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The Future of Preventive Detention

Fredrick E. Vars

Forthcoming, LOUISIANA LAW REVIEW (2014)

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The Future of Preventive Detention

Fredrick E. Vars[†]

Abstract:

America is presently fighting a war on terror and war on sex offenders. In each, the government openly detains hundreds of individuals not for what they have done, but for what they might do. Some warn that this greatest restriction on liberty may expand to other types of people. This Article examines the risk of such expansion by putting our current wars in historical perspective. The two main conclusions are: (1) some categories of people detained in prior periods are not being detained today; and (2) the risk of expansion is real but lower than previously suggested.

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INTRODUCTION

America is currently fighting at least two “wars”: a war on terror¹ and a war on sex offenders.² In each, the government has openly employed indefinite preventive detention, locking up thousands not for what they have done, but for what they might do. Commentators warn that this controversial strategy may be expanded to other types of people.³ For example, the preventive detention of “suspected terrorists” at Guantanamo could expand to individuals suspected of other violent crimes.⁴ How real is that threat?⁵

This Article assesses the risk of such “mission creep”⁶—specifically, expansion of overt indefinite preventive detention beyond terrorists and sex offenders. As others have observed, the law in these areas is relatively elastic, so the potential for creep is real.⁷ In other words, the risk is not zero. To be more precise one needs a theory for when the government engages in indefinite preventive detention. Such a theory will be more persuasive if it has explanatory power across time, as well as in multiple situations, including the wars on terror and sex offenders.

It turns out neither of these current wars is wholly new. The present war on terror can be dated to September 11, 2001. Before that, the last large attack on American soil was Pearl Harbor, December 7,

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¹ President Obama has said that the war on terror must end, but pointedly did not declare it over. Peter Baker, *Reviving Debate On Nation's Security, Obama Seeks To Narrow Terror Fight*, N.Y. TIMES A1 (May 24, 2013).

² Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.—C.L. L. REV. 435 (2010).

³ David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 728, 749 (2009); ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 94, 101 (2006).

⁴ Cole, *supra* note 3, at 728.

⁵ This Article is primarily descriptive, not normative. One exception is my use of the word “threat” here rather than a neutral word like “possibility.” My criticisms of sex offender commitment appear in Fredrick E. Vars, *Delineating Sexual Dangerousness*, 50 HOUS. L. REV. 855 (2013) (hereinafter “Vars, *Dangerousness*”), and Fredrick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161 (2011) (hereinafter “Vars, *Rethinking*”). For a critical analysis of both “wars” in an historical perspective, see Eric Janus, *The Preventive State: When Is Prevention of Harm Harmful?*, in HANDBOOK OF PUBLIC PROTECTION 316 (Mike Nash & Andy Williams, eds. 2010).

⁶ Cole, *supra* note 3, at 749. The term “mission creep” generally refers to the expansion of a mission beyond its original objectives. Jim Hoagland, *Prepared for Non-Combat*, WASH. POST (Apr. 15, 1993). My focus is on creep to other categories of people, not on creep within a category.

⁷ Cole, *supra* note 3; JANUS, *supra* note 3.

1941. In fact, the government engaged in widespread, indefinite preventive detention after both attacks.⁸ In contrast, the Oklahoma City bombing in 1995 did not result in preventive detention. These three events will frame the discussion of national security detentions. The current wave of sex offender commitment started in 1990; a previous wave started in the late 1930s.⁹ Sex offender commitment is often justified as an extension of mental illness civil commitment. Because these two types of commitment share a mental defect component, they are considered together in this Article. Sticking to cases where fear is greatest, the mental illness example is the 2007 Virginia Tech mass shooting, which also led to an expansion of preventive detention authority.

A complete history of even one of these six cases is beyond the scope of this Article. Rather, the goal is to distill the key factors that contribute to preventive detention. The touchstone is *fear* of an *undeterrable Other*.¹⁰ *Fear* is a relatively straightforward concept, but it is not always correlated with risk.¹¹ *Other* is a term of art. In this context, it means an identifiable minority group that is perceived negatively by the majority.¹² *Undeterrable* is used loosely to describe anyone with a defect in control or other attribute that weakens the normal deterrent effect of civil and criminal penalties.¹³ Deterrence is the preferred default option because, if it works, the government has to incarcerate fewer people than it would need to preventively detain.¹⁴ Although generally presented here separately, these three factors can be mutually reinforcing.

Broad fluctuations in detention practices appear to be driven mainly by fluctuating levels of fear. The scope of such practices, however, is sensitive to then-operative notions of Otherness. Here, there is some room for optimism, or at least two silver linings to the current resurgence of preventive detention. Tens of thousands of Japanese-American citizens were interned during World War II. It appears that only a few American citizens were detained after 9/11.¹⁵ Citizenship trumped ethnic and cultural Otherness. Less appreciated

⁸ See *infra* Sections I.A and I.C.

⁹ Samuel Jan Brakel & James L. Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69 (2000). See also *infra* Sections II.A, II.B.

¹⁰ See JANUS, *supra* note 3, at 108 (“threatened by an outsider group”).

¹¹ Vars, *Dangerousness*, *supra* note 5, at 878-82.

¹² Cf. Natsu Taylor Saito, *Interning the “Non-Alien” Other: The Illusory Protections of Citizenship*, 68 L. & CONTEMP. PROBS. 183 (2005).

¹³ CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 140 (2006).

¹⁴ See *infra* Section III.

¹⁵ See *infra* Section I.C.

is the status of homosexuals in the history of sex offender commitment. Many were detained in the first wave based on consensual adult sex; very few, if any, in the second.¹⁶ Our culture no longer views lesbian, gay, bisexual, and transgender people as a sufficiently threatening Other to detain preventively. Muslim and Arab American citizens and homosexuals should probably be thankful they don't live in an earlier era.

Should we nonetheless be worried about mission creep? That post-9/11 detentions focused almost exclusively on non-citizens is hopeful.¹⁷ A terror attack would likely have to be larger than 9/11 to lead to widespread detentions of citizens. The more likely threat is fear induced by a domestic crime wave or even a few horrific crimes, as in the case of sex offenders. Sex offenders have been called the most reviled Other. That kind of antipathy, thankfully, does not materialize overnight. But other categories of dangerous people may still be at risk. Fear of an undeterrable Other is not presently sufficient to justify overt indefinite detention of gang members, for example. But that is historically contingent and could change with rapid gang expansion and increased gang violence.¹⁸

Because the primary driver is fear, Section I outlines three moments in history when national security was in peril: (1) the attack on Pearl Harbor, (2) the Oklahoma City bombing, and (3) 9/11. The first and third engendered large-scale indefinite preventive detention. In both, there was fear of an undeterrable Other. This was not the case after Oklahoma City. Section II examines two types of out-of-control criminals: (1) sex offenders and (2) people with mental illness. Undeterrability is thought to distinguish them from other dangerous people. And, when combined with frightening crimes, the government has repeatedly authorized the indefinite preventive detention of these two types of individuals. Section III integrates the first two sections to answer to the central question about mission creep: it is possible but perhaps less likely than others have suggested. At least one of the critical requirements of fear, undeterrability, and Otherness is currently missing for the most plausible candidates for expanded preventive detention.

¹⁶ See *infra* Section II.

¹⁷ Mark Tushnet, *Defending Korematsu: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 297.

¹⁸ Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J. L. MED. & ETHICS 56, 65 (2004).

