Florida State University College of Law
Scholarship Repository

Scholarly Publications

Winter 2003

Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators

Wayne A. Logan
Florida State University College of Law

Eric S. Janus

Follow this and additional works at: http://ir.law.fsu.edu/articles

Part of the Constitutional Law Commons, and the Criminal Law Commons

Recommended Citation
Wayne A. Logan and Eric S. Janus, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 *Conn. L. Rev.* 319 (2003),
Available at: http://ir.law.fsu.edu/articles/192

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

HEINONLINE

Citation: 35 Conn. L. Rev. 319 2002-2003

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Wed Apr 29 11:56:49 2015

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0010-6151

CONNECTICUT LAW REVIEW

VOLUME 35 | WINTER 2003 | NUMBER 2

Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators

ERIC S. JANUS* & WAYNE A. LOGAN**

I. INTRODUCTION

Social historians will doubtless look back on the 1990s as a period of remarkable economic growth and stability in American society. At the same time, however, they will have to reconcile a contemporaneous, seemingly paradoxical social occurrence: The nation's undertaking of an unprecedented massive experiment in social control—mainly by use of imprisonment,[1] but also by other more novel means.[2] A foremost target of

* Professor of Law, William Mitchell College of Law. Professor Janus served as co-counsel in extended litigation challenging the constitutionality of Minnesota's Sexually Dangerous Person Act. *See In re* Linehan, 557 N.W.2d 171 (Minn. 1996); *In re* Linehan, 557 N.W.2d 167 (Minn. 1996), *cert. granted and judgment vacated sub nom.* Linehan v. Minnesota, 522 U.S. 1011 (1997), *on remand, In re* Linehan, 594 N.W.2d 867 (Minn. 1999), *cert. denied sub nom.* Linehan v. Minnesota, 528 U.S. 1049 (1999); *In re* Linehan, 518 N.W.2d 609 (Minn. 1994).

**Associate Professor of Law, William Mitchell College of Law.

The authors thank Deb Jessen, class of 2003, for her research assistance, and Meg Daniel for her editorial support.

[1] *See* U.S. DEP'T OF JUST.: BUREAU OF JUST. STATISTICS, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2001, at 1 (2001) (noting that from 1990 to 2000, the nation's prison and jail populations grew by 783,157 inmates, a 5.6% annual rate of increase), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim00.pdf (last visited Oct. 21, 2002) (on file with the Connecticut Law Review). *See generally* MARC MAUER, RACE TO INCARCERATE (1999); THE SENTENCING PROJECT, U.S. SURPASSES RUSSIA AS WORLD LEADER IN RATE OF INCARCERATION 1 (2000), *available at* http://www.sentencingproject.org/brief/usvsrus.pdf (last visited Oct. 21, 2002) (on file with the Connecticut Law Review).

these strategies has been sex offenders, a criminal sub-population that historically inspired unique fear and disdain, and continues to do so today.[3] Faced with the prospect of sex offenders being set free at the end of their prison terms, and catalyzed by high-profile sexual victimizations of women and children, legislators took action.[4] One outgrowth has been registration and community notification laws, now in effect nationwide, which seek to deter recidivist sexual offenders by providing police and citizens alike with information on released sex offenders, and to facilitate apprehension of offenders should recidivism occur.[5] Another method has targeted especially fearsome offenders (often referred to as "sexually violent predators," or "SVP"s) for actual physical confinement, after completion of prison terms, pursuant to civil commitment. Together, the methods are cornerstones of what has been aptly called America's emerging "preventive state," which, rather than achieving social control by means of avowedly penal regimes behind prison walls, seeks to "identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in a variety of ways."[6]

This Article addresses commitment laws, the more aggressive of the

---

[2] *See* Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1752 (1999) (noting that "[w]e live in a repressive era when punishment policies that would be unthinkable in other times and places are not only commonplace but also are enthusiastically supported by public officials, policy intellectuals, and much of the general public").

[3] *See, e.g.*, State *ex rel.* Pearson v. Probate Court, 287 N.W. 297, 299 (Minn. 1939), *aff'd*, 309 U.S. 270 (1940) (referring to persons committed pursuant to the State's then-new "sex psychopath" law as "unnaturals"); *see also* ADAM SAMPSON, ACTS OF ABUSE: SEX OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM 124 (1994) (noting that "[t]he vehemence of the hatred for sex offenders is unmatched by attitudes to any other offenders"); Peter Davis, *The Sex Offender Next Door*, N.Y. TIMES MAG., July 28, 1996, at 20, 43 (likening sex offenders to lepers); David Van Biema, *Burn Thy Neighbor: Where Can A Child Molester Go After Serving Time? Not Home*, TIME, July 26, 1993, at 58 (noting the common perception of sex offenders as "irredeemable monsters").

[4] As social historian Philip Jenkins has observed, incidents of sexual violence have led to a "moral panic" and aggressive legislative reactions in three different periods—the 1910s, 1940s, and 1990s. *See* PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 6, 11-12 (1998); *see also* Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 143-47 (1950) (noting how the prior generation of "sexual psychopath" laws was triggered, in part, by a "hysteria"). Professor Deborah Denno's research, however, examining the period from 1937 to 1957, suggests that this legislative preoccupation was driven less by reportage of particularly brutal sex crimes than by an emerging "emphasis on psychiatry, family, and children." Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317, 1321 (1998). For more on the cyclical nature of deviant commitment laws, see John Pratt, *The Rise and Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society*, 4 PSYCHOL., PUB. POL'Y, & L. 25 (1998).

[5] Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1169 (1998).

[6] Carol S. Steiker, *The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774 (1998); *see also* Eric Janus, *Civil Commitment as Social Control: Managing the Risk of Sexual Violence*, *in* DANGEROUS OFFENDERS: PUNISHMENT AND SOCIAL ORDER 84, 85 (Mark Brown & John Pratt eds., 2000) (observing that SVP laws entail a "ritual exile," confining a "small, aberrational group of 'others'").

innovations currently used in sixteen U.S. jurisdictions.[7] The laws, by design, operate at the margins of the justice system,[8] and have been largely immune from constitutional attack. Notably, in 1997 the Supreme Court concluded in *Kansas v. Hendricks*[9] that the laws do not constitute "punishment"—and hence do not violate the Ex Post Facto and Double Jeopardy Clauses—freeing the states to impose the laws retroactively and in addition to criminal sentences.[10] Confident in the legality of their laws, states have confined over 2400 SVPs during the past several years.[11]

Although the predominant motivation for SVP commitment laws is incapacitation, states uniformly promise treatment as an ancillary purpose. Indeed, it is this "treatment" purpose that marks the high-security, long-term incapacitation characteristic of SVP regimes as non-punitive, and insulates them from constitutional challenge. Yet, in practice, the promised treatment most often goes unredeemed. More than a decade into the SVP experiment, almost no committees have been released, even provisionally.

The ever-growing populations housed in these facilities highlight the ongoing uncertainty over the obligations of government to those it involuntarily commits. To date, the Supreme Court has embraced the promise of treatment in justifying its rejection of constitutional challenges sounding in ex post facto and double jeopardy principles. The time has now come to redeem the promise of treatment, requiring that the Court ensure that the SVP laws are being applied in a manner true to the substantive due process commands associated with "civil" commitment.

In this Article we argue that SVP commitment laws, rather than operating in a netherworld of constitutional immunity, fit squarely within the delimiting principles and constraints of substantive due process. Prior decisions by the Court make clear that civil committees possess at least two distinct, yet closely related, substantive due process rights. First, those involuntarily confined by civil means are entitled to non-punitive conditions of confinement.[12] Second, at the very least, the nature of conditions and duration of confinement must "bear some reasonable relation" to the

---

[7] W. LAWRENCE FITCH, SEX OFFENDER COMMITMENT IN THE UNITED STATES: LEGISLATIVE AND POLICY CONCERNS IN SEXUAL COERCION: UNDERSTANDING AND MANAGEMENT (Robert Prentky et al. eds.) (forthcoming 2003) (noting that 15 states and the District of Columbia have SVP laws).

[8] *See generally* C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the "Politically Ill,"* 19 WM. MITCHELL L. REV. 99 (1993).

[9] 521 U.S. 346 (1997).

[10] *Id.* at 368-69.

[11] *See* FITCH, *supra* note 7 (noting that more than 1,200 persons have been detained pursuant to modern SVP laws).

[12] *See, e.g.*, Kansas v. Crane, 534 U.S. 407, 412 (2002); *Hendricks*, 521 U.S. at 363; Foucha v. Louisiana, 504 U.S. 71, 80 (1992); United States v. Salerno, 481 U.S 739, 741-48 (1987).

avowed civil purpose of confinement.[13] What remains unclear, however, after several decades of litigation, is how these two rights interrelate in assessing the constitutionality of involuntary civil commitments. In particular, when, if ever, do constitutionally substandard conditions of confinement, especially the lack of effective treatment, render the confinement itself unconstitutional? This, in turn, presents a pragmatic question of central importance: When do such substandard conditions mandate the release of detainees, as opposed to simply supporting injunctive or monetary relief?[14]

This inquiry is prompted by the Supreme Court's recent decision in *Seling v. Young*,[15] where the Court held that release from civil commitment is unavailable, even in the face of "serious" concern over the confinement conditions experienced by a habeas corpus petitioner.[16] In *Young*, the Court rejected ex post facto and double jeopardy claims brought by a recidivist sex offender involuntarily confined pursuant to Washington's SVP law, reasoning that the law was civil at its origin, and was not rendered criminal by the subsequent failure of the State to afford proper conditions and treatment.[17] The Court acknowledged, but did not expound upon, the availability of a substantive due process right to a petitioner such as Young.[18] This acknowledgment suggests that due process supports rights and remedies that are distinct from, and not subject to the particular limits of, the ex post facto and double jeopardy analysis foremost in *Young*—a matter tantalizingly left open by the Court.

This jurisprudential caveat is of major importance given the considerable latitude the Court has afforded states in the implementation of their SVP laws. In *Hendricks*, for instance, rather than adhering to its prior insistence that committees be "mentally ill" and "dangerous,"[19] the Court instructed that substantive due process permits the commitment of dangerous individuals with a "mental abnormality" or "personality disorder"[20]—a

---

[13] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[14] Our analysis here should be distinguished from a cognate inquiry that has received considerable attention, namely, when confinement-related claims *may* be brought in federal court pursuant to 42 U.S.C. § 1983 (which does not require exhaustion of state remedies), versus when they may be brought as habeas claims (which require exhaustion). In *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973), the Supreme Court held that cases challenging "the very fact or duration of the confinement itself" *must* be brought under the habeas rubric, whereas those seeking correction of conditions of confinement (but not release) *may* be brought under § 1983. Our analysis in a sense combines two branches of the *Preiser* puzzle: We ask when unconstitutional conditions of confinement infect the "fact or duration" of confinement, thereby requiring release.

[15] 531 U.S. 250 (2001).

[16] *Id.* at 263.

[17] *See id.*

[18] *See id.* at 258-59.

[19] *See* Foucha v. Louisiana, 504 U.S. 71, 78 (1992).

[20] Kansas v. Hendricks, 521 U.S. 346, 358-60 (1997).

considerably more inviting standard. More recently, in its 2002 decision in *Kansas v. Crane*,[21] the Court held that substantive due process imposes limits on the types of mental abnormalities that can serve as commitment predicates, but stopped short of requiring proof of a "*total* or *complete* lack of control," requiring only that committees have serious difficulty in controlling their dangerous behavior.[22]

While *Hendricks* and *Crane* help clarify the substantive due process limits on the state's power to commit, as an initial matter, they do not speak to its subsequent authority to retain control over committees. This authority must inevitably be supported by the putative civil rationale that constitutionally redeems the commitment laws themselves—"civil" treatment. Social science data now becoming available, however, raise real doubts over whether this treatment purpose is being attained or, indeed, even being seriously pursued. Perhaps the most glaring piece of evidence relates to the dramatic paucity of committees released since the modern reemergence of the laws in the early 1990s.[23] These meager release rates are not surprising given the natural aversion of system actors to release, and communities to accept, sex offenders.[24] But they are also explained by the persistent lack of scientific consensus about the effectiveness of sex

---

[21] 534 U.S. 407 (2002).

[22] *Id.* at 411-12. The majority added that "[i]nsistence upon absolute lack of control would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities." *Id.* at 412. In so holding, the Court sought to elucidate the cryptic language in *Hendricks* that states could commit individuals who found it "*difficult*, if not impossible," to control their urge to sexually victimize. *Id.* at 411 (quoting *Hendricks*, 521 U.S. at 358). Stopping short of requiring that a committee have a "complete inability" to control his behavior, the 7-2 majority emphasized that volitional impairments cannot be measured with "mathematical precision," and welcomed a case-by-case evolution of the law. *Id.* at 411-14 (noting that the majority's decision was motivated by a desire to "proceed[] deliberately and contextually" and eschew "absolutist" and "bright-line" rules). Whether the modified standard will provide sufficient guidance in commitment decisions—or, as Justice Scalia warned in dissent, remains so imprecise as to provide states "*not a clue* as to how . . . to charge the jury"—remains to be seen. *Id.* at 423 (Scalia, J., dissenting).

[23] Roxanne Lieb and Craig Nelson report that as of June 2000, fewer than 2% of 1757 SVPs under detention nationwide had been released even conditionally. *See* Roxanne Lieb & Craig Nelson, *Treatment Programs for Sexually Violent Predators—A Review of States*, *in* 2 THE SEXUAL PREDATOR: LEGAL ISSUES, CLINICAL ISSUES, SPECIAL POPULATIONS 5-4 (Anita Schlank ed., 2001). Removing Arizona, which had a rate of release substantially greater than the other states (15%, compared to the next most successful state, Washington, which had a 4% release rate), the overall rate of release was 1%. *Id*; *see also* Sarah E. Spierling, Note, *Lock Them Up and Throw Away the Key: How Washington's Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL'Y 879, 881-82, 920-21 (2001) (noting that since 1990, only five committees have been released in Washington); Paul Demko, *Throwing Away the Key*, CITY PAGES (Minneapolis-St.Paul, Minn.), Mar. 13, 2002, at 15 (noting that since 1994 only one Minnesota committee has been released even conditionally).

[24] *See, e.g.*, Sarah Duran, *State Pays a Price to House Sex Offenders*, MORNING NEWS TRIB. (Tacoma, Wash.), May 19, 2002, at A1 (describing local opposition to citing of halfway houses for SVPs), 2002 WL 3197484.

offender treatment[25] and the inability of experts to determine, either pre- or post-commitment, whether any particular sex offender's risk will be or has been reduced by treatment.[26] The situation is exacerbated all the more to the extent that one-size-fits-all treatment approaches characterize SVP programs,[27] pursued in lieu of more expensive (and appropriate) individualized approaches.[28] Finally, while the laws are promoted and justified on the ground that they target only the "most dangerous" sex offenders, the reality is that they confine a full spectrum of individuals,[29] from sadistic rapist-murderers to exhibitionists[30] and gropers.[31]

---

[25] *See* Eric S. Janus, *Treatment and the Civil Commitment of Sex Offenders, in* PROTECTING SOCIETY FROM DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY (Bruce J. Winick & John Q. LaFond eds., forthcoming) (manuscript on file with author) (summarizing literature on treatment efficacy).

[26] *Id*; *see also* Ake v. Oklahoma, 470 U.S. 68, 81 (1985) (observing that "[p]sychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms . . . and on likelihood of future dangerousness"). For a discussion of the arguably inherent uncertainties of diagnosing mental illness, see Lars Noah, *Pigeonholing Illness: Medical Diagnosis as a Legal Construct*, 50 HASTINGS L.J. 241, 248-49 (1999).

[27] Elizabeth A. Weeks, *The Newly Found "Compassion" For Sexually Violent Predators: Civil Commitment and the Right to Treatment in the Wake of* Kansas v. Hendricks, 32 GA. L. REV. 1261, 1294 (1998) (noting "similar treatment for the entire category of [sex] offenders" in SVP facilities); *see also* Janice K. Marques, *Professional Standards for Civil Commitment Programs, in* 2 THE SEXUAL PREDATOR: LEGAL ISSUES, CLINICAL ISSUES, SPECIAL POPULATIONS 2-9 (Anita Schlank ed., 2001) (surveying uniform treatment plans and disclaiming "one-size-fits-all" approaches).

[28] Social science data suggest that sex offenders do not comprise a homogeneous group. *See* Marques, *supra* note 27, at 2-9 (stating that "individuals entering civil commitment programs are a very diverse group"); R. Karl Hanson et al., *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646, 646 (1993) (noting the importance of distinguishing between high and low risk offenders). Furthermore, it is well-established that distinct patterns of sexual offending require distinct treatment approaches. *See* W.L. Marshall & W.D. Pithers, *A Reconsideration of Treatment Outcome with Sex Offenders*, 21 CRIM. JUST. & BEHAV. 10, 20 (1994) (discussing the need for varied treatment approaches for distinct offender types); Danielle M. Polizzi et al., *What Works in Adult Sex Offender Treatment? A Review of Prison-and-Non-Prison-Based Treatment Programs*, 43 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 357, 372 (1999) (noting the lack of studies regarding treatment modalities for particular types of offenders). In fact, some forms of treatment can actually worsen the pathology of certain groups of offenders, e.g., those with psychopathy. *See* Barbara K. Schwartz, *The JRI Model for Treating Varied Populations with Inappropriate Sexual Behavior, in* 4 THE SEX OFFENDER: CURRENT TREATMENT MODALITIES AND SYSTEMS ISSUES 1-16 (Barbara K. Schwartz ed., 2002); Tony Ward & Stephen M. Hudson, *A Self-Regulation Model of Relapse Prevention, in* REMAKING RELAPSE PREVENTION WITH SEX OFFENDERS: A SOURCEBOOK 79, 80 (D. Richard Laws et al. eds., 2000).

[29] *See, e.g.*, Eric S. Janus & Nancy H. Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343, 371 (2000) (observing wide variation among SVP committees on indices commonly associated with dangerousness).

[30] *See, e.g., In re* Clements, 440 N.W.2d 133 (Minn. Ct. App. 1989) (affirming the commitment of an exhibitionist).

[31] *See* Demko, *supra* note 23 (describing the case of Timothy Same, whose criminal sexual conduct sentence was stayed on the condition that he voluntarily commit himself as a sexual psychopathic personality).

Given the uncertainty and expense of treatment, a strong temptation exists for states to simply warehouse committees, much as in their avowedly criminal systems. In a sense, viewed in historical context, this pessimism should be no surprise, for it was a commonplace reaction to the "sexual psychopath" laws in effect from the 1930s to the 1960s, the direct antecedents of modern SVP laws.[32] Eventually, courts and policy-makers lost faith in those earlier laws, leading to their repeal and abandonment.[33] Today, courts and policy-makers seem largely unconcerned.[34] The contemporary apathy is all the more alarming when one compares the current near-zero "success" rates with the fact that at least some of the earlier laws eventually released as many as fifty percent of committees.[35] As a result, rather than being a "step away" from confinements for dangerousness alone,[36] the SVP laws suggest a regime of preventive detention itself, heretofore anathema to due process.[37]

To a degree, this concern over warehousing is arguably of limited practical magnitude, given that the numbers of persons now committed is relatively small, and that newly-enacted sentencing provisions have ensured

---

[32] *See* W. Lawrence Fitch & Richard James Ortega, *Law and the Confinement of Psychopaths*, 18 BEHAV. SCI. & L. 663, 664-67 (2000) (discussing evolution of sex offender laws); Barbara A. Weiner, *Mental Disability and the Criminal Law*, *in* THE MENTALLY DISABLED AND THE LAW 743 (Samuel Jan Brackel et al. eds., 3d ed. 1985) (noting that several professional organizations urged the repeal of earlier SVP laws).

[33] AM. BAR ASS'N, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 459-60 (1989); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S, at 843 (1977). One landmark study of the era, for instance, expressed concern over the lack of any real treatment efforts to cure or rehabilitate these offenders after they are committed:

> Their "treatment" is almost purely custodial. . . . Hospital administrators generally indicate that they are completely impotent to provide even experimental treatment efforts for their sex psychopaths. . . . [I]t is a travesty to assume that by mere custodial hospitalization a state can solve either the purposes of rehabilitation or of community protection.

PAUL W. TAPPAN, THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER 32-33 (1950), *cited in* State v. Newton, 111 A.2d 272, 275-77 (N.J. 1955) (Brennan, J.).

[34] *See, e.g.*, Demko, *supra* note 23 (quoting Ramsey County (Minnesota) Attorney Susan Gaertner as characterizing the dearth of SVP discharges as a sign that the system is working properly).

