopath” law was upheld in *State of Minnesota ex. rel. Pearson v. Probate Court*, 287 N.W. 297 (Minn. 1939), *aff’d*, 309 U.S. 270 (1940).

27 See *Kansas v. Hendricks*, 521 U.S. 346 (1997).

28 See Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 *Conn. L. Rev.* 319, 323 n.23 (2003) (noting very low rates of release for committed sexual predators).

29 *Kansas v. Hendricks*, 512 U.S. 346, 367 (1997).

30 See Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, in *Sexually Coercive Behavior: Understanding and Management* 337, 338 (Robert A. Prentky et al. eds., 2003).

Both types of predator laws utilize systemic surveillance of sex offenders. With Megan’s laws, surveillance is achieved by means of the registration requirement (which can persist for many years), and the combined efforts of police and the registrant’s fellow citizens who monitor the presence of the registrant.³¹ Commitment laws achieve surveillance more directly—by physical restraint in a state-run institution.³² Both, also, employ, in a systematic manner, empirically-derived actuarial instruments to estimate the “risk” that a particular sex offender will commit another sex offense in the community.³³

Together, the sexual predator laws create an alternate and degraded system of justice for dangerous sex offenders – a system which has proven safe from constitutional attack.³⁴ The laws use preventive measures to single out individuals thought to have a propensity for sexual violence. With commitment, individuals are confined--often for many years--not for punishment of past crimes (for which they have served their sentences), but to prevent predicted future crimes. With Megan’s Laws, the privacy and freedom of movement of sex offenders is curtailed through extended registration and community notification requirements.

³¹ Smith v. Doe, 538 U.S. 84 (2003) (addressing Alaska’s law).

³² See Janus & Logan, *supra* note 28, at 320-27 (discussing sexual predator commitment regimes).

³³ Eric S. Janus & Robert A. Prentky, The Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 Am. Crim. L. Rev. 1443, 1457-58 (2003) (describing use of risk assessment in commitment regimes); Wayne A. Logan, A Study in “Actuarial Justice”: Sex Offender Classification Practice and Procedure, 3 Buff. Crim. L. Rev. 93, 602-19 (2000) (describing use of risk assessment in registration and notification classification decisions).

³⁴ See Smith v. Doe, 538 U.S. 84 (2003) (rejecting constitutional challenges against registration and notification); Kansas v. Hendricks, 521 U.S. 346 (1997) (rejecting constitutional challenges against commitment).

Unsurprisingly, however, there has been little mainstream concern about these incursions on civil liberties. On the contrary, the political momentum is to applaud these laws and expand their use.³⁵

III. A Brief History of Prevention in American Law: Balancing Liberty and Security

Over the past century, our legal system has struggled to balance liberty and security. As we look at the development of “preventive” legislation in the United States over the past century, we observe a progressive narrowing of the means by which legislatures can impose radical restraints on liberty in a preventive posture. This has been done this in three ways. First, most importantly, the idea that our laws may pick out a disfavored group of “others” for specially disfavored treatment in the law has been all but eliminated.³⁶ Second, the Supreme Court has developed a hierarchy of liberty, so that some forms of our liberty – those that are “fundamental” – are more carefully protected than others.³⁷ Third, a strict set of rules for our criminal justice system has been articulated, imposing careful constraints on the government’s power to enforce criminal laws that take away privacy and liberty.³⁸

These limits, however, have been hard won. Historically, many forms of legislation sought to identify “dangerous” people and restrain their liberty before they could do harm.³⁹ In American legal history, the most egregious and prominent form of preventive legislation

³⁵ Eric S. Janus, *Closing Pandora’s Box: Sexual Predators and the Politics of Sexual Violence*, 34 *Seton Hall L. Rev.* ___ (forthcoming 2004) (manuscript on file with author).

³⁶ See *infra* at notes 40-60.

³⁷ See generally Erwin Chemerinsky, *Constitutional Law* ch. 10 (2d ed., 2002).

³⁸ Lawson Mack & Kelly, *supra* note 8, at 123.

³⁹ Barbara Hudson, *Justice in the Risk Society* 35 (2003).

historically has been racially discriminatory laws. These laws created a degraded justice system in which the outsider group's rights were reduced in order to prevent some (imagined) future harm to the larger society. In *Dred Scott v. Sandford*,⁴⁰ the Supreme Court made explicit the structure of this sort of "outsider" legislation. Justice Taney observed that racial classifications in America reflected the degraded status of slaves "as a subordinate and inferior class of beings," who, as a consequence of that degraded status, "had no rights or privileges but such as those who held the power and the Government might choose to grant them."⁴¹

While the use of race as a marker of subordinated "otherness" was explicit in *Dred Scott*, its use in the law became problematic after the ratification of the Fourteenth Amendment's Equal Protection Clause in 1868. But the practice continued explicitly for decades, under the transparently false premise (put forth in *Plessy v. Ferguson*⁴²) that race-based discrimination was not hierarchical – i.e., that these race-based classifications did not subordinate blacks as the "other"; rather, they were "separate" yet "equal."

The preventive nature of race-based laws was vividly evidenced in the Japanese Internment Cases during World War II. The cases involved a series of wartime orders directing individuals of Japanese descent, citizens and non-citizens alike, to vacate their homes in western states and remove themselves to concentration camps California, Oregon, Arizona and eleven other states. The Supreme Court upheld the laws, in cases that have never been overruled.⁴³

40 60 U.S. (19 How.) 393 (1856).

41 *Dred Scott*, 60 U.S. at 404-05.

42 163 U.S. 537 (1889).

