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Preempting Justice: "Precrime" in Fiction and in Fact

Mark C. Niles[†]

[W]e get them first, before they can commit an act of violence. So the commission of the crime itself is absolute metaphysics. We claim they're culpable. They, on the other hand, eternally claim they're innocent. And, in a sense, they are innocent. In our society we have no major crimes, but we do have a detention camp full of would-be criminals.[1]

That which keeps us safe will also keep us free.[2]

I. INTRODUCTION

In the opening scene of Steven Spielberg's 2002 film adaptation of Philip K. Dick's short story *The Minority Report*,[3] we see stylistically edited, disjointed images that appear to depict a man murdering two lovers. It is soon made clear that the images are the video representations of precognitive predictions of a future crime that were made by members of a futuristic crime prevention agency.

Later in the film, we see the same man, at home with his wife—the woman he is shown murdering in the earlier images—and it becomes clear that we are watching the last few moments before the predicted murder. While retrieving the daily paper, the husband notices a familiar man standing in the park across the street from the house and becomes suspicious. Instead of leaving for work as he normally would, he hides behind a tree after leaving the house and watches his wife open the door to let this man inside. Unnoticed, the husband follows his wife and her lover upstairs, hiding while they have sex. When he finally reveals himself, he

picks up the scissors we have already seen him kill the lovers with, but he is grabbed from behind by the chief of the crime prevention unit just before he lunges at his wife.[4] The police enter the bedroom, and the husband is quickly taken into custody. The chief tells the man: "By mandate of the District of Columbia Precrime Division, I am placing you under arrest for the future-murder of [your wife and her lover] to take place today, April 22nd, at 0800 hours and four minutes." The man responds, "No, I didn't do anything. . . . I wasn't going to do anything!"

Later, we see the man has been taken to a detention facility that houses other pre-murderers, all encased in individual glass cells, in a state of permanent suspended animation, forced to eternally relive the video predictions of the crimes they would have committed.

The *Minority Report's* fictional, futuristic depiction of a law enforcement unit that prevents predicted crimes before they occur, fanciful as it might seem, bears a striking resemblance to post-9/11 law enforcement and national security policies implemented by the United States government.[5] On June 23, 2006, in Miami, Florida, for example, the Federal Bureau of Investigation (FBI) arrested seven men who belonged to what was described as "a homegrown terrorist cell."[6] The federal officials asserted that the accused individuals—who would come to be known as the "Liberty City Seven"[7]—intended to carry out domestic terrorist activities, including a "plan" to blow up the Sears Tower in Chicago, Illinois.[8]

However, at a news conference (attended by scores of reporters and providing the lead story for local and national newscasts throughout the United States), FBI officials readily acknowledged that the supposed terrorists had never met with, nor had any contact with, any domestic or international terrorist organization, nor had they obtained any explosives or explosive devices.[9] The Deputy FBI Director referred to the plan to attack the Sears Tower as "aspirational rather than operational."[10] Indeed, the "terrorists" were identified as the result of an FBI sting operation in which an agent, posing as a terrorist, contacted the suspects in order to develop a

relationship with them that could facilitate their prosecution.[11] The arrests were made only after the nascent plan "had largely petered out because of organizational problems," and presumably, there was no longer any hope that the "terrorists" might actually commit an overt act.[12] The Washington Post observed that the "case underscores the murkiness that has been common to many of the government's terrorism-related prosecutions since the Sept[ember] 11, 2001, attacks, cases that often hinge on ill-formed plots or debatable connections to terrorism."[13]

After two mistrials, four of the seven men were convicted of providing material support for terrorism,[14] while two others were acquitted of all charges.[15] In November 2009, the "leader" of the group was sentenced to thirteen and one-half years in prison.[16]

Viewing these policies through the prism of this science-fiction morality tale provides an intriguing foundation to address the vexing questions raised by the preemptive law enforcement procedures increasingly imposed within this country and in its dealings with foreign nations. These questions include: What level of certainty that a crime or other dangerous act is on the verge of being committed will justify apprehension and prosecution of a would-be criminal? What level of fallibility in the predictive process will be acceptable to the law enforcement community and the public at large? And what kind of punishment, if any, is appropriate for someone who is prevented from committing a crime, even if we are sure that he or she would have done so absent the intervention?

The short story, *The Minority Report*, relies on a darkly dystopian future that bears limited familiarity to the modern world, while the film version enhances verisimilitude and credibility with a tantalizingly familiar image of our near future. In the short story, the "precrime" technology is depicted as impeccable and ultimately immune from human attempts to undermine its effectiveness and impact, while in the film, the system is successfully circumvented (and ultimately destroyed) by the depravity and corruption of its own cocreator.[17]

The two stories differ significantly in their attitude toward the questions posed by this article. The short story, written ten years after World War II ended, expresses little doubt or concern with the notion that future criminals might be identified and incarcerated indefinitely before they have a chance to commit their crimes. On the other hand, the film, released immediately after the 9/11 terrorist attacks, ultimately rejects the propriety of such a predictive system and of the means of punishment. These differences may say something interesting about the different eras when these stories were produced, about those responsible for their production, or both.

But as different as the stories are, they share one central assumption—as beneficial as a preventive law-enforcement system might prove to be, no community could ever be expected to support its continued use if it were shown to be fallible. The primary threat driving the action in both stories is the fear that one of Precrime's predictions might turn out to be wrong, and that once the public becomes aware of just *one* mistake, the deafening outcry of injustice would require the system's immediate termination. Both the movie and the short story advance their unquestioned belief that no society would tolerate a system of this kind being enforced in a clearly fallible manner.

But recent history, if not much of this nation's history, suggests that this shared assumption might be as fanciful as the science-fiction supposition of precognition at the heart of both stories. Even the most cursory review of our national responses to real and perceived security threats demonstrates that, under the right circumstances, and applied to the right population of citizens, the majority of this nation has accepted the continued implementation of a preemptive detention system with dubious predictive reliability. It appears that society is far more willing to accept preemptive detention of individuals who have not yet committed a criminal act, even in the face of evidence of fallibility of the decision-making process that led to the detentions, than is assumed by either of the *Minority Report* stories.

Part II of this article discusses the ways that the short story and film address the fundamental questions of precrime. Part III examines the use of preemptive action by the United States in its international policy and by law enforcement agencies within this country. Finally, the article concludes by considering the insights that the *Minority Report* stories offer in engaging in preemptive criminal justice and military actions.

II. PRECRIME IN FICTION: TWO *MINORITY REPORTS*

A. Philip K. Dick's "The Minority Report"

Philip K. Dick (1928-1982) was a prolific, if somewhat obscure, science-fiction writer and "futurist" who has received wide popular attention much more for the film adaptations of his short stories than for his original written work, starting with the overwhelming commercial and critical success of Ridley Scott's 1982 *Blade Runner*,[18] an adaptation of Dick's story, *Do Androids Dream of Electric Sheep*.[19] Perhaps as a result of the success of *Blade Runner*,[20] other filmmakers have repeatedly turned to Dick's work to develop screen projects, including *Total Recall*,[21] *Screamers*,[22] *Impostor*,[23] *Minority Report*,[24] *Paycheck*,[25] *A Scanner Darkly*,[26] *Next* (from *The Golden Man*[27]),[28] and the upcoming *Radio Free Albemuth*[29] and *The Adjustment Bureau*.[30]

Filmmakers have returned again and again to Dick's texts because they are often in the short story or novella format, facilitating their transfer to the shorter narrative form and marketing requirements of popular cinema. The combination of near-future, realistic settings with high-concept scientific scenarios (like the memory-implanting technology of *Total Recall*[31] or prescient powers of the protagonist in *The Golden Man*[32]) that characterize his works makes for a relatively tight and visually dynamic narrative structure in comparison to some of the more sprawling and cerebral texts of more famous and critically regarded science-fiction authors including Isaac

Asimov, Ray Bradbury, Orson Scott Card, Frank Herbert, and Ursula LeGuin.

One of Dick's earliest and previously most obscure works, *The Minority Report* (1956), begins with a meeting between two men, one young and one aging.[33] The older man is John Anderton, the commissioner and founder of a special law enforcement unit in a near-future New York City.[34] The unit, known as the "Precrime" unit, is special because it relies on the precognitive psychic abilities of a trio of human genetic "mutants" to predict the impending commission of crimes before they actually happen.[35] Precrime has led to a 99.8 percent reduction in the commission of felonies, and instances of those even *planning* crime have all but disappeared because, as Anderton notes, "the culprit knows we'll confine him in the detention camp a week before he has a chance to commit the crime."[36]

The younger man is Ed Witwer, a representative of the legislative body who oversees Precrime and who is the newly installed "assistant" to Anderton.[37] Anderton responds to Witwer's arrival with severe trepidation, born of both the imputed authority he enjoys from his bosses in "the Senate" and the sense that this younger, more vital man will soon be pushing him out of his job.[38] The frustration only grows when Anderton's young wife, Lisa, who works with him at Precrime, appears to be flirting with Witwer.[39]

Anderton successfully stifles his growing annoyance long enough to familiarize Witwer with Precrime's operation.[40] Witwer starts by informing Anderton of what he already knows: "With the aid of your precog mutants, you've boldly and successfully abolished the post-crime punitive system of jails and fines. As we all realize, punishment was never much of a deterrent and could scarcely have afforded comfort to a victim already dead."[41] Anderton responds with what he calls the "basic legalistic drawback to the Precrime methodology":

> We're taking in individuals who have broken no law. . . . Happily they don't—because we get them first, before they can commit an

> act of violence. So the commission of the crime itself is absolute metaphysics. We claim they're culpable. They, on the other hand, eternally claim they're innocent. And, in a sense, they *are* innocent. In our society we have no major crimes, but we do have a detention camp full of would-be criminals.[42]

