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# SUPREME COURT REVIEW

## FOREWORD: THE LIMITS OF THE PREVENTIVE STATE

CAROL S. STEIKER\*

### I. PUNISHMENT VS. PREVENTION

Our federal Constitution has a lot to say about crime and punishment. Even in the “structural” part of the Constitution, which is not often thought to be the source of much criminal regulation, references to criminal law and criminal procedure abound. For example, the drafters took care to enumerate the crimes for which federal officials are subject to impeachment and removal from office<sup>1</sup> and for which federal law-makers are exempt from arrest during Congressional sessions.<sup>2</sup> And they specifically provided for Congress’ power to punish the crimes of counterfeiting,<sup>3</sup> treason,<sup>4</sup> piracy,<sup>5</sup> and violations of “the Law of Nations.”<sup>6</sup> Moreover, entire species of penal laws—bills of attainder and ex post facto laws—are placed by the Constitution

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\* Professor of Law, Harvard Law School. I thank Marty Lederman, Jordan Steiker and participants in the Harvard Law School Summer Research Program for helpful comments and discussions.

<sup>1</sup> See U.S. CONST. art. II, § 4 (stating that federal officials may be impeached and removed from office for the crimes of “Treason, Bribery, or other high Crimes and Misdemeanors”).

<sup>2</sup> See *id.* at art. I, § 6, cl. 1 (stating that Senators and Representatives are privileged from arrest during law-making sessions for all crimes “except Treason, Felony and Breach of the Peace”).

<sup>3</sup> See *id.* at art. I, § 8, cl. 6.

<sup>4</sup> See *id.* at art. III, § 3, cl. 2.

<sup>5</sup> See *id.* at art. I, § 8, cl. 10.

<sup>6</sup> See *id.*

outside of the reach of both state and federal legislators.<sup>7</sup> And certain procedures are required not only for treason trials,<sup>8</sup> but also for criminal trials more generally—in particular, trial by jury<sup>9</sup> and the availability of the writ of habeas corpus in peacetime.<sup>10</sup>

The Bill of Rights more famously and in more detail occupies itself with both substantive and procedural criminal law. The Eighth Amendment's proscription of "excessive bail," "excessive fines," and "cruel and unusual punishments" has been interpreted by the Supreme Court to limit both federal and state officials in their legislative and judicial capacities.<sup>11</sup> The Fifth Amendment's repudiation of double jeopardy can also be read as a substantive limit on the government's power to punish.<sup>12</sup> Moreover, the Fifth and Sixth Amendments speak directly and in significant detail about the procedures necessary in "criminal case[s]"<sup>13</sup> and "criminal prosecutions,"<sup>14</sup> requiring, among other things, grand jury indictments,<sup>15</sup> the privilege against self-incrimination, speedy trials, impartial juries, confrontation of witnesses by the accused, compulsory process for the accused, and the assistance of counsel for the defense. And the "due process" clause of the Fifth and Fourteenth Amendments has been held to require even more in the way of proce-

<sup>7</sup> See *id.* at art. I, § 10, cl. 1 (state legislators); *id.* at art. I, § 9, cl. 3 (Congress).

<sup>8</sup> See *id.* at art. III, § 3, cl. 1.

<sup>9</sup> See *id.* at art. III, § 2, cl. 3.

<sup>10</sup> See *id.* at art. I, § 9, cl. 2.

<sup>11</sup> See *id.* at amend. VIII; *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (stating that the "excessive bail" clause "has been assumed" to apply to the states); *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (applying the Eighth Amendment's "cruel and unusual" punishment clause to a state statute). While the Supreme Court has not yet had occasion to rule that the "excessive fines" clause likewise applies to the states, agreement "appears universal" that the Court will do so. See Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 155 n.155 (1995) (citing sources).

<sup>12</sup> See generally King, *supra* note 11, at 104-05 (arguing for such an interpretation of the Double Jeopardy Clause in conjunction with the Due Process Clause and the Eighth Amendment).

<sup>13</sup> U.S. CONST. amend. V.

<sup>14</sup> *Id.* at amend. VI.