[35] *See* Lawrence T. Burick, *An Analysis of the Illinois Sexually Dangerous Persons Act*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 254, 261 n.73 (1968) (discussing release data from 1938 to 1952).

[36] Foucha v. Louisiana, 504 U.S. 71, 83 (1992).

[37] *See, e.g.*, Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969) (condemning "sexual psychopath" laws—a predecessor to modern SVP laws—for being equivalent to "a warehousing operation for social misfits"); Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J.) (stating that "[i]imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it . . . .").

longer determinate prison terms for sex offenders,[38] to some extent obviating the need for SVP facilities. However, the enormous appeal of segregating "predators" will surely encourage the continued use of commitment laws, given that they promise *indefinite* detention[39] and provide a safety valve for plea-bargained sentences that are inevitable in the real world of criminal justice.[40] But what must also be recognized is that the jurisprudence in this context is readily transferable to other, related contexts, in particular preventive detention of terrorism suspects[41] and individuals who threaten the public health.[42] The lessons learned from involuntary civil commitment of sex offenders thus have direct relevance as we attempt to locate the limits of this type of intervention. Finally, from a purely pragmatic perspective, judicial scrutiny of commitment duration and efficacy will assist politicians and policy makers in best utilizing scarce treatment

[38] *See generally* U.S. DEP'T OF JUST.: BUREAU OF JUST. STATISTICS, SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS (1999) (surveying the effects of newly implemented laws), *available at* http://www.ojp.usdoj.gov/bjs/pub/ltssp.pdf (last visited Oct. 21, 2002) (on file with the Connecticut Law Review).

[39] *See* MINN. DEP'T OF CORR., SEX OFFENDER POLICY AND MANAGEMENT BOARD STUDY 21 (2000) [hereinafter SEX OFFENDER POLICY], *available at* http://www.corr.state.mn.us/publications/legislativereports/pdf/sexoffenderboard.pdf (last visited Oct. 21, 2002) (on file with the Connecticut Law Review) (concluding that "attempting to target just the very small group of offenders who are potentially eligible for civil commitment referral with longer sentencing options (particularly mandatory sentences) would probably not result in elimination of the need for civil commitment of a select, high-risk group of sex offenders"); CIVIL COMMITMENT TASK FORCE OF THE STATE OF MINN., 1988 REPORT TO THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF HUMAN SERVICES 48 (1999) (observing that sex offender commitment laws are needed to incarcerate offenders who "may be dangerous but evade conviction due to the high burden of proof required in criminal cases").

[40] *See* SEX OFFENDER POLICY, *supra* note 39, at 17 (reporting that enhanced sentences are often used as bargaining chips in plea negotiations); *cf.* Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring) (stating that "[i]f the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function").

[41] *See, e.g.*, Zadvydas v. Davis, 534 U.S. 407, 413 (2001) (suggesting that "terrorism or other special circumstances" might provide "special arguments . . . for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security"); Katharine Q. Seelye, *War on Terror Makes for Odd Twists in Justice System: Flexible Rules Raise Constitutional Issues*, N.Y. TIMES, June 23, 2002, at A16 (quoting a senior administration official who characterized the indefinite detention of American terrorism suspects as "not a punitive action," but rather "self-protection"). *See generally* Kristin Choo, *Controversial Cure: Proposed CDC Model Act on Bioterrorism Seeks to Clarify State Enforcement Powers*, A.B.A. J., Apr. 2002, at 20.

[42] *See, e.g.*, 2002 Minn. Laws 402 (establishing the Minnesota Emergency Health Powers Act with provisions for quarantine and isolation); CTR. FOR LAW & THE PUBLIC'S HEALTH, THE MODEL STATE EMERGENCY HEALTH POWERS ACT 27 (2001) (providing for quarantine and isolation during "emergencies"), *available at* http://www.publichealthlaw.net/MSEHPA/MSEHPA2.pdf (last visited Oct. 21, 2002) (on file with the Connecticut Law Review); *see also* Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals*, 16 HASTINGS CONST. L.Q. 329, 329 (1989) ("As America moves into the twenty-first century, we must determine to what extent individual liberties must be sacrificed for the common good. Ideals of liberty and privacy are stretched to the limit as modern fears of street crime merge with ancient fears of plague.").

and prevention resources.[43]

The Article begins with a discussion of *Seling v. Young*,[44] examining the result and rationales of the Court, followed by a review of the Court's substantive due process jurisprudence as it has developed in the context of involuntary civil commitment. While the Court has insisted that substantive due process provides only weak limits on state action in many areas, civil commitment persists as one of the select categories sufficient to trigger closer constitutional scrutiny.[45] However, while the Court has repeatedly intoned that there are limits to commitment authority, requiring in particular that the nature or conditions and duration of commitment bear some reasonable relation to its purpose, the constitutional calculus remains uncertain.

Focusing in particular on decisions addressing conditions of confinement and the obligation of government to treat those it involuntarily commits pursuant to its police power, we will argue that substantially more than the mere warehousing of "social misfits" is called for. Although widely cited dicta suggest otherwise, we argue that the Court's substantive due process jurisprudence entails an expectation of individual treatment efficacy, the enforcement of which is triggered by the state's failure over time to deliver on its treatment promise. To be sure, states deserve substantial deference in the operation of their SVP laws. This deference, however, is circumscribed by the heightened scrutiny courts must use in patrolling the border between the civil and criminal systems of social control, such as with SVP laws. We then examine a series of lower court decisions that have engaged in such patrol, demonstrating that these decisions support, or at least leave open, the enforcement of an effective right to treatment. The Article concludes by offering some guidelines and criteria for implementing the proposed constitutional analysis advanced.

---

[43] *See generally* Eric S. Janus, *Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences*, 18 BEHAV. SCI. & L. 5, 18 (2000) (discussing resource allocation choices necessitated by SVP laws).

[44] 531 U.S. 250 (2001).

[45] *See, e.g.*, Kansas v. Crane, 534 U.S. 407, 413 (2002) (noting that the standard for commitment "must be sufficient to distinguish the dangerous sexual offender . . . from the dangerous but typical recidivist convicted in an *ordinary criminal case*") (emphasis added); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (quoting Jones v. United States, 463 U.S. 354, 361 (1983)); *see also* Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) (noting generally that the "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.").

II. *SELING V. YOUNG*: CONDITIONS OF CONFINEMENT UNDER EX POST FACTO AND DOUBLE JEOPARDY ANALYSIS

Seling v. Young[46] concerned the involuntary civil commitment of Andre Young, a recidivist rapist who was one of the first sex offenders targeted by Washington State's Community Protection Act of 1990.[47] Under the law, "sexually violent predators," persons convicted of or charged with a crime of sexual violence, and who suffer from a "mental abnormality" or "personality disorder" that makes them likely to commit further acts of criminal sexual violence, are subject to indefinite, involuntary civil confinement by the state.[48] Washington authorities, invoking the law, successfully petitioned to have Young committed subsequent to his release from prison in October 1990.[49]

Young challenged his commitment in Washington state court alleging that it constituted punishment and hence violated the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution.[50] The state court rejected these claims, reasoning that the commitment law was civil, not criminal, in nature.[51] In addition, Young claimed that substantive due process was violated by the conditions of confinement and quality of treatment available, amounting to impermissible preventive detention.[52] The court likewise rejected Young's due process claim, reasoning that he failed to "show that the specific conditions of his confinement are incompatible with treatment," and that the law "provide[d] for treatment, and [Young] . . . failed to prove that this goal cannot be effectuated under the Statute's terms."[53]

A. *Federal Habeas Corpus Proceedings*

Young then sought habeas corpus relief in the Western District of Washington and raised the identical trio of constitutional claims, this time winning relief. On the due process challenge, Judge Coughenour held that the commitment law violated substantive due process because it permitted indefinite civil confinement of persons without a requisite showing of

---

46 531 U.S. 250 (2001).

47 *Id.* at 253.

48 *Id.* at 250, 253 (citing WASH. REV. CODE § 71.09.010 (1992)).

49 *Id.* at 255-56.

50 *Id.* at 256 (citing *In re* Young, 857 P.2d 989 (1993) (en banc)).

51 *Id.* at 256-57 (citing *Young*, 857 P.2d at 996-1000).

52 *Id.* at 259 (citing Young v. Weston, 898 F. Supp. 744, 744 (W.D. Wash. 1995)).

53 *Id.* at 262. The court added that the record was devoid of evidence "addressing either the actual conditions of confinement, or the quality of treatment. These issues are not currently before the court. Facially, the Statute and associated regulations suggest that the nature and duration of commitment is compatible with the purposes of the commitment." *Young*, 857 P.2d at 1005.

"mental illness."[54] Moreover, the law violated ex post facto and double jeopardy principles because "the Statute cannot be classified as civil, considering the relevant factors."[55]

While the State's appeal of Judge Coughenour's order was pending before the Ninth Circuit, the U.S. Supreme Court decided *Kansas v. Hendricks*,[56] which rejected similar constitutional challenges to a nearly identical law, Kansas' Sexually Violent Predator Act.[57] Accordingly, the Ninth Circuit remanded the matter for reconsideration in light of *Hendricks*.[58] On remand, Young amended his petition, focusing for the first time on the actual conditions of confinement that he was experiencing in commitment.[59] The district court denied the petition and Young again appealed to the Ninth Circuit.[60]

At the outset of its opinion, the Ninth Circuit noted that Young advanced both ex post facto/double jeopardy and substantive due process claims, stemming from the application of the Washington law as newly alleged in his petition.[61] The court, however, characterized the ex post facto and double jeopardy claims as the "linchpin" of the case, and dedicated almost the entirety of its decision to assessing whether the Washington law was "punitive . . . as applied to Young."[62] After noting the similar-

---

[54] Young v. Weston, 898 F. Supp. 744, 751 (W.D. Wash. 1995).

[55] *Id.* at 752. Central to the court's analysis was its conclusion that the law "plainly delays the treatment that must constitutionally accompany commitment pursuant to the Statute. The failure of the Statute to provide for examination or treatment prior to the completion of the punishment phase strongly suggests that treatment is of secondary, rather than primary, concern." *Id.* at 753.

[56] 521 U.S. 346 (1997).

[57] *Id.* at 369-71.

[58] Young v. Weston, 122 F.3d 38 (9th Cir. 1997).

[59] The allegations included the following:

- Young is subject to conditions more restrictive than those placed either on true civil commitment detainees or even those placed on state prisoners;
- Young has been subject to such conditions for more than seven years;
- The Special Commitment Center is located wholly within the perimeter of a larger Department of Corrections facility;
- The conditions of confinement at the Special Commitment Center are not compatible with the Washington statute's treatment purposes;
- The conditions and restrictions at the Special Commitment Center are not reasonably related to a legitimate non-punitive goal;
- Special Commitment Center residents were housed in units that were, according to Special Master Janice Marques, "clearly inappropriate for individuals in a mental health treatment program"; and
- There were no certified sex-offender treatment providers at Special Commitment Center.

In re Young, 192 F.3d 870, 875 (9th Cir. 1999).

[60] *Id.* at 873.

[61] *Id.* at 870.

[62] *Id.* at 873.

ity between the Washington and Kansas commitment laws, the Ninth Circuit concluded that any facial challenge was to no avail.[63] However, the court was at pains to emphasize that *Hendricks* did not involve an "as applied" challenge as such, and that both the majority and concurring opinions in *Hendricks* insisted that the avowed civil purposes of the Kansas law should not serve as a veil for actual punitive conditions of confinement.[64] Accordingly, the Ninth Circuit looked to the conditions of confinement alleged by Young to assess whether the law's civil label was "divested" by the "'clearest proof' that the statutory scheme [was] punitive in its 'effect.'"[65] Employing this framework, the court concluded that Young "alleged sufficient facts that, if proved, would constitute such 'clear proof.'"[66] The court, however, remanded the matter to the trial court for an evidentiary hearing because the state courts failed to provide Young with sufficient opportunity to support his allegations.[67]

The Ninth Circuit ignored Young's substantive due process claim sounding in improper confinement conditions. However, the court concluded that the statutory requirements for commitment of "mental abnormality" and "personality disorder" were not so vague as to violate due process.[68]

B. *The Supreme Court's Decision in* Young

The U.S. Supreme Court granted Washington State's petition for review.[69] The sole question addressed by the Court was whether an "as applied" challenge based on ex post facto and double jeopardy grounds was cognizable, requiring release.[70] Writing for the majority, Justice O'Connor rejected the claim, offering several reasons. First, she noted that Washington's commitment law was "strikingly similar" to that of Kansas, which only a few terms before in *Hendricks* the Court deemed "civil" for purposes of ex post facto and double jeopardy analysis.[71] Justice O'Connor hastened to add that the *Hendricks* Court also considered the conditions of

---

[63] *Id.* at 874.

[64] *Id.*

[65] *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

[66] *Id.*

[67] *Id.* at 876. The court added that "Washington's refusal to allow Young to appear before any court for four months—where those facing commitment under Washington's regular civil commitment statute are entitled to a *prompt* probable cause hearing—may be an indicia of the statute's punitive purpose or effect." *Id.* at 876-77.

[68] *See id.* at 876 (noting that "while the statute's failure to limit its reach to whose who completely lack control may be an indicia of a forbidden deterrent purpose, this failure does not, by itself, render the statute unconstitutional").

[69] Seling v. Young, 529 U.S. 1017 (2000).

[70] Seling v. Young, 531 U.S. 250, 262 (2001).

[71] *Id.* at 260-62.

confinement associated with the Kansas law at its origin, including the fact that detainees were held in a segregated unit in the prison system and quite possibly would be held without receiving treatment.[72] Young's allegations regarding conditions, Justice O'Connor concluded, were "in many respects like the claims" rejected by the Court in *Hendricks*.[73]

The second reason advanced by Justice O'Connor was more novel. This was that an "as applied" challenge to a statutory provision, previously deemed non-punitive for ex post facto and double jeopardy purposes, would "prove unworkable."[74] The Court stated that "[s]uch an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and Ex Post Facto Clauses."[75] Justice O'Connor explained:

> Unlike a fine, confinement is not a fixed event. . . . [I]t extends over time under conditions that are subject to change. The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively. The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.[76]

Justice O'Connor added that the civil or punitive nature of a law is to be determined on the basis of its text and legislative history, rather than the effect the law might have on a given individual over the course of commitment.[77]

In Young's case, despite his individualized claims of punitive confinement, the non-punitive character of the Washington law had been recognized twice before: By the Supreme Court of Washington[78] and by the U.S. Supreme Court in *Hendricks* when it construed Kansas' commitment law.[79] To allow an as applied challenge to the Washington law in the face of this precedent would amount to an "end run," which the *Young* majority would not abide.[80] The Court concluded that "[a]n Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses and provide cause for re-

---

[72] *Id.* at 261-62.

[73] *Id.* at 262.

[74] *Id.* at 263.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 262 (citing Hudson v. United States, 522 U.S. 93 (1997)).

[78] *In re* Young, 857 P.2d 989, 998 (Wash. 1993) (en banc).

[79] Kansas v. Hendricks, 521 U.S. 347, 369 (1997).

[80] *Young*, 531 U.S. at 263-64.

lease."[81] In so concluding, however, the majority acknowledged that "some of respondent's allegations are serious."[82] Furthermore, the majority expressly reserved judgment on "how [Young's] allegations would bear on a court determining in the first instance whether Washington's confinement scheme is civil."[83]

Justice O'Connor concluded by noting that individuals such as Young were not entirely without remedy. In particular, Washington statutory law expressly provided that detainees enjoyed the right to adequate care and individualized treatment, a right the state courts had recognized and were charged with enforcing.[84] Moreover, both state and federal courts remain empowered to adjudicate and remedy federal constitutional claims, correcting unlawful conditions based on the precept that "due process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed."[85] As an example, the Court noted that a § 1983 claim had already succeeded in securing an injunction requiring state authorities to adopt and implement a plan making several treatment-related improvements.[86]

Justice Scalia, joined by Justice Souter, concurred in the result, and endorsed the view that a law once deemed civil for double jeopardy and ex post facto purposes cannot later be transformed into a punitive one because of the way that it is implemented.[87] According to Justice Scalia:

> The short of the matter is that, for Double Jeopardy and *Ex Post Facto* Clause purposes, the question of criminal penalty *vel non* depends upon the intent of the legislature; and harsh executive implementation cannot "transfor[m] what was clearly intended as a civil remedy into a criminal penalty," any more than compassionate executive implementation can transform a criminal penalty into a civil remedy.[88]

Justice Scalia flatly rejected, however, the majority's view that actual conditions of confinement and implementation might have relevance to the

[81] *Id.* at 267.

[82] *Id.* at 263.

[83] *Id.*

[84] *Id.* at 265 (citing WASH. REV. CODE § 71.09.080(2) (1992)).

[85] *Id.* (citing Foucha v. Louisiana, 504 U.S. 71, 79 (1992); Youngberg v. Romeo, 457 U.S. 307, 324 (1982); Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

[86] *Id.* at 265-66.

[87] *Id.* at 269.

[88] *Id.* (Scalia, J., concurring) (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)) (alteration in *Young*) (internal citation omitted). In a footnote, Justice Scalia added that because the Ex Post Facto Clause expressly prohibits "pass[ing]" ex post facto laws, a limit on legislative action, "the irrelevance of subsequent executive implementation to" assessing legislative intent "is, if anything, even clearer." *Id.* at 269 n.*.

analysis of whether a law is civil or criminal "in the first instance."[89] To Justice Scalia, this was not an open question, but rather one that had been definitively resolved by the Court's decision in *Hudson v. United States*,[90] which rejected a double jeopardy challenge to a fine authorized by a statute the nature of which the courts had not yet evaluated, and eschewed consideration of how the law had been "applied" to the petitioners.[91]

Like Justice O'Connor, however, Justice Scalia held out some hope for relief in the event that a state failed to administer a facially civil statute in a civil manner: Those targeted can "resort to the traditional state proceedings that challenge unlawful executive action."[92] Only where such proceedings are unsuccessful, "and the state courts authoritatively interpret the state statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a statute that on its face is civil to be criminal."[93] In short, a committee must first petition state authorities to remedy "whatever excess in administration contradicts the statute's civil character."[94] Only if state courts fail to cure such excesses will an ex post facto or double jeopardy claim lie to invalidate a statute.[95]

According to Justice Scalia, such deference is consistent with the abstention-based concerns implicated by federal oversight of state executive action:

> Such an approach protects federal courts from becoming enmeshed in the sort of intrusive inquiry into local conditions at state institutions that are best left to the State's own judiciary, at least in the first instance. And it avoids federal invalidation of state statutes on the basis of executive implementation that the state courts themselves, given the opportunity, would find to be ultra vires. Only this approach, it seems to me, is in accord with our sound and traditional reluctance to be the initial interpreter of state law.[96]

---

[89] *Id.* at 267-68 (Scalia, J., concurring).

[90] 522 U.S. 93 (1997).

[91] *Young*, 531 U.S. at 267-68 (Scalia, J., concurring).

[92] *Id.* at 269 (Scalia, J., concurring).

[93] *Id.* at 269-70 (Scalia, J., concurring).

[94] *Id.* at 269 (Scalia, J., concurring).

[95] *Id.* at 269-70 (Scalia, J., concurring).

[96] *Id.* at 270 (Scalia, J., concurring) (citing R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500-01 (1941)). Although beyond the scope of discussion here, Justice Scalia's paramount concern for deference to state court decisions is unwarranted outside of the unique procedural posture of *Young*. Generally, basic rules of procedure limit federal appellate review to issues presented to the lower court. *See* CHARLES A. WRIGHT ET AL., 12 FEDERAL PRACTICE AND PROCEDURE § 1394 (2d ed. 1987 & Supp. 2000). Likewise, in the habeas context, doctrines of exhaustion and procedural default ensure that state courts have the first opportunity to correct unconstitutional confinement. *See* 28 U.S.C. §

Justice Thomas also concurred in the result, but voiced an even greater aversion for analytic consideration of how a statute is implemented. At the outset Justice Thomas criticized the majority for its characterization of Young's claim as being an "as applied," as opposed to "facial," challenge. According to Thomas, "[t]ypically an 'as applied' challenge is a claim that a statute, '*by its own terms*, infringe[s] constitutional freedoms in the circumstances of [a] particular case.'"[97] Young's claim, Thomas reasoned, was not that Washington's commitment law was unconstitutional "'by its own terms' . . . as applied to him, but rather that the statute is not being applied according to its terms at all."[98] According to Justice Thomas, Young "essentially contend[ed] that the actual conditions of confinement, notwithstanding the text of the statute, are punitive and incompatible with the Act's treatment purpose."[99] Therefore, similarly to Justice Scalia, Justice Thomas inferred that if a putatively civil statute is "not being applied according to its terms, the conditions are *not* the effect of the statute, but rather the effect of its improper implementation."[100]

Furthermore, to Justice Thomas, conditions have no relevance to double jeopardy and ex post facto analysis, as evidenced in the Court's decision in *Hudson*.[101] Judicial determination of whether a statute is civil or criminal is to be determined by examining the "statute on its face,"[102] without consideration of how the statute has been implemented (in this case,

---

2254(b) (2000); Preiser v. Rodriguez, 411 U.S. 475, 489-90 (1973) (noting that exhaustion requirements give the state court "an opportunity to correct its own constitutional errors.").