Anderton then takes Witwer to the "Analytical Wing" where the three precognitive mutants (precogs) are housed in shockingly unpleasant conditions.[43] They are held in chairs twenty-four hours a day by metal bars, only partially conscious.[44] They are all but completely oblivious to their surrounding and almost completely noncommunicative with the exception of their incoherent babblings that are "analyzed, compared, reassembled," and turned into specific predictions of future crimes.[45] Witwer immediately expresses sympathy for the condition of the mutants and the treatment they receive, but Anderton is dismissive, referring to them as "monkeys"—"What do we care? We get their prophecies. They pass on what we need."[46]

Anderton then picks up a stack of cards that have been spit out from the machinery with the names and information of future criminals and their crimes.[47] While leafing somewhat aimlessly through them in the course of the tour, Anderton is stunned to find his name on one of the cards indicating that he will kill someone in the next few days.[48] He takes the card before Witwer or anyone else can see it and puts it in his pocket—only a short-term solution, he is well aware, because copies of the crime predictions are disseminated to other offices within twenty-four hours.[49] Anderton's immediate thought is that he is the victim of a set-up, likely engineered by Witwer and perhaps with the help of his wife, who seems a bit too interested in and familiar with the younger man for what is supposed to be their first meeting.[50]

Anderton's first response is panic, and he attempts to leave the Precrime offices but his wife stops him at the door.[51] He tells her he believes a conspiracy is being orchestrated and shows her the card as proof that Witwer has manufactured the bogus murder plot.[52] But Lisa hands the card

back to her husband and points out something he has failed to notice: while he is listed as a future murderer, the future victim's name is not Witwer, as Anderton had assumed, but Leopold Kaplan, a name completely unfamiliar to Anderton.[53]

Shocking as it is, the unfamiliar name does not distract Anderton from the more immediate concern—that he is being framed and that he has to find a way to avoid certain and immediate incarceration.[54] But, when he arrives at home to prepare to implement his escape plans, he is confronted by a man with a gun who forces him into a limousine and drives him to a private home in a distant part of the metropolis.[55] Anderton has been brought there to meet Leopold Kaplan, a retired commanding general of the nation's army, who is somehow aware that the precogs have predicted that Anderton will kill him.[56] Anderton asks what Kaplan has planned for him, and Kaplan notes that *he* cannot be planning to kill *Anderton* or it would have shown up in one of the cards at Precrime.[57] Instead, his plan is to ensure his own safety by getting Anderton into police custody immediately.[58] As they talk, Kaplan turns on a radio, which is broadcasting a report about Anderton, his predicted crime, and his apparent escape.[59]

While being transported to police headquarters, Anderton is taunted by one of Kaplan's men, who notes how happy the detainees will be to see the former head of Precrime incarcerated with them.[60] The man then addresses the methodology of the precrime system itself, parroting Anderton's defenses back at him:

> "You wouldn't harm a hair on Kaplan's head? For the first time in history, Precrime goes wrong? An innocent man is framed by one of those cards. Maybe there've been other innocent people—right?"
>
> "It is quite possible," Anderton admitted listlessly.
>
> "Maybe the whole system can break down. Sure, you're not going to commit murder—and maybe none of them were. Is that

> why you told Kaplan you wanted to keep yourself outside? Were you hoping to prove the system wrong?" [61]

Immediately following this exchange, the car carrying Anderton and his captors slides on the wet roadway, crashing into an oncoming truck.[62] Anderton is pulled from the wreckage by an unfamiliar man who calls himself Fleming and gives Anderton a packet with money, identification, and some other papers. Anderton tells the man that he has been the victim of a conspiracy, that his wife Lisa is behind it, and that he can still prove his innocence if only he can stay hidden and avoid killing Kaplan for another week.[63] Before leaving Anderton to hide in the "slum section," Fleming tells him to study the packet he gave him carefully, and he "may still survive."[64]

When Anderton looks at the contents of the packet he finds a note reading: "The existence of a majority logically implies a corresponding minority."[65] Anderton later realizes that the reference is to the reports on predicted events provided by the three precogs—there are three, instead of two or one, so that the prediction of one can be checked. If one of the other precogs makes the same prediction, and the third disagrees, the prediction made by the two is considered the "majority report" and the outlying result is designated the "minority report."[66] Anderton concludes, based on the note from Fleming, that one of the three precogs must have disagreed with the others about his impending murder of Kaplan, and he is determined to see that minority report.[67]

With the help of one of his former employees, Anderton sneaks into the Precrime offices and finds the minority report.[68] The minority report's alternative conclusion—that Anderton would not kill Kaplan—apparently relies on the fact that Anderton happens to see the prediction before the murder is to occur.[69] The minority report was produced after the first two predictions, based on additional information and, consequently, could be expected to be more reliable.[70] Even though Anderton now has proof to show Witwer that he need not be incarcerated, he still distrusts Witwer and

dares not confront him with the minority report, which Witwer has undoubtedly seen as acting Commissioner.[71]

Anderton's wife finds him at Precrime.[72] He tells her of the minority report and of the impact of the majority prediction on his actions, leading to this exchange:

> "I wonder how many times this has happened before."
>
> "A minority report? A great many times."
>
> "I mean, one precog misphased. Using the report of the others as data—superseding them. Perhaps a lot of the people in the camps are like you."
>
> "No, I was in a position to see the card, to get a look at the report. That's what did it."
>
> "But—Perhaps all of them would have reacted that way. We could have told them the truth."
>
> "It would have been too great a risk."[73]

As they are escaping the police offices in a helicopter, Anderton decides that Kaplan is the proper audience for the minority report, not Witwer who has, of course, already seen it.[74] Once Kaplan sees it, he will no longer feel threatened and might use his significant influence to help Anderton avoid incarceration.[75]

But Lisa questions the wisdom of her husband's choice.[76] "If Kaplan gets hold of the tape, the police will be discredited. Can't you see why? It would prove that the majority report was an error. Ed Witwer is absolutely right. You have to be taken in—if Precrime is to survive."[77] As they argue over what is more important, the precrime program or his personal freedom, the two discover that there is a stowaway in their escape vehicle—Fleming.[78] After a brief struggle, Anderton knocks Fleming out with the butt of a gun and finds among his effects documentation that shows that he is an Army officer under Kaplan's control.[79]

Finally, the true nature of the conspiracy becomes clear to Anderton. It was Kaplan who orchestrated the whole thing—once the prediction was made, he endeavored to ensure first that Anderton escaped, then that the escape and falsely-predicted murder were made public.[80] Kaplan's objective was exactly what Lisa warned Anderton would happen if he escaped—the destruction of the Precrime program based on the exposure of one false prediction. When Anderton learns that Kaplan has also obtained a copy of the minority report, he realizes that he is trapped, and he finally reaches the conclusion that his wife had made at the outset—he has to kill Kaplan.[81]

Anderton confronts Kaplan and kills him.[82] Anderton previously made a deal with Witwer (now aware of the Army plot to discredit Precrime) that he would be sent to a penal colony for the rest of his life as punishment for only the second murder in the nation in the last five years.[83] In the aftermath of the murder, as Anderton and his wife are packing for their lifetime exile, they pause to ruminate with Witwer about the recent events and what they mean for the future of Precrime.[84] Witwer wonders whether the events of the past few days demonstrate that there was something seriously wrong and whether the validity of the program should be reconsidered.[85]

Not at all, Anderton responds.[86] Indeed, if anything, the performance of the precogs reinforced the infallibility of the program. Each of the predictions was valid given the data available at the time it was made.[87] The problems only arose, as Anderton had previously suggested to his wife, when he was made aware of the prediction that he would be a murderer.[88]

"It can happen in only one circumstance," Anderton tells Witwer, before boarding the rocket to the penal planet.[89] "My case was unique, since I had access to the data. It could happen again—but only to the next Police Commissioner. So watch your step."[90]

Notwithstanding imagined and genuine conspiracies and machinations from various parties, the only thing that had remained pure was the precrime process itself—all predictions, majority and minority, had their own independent validity. Witwer did not have to worry. The system was

sound and could be expected to remain so long into the future, with the obvious exception of the chaos that could ensue if the machines punched out a card with Ed Witwer's name on it!

B. Steven Spielberg's "Minority Report"

In 2002, Steven Spielberg directed a film entitled *Minority Report*,[91] loosely based on Dick's short story. Spielberg, arguably the most commercially successful filmmaker of his generation, is best known for action and science-fiction films made earlier in his career like *Jaws*,[92] *Close Encounters of the Third Kind*,[93] *Raiders of the Lost Ark*,[94] and *E.T.: The Extra-Terrestrial*.[95] However, his more recent films, like the highly acclaimed Holocaust story *Schindler's List*,[96] *Amistad*,[97] *Saving Private Ryan*,[98] *Artificial Intelligence: AI* (a collaboration with Stanley Kubrick),[99] and *Munich,*[100] have taken on more serious subjects and addressed central moral concerns.

In discussing his interest in making a film from Dick's short story, Spielberg told an interviewer that he always liked George Orwell's *1984* and was interested in addressing similar subjects in a film.[101] He also noted that the film is "totally informed" by "all the political parallels to the post John Ashcroft era. How many of our civil liberties are we willing to give up because the government tells us we have to in order to protect ourselves better from terrorism in the shadow of the aftermath of 9/11?"[102]

Some basic features of the mid-century story[103]—a law enforcement unit relying on precognitive mutants to predict crimes before they happen, the prediction that an official of that unit named Anderton would commit murder, and Anderton's frantic initial attempts to escape for long enough to prove his future innocence—remain. Everything else, details both large and small, are completely different, including, perhaps most importantly, the ultimate fate of the precrime program itself.