I. NATIONAL SECURITY

A. World War II

On the morning of December 7, 1941, hundreds of Japanese aircraft surprise-attacked the American military base at Pearl Harbor, Hawaii. Over a dozen ships and over three hundred aircraft were sunk, damaged, or destroyed. 2,402 Americans were killed and 1,247 wounded. Over 97% of the dead and wounded were members of the military.¹⁹

That night, the FBI took into custody whom it deemed to be the most dangerous German, Italian, and Japanese citizens. “Over the next several months, the FBI detained 9,121 enemy aliens in this manner. Approximately 5,100 (57 percent) were Japanese nationals, 3,250 (36 percent) were German nationals, and 650 (7 percent) were Italian nationals.”²⁰ Individualized hearings led to the release of more than half of these detainees by June 30, 1943.²¹

But preventive detention did not stop there. On February 19, 1942, President Roosevelt signed Executive Order No. 9066, which in vague terms authorized the exclusion of any persons from military areas. Over the next eight months, under the direction of West Coast commander General John DeWitt, almost 120,000 persons of Japanese descent were ordered to leave their homes in California, Washington, Oregon, and Arizona. Two-thirds of those forcibly relocated into internment camps were American citizens.²² Exclusion persisted until December 17, 1944.²³

Why did this happen? The official justification in 1942 was that there was no quick enough way to distinguish loyal from disloyal Japanese.²⁴ The United States Supreme Court accepted this justification in upholding the internment.²⁵ Official thinking has changed. In 1982, a Congressional commission concluded:

¹⁹ WALTER LORD, *DAY OF INFAMY* (1957); *see also* *Attack on Pearl Harbor*, at http://en.wikipedia.org/wiki/Attack_on_Pearl_Harbor (visited Aug. 14, 2013).

²⁰ GEOFFREY R. STONE, *WAR AND LIBERTY: AN AMERICAN DILEMMA: 1790 TO THE PRESENT* 65 (2007).

²¹ *Id.* at 66.

²² *Id.*

²³ Comm’n on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*, Chapter 8 (1982), at http://www.nps.gov/history/history/online_books/personal_justice_denied/contents.htm (hereinafter “Comm’n Report”).

²⁴ *Korematsu v. United States*, 323 U.S. 214, 218-19 (1944).

²⁵ *Id.* at 214. *See* David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2568-69 (2003) (citing *Korematsu* as evidence that “courts are ineffective as guardians of liberty when the general public is clamoring for security”). Justice Scalia agrees. *See* Audrey McAvoy,

The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it—detention, ending detention and ending exclusion—were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership.²⁶

The Japanese Internment supports my thesis that the government engages in indefinite preventive detention in response to fear of an undeterrable Other. Fear of an Other is obviously consistent with the modern view that internment was driven by “race prejudice” and “war hysteria.” Undeterrability is implicit in the contemporaneous rationale of disloyalty: the threat of sanctions could not deter a loyal subject of Japan if called to assist its war effort.

Fear. After Pearl Harbor, fear of a Japanese attack on the West Coast was intense.²⁷ Japanese forces quickly compiled a string of surprising victories against the U.S. and its allies. In January 1942, Congressman Homer Angell of Oregon warned: “We must wake up, and if we do not wake up and protect ourselves from this menace something infinitely worse than Pearl Harbor will be enacted on our very shores.”²⁸ Fear motivated the internment.²⁹

Other. The Japanese were an identifiable and widely reviled Other. In January 1942, General DeWitt stated, “The Japanese race is an enemy race and while many second and third generation Japanese were born on United States soil, possessed of United States citizenship, have become ‘Americanized,’ the racial strains are undiluted.”³⁰ On another occasion, DeWitt infamously proclaimed, “[A] Jap’s a Jap.”³¹

Undeterrable. The content of the anti-Japanese stereotypes fed the perception that preventive detention was necessary. These

Scalia Says Internment Ruling Could Happen Again, ABCNEWS (Feb. 4, 2014), at <http://abcnews.go.com/US/wireStory/scalia-internment-ruling-happen-22353561> (visited Feb. 7, 2014).

²⁶ Comm’n Report, *supra* note 23, Summary at 5, 8, 67-68.

²⁷ *Id.*

²⁸ JACOBUS TENBROEK, EDWARD N. BARNHART, & FLOYD W. MATSON, PREJUDICES, WAR AND THE CONSTITUTION 78 (1954).

²⁹ “Certainly, this demand [for removal of all Japanese] was fed by fears of a large-scale Japanese invasion of the mainland.” GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 290 (2004). Accord Meaghan Kelly, Note, *Lock Them Up--and Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT’L L. 551, 553 (2008) (fear led to the Japanese internment).

³⁰ STONE, *supra* note 29, at 292.

³¹ *Id.*

stereotypes ran deep, bleeding over from earlier prejudice against the Chinese “yellow peril.”³² Both the Chinese and Japanese were viewed as “treacherous” and loyal only to their home countries.³³ After sweeping Japanese victories against Russia, a San Francisco paper *in 1905* warned that Japanese “uncontrollable ambitions” threatened California.³⁴

Pearl Harbor fanned a burning flame of racial distrust. California State Senator Jack Metzger stated in February 1942: “I don’t believe there is a single Japanese in the world who is not pulling for Japan. They will spy, commit sabotage, or die if necessary.”³⁵ California Attorney General Earl Warren warned of the “broad control” Japan had over all ethnic Japanese in America.³⁶ One commentator has explained: “A Japanese-American citizen in 1942 was easily considered ‘foreign,’ thus making possible the judgment that likelihood of disloyalty was high enough to justify wholesale internment.”³⁷

In sum, fear of an undeterrable Other motivated the Japanese internment.

B. Oklahoma City Bombing

On April 19, 1995, Timothy McVeigh detonated an explosive-filled truck next to a federal building in Oklahoma City. 168 people were killed; over 680 injured. In his trial, the prosecution claimed that McVeigh was “motivated by hatred of the government” and was “in a rage over the events at Waco”³⁸ (where two years to the day before the bombing a federal raid produced 76 civilian casualties). McVeigh was not a member of any militia group, but had attended meetings.

Even before the bombing some militia members believed that the federal government was building concentration camps to incarcerate citizens,³⁹ but this did not turn out to be true either before or after. Rather, the primary policy response to the bombing was the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. This Act

³² TENBROEK ET AL., *supra* note 28, at 19.

³³ *Id.* at 20, 24, 67.

³⁴ *Id.* at 26.

³⁵ *Id.* at 77.

³⁶ *Id.* at 84.

³⁷ Saito, *supra* note 12, at 183 (2005) (quoting Neil Gotunda, “Other Non-Whites” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1191 (1985)); *see also* DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 97 (2003).

³⁸ *Excerpts From Closing Arguments in the Oklahoma City Bombing Case*, N.Y. TIMES A26 (May 30, 1997).

³⁹ Kevin Mayhood, *Ohio Had Eye on Radical Militia Members Before Bombing*, COLUMBUS DISPATCH (OHIO) 01A (May 2, 1995).

narrowed habeas corpus and broadened some criminal restrictions, but it did not authorize or expand preventive detention in any way.⁴⁰

There were obviously complicated politics at work, but the government's failure to engage in large-scale, indefinite preventive detention after the Oklahoma City bombing should not be surprising. Fear of an undeterrable Other was lacking. Fear of terrorist attacks was no doubt elevated after the bombing. A week later 42% of Americans in one survey were very or somewhat worried that they or someone in their family would become a victim of a terrorist attack.⁴¹ (The comparable figure after 9/11 was 59%, see below).

The deeply held beliefs of militia members might be viewed as just as fixed as loyalty to a home country or radical religious precepts. In other words, militia members may be undeterrable, but they are not Other. A letter to the editor dismissed calls for post-9/11 internment camps as reflecting "war hysteria and racism aimed against foreigners":

After all, when Timothy McVeigh bombed an Oklahoma City federal building in 1995, did anyone . . . suggest that the militia-oriented citizenry should be forcibly detained in camps? Heaven forbid we should imprison anyone affiliated with right-wing militia groups. They may be armed to the teeth, but at least they're God-fearing white Americans!⁴²

The response to the Oklahoma City bombing was to increase the bite of criminal sanctions, not to employ preventive detention. There was insufficient fear of an undeterrable Other.