<sup>15</sup> But only for federal prosecutions. See *Hurtado v. California*, 110 U.S. 516 (1884) (refusing to apply the grand jury clause to state prosecutions).

dural protections in criminal cases, most notably the requirement of proof beyond a reasonable doubt for conviction.<sup>16</sup> Finally, the Fourth Amendment's prohibition of "unreasonable searches and seizures," while not on its face limited to criminal cases, has been elucidated extensively—indeed, virtually exclusively—in the realm of the regulation of police practices in criminal cases.<sup>17</sup>

The Supreme Court, the lower federal courts, and state courts of all levels have elaborated extensively on the meaning of most of these constitutional proscriptions and requirements in the thirty-plus years since the Warren Court's criminal procedure "revolution," when most of the provisions of the Bill of Rights relating to criminal investigation and prosecution were made applicable to the states.<sup>18</sup> As a result, the constitutional regulation of the criminal process has become its own legal subspecialty, with its own courses, casebooks, treatises, and experts. It is taken for granted, both in the legal academy and in the wider world of legal institutions, that the constitutional problems posed by the creation and enforcement of criminal laws are distinct and distinctively important. To coin a phrase, the limits of "the punitive state"<sup>19</sup> have been explored extensively (if not resolved successfully) both by courts and legal commentators.

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<sup>16</sup> See U.S. CONST. amend. V; *id.* at amend. XIV; *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>17</sup> This focus is largely due to the incorporation of the exclusionary rule, see *Mapp v. Ohio*, 367 U.S. 643 (1961), which has created an incentive for Fourth Amendment litigation by criminal defendants in every plausible case. Moreover, as Bill Stuntz has noted, the conceptual focus on privacy as the Fourth Amendment's central organizing value has proven to have limited bite in non-criminal cases, given the inescapable rise of the regulatory state since the New Deal. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1018-19 (1995).

<sup>18</sup> See generally Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (describing and evaluating the evolution of constitutional criminal procedure from the 1960s to the 1990s).

<sup>19</sup> It might not be obvious in this context that by "state" I mean not one of the fifty states in our federal system, but more generally any sovereign governmental power. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1151 (1990) (contrasting "a politically organized body of people . . . ; *esp.*: one that is sovereign" with "one of the constituent units of a nation having a federal government").

In contrast, courts and commentators have had much less to say about the related topic of the limits of the state not as punisher (and thus, necessarily as investigator and adjudicator of criminal acts) but rather as preventer of crime and disorder generally. Indeed, courts and commentators have not yet even recognized this topic as a distinct phenomenon either doctrinally or conceptually. Of course, one way to prevent crime is to punish criminals, thereby incapacitating (and perhaps even rehabilitating) them during the period of their incarceration, deterring the specific individuals involved from further criminality, and deterring others by example. But punishment is not the only, the most common, or the most effective means of crime prevention. The state can also attempt to identify and neutralize dangerous individuals before they commit crimes by restricting their liberty in a variety of ways. In pursuing this goal, the state often will expand the functions of the institutions primarily involved in the criminal justice system—namely, the police and the prison. But other analogous institutions, such as the juvenile justice system<sup>20</sup> and the civil commitment process, are also sometimes tools of, to coin another phrase, the “preventive state.”

The preventive state is all the rage these days, and it can be seen in many different guises. One set of prophylactic measures involves giving the police more authority to intervene earlier to prevent, as opposed to merely detect and investigate, crime. For example, “community policing” initiatives are sweeping the country’s urban police departments, and one thing that these often divergent policies seem to have in common is enhancing the preventive role of police officers.<sup>21</sup> Localities are also seeking to give the police broader preventive authority by enacting

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<sup>20</sup> A typical juvenile justice system consists of at least three different sorts of state intervention: intervention to deal with children who are abused or neglected by their parents or guardians; intervention to deal with children who are at risk because of behaviors like truancy or running away (in which case the children are deemed “in need of supervision” or “in need of services”); and intervention to deal with children who have committed delinquent acts (acts which would be crimes if committed by adults). See, e.g., MASS. ANN. LAWS ch. 119, §§ 21, 39E, 51B, 52, 58 (1998).