In the film, John Anderton, played by Tom Cruise, is not the aging commissioner of a national precrime police unit, but the young and severely

troubled operational chief and second-in-command of the Department of Precrime in Washington, D.C., in the year 2054. While the story has been moved from New York City to the nation's capital, the scope of the law enforcement program has been reduced—Precrime is used to predict and prevent murder only in the District of Columbia.

As the film begins, the nation is on the verge of a referendum to extend Precrime to the entire country. The film includes a decidedly believable version of a political commercial, with testimonials from potential future murder victims, telling viewers how the program saved their lives. The commercial begins with a voice-over asking viewers to: "Imagine a world without murder." The announcer reports that within just a few months following the implementation of Precrime, the murder rate in Washington, D.C., was reduced by more than 90 percent, and within a year, murder was eradicated altogether. The U.S. attorney general is then shown explaining to the audience that his department will ensure the "utter infallibility" of the precrime system so as to guarantee "that which keeps us safe will also keep us free." The spot closes with first one and then a chorus of the saved future victims saying: "Precrime—it works."

The precrime methodology depicted in the film is different from that in the book. Notably, in the film, there is a limit to the detail of the information the precogs provide. They give the Precrime officers the names of the murder victim and the assailant as well as the day and time of the attack. Then, the Precrime officers review images of the precogs' visions projected on a large computer screen. By manipulating and scrutinizing the images as if they were digital video, the officers solve the future murder.

The dramatically visual precrime mechanism of the film is deserving of some close attention. On its face, the choice to replace the short story's decidedly low-tech computer cards with the visually expansive techno-dance performed in the early scenes of the film by Cruise seems to serve a relatively obvious goal in transferring the story from page to screen. The film's use of video images and heightened uncertainty of the place and time

of the crimes certainly provides enhanced cinematic texture and dramatic potential not necessary in the short-story format.

Adept filmmakers allow important events to unfold for the audience, allowing the audience to "live" the story, as opposed to having them described by a character or narrator, wherever possible. Therefore, it is certainly no surprise that Spielberg, one of the great masters of the visual aspects of the medium, would find a much more visually compelling means of depicting the precog process than having one of the characters read a few names off a card. Additionally, this creates the edge-of-the-seat action sequences, so valuable for a wide-release film, that are generated by the fact that Cruise's Anderton cannot quite figure out where the murder is going to be committed until the very last minute.

But this change imposed by the filmmakers suggests more than aesthetic choices born of differences in media. The visual record of future crimes depicted in the film closely resembles the way consumers of our ubiquitous mass media experience crime in the real twenty-first century. The video of O.J. Simpson's white Chevy Bronco, or any number of other car chases that briefly dominate the airwaves on a given afternoon, the real-time visual images of the 9/11 attacks, or the "shock and awe" commencement of the invasion of Iraq, are so familiar as to be second nature in popular culture. Consequently, there is an implied veracity to a precognitive crime prediction that comes with a handy video record which would feel right at home as breaking news on CNN or the Fox News Channel. Somehow, such a prediction would be sapped of credibility and impact if there were no visual record to accompany it.

In the film's opening scene, before Anderton can begin his pursuit of the cuckolded husband, he is required to provide the basic information on the future crime to a pair of "remote witnesses," one apparently the chief justice of the United States, and the other a "doctor." Within seconds they give validation of the action, and Anderton begins to "scrub" the computer-generated image in search of the location of the murder. Nothing

resembling this scene, or its concern for some semblance of due process protections as part of this procedure, is present in the short story. It is one indication of the filmmakers' alternate concerns, whose focus is less on the technological and logical conundrums that drive the plot in the story, and more on the parallels between the precrime program and the similar preemptive procedures that were becoming increasingly prevalent in the nation at the time.

Anderton returns to the office after apprehending the future murderer to find Danny Witwer, an investigator sent by the attorney general in advance of the national referendum to ensure the infallibility of Precrime. In the course of giving Witwer a tour, Anderton ends up alone in the room that houses the precogs and witnesses an "echo" of a past murder that the female precog, Agatha, is experiencing. Intrigued, Anderton looks further into the circumstances of the murder and finds that the record of Agatha's image of the event has been deleted from the precrime system. (We also find out that Anderton is addicted to a new high-tech drug and has fallen into a state of well-concealed depression, as a result of the abduction of his five-year-old son six years before, and the subsequent collapse of his marriage).

After Anderton reports the gap in the records to his superior, Burgess, the cofounder and leader of the precrime program, Anderton finds out the precogs have predicted that he will kill a man named Leo Crow. Like the similar instance in the short story, Anderton has never heard the name of his supposed victim before. As he attempts to leave the office, an alarm begins to sound, but Anderton escapes. Searching for an explanation of what he assumes is a set-up perpetrated by Witwer, Anderton seeks out the other co-founder of the precrime methodology, Dr. Iris Hinemen, a brilliant geneticist who has become disenchanted with the program and the way her former partner has administered it.

Dr. Hinemen is particularly dissatisfied with the treatment of the precogs. The precogs are housed in less than ideal conditions, albeit better than those depicted in the short story—they spend their lives in a pool of water that

provides them nourishment and sedation, connected to the computer-imaging system used by the Precrime officers. Dr. Hineman tells Anderton of the existence of the minority reports—"The precogs are never wrong . . . but occasionally they do disagree. Most of the time all three precognitives will see an event in the same way, but once in a while one of them will see things differently than the other two." Anderton asks why he was never told of the existence of the minority reports, and Hinemen responds:

> Because these minority reports are destroyed the instant that they occur. Obviously, for Precrime to function there can't be any suggestion of fallibility. Who wants a justice system that instills doubt? It may be reasonable, but it is still doubt. . . . I'm saying that every so often those accused of a precrime might have an alternate future.

Anderton is devastated by the news of the minority reports and the fact that he has incarcerated people who might have had alternate futures in which they did not commit the predicted crimes.

The somewhat heavy-handed irony of his current circumstances—that not only has he been incarcerating people who may be "innocent" but he's also now the one falsely accused of a crime he's convinced he would never commit—adds texture, albeit somewhat heavily and predictably, to the dramatic narrative. And it is no surprise that the film retains this aspect of the short story. The unavoidable plot point of a story about a crime predicting technology is a flaw, or potential flaw, in the system. The decision to have the consequences of that flaw fall on the protagonist of the story draws in the reader or audience and creates the highest level of empathy. It is this empathy for the potentially innocent victims of precrime prosecution and detention that makes it so important that no flaw in the system ever be exposed. Such exposure would be expected to produce some version of a "that could happen to me" response from a majority of the population that would certainly ensure the defeat of the pending national referendum in the film. But, if someone less connected to the audience,

producing a diminished sense of commonality with the majority of the public, were to fall victim to an obvious flaw in the system, it is unclear if the lack of empathy would produce a similar negative response.

But the news of the minority report, in addition to undermining Anderton's faith in the program, also provides some hope for his escape and much of the film's second act, as Anderton sets out to find the alleged minority report of his predicted crime. Hinemen tells him that while the records of the minority reports are immediately destroyed, the original is always available at the source—the precog who created it. So, Anderton returns to the Precrime office and is forced to take the precog, Agatha, with him as he again escapes. He takes her to an underground computer expert to extract more information about the predicted murder. In viewing her prediction, he sees that there is no minority report—her account of his future murder is the same as the others. But while there now appears to be irrefutable evidence that he is going to commit murder, Anderton still knows nothing about the man he is destined to kill.

Soon thereafter, he and Agatha come upon the building depicted in her prediction, and find Crow listed in the registry. Agatha begs Anderton not to confront him: "You still have a choice, the others never saw their future." But Anderton has to find out what happened to his life and why; he assures her with complete sincerity that he will certainly not kill a man he does not even know. However, upon entering Crow's empty room, Anderton finds evidence in the form of pictures that Crow was the man who abducted and, almost certainly, murdered Anderton's lost son, along with seemingly many other children. Crow returns, and in the course of being beaten by Anderton, confesses to the crime. But as the time passes for the predicted murder, Anderton does not shoot Crow and arrests him instead, even reading him his rights in a nod to present-day-pop-culture depictions of law enforcement activities.

But, as Anderton is taking Crow into custody, the man changes his story. Crow claims that he was an incarcerated prisoner and was offered a deal. If

he pretended to be the man who abducted Anderton's son, and Anderton subsequently killed him, Crow's family would be protected and provided for. He proceeds to beg Anderton to kill him so that his family will receive the promised help. Anderton refuses, at which point Crow grabs Anderton's gun and shoots himself in a way that looks identical to the predicted crime.

In the film version, it seems as though the predictions of Anderton's future crime are completely valid, except for two things: first, he does not commit the crime, although the circumstances look the same as the predicted occurrences; and second, he finds out he has been the victim of an attempted conspiracy—that unlike the short story, someone was successful in manipulating Precrime's methodology. As Anderton investigates who set him up, he uncovers a much greater and more extensive compromise to the precrime system. He discovers that Burgess found a way to deceive the system by staging crimes seemingly so identical to ones previously predicted, that they look to the Precrime officials as mere echoes of prior predictions that the precogs were reliving. The murder with the absent file that Anderton had discovered earlier in the film and told his boss about, was actually a murder that Burgess committed and covered up—he had killed Agatha's mother because she was demanding to have her daughter returned to her.

Just as Anderton realizes what has happened and what his boss has done, Anderton is finally captured by his former colleagues. He escapes to confront Burgess at the celebration for the national extension of the Precrime program with the visual image of the actual crime. Anderton goads Burgess to shoot him, an apparent future murder that the now-reactivated precogs see and document. Burgess is, thus, given a similar choice as the Anderton character in the short story—to kill Anderton and be incarcerated for life, or refrain from killing him and prove Precrime to be fallible. Burgess makes a very different choice, however, resolving his

dilemma by killing himself and the program. The closing voice-over informs the audience that:

> [The] Precrime experiment was abandoned. All prisoners were unconditionally pardoned and released, although police departments keep watch on many of them for years to come. Agatha and the twins were transferred to an undisclosed location. A place where they could find relief from their gifts. A place where they could live out their lives in peace.