43 It bears mention, however, that Congress' authorization of compensation for internment victims supports the view that these cases and the principles they applied are now generally rejected.

In *Korematsu v. United States*, the Court seemed to acknowledge that wholesale restrictions on the liberty of citizens are generally not allowed, absent constitutionally based procedural protections. According to the Court, “[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions.”⁴⁴ In dissent, Justice Murphy referred to the “constitutional rights [of citizens] to live and work where they will, to establish a home where they choose and to move about freely.”⁴⁵ The fundamental nature of this aspect of liberty is a key point. It is a truism that liberty is not absolute, and is potentially subject to government regulation for the common good. But these passages, as well as the overall tenor of the Court’s decision, suggest that the liberty to live, work, and move about freely is a fundamental liberty, subject to curtailment only in the “direst emergency and peril.”⁴⁶

Sensitive, by 1944, to the use of race as a category in law, the majority in *Korematsu* was at pains to insist that “racism” or “racial antagonism” was not – and could not constitutionally be – a permissible ground for such a curtailment of liberty. But the Court’s statements and the logic of the decision belie a reasoning that was group-based:

Exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members *of the group*, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the *whole group*.⁴⁷

44 *Korematsu*, 323 U.S. at 219-20.

45 *Korematsu*, 323 U.S. at 235.

46 *Korematsu*, 323 U.S. at 220.

47 *Korematsu*, 323 U.S. at 218-19 (emphasis added).

To the Court, it was clear with no need for discussion that the relevant characteristic for defining the “group” was race. It was reasonable, in the Court’s view, to ascribe some risk to the individual members of the group because of the (assumed) aggregate risk posed by the entire group. To the Court, individual Japanese citizens shared, simply by dint of their race, the essential qualities of the group so that this ascription of risk was appropriate.

Of course, the other key factor about *Korematsu* was that it took place during wartime, a circumstance that in itself might be thought to provide the “dire emergency” the Court said was needed to justify mass internment. To this, the Court added that there was no time to determine on an individual basis who was loyal and who was disloyal. But these emergency circumstances simply provided the context that the Court thought justified its use of a racial category for the ascription of risk. If the dire circumstances made the restriction of liberty necessary, it was the targeting of a racial group that made the restriction possible by showing how the restriction would be “safely” confined.

Buck v. Bell,⁴⁸ decided less than twenty years earlier, grew out of the eugenics movement, which combined the new science of genetics with emerging theories of criminology and notions of Darwinism to assert that the human race could--and should-- control or at least improve its future through control of human breeding.

When these sterilization laws were written, many subscribed to a simplistic version of genetics called eugenics and hoped to improve American society by encouraging the “healthy” to reproduce while simultaneously preventing those with “deleterious inherited traits” from doing so. Under this rubric, mental retardation, insanity and even criminal behavior were considered hereditary and the “carriers” of these traits a danger to future generations.⁴⁹

48 274 U.S. 200 (1927).

49 Howard Markel, *The Ghost of Medical Atrocities: What's Next, After the Unveiling?* N.Y. Times, Dec. 23, 2003, at F6.

Thirty-three states passed eugenics laws, and some 60,000 people were sterilized under these laws.⁵⁰

The preventive, eugenics-based rationale was unabashedly manifest in *Buck*. Writing for the majority, Justice Holmes famously posited that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”⁵¹ Further, as this passage suggests, *Buck*’s reasoning is very much based on the outsider status of the target group: these people constitute a “kind” of people who are “mental defectives,” “degenerate” and criminal and imbecilic, and “sap the strength of the State.” As one commentator put it: “Sadly, those targeted for reproductive quarantine were already defined as outcasts by a white majority: the mentally ill or retarded, “sexual deviants,” the impoverished, African-Americans and immigrants.”⁵²

The *Buck* Court relied on a staple in the jurisprudence of prevention, its 1905 decision in *Jacobson v. Massachusetts*,⁵³ asserting that “[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”⁵⁴ But the line that rings so clearly in our ears from *Buck* is Justice Holmes’s definitive statement: “Three generations of imbeciles are enough.”⁵⁵ The State’s power to curtail liberty in a radical way, in short, was limited in this case

50 Markel, *supra* note 49.

51 *Buck*, 274 U.S. at 207.

52 Markel, *supra* note 49.

53 197 U.S. 11 (1905).

54 *Buck*, 274 U.S. at 207.

55 *Buck*, 274 U.S. at 207.

to those who fell outside the civic polity by reason of their degeneracy, dependency and incompetence.

Buck and its approval of involuntary sterilization on a theory of eugenics have now been discredited, though *Buck*, like *Korematsu*, has never been formally overruled by the Court. But as with *Korematsu*, the “court of popular opinion” has rejected *Buck* and what it stands for. The Supreme Court has firmly established that reproductive rights are fundamental.⁵⁶ No court now would suggest that these rights could be in any sense diminished simply by reason of a person’s mental incapacity, or other outsider status.

Korematsu and *Buck* highlight the distance that that our society, and the courts, have come in eliminating the last of the outsider classifications traditionally used to justify diminished civic personhood. Developments in the law beginning in the 1970s make clear that gender can not, in most circumstances, justify diminished rights.⁵⁷ The passage of the Americans with Disabilities Act in 1990, suggests that disability status, long a marker of diminished rights, also is removed from the list.⁵⁸ In two recent cases, the Supreme Court struck down laws that curtailed the rights of homosexuals. In *Romer v. Evans*,⁵⁹ the Court struck down a Colorado constitutional amendment that essentially limited the ability of gays to participate in the political process. And in *Lawrence v. Texas*,⁶⁰ the Court struck down a criminal law punishing

⁵⁶ See, e.g., *Griswold v. Connecticut*, 381 U.S. 471 (1965).