Curiously, in *Young* the Supreme Court did not address either of these two threshold issues. The Ninth Circuit found that Young had exhausted his claim by repeatedly attempting to present the claim in state courts. The state courts refused to hear it, and the federal appellate court properly held that "[t]he fact that the state courts refused to receive this evidence does not render Young's claim unexhausted." Young v. Weston, 192 F.3d 870, 874 (9th Cir. 1999). But the Ninth Circuit did not address the question of procedural default—whether Young had raised his conditions claim in the correct procedural posture. Young's habeas petition, amended years after his initial commitment, argued that those years of substandard conditions rendered his confinement punitive. These as applied issues were not before the Washington Supreme Court. *See In re* Young, 857 P.2d 989, 1005 (Wash. 1993) ("There is no evidence in the record addressing either the actual conditions of confinement, or the quality of treatment. These issues are not currently before the court."). Subsequently, in *In re Turay*, 986 P.2d 790 (Wash. 1999), the Washington Supreme Court made clear that as applied claims were procedurally improper in initial commitment proceedings: "[A] person committed under RCW 71.09 may not challenge the actual conditions of their confinement, or the quality of the treatment at the DSHS facility until they have been found to be an SVP and committed under the provisions of RCW 71.09." *Turay*, 986 P.2d at 803.

[97] *Young*, 531 U.S. at 271 (Thomas, J., concurring) (quoting United States v. Christian Echoes Nat'l Ministry, Inc., 404 U.S. 561, 565 (1972)) (alteration and emphasis in *Young*).

[98] *Id.* (Thomas, J., concurring).

[99] *Id.* (Thomas, J., concurring).

[100] *Id.* at 273-74 (Thomas, J., concurring).

[101] Hudson v. United States, 522 U.S. 93 (1997).

[102] *Young*, 531 U.S. at 272 (Thomas, J., concurring) (citing *Hudson*, 522 U.S. at 101).

per the "actual conditions of confinement").[103] Justice Thomas, like Justice Scalia, also disagreed that conditions might have relevance in "first instance" analysis. This was because *Hudson* bars judicial consideration of implementation indicia "at any time,"[104] and consideration would be as "unworkable" in the first instance as it would be later, because it would pin a statute's survival on the "vagaries" of implementation at different times and within different institutions.[105]

The sole dissent was lodged by Justice Stevens, who vigorously challenged his colleagues' refusal to consider Young's allegations as to confinement conditions. While acknowledging that the civil/criminal nature of a statute is "initially one of statutory construction,"[106] Justice Stevens argued that conditions should play a role in the constitutional inquiry, regardless of whether the statute was initially deemed civil by a court.[107] "If conditions of confinement are such that a detainee has been punished twice in violation of the Double Jeopardy Clause, it is irrelevant that the scheme has been previously labeled as civil without full knowledge of the effects of the statute."[108] To Justice Stevens, the majority mischaracterized Young's claim as "whether an Act that is otherwise civil in nature can be deemed criminal in a specific instance based on evidence of its application to a particular prisoner."[109] Rather, Young's allegations concerning the "starkly punitive character of the conditions of his confinement,"[110] in which he was not receiving adequate treatment, constituted evidence of the punitive purpose and effect of Washington's commitment law.[111] As such, the allegations raised concern that Washington was in fact pursuing a criminal sanction, despite the nominally civil character of its law.[112]

C. *Questions Left Open By* Young

Young is a rich decision, distinguished as much by what it left unresolved as what it seemingly resolved. To eight members of the Court, it is clear that, for purposes of the Ex Post Facto and Double Jeopardy Clauses, the initial "civil" character of a statute cannot be rendered "criminal" by the manner in which it is later implemented.[113] However, Justice

---

[103] *Id.* (Thomas, J., concurring).
[104] *Id.* at 273 (Thomas, J., concurring).
[105] *Id.* (Thomas, J., concurring).
[106] *Id.* at 276-77 (Stevens, J., dissenting).
[107] *Id.* (Stevens, J., dissenting).
[108] *Id.* at 277 (Stevens, J., dissenting).
[109] *Id.* at 275 (Stevens, J., dissenting).
[110] *Id.* at 277 (Stevens, J., dissenting).
[111] *Id.* at 275 (Stevens, J., dissenting).
[112] *Id.* at 277 (Stevens, J., dissenting).
[113] *See* discussion *supra* Part II.B.

O'Connor's majority opinion for five members of the Court was at pains to emphasize that other potential claims, in particular substantive due process, were not implicated.[114] Indeed, the majority noted that a constitutional challenge might arise from Washington's improper implementation of its commitment law, which is "designed to incapacitate and to treat."[115] Citing several of the Court's prior substantive due process cases that have dealt with involuntary civil commitment, the majority noted that "due process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed."[116]

The continued vitality of a substantive due process claim for committees such as Young is buttressed by the distinctiveness of due process, as compared to the ex post facto and double jeopardy claims litigated in *Young*. Ex post facto and double jeopardy are inherently *ab initio*, static claims oriented to statutory analysis, which seek to prevent laws that punish retroactively (ex post facto) or punish twice (double jeopardy). They turn on legislative purpose and the "effects apparent upon the face of the statute."[117] As the majority noted, substantive due process, by contrast, requires at the very least an inquiry into whether a "reasonable relation" exists between legislative purpose and its actual implementation (i.e., "conditions and duration" of commitment),[118] and thus of necessity is "as applied." If a court is to evaluate the relation it must look beyond the face of any given statute, taking into account how the statute is implemented, with due regard for constitutional doctrine.[119] Relatedly, a civil commitment, although fully constitutional *ab initio*, becomes unconstitutional if and when one of the constitutional bases justifying commitment disappears.[120]

In sum, substantive due process is inherently more flexible, looking less to statutory interpretation than to the real-world practicalities of a

---

[114] *See Young*, 531 U.S. at 266 (noting that "[t]his case gives us no occasion to consider how the civil nature of a confinement scheme relates to other constitutional challenges, such as due process").

[115] *Id.* at 265.

[116] *Id.* (citing Foucha v. Louisiana, 504 U.S. 71, 79 (1992); Youngberg v. Romeo, 457 U.S. 307, 324 (1982); Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

[117] *Id.* at 269 (Scalia, J., concurring).

[118] *Id.* at 265. *See also infra* notes 221-226 and accompanying text.

[119] *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 368 (1997) (urging that constitutional interpretation "be flexible, recognizing that different constitutional provisions are based on different principles and therefore impose distinct limitations on government action"); Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1286-87 (1998) (surveying decisions by the Court placing "heavy emphasis" on functional role played by particular constitutional provisions).

[120] *See infra* notes 227-247 and accompanying text.

law's application to detainees before the court.[121] Although this fluidity can make the system less "workable," requiring judicial review of post-confinement decisions, with concomitant separation of powers concerns,[122] the open-ended approach is compelled by the peculiar commands of substantive due process, which operates as a constitutional check on the application of laws threatening unjustified deprivations of liberty.[123] In short, *Young* does nothing to undercut the viability of an as applied substantive due process claim, the contours of which are addressed at length later in this Article.

Another basic question left unanswered by *Young* is the scope of remedies available to committees such as Andre Young. Justice O'Connor's majority opinion stressed that Young was not bereft of remedy. He could sue to ensure enforcement of a state statutory right to adequate care and individualized treatment and to vindicate his due process right that "the conditions and duration of [his] confinement . . . bear some reasonable relation" to the putative purpose of that confinement.[124] Justice O'Connor made equally clear, however, that Young's particular habeas petition—a writ that normally affords release as a remedy[125]—did not warrant his re-

---

[121] As Professor Richard Fallon has noted, "[s]ome doctrinal tests call for statutes to be tested on their faces, whereas others do not. Accordingly, debates about the permissibility of facial challenges should be recast as debates about the substantive tests that should be applied to enforce particular constitutional provisions." Richard L. Fallon, Jr., *As Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000).

The debate over the distinction between facial and applied challenges has raged among courts and commentators for years. *Id.* (noting debate and asserting that "[t]o a large extent, this debate reflects mistaken assumptions. There is no single distinctive category of facial, as opposed to as applied, litigation. All challenges to statutes arise when a litigant claims that a statute cannot be enforced against her."); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 294 (1994) (asserting that "[t]he distinction between as applied and facial challenges may confuse more than it illuminates. In some sense, any constitutional challenge to a statute is both as applied and facial.").

[122] *See generally* Todd W. Wyatt, *Double Jeopardy and Punishment: Why an As Applied Approach, As Applied to Separation of Powers Doctrines, Is Unconstitutional*, 24 SEATTLE U. L. REV. 107 (2000) (noting possible separation of powers concerns).

[123] As the Seventh Circuit observed with respect to a first-generation SVP law: "All too often the 'promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits.' It is well settled that realities rather than benign motives or non-criminal labels determine the relevance of constitutional policies." Stachulak v. Coughlin, 520 F.2d 931, 936 (7th Cir. 1975) (quoting Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969)); *see also* People v. McDougle, 708 N.E.2d 482, 488 (Ill. Ct. App. 1999) (stating that courts have authority to review treatment given SVPs because "without the power of review, there is no way to guarantee that the defendant will receive *any* treatment from the [department of corrections]").

[124] Seling v. Young, 531 U.S. 250, 265 (2001).

[125] *See* Preiser v. Rodriguez, 411 U.S. 475, 490 (1973) ("[H]abeas corpus is the appropriate remedy for state prisoners attaching the validity of the fact or length of their confinement.").

lease, at least insofar as it was premised on the Ex Post Facto and Double Jeopardy Clauses.[126] It remains an open question whether this same result would obtain if a substantive due process claim were to be brought by a habeas petitioner similar to Young in the future—the question to which we now turn.

III. SUBSTANTIVE DUE PROCESS AND INVOLUNTARY CIVIL COMMITMENT

A. *Introduction*

The Supreme Court's substantive due process jurisprudence is guided by an equation of sorts when it comes to evaluating state involuntary civil commitment regimes. As a threshold matter, due process limits the *purposes* that a state can seek to promote through the auspices of civil commitment. In turn, the *nature or conditions* and *duration* of commitment must "[a]t the least . . . bear some reasonable relation" to the espoused purpose of commitment.[127] Despite the clarity of the equation, over the years the Court has sent conflicting signals on the contours of permissible government purpose, and, indeed, on the corollary measures of nature/condition and duration. This section surveys the Court's relevant civil commitment decisions to lay the foundation for our argument, in the next section, that there exists an enforceable right to effective treatment.

Our discussion will be assisted by a preliminary distinction. Civil commitment can be divided into two relatively distinct sub-types based on two broad justifications—*parens patriae* and police power. When the government acts in a *parens patriae* capacity it seeks to preserve the health and well-being of disabled individuals, "providing care to its citizens who are unable because of emotional disorders to care for themselves."[128] By contrast, the government exercises its police power authority, such as with SVP laws,[129] in the name of societal self-protection; the government seeks to "protect the community from the dangerous tendencies of some who are mentally ill."[130] Courts and commentators agree that the two forms of civil

---

[126] *See Young*, 531 U.S. at 267 ("An Act, found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses and provide cause for release.").

[127] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[128] Addington v. Texas, 441 U.S. 418, 426 (1979).

[129] *See* Eric S. Janus, Hendricks *and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL., PUB. POL'Y, & L. 297, 302 (1998) (noting that *Hendricks* in particular relied exclusively on police power authority).

[130] *Id.* at 303.

commitment are analytically separate.[131] Although our focus is on police power commitments, a full understanding of the due process implications of effective treatment requires references to both rationales for commitment.

B. *The Case Law*

The Court has set some clear substantive due process limits on the states' authority to civilly commit. The first limit relates to the *purposes* a state may pursue. The other three limits are derivative of, and serve, that limit. They pertain to *conditions of the detainee* (dangerousness and mental disorder), *duration of confinement*, and *conditions of confinement* (including treatment).

1. *Purposes of Confinement*

Since 1975, the Court has insisted that only certain governmental purposes suffice, for substantive due process purposes, to justify involuntary civil commitment. In *O'Connor v. Donaldson*,[132] arguably its seminal decision on *parens patriae* authority, the Court considered the constitutionality of the involuntary commitment of a person deemed mentally ill but dangerous neither to himself nor others, in a facility that offered no mental health treatment.[133] Decided at a time when the nation was critically reexamining the propriety of warehousing mentally ill yet non-dangerous persons, *Donaldson* clarified the permissible bounds of *parens patriae*-based commitments. The Court stated that permissible state goals in *parens patriae* commitments were limited "to prevent[ing] injury to the public, to ensur[ing] [the individual's] survival or safety, or to alleviat[ing] or cur[ing] his illness."[134] Concurring, Chief Justice Burger characterized the states' purpose in *parens patriae* commitments as "the duty to protect 'persons under legal disabilities to act for themselves.'"[135]

The Court has been equally clear that substantive due process imposes limits on police power civil commitment authority. Two central limiting principles have emerged: First, as the Court has repeatedly made clear, civil commitment cannot be punitive in purpose. In *Jones v. United States*,[136] for instance, the Court addressed the limits of state authority to

---

[131] *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring) (noting that "the use of alternative forms of protection may be motivated by different considerations, and the justifications for one may not be invoked to rationalize another").

[132] 422 U.S. 563 (1975).

[133] *Id.* at 573.

[134] *Id.* at 573-74.

[135] *Id.* at 583 (Burger, C.J., concurring) (quoting Hawaii v. Stamford Oil Co., 405 U.S. 251, 257 (1972)).

[136] 463 U.S. 354 (1983).

hold those adjudicated not guilty by reason of insanity.[137] The Court observed that a state "may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes."[138] Moreover, "[d]ifferent considerations underlie commitment of an insanity acquitee. As he was not convicted, he may not be punished."[139] Likewise, in *Foucha v. Louisiana*,[140] the Court addressed a Louisiana law that permitted the continued confinement of an insanity acquitee, who, although no longer "mentally ill," continued to be held because he was "dangerous."[141] The Court observed, again, that the State is empowered to imprison individuals pursuant to its police power—"for the purposes of deterrence and retribution."[142] Foucha, however, "was not convicted, [and therefore] he may not be punished."[143]

Second, and closely related, civil commitment must not threaten the primacy of the criminal law as the tool for addressing antisocial behavior. The Court expressed this principle in *Foucha*, holding that Louisiana could not continue to civilly confine an insanity acquitee who was no longer mentally ill because it had not "explain[ed] why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction."[144] Likewise, in *Kansas v. Crane*,[145] where the Court revisited its due process judgment in *Kansas v. Hendricks*[146] regarding the Kansas SVP law, the Court emphasized that

> the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." That distinction is necessary lest "civil commitment" become a "mechanism for retribution or deterrence"—functions properly those of criminal law, not civil commitment.[147]

2. *Conditions of the Detainee*

The Court's numerous due process decisions have also attached impor-

---

[137] *Id.* at 356.
[138] *Id.* at 369.
[139] *Id.*
[140] 504 U.S. 71 (1992).
[141] *Id.* at 73.
[142] *Id.* at 80.
[143] *Id.*
[144] *Id.* at 82.
[145] 534 U.S. 407 (2002).
[146] 521 U.S. 346 (1997).
[147] *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 360, 372-73 (Kennedy, J., concurring)).

tance to the mental condition of individuals involuntarily committed, both at the time of initial commitment and thereafter. In *Donaldson*,[148] the majority concluded that it was constitutionally impermissible for Florida to commit, and continue to confine, a "harmless mentally ill" individual.[149] The Court stated that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."[150] Concurring, Chief Justice Burger stated that "[a]t a minimum, a particular scheme for protection of the mentally ill must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves."[151] In short, for *parens patriae* purposes, states must operate in the "best interests" of the individual, and therefore can involuntarily commit only persons who are mentally impaired (in the sense of being incompetent to care for themselves) and dangerous (in the sense that they will suffer or cause physical harm to others in the absence of intervention).[152]

Similarly, in police power commitments substantive due process requires that a committee be both dangerous and suffer from a mental impairment of some type.[153] However, as will be made clear later, mental impairment must represent something other than incompetence in the police power context.[154]

3. *Duration of Confinement*

Another central limit on the states' commitment authority is the principle that the duration of a civil commitment must be related to its purpose. That is, regardless of the validity of the initial judgment of commitment, confinement must end when its justification expires. In the *parens patriae* context, this principle is illustrated by *Donaldson*, which stated that it is "[not] enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally

[148] O'Connor v. Donaldson, 422 U.S. 563 (1975).

[149] *Id.* at 574.

[150] *Id.* at 575; *see also id.* at 576 (asserting that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends").

[151] *Id.* at 583.

[152] For a fuller treatment of *parens patriae*, see JOHN Q. LAFOND & MARY L. DURHAM, BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES 25-34 (1992); BARBARA A. WEINER & ROBERT W. WETTSTEIN, LEGAL ISSUES IN MENTAL HEALTH CARE 47, 111-12 (1993).

[153] *See* Kansas v. Crane, 534 U.S. 407, 409-10 (2002); Kansas v. Hendricks, 521 U.S. 346, 358 (1997); Foucha v. Louisiana, 504 U.S. 71, 77 (1992).

[154] *See infra* notes 206-211 and accompanying text.

continue after that basis no longer existed."[155]

The principle is equally at play in the police power context. In 1972, in *Jackson v. Indiana*,[156] the Court addressed the power of the state to hold for an indefinite period of time an individual, prior to criminal trial, due to mental incompetency. The Court ordered his release from confinement, holding that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[157] Applying this principle in *Foucha*, the Court ordered the release of an insanity acquitee who, while ostensibly still dangerous, was no longer mentally ill.[158]

4. *Conditions of Confinement,* Parens Patriae, *and the Right to Treatment*

Having explored the basic due process limits associated with the two major rationales of civil commitment, we now turn to the right to treatment, restricting our discussion in this subsection to *parens patriae*. We do so in order to set the stage for our central concern, namely the right to treatment in police power commitments.

The Court's *parens patriae* cases have approached the right to treatment in two ways. First, and most fundamentally, the basic logic of the *parens patriae* authority entails an implicit expectation of beneficial treatment, most often serving as *the factor* that explains why loss of liberty is in the individual's "best interests."[159] Of course, there might be rare instances in which the individual's "survival or safety" is so endangered that custodial confinement, standing alone without treatment, would be thought in the committee's best interest.[160] For most mentally impaired individuals, however, the massive loss of liberty associated with involuntary civil confinement is in their best interests only when it is necessary for an effective course of treatment.

Youngberg v. Romeo[161] establishes a second substantive due process derivation of the right to treatment. *Youngberg* concerned the responsibility of government in the care of a "profoundly retarded" adult, who lacked

---

[155] *Donaldson*, 422 U.S. at 574-75.

[156] 406 U.S. 715 (1972).

[157] *Id.* at 738.

[158] *Foucha*, 504 U.S. at 83.

[159] *See, e.g.*, Addington v. Texas, 441 U.S. 418, 429 (1979) (suggesting that institutionalization is in the interests of "a genuinely mentally ill person . . . suffering from a debilitating mental illness and in need of treatment").

[160] *Donaldson*, 422 U.S. at 584 (Burger, C.J., concurring) (acknowledging that there are persons who "are unable to function in society and will suffer real harm to themselves unless provided with care in a sheltered environment" and stating that government must reserve the right to institutionalize persons with mental illnesses for which "no effective therapy has yet been discovered").