C. Decoding the Short Story and Film: Messages, Cautions, and Shared Illusions

The short story and the film of *Minority Report* approach the issues posed by the possibility of reliable prediction of future criminal acts in very different ways and reach remarkably different conclusions. As the short story concludes, the precrime system is still in place and, perhaps, more credible than ever, as the prescient visions of all the precogs are finally validated for the confused characters and all fears of the potential corruption and deception infecting the system are proven to be mistaken.[104] The central dramatic conflict of Dick's story is not the moral and ethical dilemmas that Precrime introduces, to which Dick offers only a glimpse, but rather the internal battle within Anderton and his decision whether to save himself or save the one thing that has given his life meaning.[105]

In the end, his choice to save Precrime is validated by the renewed respect of his beautiful wife, who chooses to join him in exile, and the revitalization of the program itself, with the one caveat that the next Commissioner better be careful about what he plans to do.[106] The possibility that the system may have been convicting innocent people all along, or that those future criminals could be informed of the predictions and given the chance to avoid their fate, are again undermined by the resolution of the short story. All the reader is left with is a sense of pathos for the precogs themselves, muted as it is by Dick's lack of intense focus on their situation. Readers are, of course, free to decode other kinds of messages from the text,

bringing into sharper relief some of the issues that are raised—the options of stopping the predicted crimes short of incarcerating the future criminals or the idea that more people may have chosen to change their actions if they were made aware of the precognitive prediction—but Dick seems most interested in the imagined technology itself and the perplexing paradox that Anderton first finds himself in, followed by his unconventional and dramatic escape.

In the hands of Spielberg and his collaborators, the encoded message provides a far more cautionary note to the precrime methodology and the similar real-life, law-enforcement techniques beginning to take hold at the time of the making of the film. In the film, Precrime is abandoned, not because of the ineffectiveness of the technology, but because it, like any other intelligence enterprise, is subject to both abuse and manipulation by those in power.[107] Spielberg's team also seems more interested in the lives of the precogs themselves and the moral implications of deriving a greater good from the exploitation or abuse of a minority.[108]

Perhaps most significantly, the film expresses a willingness to trade the indubitable benefits of a "world without murder" for a world where a small number of possibly innocent people are convicted, along with many more who are, or at least certainly will be, guilty.[109] The release of all of the "murderers" convicted under the system, particularly in light of the relative certainty that most, if not all, of them would have committed their predicted crime is perhaps the strongest message encoded by the filmmakers, and perhaps the most optimistic.[110] It depicts their conclusion that the risks inherent in a precrime program are not justifiable if there is even a chance that the innocent are punished as well as the guilty.[111] Perhaps it is sufficient to monitor those we suspect of intent to commit illegal actions and let them know they are under surveillance.

But compelling as this resolution is, it seems unduly optimistic given what our nation has experienced in the years since the film's release, as well as the years and decades that preceded it. While the majority of citizens

responded quite negatively to the revelations of the flawed predictions that led to our involvement in the war in Iraq, our society has proven itself far more willing to accept preemptive detention of individuals who have not yet committed a criminal act, even in the face of evidence that the decision-making process leading to the detentions is fallible. Perhaps it is the lack of empathy, so central in both the story and the film, for those burdened by the preemptive system that explains present (and past) willingness to let these programs continue.

III. PRECRIME IN FACT: THE NEW PREEMPTIVE LAW ENFORCEMENT REGIME

A. Preemptive Action on the International Stage

As Steven Spielberg noted in an interview, the preemptive international and domestic response policy of the United States after 9/11 parallels the fictional precrime program of the *Minority Report* stories.[112] Immediately after the terrorist attacks, U.S. law enforcement officials publicly acknowledged an important shift in their defining mission.[113] In an interview on *Meet the Press* five days after the attacks, the Bush administration's point man on post-9/11 law enforcement policy, Vice President Dick Cheney, stated the nature of this shift in intentionally vague terms.[114] The tragic and traumatic events of that day suggested to politicians and policymakers alike that it might no longer be enough for law enforcement agencies, like the FBI, to focus on investigating crime and apprehending criminals.

In the days and weeks that followed, "the Attorney General and the FBI Director . . . elevated counterterrorism and the prevention of future terrorist attacks against the United States interests as the top priority of the [Department of Justice (DOJ)] and the FBI."[115] On October 25, 2001, Attorney General John Ashcroft articulated that the DOJ's "single objective" was preventing "terrorist attacks by taking suspected terrorists

off the street."[116] And, former Deputy Attorney General Larry Thompson described this new focus to the Office of Inspector General "as a huge paradigm shift within the DOJ from prosecution to prevention," while "other high-level DOJ and FBI officials told [the Office of the Inspector General] that after September 11, they worked to transform the FBI into an organization that would prevent attacks as opposed to react to attacks."[117]

This new prevention focus became a central component of the Bush administration's foreign and national security policies. After an almost immediate decision to attack the Taliban forces in Afghanistan—which were seen as responsible in some identifiable way for the 9/11 attacks[118]—the Bush administration then turned to Iraq as a potential target for military action. The administration articulated the justification for invading Iraq, in part, by referencing the potential future threat it might pose to the United States and its allies.[119] In a September 8, 2002 interview on *Meet the Press*, Vice President Cheney alleged that Saddam Hussein was moving aggressively to add nuclear weapons to an existing stockpile of chemical and biological weapons, adding that "the United States may well become the target of those activities."[120] Then National Security Advisor Condoleezza Rice summarized this concern with her famous statement, repeated on various appearances on national television, that the United States would not allow for the "smoking gun," demonstrating conclusively that Iraq had an effective program for producing weapons of mass destruction, to later come in the form of the "mushroom cloud" of an Iraqi nuclear weapon.[121]

Then Secretary of State Colin Powell made a highly detailed presentation to the United Nations that reliable intelligence proved there was no doubt that Iraq was in possession of weapons of mass destruction, and it was in the process of developing new ones.[122] The power of this message to the American people was enhanced by a compliant mainstream media that offered little, if any, contrary evidence to challenge the administration's description of a dangerous Iraq and, instead, offered a consistent and

unmistakable attitude of support for the increasingly inevitable war.[123] On the basis of this powerful narrative—that Iraq posed a future threat to the United States as result of the combination of its dangerously unpredictable leadership and its weapons of mass destruction—the United States invaded Iraq in March of 2003.[124]

After the invasion, when no weapons of mass destruction (or even programs that might have produced them in the near future) were found, one of the central foundations of public support for the war disappeared. When the war was far more costly (in both lives and resources) and far more complex than the administration had led anyone to believe it would be, public support collapsed in much the way the author and director of the *Minority Report* story and film would have expected it would.[125]

B. Domestic Preemptive Criminal Prosecution

The new preventative law-enforcement policy has produced important domestic consequences as well. During the time period immediately following the 2001 terrorist attacks, the focus of domestic law enforcement was on, among other things, the identification of potential terrorist threats and the development of short- and long-term solutions to diffuse their potential to cause future harm.

In 2002, the U.S. military set up a detention facility on a Marine base in Guantánamo Bay, Cuba, to detain prisoners captured during the Afghanistan and Iraq wars who were considered to pose a risk of future violent activity. [126] Prisoners continue to be held in the facility for an indefinite period of time, without charge, and without access to legal representation.[127] Between 2002 and 2010, 779 prisoners, referred to as "enemy combatants" by the Bush administration, were brought to Guantánamo and approximately five hundred have been released without charges.[128] Of the 245 detainees that remained in the facility as of spring 2010, several have been cleared for release, but countries have not been found willing to accept them.[129]

The Bush and Obama[130] administrations assert that because the detainees pose a particular threat of future attack to citizens of the United States or the nation's interests, they should remain confined.[131] However, this assertion is unsupported by any evidence disclosed either publicly, before a grand jury, or at trial.[132] In 2006, the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld* that the detainees could not be kept permanently without charge and a legal proceeding to determine their guilt had to be made available to them.[133]

Enemy combatants taken off of the battlefield in Afghanistan were not the only potential terrorists detained during this period. In addition to the Liberty City Seven,[134] hundreds of other suspected terrorists, or future terrorists, have been apprehended in the United States and abroad since 9/11. Perhaps the most famous is Jose Padilla, an American citizen who was arrested at O'Hare International Airport in Chicago on suspicion of having an interest in committing a future terrorist act.[135] These "detainees" were immediately incarcerated at Guantánamo Bay or similar facilities set up for American citizens like Padilla and given no access to an attorney, nor charged, nor provided other justification of their detention.[136]

Padilla was detained on the grounds that he was allegedly taking part in an Al Qaeda plot to detonate a "dirty bomb" in the United States.[137] He was confined in a military facility in the United States in solitary confinement for three years as a designated enemy combatant.[138] Then, in November 2005, the DOJ announced that criminal charges were being filed against Padilla in Miami.[139] These charges did not allege any dirty bomb related activities.[140] He was charged, instead, with "being part of a 'North American support cell' that worked to support violent jihad campaigns in Afghanistan and elsewhere overseas from 1993 to 2001."[141] Padilla was convicted pursuant to the new indictment and sentenced to seventeen years in prison.[142]

The post-9/11 detention of terror suspects is not this nation's first such response to a perceived security threat, however.[143] In 1941, after the Japanese attack on the U.S. naval base at Pearl Harbor, Hawaii, negative

public attention was immediately focused on Japanese Americans, who had already been the victims of discriminatory treatment for generations.[144] As Professor Lorraine Bannai has observed, "[t]he popular press was quick to blame Japanese Americans for Pearl Harbor," and it soon began "to call for the removal of Japanese Americans from the West Coast. Both state and federal legislators joined in the call" with one California congressman arguing that if a citizen of Japanese descent "wants to make his contribution, [he] will submit himself to a concentration camp."[145]