⁵⁷ *United States v. Virginia*, 518 U.S. 515 (1996) (requiring “exceedingly persuasive justification” for gender discrimination).

⁵⁸ 42 U.S.C.A. § 12101 et. seq. (2004).

⁵⁹ 517 U.S. 620 (1996).

⁶⁰ 539 U.S. 558 (2003).

consensual gay sex. In both cases, the Court essentially ruled that the state may not curtail the liberty rights of a group simply because the majority perceives the group as different and morally outside of the protections of the law.

If it has been the demise of an “outsider jurisprudence” that blocks the creation of an alternate system of degraded justice, then it is the “great safeguards which the law adopts in the punishment of crime”⁶¹ that characterize the “normal” system of justice. These “ordinary criminal processes,” are the “normal means of dealing with persistent criminal conduct.”⁶² And the core requirement in the criminal process is charge and conviction for an actual – not predicted – crime.

During the past half century, constitutional bulwarks against radical prevention have been strengthened by a series of cases prohibiting the creation of “crimes” that are too far distant from actual harm. Prior to mid-twentieth century, vagrancy laws were a ubiquitous means of preventive control. These laws “erect[ed] flexible status definitions of possibly dangerous character types, designed to permit the preventive apprehension of supposedly likely criminals.”⁶³ Closely related to the vagrancy laws were the anti-loitering laws that replaced them. The courts have since struck down both vagrancy and the loitering laws.⁶⁴ These laws

⁶¹ Cooper v. Oklahoma, 517 U.S. 348, 366 (1996) (quoting United States v. Chisolm, 149 F. 284, 288 (C.C.S.D.Ala. 1906)).

⁶² Foucha v. Louisiana, 504 U.S. 71, 81 (1992).

⁶³ Anthony Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205 (1967).

⁶⁴ City of Chicago v. Morales, 527 U.S. 41 (1999) (loitering law); Kolender v. Lawson, 461 U.S. 352 (1983) (loitering law); Papachristou v. Jacksonville, 405 U.S. 156 (1972) (vagrancy law).

have generally been invalidated on vagueness grounds, because, as the Supreme Court put it, the laws “vest[] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way.”⁶⁵

The disapproval of vagrancy laws is of a kind with limits placed on the criminal law in the past fifty years to create crimes on the basis of potential, rather than actual, harmful behavior. During World War I, the Supreme Court regularly upheld the criminal punishment of speech that was critical of the war effort without any convincing proof that the speech created any realistic risk of harm to the country’s defense.⁶⁶ Similarly, during the Cold War, political speech that was similarly distant from concrete harm was punished.⁶⁷ But beginning in the 1960s, the Court curtailed the criminalization of speech deemed too distant from harmful behavior.⁶⁸ Almost simultaneously, the Court held that a person could not be punished for a “status” such as being an alcoholic or a drug addict.⁶⁹ Similarly, while the criminal law permits punishment not only of actually harmful acts, but also of inchoate crimes such as attempts and conspiracies, the general principle is that “attempts” should be limited by the “dangerous proximity” test⁷⁰ and conspiracy requires some concrete action linked to specific harmful acts.⁷¹ Thus, the law constrains the

⁶⁵ *Kolender*, 461 U.S. at 352.

⁶⁶ See, e.g., *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

⁶⁷ See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

⁶⁸ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁶⁹ See *Robinson v. California*, 270 U.S. 660 (1962).

⁷⁰ *Hyde v. United States*, 225 U.S. 347, 388 (1912).

⁷¹ See *U.S. v. Cintolo*, 818 F.2d 980, 1003 (1987).

criminal law not only by means of strict procedural protections, but also by limiting the reach of the criminal law to harmful acts rather than harmful propensities.

To sum up, our legal system has a long history of radically preventive laws, but the legal developments, particularly of the past fifty years have in fundamental ways circumscribed permissible forms of radical prevention in the law.

Applying the Lessons of History: Emergency Health Powers Legislation

My thesis is that the sexual predator laws provide a template for an expansive version of the preventive state. The centerpiece of the predator template is the return to a shameful outsider jurisprudence, widely used in the past, but since renounced. An examination of the post-9/11 initiative to update the nation's public health laws lays the groundwork for this point. These public health laws provide an instructive comparison with the sexual predator laws. The two sets of laws share a common structure: they both identify people who pose a risk to the society, and both restrict the liberty of those who pose the risk in order to prevent future harm. But the modern health laws do not target an outsider group, whereas the sexual predator laws do. As a consequence, policymakers have been more respectful of civil liberties in the health area than in the sexual predator area, even though the threat to U.S. society from biological agents poses risk on a potentially catastrophic scale, and the liberty restrictions in the health area much more mild than in the predator laws.

During the late 1990s, Dr. Michael Osterholm and others began sounding the alarm about a looming threat to the security of the country from bio-terrorism.⁷² Although governments

⁷² Michael T. Osterholm & John Schwartz, *Living Terrors* 34-46 (2000).

responded to these warnings through increased funding for preparedness,⁷³ it was not until after September 11, 2001 that serious attention was paid at the national level to the adequacy of state public health laws to address the threat.