C. "War on Terror"

On the morning of September 11, 2001, 19 men hijacked four civilian aircraft and crashed them into the World Trade Center, the Pentagon, and a field in Pennsylvania. 2,982 people died. The casualties were overwhelmingly civilian, but included 125 Pentagon

⁴⁰ To the extent the Act targeted terrorism, it was international rather than domestic. Michael J. Whidden, *Note, Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825, 2844 (2001). This is further, though indirect, support for my Otherness requirement.

⁴¹ *Americans' Fear of Terrorism in U.S. Is Near Low Point* (Sept. 2, 2011), at <http://www.gallup.com/poll/149315/americans-fear-terrorism-near-low-point.aspx> (hereinafter "Gallup Poll").

⁴² Doris Mah, *Internment Camps Are Wrong and Illegal*, *LANCASTER INTELLIGENCER* J. 15 (Oct. 4, 2001) (letter).

employees.⁴³ The hijackers were Muslim, members of al Qaeda, and 15 were of Saudi Arabian origin. None was a U.S. citizen.

The government immediately began detaining people under a variety of authorities. The greatest number of such detentions involved the immigration system.⁴⁴ The federal government, using immigration law, preventively detained more than 5,000 foreign nationals, nearly all Arab or Muslim, in the first two years after 9/11.⁴⁵ Immigration detentions are, at least in theory, temporary.⁴⁶ Noncitizens have been detained indefinite, however, at the U.S. naval base at Guantanamo Bay, Cuba. Of 779 total, 223 remained by late September 2009.⁴⁷ As of March 2013, 166 detainees remained.⁴⁸

The detentions of three American citizens received a great deal of media and legal attention.⁴⁹ John Walker Lindh and Yaser Esam Hamdi were captured in Afghanistan. Lindh soon appeared in civilian criminal court and eventually pled guilty. Hamdi was placed in a naval brig in Virginia incommunicado for nearly three years. He was removed to Saudi Arabia only after successfully challenging his confinement before the United States Supreme Court.⁵⁰ A third citizen, Jose Padilla, was first detained for a prolonged period, then convicted in civilian criminal court.⁵¹

Preventive detention in the “War on Terror,” as during World War II, has been driven by fear of an undeterrable Other.

Fear. The Secretary of Defense minced no words justifying the Guantanamo detentions on fear, describing the prisoners as “among the most dangerous, best-trained, vicious killers on the face of the earth.”⁵² In his 2002 State of the Union Address, President George W. Bush spoke of “unprecedented dangers” and warned that tens of thousands of terrorists spread throughout the world were “like ticking time bombs -

⁴³ THE 9/11 INVESTIGATIONS 392-93 (Steven Strasser, ed. 2004).

⁴⁴ Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85, 147-48 (2011).

⁴⁵ Cole, *supra* note 3, at 703.

⁴⁶ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

⁴⁷ David Glazier, *Playing by the Rules: Combating al Qaeda within the Law of War*, 51 WM. & MARY L. REV. 957, 1021 (2009).

⁴⁸ Julian Finn & Julie Tate, *Guantanamo Bay detainees’ frustrations simmering, lawyers and others say*, WASH. POST. (Mar. 16, 2013). “Congress responded to the 2001 [Supreme Court case holding that immigration detentions must be temporary] with the USA PATRIOT Act language establishing a process for long-term detention of suspected alien terrorist who cannot be deported --- provisions that have yet to face judicial test.” Klein & Wittes, *supra* note 44, at 150.

⁴⁹ At least seven other citizens were detained as material witnesses. COLE, *supra* note 37, at 39.

⁵⁰ Saito, *supra* note 12, at 203-06.

⁵¹ Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. TIMES A14 (Jan. 23, 2008).

⁵² Glazier, *supra* note 47, at 1019.

set to go off without warning.”⁵³ The public shared these fears. Before 9/11 about a quarter of Americans felt very or somewhat worried that they or a family member could become a victim of terrorism; shortly after 9/11, the percentage was 59%.⁵⁴ Nearly 90% of Americans post-9/11 thought another terrorist attack *within a few months* was very or somewhat likely.⁵⁵

Other. There is no question that the government overwhelmingly targeted noncitizen Arabs and Muslims for preventive detention. Muslim Americans (citizens and noncitizens) are Others. Indeed, one set of researchers contends that Muslims are uniquely, doubly Other, classified in both the cultural and racial/ethnic outgroups.⁵⁶ A survey in 2004 put Muslims just above 50 on a temperature of feeling scale, as compared with a mid-70s score for Whites and high 60s for Blacks, Catholics, Jews, Asian-Americans and Hispanic-Americans.⁵⁷ Whites considered Muslims more violent and less trustworthy than any other group.⁵⁸ These negative stereotypes have been found to be significantly associated with an increased willingness to sacrifice civil liberties for security.⁵⁹

Illegal immigrants scored even lower than Muslims on the aforementioned temperature scale (high 30s)---indeed, the lowest of any group.⁶⁰ In one study conducted a year after 9/11, college students in the U.S.-Mexico border area felt greater symbolic threat concerning Arab immigrants than much more numerous Mexican immigrants.⁶¹ “Arab immigrants were viewed with more negative affect (greater prejudice) and were perceived to represent a greater threat to the cultural milieu of the U.S.”⁶² Japanese Americans after Pearl Harbor were deemed “foreign” enough to intern as Others, but Muslim Americans after 9/11 were not.⁶³

⁵³ Editorial, *A War Speech*, ST. LOUIS POST-DISPATCH C10 (Jan. 30, 2002).

⁵⁴ Gallup Poll, *supra* note 41.

⁵⁵ Brigitte L. Nacos, Yaeli Bloch-Elkon, & Robert Y. Shapiro, *Post-9/11 Terrorism Threats, News Coverage, and Public Perceptions in the United States*, 1 INT’L J. CONFLICT & VIOLENCE 105, 114 (2007).

⁵⁶ Kerem Ozan Kalkan, Geoffrey C. Layman, & Eric M. Uslaner, “*Bands of Others?*” *Attitudes toward Muslims in Contemporary American Society*, 71 J. POL. 1 (2009).

⁵⁷ John Sides & Kimberly Gross, *Stereotypes of Muslims and Support for the War on Terror*, J. POL. Fig. 1, at <http://home.gwu.edu/~jsides/muslims.pdf> (forthcoming).

⁵⁸ *Id.* at Fig. 2.

⁵⁹ *Id.* at 17.

⁶⁰ *Id.* at Fig. 1.

⁶¹ Robert T. Hitlan, Kimberly Carrillo, Michael A. Zárate, & Shelley N. Aikman, *Attitudes Toward Immigrant Groups and the September 11 Terrorist Attacks*, 13 PEACE & CONFLICT: J. PEACE PSYCH. 135, 149 (2007).

⁶² *Id.* at 144.

⁶³ See Gotunda, *supra* note 37, at 1188 (“One of the critical features of legal treatment of Other non-Whites has been the inclusion of a notion of ‘foreignness’ in considering their racial identity and legal status.”); COLE, *supra* note 37, at 97 (“The close

Terrorists themselves are plainly Other, described as: “predator,” “inherently malevolent,” “savage,” “beast,” “parasites,” and “evil and inhuman.”⁶⁴

At its most basic level, this 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.”⁶⁵

Terrorists were quickly added to this list as one of the most hated Other.

Undeterrable. The strongest evidence that terrorists were undeterrable came from the fact that the hijackers on 9/11 committed suicide as part of the attack. Our strongest sanction, the death penalty, is no deterrent to a suicide bomber.⁶⁶ This may be one reason the terrorists were branded as “inherently malevolent” “beasts.” An animal cannot be made human.