[161] 457 U.S. 307 (1982).

the "most basic self-care skills," and was prone to injure himself, and as a result was involuntarily committed.[162] The petitioner alleged that despite having been afforded due process by the state in its commitment procedures, he retained certain "liberty interests," in particular, to be cared for in a safe manner and a right to be free from undue bodily restraint.[163]

In responding to the challenge, the Court framed the issue as one requiring it to discern the proper standard for balancing an "individual's liberty interest against the State's legitimate interests in confinement."[164] It emphasized that civil committees such as Romeo, who was neither charged with nor convicted of a crime, are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[165] However, in assessing the fit between the avowed civil purpose and the means chosen by the state, the applicable "standard is lower than the 'compelling' or 'substantial' necessity tests" because those standards "would place an undue burden on the administration of institutions."[166] Further, in determining what is "reasonable," courts "must show deference to the judgment exercised by a qualified professional."[167] This ensures the minimization of "interference by the federal judiciary with the internal operations of these institutions."[168]

Taken together, these considerations dictate that significant deference be shown state authorities. However, the deference is not without limit. In particular, "[i]t may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence,"[169] with such training being consistent with what "an appropriate professional would consider reasonable."[170] Romeo thus enjoyed "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests. Such conditions of confinement would comport fully with the purpose of [Romeo's] commitment."[171] The Court, as a consequence, identified a residuum of "liberty interests . . . that involuntary commitment proceedings do not extinguish."[172] According to the Court, "[t]he mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the

[162] *Id.* at 309-10.

[163] *Id.* at 315.

[164] *Id.* at 321 n.28 (citing *Addington*, 441 U.S. at 431-32).

[165] *Id.* at 321-22.

[166] *Id.* at 322.

[167] *Id.*

[168] *Id.* (footnote omitted).

[169] *Id.* at 324.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 315.

Fourteenth Amendment."[173]

Youngberg thus required the Court to identify two things: First, a core area of liberty that states are not permitted to invade in civil commitment ("residual liberty"); second, an *affirmative* obligation that operates on government to enhance and protect that liberty—not merely avoid infringing it—when depriving a person of physical liberty.[174] In *Youngberg*, the liberty at stake was the most elemental kind of freedom—freedom from "unreasonable bodily restraints."[175] Because the petitioner was severely retarded, and seemingly without the ability to live in the community, the Court did not feel the need to address the further question of whether the residual liberty interest includes a post-commitment freedom from constraint altogether. But the implication seems clear that this liberty entails some quantum of post-commitment freedom.[176] If so, the logic of *Youngberg* requires that the government affirmatively enhance that interest[177] through the provision of treatment[178] that enables committees to recover sufficiently to enjoy post-commitment ("residual") liberty.[179]

---

[173] *Id.* As pointed out in Justice Blackmun's concurring opinion (joined by Justices Brennan and O'Connor), the majority's decision left "unresolved two difficult and important issues." *Id.* at 325 (Blackmun, J., concurring). The first was whether the state could commit a person for "care and treatment" and then "constitutionally refuse to provide him any 'treatment,' as that term is defined by state law." *Id.* Blackmun argued that if a state commits a person for "care and treatment," "commitment without any 'treatment' whatsoever would not bear a reasonable relation to the purposes of the person's confinement." *Id.* at 325-26. But Blackmun also wrote that if a state commits a person for "safekeeping," it may then "constitutionally refuse to provide him treatment." *Id.* at 326. Our approach to the right to treatment avoids conditioning the right to treatment on the contingency of the state's articulation of purpose.

[174] *Id.* at 319 (recognizing that the "respondent's liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint").

[175] *Id.* at 327. The Court noted that Romeo's "primary needs are bodily safety and a minimum of physical restraint"—which it has recognized as "constitutionally protected liberty interest[s]"—and that "training may be necessary to avoid unconstitutional infringement of those rights." *Id.* at 317-18.

[176] *See also* Washington v. Harper, 494 U.S. 210, 221 (1990) (holding that a mentally ill inmate has a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs").

[177] The literature asserting the existence of a constitutional right to treatment for civil committees is well-developed and large. *See generally* MICHAEL L. PERLIN, 2 MENTAL DISABILITY LAW: CRIMINAL AND CIVIL §§ 3A-1 to 3A-15 (1999 & Supp. 2001). Although addressing a claim brought under federal statutory law, the Court's recent decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), held that the state has an affirmative obligation to find community placements for disabled individuals, not merely house them in institutions. *Id.* at 597. *Olmstead* has been interpreted to further substantiate the right to treatment. *See* Mary C. Cerreto, Olmstead: *The* Brown v. Board of Education *for Disability Rights: Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47, 65-66 (2001).

[178] Although *Youngberg* referred to treatment as "training," with particular regard to the retarded, courts have subsequently equated such training with the provision of treatment to the mentally ill. *See, e.g.*, Woe v. Cuomo, 729 F.2d 96, 104-07 (2d Cir. 1984) (interpreting *Youngberg* to support a right to treatment).

[179] *Cf.* Alexander S. v. Boyd, 876 F. Supp. 773, 790 (D. S.C. 1995) (holding that "[u]nder the Constitution, a minimally adequate level of [correctional] programming is required in order to provide juveniles with a reasonable opportunity to accomplish the purpose of their confinement"); MINN. STAT. ANN. § 253B.03(7) (West 1998) (providing that persons under mental health commitment have "the

The discussion thus far has identified two treatment rights of divergent shapes on the basis of the Court's *parens patriae* jurisprudence. In the first formulation (*Donaldson*), treatment-benefit is most often a precondition for "best interests" commitment, and, in those circumstances, the absence of the treatment-benefit would mandate release. In rare instances, however, commitment would be justifiable without treatment because it satisfies the "best interests" calculus.[180] In contrast, as its facts make clear, *Youngberg* requires treatment even if the commitment itself is justifiable for pure custodial reasons. However, because *Youngberg* is satisfied by proof of compliance with professional standards,[181] it entails no necessary guarantee of efficacy or amenability to treatment.[182] Finally, the *Youngberg* right to treatment is not directly derived from the state's justifications for commitment, but rather from an analysis of the ("residual") liberty interest that remains despite the commitment. Thus, unlike the "best interests" derivation for the right to treatment expectancy (*Donaldson*), it is not clear that a failure of the state to comply with *Youngberg* would render the commitment itself unconstitutional.

Police power commitments, although they have an avowedly different purpose, clearly also entail a right to treatment. Like *parens patriae*, the police power-derived right to treatment assumes a handful of different forms. In the next Part, we argue that the Court's police power jurisprudence entails a strong right to effective treatment, constitutionally enforceable by means of the remedy of release.

IV. SUBSTANTIVE DUE PROCESS AND THE RIGHT TO EFFECTIVE TREATMENT IN POLICE POWER COMMITMENTS

Upon initial consideration, the states' police power, which permits commitments in the name of societal self-protection, would appear to lack an enforceable right to treatment. This is because, by its own logic, the power applies to all dangerous persons—targeting both mentally disordered dangerous persons and those whose dangerousness arises from greed, callousness or simple evil.[183] Under this view, the police power might

right to receive proper care and treatment, best adapted, according to contemporary professional standards, to rendering further supervision unnecessary").

[180] *See supra* notes 164-173 and accompanying text.

[181] *See supra* notes 166-167 and accompanying text.

[182] After all, mere professional involvement in the design of treatment and the care provided is no guarantee of effectiveness. *See* Polizzi et al., *supra* note 28, at 362 (noting the existence of failures (recidivism) in all studied treatment programs).

[183] Indeed, just such a view was expressed in 1975 by Chief Justice Burger in *Donaldson*, where he opined in his concurrence that "[t]here can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease." O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring). For an argument supporting such a "jurisprudence of prevention," see Edward P. Richards, *The*

readily justify incapacitation of dangerous persons who either do not receive treatment or, in practical terms, are not amenable to it. Language in *Hendricks* and *Young* could be taken to support this expansive view of police power, stating that "not all mental conditions [are] treatable. For those individuals with untreatable conditions . . . there [is] no federal constitutional bar to their civil confinement, because the State [has] an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions."[184]

As clear as these pronouncements are, we argue that they are wrong, or at least incomplete.[185] *Hendricks* and *Young* addressed facial challenges to SVP statutes, and thus the Court was not asked whether the *ongoing* commitment of dangerous individuals not amenable to treatment comports with substantive due process. Moreover, in *Hendricks*, which served as the basis for the non-amenability statement, the Court attached importance to the State's assertion that the Kansas law intended to treat Hendricks, and that he was in fact receiving treatment, a linchpin of its analysis of whether the law was punitive for ex post facto and double jeopardy purposes.[186] As Justice Breyer noted in his dissent, the majority had no occasion to decide whether due process "forbid[s] civil commitment of an *untreatable* mentally ill, dangerous person."[187]

In short, the states are not allowed to invoke police power free of the right to treatment. As discussed in this Part, police power commitments entail a right to treatment, which assumes three forms of varied strengths: (1) treatment serving as a basis to maintain the necessary boundary between "civil" commitment and criminal confinement; (2) treatment protecting the "residual" liberty that endures despite commitment; and (3)

Jurisprudence of Prevention: The Right of Societal Self-Defense Against Dangerous Individuals, 16 HASTINGS CONST. L.Q. 329 (1989).

[184] Seling v. Young, 531 U.S. 250, 262 (2001) (citing Kansas v. Hendricks, 521 U.S. 346, 366 (1997)). This view, it bears mention, has been embraced by courts in California and Wisconsin as well. *See* Hubbart v. Superior Court, 969 P.2d 584, 602 (Cal. 1999) (quoting *Hendricks*, 521 U.S. at 366) (alteration in *Hubbart*) (stating that *Hendricks* "strongly suggests that there is no broad constitutional right of treatment for persons involuntarily confined as dangerous and mentally impaired, at least where 'no acceptable treatment exist[s]' or where they cannot be 'successfully treated for their afflictions'"); State v. Post, 541 N.W.2d 115, 124 (Wis. 1995) (stating that precedent "does not necessarily equate with a constitutional requirement that commitment be based on amenability to treatment nor even on a constitutional right to treatment").

[185] Below we acknowledge that there is an important grain of truth in the Court's statements regarding amenability to treatment: Given the state of the art of sex offender treatment, a precommitment amenability to treatment requirement would be unworkable, since there is simply no way to distinguish, in advance, sex offenders who will, from those who will not, benefit from treatment. Our formulation addresses an issue never addressed by the Court: Whether the Constitution places a limit on the duration of confinement in the absence of effective treatment. *See* discussion *infra* Part IV.C.

[186] Kansas v. Hendricks, 521 U.S. 346, 368 n.5 (1997).

[187] *Id.* at 378 (Breyer, J., dissenting).

treatment supporting the bedrock due process requirement that continued commitment be reasonably related to its redemptive civil purpose, treatment.

A. *Treatment as Manifestation of Non-Punitive State Intent*

The weakest form of the police power right to treatment derives from two central limiting principles. First, civil commitment cannot be punitive in purpose or effect (the "no-punishment" principle).[188] Second, and closely related, civil commitment must not threaten the primacy of the criminal law as the tool for addressing antisocial behavior (the "distinct intervention" principle).[189]

The "no punishment" principle emanates directly from the central command that "civil" commitment not be "punitive."[190] To ensure compliance with this command, the Court has historically employed the test first enunciated in *Kennedy v. Mendoza-Martinez*,[191] where the Court invalidated a federal law because it deprived an individual of citizenship as punishment, but did so without providing the strict procedural protections of the criminal law.[192] The Court identified a variety of factors to be considered in judging whether a non-criminal sanction betrays a forbidden punitive purpose. Two of those factors are especially relevant here: "[W]hether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."[193]

The Court applied these criteria in *Bell v. Wolfish*,[194] in the context of pre-trial detention of criminal defendants, a case relevant here because it sought to identify the "distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may."[195] The Court identified the no-punishment principle as the primary tool for analyzing a substantive due process challenge in such circumstances.[196] Because Bell had not been convicted of a crime, and the government evinced no express intent to punish him, the constitutionality of detention turned on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it

---

188 *See supra* notes 132-43 and accompanying text.

189 *See supra* notes 144-47 and accompanying text.

190 *See supra* notes 132-43 and accompanying text.

191 372 U.S. 144 (1963).

192 *Id.* at 183-84.

193 *Id.* at 168-69.

194 441 U.S. 520 (1979).

195 *Id.* at 537.

196 *Id.* at 535.

appears excessive in relation to the alternative purpose assigned [to it]."[197]

The "alternative purpose" in civil commitment (in addition to incapacitation) is treatment.[198] Treatment is the alternate purpose the state must pursue to establish the *bona fides* of its non-punitive commitment regime. For instance, in *Allen v. Illinois*,[199] the Court addressed a "first generation" SVP law (the Illinois Sexually Dangerous Persons Act), and emphasized that "the State serves its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment."[200] *Hendricks* is quite consistent with this view,[201] and lower courts consistently cite "treatment" as the purpose that redeems the constitutionality of SVP laws.[202]

Similarly, the "distinct intervention" principle supports a right to treatment in the police power context, albeit more indirectly. Applying this principle, the Court in *Foucha*, *Hendricks*, and *Crane* imposed on states the burden to justify their departure from the normal "charge and conviction" methods of the criminal law. A key marker of the putative satisfaction of this requirement is the statutory requirement of a mental impairment. In *Foucha*, the Court made clear that "mental illness" (along with dangerousness) was a constitutional predicate for police power civil commitments.[203] Justice O'Connor, who in concurring provided the key fifth vote for the majority in *Foucha*, averred that involuntary civil commitments must have a "medical justification."[204] Otherwise, she concluded, "the necessary connection between the nature and purposes of confinement would be ab-

[197] *Id.* at 538 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)) (alteration in *Wolfish*).

[198] *See* Jones v. United States, 463 U.S. 354, 368 (1983) ("The purpose of commitment . . . is to treat the individual's mental illness and protect him and society from his potential for dangerousness.").

[199] 478 U.S. 364 (1986).

[200] *Id.* at 373.

[201] *See* Kansas v. Hendricks, 521 U.S. 346, 366-67 (1997) (attaching importance to the fact that treatment was an "ancillary goal" of the Kansas SVP law and noting the state's corresponding "obligation to provide treatment for committed persons"); *see also id.* at 371 (Kennedy, J., concurring) (denominating the absence of treatment as an "indication of the forbidden purpose to punish"); *id.* at 383 (Breyer, J., dissenting) (asserting that a "statutory scheme that provides confinement that does not reasonably fit a practically available, medically oriented treatment objective, more likely reflects a primarily punitive legislative purpose").

[202] *See, e.g.*, *In re* Blodgett, 510 N.W.2d 910, 916 (Minn. 1994) ("So long as civil commitment is programmed to provide treatment and periodic review, due process is provided."); State v. Post, 541 N.W.2d 115, 128 (Wis. 1995) (holding that treatment for paraphilias provides the "medical justification" for Wisconsin's SVP law); West v. Macht, 614 N.W.2d 34, 40 (Wis. Ct. App. 2000) ("To be lawful, the restriction on the involuntarily committee's constitutional rights must be reasonably related to legitimate therapeutic and institutional interests."); *see also* Ohlinger v. Watson, 652 F.2d 775, 777-78 (9th Cir. 1981) (holding, with respect to sex offenders incarcerated under a "rehabilitative rationale," that "[a]dequate and effective treatment is constitutionally required because, absent treatment, appellants could be held indefinitely . . . .").

[203] Foucha v. Louisiana, 504 U.S. 71, 80-81 (1992).

[204] *Id.* at 88 (O'Connor, J., concurring).

sent."[205]

In *Hendricks*, while the Court disavowed the necessity of a "mental illness" requirement per se, instead condoning the statutory criterion of "mental abnormality,"[206] the Court insisted that the Kansas SVP law employ some mental impairment requirement. This was necessary for due process purposes insofar as the requirement served to "adequately distinguish[] Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[207]

This same concern was evidenced in *Crane*.[208] In refining the mental impairment requirement, the *Crane* Court emphasized its crucial role in "distinguishing" police power commitments from criminal confinements, a distinction "necessary lest 'civil commitment' become[s] a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment."[209] Describing the required mental impairment alternately as "a special and serious lack of ability to control behavior," and "proof of serious difficulty in controlling behavior,"[210] the Court stated that the requirement served to "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."[211]

In sum, the requirement that SVP committees have a mental impairment serves to substantiate the police power right to treatment. A treatment purpose in itself, of course, does not signify that confinement is "civil," given that penal servitude has been known to involve a treatment component.[212] However, to the extent that "treatment" is shorthand for "treatment for a mental impairment," it has stronger distinguishing powers, because such treatment traditionally characterizes civil commitment. Al-

---

[205] *Id.*

[206] *Hendricks*, 521 U.S. at 358-59.

[207] *Id.* at 360.

[208] Kansas v. Crane, 534 U.S. 407, 409 (2002).

[209] *Id.* at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

[210] *Id.* at 413.

[211] *Id.*

[212] Prison programs often have "correctional treatment" aimed at the criminal behavior of convicts, and "rehabilitation" has for decades served as a core goal of penal confinement. *See, e.g*, Pell v. Procunier, 417 U.S. 817, 823 (1974) (holding that "[a] paramount objective of the corrections system is the rehabilitation of those committed to its custody"). Further, some states have quite frankly used penal confinement as a form of treatment. *See, e.g.*, *In re* Maddox, 88 N.W.2d 470, 474 (Mich. 1958) ("In effect, the doctors' testimony really stated that incarceration in prison under prison conditions was a medical prescription for the type of problems which defendant had been found to have."); *see also* John W. Parry, *Shrinking Civil Rights of Alleged Sexually Violent Predators*, 25 MENTAL & PHYS. DISABILITY L. REP. 318, 322-23 (2001) (noting that thirty-five jurisdictions permit imposition of treatment on sex offenders during or after prison); *cf.* Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205 (1998) (discussing drug treatment courts, which meld "substance abuse treatment and punishment").

though there are several possible reasons underlying the Court's mental impairment predicate,[213] the clearest way in which the presence of a mental impairment serves to distinguish civil from criminal confinement is by invoking a "medical justification"—the provision of treatment.

Thus far we have identified the first of three potential sources of the right to treatment in police power commitments. It is important to note that this first right is rather weak in origin and application, entailing no requirement of efficacy or treatment amenability. This is because treatment serves merely as an indication of the "bona fides" of the state's non-punitive intent; therefore, a sufficiently strong treatment *effort*, even though inefficacious for some detainees, might negate an inference of punitive intent with regard to the statutory regime as a whole.[214]

B. Youngberg *and Police Power*

The second police power incarnation of the right to treatment entails a straightforward application of *Youngberg*, which, although a *parens patriae* case, has been applied in the police power context.[215] Most courts interpret *Youngberg* as imposing a "professional standards" test.[216] Some courts, however, interpret *Youngberg* as also requiring that treatment entail methods that provide "a realistic opportunity to be cured or improve the mental condition for which they were confined."[217]

Taken together, these two formulations of *Youngberg* demarcate a

---

[213] *See* Eric S. Janus, *Foreshadowing the Future of* Kansas v. Hendricks: *Lessons From Minnesota's Sex Offender Commitment Litigation*, 92 NW. U. L. REV. 1279, 1291 (1998) (enumerating and critiquing various roles for the "mental disorder" predicate in civil commitment).

[214] Indeed, in many cases, the mere *articulation* of the intention to provide treatment has sufficed to negate any inference of a forbidden punitive purpose. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 368 (1997) (stating that it is sufficient that state has "recommended treatment if such is possible"); Allen v. Illinois, 478 U.S. 364, 369 (1986) (noting that "the State has a statutory obligation to provide 'care and treatment for...[SVPs] designed to effect recovery'"); *In re* Young, 857 P.2d 989, 997 (Wash. 1993) (holding that "the State had a statutory obligation to provide care and treatment designed to effect recovery for those committed").

Of course, this "would if it could" theory cannot justify commitments for mental disorders that are inherently unamenable to treatment. That argument has no real practical application, however, since there is no certainty, *ab initio*, whether a specific condition will respond to some potential treatment.

[215] The Court, for instance, invoked *Youngberg* in both *Hendricks* and *Young*. *See* Seling v. Young, 531 U.S. 250, 265 (2001); *Hendricks*, 521 U.S. at 368 n.4.

[216] *See, e.g.*, Bailey v. Gardebring, 940 F.2d 1150, 1154 (8th Cir. 1991); Thielman v. Leean, 140 F. Supp. 2d 982, 989-90 (W.D. Wis. 2001); West v. Macht, 614 N.W.2d 34, 39-40 (Wis. Ct. App. 2000). For discussion of the parameters of the standard more generally, see Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992).

[217] Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000). Authoritative formulations of "professional standards" for SVP treatment programs echo this requirement. *See, e.g.*, JANICE MARQUES, PROFESSIONAL STANDARDS FOR CIVIL COMMITMENT PROGRAMS 2-15 (2001) (asserting that the treatment program must consider the viability of rehabilitation).

more substantive right to treatment than that discussed above. However, despite the added strength, the *Youngberg* formulation does not guarantee individual treatment efficacy. Given the self-acknowledged limits of even state-of-the-art sex offender treatment,[218] the "professional standards" test is no guarantee of efficacy. In contrast, the "realistic opportunity to be cured" view would appear to have some bite, especially given the meager release rates of SVP regimes.[219] Nonetheless, even application of this latter standard might justify indefinite confinement of a large proportion of committees. This is because "realistic opportunity" is derived from an aggregate measure, based on group performance, and for that reason does not guarantee treatment success for any given individual.