Public health laws traditionally have allowed states to limit the liberty of individuals where necessary to protect against outbreaks of infectious disease. Quarantine laws confine people who have been (or are suspected of having been) exposed to an infectious disease. Isolation laws confine people who have actually contracted the disease, and are therefore contagious. Related laws require people to submit to physical examination and to vaccination. In all of these variations, the structure is the same: the state intervenes and curtails a person's liberty in order to reduce a risk of future harm to others.⁷⁴

The development of antibiotics to combat most infectious diseases during the past half century had largely put this sort of public health laws into quiescence.⁷⁵ But with the 9/11 attacks, warnings like those of Dr. Osterholm about our ill-preparedness for bio-terrorism led to a renewed level of attention. The publication in late 2001 of a draft Model Emergency Health Powers Act, prepared by The Center for Law and the Public's Health at Georgetown and Johns Hopkins Universities and sponsored by the Federal Centers for Disease Control, prompted a

⁷³ James G. Hodge, Jr., *Bioterrorism Law and Policy: Critical Choices in Public Health*, 30 *J.L. Med. & Ethics* 254 (2002).

⁷⁴ See generally Lawrence O. Gostin, *Public Health Law: Power, Duty, Restraint* (2001).

⁷⁵ Mimi Hall, *Many States Reject Bioterrorism Law*, *USA Today*, July 23, 2002, at 1A (quoting lawyer for a state health department "We have not used emergency powers in probably 50 years.").

number of states (eventually 44) to reexamine their public health laws during the 2002-2004 legislative seasons.⁷⁶

Despite the long pedigree of public health laws, this renewed attention to intrusive health powers laws provoked serious concern about intrusions upon civil liberties by a “broad coalition of opponents.”⁷⁷ This reaction had an impact on legislators, and much of the legislative agenda pushing for change was either delayed or modified, although eventually about 33 jurisdictions adopted some legislation at least “closely related to” the model law.⁷⁸

To an observer who had watched the earlier progress of sexual predator legislation, the contrast was striking. While the civil liberties critique of sexual predator laws got no traction, debate over the bio-terror laws, which could well apply to anyone, showed acute sensitivity to civil liberties.

This concern for “our own” civil liberties resulted in a variety of significant limitations on the states’ preventive power in the public health context. Many of the laws limited the most aggressive use of quarantine to declared emergency situations, placed time limits both on the existence of an emergency, and on the length of quarantine, and established rather elaborate due

⁷⁶ The Center for Law and the Public’s Health, Model State Public Health Laws, (last visited Oct. 3, 2004) [hereinafter Center for Law] (reporting that as of July 2004, 44 states had introduced legislation based “in whole or in part” on the Model Act.), available at <http://www.publichealthlaw.net/Resources/Modellaws.htm>.

⁷⁷ Hall, *supra* note 75.

⁷⁸ Center for Law, *supra* note 76 (reporting as of July 2004 that 33 states and the District of Columbia “have passed bills or resolutions that include provisions from or closely related to the Act.”); Hall, *supra* note 75 (indicating as of July 2002 that 16 states had passed health law changes, and legislation had been “rejected or stalled in 22.”); Betsy McKay, *If Deadly Illness Returns, CDC Wants Tough Steps; Legal Barriers May Arise*, Wall St. J., Oct. 20, 2003, at A3 (stating that 32 states had passed some version of the Model Emergency Health Powers Act).

process protections. Much of the legislation strengthened the pre-existing articulation of the right to refuse treatment. In Minnesota, for example, the 2003 legislation declared that “individuals have a fundamental right to refuse medical treatment, testing, physical or mental examination, vaccination....”⁷⁹ On the other hand, pre-existing public health laws specifically aimed at individuals with HIV or TB (arguably “outsider groups”) made no provision for refusing treatment,⁸⁰ and Minnesota law mandated that persons subject to mental health and sex predator commitments submit to examinations.⁸¹

This comparison of health powers legislation with sexual predator legislation offers some instructive lessons. With the bio-terror laws, the absence of an outsider group heightened legislative concern for the preservation of liberty, even in the face of a potentially lethal risk of catastrophic scale, and even in a legal context that traditionally has permitted a preventive approach to dealing with risk. That concern is absent disappears in the sexual predator context, where the development of a degraded system of justice is safely limited to a group squarely considered “outsiders.” True, the targeted sexual predators had all been convicted of harmful crimes. But as with the carriers of infection, it is the risk they pose, not their guilt, that rationalizes the use of prevention.

IV. Sexual Predator Laws: A Ready Template for the Preventive State

79 Minn. Stat. § 12.39 subd.1 (2002).

80 E.g., Minn. Stat. § 144.4806 (2004) (providing for court orders requiring a TB carrier to “submit to diagnostic examination,” “complete a course of treatment.”); Minn. Stat. § 144.4172 (2004) (authorizing “health directives” that “require” a person with HIV to participate in treatment programs and undergo testing and examinations).

81 Minn. Stat. § 253B.07 subd.4. (2004).

In contrast to the health powers legislation, the sexual predator laws have encountered little resistance based on civil liberties concerns. Yet the predator laws create a degraded system of justice that radically curtails the usual protections of the Constitution. They accomplish this by resurrecting the outsider jurisprudence that we have, with such difficulty, discarded over the past few decades. Instead of being based on race, gender, sexual orientation, or disability, the new outsider status is based on mental disorder and “risk.” This mental disorder criterion, however, is exceedingly porous, and in reality the laws use risk as the real marker of otherness.

The predator template for radical prevention poses a threat to maintaining a sound balance between liberty and security. In resurrecting an outsider jurisprudence, we return to a path that places no principled limits on the degradation of rights for the outside group. Basing outsider status on risk invites broad expansion of the targeted group, and legitimizes not only preventive detention, but also broad systemic surveillance of population groups.