The government did not detain only known terrorists, but rather suspected terrorists. And suspicion was deemed strong enough to detain temporarily literally thousands of Arab and Muslim noncitizens. One explanation is that the stereotypes discussed above that Muslims are more violent and less trustworthy than other groups suggest that they may be resistant to deterrence. More to the point, one survey found that 43% of Americans thought Muslims were fanatic.⁶⁷ But the connection is tighter than that. Even before 9/11, 42 percent of respondents in one survey agreed with the statement that “Muslims

interrelationship between anti-Asian racism and anti-immigrant sentiment made the transition from enemy alien to enemy race disturbingly smooth.”).

⁶⁴ Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 766 (2011).

⁶⁵ *Id.* at 768 (quoting RICHARD JACKSON, *WRITING THE WAR ON TERRORISM: LANGUAGE, POLITICS, AND COUNTER-TERRORISM* 60 (2005)).

⁶⁶ Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1142 (2011).

⁶⁷ Madalla A. Alibeli & Abdulfattah Yaghi, *Theories of Prejudice and Attitudes toward Muslims in the United States*, 2 INT’L J. HUMAN. SOC. SCI. 21, 25 (2012).

belong to a religion that condones or supports terrorism.”⁶⁸ Echoing much earlier anti-Japanese sentiment, a 1993 anti-immigration publication warned against “Arab-born aliens who support terrorist activity and remain loyal to Middle East tyrants.”⁶⁹

II. MENTAL DEFECT

During two periods in American history, thousands of sex offenders have been detained for indeterminate terms. The stated justifications for such detentions have been prevention---as with the Japanese, Arabs, and Muslims---but also treatment. At least in the current phase, “the notion that the sex offenders are being medically ‘treated’ as part of this program is largely a fiction.”⁷⁰ Treatment, even when sincerely pursued, is usually ineffective.⁷¹ Perhaps as a result, very few sex offenders are ever released,⁷² leaving prevention as the primary, and perhaps only genuine, justification. Hence, sex offender commitment amounts to indefinite preventive detention, like the national security detentions discussed above. The driving force---fear of an untterrable Other---is also the same.

Defenders of sex offender commitment claim that it is a modest expansion of traditional, mental illness commitment.⁷³ Such commitments require dangerousness in addition to mental illness.⁷⁴ This is a more complicated case because treatment generally is a valid, required, and perhaps primary motivation for commitment.⁷⁵ In other words, mental illness civil commitment is not pure preventive detention---it has a genuine therapeutic component. Due largely to better treatments and massive contraction in available beds, the

⁶⁸ JACK G. SHAHEEN, ARAB AND MUSLIM STEREOTYPING IN AMERICAN POPULAR CULTURE 2-3 (1997).

⁶⁹ *Id.* at 8. “Also, about 17 percent of Americans supported the idea of locking up Muslims just in case they are planning terrorist attack.” Alibeli & Yaghi, *supra* note 67, at 25 (2006 survey).

⁷⁰ Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 983 (2011).

⁷¹ Vars, *Dangerousness*, *supra* note 5, at 857 n.14.

⁷² See John L. Schwab, *Note, Due Process and "The Worst of the Worst": Mental Competence in Sexually Violent Predator Civil Commitment Proceedings*, 112 COLUM. L. REV. 912, 917 (2012) (“Of the over 3,000 individuals detained as SVPs since 1990, just fifty have been released because medical professionals deemed them mentally stable and nondangerous enough to re-enter society.”).

⁷³ *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

⁷⁴ BRUCE J. WINICK, *CIVIL COMMITMENT* 2 (2005).

⁷⁵ See *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) (required); Paul S. Appelbaum, *A History of Civil Commitment and Related Reforms in the United States: Lessons for Today*, 25 DEV. MENTAL HEALTH L. 13 (2006) (primary).

duration of civil commitments, and hence daily census, has declined substantially since the 1950s.⁷⁶ The modest changes to Virginia law described below should be viewed against this larger context.

A. *First Generation Sex Offender Laws*

In the late 1930s, states began adopting what amounted to alternative, indeterminate sentencing programs for certain sex offenders.⁷⁷ The consensus view of historians is that intense media coverage of “a series of brutal and apparently sexually motivated child murders” precipitated the first generation of sex offender commitment laws.⁷⁸ It may not have been quite this simple. One pair of researchers finds that adopting states were predominantly urban and had recently experienced the greatest influx of blacks.⁷⁹ As discussed below, however, these alternative narratives also draw upon fear.

Some states started with rather narrow programs, but the overall scope became very broad. For example, California first targeted just child molesters, but then expanded its program to basically all crimes involving sexual activity.⁸⁰ California’s became the “most extensively utilized program,” confining approximately 1,000 people each year from 1949 to 1980.⁸¹ By the late 1960s, well over half of states had adopted such laws, but only a handful retained them in 1990.⁸²

Most laws were broad but not mandatory, so only a subset of those eligible was actually detained. “In Minnesota [between 1940 and 1960], for example, the typical commitments were for nonviolent behavior such as window peeping, indecent exposure, and consenting adult homosexuality, with three-quarters of the individuals being first-time offenders.”⁸³ Consensual homosexuality was the predicate for

⁷⁶ JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 87, 144-45 (1992).

⁷⁷ John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 659-60 (1992).

⁷⁸ Estelle B. Freedman, “*Uncontrolled Desires*”: *The Response to the Sexual Psychopath, 1920-1960*, 74 J. AM. HISTORY 83, 92 (1987).

⁷⁹ John F. Gallihar & Cheryl Tyree, *Edwin Sutherland's Research on the Origins of Sexual Psychopath Laws*, 33 SOC. PROBS. 100, 109-110 (1985).

⁸⁰ Roxanne Lieb, Vernon Quinsey, & Lucy Berliner, *Sexual Predators and Social Policy*, 23 CRIME J. 43, 64 (1998).

⁸¹ *Id.* at 63-64.

⁸² La Fond, *supra* note 77, at 660-61.

⁸³ Lieb, Quinsey, & Berliner, *supra* note 80, at 59. See also MORRIS PLOSCOWE, SEX AND THE LAW 229 (1951) (“Because of the vagueness of the statutes, the sex-psychopath laws have been used primarily against minor sex offenders and in considerable degree *have not* been employed to isolate dangerous sex criminals.”); PAUL W. TAPPAN, THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATION OF THE COMMISSION ON THE HABITUAL SEX

detention of over seven percent of persons detained in Nebraska between 1949 and 1956.⁸⁴ Four out of the first 100 cases studied at the New Jersey diagnostic center under a new sexual psychopath law were “fixed homosexual deviates.”⁸⁵ In another jurisdiction, one of the first 14 cases adjudicated was a “non-aggressive homosexual, convicted of passing bad checks.”⁸⁶ In Minnesota, “[m]ost were detained for homosexual activity, not for being hard-core sex criminals.”⁸⁷

Fear. In 1937, J. Edgar Hoover warned that the “sex fiend” had become a “sinister threat to the safety of American childhood and womanhood.”⁸⁸ The fears that drove the first “sex crime panic” were specific and general.⁸⁹ Individual acts of sexual brutality, once publicized, led to demands for clamping down on sex crimes.⁹⁰ Brutality is frightening enough, but at this moment in history it activated other, deeper anxieties.