Just two months after the Pearl Harbor attack, President Roosevelt signed an executive order authorizing the detention of more than one hundred thousand Americans of Japanese descent and Japanese immigrants living in the United States.[146] The detainees were sent to ten camps, called "relocation centers," in the western and southern United States.[147] While the internment began only after the attack on Pearl Harbor, the motivations for the action can be seen in "anti-Japanese sentiment among farmers who competed against Japanese labor, [and] politicians who sided with anti-Japanese constituencies" long before the attack.[148]

Professor Keith Aoki has discussed one major legal component of the pre-Pearl Harbor discrimination against Americans of Japanese ancestry—the Alien Land Laws of the early twentieth century.[149] Aoki notes that "[t]hese laws linked the virulent nineteenth century Sinophobia that culminated in the 1882 Chinese Exclusion Act with the mass internment of Japanese Americans in the mid-twentieth century" by barring "'aliens ineligible to citizenship' from owning fee simple title in agricultural land and prohibited leases for such land lasting longer than three years."[150] As Aoki observes, the "salient point of these laws was their strongly racialist basis," motivated in part "by a xenophobic paranoia" that John Higham[151] has called "racial nativism," which "depended upon the existence in the popular U.S. imagination of a racial 'link' between the reviled Chinese immigrants of the nineteenth century and the Japanese immigrants of the late-nineteenth and early-twentieth centuries."[152] In making the connection

between the Alien Land Laws and the World War II internment, Aoki argues that understanding the former "empowers us to comprehend the depth and scope of the practices and institutionalized subordination that helped make the racial scapegoating of the internment possible."[153]

After a time, detainees were offered the opportunity to leave the camps if they enlisted in the American military.[154] Ironic and insulting as such an offer was, given the supposed national security threat posed by the detainees, as many as twelve hundred detainees enlisted as a result.[155] Finally, in 1944, President Roosevelt rescinded the internment order, and the last camps were closed by 1945.[156]

C. Legal Implications of Preemptive Action

The express justifications for these preemptive criminal or security-based detentions are grounded in the undeniably valid impulse to avoid security risks to the public. But as Professor Robert Chesney recently observed in addressing the post-9/11 detentions,

> [T]he nature of prosecutorial intervention in these and other terrorism-related cases has not been welcomed in every quarter. The prospect that the government has adopted a policy of prosecuting suspected terrorists at the earliest available opportunity has generated criticism from both civil liberties and national security perspectives, with the former contending that we risk prosecuting dissenting thought uncoupled from culpable action and the latter contending that such a policy would sacrifice the benefits of additional intelligence and evidence gathering.[157]

Chesney notes that the civil liberties concerns he cites are well-illustrated in the *Minority Report* film, with its presentation of precrime as a "law enforcement fantasy" where "all criminal harms are averted, without any false positives in the form of persons wrongly accused."[158] He notes that in reality, and even in the film, this paradigm is indeed a fantasy, and that "the problem of false positives cannot be avoided" in any criminal justice

system.[159] But while unavoidable, the degree of risk of erroneous prosecution:

> is not uniform across all types of criminal liability. The farther one moves from the paradigm of a completed act—as one moves backwards successively through attempt, to advanced planning, to initial planning, and so forth—the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated.[160]

As observed by David Cole, although the United States has not gone so far as to enact "a 'pre-crime' law that allows the government to arrest and prosecute people before they commit their crimes" as in *Minority Report*, recent law has allowed law enforcement to move in that direction.[161] The criminal prosecution of the Liberty City Seven for allegedly providing "material support" for terrorism is one such example.[162] The 1996 Antiterrorism and Effective Death Penalty Act was rarely used until after 9/11; however, it "allows the government to obtain a 'terrorist' conviction without establishing that an individual engaged in any terrorism, conspired to engage in any terrorism, aided or abetted terrorism, or even intended to further terrorism."[163]

This kind of prosecution institutionalizes a new way of thinking about criminal law, changing the focus from the investigation and prosecution of those who commit harmful acts to the prevention of those acts before they occur.[164] Our criminal law regime has long contained categories of offenses such as attempt and conspiracy that do not require the completion of the ultimate objective of the criminal. But even a conspiracy charge traditionally requires some overt act in the furtherance of the criminal agreement (and not merely the agreement alone).[165] Further, the elements of an attempt crime are not traditionally demonstrated until it can be shown that the defendant has taken some sort of action beyond the decision to commit a criminal act.[166]

The reasons for this kind of limitation on the scope of criminal prosecution are clear. Absent an overt act in furtherance of a conspiracy or an action beyond a decision to commit a crime in an attempt, sufficient uncertainty remains as to whether the potential criminal would have gone forward with the intended act. In an attempt crime when an action has been taken to further the ultimate objective, even when the goal is not achieved, there is no doubt as to whether the person would have gone through with what was intended. But criminal intent alone has not traditionally provided the basis for prosecution and incarceration in our system.[167]

Robert Batey, in his analysis of the law of attempt in the context of the *Minority Report* story, notes that "Anglo-American courts have made it very difficult to satisfy the act requirement for attempt, in order to allow for changes of the heart like Anderton's [in the film]."[168] Noting the vagaries of how "attempt" has been defined over time, Batey observes that while the common law approach has generally required "the granting of a large locus poenitentiae" (or "chicken-out zone") in which "the devil may lose the contest" for the free will of the potential criminal, the Modern Penal Code requires "proof only of a 'substantial step' toward commission of the crime . . . that is 'strongly corroborative' of the defendant's criminal intent."[169] But the post-9/11 law enforcement policies seek to identify and incarcerate potential criminals long before either version of the crime of "attempt" has been demonstrated. Professor Robert Chesney recently posed the question: where along "a continuum that runs from contemplation to completion of a criminal act," should criminal culpability lie "involving potential acts of terrorism?"[170]

In the two *Minority Report* stories, assuming the efficacy of the predictive technology, this problem of uncertainty is removed.[171] There is no longer any need to wait and see if the person would have committed the crime; we have already seen it happen through the eyes of the precogs.[172] But in the real life version of precrime prosecution, there rarely exists anything even approaching this level of predictive certainty.[173]

Consequently, the "risk of unnecessarily detaining innocent people is high," as the inclination of law enforcement officials will likely lead them to be safe, rather than sorry.[174] And it is similarly likely that an erroneous detention will be perpetuated, as there are limited incentives for a judge to release a detainee given the devastating consequences if the person were to go on to commit a crime and strong counter-incentives to take no action at all.[175]

In the case of the Liberty City Seven, for example, not only is it metaphysically uncertain that the band of aspirational terrorists would have even attempted to blow up the Sears Tower, but the facts demonstrate that there was little, if any, chance that they could have committed the kinds of terrorists acts they had discussed. [176]

IV. WITHER PRECRIME: REAL LIFE LESSONS FROM FICTION

So what insights have these two texts offered us in addressing the questions posed at the beginning of this article: What level of certainty that a crime is on the verge of being committed will justify apprehension and prosecution of a would-be criminal or the decision to engage in aggressive military action? What level of fallibility in the predictive process will be acceptable to the law enforcement community and the public? And, what kind of punishment, if any, is appropriate for someone who is prevented from committing a crime even if we are somehow sure that he or she would have committed it absent the intervention?

The lessons from the two texts strongly indicate that if our government is going to engage in preemptive criminal investigation or military action, it will need a much higher level of certainty in regard to our predictive intelligence than has been previously demonstrated.[177] The motivations and justifications for the decision to go to war in Iraq, if not Afghanistan, and for the establishment of permanent detention facilities for suspected terrorists, are identical to those that initiated precrime procedures in both the short story and the film. As Witwer notes at the beginning of the story,

"punishment . . . could scarcely have afforded comfort to a victim already dead."[178] Similarly, the sense that apprehending criminals after their crimes are committed is unsatisfactory in a society traumatized by violent crime—that given the horrific nature of the threat, post-crime investigation and incarceration would not be sufficient—seemed to dominate the popular consciousness of the United States in the immediate post-9/11 period and to foster a dramatic shift away from law enforcement to crime prevention. Despite this shift in popular sentiment, the risk of detention of the innocent (and those who could be counted on to remain innocent) seems severe in the absence of more certain means of prediction, such as those applied in the fictional stories.

But even assuming we had better intelligence and a more reasonably reliable means of predicting future criminals or future international threats, what should be done with this information? The prospect of incarceration or invasion under these circumstances (particularly indefinite incarceration) seems excessively harsh, particularly in light of several available alternatives such as surveillance or containment. Both the short story and the film offer alternatives to the perpetual incarceration for future criminal acts—in the story, at least some of the precriminals are offered banishment to a primitive colony; while in the film, once the corruption in the program is exposed, the detainees are freed, but are put under special surveillance for a period of time. The lesson from both stories is that the benefits that may arise from early prediction of potential threats can be attained through an apparatus that is less detentive than the one currently in place, namely the Guantánamo Bay detention facility.

One question for which neither story provides a satisfying answer, however, is why, or whether, it is to be expected that members of a community would abandon this kind of crime prevention procedure simply because it had the potential to identify some innocents along with the mass of guilty or "pre-guilty." The essentially unchallenged assumption that the public would not support a flawed system appears to have two distinct

components. First, as odd and magical as the process might seem, if it could really be shown that the prediction of criminal acts were valid, there would be widespread support for not only preventing the crimes, but also incarcerating predicted criminals, even though, by definition, they never actually did anything wrong. And second, if there was even the possibility that this procedure could lead to the incarceration of people who were not going to do anything wrong, it would somehow be an anathema. Not that something should be done to address the flaw and compensate for the small percentage of mistakes, but the entire procedure must be essentially perfect or abandoned altogether.