Predator laws demarcate a new outsider group, and build their alternate system of justice on that edifice. They harness the authority and legitimacy of science and medicine to make their classification of people into “us” and “them” appear to be natural and inevitable, untainted by the invidious prejudice of the rejected outsider jurisprudence. Focusing mainly on “risk” and “mental disorder” as markers of difference, the laws are based on the notion that the risky *person* is different at some essential level - or, to put it another way, that he is a different kind of person.

The sexual predator laws rely on and produce the same kind of “essential difference” between groups of people that we have struggled to eliminate from our law. A central tenet of the predator commitment laws is that its targets constitute an “identifiable” group suffering from

a particular “condition.”⁸² To support this view, sex predator commitment laws employ a flawed effort at diagnosis. Diagnosis claims to identify the essence, discarding or ignoring what is “accidental” about the individual, yet relies on a static understanding of classification and categorization. The real definitional foundation for this outsider group is the ascription of risk. Risk assessment is possible only to the extent that individuals are said to “belong” to groups whose statistical probability of exhibiting the target behaviour can be measured or estimated. An individual “belongs” to the group only to the extent that he or she is “essentially”--rather than “accidentally” – associated with the group.⁸³ Predator laws, in short, ascribe the group risk to the individual.⁸⁴

The Supreme Court has held that the key marker of “difference” in the predator laws is the “mental disorder” of the individual subject to commitment. In *Kansas v. Crane*, the court held that a “mental disorder” is constitutionally adequate to support civil commitment only if it “*distinguish[es]* a dangerous sexual offender subject to civil commitment from ‘other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.’”⁸⁵

[T]here must be proof of serious difficulty in controlling behavior ... [that] must be *sufficient to distinguish* the dangerous sexual offender whose serious mental

82 In re Blodgett 510 N.W.2d 910, 913 (Minn. 1994); In re Young, 857 P.2d 989, 992 (Wash. 1993).

83 Eric S. Janus, Civil Commitment as Social Control: Managing the Risk of Sexual Violence, in *Dangerous Offenders: Punishment and Social Order* 82-83 (Mark Brown & John Pratt eds., 2000).

84 Eric S. Janus & Paul Meehl, Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings, 3 *Psychol., Pub. Pol’y & L.* 33, 42 (1997).

85 534 U.S. 407, 412 (2002) (emphasis added) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997)).

illness, abnormality, or disorder subjects him to civil commitment from the *dangerous but typical recidivist* convicted in an ordinary criminal case.⁸⁶

The use of “mental disorder” as the definition of the “other” allows the creation of a degraded system of justice without triggering widespread concern about the encroachment of radical prevention on civil liberties. The mental disorder classification invokes science and medicine, and we tend to think that those with “mental disorders” really are, in some sense, aberrational and different. This reassures us that the alternate legal system is well-limited, and does not threaten our own liberty.

But in actuality, the Supreme Court’s definition of “mental disorder” as “serious difficulty in controlling behavior” does little to define a limited group that is truly different in any sense from the rest of us.⁸⁷ “Difficulty controlling” behavior is ubiquitous among “normal” human beings. Many people have difficulty – serious difficulty – controlling their eating, smoking, gambling, alcohol or drug use, computer gaming, or work hours. Further, it turns out (unsurprisingly) that impaired self-control is almost a defining characteristic of *most* people who engage in crime. Failure of self-control is a characteristic that sex offenders and other criminals share. Knight and Prentky report that “lifestyle impulsivity” is highly predictive of future sexual reoffending and is a “relatively robust predictor of reoffense risk across domains of criminal behavior.”⁸⁸ One of the most widely accepted general theories of criminality, that of

86 *Crane*, 534 U.S. at 413 (emphasis added)

87 See Eric S. Janus, *Sex Offender Commitments and the ‘Inability to Control’: Developing Legal Standards and a Behavioral Vocabulary for an Elusive Concept*, in *The Sexual Predator: Legal Issues, Clinical Issues, Special Situations* 1-1, 2-4 (Anita Schlank ed., 2001).

88 Robert A. Prentky & Raymond A. Knight, *Identifying Critical Dimensions for Discriminating Among Rapists*, 59 *J. of Consulting and Clinical Psychology* 643, 643 (1991).

Gottfredson and Hirschi, argues that criminality stems from an underlying deficit in self-control.⁸⁹ Poor self-control is widely thought to be a “stable and robust predictor of reoffending among the general criminal population.”⁹⁰ As Baumeister et al. point out: “the most important generalization about crime and criminality is that they arise from lack of self-control. Most crimes are impulsive actions, and most criminals exhibit broad and multifaceted patterns of lacking self-control.”⁹¹ In short, impaired self-control does not make sex offenders different from other criminals – it is precisely what makes them similar to other criminals.

Behind the “mental disorder” screen, the real work of creating the outsider group is done by the concept of risk as employed in the predator laws. Like diagnosis, risk-assessment is seen as an expert endeavor, one that is increasingly seen as being scientific.⁹² Predator laws reify risk, make it concrete and ascribe it to the individual. Risk assessment reduces the future to a present “condition” or “propensity.” It “seeks to bring the future into the present.”⁹³ This is necessary because otherwise we couldn’t lock somebody up *now* because of what they might do in the future. While the “causal factors” for violence may be a combination of internal (psychological)

89 See Daniel A. Krauss et al., *Beyond Prediction to Explanation in Risk Assessment Research: A Comparison of Two Explanatory Theories of Criminality and Recidivism*, 23 *Int’l J.L. & Psychiatry* 91, 98 (2000).