As mentioned above, highly urbanized states tended to adopt sexual psychopath legislation. Closer proximity to other people meant more opportunity for victimization. Growing populations of a traditionally feared minority group, black people, was also correlated

OFFENDER (1950) (same). On homosexuality generally, compare Freedman, *supra* note 78, at 102 (“[M]en diagnosed as psychopaths were more likely to be accused of pedophilia and homosexuality than of rape or murder.”), with Committee on Psychiatry and Law, *Psychiatry and Sex Psychopath Legislation: The 30s to the 80s*, Vol. IX, Pub. No. 98, Page 831, 842 (Apr. 1977) (“Less threatening acts of a sexually deviant or dysfunctional nature (e.g., homosexuality between consenting adults, exhibitionism, and voyeurism) are usually not included.”).

⁸⁴ Domenico Caporale & Deryl F. Hamann, *Sexual Psychopathy---A Legal Labyrinth of Medicine, Moral and Mythology*, 36 NEB. L. REV. 325 tbl.1 (1957).

⁸⁵ TAPPAN, *supra* note 83, at 26.

⁸⁶ *Id.* at 28. See also Preliminary Report of the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Process (Cal. 1949) (Statement of Dr. Eugene Ziskind) (“For this group, namely the constitutional homosexuals, the Sex Psychopath Act should be revised in keeping with the more scientific and tolerant attitudes existing in other countries.”).

Sexual psychopath commitment was by no means the only method used to penalize homosexuality: 9% of felony sex convictions in New York County from 1932-1938 were for homosexuality. Jack Frosch & Walter Bromberg, *The Sex Offender---A Psychiatric Study*, 9 AM. J. ORTHOPSYCHIATRY 761 (1939). However, in Los Angeles in the early 1960s, less than one percent of felony convictions for consensual homosexuality resulted in commitment. *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643, 767 tbl.a, 780 n.63 (1966).

⁸⁷ NEIL MILLER, SEX-CRIME PANIC: A JOURNEY TO THE PARANOID HEART OF THE 1950S 82 (2002).

⁸⁸ Frosch & Bromberg, *supra* note 86, at 761 (quoting an article titled “War on the Sex Criminal”).

⁸⁹ Steven R. Morrison, *Creating Sex Offender Registries: The Religious Right and the Failure To Protect Society's Vulnerable*, 35 AM. J. CRIM. L. 23, 46 (2007); Freedman, *supra* note 78, at 92.

⁹⁰ Freedman, *supra* note 78, at 92.

with sex offender commitment. Even more broadly, some have argued that the Cold War labeled nonconformity, including sexual nonconformity and homosexuality, as a threat to national security.⁹¹

Other. Sex offenders were (and are) perceived as less than human. J. Edgar Hoover described the “sex fiend” as the “most loathsome of all the vast army of crime.”⁹² In affirming its first generation sexual psychopath law, the Minnesota Supreme Court described covered sex offenders as “unnaturals,” “hopelessly immoral,” and “insane.”⁹³ Such language obviously included such “outsider figures” as would be recognized today as “fiends and psychopaths, pedophiles and predators.”⁹⁴ But it also included homosexuals: prior to the 1950s, the popular perception of the homosexual was “the pathological, predatory, sexually violent deviant.”⁹⁵

Undeterrable. Sex offenders were seen to be out of control. Recall that the Minnesota Supreme Court described sex offenders subject to detention not just as “immoral,” but “hopelessly” so.⁹⁶ This lack of control, and hence undeterrability, was a defining attribute of those subject to detention. “Almost every state included the phrase ‘utter lack of power to control his sexual impulses.’”⁹⁷

The first wave of sex offender commitment falls squarely within the paradigm derived from the national security context: overt large-scale indefinite preventive detention in response to fear of an undeterrable Other.

B. Second Generation Sex Offender Laws

On May 20, 1989, a young boy in Tacoma, Washington was the victim of a brutal sexual attack by a man with a history of killing, assault, and kidnapping.⁹⁸ The current phase of sex offender commitment began one year later with Washington’s “sexually violent

⁹¹ Morrison, *supra* note 89, at 47; Freedman, *supra* note 78, at 97.

⁹² Frosch & Bromberg, *supra* note 86, at 761.

⁹³ State of Minnesota ex rel. Pearson v. Probate Court, 287 N.W. 297, 299, 301, 303 (Minn. 1939), *aff’d*, 309 U.S. 270 (1940).

⁹⁴ PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 236 (1998).

⁹⁵ Michael A. Smyth, *Queers and Provocateurs: Hegemony, Ideology, and the “Homosexual Advance” Defense*, 40 LAW & SOC’Y REV. 903, 904 (2006).

⁹⁶ Pearson, 287 N.W. at 301.

⁹⁷ Freedman, *supra* note 78, at 84 n.2.

⁹⁸ David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525 (1992).

predator” (“SVP”) act.⁹⁹ This phase differed from the first by permitting detention *after* defendants had served time for the predicate offenses.¹⁰⁰

At least twenty states and the federal government have SVP laws.¹⁰¹ The Kansas statute is typical. It defines “sexually violent predator” as: “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence.”¹⁰²

This definition withstood constitutional challenge in the United States Supreme Court case of *Kansas v. Hendricks*.¹⁰³ Five years later the Court clarified that “there must be proof of serious difficulty in controlling behavior.”¹⁰⁴ A key statutory term is “sexually violent offense.” That runs the gamut from rape,¹⁰⁵ to “any act which . . . has been determined beyond a reasonable doubt to have been sexually motivated.”¹⁰⁶ Notably, Kansas still purports to criminalize same-sex adult sodomy,¹⁰⁷ but that is not separately listed as a “sexually violent offense” for purposes of the SVP law.

Thousands of individuals have been detained under SVP laws.¹⁰⁸ Looking just at Minnesota, it appears that current detainees have many more prior offenses than first generation detainees. In the first generation in Minnesota, three-quarters were first-time offenders.¹⁰⁹ In the current wave, the number is flipped: three-quarters of civilly committed sex offenders had two or more felony convictions.¹¹⁰

Few, if any, individuals have been detained pursuant to a current SVP law for having participated in consensual adult homosexual activity. Only four states were enforcing anti-sodomy laws against homosexuals in 2003 when the United States Supreme Court declared such laws unconstitutional.¹¹¹ Kansas was one such state. There are 127 Kansas cases that contain the phrase “sexually violent predator.” Of these, only six also include the words “homosexual” or “homosexuality.”

⁹⁹ *Id.*

¹⁰⁰ Vars, *Dangerousness*, *supra* note 5, at 857.

¹⁰¹ Schwab, *supra* note 72, at 916-17.

¹⁰² KAN. STAT. ANN. § 59-29a02(a).

¹⁰³ 521 U.S. 346 (1997).

¹⁰⁴ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

¹⁰⁵ KAN. STAT. ANN. § 59-29a02(e)(1).

¹⁰⁶ *Id.* § (e)(13).

¹⁰⁷ KAN. STAT. ANN. § 21-5504(a)(1).

¹⁰⁸ Vars, *Dangerousness*, *supra* note 5, at 857 n.12.

¹⁰⁹ Lieb, Quinsey, & Berliner, *supra* note 80, at 59.

¹¹⁰ Office of the Legislative Auditor, *Evaluation Report: Civil Commitment of Sex Offenders* 7 fig.1.2 (Mar. 2011).