Recent history has offered a mixed response to these questions. The absence of any weapons of mass destruction in Iraq (or even the discovery of any existing programs for their creation) demonstrated the falsity of the articulated premise for the war. Recent revelations from participants in the deliberation process leading up to the second Iraq war report a lack of unanimity about the level of threat posed by Iraq, both within the Bush administration[179] and from our main Iraq War ally, Great Britain.[180] Much like the precrime methodology in both the story and film, the dissenting opinions—the real life version of the minority reports—were apparently dismissed in favor of the "majority" opinion. And these facts, once revealed, resulted in the expected collapse of support for the decision to invade Iraq and have, perhaps, diminished enthusiasm for other similar or possible actions.

But there has not been a similar public backlash in light of revelations of flaws in the detention regime for enemy combatants and other suspected terrorists, or exposed problems in the broader criminal prosecution dynamic. Recent and highly publicized instances of exonerations of convicted felons,[181] including death row inmates, have not resulted in a national outcry to end the death penalty,[182] as assumed by the filmmakers and, presumably, the audience.

Perhaps the most interesting product of application of the allegorical tales in the two texts to the real life forays into precrime is the capacity of both government officials, and seemingly large portions of the public, to accept the prosecution of crimes that have not occurred and of criminals who have not yet done anything, in the interest of avoiding future catastrophes like those of 9/11. Even though it has been demonstrated that at least some of the Guantánamo detainees were detained based on erroneous identification and had no connection to terrorist activities,[183] subsequent calls in some circles to disband the camp and either release or try the remaining prisoners have been largely ignored. The program continues, and there does not appear to be a strong public outcry against it.

The most dramatic and disturbing divergence from the narratives of the *Minority Report* stories and the post-9/11 reality is the fact that the American public as a whole appears to have little concern about the possibility (and indeed the certainty) that innocent or likely innocent people are being incarcerated, indefinitely, without evidence or charge. In the short story—and to a much greater extent, the film—the narrative tension rests on the assumption that no matter how impressive and salutary the precrime technology and methodology might be, exposure of even one mistake, one instance of an innocent person being identified and incarcerated by the system, would be fatal to the program. Following the story, there would be such an outcry and, indeed, an admission on the part of the officials responsible for the program themselves that a crime-predicting mechanism could not be allowed to continue absent a clear demonstration of its infallibility. If not, the unstated argument clearly runs, even one wrongly accused innocent party would be enough to counterbalance all the perceived and actual benefits of the law enforcement program.

Perhaps the Japanese internment is a particularly instructive comparison to help explain the absence of broad public outrage about our current internment regime. The combination of the broad fear of severe threat to public safety and the ability to focus that fear on a small, identifiable

portion of society that can be alien in some essential way may explain an absence of empathy that might otherwise foster more concern about the indefinite detention of precriminals. Perhaps the same social dynamics that led to calls for racial profiling in the wake of the 9/11, but not the Oklahoma City attacks, and for detention of those who might appear to some to be "illegal" on our southern (as opposed to northern) border, help explain why such a questionable detention regime could survive in this freedom-loving nation for so long.

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[1] John Anderton, Commission of Police, in PHILIP K. DICK, *The Minority Report*, *in* THE PHILIP K. DICK READER 324 (Citadel Press 1987) (1956).

[2] Fictional United States Attorney General in MINORITY REPORT (Twentieth Century Fox and DreamWorks 2002).

[3] *See generally* DICK, *The Minority Report*, *supra* note 1.

[4] There is an interesting legal question as to whether the acts of the husband would constitute attempted murder of his wife even within the futuristic scenario of the film.

[5] For discussion of similarities between the law enforcement regime depicted in *The Minority Report* and the Bush administration response to the 9/11 attacks, see Michael P. Scharf & Gwen Gillespie, *Foreword: Security Detention*, 40 CASE W. RES. J. INT'L. L. 315, 316 (2009) ("I could not help but ponder the parallels between 'Minority Report' and the Bush Administration's policy of incarcerating hundreds of foreign citizens at the sprawling detention facility in Guantánamo Bay, Cuba.").

[6] Peter Whoriskey & Dan Eggen, *Terror Suspects Had No Explosives and Few Contacts; Sears Tower Plan Never Finished, Authorities Say*, WASH. POST, June 24, 2006, at A3, *available at* PROQUEST, Document ID 1065683691.

[7] Julienne Gage, *2nd Mistrial in 'Liberty City 7' Case*, WASH. POST, Apr. 17, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/16/AR200804160360 7.html.

[8] *See* Whoriskey & Eggen, *supra* note 6, at A3.

[9] *See id.*

[10] *Id*. ("Pistole and other U.S. officials said aggressive policing and early arrests were necessary to ensure that potential terrorist attacks—no matter how improbable they may seem—are thwarted.").

[11] *Id.* The only activity that the suspects engaged in that could be seen as even the most preliminary steps towards some sort of terrorist action, in addition to participating in supposed "oath of loyalty" to al-Qaeda led by the FBI agent, was the videotaping of some

government buildings in Miami using a camera provided by the government agent. *See id.*

[12] *Id*. An arrest of would-be terrorists at what at least appears to be a somewhat more advanced stage of planning was made and highly publicized by British police in August 2006. *See* John Ward Anderson & Karen DeYoung, *Plot to Bomb U.S.-Bound Jets is Foiled*, WASH. POST, Aug. 11, 2006, at A1 (discussing how a plot to blow up U.S.-bound passenger planes was foiled by British and American investigators); *Airlines Terror Plot' Disrupted*, BBCNEWS (Aug. 10, 2006), http://news.bbc.co.uk/2/hi/uk_news/4778575.stm.

[13] Whoriskey & Eggen, *supra* note 6. *See also* Gordon Rayner & Duncan Gardham, *Terror Suspects Planned Family Sacrifice*, TELEGRAPH MEDIA GROUP (Apr. 4, 2008) (discussing the would-be terrorists plans, including possibly bringing their families), http://www.telegraph.co.uk/news/uknews/1583921/Terror-suspects-planned-family-sacrifice.html; *Agent Infiltrated Terror Cell, U.S. Says*, CABLE NEWS NETWORK (Aug. 11, 2006), *available at* http://www.cnn.com/2006/US/08/10/us.security/index.html.

[14] *See* Gage, *supra* note 7. *See also* Press Release, Dep't of Justice, Leader of Liberty City Six Convicted on all Counts, Four Others Convicted on Multiple Counts, and One Defendant Acquitted on Charges of Conspiring to Support Al Qaeda, Attack Targets in the United States (May 12, 2009), *available at* http://miami.fbi.gov/dojpressrel/pressrel09/mm051209.htm. The "leader of the group" Narseal Batiste was convicted of conspiracy to provide material support to a foreign terrorist organization, conspiracy to provide material support and resources to terrorists, conspiracy to maliciously damage and destroy by means of an explosive, and conspiracy to levy war against the government of the United States. Patrick Abraham was convicted on all counts except conspiring to levy war against the United States, and Stanley Grant Phanor, Burson Augustin, and Rothschild Augustine were each convicted of two counts of conspiracy to provide material support to terrorists. *Id.*

[15] *See* Vanessa Blum, *Five Found Guilty in Miami of Plotting with Al Qaeda*, L.A TIMES (May 13, 2009), http://articles.latimes.com/2009/may/13/nation/na-terror-trial13. Lyglenson Lemorin was acquitted in 2007 in the first trial, whereas Naudimar Herrera was acquitted in the third trial, after two in prison. *Id.*

[16] *Five Florida Men Get Prison for Plotting Terrorist Attacks with Al Qaeda*, CABLE NEWS NETWORK (Nov. 20, 2009), http://www.cnn.com/2009/CRIME/11/20/florida.terror.trial/index.html.

[17] For a discussion of the differences in narrative approaches between the short story and film, *see* Cynthia D. Bond, *Law as Cinematic Apparatus: Image, Textuality, and Representational Anxiety in Spielberg's Minority Report*, 37 CUMB. L. REV. 25 (2006–07).

[18] BLADE RUNNER (Warner Bros. Pictures 1982).

[19] PHILIP K. DICK, DO ANDROIDS DREAM OF ELECTRIC SHEEP? (Oxford Univ. Press 2007) (1968).

[20] BLADE RUNNER, *supra* note 18.

[21] TOTAL RECALL (TriStar Pictures 1990).

[22] SCREAMERS (Columbia Pictures 1995).

[23] IMPOSTOR (Dimension Films 2001).