90 Robert J. McGrath, *Sex Offender Risk Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, 35 *Int’l J. Offender Therapy and Comparative Criminology* 328, 338 (1991).

91 Roy F. Baumeister et al., *Losing Control: How and Why People Fail at Self-Regulation* 11-12 (1994).

92 Janus & Prentky, *supra* note 33.

93 Nikolas Rose, *At Risk of Madness*, in *Embracing Risk: The Changing Culture of Insurance and Responsibility* 214 (Tom Baker & Jonathan Simon eds., 2002).

and external (environmental) factors,⁹⁴ the resultant “risk” is ascribed solely to the individual. He “is” dangerous, he “has” risk, and it is his “possession” of these characteristics that justifies his incarceration. Under the predator template, we lock people up who “pose a threat to others, not because of what they had done but because of who they are, because their very makeup as a human being made them a threat to ‘the community.’”⁹⁵

As constructed by the predator laws, risk tells us something essential – rather than accidental – about the person. This characteristic – sometimes called “dangerousness”--serves as a stable ingredient of the person, a part of him even if it is not now visible.⁹⁶ It is this internal characteristic, treated as having long-term stability, that justifies both the prediction of future behavior and the creation of outsider status. This is not simply a person who commits a crime, but rather a person whose nature is criminal, “a ‘criminal man’, a person who by his very nature is driven to commit the most violent of crimes against the most vulnerable of victims.”⁹⁷

In the predator template, risk quietly takes the place of race, gender, sexual orientation and disability in the outsider jurisprudence. The concept of risk, however, tends to remove the taint of racism, sexism, homophobia and other forms of rejected prejudice. Risk is seen as

94 J. Arboleda-Florez et al., *Understanding Causal Paths Between Mental Illness and Violence*, 33 *Social Psychiatry & Psychiatric Epidemiology* S38-S46 (Supp. 1998); V.A. Hiday, *Understanding the Connection Between Mental Illness and Violence*, 20 *Int'l Law Psychiatry* 399, 399-417 (1998).

95 Rose, *supra* note 93, at 209.

96 Grant T. Harris & Marnie E. Rice, *Actuarial Assessment of Risk Among Sex Offenders, in Sexually Coercive Behavior: Understanding and Management* 989 (Robert A. Prentky et al. eds., 2003).

97 Michael Petrunik, *Models of Dangerousness: A Cross Jurisdictional Review of Dangerousness Legislation and Practice, Public Safety and Emergency Preparedness Canada* (Feb. 1994), available at http://www.psepc-sppcc.gc.ca/publications/corrections/199402_e.asp (last visited Oct. 8, 2004).

something in nature, “an ontological state of the world,”⁹⁸ “a material object amenable to objective calculation and measurement.”⁹⁹ The use of science to measure risk and to demonstrate a “condition” underlying human violence, gives risk a “moral neutrality [and] scientificity.”¹⁰⁰

But this “naturalizing” of risk is misleading, disguising a strong moral condemnation of “the risky.” As noted by Hudson, “the language of risk plays the same role in contemporary society as stigma and taboo in pre-modern societies.”¹⁰¹ “The morally neutral scientific, actuarial terminology of risk disguises the condemnatory pariahdom created by the classification. Persistent offenders, especially sex offenders, become the new lepers: diseased, incurable, unable to control outbreaks, themselves to blame for whatever privations society imposes upon them.”¹⁰²

Thus, we see that risk functions in much the same way that race did as a marker of degraded status. Of course, risk and race differ in many critical aspects. After all, unlike members of racial groups, the members of the group targeted by the predator laws – sex offenders – have *all* violated the rights of others in egregious ways, and it is this behavior – at least in part – that has landed them in the risky category. Sex offenders are properly blamed for the crimes they have committed. But this blame is expiated, so far as the law is concerned, in the

98 Carolo C. Jaeger et al., *Risk, Uncertainty, and Rational Action* 18 (2001).

99 Hazel Kemshall, *Understanding Risk in Criminal Justice* 6 (Mike Maguire ed., 2003).

100 Hudson, *supra* note 39, at 66 (quoting Mary Douglas, *Purity and Danger: An Analysis of Conceptions of Purity and Taboo* (1966)).

101 Hudson, *supra* note 39, at 66.

102 Hudson, *supra* note 39, at 67.

criminal punishment that the justice system has meted out. Under the Constitution, the imposition of civil commitment, and the intrusive impositions on privacy and liberty of Megan's laws, cannot be premised on the blameworthy criminal "guilt" of the individuals.¹⁰³

Furthermore, past harmful behavior is only a contingent feature of risk, perhaps an artifact of the limitations on our current ability to measure risk. There is nothing *inherent* in the notion of risk that limits its application to people who have actually engaged in harmful behavior. The logic of risk assessment would suggest that the risk exists even before any harmful behavior has occurred.

Indeed, there is a long tradition – and a developing science – suggesting that the seeds of future antisocial behavior are in the person long before they become manifest. For at least a century, researchers have sought to identify something unique and different about criminals. The idea is that crime is not really a choice that an individual makes, but rather a manifestation of some aspect of his or her "constitution" or essential make-up. This sort of thinking has inspired a variety of "scientific" attempts to demonstrate a "criminal personality," a genetically inferior "type," related to the "lower" species, destined to commit crime.¹⁰⁴ In its 1939 *Pearson* decision, the Minnesota Supreme Court referred to "sex psychopaths" as "hopelessly immoral" and as a "type[] of 'unnaturals'."¹⁰⁵

103 *Hendricks*, 512 U.S. at 347 (noting that a conviction for a prior sexual offense does not again "affix culpability for prior criminal conduct, but uses such conduct solely for evidentiary purposes.").