¹¹¹ *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

In the first case, homosexual activity was cited by an expert, but there were also convictions for aggravated (under age or nonconsensual) criminal sodomy.¹¹² The second and third cases involved aggravated incest.¹¹³ The fourth case involved registration, not commitment.¹¹⁴

The last two cases are telling. The respondent in one complained that repeated references to his “homosexuality” were improper because homosexuality is not a mental abnormality or personality disorder.¹¹⁵ The court rejected this argument not as stated but on the ground that respondent admitted to being bisexual---which was consistent with the testimony and found by the lower court---so the court did not rely on his homosexual orientation.¹¹⁶ His homosexual *acts*, as opposed to orientation, were properly considered in evaluating the respondent’s risk to both sexes.¹¹⁷ In the final case, the court rejected commitment precisely because “it appears that the two instances of homosexual activity being referred to do not support the position that he has sexually reoffended with a child.”¹¹⁸ In reversing, the Kansas Supreme Court emphasized that some of the activity involved an underage individual, although not a child.¹¹⁹ Homosexuality was not cited as a risk factor.¹²⁰

In sum, during the first wave in Nebraska homosexuality was the predicate for detention in over seven percent of cases.¹²¹ During the second wave just across the border in Kansas, an admittedly non-scientific review of case law finds not a single case in which homosexuality was a predicate for detention. More broadly, one commentator concludes that during the second wave of sex offender commitment, unlike the first, “[m]ental hospitals are not used as warehouses for homosexuals.”¹²²

¹¹² *In re Patterson*, No. 107,232, 301 P.3d 789 (Table), 2013 WL 2395313 (Kan. App. May 24, 2013); KAN. STAT. ANN. § 21-5504(b).

¹¹³ *In re Lowry*, No. 102,862, 2013 WL 1490946 (Kan. App. Apr. 12, 2013); *In re Care and Treatment of Lowry*, No. 102,862, 277 P.3d 1193 (Table), 2012 WL 2148159 (Kan. App. June 08, 2012).

¹¹⁴ *State v. Coman*, 214 P.3d 1198 (Kan. App. 2009).

¹¹⁵ *In re Martin*, No. 104,826, 259 P.3d 749 (Table), 2011 WL 4357844 (Kan. App. Sept. 16, 2011).

¹¹⁶ *Id.* at *4.

¹¹⁷ *Id.* at *5.

¹¹⁸ *In re Care and Treatment of Williams*, No. 99,235, 214 P.3d 1225 (Table), 2009 WL 2762455 (Kan. App. Aug. 28, 2009).

¹¹⁹ *In re Williams*, 253 P.3d 327, 337 (Kan. 2011).

¹²⁰ This is not to say that the fact the victim was male did not influence the outcome. My claim is that disparate treatment has been dramatically reduced, or even eliminated; disparate impact almost certainly remains. Vars, *Rethinking*, *supra* note 5, at 165 n.13.

¹²¹ Caporale & Hamann, *supra* note 84, at 325 tbl.1.

¹²² MILLER, *supra* note 87, at 290.

Fear. Sex offender commitment laws were adopted almost uniformly in direct response to brutal and highly salient sex crimes.¹²³ Fear that such atrocities would be repeated was the primary catalyst.¹²⁴ Vivid cases, not statistics, generate fear.¹²⁵

Other. Sex offenders remain decidedly Other. “It is difficult, if not impossible, to name a group in the United States that is more reviled than sex offenders.”¹²⁶ Sex offenders are viewed as “outsiders” and “monsters,” “driven by non-human, animal impulses.”¹²⁷ They have been described by lawmakers as “the vile and the worthless.”¹²⁸ Otherness and fear can go hand in hand and connect to terrorism detentions. Fear of an outsider group is commonly cited as the key ingredient for sex offender commitment.¹²⁹ Sex offenders have been described as “each community’s Osama bin Laden”¹³⁰ and regarded as “domestic terrorists.”¹³¹

Undeterrable. It is believed that sex offenders cannot be deterred. They are not just “monsters”; they are monsters “incapable of making choices”¹³² and “beyond comprehension or reform.”¹³³ Sex offenders are perceived as “the new lepers: diseased, incurable, unable to control outbreaks.”¹³⁴ Dread of these uncontrollable monsters has driven policy again.

C. Virginia Tech Shooting

On April 16, 2007, Seung Hui Cho shot and killed 33 people, including himself, and injured about 30 others, on the Virginia Tech

¹²³ JANUS, *supra* note 3, at 14; Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 785 (1996).

¹²⁴ Vars, *Dangerousness*, *supra* note 5, at 857-58. Accord JANUS, *supra* note 3, at 4 (2006) (“a danger that we all dread”); Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 113 (1996) (“public fear”); La Fond, *supra* note 77, at 675 (“public fear”).

¹²⁵ La Fond, *supra* note 77, at 680; JANUS, *supra* note 3, at 16.

¹²⁶ Yung, *supra* note 70, at 988.

¹²⁷ John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y. L. SCH. L. REV. 31, 34, 38 (2008/09).

¹²⁸ Michael Louis Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. REV. 77, 82 (2005).

¹²⁹ JANUS, *supra* note 3, at 108; Kelly, *supra* note 33, at 551.

¹³⁰ JANUS, *supra* note 3, at 131.

¹³¹ Douard, *supra* note 127, at 38.

¹³² *Id.* at 34.

¹³³ Margulies, *supra* note 64, at 752.

¹³⁴ Eric S. Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 CRIM. L. BULL. 576 (2004) (quoting BARBARA HUDSON, *JUSTICE IN THE RISK SOCIETY* 67 (2003)).

campus.¹³⁵ Cho, who had psychiatric problems, had previously been found to be an “imminent danger,” but ordered into outpatient rather than inpatient treatment.¹³⁶ In response to the shooting, Virginia broadened its civil commitment standards, replacing the “imminent danger” requirement with a mere “substantial likelihood” of harm.¹³⁷ The impact of the change has been “minimal,”¹³⁸ probably due to space and budget constraints.¹³⁹

Still, the government at least attempted to expand indefinite preventive detention after the Virginia Tech shooting. There was ample fear and horror at the nature of the crime. Perhaps more important, the mentally ill are almost a paradigmatic undeterrable Other. Less susceptible to the force of reason, the mentally ill are less able to modify their behavior in response to the threat of criminal sanction.¹⁴⁰ They cannot control their illness and by definition it is the source of their dangerousness. In perception at least, mental illness is quite analogous to sexual deviance.

Although generally not as despised as sex offenders and terrorists, the mentally ill are an identifiable and devalued minority group.¹⁴¹ Only 25% of people with mental health symptoms in one study believed that people were caring and sympathetic toward persons with mental illness.¹⁴² Such feelings are justified. In another study, 64% of Americans reported that they would be “definitely” or “probably” unwilling to work closely on the job with someone who had schizophrenia.¹⁴³

¹³⁵ Alison Pfeffer, Note, “Imminent Danger” and Inconsistency: The Need for National Reform of the “Imminent Danger” Standard for Involuntary Civil Commitment in the Wake of the Virginia Tech Tragedy, 30 CARDOZO L. REV. 277, 277 (2008) (citing Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech In Deadliest Shooting in U.S. History*, WASH. POST A1 (Apr. 17, 2007)).

¹³⁶ *Id.*

¹³⁷ *Id.*; VA. STAT. §§ 37.2–808, 37.2–809.

¹³⁸ Laurence Hammack, *Mental Care Mandates See Decline*, ROANOKE TIMES & WORLD NEWS A1 (Apr. 19, 2009).

¹³⁹ *Parents of Mentally Ill Tell Lawmakers of Difficulties Some Laws Present*, CQ NEWS (Mar. 5, 2013).

¹⁴⁰ Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 59, 63 (1982).

¹⁴¹ Joseph M. Livermore, Carl P. Malmquist, & Paul E. Meehl, *On the Justifications for Civil Commitment*, 117 U. PENN. L. REV. 75, 78 (1968) (“The common distinguishing factor in civil commitment is aberrance.”).

¹⁴² CDC, *Attitudes Toward Mental Illness --- 35 States, District of Columbia, and Puerto Rico*, 2007, at 619-25 (May 28, 2010), at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5920a3.htm> (visited Aug. 14, 2013).

¹⁴³ BERNICE A. PESCOLIDLO ET AL., AMERICANS’ VIEWS OF MENTAL HEALTH AND ILLNESS AT CENTURY’S END: CONTINUITY AND CHANGE 31 Tbl.11 (MacArthur 1996 GSS).