C. *The "Duration Principle" and the Strong Right to Treatment*

We have shown that it is the treatment purpose of police power commitments that redeems their non-punitive purpose, and is thus constitutionally required. We now add to the analysis the "duration principle," and argue that the two requirements together allow states only a reasonable period to accomplish the goals of treatment.[220] Due process commands that the conditions and duration of confinement bear some reasonable relation to its civil purpose—treatment—without which incapacitation serves as mere preventive detention, "a warehousing operation for social misfits."[221] This formula requires reasonable progress toward release, which is the goal of treatment. When it is clear that the treatment goal is hopeless, release may be required.

This strong right to treatment is derived from the durational principle that commitments must end when they are no longer justified, which constitutes a fundamental distinction from criminal confinements, the validity of which depends on the constitutionality of the initial judgment of convic-

---

[218] *See* Robert Prentky, *Rape: Behavioral Aspects*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 1300, 1303, 1305 (Joshua Dressler ed., 2002) (surveying treatment programs and concluding that the "jury is still out" on treatment efficacy).

[219] *See* discussion *supra* note 23 and accompanying text.

[220] It bears mention that the treatment-oriented claim asserted in *Seling v. Young* differs from the discussion here. Young argued that the fact that he had been "held in punitive conditions for nearly ten years . . . demonstrates that the treatment goal of the statute is a sham." Brief for Respondent at 10, *Seling v. Young*, 531 U.S. 250 (2001). Young thus mainly argued that the evidence supported "proof of an unconstitutional purpose in passing the statute," rather than that the State had exceeded its reasonable opportunity to provide treatment. *Id.* at 24.

[221] Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969); *see also* Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000) (holding that due process requires that committees be provided "a realistic opportunity to be cured or improve the mental condition for which they were confined"); Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1980) ("Adequate and effective treatment is constitutionally required because, absent treatment, appellants could be held indefinitely as a result of their mental illness.").

tion. By tying the right to treatment to the durational principle, we also provide a partial answer to the question of remedy. The clearly established remedy for a commitment that has exceeded its constitutionally permissible duration is release.[222]

Our argument proceeds in two steps. First, we trace the jurisprudential evolution of the duration principle, briefly touched upon earlier.[223] Second, we show that its limits apply to the right to treatment, allowing a state only a reasonable period, for each committed individual, to accomplish its avowed treatment purpose.

The Court first articulated the duration principle in its seminal 1972 decision of *Jackson v. Indiana*, providing that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[224] The principle has been recited, and applied, repeatedly since then,[225] and is one characteristic of SVP laws cited to establish and sustain their legitimacy.[226]

The duration principle requires release when circumstances become constitutionally inadequate to support civil commitment, and has been applied in two types of situations. First, the Court has ordered release when the circumstances that originally justified commitment no longer obtain. This principle was applied in *Donaldson*, where the Court squarely held that commitment "could not constitutionally continue after [its justifying] basis no longer existed."[227] The Court extended the principle to the police power context in *Jones v. United States*,[228] where the Court examined the

[222] *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (stating that the states cannot continue to hold in civil confinement a person who is no longer mentally ill); O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (noting that "confinement must cease when [its] reasons no longer exist"); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that a committee "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain . . . capacity in the foreseeable future").

[223] *See supra* notes 155-158 and accompanying text.

[224] *Jackson*, 406 U.S. at 738. Even prior to *Jackson*, it appeared well established that civilly committed individuals, including those held under police power commitments after a finding of not guilty by reason of insanity, could be confined only so long as "the present status of the patient is such that continued confinement is justifiable." Dixon v. Jacobs, 427 F.2d 589, 598 (D.C. Cir. 1970).

[225] *See, e.g.*, *Young*, 531 U.S. at 265; *Foucha*, 504 U.S. at 79; Jones v. United States, 463 U.S. 354, 368 (1983).

[226] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 368-69 (1997) (concluding that because state law "permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent"); Martin v. Reinstein, 987 P.2d 779, 786 (Ariz. Ct. App. 1999) (stating that an SVP "must be afforded treatment and must be examined at least annually to determine whether his mental disorder has sufficiently improved that he no longer poses a danger to the public"); *In re* Young, 857 P.2d 989, 997 (Wash. 1993) (en banc) (stating that "committed persons must be released as soon as they are no longer dangerous"); State v. Post, 541 N.W.2d 115, 127 (Wis. 1985) ("Thus, the duration of an individual's commitment is intimately linked to treatment of his mental condition.").

[227] *Donaldson*, 422 U.S. at 575.

[228] 463 U.S. 354 (1983).

permissible duration of commitment for an insanity defense acquitee. Rejecting the argument that the defendant's civil commitment could extend no longer than the maximum prescribed criminal sentence, the Court, quoting *Jackson*, observed that "[t]he Due Process Clause 'requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'"[229] The Court then explained that the "[t]he purpose of commitment . . . is to treat the individual's mental illness and protect him and society from his potential dangerousness."[230] Moreover, "the committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous."[231] Finally, in *Foucha*, the Court ordered the release of an insanity acquitee who, while apparently still "dangerous," was no longer "mentally ill."[232] "Thus," the Court concluded, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis."[233] Taken together, these cases establish that, with the passage of time, the state's interest or purpose upon which commitment is justified can be rendered constitutionally suspect.

The second category of duration cases involves a subtle but important difference: Although the state's purpose for commitment remains constitutionally valid, its accomplishment within a reasonable period has become doubtful, and thus the commitment has exceeded its permissible duration. Implicit in these cases is the constitutional expectation that states have only a reasonable period of time to accomplish their legitimate commitment objectives. These cases recognize that the constitutional permissibility of confinement depends not only on the harshness of conditions, but also on duration. Punitiveness is not only a momentary measure, but also a cumulative one. Confinement that is non-punitive, in short, can become punitive if its duration is excessive.

In *Jackson*, for instance, the Court invalidated Indiana's right to hold, for an indefinite period, a criminal defendant deemed incompetent to stand trial.[234] The State, rather, could hold Jackson only for the "'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future."[235] And, even though the state's interest in evaluating Jackson and rendering him competent for trial remained unabated, the Court held that Jackson's "continued commitment must be justified by progress toward

[229] *Id.* at 368 (quoting *Jackson*, 406 U.S. at 738).
[230] *Id.*
[231] *Id.*
[232] Foucha v. Louisiana, 504 U.S. 71, 81 (1992).
[233] *Id.* at 78.
[234] *Jackson*, 406 U.S. at 733.
[235] *Id.*

that goal."[236] Likewise, in *United States v. Salerno*,[237] the Court emphasized that the pretrial detention permitted by the federal Bail Reform Act had "stringent time limitations."[238] The Court made explicit the connection between duration and punishment, but "intimate[d] no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress's regulatory goal."[239] A similar view was voiced in *Bell v. Wolfish*,[240] another pre-trial confinement case. The Court warned that any regime involving endurance of "genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment."[241]

Most recently, in *Zadvydas v. Davis*,[242] the Court examined provisions of federal immigration law that authorized civil detention of deportees while they awaited deportation.[243] For some deportees, deportation is delayed because no country can be found to accept the individual.[244] Although the Court eventually determined that this policy of indefinite detention was contrary to applicable law,[245] its statutory analysis was conducted against the backdrop of the Court's due process jurisprudence. The *Zadvydas* majority cited *Jackson* for the proposition that "where detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.'"[246] The Court concluded that a deportee may not be held once it is determined that there is "no significant likelihood of removal in the reasonably foreseeable future . . . . And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."[247]

---

[236] *Id.* at 738. In *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 249 (1972), decided the same term as *Jackson*, the Court likewise deemed unconstitutional the indefinite confinement of an individual who had been confined for purposes of "observation."

[237] 481 U.S. 739 (1987).

[238] *Id.* at 747.

[239] *Id.* at 747 n.4.

[240] 441 U.S. 520 (1979).

[241] *Id.* at 542; *see also* Schall v. Martin, 467 U.S. 253, 269 (1984) ("There is no indication in the statute itself that preventive detention is used or intended as a punishment. First of all, the detention is strictly limited in time.").

[242] 533 U.S. 678 (2001).

[243] *Id.* at 699.

[244] *Id.* at 711.

[245] *Id.* at 699.

[246] *Id.* at 690 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)) (alteration in *Zadvydas*).

[247] *Id.* at 701. *Zadvydas* confirms the view of numerous district court and appellate holdings finding serious constitutional problems with indefinite detention by the Immigration and Naturalization Service ("INS"). *See, e.g.*, Ma v. Reno, 208 F.3d 815, 821-22 (9th Cir. 2000) (holding that the INS may not indefinitely hold alien where no reasonable likelihood existed for removal); Koita v. Reno, 113

These cases teach that punishment comprises not only unduly harsh conditions, but also confinement that is *durationally* out of proportion to the state's non-punitive purpose. Whether confinement is punitive thus turns on proportionality—which, in turn, can depend on duration. Although the state's "interest" remains constant (assuming that the need for treatment, evaluation, restoration, deportation, or protection remain unchanged), at some point the *cumulative* imposition on the individual's liberty outweighs the government's interest, requiring an end to the confinement. In the terminology of *Mendoza-Martinez*, the confinement has become "excessive in relation to the alternative purpose assigned."[248]

In the same way, confinement can become excessive in relation to treatment, the "alternative purpose" that ensures the non-punitiveness of police power commitments.[249] States are entitled to a reasonable opportunity to achieve a reduction of risk via treatment. Confinement becomes excessive when there is no "reasonable progress" toward that end, and when there is "no significant likelihood of . . . [risk reduction] in the reasonably foreseeable future."[250] Like the alternative purposes in the duration cases, treatment no longer outweighs the cumulative imposition on the individual's freedom.[251]

Critics might raise two objections to the foregoing analysis. First, they might observe that police power commitments serve dual purposes—incapacitation and treatment. Even if treatment no longer justifies confinement, the danger remains and continues to support the state's incapacitation purpose. But, as the cases plainly demonstrate, incapacitation alone supports, at most, confinement that is strictly time limited. That is the lesson of *Salerno* and *Foucha*. In *Zadvydas*, as well, the Court stated that dangerousness did not provide a justification for indefinite "preventive detention" of deportees.[252]

Second, critics might argue that civil commitments are *sui generis*.

F. Supp. 2d. 737, 741 (M.D. Pa. 2000) (stating that mandatory detention requirement of INS may violate substantive due process rights); Kay v. Reno, 94 F. Supp. 2d 546, 552 (M.D. Pa. 2000) (holding that the INS's mandatory detention requirement violated the alien's substantive due process rights); Duong v. INS, 118 F. Supp. 2d 1059, 1067 (S.D. Cal. 2000) (holding that indefinite incarceration of alien violated his substantive due process right); Nguyen v. Fasano, 84 F. Supp. 2d 1099, 1110-11 (S.D. Cal. 2000) (holding that, when removal of deportable alien is not foreseeable, detention by the INS becomes punitive after a certain amount of time).

[248] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963).

[249] *See, e.g.*, Thielman v. Leean, 140 F. Supp. 2d 982, 1000 (W.D. Wis. 2001) (noting that "because one of the purposes for which sexually violent persons are committed . . . is to receive treatment, the conditions and duration of plaintiff's confinement must be reasonably related to that purpose").

[250] *Zadvydas*, 533 U.S. at 701.

[251] Note, as well, that the constitutional analysis at work is individual (or, in the parlance of *Young*, "as applied"). So it was in *Jackson* and *Zadvydas* that the Court focused its inquiry on whether competency or deportation can be achieved for the individual; group-based efficacy is irrelevant.

[252] *Zadvydas*, 533 U.S. at 691.

Such an inference might be drawn from additional language in *Zadvydas* to the effect that "[i]n cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger."[253] The unarticulated premise is that, somehow, mental illness changes the constitutional calculus, exempting the liberty-deprivation of civil commitment from the due process limits of durational proportionality. This would explain the Court's dicta discussed above suggesting that it is permissible to detain dangerous mentally disordered persons for whom no treatment is available.[254]

Such an argument, while benefiting from an alluring definitiveness, suffers from a fatal failure to distinguish among forms of civil commitment. Mental infirmity indeed can, in limited circumstances, change the constitutional calculus, but the variety of mental disorder in SVP cases falls outside of this narrow band, for several reasons.

First, in *parens patriae* cases, mental illness manifests as incompetence—the inability to care for oneself—and can justify the state's intervention in service of the individual's "best interests." As a result, in rare instances, if necessitated by severe, untreatable illness, even unlimited state-intervention is not punishment, so long as it serves the individual's interests (e.g., the facts in *Youngberg*).[255] However, it has never been argued that modern SVP laws are characterized in any manner by benign *parens patriae* considerations, and therefore this limited justification for custodial confinement has no applicability.

Second, a finding of criminal insanity might justify indefinite commitment of the mentally disordered—such as the Court approved in *Jones v. United States*[256]—even of persons with untreatable impairments. If this were not so a gap would exist in the system of social control: States would lack any means of confining dangerous persons exempt from both the criminal and civil commitment systems.[257] This gap intensifies the state's interest in crossing over to the civil system, which serves as the only available form of social control.[258] In short, for such insanity acquitees, lack of

---

253 *Id.*

254 *See supra* notes 183-184 and accompanying text.

255 *See supra* notes 161-162 and accompanying text.

256 463 U.S. 354, 370 (1983) (recognizing "the widely and reasonably held view that insanity acquitees constitute a special class that should be treated differently from other candidates for commitment").

257 *Foucha* confirms this very point: The insanity acquitee, having recovered his sanity (albeit still "dangerous"), is then subject to the "normal" means of social control—the criminal justice system—in the event further criminal activity occurs. *See* Foucha v. Louisiana, 504 U.S. 71, 82-85 (1992).

258 *See* Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 213 (1996) (discussing the use of civil institutionalization as a tool to prevent sexual violence).

available effective treatment should not disable society's ability to defend itself against violence by means of confinement. Most SVP committees, however, are fully responsible for their prior crimes,[259] and courts have uniformly eschewed the notion that SVP commitments are constitutional only for persons who lack criminal responsibility.[260] In other words, in the SVP context, the etiological connection between risk and mental disorder contributes nothing to the state's interest in confinement. If shortcomings in treatment render civil commitment unavailable, states can rely on the "normal means of dealing with persistent criminal conduct"—the criminal justice system.[261]

Finally, if mentally infirm persons were deemed to have a "diminished civic personhood" that reduced their interest in liberty,[262] perhaps their "excessive" confinement would be accounted for differently in the constitutional calculus. Such a characterization of the mentally ill would explain why they, but not ordinary criminals, could be civilly committed for life without effective treatment. But, at least in modern times, no court has tried to justify indefinite commitment on the grounds that the liberty of the "mentally disordered" matters less than the liberty enjoyed by the non-impaired.

In short, there is some validity in the assertion that the duration limitation principle of *Jackson* and its progeny do not apply where the "danger" is tied to mental impairment. However, such a view is tenable only if the juridicial requirement of impairment is narrowed considerably. The type of impairment characteristic of SVP committees neither enhances the state's interest nor diminishes the individual's. Thus, in the SVP context, it is not mental impairment that justifies the use of civil confinement; rather, it is treatment.[263] Treatment is tied to duration, and there is no logic that suggests that the "reasonable progress" rule of *Jackson* (and *Zadvydas*) does not also apply to treatment.

---

[259] Eric S. Janus & Nancy Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343, 359 (2000) (noting that almost all SVP committees in Minnesota have been held criminally responsible for the sexual violence that is the predicate for their commitments).

[260] *See, e.g.*, State *ex rel.* Pearson v. Probate Court, 287 N.W. 297, 300-01 (Minn. 1939), *aff'd*, 309 U.S. 270 (1940).

[261] *Foucha*, 504 U.S. at 82.

[262] CLIVE UNSWORTH, THE POLITICS OF MENTAL HEALTH LEGISLATION 36, 41 (1987) (arguing that mentally disordered persons were excluded from full participation in the benefits of a legal personality, characterized by "freedom, autonomy and responsibility").

[263] As the D.C. Circuit put it some fifty years ago: "[W]e are here considering an indefinite commitment, justifiable only upon a theory of therapeutic treatment." Miller v. Overholser, 206 F.2d 415, 419 (D.C. Cir. 1953). *See also* Clatterbuck v. Harris, 295 F. Supp. 84, 86 (D.D.C. 1968) (quoting Millard v. Cameron, 373 F.2d 468, 472-73 (D.C. Cir. 1966) (stating that commitment "is justifiable only upon a therapeutic treatment . . . . Lack of treatment destroys any otherwise valid reason for differential treatment of the sexual psychopath.").

In other words, the *Jackson* line of cases suggests a strong right to treatment, one in which *effective* treatment facilitates real progress toward community re-entry. The violation of the right, in turn, is remedied by release. If otherwise, the state would have no actual purpose beyond incapacitation—which in itself, as discussed, fails to qualify as a long-term, non-punitive purpose sufficient to satisfy due process.[264]

To sum up, we have identified three distinct formulations of the right to treatment in police power civil commitments. In its weakest form, the right is derived directly from the no-punishment principle, with treatment signifying that the intentions of the state are non-punitive. This is the weakest formulation because it does not necessarily entail any requirement of treatment efficacy, and it can tolerate substantial deviation in application over time. If the evidentiary role of treatment is to instantiate non-punitive intent, then such factors as the level of the state's effort, and the difficulty and novelty of the task, are relevant. However, the Court has clearly stated that a non-punitive purpose is a constitutional predicate for a civil commitment scheme. Thus, if a state's treatment conduct falls below this weakest threshold—i.e., if it is insufficient to negate the punitive intent—it should be expected that the commitment scheme would be found unconstitutional, and its committees rightfully released. In *Young*, even Justice Scalia appeared to assume that release from commitment would be appropriate if the state's treatment purpose were negated by appropriate evidence.[265]

Youngberg embodies the second formulation of the police power right to treatment. This right manifests the state's obligation to respect, and enhance, the residual liberties of civil committees. Arguably, this right is triggered by commitment and its post-commitment violation does not implicate the constitutionality of the initial commitment itself.[266] Thus, one would expect this right to be enforced through injunction and damages rather than release.[267]

---

[264] *See* Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1980) (stating that "[a]dequate and effective treatment is constitutionally required because, absent treatment, appellants could be held indefinitely as a result of their mental illness").

[265] *See* Seling v. Young, 531 U.S. 250, 269-70 (Scalia, J., concurring) ("[I]f those proceedings fail, and the state courts authoritatively interpret the state statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a statute that on its face is civil to be criminal.").

[266] *See, e.g.*, *In re* Turay, 986 P.2d 790, 803 (Wash. 1999) ("[A] person committed under [the Washington State SVP law] may not challenge the actual conditions of their confinement, or the quality of the treatment at the . . . facility until they have been found to be an SVP and committed under the provisions of [the law].").

[267] *See, e.g.*, Sharp v. Weston, 233 F.3d 1166, 1169 (9th Cir. 2000) (requiring the State of Washington "to take all reasonable steps to bring a constitutionally adequate program into reality rather than merely describing it on paper").

Finally, we have shown that a strong right to treatment can be derived from the *Jackson* principle that the duration of confinement must be reasonably related to the purposes of confinement. Confinement that is nonpunitive, because it is undertaken with the proper intent, can become punitive if it is excessive in duration, as compared to its purpose. States have only a reasonable period to accomplish their treatment objective, which is the reduction in risk sufficient to allow release. This is an individualized right that is predicated on efficacy. Further, because it implicates the duration of confinement, it is clearly enforceable by release.

V. ENFORCING THE RIGHT TO TREATMENT IN POLICE POWER COMMITMENTS

Having identified several different rights to treatment, and their limits, we now focus on enforcement, with particular regard to the strong right to treatment explored in the previous section. As will be discussed, this strong right compels a strong remedy for its violation—release. However, courts in recent times have been reluctant to order release in treatment and conditions cases.[268] What accounts for this reluctance?

We conclude that it stems from both the varied forms of the right to treatment (some of which are enforceable by remedies short of release),[269] and the reluctance of courts, and federal courts in particular, to interfere with the operation of state institutions.[270] We argue, however, that such deference should not be infinite,[271] and that it is limited by a heightened scrutiny, triggered when the Court patrols the shadowy boundary between the civil and criminal systems of social control. A rule of reason and proportion does and should inhere in the Court's substantive due process jurisprudence. We argue that this expectation affords the state a reasonable period of time to accomplish the ostensible treatment purposes of civil commitment, and that reasonableness is proportionate to the danger involved and the strength of the state's interest in using civil commitment to

---

[268] *See* cases cited *infra* notes 377-404 and accompanying text.