104 Stephen J. Gould, *The Mismeasure of Man* 113-45 (1981).

105 *State of Minnesota ex. rel. Pearson v. Probate Court*, 287 N.W. 297, 301 (Minn. 1939), *aff'd*, 309 U.S. 270 (1940).

In many ways, the early attempts to identify a “criminal type” have been discredited.¹⁰⁶ But recent developments in science may breathe new life into this notion. In 2003, Harris and Rice recognized that “the preponderance of scientific evidence supports the idea that the majority of variance in violent criminal conduct (including sexual aggression) can be attributed to genetically and physiologically based enduring traits that, once initiated, exhibit life-long persistence under conditions so far observed.”¹⁰⁷ In a similar vein, Quinsey has noted that there are a number of distinct psychological tests that have been developed in recent years for estimating the risk of future criminal violence. He notes that although each of these approaches uses somewhat different methods and includes somewhat different factors, their results correlate with each other and with future violence.¹⁰⁸ Building on the work of David Rowe, Quinsey wonders whether “a super-factor, called ‘d,’ underlies all of the disparate correlates of criminal propensity.” Quinsey compares “d” (for deviance) with “g,” the super-factor that underlies intelligence. Noting that “g” “is a biological variable reflecting some aspect of neural process speed,” Quinsey cautions that “it is much less clear what the nature of *d* is.”¹⁰⁹

Quinsey’s caution, however, may be irrelevant in the development of the law. The predator template provides a ready vehicle to transform this “condition” – the presence of “d” - into the mark of an outsider status.

106 See generally Gould, *supra* note 104.

107 Harris & Rice, *supra* note 96, at 208.

108 Roundtable Discussion, Risk Assessment: Discussion of the Section, in *Sexually Coercive Behavior: Understanding and Management* 240 (Robert A. Prentky et al. eds., 2003).

109 Roundtable Discussion, *supra* note 108.

After *Lawrence*, we might have been tempted to pronounce American outsider jurisprudence all but dead. But there is evidence that the existence of the “degraded other” was not a horrible historical diversion, but rather a tragic, though central, aspect of our liberal democracy. We can see *Lawrence* as one key victory in a struggle to overcome a powerful addiction. But like all addicts, America is not cured of this disease, and must be vigilant to resist those apparently innocent “lapses” that lead inexorably to full relapse. The predator template is not an anomaly, but a reversion to a practice that fits all too comfortably into liberal democracies.

Barbara Hudson argues that the “key question for liberal theories of justice [is] that of membership and exclusion. Who is to be included in the community of justice, and whom is the just community to defend itself against?”¹¹⁰ She endorses the work of Gilroy and Said, who posit “the necessity for liberalism of constructing irrational, uncivilized black and oriental ‘others’ who are defined by their lack of everything that distinguishes the citizen of the west.”¹¹¹

The role played by the negative other in liberal systems, according to Hudson, is to define what it means to have rights, by showing its opposite: “for rights to have meaning, to be cognitively as well as politically recognized, there must be groups without rights, so that the difference between rights and non-rights can be appreciated.”¹¹² Outsider groups inhabit what I have referred to in this article as an “alternative system of justice.” Hudson’s point is that the existence of such a “no-rights zone” is not anomalous in liberal democracies, but rather

110 Hudson, *supra* note 39, at 38.

111 Hudson, *supra* note 39, at 181.

112 Hudson, *supra* note 39, at 181-82.

consistent with their essential natures. Noting that even John Stuart Mill espouses “despotism” as a “legitimate mode of government in dealing with barbarians,” Hudson explains that

we find no guidance from liberalism on questions of the limits that should be placed on measures taken to protect good citizens against the risky and dangerous. ...they have no real existence for us as moral agents with claims upon us....The tenets of rights-respecting democratic governance do not apply to them.¹¹³

Hudson’s analysis helps explain why the sexual predator template poses distinctive threats at this juncture in our history. The predator laws provide the outsider jurisprudence with a new and legitimized foothold in our national consciousness. There is a danger that this foothold will awaken our old addiction, supporting an expansive use of outsider logic, just at a time when we thought we had gotten some control over that destructive and immoral practice.

Just as threatening is the role that the negative other plays in defining the meaning and scope of rights that “we the people” retain. By creating an outside group with radically reduced rights, the predator template changes the scale against which we measure and understand the terrorism-related restrictions on our own rights. To the extent that an outsider exists in a legally degraded alternate system of justice, “our” protected position under the Constitution’s umbrella is highlighted. The stark contrast between “our” rights and the outsiders’ non-rights may obscure the serious, but relatively less severe degradation of rights enjoyed by the “in” group.