It should be noted that Virginia is not alone in expanding civil commitment criteria in response to public fear. John Monahan, *A Jurisprudence of Risk Assessment*:

Fear of an undeterrable Other, the mentally ill, prompted expansion of preventive detention authority in Virginia, but not a corresponding increase in detentions. The most likely explanation is that there simply weren't the beds available to accommodate new patients.

III. PROSPECTS FOR EXPANSION

Will the logic of terrorist and sex offender commitment be expanded to other groups? In the terrorism context, expansion would mean expansion to citizens, who were interned in large numbers during World War II but not after 9/11.¹⁴⁴ The recipe for expanded indefinite civil commitment is fear of an undeterrable Other. Arab and Muslim American citizens are an identifiable and devalued minority, although less disliked than illegal immigrants. Many in the majority continue to believe that Islam endorses fanaticism and terrorism---by implication, Muslims are undeterrable. Their fate would seem to turn largely on fear. That this group was not widely targeted for preventive detention after the massive 9/11 attack suggests that fear will have to be very intense indeed to prompt a change of course.¹⁴⁵ It is probably not going to happen due to mere inattention¹⁴⁶ or passive mission creep.¹⁴⁷

Two citizens and two non-citizens, either journalists or members of advocacy organizations, recently claimed that they feared indefinite government detention pursuant to a statute reaffirming extraordinary post-9/11 powers.¹⁴⁸ The Second Circuit rejected that claim, holding that the statute did not expand authority to detain citizens.¹⁴⁹ Importantly, the court recognized that there might be such authority, just not based on this statute.¹⁵⁰ The court's ruling with respect to the non-citizens is more interesting: they lacked standing because, despite

Forecasting Harm Among Prisoners, Predators, and Patients, 92 VA. L. REV. 391, 400, 403 (2006); Glenn L. Pierce, Mary L. Durham, & William H. Fisher, *The Impact of Public Policy and Publicity on Admissions to State Mental Hospitals*, 11 J. HEALTH POLITICS, POL'Y & L. 41 (1986).

¹⁴⁴ Commentators debate whether the War on Terror reflects progress since the widely discredited Japanese internment. Compare Tushnet, *supra* note 17, with Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006).

¹⁴⁵ "[I]f the United States had been hit with six terrorist attacks on the scale of September 11 within a single month in 2001, who knows what measures we might have embraced?" STONE, *supra* note 20, at 171.

¹⁴⁶ Cole, *supra* note 3, at 882.

¹⁴⁷ *Id.* at 749.

¹⁴⁸ *Hedges v. Obama*, 724 F.3d 170, 186-87 (2d Cir. 2013).

¹⁴⁹ *Id.* at 193.

¹⁵⁰ *Id.*

arguably falling within the scope of the statute, “they [had] not established a basis for concluding that enforcement against them [was] even remotely likely.”¹⁵¹ Of course, enforcement against non-citizens with closer ties to terrorism may well be likely enough to establish standing, but the Second Circuit basically dismissed the threat that preventive detention would be expanded, even to *non-citizens* who had indirectly supported terrorism.

The first wave of sex offender commitment expressly targeted homosexuals; the current wave does not.¹⁵² Nonetheless, the logic of sex offender commitment could be expanded to other groups. John La Fond warned of this potential almost immediately after Washington adopted the first new wave SVP law.¹⁵³ His list of possible targets includes drunk drivers, domestic abusers, drug users, and gang members.¹⁵⁴ This warning came before the Supreme Court grafted onto Kansas’s SVP law a control-defect requirement.¹⁵⁵ But most criminals have a control defect, especially those in La Fond’s list.¹⁵⁶ Drug users and drunk drivers may well have impaired volition.¹⁵⁷ Domestic abusers, like sex offenders, could be viewed as pathological, not just immoral. And gang members, like the allegedly disloyal Japanese, adhere to a code of conduct that may mitigate the deterrent effect of law. In other words, these criminals are all arguably undeterrable---mad, not just bad.¹⁵⁸

That leaves Otherness and fear. Drunk drivers almost certainly fail the Otherness test. Seventeen million Americans admitted to drunk driving in 2010, including almost a quarter of people aged 21 to 25.¹⁵⁹ There is powerful stigma associated with drunk driving, but,

¹⁵¹ *Id.* at 202.

¹⁵² One commentator concludes that “the sex offender is the new homosexual.” Joseph J. Fischel, *Transcendent Homosexuals and Dangerous Sex Offenders: Sexual Harm and Freedom in the Judicial Imaginary*, 17 DUKE J. GENDER L. & POL’Y 277, 302 (2010). But that’s not correct: rather, the old definition of sex offender included homosexual; the new one does not. The same commentator, however, nicely summarizes the critical change in perspective: homosexuals are now considered people, sex offenders are still not. *Id.* at 307.

¹⁵³ La Fond, *supra* note 77, at 698-99.

¹⁵⁴ *Id.* at 699. For a similar list and concern, see Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 121-22 (1999). As a preliminary matter, there would seem to be no equality concerns that would push against preventive detention of these groups, unlike homosexuals and citizens.

¹⁵⁵ See *supra* note 104 and accompanying text.

¹⁵⁶ JANUS, *supra* note 3.

¹⁵⁷ *E.g.*, Robinson v. California, 370 U.S. 660, 671 (1962) (Douglas, J., concurring) (“The addict is under compulsions not capable of management without outside help.”).

¹⁵⁸ Morse, *supra* note 124, at 134.

¹⁵⁹ Mothers Against Drunk Driving, *Statistics*, at <http://www.madd.org/statistics/> (visited Aug. 8, 2013).

assuming no accident, less than that attributed to drug use.¹⁶⁰ Some subset of serious drug users may therefore be sufficiently Other. And while there is currently not enough fear to justify preventive detention, that could change with a new drug or other market shock.¹⁶¹

Domestic abusers, like drunk drivers and drug users, are hard to identify in advance. (Being identifiable, recall, is a prerequisite for Otherness.) That may be why current practice in some jurisdictions is to preventively detain some domestic abusers after they have acted but before they are convicted of any crime.¹⁶² Gang members, perhaps easier to identify, are treated similarly when bail is denied because they are considered dangerous.¹⁶³ But government has at times been even more proactive regarding gang membership.

Chicago's 2000 Gang Congregation Ordinance is a good example. It criminalizes gang loitering, which is defined as loitering with intent to commit a crime.¹⁶⁴ As written, this is plainly preventive: the goal is to preempt the planned crime. Almost 3,000 orders to disperse were issued by Chicago police from 2000 through October 15, 2010, over 97% to blacks or Hispanics.¹⁶⁵ Blacks and Hispanics are certainly Others; black and Hispanic gang members doubly so.

Among La Fond's list of four groups, gang members would seem to be the only group sufficiently Other for preventive detention. The last ingredient is fear. To be sure, people fear gang members, but probably not in the same way as they fear terrorists or sex offenders. In 2008, about 5% of violent crime victims could determine that the offender or offenders were gang members.¹⁶⁶ Of course, many victims do not know and many crimes go unreported. The FBI estimates that gangs are responsible for an average of 48% of violent crime in most jurisdictions.¹⁶⁷ That is a huge number, which could drive fear through

¹⁶⁰ Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 419 (2012).

¹⁶¹ Mara Lynn Krongard, *A Population at Risk: Civil Commitment of Substance Abusers after Kansas v. Hendricks*, 90 CAL. L. REV. 111, 145-47 (2002).

¹⁶² See, e.g., Ted Sampsell-Jones, *Preventive Detention, Character Evidence, and the New Criminal Law*, 2010 UTAH L. REV. 723, 726; Steven J. Mulroy, "Hold" On: *The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 817-18, 824 (2013).