[269] *See infra* notes 394-401 and accompanying text.

[270] *See, e.g.*, *Sharp*, 233 F.3d at 1171 (citing Youngberg v. Romeo, 457 U.S. 307 (1982)) (noting that "[i]n order to minimize the interference by the federal judiciary with the internal operations of state institutions, courts should show deference to the judgment exercised by a qualified professional").

[271] *See, e.g.*, *id.* ("Although the state enjoys wide latitude in developing treatment regimens, the courts may take action when there is a substantial departure from accepted professional judgment or when there has been no exercise of professional judgment at all."); Thomas S. v. Flaherty, 902 F.2d 250, 252 (4th Cir. 1990) (holding that under *Youngberg*, decisions of professionals are presumptively valid but not conclusive, because the court has the authority to determine if there has been a substantial deviation from accepted standards).

address the danger. Beyond that period, release is constitutionally compelled.[272]

In sum, the right to treatment advanced here accommodates both meaningful judicial oversight of, and ample deference to, state implementation of SVP regimes. In this section, we show that the Court's substantive due process jurisprudence supports this dynamic and nuanced approach to judicial scrutiny of state deprivations of liberty that straddle the border of civil and criminal methods of social control.

A. *Fundamental Rights and Level of Scrutiny*

In the Supreme Court's due process jurisprudence, a key first step in the analysis is to determine the appropriate level of scrutiny to be applied in assessing a law that infringes liberty. The Court has invoked a variety of levels, ranging from highly deferential "rational basis" review, to intermediate "reasonableness" review, to its most exacting standard, "strict scrutiny." The level of scrutiny, as the Court's decisions have amply borne out, often determines the outcome of a given constitutional challenge.[273]

Before a level of scrutiny can be identified, however, a reviewing court must first be clear on what constitutional liberty is threatened by the governmental action. The Court itself has quite correctly recognized that involuntary civil commitment involves a "massive curtailment of liberty,"[274] with uniquely stigmatizing consequences.[275] As such, it would stand to reason that the Court would unhesitatingly apply its most exacting standard—strict scrutiny—requiring that the state action serve a compelling governmental interest and employ narrowly tailored, least restrictive means

---

[272] *See, e.g.*, Rouse v. Cameron, 373 F.2d 451, 458 (D.C. Cir. 1966) (quoting Watson v. City of Memphis, 373 U.S. 526, 533 (1963)) (alteration in *Rouse)* ("We also recognize that [deficiencies in treatment] cannot be remedied immediately. But indefinite delay cannot be approved. 'The rights here asserted are . . . present rights . . . and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.'").

[273] *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1454-65 (2d ed. 1988) (surveying decisions supporting this view); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (referring to strict scrutiny as "fatal in fact").

[274] Humphrey v. Cady, 405 U.S. 504, 509 (1972); *see also* Vitek v. Jones, 445 U.S. 480, 493 (1980) (stating that involuntary civil commitment infringes on a defendant's liberty).

[275] *See Vitek*, 445 U.S. at 492 (quoting Addington v. Texas, 441 U.S. 418, 425-26 (1979)) (observing that "[t]he loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual . . . .'"). Insofar as those targeted by SVP laws are designated "sex predators"—an especially opprobrious label today—such stigma is decidedly exacerbated. *See* Allen v. Illinois, 478 U.S. 364, 377 (1986) (Stevens, J., dissenting) (stating that the "impact of an adverse judgment against an individual deemed to be a 'sexually dangerous person' is at least as serious as a guilty verdict in a typical criminal trial").

available to achieve that end.[276] However, while there is no question that the liberty infringement entailed in civil commitment triggers heightened due process scrutiny,[277] the Court has noticeably failed to articulate where on the continuum of scrutiny the various claims that have come before it lie.

A central reason for this uncertainty is the persistent failure to accurately define the nature of the right under analysis. Much as due process doctrine in general has been justifiably condemned for its uncertainty,[278] the Court's civil commitment jurisprudence, in particular, can be criticized for its failure to identify with any degree of precision just what liberty interest is at stake. In general, civil commitment has been said to jeopardize the very broad "freedom from bodily restraint."[279] However, as Justice Thomas has pointed out, this formulation proves too much. It would, for example, conceivably subject the entire criminal justice system to strict scrutiny.[280] Yet, at the same time, the formulation in a sense proves too little. Given that the protection of the public from violent offenders constitutes a compelling state interest, commitment laws aimed at *all* dangerous persons, whether or not mentally disordered, would seem to be sufficiently narrowly tailored. This latter formulation, however, demonstrably fails to take account of the Court's continued assertion that due process requires a mental disorder predicate—not dangerousness alone—for civil commitment to be justified.[281]

The solution lies in a reformulation of the right involved:[282] A formulation that more accurately reflects the interest at stake, which is the right not

---

[276] *See* TRIBE, *supra* note 273, at 1454 (discussing the application of the strict scrutiny analysis for inequalities bearing on fundamental rights).

[277] *See, e.g.*, *Addington*, 441 U.S. at 425 (stating that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection").

[278] *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) (noting that "[d]ue process doctrine subsists in confusion"); *id.* at 314 (noting that "[s]ubstantive due process is widely viewed as the most problematic category in constitutional law").

[279] Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

[280] *See id.* at 118 (Thomas, J., dissenting) (noting same and dismissing "the existence of a sweeping, general fundamental right to 'freedom from bodily restraint' applicable to *all* persons in *all* contexts"). For an extended rebuttal of this view, and an argument that strict scrutiny should apply to claims brought by those incarcerated for victimless crimes such as marijuana use and consensual sodomy, see Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different From All Other Rights*, 69 N.Y.U. L. REV. 781 (1994).

[281] *See Foucha*, 504 U.S. at 82; *see also* Janus, *supra* note 258, at 174 (stating that courts have held that "civil commitment may not be based on dangerousness alone").

[282] *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1106 (1990) (noting that "[a] too-abstract right will be recognizable as such whenever its enunciation requires us to virtually ignore the rationales of the cases which allegedly established it").

to be confined without a criminal charge and conviction—the *sine qua non* of the criminal system.[283] The question thus becomes not (as under the broader formulation) when can the State deprive a person of liberty, but rather when can the State deprive a person of liberty outside the rubric of the criminal justice system?

This more specific formulation is evidenced in the Court's most significant due process decisions. Foremost among these is *Foucha v. Louisiana*,[284] where the Court struck down a Louisiana law that allowed dangerous insanity acquitees to remain under civil commitment even after they had regained their sanity.[285] Justice White's majority opinion began with the tenet that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause,"[286] and emphasized the imperative that courts not '"minimize the importance and fundamental nature"' of this right.[287] Having noted the significance of the constitutional terrain, Justice White proceeded to express the Court's special concern for the need to police the boundary between criminal and civil species of liberty deprivation. Because Foucha was institutionalized as a result of having been adjudicated not guilty by reason of insanity, the Court characterized his commitment as civil.[288] At the same time, however, a diagnostic finding by civil authorities of dangerousness, standing alone, was "not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility."[289] The State demonstrably had an interest in protecting its citizens from dangerous persons such as Foucha. The question, however, was whether its means of serving this interest—outside of the "ordinary" rubric of the criminal justice system—satisfied substantive due process:

> [T]he State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns

[283] *See Foucha*, 504 U.S. at 80 (acknowledging that "[a] State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution"); Vitek v. Jones, 445 U.S. 480, 493 (1980) (stating that "[u]ndoubtedly, a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement"); Meachum v. Fano, 427 U.S. 215, 224 (1976) (noting that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty," and that henceforth "the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution").

[284] 504 U.S. 71 (1992).

[285] *Id.* at 71.

[286] *Id.* at 80.

[287] *Id.* (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

[288] *See id.* ("As Foucha was not convicted, he may not be punished. . . . Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility . . . .").

[289] *Id.* at 82.

> of criminal conduct. These are the normal means of dealing with persistent criminal conduct. Had they been employed against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way.[290]

In other words, the constitutional proof required from the State concerned not solely that proof necessary to justify a deprivation of liberty, but much more specifically, to justify the crossing by the State from the "ordinary" and "normal" means of dealing with antisocial behavior (i.e., the criminal law) to civil commitment.[291] The constitutional task, the *Foucha* Court made clear, is to guard against "substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."[292]

Justice Kennedy dissented in *Foucha*, but the gravamen of his disagreement centered on the *location* of the border between criminal and civil, and not on the need for augmented policing to protect against its breach.[293] He apparently agreed with the core nature of the liberty interest involved,[294] but would hold that Foucha's confinement, resulting from a

---

[290] *Id.*

[291] As Professor Donald Dripps has written:

> [T]he special due process doctrines of the criminal law presuppose the exclusivity of the criminal sanction. The criminal defendant who wins acquittal at a trial cannot be seized on the courthouse steps and chucked into a "detention facility for dangerous persons." Certain things can be done to individuals through the criminal process or not at all.

Donald Dripps, *The Exclusivity Of The Criminal Law: Toward A "Regulatory Model" Of, or "Pathological Perspective" On, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199, 202 (1996).

[292] *Foucha*, 504 U.S. at 83. See also Allen v. Illinois, 478 U.S. 364, 380 (1986) (Stevens, J., dissenting), where the Court noted that:

> [N]othing would prevent a State from creating an entire corpus of "dangerous person" statutes to shadow its criminal code. Indeterminate commitment would derive from proven violations of criminal statutes, combined with findings of mental disorders and "criminal propensities," and constitutional protections for criminal defendants would be simply inapplicable. The goal would be "treatment"; the result would be evisceration of criminal law and its accompanying protections.

Id.

[293] *Foucha*, 504 U.S. at 102 (Kennedy, J., dissenting). Justice Thomas also dissented. *Id.* at 103-05 (Thomas, J., dissenting). Although vigorously disagreeing with the view that Louisiana's scheme was invalid, Justice Thomas rightly pointed out that the majority's decision could not have been reached without application of a heightened form of constitutional scrutiny, with which he would also disagree. Justice Thomas' dissent focused on the definition of the right involved, positing and critiquing two formulations. *Id.* (Thomas, J., dissenting). In our judgment, the formulations are straw persons, one being too broad (physical liberty simpliciter) and the other too narrow (freedom from confinement in a "mental hospital"). Our formulation situates itself between the two.

[294] *Id.* at 90 (Kennedy, J., dissenting) ("[F]reedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution. I agree with the Court's reaffirmation of this first premise.").

finding of not guilty by reason of insanity, was a "criminal case."[295] To Kennedy, the fact that Foucha was found, beyond a reasonable doubt, to have committed a criminal act, relegated his case to the criminal side of the ledger, where states "may incarcerate on any reasonable basis."[296] Accordingly, Justice Kennedy stated that the Court erred in placing "primary reliance on cases . . . which define the due process limits for involuntary civil commitment."[297] Justice Kennedy emphasized, however, the constitutional importance of preserving the boundary between the criminal and civil systems. Where this boundary has been crossed, "[w]e have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty."[298]

Kansas v. Hendricks[299] and *Kansas v. Crane*[300] also evidenced use of a heightened concern, triggered by the government's use of its police power to civilly commit. Although *Hendricks* upheld Kansas's SVP law,[301] the decision highlighted the Court's continued concern over maintaining appropriate boundaries of civil commitment. The Court framed the constitutional challenge as identifying the circumstances in which the "forcible civil detainment of people" is permissible,[302] noting that this is so only under "certain narrow circumstances."[303] The requirement that a committee have a mental impairment served to "adequately distinguish[] Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[304] Justice Kennedy's concurrence likewise focused on the proper roles for criminal and civil confinement, and the location of the boundary between them.[305]

In *Crane*, the Court again addressed the constitutionality of Kansas's

---

[295] *Id.* at 94 (Kennedy, J., dissenting).

[296] *Id.* at 93 (Kennedy, J., dissenting).

[297] *Id.* at 90 (Kennedy, J., dissenting).

[298] *Id.* at 93 (Kennedy, J., dissenting).

[299] 521 U.S. 346 (1997).

[300] 534 U.S. 407 (2002).

[301] *Hendricks*, 521 U.S. at 350.

[302] *Id.* at 357.

[303] *Id.*

[304] *Id.* at 360.

[305] In particular, Justice Kennedy stated:

> The concern . . . is whether it is the criminal system or the civil system which should make the decision in the first place. If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.

Id. at 373 (Kennedy, J., concurring).

SVP law—and again upheld it, concluding that substantive due process did not require that a committee have a "total" inability to refrain from sexual misconduct.[306] In so holding, the seven-member majority was even more explicit in situating the criminal/civil boundary at the center of constitutional analysis, asserting that states must "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."[307] Such a distinction "is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment."[308]

Viewed as such, the right warrants a heightened level of constitutional scrutiny, not simply because of the undisputed core importance of liberty, but also because of the need to guard against the understandable desire of government to maintain a system of incapacitation that parallels the criminal system. Such an alternate system has great appeal to the government insofar as it is not obliged to observe constitutional constraints applicable in the criminal system. Although many state commitment regimes now entail criminal-style protections, they are not required to afford such protections because the laws are deemed civil.[309] They thus also avoid a basic constraint fundamental to the operation of the criminal system—proof beyond a reasonable doubt of a legislatively specified criminal act.[310] In

---

[306] Kansas v. Crane, 534 U.S. 407, 411 (2002).

[307] *Id.* at 410, 413 (stating that the distinction is necessary to ensure that the civil system distinguishes SVPs "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings") (quoting *Hendricks*, 521 U.S. at 357-58, 360).

[308] *Id.* at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)).

[309] *See, e.g.*, Allen v. Illinois, 478 U.S. 364, 367 (1986) (the right against self-incrimination does not apply in sex offender commitments).

Indeed, SVP states already show considerable variability in the degree of protections and rights afforded. *See, e.g.*, State *ex rel.* Pearson v. Probate Court, 287 N.W. 297, 299 (Minn. 1939) (holding that a jury trial is not mandated for sex offender commitments), *aff'd*, 309 U.S. 270 (1940)); *see also* People v. Kibel, 701 P.2d 37, 37 (Colo. 1985) (holding that the state may provide committed sex offenders fewer procedural protections than either civil committees or mentally ill prisoners). *But see* Stachulak v. Coughlin, 520 F.2d 931, 931 (7th Cir. 1975) (interpreting Illinois law) (requiring proof beyond a reasonable doubt in first-generation SVP proceeding); People v. Burnick, 535 P.2d 352, 353 (Cal. 1975) (same).

[310] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.2, at 195 (2d ed. 1986) ("Bad thoughts alone cannot constitute a crime; there must be an act . . . ."); *see also* State v. Brewer, 767 So. 2d 1249, 1250 (Fla. Dist. Ct. App. 2000) (observing that the Constitution guarantees the "right not to be convicted of or punished for a crime which has not occurred"). SVP laws, on the other hand, seek to enable the states to commit individuals before they commit "horrifying crimes." Sarah H. Francis, Note, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 SUFFOLK U. L. REV. 125, 145 (1995). Thus, while *In re Winship*, 397 U.S. 358, 364 (1970), requires states "to prove *every element of the offense* beyond a reasonable doubt," SVP laws guarantee at most proof of a current diagnosis and a predicted future crime, a far less exacting determination.

short, unlike the criminal law,[311] SVP laws effectively allow confinement based on the "status" of being a dangerous person.[312]

Moreover, even if such protections are extended, they cannot substitute for the substantive right of citizens to demand that government satisfy the expectations of its putative civil confinement. Even the most demanding procedural regime—which, at best, fairly and accurately delimits persons warranting commitment as an initial matter—can fail to afford substantive protection to those kept after the government's civil purpose evaporates. Heightened scrutiny thus helps ensure that the government will be held to its constitutional bargain and the largesse afforded states in administering their civil commitment regimes; it ensures that states will not "cut corners."[313] As noted by one court some forty years ago:

> The creation of a non-medically determinable category of persons who may be confined for indeterminate periods by a civil proceeding is so serious a departure from traditional concepts of justice that it deserves a critical analysis on the broadest of terms after a careful factual development of its present operation.[314]

Having established that heightened scrutiny is required, the challenge remains of determining what level of scrutiny, beyond rational basis review, applies. As other commentators[315] and Justice Thomas[316] have noted, the Court's civil confinement rhetoric has invoked a range of standards without actually naming them. Professor Cornwell in particular has argued that the Court uses a "more rigorous form of heightened scrutiny," albeit not "strict scrutiny."[317] As a result, states must have an "exceedingly persuasive justification" for their legislative purpose, and a "demonstrated and significant linkage" between the classification and the purpose of the legislation.[318]

---

[311] *See* Robinson v. California, 370 U.S. 660, 660 (1962) (holding that a criminal conviction cannot rest on "status," but rather only a criminal act).

[312] *See, e.g.*, People v. Kibel, 701 P.2d 37, 44 (Colo. 1985) (noting the argument that sex offenders are held based on their status—"their dangerous character"—rather than an act).

[313] Kansas v. Hendricks, 521 U.S. 346, 396 (1997) (Breyer, J., dissenting); *see also* St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting) (urging that "the Government should turn square corners in dealing with the people").

[314] Sas v. Maryland, 334 F.2d 506, 517 (4th Cir. 1964).

[315] *See* John Kip Cornwell, *Confining Mentally Disordered "Super Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 679-81 (1996) (noting uncertainty in applicable scrutiny for classifications affecting involuntary commitments); Stephen R. McAllister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 4 PSYCH., PUB. POL'Y, & L. 268, 274-78 (1998) (same).

[316] *See* Foucha v. Louisiana, 504 U.S. 71, 116-17 (1992) (Thomas, J., dissenting).

[317] Cornwell, *supra* note 315, at 681.

[318] *Id.*

A review of the Court's recent jurisprudence supports this contention. In *United States v. Salerno*,[319] the Court employed heightened scrutiny language as it emphasized that the government's circumscribed use of pretrial detention under the Bail Reform Act of 1984 "narrowly focuses on a particularly acute problem in which the Government interests are overwhelming."[320] In *Foucha*, the Court invalidated a Louisiana law that allowed civil confinement of insanity acquitees who, although still dangerous, were no longer mentally ill.[321] As noted by Justice Thomas in dissent, if the Court were in actuality subjecting the Louisiana law to mere "reasonable" basis scrutiny, it would have withstood the due process challenge.[322]

The Court's most recent decision on SVP laws, *Kansas v. Crane*,[323] evinces a similar heightened scrutiny. In its *Crane* briefs, Kansas argued that the Court should subject the commitment criteria contained in Kansas law to "reasonableness" review, allowing states wide latitude in accommodating the fit between the operative classification ("mentally disordered") and the goals of the legislation.[324] A seven-member majority of the Court, however, felt otherwise, holding that mental disorders must satisfy a constitutionally set threshold ("serious difficulty in controlling behavior"), tied specifically to the state's interest in using civil commitment (as opposed to the criminal law) to control antisocial behavior.[325] Taking their cue from the Supreme Court, state courts have likewise applied a more exacting standard of review when addressing due process challenges to commitments.[326]

---

[319] 481 U.S. 739 (1987).

[320] *Id.* at 750; *see also id.* at 749 (noting that "[t]he government's interest in preventing crime by arrestees in preventing crime by arrestees is both legitimate and compelling").

[321] *Foucha*, 504 U.S. at 86.

[322] *Id.* at 116-17 (Thomas, J., dissenting).

[323] 534 U.S. 407 (2002).

[324] The State's argument rested on its interpretation of the Court's civil commitment jurisprudence, focusing particularly on the lack of medical or scientific consensus on issues of diagnosis, predication and treatment of sexual offending. Brief for State of Kansas at 14-15, Kansas v. Crane, 534 U.S. 407 (2002) (No. 00-957) (asserting that "*Hendricks* confirms that substantive due process notions only require that State legislatures choose between reasonable options supported by the legitimate judgments of mental health professionals, especially when there may not be consensus on particular medical or scientific questions").

[325] *Crane*, 534 U.S. at 408, 413. Furthermore, the Court implicitly rejected the State's deferential "medical uncertainty" argument. The Court's analytic formulation in *Crane*, "serious difficulty in controlling behavior," *arises* from constitutional policy, not science (though, of course, its *application* will require science in particular cases). *Id.* at 413.