<sup>21</sup> See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 576 (1997).

new substantive offenses such as "drug loitering" or "gang loitering."<sup>22</sup> The federal government has enhanced federal law enforcement's preventive power by reviving and expanding the practice of civil forfeiture based only upon "probable cause."<sup>23</sup> And the Supreme Court has authorized several important aspects of preventive policing under the Fourth Amendment. For example, the Court has extended its holding that a limited *Terry* "stop-and-frisk" of a person is justified without probable cause in order to prevent harm to police officers to legitimize similar prophylactic "frisks" of cars<sup>24</sup> and even houses.<sup>25</sup> And the Court has added significantly to the (formerly) short list of searches and seizures that may be done without any individualized suspicion whatsoever.<sup>26</sup>

Another set of prophylactic measures involves direct restraints by legislatures on the liberty of certain individuals believed to be particularly dangerous. For example, pre-trial preventive detention of both juveniles and adults has become much more common in recent years.<sup>27</sup> Many states are seeking

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<sup>22</sup> See, e.g., *Chicago v. Morales*, 687 N.E.2d 53 (Ill. 1997), cert. granted, 66 U.S.L.W. 3686 (U.S. Apr. 21, 1998) (No. 97-1121) (granting certiorari to decide the constitutionality of a municipal ordinance permitting the police to order groups in public places to disband if the police officer reasonable believes that the group contains at least one gang member); *City of Akron v. Rowland*, 618 N.E.2d 138, 148 (Ohio 1993) (striking down a municipal ordinance prohibiting loitering "under circumstances manifesting the purpose to engage in drug-related activity" as unconstitutionally vague).

<sup>23</sup> See generally Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair?: Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1 (1994) (describing and critiquing the recent explosion in both federal and state civil forfeiture law).

<sup>24</sup> See *Michigan v. Long*, 463 U.S. 1032 (1983) (extending *Terry* frisk to passenger compartment of automobile).

<sup>25</sup> See *Maryland v. Buie*, 494 U.S. 325 (1990) (approving limited protective sweep of house).

<sup>26</sup> See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (permitting suspicionless drug testing of high school athletes); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (permitting suspicionless stopping and questioning of motorists at sobriety checkpoints); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (permitting suspicionless drug and alcohol testing of certain railroad employees).

<sup>27</sup> See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the preventive detention provisions of the federal Bail Reform Act of 1984); *Schall v. Martin*, 467 U.S. 253 (1984) (upholding the preventive detention provisions of the New York Family Court Act).

to prevent sexual assaults, particularly those against children, by enacting sex offender registration and/or community notification statutes<sup>28</sup> and by creating or reviving “sexually violent predator” statutes that permit the indefinite civil commitment of convicted sex offenders who would otherwise be released at the end of their prison terms.<sup>29</sup>

This diverse set of preventive practices and policies has created (or at least exacerbated) two important legal problems, one of which is beginning to get a lot of attention, and one of which is hardly recognized at all. The problem currently attracting attention is the problem of identifying those preventive practices and policies that are “really” criminal punishment and thus subject to the range of constitutional constraints, both substantive and procedural, that delimit the use of the criminal sanction. For example, must the civil forfeiture of property used or acquired in the course of criminal behavior be “proportionate” in the way in which criminal punishment must be under the Eighth Amendment?<sup>30</sup> If and when does the Double Jeopardy Clause of the Fifth Amendment apply to separate civil forfeiture and criminal proceedings,<sup>31</sup> or to separate civil penalty and criminal proceedings?<sup>32</sup> Does the preventive detention

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<sup>28</sup> See, e.g., *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997) (upholding the community notification provisions of “Megan’s Law” against constitutional challenge); *Artway v. Attorney General of New Jersey*, 81 F.3d 1235 (3d Cir.) (en banc) (upholding the sex offender registration provisions of New Jersey’s “Megan’s Law” against constitutional attack), *reh’g denied*, 83 F.3d 594 (3d Cir. 1996).

<sup>29</sup> See, e.g., *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (upholding Kansas’ “sexually violent predator” statute).

<sup>30</sup> See *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that the Eighth Amendment requires proportionality of civil forfeitures, but leaving open the question as to what exactly the forfeitures must be proportionate).

<sup>31</sup> See *United States v. Ursery*, 518 U.S. 267 (1996) (holding that the Double Jeopardy Clause does not bar separate civil forfeiture and criminal proceedings premised on the same underlying conduct).