[24] MINORITY REPORT, *supra* note 2.
[25] PAYCHECK (Paramount Pictures 2003).
[26] A SCANNER DARKLY (Warner Independent Pictures 2006).
[27] PHILIP K. DICK, *The Golden Man*, *in* THE PHILIP K. DICK READER, *supra* note 1.
[28] NEXT (Paramount Picutres 2007).
[29] RADIO FREE ALBEMUTH (Open Pictures 2011).
[30] THE ADJUSTMENT BUREAU (Universal Pictures 2010).
[31] *See generally* TOTAL RECALL, *supra* note 21.
[32] *See generally* PHILIP K. DICK, *The Golden Man*, *in* THE PHILIP K. DICK READER, *supra* note 1.
[33] *See* DICK, *The Minority Report*, *supra* note 1, at 323.
[34] *See id.* at 324, 326–28.
[35] *Id.* at 324–25.
[36] *Id.* at 326.
[37] *Id.* at 324.
[38] *Id.* at 328.
[39] *See id.* at 327–28.
[40] *See id.* at 324–28.
[41] *Id.* at 324.
[42] *Id*.
[43] *Id.* at 324–25.
[44] *See id.* at 325.
[45] *Id*.
[46] *Id.*
[47] *See id.* at 326.
[48] *See id.* at 326–27.
[49] *See id*.
[50] *See id.* at 327–28.
[51] *See id.* at 328.
[52] *See id.*
[53] *See id.* at 328–30.
[54] *See id.*
[55] *See id.* at 330–31.
[56] *See id.* at 331.
[57] *See id.*
[58] *See id.* at 332.
[59] *See id.* at 332–33.
[60] *See id.* at 333.
[61] *Id.* at 333–34.
[62] *See id.* at 334.
[63] *See id.* at 334–35.
[64] *Id.* at 335.
[65] *Id.* at 336.
[66] *Id.* at 337. "[U]nanimity of all three precogs is a hoped-for but seldom-achieved phenomenon. . . . It is much more common to obtain a collaborative majority report of

two precogs, plus a minority report of some slight variation, usually with reference to time and place, from the third mutant." *Id.*

[67] *See id.*
[68] *See id.* at 339.
[69] *See id.* at 340.
[70] *See id.*
[71] *See id.*
[72] *See id.* at 341.
[73] *Id.*
[74] *See id.*
[75] *See id.*
[76] *Id.*
[77] *Id.* at 342.
[78] *See id.* at 343.
[79] *See id.* at 343–44.
[80] *See id.* at 344.
[81] *Id.* at 348.
[82] *Id.* at 349–51.
[83] *See id.* at 348.
[84] *See id.* at 352–53.
[85] *See generally id.*
[86] *See id.*
[87] *See id.*
[88] *See id.*
[89] *Id.* at 353.
[90] *Id.*
[91] MINORITY REPORT, *supra* note 2.
[92] JAWS (Universal Pictures 1975).
[93] CLOSE ENCOUNTERS OF THE THIRD KIND (Columbia Pictures 1977).
[94] RAIDERS OF THE LOST ARK (Paramount Pictures 1981).
[95] E.T.: THE EXTRA-TERRESTRIAL (Universal Pictures 1982).
[96] SCHINDLER'S LIST (Universal Pictures 1993).
[97] AMISTAD (DreamWorks 1997).
[98] SAVING PRIVATE RYAN (DreamWorks Distribution 1998).
[99] ARTIFICIAL INTELLIGENCE: AI (Warner Bros. Pictures and DreamWorks 2001).
[100] MUNICH (DreamWorks and Universal Pictures 2005).
[101] *Spielberg on Spielberg* (Turner Classic Movies television broadcast July 9, 2007), *available at* http://www.youtube.com/watch?v=hAXFV6TvjJM.
[102] *Id.*
[103] In discussing the changes made in the original short story, and in earlier versions of the screenplay, cowriter Scott Frank said that "the concept of 'Precrime' and people being arrested for crimes they're going to commit is from the short story. The basic set-up of the head of Precrime being accused of such a future murder is also from the short story. But that's it." Scott Frank Minority Report Chat, SCREENWRITER'S UTOPIA,

http://www.screenwritersutopia.com/modules.php?name=Content&pa=showpage&pid=15 (last visited Aug. 25, 2010).

[104] *See* DICK, *The Minority Report*, *supra* note 1, at 352–54.

[105] *See id.*

[106] *Id.*

[107] MINORITY REPORT, *supra* note 2.

[108] *See id.*

[109] *See id.*

[110] *See* Robert Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 697 (2004) ("Even for a believer in free will and a large locus poenitentiae, this result seems extreme. After all, Precrime had all but eliminated murder in Washington, an achievement difficult to forget or to forgo. A far more likely result politically is that the government would have installed a sanitized version of Precrime.").

[111] *See* MINORITY REPORT, *supra* note 2.

[112] *Spielberg on Spielberg*, *supra* note 101.

[113] Interview by Tim Russert with U.S. Vice President Dick Cheney, *Meet the Press* (NBC television broadcast Sept. 16, 2001), *available at* http://s3.amazonaws.com/911timeline/2001/meetthepress091601.html. For an observation that federal law enforcement policy had already begun to shift from a "post hoc" to "preventative" model prior to the 9/11 attacks, see Robert M. Chesney, *Terrorism, Criminal Prosecution and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 676-77 (2009).

[114] Russert, *supra* note 113.

[115] U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTÁNAMO BAY, AFGHANISTAN, AND IRAQ (UNCLASSIFIED) 11 (2008), *available at* http://www.usdoj.gov/oig/special/s0805/final.pdf.

[116] *Id.*

[117] *Id.*

[118] Robert Farley, *Still the Right War*, THE AMERICAN PROSPECT (Oct. 27. 2006), http://www.prospect.org/cs/articles?article=still_the_right_war. ("Al-Qaeda had used Afghanistan as a base for training and operations for attacks against the United States since at least 1997. Air attacks had, unsurprisingly, failed to dislodge al-Qaeda or destroy its camp infrastructure. . . . There was, moreover, good reason to believe that the U.S. operation would be a success. . . . The Taliban had no patron outside of Pakistan, whose cooperation with the invasion was secured prior to the attack . . . [and] Taliban forces were not unified."). *Id.*

[119] Interview by Tim Russert with U.S. Vice President Dick Cheney, *Meet the Press* (NBC television broadcast Sept. 8, 2002), *available at* *http://www.mtholyoke.edu/acad/intrel/bush/meet.htm.*

[120] *Id.*; *See also Top Bush Officials Push Case Against Saddam*, CABLE NEWS NETWORK (Sept. 8, 2002), http://www-cgi.cnn.com/2002/ALLPOLITICS/09/08/iraq.debate/ (quoting Secretary of Defense Donald Rumsfeld as telling CBS's *Face the Nation* that after the first Iraq war in 1992 the Iraqis were "six months to a year away from developing a nuclear weapon.").

[121] Wolf Blitzer, *Search for the 'Smoking Gun*,' CABLE NEWS NETWORK (Jan. 10, 2003), http://www.cnn.com/2003/US/01/10/wbr.smoking.gun/ (quoting Rice as saying, "We know that [Saddam Hussein] has the infrastructure, nuclear scientists to make a nuclear weapon. And we know that when the inspectors assessed this after the Gulf War, he was far, far closer to a crude nuclear device than anybody thought.").

[122] *See Transcript of Powell's U.N. Presentation*, CABLE NEWS NETWORK (Feb. 6, 2003), http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript/.

[123] *See* Dan Froomkin, Commentary, *A Refresher on How the Press Failed the People*, NIEMAN WATCHDOG (May 29, 2008) http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=00255 (quoting Scott McClellan, one of President Bush's closest aides, as saying, "the media would serve as complicit enablers. Their primary focus would be on covering the campaign to sell the war, rather than aggressively questioning the rationale for war or pursuing the truth behind it . . . the media would neglect their watchdog role. . . . The public should have been made much more aware, before the fact, of the uncertainties, doubts, and caveats that underlay the intelligence about the regime of Saddam Hussein. The administration did little to convey those nuances to the people, the press should have picked up the slack but largely failed to do so because their focus was elsewhere—on covering the march to war, instead of the necessity of war.").

[124] *See Transcript of Powell's U.N. Presentation*, *supra* note 122; *A Timeline of the Iraq War*, THINK PROGRESS, http://thinkprogress.org/iraq-timeline/.

[125] Public support for the military invasion of Iraq went from a high of more that 72 percent in March, 2003, to a low of less than 38 percent in February, 2008. *See Public Attitudes Toward the War in Iraq: 2003–2008*, Mar. 19, 2008, http://pewresearch.org/pubs/770/iraq-war-five-year-anniversary.

[126] *See Guantánamo Bay's Peculiar History*, PUB. BROAD. SERV., http://www.pbs.org/now/shows/220/guantanamo-bay-history.html ("The United States first established a military base on Cuba in 1898 when it took control of the island from the Spanish. It obtained a 'perpetual lease' from the Cuban government in 1903."). *See also* Jerica M. Morris-Frazier, *Missing in Action: Prisoners of War at Guantánamo Bay*, 13 UDC/DCSL L. REV. 155 (2010).

[127] *See* Morris-Frazier, *supra* note 126, at 165.

[128] *See id*. at 156.

[129] *See id.*

[130] *See* Maureen T. Duffy, *The Slow Creep of Complacency: Ongoing Challenges for Democracies Seeking to Detain Terrorism Suspects*, 1 No. 9 PACE INT'L L. REV ONLINE COMPANION 42, 44 (2010) ("When President Obama announced, as one of his first official actions as President, that he would be closing the infamous detention camp at Guantánamo Bay within one year, it seemed this hope was realized. In hindsight, however, it is clear that such promises were not so simple and that, after years of evolving terrorism detention policies, it was not so obvious how to go back, or whether it was even possible or advisable to do so.").

[131] *See* Michael B. Mukasey, Attorney Gen. of the United States, Keynote Address at the American Enterprise Institute for Public Policy Research (July 21, 2008), *available at* http://www.justice.gov/archive/ag/speeches/2008/ag-speech-0807213.html ("The United

States has every right to capture and detain enemy combatants in this conflict, and need not simply release them to return to the battlefield. . . . We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians.").

[132] *See id.*

[133] *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[134] *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 426 (2007).

[135] *Jose Padilla*, N.Y. TIMES, Mar. 6, 2009, http://topics.nytimes.com/top/reference/timestopics/people/p/jose_padilla/index.html.

[136] *See* Theo Emery, *How Should America Try Terror Suspects?*, TIME, Jan. 7, 2010, *available at* http://www.time.com/time/nation/article/0,8599,1952354,00.html ("Since Sept. 11, only two terrorism suspects arrested on American soil—Jose Padilla and Ali Saleh Kahlah al-Marri—have been designated as enemy combatants; the remainder were captured overseas. Both men were held for years in an offshore Navy brig" and eventually tried in federal court.).

[137] *Jose Padilla*, *supra* note 135.

[138] *See id.*

[139] *See id*.