[326] *See, e.g.*, Hubbart v. Superior Court, 969 P.2d 584, 593 n.20 (Cal. 1999) (stating that the court "has traditionally subjected involuntary civil commitment statutes to the most rigorous form of constitutional review"); *In re* Hay, 953 P.2d 666, 675 (Kan. 1998) ("There is no doubt that the civil commitment of sexually violent predators involves so significant a deprivation of liberty that the protections of due process and equal protection are involved. This clearly requires that we apply the strict scrutiny test and the analysis it involves."); *In re* Blodgett, 510 N.W.2d 910, 914 (Minn. 1994) (noting that "the state must show a legitimate and compelling interest to justify any deprivation of a person's physical

The foregoing, however, fails to explain the "reasonable relation" language reflexively used by the Court when assessing civil commitments. For example, *Jackson*[327] and *Youngberg*[328] both speak in terms of "reasonableness," prompting one commentator to interpret the Court's due process jurisprudence as entailing a deferential "reasonable basis" standard of review.[329] The deference stems from the understandable reluctance, deriving from separation of powers concerns, to license onerous judicial oversight of the complex functions of state institutions, or to dampen creative state problem-solving in areas of uncertain science. In a corollary sense, deference serves the interest of institution building; it takes time and money to build a professionally proper treatment program, especially in areas that are new and developing, such as sex offender treatment. Finally, federalism can, under certain circumstances, increase the reluctance of federal courts to interfere in state action.[330] Altogether, these considerations provide states a strong measure of latitude.

Again, however, this deference is not without limit, as the Court itself has suggested. For example, although the Court has said that the duration of confinement must be reasonably related to its purpose,[331] it has also said that commitment must end when the grounds for it are no longer present.[332] Furthermore, although the Court has said that "the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment,"[333] it has limited the kinds of "mental disorder" that qualify for commitment,[334] and insisted that "dangerous" persons be freed when they no longer satisfy this requirement.[335] Perhaps more to the point, while states are afforded considerable deference in the abstract exercise of developing terminology and substan-

---

freedom"); *In re* Campbell, 986 P.2d 771, 774 (Wash. 1999) (en banc) (applying strict scrutiny to determine whether "conditions violate the detainees' rights"); State v. Post, 541 N.W.2d 115, 122 (Wis. 1995) (noting that "legislation that restricts a fundamental liberty requires this court to apply strict scrutiny to its due process analysis").

[327] Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[328] Youngberg v. Romeo, 457 U.S. 307, 322 (1982).

[329] *See* McAllister, *supra* note 315, at 282.

[330] As discussed above, federalism concerns loomed large in *Seling v. Young*, especially in Justice Scalia's concurrence, explaining in large measure his (and the majority's) reluctance to approve a federal role in judging the actual implementation of Washington's SVP law. Seling v. Young, 531 U.S. 250, 264-65, 269-70 (2001) (Scalia, J., concurring). We argue that the concerns in *Young* were anomalous, arising because the federal constitutional issue reached the federal courts without a thorough hearing in the state courts. In the normal course of events, claims for release from confinement will reach the federal courts only in postures that guarantee prior state court examination. *See supra* note 96.

[331] *Jackson*, 406 U.S. at 738.

[332] O'Connor v. Donaldson, 422 U.S. 563, 574-75 (1975).

[333] Kansas v. Crane, 504 U.S. 407, 413 (2002).

[334] *Id.* at 412-13.

[335] *See* Foucha v. Louisiana, 504 U.S. 71, 86 (1992).

tive legal bases for commitment—especially in an area of such definitional disagreement as mental health—less deference is deserved post-hoc when an individual petitioner, deprived of liberty on a long-term basis, seeks accountability from the government for its action.[336] This is especially so when courts patrol the civil-criminal boundary, assessing the very aspect of SVP regimes that mark them as civil (and hence constitutional).

The Court has exhibited a similar capacity to accommodate both deference and scrutiny in its substantive due process jurisprudence more generally. For example, in *Zablocki v. Redhail*,[337] the Court identified the right to marry as being of "fundamental importance,"[338] and thus required means "closely tailored" to "sufficiently important state interests."[339] Nonetheless, the Court stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[340]

Similarly, in *Troxel v. Granville*[341] a majority of the Court deemed fundamental the right of parents to raise their children, and thus invalidated a state law authorizing wide grounds for any person to seek visitation.[342] *Troxel* thus intimated permissible outer bounds for state intrusions on the parental right. But clearly, within those outer boundaries, states retain substantial discretion in articulating standards for, and adjudging individual cases of, child custody and visitation.[343]

Thus, we propose that the outer boundaries of involuntary civil commitment—in particular, its boundary with the criminal law—should be

---

[336] *See id.* at 80 (recognizing "a [due process] component that bars certain arbitrary, wrongful government actions").

[337] 434 U.S. 374 (1978).

[338] *Id.* at 383.

[339] *Id.* at 388.

[340] *Id.* at 386.

[341] 530 U.S. 57 (2000).

[342] *Id.* at 65-67, 75. While the Court itself did not specify a level of scrutiny, Justice Thomas, in his concurrence, stated: "I would apply strict scrutiny to infringements of fundamental rights." *Id.* at 80 (Thomas, J., concurring).

[343] For example, Justice Kennedy's dissent suggests that a "best interests" standard might be appropriate in certain circumstances. *See id.* at 98 (Kennedy, J., dissenting) (noting that the "best interests standard [is] sufficient in [an] adoption proceeding to protect [the] interests of [a] natural father who [has] not legitimated the child"). Clearly, such a standard would allow state courts great discretion in adjudicating individual claims.

carefully policed by the courts. Within those bounds, states have considerable discretion; but even then, their actions must have a reasonable relation to the constitutionally mandated standards constraining civil commitment.[344] In their patrol of the boundary, courts must be mindful that treatment serves as the sole consideration that inoculates long-term, secure confinement against the "punishment" label.[345] Without careful judicial scrutiny to root out ineffective treatment programs, SVP commitment becomes indistinguishable from lifetime imprisonment.

B. *Enforcement of the Right to Treatment*

Having delineated the basic contours of due process in police power commitments and the related role of treatment, it remains to be addressed how heightened scrutiny influences analysis.[346] To be sure, the governmental interest in protecting the public from SVPs is powerful, and the deference robust—affording states ample leeway in administering their regimes. In this sense, the reasonable-duration formulation of the right to treatment advanced here incorporates those principles.

In a series of decisions over the years, lower courts have adopted legal theories consistent with this analysis, indicating that serious violations of the right to treatment should result in release. In these cases, the courts engaged in as applied analysis to examine whether the actual implementation of the treatment objective was sufficient to support continued civil confinement. However, more recent decisions, addressing the modern wave of SVP laws, evince a markedly more hostile position toward enforcement of the right. In this section, we first discuss this older generation of cases, and then turn to newer cases—arguing that, despite the apparent hostility of the newer cases, their jurisprudence is not inconsistent with the view advanced here.

---

[344] Our formulation helps explain why a number of decisions have applied a lower level of scrutiny to equal protection claims attacking procedural differences *within* civil commitment regimes. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 321-28 (1993) (applying rational basis standard to review the difference in procedures used to commit those who are mentally ill and those who are mentally retarded); People v. Pembrock, 342 N.E.2d 28, 30 (Ill. 1976) (applying the rational basis test to different commitment procedures for sexually violent predators and the mentally ill). Further, mental illness is not a suspect classification, which also explains why courts have been disinclined to apply strict scrutiny in the context of equal protection claims. *See, e.g.*, *In re* Bailey, 740 N.E.2d 1146, 1151 (Ill. Ct. App. 2000) (the rational basis test, as opposed to strict scrutiny, applies to equal protection challenges involving involuntary commitment classifications); *In re* Turay, 986 P.2d 790, 806 (Wash. 1999) (en banc) (applying the rational basis test to an equal protection challenge). *But see In re* Williams, 628 N.W.2d 447, 451, 453 (Iowa 2001) (applying the rational basis test to a substantive due process claim asserting that a SVP committee was entitled to the "least restrictive alternative").

[345] *See supra* notes 198-202 and accompanying text.

[346] As discussed in Part V, heightened scrutiny applies in the due process analysis of police power commitments and accompanying treatment. *See supra* notes 282-326 and accompanying text.

Rouse v. Cameron[347] represents one of the first notable decisions in this tradition of identifying a durationally related right to effective treatment. *Rouse* involved an insanity acquitee who had been held under a civil commitment for four years—with no end "in sight" and, allegedly, without appropriate treatment—who sought release in a habeas proceeding.[348] The D.C. Circuit, Judge Bazelon writing for the court, noted that the challenge was an "as applied" challenge to confinement under a District of Columbia statute,[349] which did not challenge the per se constitutionality of the provision.[350] Addressing the habeas claim, Judge Bazelon allowed the state a "reasonable opportunity to initiate treatment,"[351] and directed consideration of a variety of factors, including "the length of time the patient has lacked adequate treatment, the length of time he has been in custody, the nature of the mental condition that caused his acquittal, and the degree of danger, resulting from the condition, that the patient would present if released."[352] This governmental latitude, however, is not indefinite. When "the opportunity for treatment has been exhausted or treatment is otherwise inappropriate," Judge Bazelon concluded, "[u]nconditional or conditional release may be in order."[353]

At about the same time, the Fourth Circuit in *Sas v. Maryland*[354] articulated a right to treatment in a habeas challenge to Maryland's "Defective Delinquent" confinement scheme.[355] Although the court found the scheme constitutional on its face, it remanded for a determination of "whether the statute is being constitutionally applied."[356] On remand, the district court was instructed to determine "whether the proposed objectives of the Act are sufficiently implemented in its actual administration to support its categorization as a civil procedure and justify the elimination of conventional criminal procedural safeguards."[357] Such an "as applied" examination was necessary, the court explained, because:

> [A] statute though "fair on its face and impartial in appearance" may be fraught with the possibility of abuse in that if not administered in the spirit in which it is conceived it can become a mere device for warehousing the obnoxious and

---

[347] 373 F.2d 451 (D.C. Cir. 1967).
[348] *Id.* at 453.
[349] *Id.* at 452.
[350] *Id.*
[351] *Id.* at 458.
[352] *Id.*
[353] *Id.* at 458-59.
[354] 334 F.2d 506 (4th Cir. 1964).
[355] *Id.* at 509.
[356] *Id.*
[357] *Id.*

> antisocial elements of society.[358] . . . Deficiencies in staff, facilities, and finances would undermine the efficacy of the Institution and the justification for the law, and ultimately the constitutionality of its application.[359]

More recently, in *People v. Feagley*,[360] the California Supreme Court ordered the release of an individual committed under the State's sexually dangerous person statute, holding that "the effect of a statutory declaration of the right to treatment may be negated by evidence that such treatment is not in fact provided."[361] Without treatment, the court noted, "nothing remains but bare incarceration 'for the protection of society.'"[362] The court held that "medical treatment [is] the *raison d'etre* of the mentally disordered sex offender law, it is its sole constitutional justification."[363] Moreover, "[a]dequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.'"[364]

Similarly, in *Commonwealth v. Page*,[365] the Massachusetts Supreme Judicial Court ordered the release of an individual committed pursuant to the Commonwealth's Sexually Dangerous Persons Law.[366] Since no treatment center had been established, committees were housed in prisons with the general prison population.[367] Assuming that the statute was non-penal in character—and thus constitutional on its face—the court nonetheless ordered the release, holding that "it is necessary that the remedial aspect of confinement thereunder have foundation in fact. It is not sufficient that the Legislature announce a remedial purpose if the consequences to the individual are penal."[368]

The remedial result in these cases finds support in judicial decisions that have mandated release to remedy the imposition of unconstitutional conditions experienced by individuals held under various forms of civil

---

[358] *Id.* at 516.

[359] *Id.* at 516-17.

[360] 535 P.2d 373 (Cal. 1975).

[361] *Id.* at 396.

[362] *Id.*

[363] *Id.* at 386.

[364] *Id.* at 387 (quoting Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971)).

[365] 159 N.E.2d 82 (Mass. 1959).

[366] *Id.* at 85.

[367] *Id.* at 84-85.

[368] *Id.* at 85. Similarly, in *People v. Hutchings*, 347 N.Y.S.2d 268 (Sup. Ct. 1973), a New York trial court vacated a special "one-day-to-life" sentence for a sex offender, on the ground that the treatment contemplated by the sentence had not been provided. Concluding that the Department of Corrections "had no intention of fulfilling its obligations" to provide treatment, the court vacated the sentence. *Id.* at 270. The court indicated that Hutchings would be re-sentenced. *Id.*

authority. In a typical older case, *In re Maddox*,[369] the Michigan Supreme Court ordered release of a habeas petitioner committed under the state's facially constitutional sex psychopath law, but held in the state's prison.[370] Admonishing that "courts have upheld the civil and noncriminal procedures of the statute in direct relationship to its stated purpose and to the treatment contemplated,"[371] the court held that the conditions in the prison were constitutionally inadequate.[372] The court ordered the individual released if an appropriate placement was not provided within one month.[373]

The foregoing cases, decided in a time of heightened judicial sensitivity to institutional abuses, stand in contrast to more recent decisions. These latter cases suggest that repair—not release—is the appropriate remedy. Although they might not appear at first blush to do so, they in fact lend support to our approach to the right to treatment.

To begin, several state courts have held that individuals may not raise *as applied* conditions of confinement issues at the initial commitment hearing. In *In re McClatchey*,[374] for example, the Washington Supreme Court specifically acknowledged that treatment and conditions of confinement are central factors in determining the *facial* validity of a SVP law, and that its cases establishing the facial validity of the statute "left the door open for a challenge to the statute as applied to the facts in an individual case."[375] However, for due process purposes, "unless and until [petitioner] is found to be a sexually violent predator, and committed . . ., the constitutionality of the statute as applied to the facts of his case cannot be determined."[376] This forbearance is consistent with the analytic approach advanced here, given that the right to treatment is a condition subsequent to the commitment, sensitive to the expectation that states have a reasonable period to attempt treatment.

Other cases, however, have examined and rejected as applied claims for release.[377] The most sustained attention has come from the Washington

---

[369] 88 N.W.2d 470 (Mich. 1958).

[370] *Id.* at 473.

[371] *Id.* at 475.

[372] *Id.* at 478.

[373] *Id.*

[374] 940 P.2d 646 (Wash. 1997) (en banc).

[375] *Id.* at 647.

[376] *Id.* at 647-48 (citing Jackson v. Indiana, 406 U.S. 715 (1972)).

It bears mention that one appellate court, in conjunction with an initial commitment, has addressed a treatment-based claim. *See In re* Commitment of K.D., 2003 WL 142477, at *1 (N.J. Super. Ct. App. Div. 2003). In *K.D.*, the court notes that commitment under the State SVP law "invokes a correlative statutory and constitutional duty of appropriate treatment where feasible, designed to permit ultimate release to the community." *Id.* at *2 (citing Seling v. Young, 531 U.S. 250, 265-66 (2001); Kansas v. Hendricks, 521 U.S. 346, 365-68 (1997)). In short, "a court has the inherent power to examine the conditions of confinement, including treatment, prescribed by the SVPA." *Id.*

[377] Although many such cases have foundered at the evidentiary stage, several courts have acknowledged the constitutional inadequacy of particular conditions or treatment, and proceeded to

Supreme Court. Confronted with findings from federal[378] and state[379] courts suggesting that conditions and treatment in the SVP program fell below constitutional standards, the response of Washington's highest court has been decidedly hostile to SVP claimants. Nonetheless, as we suggest below, that court's holdings are not inconsistent with our formulation of the right to treatment.[380]

In re Young[381] provided the Washington Supreme Court with its initial occasion to address the State SVP law. The court rejected Young's conditions of confinement of claim, purely on the terms of the statute, noting that "[t]here is no evidence in the record addressing either the actual conditions of confinement, or the quality of treatment. These issues are not currently before the court."[382]

In *In re Turay*,[383] the petitioner was committed on a less than unanimous verdict.[384] Two years later, however, the outcome was reversed, with the state supreme court holding that a unanimous verdict was necessary.[385] While his case was on remand, Turay successfully filed suit under 42 U.S.C. § 1983, challenging the conditions of his confinement on constitutional grounds.[386] The federal court reviewing the matter found that Turay's "constitutional right to access to adequate mental health treatment" had been violated, and it entered an injunction to remedy this violation.[387]

---

analyze directly the issue of remedy. *See, e.g.*, Thielman v. Leean, 140 F. Supp. 2d 982, 1001 (W.D. Wis. 2001) ("Although the modest amount of time devoted to therapy raises questions about the state's commitment to treatment of [SVP] patients, plaintiff has presented no evidence in the form of expert testimony or otherwise from which this court could conclude that the amount of treatment plaintiff is receiving is not related reasonably to treating him for his mental condition."); People v. Kibel, 701 P.2d 37, 44 (Colo. 1985) ("Because the record in these cases fails to show that either defendant was denied treatment, we do not need to resolve these questions [of the right to treatment]"); *In re* Seibert, 582 N.W.2d 745, 749 (Wis. Ct. App. 1998) (finding that "[f]irst, and most importantly, the evidence shows that the treatment program at the center is tailored for individuals, including Seibert").

378 *See, e.g.*, Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000).

379 *See, e.g.*, *In re* Turay, 986 P.2d 790, 812 (Wash. 1999); *In re* Campbell, 986 P.2d 771, 775 (Wash. 1999).

380 As discussed above, the Washington Supreme Court acknowledged that some conditions of confinement can be so punitive as to invalidate commitments and require release. *See* discussion *supra* notes 356-58 and accompanying text. In contrast, it appears well established that unconstitutionally cruel and unusual conditions in a correctional setting do not require release. *See, e.g.*, Gomez v. United States, 899 F.2d 1124, 1126 (11th Cir. 1990). These Eighth Amendment cases highlight the inherent difference between criminal and civil confinement. While the validity of a criminal confinement is established *ab initio*, a civil confinement remains valid only to the extent that its justification remains valid at the moment of assessment.

381 857 P.2d 989 (Wash. 1993).

382 *Id.* at 1005.

383 986 P.2d 790 (Wash. 1999).

384 *Id.* at 793.

385 *Id.*

386 *Id.* at 794.

387 *Id.*

Later, when the state's commitment petition came on for re-trial, Turay moved to dismiss the petition "because the conditions of his confinement are punitive, not treatment oriented in nature."[388] The state trial court entered findings that certain aspects of Turay's confinement violated his constitutional rights, and it directed that the deficiencies be remedied within thirty days.[389] Subsequently, Turay filed another motion to dismiss the commitment petition, arguing that his confinement amounted to "punishment," and thus violated the double jeopardy clause.[390] The trial court denied Turay's motions to dismiss, and direct appeal was taken to the Washington Supreme Court.[391]

The state supreme court characterized Turay's argument as claiming that the punitive conditions of confinement rendered the SVP statute "criminal" as applied to him, and that "in order to remedy this violation of his constitutional rights, we must order his release."[392] The court rejected Turay's argument as applying the wrong test: "We believe that Turay's 'as applied' double jeopardy challenge . . . based upon the conditions at the [commitment center], rather than the language of the statute, is flawed."[393] Further, the court stated that the federal court's finding of unconstitutional conditions was "irrelevant . . . because Turay's remedy for these unconstitutional conditions is not a release from confinement. Turay's remedy for unconstitutional conditions of confinement at the [commitment center] is, therefore, an injunction action and/or an award of damages."[394]

The court supported its remedial result in several ways. First, it noted that "the federal court is maintaining a zealous watch over the conditions at [the commitment center] to enforce the injunction that it put in place. Accordingly, Turay has an adequate remedy that will guarantee that the conditions at the [center] will meet or exceed constitutional standards."[395] Because the conditions were in the process of being remedied, Turay had failed to "prove not only that the conditions of his confinement [were] constitutionally deficient in some manner, but that these deficiencies [were] 'so punitive' that they wholly render[ed] the application of [the SVP statute] criminal rather than civil."[396]

Despite its apparent hostility to the right to treatment in police power cases, the Washington Supreme Court's jurisprudence is in fact quite com-

---

388 *Id.* at 793.
389 *Id.* at 794.
390 *Id.*
391 *Id.*
392 *Id.* at 809.
393 *Id.* at 810.
394 *Id.* at 812.
395 *Id.*
396 *Id.*

patible with the formulation advanced here. The court acknowledged the existence of a constitutional right to treatment, and that the claim could be brought both with respect to the statutory scheme as a whole (facially) and relative to the actual conditions and treatment experienced by a single individual.[397] Moreover, like the U.S. Supreme Court in *Seling v. Young*,[398] the Washington Supreme Court not only ruled out "applied" claims sounding in double jeopardy (or ex post facto), but it also specifically left open the prospect for other as applied claims—presumably based on substantive due process, though no such claims were before the court.[399]

More troublesome to the thesis advanced here are the court's pronouncements, mainly in *Turay*, seemingly prescribing injunctive relief rather than release from confinement as the appropriate remedy for unconstitutional conditions.[400] In large measure, these pronouncements are dicta, because they pertain to the as applied claim that the court clearly held was not before it. Even further outside the issue *sub judice* was the species of claim of central interest here, one alleging a violation of substantive due process on the expiration of the state's "reasonable opportunity" to provide effective treatment.