<sup>32</sup> Compare *United States v. Halper*, 490 U.S. 435, 449-50 (1989) (holding that the Double Jeopardy Clause bars later criminal proceedings when earlier civil penalties are so disproportionate to the injury caused that they should be deemed punitive rather than “remedial”), with *Hudson v. United States*, 118 S. Ct. 488 (1997) (overruling *Halper* and holding that the Double Jeopardy Clause bars later criminal proceedings only when earlier civil penalties should be considered “criminal” punishment under the multi-factor test announced in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

of pre-trial detainees constitute criminal punishment without trial in violation of the Due Process Clause?<sup>33</sup> And does the indefinite civil commitment of “sexually violent predators” at the conclusion of their prison terms constitute new punishment in violation of the Ex Post Facto and Double Jeopardy provisions of the Constitution?<sup>34</sup> More generally, should putatively civil penalties and restraints be considered “really” criminal punishments based on the government’s motivation, if one can be discerned? Or on the effect such penalties and restraints have on the individual on whom they are imposed? Or on how the relevant community would understand the imposition of such penalties and restraints? Scholars as well as courts have begun to engage these cases and questions, offering different theories of how we might identify hidden but “real” criminal punishment that must be subject to our constitutional constraints on “the punitive state.”<sup>35</sup>

The urgency and complexity of this first problem has tended to obscure a second problem, which is also in need of careful attention, but which has not yet been generally recognized *as* a problem. What constitutional and/or policy limits are there on the non-punitive “preventive” state? Even if certain policies and practices do not implicate the special substantive and procedural constraints that we place on criminal punishment, they may well implicate other constitutional provisions and/or policy concerns. This point is all too often lost. Courts and commentators often tend to conclude, too quickly, that if some policy or practice is not “really” punishment, then there is nothing wrong with it. And they often treat preventive searches and seizures as inherently far less problematic than those en-

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<sup>33</sup> See *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the constitutional validity of pretrial preventive detention under certain circumstances).

<sup>34</sup> See *Hendricks*, 117 S. Ct. at 2072 (upholding the civil commitment of “sexually violent predators” under certain circumstances).

<sup>35</sup> I am myself one of the scholars who has recently engaged the problem of identifying which putatively civil penalties and restraints are “really” criminal punishment. See Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. J.L. 775 (1997) [hereinafter Steiker, *Punishment and Procedure*]. In addition to offering my own theory (of course), I canvass the wide variety of cases that have recently raised this question, see *id.* at 778-80, and note the burgeoning recent literature on the topic, see *id.* at 781 & nn.41-43.



gaged in for the purposes of investigating and prosecuting crime.

Not only do courts and commentators often trivialize objections to actions of a “merely” preventive (as opposed to punitive) state, they also do not tend to see the various preventive policies and practices canvassed above as part of a unified problem. Instead, the cases and commentary on these issues have a fragmented and haphazard quality. On the procedural side, the legal issues posed by “preventive” policing have not generally been seen as related to the larger category of preventive searches and seizures by non-police entities in non-investigative capacities. Thus, those writing about community policing initiatives have had little to say about, for example, random drug testing programs. And on the substantive side, few connections have been made between the main categories of preventive restraints, such as pre-trial detention, civil commitment of the dangerous mentally ill, and the incarceration of delinquent juveniles. Rather, each individual preventive practice has been treated as *sui generis* rather than as a facet of a larger question in need of a more general conceptual framework.

The neglect of this second problem—the problem of the limits of the preventive state—is traceable, at least in part, to the text and history of the Constitution. At the time of the drafting and ratifying of the Constitution, the dangers of the punitive state were well known. Thus, the Founders were careful to include in our foundational text the many references noted above to particular criminal processes and protections in order to cabin appropriately the punitive power of the new federal government. The preventive state became possible only as the next century progressed, with the invention of modern police forces<sup>36</sup> and total institutions like the prison, the mental hospital, and the home for juvenile delinquents.<sup>37</sup> The growth of the regula-

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<sup>36</sup> See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 833 (1994) [hereinafter Steiker, *Second Thoughts*] (describing the development of modern police forces as “one of the ‘major social inventions’ of the nineteenth century”) (quoting LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 67 (1993)).