[140] *See id.*

[141] *Id.*

[142] *See id.*

[143] David Cole notes that the Japanese internment was actually the second "significant preventive roundup" in the United States, citing the Palmer Raids of 1919–20 as the first. *See* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists and War*, 97 CAL. L. REV. 693, 694 (2009).

[144] *See* Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. FOR SOC. JUST. 1, 3–4 (2005) ("Fred Korematsu was born on January 30, 1919, in Oakland, California. His parents had emigrated from Japan and found themselves in a society that did not want them. The public had been hostile to persons of Japanese ancestry when they first started to arrive in large numbers. They were excluded from society from early on and denied the privileges and rights afforded others. *Issei*, or first-generation immigrants from Japan, were denied the ability to become naturalized citizens; anti-miscegenation statutes prohibited Japanese Americans from marrying Caucasians; and some Japanese American children were placed into segregated schools. By its Alien Land Law of 1913, California barred aliens ineligible for citizenship from purchasing land or acquiring leases longer than three years. It was in this atmosphere of racial antagonism that Fred grew up.").

[145] *Id.* at 6.

[146] *See Exploring the Japanese American Internment Through Film and the Internet*, NAT'L ASIAN AM. TELECOMM. ASS'N., http://www.asianamericanmedia.org/jainternment/. *See also*, Bannai, *supra* note 144, at 7 ("On February 19, 1942, in response to the calls for the internment of Japanese Americans, President Franklin Delano Roosevelt signed Executive Order 9066 granting sweeping power to military authorities. Pursuant to Executive Order 9066, the Secretary

of War, or any military commander he named, was authorized to exclude any persons he might designate from military areas he would prescribe 'in his discretion.' Lieutenant General John L. DeWitt, the commanding officer responsible for the Western states, undertook the control of the Japanese population on the West Coast. Congress made violation of any military order issued pursuant to a Federal crime.").

[147] Rico Villanueva & Shmuel Ross, *Japanese Relocation Centers*, FAMILY EDUC. NETWORK, http://www.infoplease.com/spot/internment1.html#axzz0wcKVU8QT.

[148] *Id.*; *see also* Margaret Chon, *Remembering and Repairing: The Error Before Us, In Our Presence*, 8 SEATTLE J. FOR SOC. JUST., 643, 646 (2010) ("As historian Greg Robinson recently documented, this mass detention of a group based on ethnicity without individualized due process, charges, or trial was preceded by years of government surveillance.").

[149] *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, (1998).

[150] *Id.* at 37–38.

[151] *Id.* at 38–40. John Higham was a renowned cultural historian until his death in 2003. His work *Strangers in the Land* (1955, republished in 1963, 1975, and 1988) continues to dominate this field. *See also* Am. Historical Ass'n, *In Memoriam*, PERSPECTIVES, Oct. 2003, http://www.historians.org/perspectives/issues/2003/0310/0310mem2.cfm.

[152] Aoki, *supra* note 149, at 40. Professor Aoki notes that even before the passage of the Alien Land Laws, the San Francisco School Board implemented a policy of segregating Japanese students from their white counterparts. The Japanese government prevailed upon President Roosevelt to step in and suspend the policy, which he ultimately did only after receiving assurances from Japan that it would restrict Japanese immigration to the United States. *Id.* at 48–49.

[153] *Id.* at 68.

[154] *See* Villanueva & Ross, *supra* note 147.

[155] *Id.*

[156] *Id*

[157] Chesney, *supra* note 134, at 426.

[158] *Id.* at 434–35.

[159] *Id.* at 435.

[160] *Id*.

[161] Cole, *supra* note 143, at 723.

[162] *See* 18 U.S.C. § 2339B ("**(a) Prohibited activities.—(1) Unlawful conduct.**—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.").

[163] Cole, *supra* note 143, at 723; *see also* Chesney *supra* note 134, at 436 ("Briefly stated, § 2339B and § 1705 were designed to achieve prevention indirectly by reducing the flow of resources to [foreign terrorist organizations (FTOs)]. But they also are capable of serving the goal of prevention more directly because they provide a readily available charge in circumstances involving potentially dangerous persons whom the government wishes to incapacitate. The statutes define the forbidden forms of support

quite broadly, encompassing most forms of interaction that might take place between a suspected terrorist and an FTO. Indeed, 'material support or resources' is defined to include not only the provision of various forms of equipment and services, but also the act of providing one's own self as 'personnel' to the designated group. In most circumstances in which a suspected terrorist is linked to an FTO, therefore, the very conduct that constitutes a link to the FTO most likely constitutes a forbidden form of support. This gives the government grounds to intervene independent of whether prosecutors can prove that the suspect is actually planning to carry out a terrorist attack.").

[164] *See* Lindsay Farmer, *Time and Space in Criminal Law*, 13 NEW CRIM. L. REV. 333, 335 (2010) ("Some recent literature on criminal law has . . . begun to take more seriously the idea of 'precrime'—an idea that has its origins in the fiction of Philip K. Dick—as a way of thinking about the extended range of preventative offenses. Although such predictive capacity may remain fanciful, we should take more seriously the development of measures in criminal law that aim at the control of future behavior and their potential importance for criminal law theory. The central issue here is that of the control or management of uncertainty, and thus of the relationship between criminal law and security.").

[165] *See* MODEL PENAL CODE § 5.03 (1962) ("No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.").

[166] *See id.* at § 5.01 ("A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. (2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose.").

[167] *See* Cole, *supra* note 143, at 696 ("[P]reventive detention is inconsistent with basic notions of human autonomy and free will. We generally presume that individuals have a choice to conform their conduct to the law. Thus, we do not criminalize thought or intentions, but only actions. Respect for autonomy requires us to presume, absent a very strong showing, that individuals will conform their behavior to the law. To lock up a human being on the prediction that he will undertake dangerous and illegal action if left free is, in an important sense, to deny autonomy.").

[168] Batey, *supra* note 110, at 694.

[169] *Id.* at 696.

[170] Chesney, *supra* note 134, at 425.

[171] *See* DICK, *The Minority Report*, *supra* note 1, at 323; MINORITY REPORT, *supra* note 2.
[172] *See* DICK, *The Minority Report*, *supra* note 1, at 323; MINORITY REPORT, *supra* note 2.
[173] *See* Cole, *supra* note 143, at 696 ("[P]reventative detention rests on a prediction about future behavior, and no one can predict the future. Decision makers all too often fall back on stereotypes and prejudices as proxies for dangerousness. Humility about our predictive abilities should counsel against preventive detention. Preventing terrorist attacks is a legitimate social goal, of course, but there are many ways to do so short of detention . . . . Locking up human beings is one of the most extreme preventive measures a state can undertake; it should be reserved for situations where it is truly necessary.").
[174] *Id.*
[175] *See id.* ("When a judge releases an individual who in fact poses a real danger of future harm, and the individual goes on to inflict that harm, the error will be emblazoned across the front pages. When, by contrast, a judge detains an individual who would not have committed any wrong had he been released, the error is invisible—and, indeed, unknowable. . . . Thus, the visibility of release errors and the invisibility of erroneous detentions will lead judges to err on the side of custody over liberty.").
[176] *See* Whoriskey & Eggen, *supra* note 6.
[177] *See* David Cole, *Less Safe, Less Free: A Progress Report on the War on Terror*, 2008 2008 J. INST. JUST. INT'L STUD. 1, 1 (2008) ("As far as I can tell, we do not have witches in the Justice Department, predicting who will commit crimes in the future. Nonetheless, the Bush Administration since 9[/]11 has adopted a strategy, which in some sense depends upon the ability to predict with incredible accuracy at what will happen in the future.").
[178] DICK, *The Minority Report*, *supra* note 1, at 324.
[179] Sarah Baxter, *Powell Tried to Talk Bush Out of War*, THE SUNDAY TIMES, July 8, 2008, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2042072.ece (stating that former Secretary of State Colin Powell revealed that he vainly tried to persuade President George W. Bush not to invade Iraq).
[180] *See* Michael Savage, *Blair Warned in 2000 Iraq War Was Illegal*, THE INDEPENDENT, Mar. 2, 2010, http://www.independent.co.uk/news/uk/politics/blair-warned-in-2000-iraq-war-was-illegal-1914293.html (stating that Secret Foreign Office Strategy papers reveal that "an invasion of Iraq was discussed within the Government more than two years before military action was taken—with Foreign Office mandarins warning that an invasion would be illegal, that it would claim 'considerable casualties' and could lead to the breakdown of Iraq.").
[181] From 1989–2009, 282 convicted felons have been exonerated of their alleged crimes because of DNA testing alone. *See* Michael Doyle, *Supreme Court Closely Divided on Felon's Right to DNA Test*, MCCLATCHY NEWSPAPERS, Mar. 2, 2009, *available at* http://www.mcclatchydc.com/2009/03/02/63118/supreme-court-closely-divided.html.
[182] Since 1973, over 130 people have been released from death rows throughout the country due to evidence of their wrongful convictions. In 2003 alone, ten wrongfully convicted defendants were released from death row. *See Death Penalty and Innocence*, AMNESTY INTERNATIONAL USA, http://www.amnestyusa.org/death-penalty/death-

penalty-facts/death-penalty-and-innocence/page.do?id=1101086 (last visited Aug. 26, 2010).

[183] Tim Reid, *George W. Bush 'knew Guantanamo Prisoners were Innocent,'* THE TIMES, Apr. 9, 2010, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7092435.ece ("Lawrence Wilkerson, a top aide to Colin Powell, the former republican Secretary of State, in a signed declaration to support a lawsuit filed by a Guantanamo detainee . . . [alleges that] George W. Bush, Dick Cheney, and Donald Rumsfeld covered up that hundreds of innocent men were sent to Guantanamo prison camp because they feared that releasing them would harm the push for war in Iraq and the broader War on Terror.").