To be sure, the holdings of the Washington Supreme Court have a measure of merit. Not every instance of substandard conditions is sufficient to upset a non-punitive statutory scheme. In addition, often the proper remedy for substandard conditions *is* an injunction to repair the deficiency; this is particularly where, as assumed by the Washington Supreme Court, progress is being made and the State is acting in "good faith."[401]

However, it would be a mistake to read the dicta about remedy as extending beyond these limited factual circumstances. The court has acknowledged the essential underpinnings of a duration claim, including: The duration principle itself,[402] the right to have as applied violations of the right to treatment remedied,[403] and (at least by implication) the principle that commitments, valid *ab initio*, become unconstitutional if the deficiencies are sufficiently punitive.[404] Further, the Washington Supreme Court's reasoning in support of the "repair not release" dicta focused on the good faith progress being made and the adequacy of the repair remedy. These factors are entirely compatible with the "reasonable opportunity" theory

---

[397] *Id.*

[398] 531 U.S. 250, 263, 265-67 (2001).

[399] *Turay*, 986 P.2d at 812.

[400] *Id.*

[401] *Id.* at 794 n.2.

[402] *In re Young*, 857 P.2d 989, 1004-06 (Wash. 1993).

[403] *Turay*, 986 P.2d at 794.

[404] *See id.* at 812 (implying that release is justified if "deficiencies are 'so punitive' that they wholly render the application of [the SVP law] criminal rather than civil").

advanced here. The court's reliance on them suggests, by negative implication, that release will be the proper remedy when repair becomes hopeless.

C. *Applying Theory to Practice*

Having established that a right to treatment exists with respect to SVP commitments, and that courts are obliged to patrol continued confinements with heightened care, what remains is a discussion of the criteria courts should use in such assessments. As discussed, *Youngberg* dictates that courts defer to, and state treatment programs adhere to, "professional judgment,"[405] which entails a "realistic opportunity to be cured."[406] However, as also discussed, this deference is not without limit, and courts will enforce this constitutional dictate, as an initial matter, by means of injunctive relief compelling appropriate treatment.[407]

In this section we address a key question: Assuming that *Youngberg* has been satisfied, what practical limits operate on the State's constitutional authority to continue civil confinement? To this end, we formulate a benchmark for judicial use, based on a rebuttable presumption that the State's reasonable opportunity to provide treatment has expired. To create this benchmark, we look to available empirical data on the length of sex offender treatment programs, with an added temporal cushion in keeping with the institutional deference owed the states in implementing their treatment regimes. Once this augmented benchmark is breached, however, the burden shifts to the State to prove that further confinement is reasonable.[408]

To set the reasonableness benchmark, courts can look first to empirical data on sex offender treatment duration. In the correctional setting, most state-run sex offender treatment programs extend for no more than three

[405] Youngberg v. Romeo, 457 U.S. 307, 322 (1982); *see also id.* at 323 (requiring evidence of "such a substantial departure from accepted professional judgment, practice, or standards . . . that the person responsible actually did not base the decision on such a judgment").

[406] Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000). The "reasonable opportunity" standard was articulated as long ago as 1971 by Judge Frank M. Johnson in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd in part, rev'd in part*, 503 F.2d 1305 (5th Cir. 1974), which held that mentally ill patients "have a constitutional right to receive such individual treatment as will give each of them a reasonable opportunity to be cured or to improve his or her mental condition." *Id.* at 784. Later, a similar view was echoed by the Fifth Circuit in *Donaldson v. O'Connor*, 493 F.2d 507, 522 (1974), *vacated*, O'Connor v. Donaldson, 422 U.S. 563 (1975).

[407] *See supra* notes 394-401 and accompanying text.

[408] For discussion of how the absence of objective criteria hindered judicial review of whether proper treatment had been afforded persons committed pursuant to earlier "sex psychopath" laws, see Michael B. Roche, Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME LAW. 527, 541-42 (1966).

years.[409] The treatment program in Kansas, for instance, was designed to be completed in eighteen months.[410] Similarly, the well-known program implemented by the California Department of Mental Health—the Sex Offender Treatment and Evaluation Project—involves a "comprehensive cognitive-behavioral treatment program" with an inpatient phase of approximately two years (fourteen to thirty months).[411] A survey of Minnesota sex offender treatment programs in prisons and community settings showed that the average length of treatment ranged from 2.5 months to 37 months.[412] The Minnesota SVP program itself is designed to be completed in a minimum of four years.[413]

Thus, three years appears to be a rough benchmark for treatment judged by professionals to achieve some treatment efficacy, if any is forthcoming. Social science data suggest that beyond that point at best only a small correlation exists between length of treatment and reductions in sexual offending recidivism,[414] raising the question of whether anything other than the interest of incapacitation is being served. However, in light of the deference rightfully accorded states in the implementation of their programs, we propose setting a benchmark for treatment efficacy at six years—twice the average, and long enough to encompass longer programs, such as Minnesota's, that are often held up as models.[415]

When an individual has been confined for longer than six years, a rebuttable presumption should arise, requiring release in the absence of convincing evidence from the state that further confinement is reasonable.[416]

---

[409] MARY WEST ET AL., STATE SEX OFFENDER TREATMENT PROGRAMS (50-STATE SURVEY) 4 (2000).

[410] McKune v. Lile, 122 S. Ct. 2017, 2025 (2002) (noting that the Kansas Sexual Abuse Treatment Program lasts for eighteen months).

[411] Janice K. Marques et al., *Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism: Preliminary Results of a Longitudinal Study*, 21 CRIM. JUST. & BEHAV. 28, 36 (1994).

[412] MINN. OFFICE OF THE LEGIS. AUDITOR, SEX OFFENDER TREATMENT PROGRAMS 55-58 (1994).

[413] E-mail from Anita Schlank, Ph.D., Clinical Director of Minnesota Sex Offender Program, to Eric S. Janus (Aug. 19, 2002) (noting that most patients are unable to complete the program in the minimum period) (correspondence on file with authors).

[414] *See* R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 352 (1998) (noting the median correlation of "length of treatment" and recidivism as .00).

[415] *See* Anita Schlank et al., *The Minnesota Sex Offender Program*, *in* THE SEXUAL PREDATOR: LAW, POLICY, EVALUATION AND TREATMENT 10-14 (Anita Schlank & Fred Cohen eds., 1999) (describing the Minnesota program and noting its national prominence).

[416] *Cf.* Jackson v. Indiana, 406 U.S. 715, 738 (1972) (stating that an individual charged with a crime cannot be held longer than a "reasonable period of time necessary to determine whether there is a substantial probability that he will attain [the] capacity [to stand trial] in the foreseeable future").

As a practical matter, all state laws provide for some form of judicial review to ensure continuing justification for the SVP commitment. These judicial proceedings, mandated by statute, assess dangerousness and mental disorder. The constitutional proposal advanced here adds an additional consideration: Whether the duration of the confinement is proportional to the putative treatment purpose.

Such evidence could assume any one or more of three types.

First, consistent with the individualized scrutiny demanded by *Jackson*, the state could adduce evidence that *this individual* has made "progress toward [the] goal"[417] of release. This would enable the reviewing court to assess whether "continued commitment [is] justified" because there is "a substantial probability that he will attain [that goal] in the foreseeable future."[418] In so doing, the court would bear in mind the principle of *Zadvydas* that "for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."[419] The court would also be mindful that treatment must be individualized, not group-based;[420] that deference is afforded to "professional judgment," not blanket policies and blunderbuss approaches.[421]

Second, the state could argue that the lack of treatment progress was the fault of the detainee,[422] rather than arising from some shortcoming in the treatment program. In assessing such an argument, courts should discredit state justifications that ascribe blame to the very characteristics of the committee that are the target of treatment,[423] because crediting such explanations would essentially put the responsibility on the committee to cure himself.

Third, courts should consider the state's practical public safety interest

---

[417] *Id.*

[418] *Id.*

[419] Zadvydas v. Davis, 533 U.S. 678, 701 (2001).

[420] Ohlinger v. Watson, 652 F.2d 775, 777-79 (9th Cir. 1980).

[421] *See* Youngberg v. Romeo, 457 U.S. 307, 321 (1982) (stating that due process requires that "the courts make certain that professional judgment in fact was exercised"); Lucas v. Peters, 741 N.E.2d 313, 324 (Ill. Ct. App. 2000) (noting "judicial duty to ensure that the professional's expertise was actually brought into play"); *see also* Janice K. Marques, *Professional Standards for Civil Commitment Programs, in* THE SEXUAL PREDATOR: LEGAL ISSUES, CLINICAL ISSUES, SPECIAL POPULATIONS 2-9 (Anita Schlank ed., 2001) (including, as one of five mandatory standards for SVP treatment programs, "treatment plans [that] are individualized and comprehensive").

[422] The use of "fault" here is intended to encompass the willful decision of the individual to not participate in or otherwise subvert the treatment process.

[423] For example, "denial" of responsibility for sex crimes is often cited both as a target for treatment modification, and as a reason for treatment failure. *See* Steven C. Brake & Diann Shannon, *Using Pretreatment to Increase Admission in Sex Offenders, in* 2 THE SEX OFFENDER: NEW INSIGHTS, TREATMENT INNOVATIONS AND LEGAL DEVELOPMENTS (Barbara K. Schwartz & Henry R. Cellini eds., 1997). In addition, much sexual violence can be traced, at least in part, to character disorders and "cognitive distortions," including assumptions and attitudes that are conducive to sexual violence. *See, e.g.*, Anita Schlank, *Issues in the Assessment of Sexual Offenders' Cognitive Distortions, in* 3 THE SEX OFFENDER: THEORETICAL ADVANCES, TREATING SPECIAL POPULATIONS AND LEGAL DEVELOPMENTS 30-32 (Barbara K. Schwartz ed., 1999) (discussing the role of cognitive distortions in both sexual offending and treatment).

in continued confinement. Although all sexual abuse should be prevented, the very existence of SVP programs[424] and community notification regimes that distinguish among sex offender types[425] assumes that post-prison sex offenders present a range of risks (both in terms of likelihood of re-offense and severity). For instance, although not insignificant, the State's interest in the lengthy confinement of a likely groper[426] or exhibitionist[427] is clearly lower than its interest in confining one whose past and possible future crimes involve sexual abuse of a more severe nature. The highest levels of danger might justify lengthening the duration of commitment, but, as argued above, cannot support making it indefinite. Courts should evaluate evidence of risk in light of research indicating that "the most effective known technique for reducing risk of relapse is intensive supervision" in the community,[428] and that community "aftercare can be made sufficiently 'tight' to reduce risk to a minimum for many offenders."[429] Reasonableness decisions, particularly about SVP detainees who fall at the lower end of the risk scale, need to take into account these methods to achieve public safety in the community, short of full-blown institutional confinement. Due process demands no less.

Finally, the courts should consider the strength of the State's interest in using civil confinement, as opposed to the criminal justice system, in addressing possible future criminal sexual offending. As discussed, the "normal" or "usual" means of addressing antisocial behavior involves post-crime intervention through the criminal system.[430] That system remains available for the vast majority of SVPs who are legally sane and thus fully amenable to criminal prosecution, conviction, and incarceration. In contrast, for those rare SVPs whose mental conditions excuse them from future criminal prosecution, the State's interest in civil confinement is heightened.

---

[424] *See, e.g.*, Eric S. Janus & Nancy H. Walbek, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343, 371 (2000) (observing a wide variation among SVP committees on indices commonly associated with dangerousness).

[425] *See* Doe v. Dep't of Pub. Safety, 271 F.3d 38, 41-42 (2d Cir. 2001) (invalidating a state law that failed to distinguish among sex offenders for purposes of effectuating community notification), *cert. granted*, 122 S. Ct. 1959 (2002); Wayne A. Logan, A Study in "Actuarial Justice": Sex Offender Practice and Procedure, 3 BUFF. CRIM. L. REV. 593, 602-19 (2000) (surveying variations in approaches to classifying registrants for notification purposes).

[426] *See* E-mail from Ron Thorsett to Eric S. Janus (Jul. 16, 2002) (describing SVP committee who has been confined for 10 years, based on a single sex offense conviction for "fondling 10-12 year old boys through their clothing").

[427] *Compare In re* Rodriguez, 506 N.W.2d 660, 662-63 (Minn. Ct. App. 1993) (holding that application of the psychopathic personality statute to nonviolent exhibitionist is beyond both the statute's intent and the precedent's narrowed definition), *with In re* Clements, 440 N.W.2d 133, 136-37 (Minn. Ct. App. 1989) (upholding SVP commitment of exhibitionist).

[428] ROBERT A. PRENTKY & ANN W. BURGESS, FORENSIC MANAGEMENT OF SEXUAL OFFENDERS 236 (2000).

[429] *Id.* at 243.

[430] *See supra* notes 290-292 and accompanying text.

This is because the criminal system is unavailable to incapacitate, thus thwarting the State's legitimate interest in self-protection. For those individuals, the "reasonableness" calculation might yield a much longer period of confinement, even for persons for whom treatment success does not seem likely.[431]

The foregoing formula is intended as a preliminary guide for courts to make the otherwise utterly standardless reasonableness judgment. As with any initial formulation, the discussion raises several potential concerns. First, it might be argued that the presumptive period of six years is inappropriate. At this point in time, such an argument is unamenable to response given the dearth of empirical evidence concerning treatment lengths and their relationship to treatment efficacy. Second, it might be argued that the formula introduces a disincentive that, rather than promoting necessary therapy, in fact encourages SVPs to "wait out" treatment regimes for six years in the hope of achieving outright release. This concern is addressed in part by the state's opportunity to assert that treatment failure is attributable to the committee.[432] However, in a system that is entirely fraught with conflicting incentives for cooperation and sabotage,[433] it is impossible to predict what influence the formula might have. In the end, however, any negative collateral consequences would be outweighed by the positive effects of increased accountability and procedural fairness.[434]

VI. CONCLUSION

In 1972, a unanimous Supreme Court remarked that, given the expansive authority of government to involuntarily commit its citizens, and the number of persons affected, it is "remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."[435]

---

[431] *See* Jones v. United States, 463 U.S. 354, 370 (1983) (approving continued commitment of insanity acquitee, noting "the widely and reasonably held view that insanity acquitees constitute a special class that should be treated differently than other candidates for commitment").

[432] *See supra* note 422 and accompanying text.

[433] *See, e.g.*, McKune v. Lile, 122 S. Ct. 2017, 2032 (2002) (upholding a state law that requires an imprisoned sex offender to admit prior sex offenses in a treatment program, if the inmate is to avoid being housed in less austere environs, while not offering immunity to prosecution because the law is not violative of the right against compelled self-incrimination).

[434] *See* TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 176 (1997) (asserting that "people who experience procedural justice when they deal with authorities are more likely to view those authorities as legitimate, to accept their decisions, and to obey social rules"); TOM R. TYLER, WHY PEOPLE OBEY THE LAW 108 (1990) (asserting that "[i]f people feel unfairly treated when they deal with legal authorities, they then view the authorities as less legitimate and as a consequence obey the law less frequently in their everyday lives"); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 989 (2000) (asserting that "the key to the effectiveness of legal authorities lies in creating and maintaining the public view that the authorities are functioning fairly").

[435] Jackson v. Indiana, 406 U.S. 715, 737 (1972).

Thirty years later, those substantive boundaries remain largely unelucidated, providing willing states with the latitude to augment their police power to preventively detain those they believe dangerous. This is certainly so with respect to sex offenders, a criminal sub-population that inspires unique fear, disdain, and social concern.

The authority to detain sex offenders under civil auspices is neither new nor novel. From the 1930s to the 1970s the states made expansive use of involuntary civil commitment, imposed in lieu of criminal conviction, by means of "sexually dangerous persons" and "sex psychopath" provisions.[436] In time, the laws fell into disuse, largely out of concern that the regimes were both ineffective and unjust, essentially "warehouses for social misfits," masquerading as psychiatric science. Undeterred by this failed experiment, however, involuntary commitment experienced a resurgence of interest in the early 1990s, this time under the gist of "sexually violent predator" laws, which, unlike predecessor laws, confine individuals after serving prison terms and not in lieu of them. The new laws have withstood constitutional challenge before the Supreme Court, redeemed in large part by the prospect that they will afford treatment and hence some meaningful prospect of release. As Justice Kennedy stated in lending his qualified support to the Kansas SVP law in *Hendricks*, "[i]f . . . civil confinement were to become a mechanism for retribution or general deterrence . . . our precedents would not suffice to validate it."[437]

Five years after *Hendricks*, and almost thirteen years after Washington State adopted the nation's first modern SVP law, the time has come for such a fair-minded scrutiny to take place. It is not simply, as this Article has argued, that the Constitution requires it. There are, as well, compelling policy grounds for courts to recognize and enforce a real promise of treatment, sufficient to distinguish SVP laws from preventive detention.

First, as time passes—and if SVP regimes continue to be beset with dismally low release rates—the illusory nature of the treatment promise will become undeniable. Eventually, the integrity of treatment professionals will compel them to spotlight the sham, calling the social control experiment, once again, into disrepute. Moreover, the danger exists that the taint will not be limited to SVP programs, but will spread to other efforts to combat sexual violence. Serious and innovative efforts are now underway to develop and validate tools for assessing, managing, and ameliorating the risk of sexual violence. These efforts depend on funding and public confidence that progress is possible in the fight against sexual violence. The

---

[436] *See* Eric S. Janus, *Sexual Predators*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 1475-76 (Joshua Dressler ed., 2002).

[437] Kansas v. Hendricks, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); *see also* Hubbart v. Superior Court, 969 P.2d 584, 612 (Cal. 1999) (Werdegar, J., concurring) ("The concrete facts of some future proceeding may force this or another court to confront the potential constitutional limits of [the SVP law].").

failure of the most aggressive and visible response to sexual violence might well inspire the pessimistic surmise, not unknown to the justice system, that "nothing works,"[438] prompting a withdrawal of resources for these positive efforts.

On a more concrete level, SVP programs consume prodigious resources.[439] Continued commitments, with few or no discharges, produce a captive population that is not only growing in absolute numbers, but also as a proportion of sex offenders under confinement. The share of state prevention and supervision resources going to SVP programs, rather than to community-based programs, will grow correspondingly. The result is a vast misallocation of resources, given that SVP programs contain only a small fraction of sexually violent individuals, compared against the multitude of sex offenders in communities and correctional systems.[440]

The solution, short of abandoning SVP laws, is the enforcement of a treatment efficacy requirement. The principle of treatment efficacy, as a matter of pure public policy, has common sense origins: Offenders should be detained in the specialized confines of SVP facilities only for such time as there is reason to hope that treatment effort, will prove warranted. When that window closes, they should be moved to the community, under close supervision as permitted by law, and subject, like other potential recidivists, to the criminal justice system should they commit another criminal offense.

Courts are properly reluctant to curtail the discretion enjoyed by state officials in the administration of complex institutions, especially those that depend on the close working involvement of psychiatric professionals. Sometimes, however, states need courts to intervene to protect them from their own misjudgments, in effect to provide cover. Having embarked on the SVP path, no politician or state administrator can afford the political risk associated with curtailing the unbridled growth of these popular programs. In the end, duration-related treatment efficacy requirement does not merely bring SVP programs into line with the due process constraints of

---

[438] The phrase "nothing works" was coined in a seminal 1974 article by Robert Martinson, which triggered a decades-long retrenchment in progressive criminal justice programming. Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 48 (1974). *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981) (surveying retrenchment).

[439] *See* Samuel Jon Brakel & James L. Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 89 (2000) (noting that in California, housing and treatment costs for SVPs are five times the costs associated with general imprisonment); John Q. LaFond, *The Costs of Enacting a Sexual Predator Law*, 4 PSYCHOL., PUB. POL'Y, & L. 468, 476-84 (1998) (surveying program implementation costs in several states).

[440] *See* LAWRENCE A. GREENFELD, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT v-vi (1997) (noting that on a given day roughly 234,000 sex offenders are under correctional care of custody, with about sixty percent being under community supervision).

the Constitution. It also functions to place sensible limits on what might prove a failed strategy, thereby allowing scarce resources to be redirected to more effective uses.