The predator template threatens the traditional liberty/security balance by transitioning from “guilt” to “risk” as the key predicate for liberty deprivation. Again, this is not an isolated or aberrational development, but an important move that accelerates and legitimizes major transformations in our society. Feeley and Simon have argued that we are becoming “markedly less concerned with responsibility, fault, moral sensibility” and more concerned with “techniques

113 Hudson, *supra* note 39, at 183-84.

to identify, classify, and manage groupings sorted by dangerousness.”¹¹⁴ Many see this as part of a larger development, the rise of the “risk society.” Rose describes Ulrich Beck’s “claim that we live in ‘risk society,’ ... saturated with fear and foreboding, [whose] political and governmental priorities are structured by concerns over the distribution of ‘bads’ or dangers and attempts to avoid harm.”¹¹⁵ In the “risk society,” according to Hudson, governance makes the avoidance of risk “the central object of decision-making processes, and administering individuals, institutions expertise and resources in the service of that ambition.”¹¹⁶

This move from guilt to risk removes key constraints on the state’s ability to limit liberty. The move to risk entails increased (and qualitatively different) surveillance of citizens. Under the traditional approach, our criminal justice system is in a crime-solving mode. Intervention and intrusion by the government are in response to some identified criminal activity, and only those whose behavior suggests a link to the crime are targeted. But the law must cast a much broader net if it is to prevent crime before it happens.¹¹⁷ The more distant the “risk” is from actual crime, the broader must be the gaze of the government. We are accustomed to preventive surveillance in limited and public areas of our lives, such as measuring the our speed by radar on

114 Rose, *supra* note 93, at 214 (quoting Malcom Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *Criminology* 449, 452).

115 Rose, *supra* note 93, at 213.

116 Hudson, *supra* note 39, at 44.

117 See Kemshall, *supra* note 99, at 1 (noting a “shift from the ‘reactive investigation of individual crimes’ to a ‘strategic, future-oriented and targeted approach to crime control’.”) (quoting Mary Maguire, *Policing By Risks and Targets: Some Dimensions and Implications of Intelligence-led Crime Control*, 9 *Policing and Society* 315, 316 (2000)).

the highway. And in limited “special circumstances,” the Supreme Court has approved “suspicionless searches” that intrude more deeply into our privacy.¹¹⁸

But the predator template legitimizes broad and intrusive surveillance of entire sub-populations. In this alternative system of justice, surveillance need not be limited only to those who are suspected of having committed a crime. Predator laws transform the government’s role from reactive crime solving, to pro-active risk-assessment and control. The latter is much more intrusive and expansive than the former. Crime-solving begins when a crime is reported. Risk-assessment precedes an actual event, and, by definition, is much broader than the crime whose “risk” is being assessed. Because it involves finding “risk” rather than “guilt,” risk-assessment must necessarily touch many more people than crime-solving, by large orders of magnitude. Risk, says Kemshall, “becomes a self-justificatory logic for increased extension of the surveillance network into every aspect of social life.”¹¹⁹

Further, the science and the politics of risk combine to broaden the scope of surveillance. The development of actuarial risk-assessment tools make risk-assessment much simpler to administer than the traditional clinical psychological examination. Though some of these tools remain rather complex, and require extensive documentation to administer, others are brief screening that are relatively simple to score.¹²⁰ Risk assessment will increasingly become a practical possibility, even for large groups of potentially risky people.

The very possibility of measuring risk creates a powerful pressure to prevent the risk. As Rose puts it:

118 See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

119 Kemshall, *supra* note 99, at 33.

120 Janus & Prentky, *supra* note 33.

[O]nce it seems that today's decisions can be informed by calculations about tomorrow, we can demand that calculations about tomorrow should and must inform all decisions made today. The option of acting in the present in order to manage the future rapidly mutates into something like an obligation.¹²¹

Experience with the predator laws confirms this reality of this "obligation." Risks "are subject to 'hindsight scrutiny,' and with the luxury of hindsight, a key test for risk decisions is their defensibility."¹²² There is immense political pressure to translate risk-knowledge into risk-control. But because risk is a continuous variable (unlike guilt), this pressure has no inherent stopping point. The safest course for politicians is to promote the notion of "zero tolerance" for risk,¹²³ to expand preventive control to cover all degrees of risk, broadening the populations being assessed, and a lowering of the risk threshold for intervention.¹²⁴ As Hudson puts it, "the demand for safety is insatiable."¹²⁵

Conclusion

Security--as achieved by the control of harmful behavior--is a necessary precondition to the enjoyment of liberty.¹²⁶ The question is how the two shall be balanced. In this Article, I have addressed a particular aspect of that more general question: how actual must the harm be before the government may intervene with substantial impositions on a person's liberty?

121 Rose, *supra* note 93, at 214.

122 Kemshall, *supra* note 99, at 12 (quoting D. Carson, *Risking Legal Repercussions*, in 1 *Good Practice in Risk Assessment and Risk Management* (H. Kemshall and J. Pritchard eds., 1996).

123 Kemshall, *supra* note 99, at 1.

124 Janus, *supra* note 30.

125 Hudson, *supra* note 39, at 60.

126 Hudson, *supra* note 39, at 40.

No one is opposed to punishing people who engage in terrorism or commit rape, or for arresting people who are conspiring to commit terrorist acts or attempting to lure children over the Internet. We can all agree on the value of programs that seek to prevent sexual violence or infectious diseases by changing the conditions that are conducive to violence and disease in the society. The problem is not prevention – but radical prevention: invading people’s privacy and physical liberty not in response to harm done, but rather to respond to a perceived “propensity” or “risk” of future harm.

Over the centuries, American jurisprudence has gradually imposed a strong set of safeguards against an overextension of security at the expense of liberty. These safeguards are both constitutional and political. We rely on both the courts and the political process to draw the right balance. But our history – and perhaps the very nature of our liberal democracy – exposes an Achilles heel in these safeguards. When we have targeted an outsider group, we disable the normal constitutional and political protections, creating a separate and degraded system of justice.

The threat of terrorism creates pressure to expand our programs of radical prevention. To date, with respect to bio-terrorism, the normal safeguards appear to be working to keep this pressure in check. But the template provided by the sexual predator laws could disable those safeguards, paving the way for an expansive, and liberty-constricting, preventive state.