¹⁶³ K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620 (2011).

¹⁶⁴ Jane Penley, *Comment, Urban Terrorists: Addressing Chicago's Losing Battle with Gang Violence*, 61 DEPAUL L. REV. 1185, 1192 (2012).

¹⁶⁵ *Id.* at 1200 fig.1, 1201 fig.2.

¹⁶⁶ Bureau of Justice Statistics, *Gangs*, at <http://www.bjs.gov/index.cfm?ty=tp&tid=36> (visited Aug. 8, 2013).

¹⁶⁷ Federal Bureau of Investigation, *2011 National Gang Threat Assessment – Emerging Trends*, at <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment> (visited Aug. 8, 2013).

the roof if combined with an increase in crime rates like the one observed in the 1960s and 1970s.¹⁶⁸

In order to drive policy, however, fear must be experienced by those in power. The victims of violent crime are also disproportionately powerless. From 1980 to 2008, the homicide victimization rate for blacks was six times higher than the rate for whites.¹⁶⁹ Most murders are intraracial: 84% of white victims were killed by whites, and 93% of black victims were killed by blacks.¹⁷⁰ The Chicago dispersal order data and these figures together suggest that at least the most visible gang members tend to be black and Hispanic and prey upon individuals in the same groups. That only 22% or so of homicide victims were killed by strangers probably reduces the level of fear the in-group feels toward gang members.¹⁷¹

A final important factor weighs against the likelihood of vast mission creep: cost. It would be infeasible to preventively detain, even for a relatively short time, every possible drunk driver, drug user, domestic abuser, or gang member.¹⁷² Of course, the intervention could be limited to the most dangerous, as is true for sex offender and mental illness commitment. But the steep cost of incarceration tilts toward freedom. Indeed, it appears to have been the greatest impediment to large-scale expansion of mental illness civil commitment in Virginia. The ingredients may be there---at least after a frightening tragedy like Virginia Tech---but the long-term cost-saving trend of deinstitutionalization is not easily reversed.

The high cost of incarceration explains why indefinite preventive detention has been limited to categories of people deemed undeterrable. In a perfect world, the threat of enforcement would eliminate all crime. Society would have to lock up no one. In our imperfect world, the hope is that locking up one wrong-doer discourages many others. On the other hand, preventive detention works only if we can accurately identify individuals who are very likely to commit crimes. Sex offender commitment relies on some of the best actuarial instruments, but few, if any, individuals can be confidently classified as more likely than not to commit an offense.¹⁷³ Many (perhaps most) detained sex offenders would not commit a crime if released. Society is wasting money by keeping them locked up.

¹⁶⁸ Alexia Cooper & Erica L. Smith, *Homicide Trends in the United States, 1980-2008*, at 2 fig.1, at <http://www.bjs.gov/content/pub/pdf/htus8008.pdf> (visited Aug. 6, 2013).

¹⁶⁹ *Id.* at 3 tbl.1.

¹⁷⁰ *Id.* at 13.

¹⁷¹ *Id.* at 16.

¹⁷² Brian J. Pollock, *Kansas v. Hendricks: A Workable Standard for "Mental Illness" or a Push Down the Slippery Slope Toward State Abuse of Civil Commitment?*, 40 ARIZ. L. REV. 319, 348 (1998).

¹⁷³ Vars, *Rethinking*, *supra* note 5.

Returning to gang members, I earlier suggested that adherence to a gang code (like being Japanese during World War II) might be viewed as rendering a member undeterrable. So far society appears to disagree.¹⁷⁴ The dominant law enforcement responses to gang violence have been focused on deterrence: more police¹⁷⁵ and stiffer sentences.¹⁷⁶ There are even serious efforts at intervention and rehabilitation.¹⁷⁷ Until a jurisdiction believes these measures are futile and fear escalates, it seems unlikely that there will be overt indefinite preventive detention of gang members.

CONCLUSION

There have been two periods in which the United States has preventively detained hundreds on grounds of national security or sex offending. In the earlier two periods, larger numbers and more types of individuals were detained: tens of thousands of citizens during World War II; hundreds of homosexuals between the 1930s and 1980s. Against this backdrop, the current wars on terror and sex offenders seem less egregious. To be sure, they rest on dangerously plastic legal concepts that could expand to cover other groups. But the likelihood of such expansion may be somewhat less than previously suggested.

Large-scale, indefinite preventive detention has historically taken place in response to fear of an undeterrable Other. Fear will come and go. Enemies and criminals can be labeled undeterrable. But the types of people we consider Other may have shrunk as we became more diverse. When everyone is a minority, no one is.¹⁷⁸ The dividing line on terrorism post-9/11 was citizenship. Arab and Muslim American U.S. citizens were not preventively detained in large numbers, though thousands of noncitizens in these groups were. The progress on sex

¹⁷⁴ Cf. Stephanie Smith, *Civil Banishment of Gang Members: Circumventing Criminal Due Process Requirements?*, 67 U. CHI. L. REV. 1461, 1468 (2000) (“There is no indication that the gang members are not capable of being deterred.”).

¹⁷⁵ E.g., Jim Guy, *Homicide rate down despite latest surge*, FRESNO BEE B2 (Dec. 22, 2005) (“An increased number of officers on the street for gang enforcement creates more of a deterrent, the [police] chief added.”).

¹⁷⁶ 18 U.S.C. § 521. This mirrors the response to the Oklahoma City bombing, *see supra* note 40 and accompanying text. The assumption appears to have been that militia members, like gang members, are deterrable.

¹⁷⁷ Scott H. Decker, *Strategies to Address Gang Crime: A Guidebook for Local Law Enforcement*, at <http://www.cops.usdoj.gov/Publications/e060810142Gang-book-web.pdf> (visited Aug. 8, 2013).

¹⁷⁸ Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747 (2011) (“pluralism anxiety”).

offender commitment seems all but irreversible. It is hard to imagine this country again detaining people merely for being homosexual.¹⁷⁹

Will the current preventive detention regimes expand in other directions? Probably not. It must be conceded that while the citizenship boundary appears to be robust based on post-9/11 actions, fear of a discrete minority of citizens could become so pronounced as to erase that line. In all likelihood, it will take a massive threat to this country. The sex offender logic could encompass almost any dangerous person, but no other group of people is as frightening and hated. Black and Hispanic gang members are perhaps the group most at risk, but they do not seem to be perceived as undeterrable. Future changes in the three key variables cannot be ruled out and could lead to mission creep, but such changes do not appear imminent. Mission creep does not seem likely.

Importantly, this Article examines just the tip of an iceberg: when the government openly declares that it will indefinitely incarcerate people solely because they are deemed dangerous. That is just a small part of the “preventive state,” which manifests itself in many ways and is growing.¹⁸⁰ With the exception of quarantine and mental illness civil commitment, open preventive detention has recently expanded in existing areas and entered new ones.¹⁸¹ Immigration and criminal pre-trial proceedings are two important areas where overt “short-term” detentions have grown dramatically. This would be cause for alarm even without terrorism and sex offender detentions. And the rise of prevention has many more subtle implications. Guantanamo and sexual predator detentions make headlines, but the growing threats to civil liberties lurk beneath the surface.

¹⁷⁹ Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2013 WL 3196928 (June 26, 2013) (holding that the Defense of Marriage Act violated the Equal Protection Clause).

¹⁸⁰ Carol Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774 (1998).

¹⁸¹ See Klein & Wittes, *supra* note 44, at 85; Ronald J. Allen & Larry Laudan, *Deadly Dilemmas III: Some Kind Words for Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 781 (2011); see also Frances M. Kreimer, *Note, Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485 (2012) (immigration). See generally Morse, *supra* note 124, at 114 (“Preventive detention has expanded in recent years and pressure for further expansion is predictable.”).