<sup>37</sup> See Steiker, *Punishment and Procedure*, *supra* note 35, at 788 (describing “the great period of prison and asylum building in the early nineteenth century . . .”).

tory state in the post-New Deal Twentieth Century further established the pervasive presence and knowledge of the state in many guises, creating new opportunities for prophylactic state action.<sup>38</sup> But as a matter of constitutional interpretation, most of these new institutions and their powers could be cabined only under the most general rubrics of the Constitution, like the Fourth Amendment's proscription of "unreasonable" searches and seizures and the Fifth and Fourteenth Amendments' Due Process Clauses. Thus, it is harder to see the preventive state as a category than it is to so view the punitive state.

Much, however, stands to be gained by recognizing the connections among the various policies of the preventive state. First, once it becomes explicit that there is a separate category of restrictions on state actions, courts and commentators who are alarmed about the use of certain state practices—such as, for example, various forms of preventive detention—need no longer try to frame their concerns only or primarily as concerns about the punitive state. We can thus have freer and more productive analyses of what limits we should place, as a matter of constitutional law or public policy, on the preventive state even when it is not acting as criminal punisher. Second, the concerns that have been raised about certain preventive practices may shed light on what may (or may not) be cause for concern about other preventive practices. The circumstances in which sex offender registration may be constitutionally permissible or wise as a matter of policy might inform other preventive projects, such as the creation of DNA or fingerprint banks, which may inform yet other preventive policing policies. Similarly, the concerns raised about the detention of juvenile delinquents share many salient similarities with the concerns raised about other forms of preventive/rehabilitative detention, such as the pre-trial detention of dangerous defendants, the detention of the dangerous mentally ill, and the quarantine of the those with dangerous communicable diseases. Moving up a level of conceptual generalization may well create new insights about particular practices. Finally, given the exceptionally particularized

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<sup>38</sup> See Stuntz, *supra* note 17, at 1018-19 (describing the new information-gathering attributes of the post-New Deal state).

way in which the law has developed on these issues up to this point, raising the level of conceptual generalization may well create a greater degree of predictability for federal and state policy-makers and for individuals concerned about their civil liberties.

In order to demonstrate the need for a more general discussion of the limits of the preventive state and to suggest some of the questions that any such discussion must address, I will examine two of the Supreme Court's cases of last Term (October Term 1996)—decisions not thought to have much to do with one another. The first, *Kansas v. Hendricks*,<sup>39</sup> is a "substantive" law case, which considered the constitutional validity of the State of Kansas' "sexually violent predator" law permitting the indefinite civil commitment of certain sex offenders after the conclusion of their prison terms. The second, *Chandler v. Miller*,<sup>40</sup> is a "procedural" case, which considered the constitutionality of the State of Georgia's requirement that certain candidates for state office submit to urinalysis drug testing.<sup>41</sup> In each of these opinions the Supreme Court failed to conceive of its decision in the case before it as part of the larger task of delimiting the powers of the preventive state. As a result, each of these opinions is less illuminating and useful than it otherwise might be. I will try to explain the ways in which the Court's analysis in these cases is unsatisfying and to suggest some of the questions that the Court might have asked had it formulated the cases as I suggest. Providing good answers to these questions is

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<sup>39</sup> 117 S. Ct. 2072 (1997).

<sup>40</sup> 117 S. Ct. 1295 (1997).

<sup>41</sup> I put "substantive" and "procedural" in quotes because these terms reflect the standard division of constitutional provisions relating to criminal law. Substantive limits on the state's power to enact criminal laws—such as the prohibition of ex post facto laws and the void for vagueness doctrine—are typically conceived of, written about, and taught separately from the procedural limits on the state's power to investigate and prosecute crime under the Fourth, Fifth, and Sixth Amendments. But this received distinction, like many such distinctions, is not entirely satisfactory. For example, there is a strong connection between the "substantive" void for vagueness doctrine and "procedural" limitations on discretionary police power under the Fourth Amendment. Nonetheless, I will continue to refer to *Hendricks* and *Chandler*, respectively, as a "substantive" or "procedural" decision in order to recognize the way in which they are generally considered to be separate and distinct.

a much larger task which I hope to prod others to undertake and to which I hope to return in the future.

## II. *KANSAS V. HENDRICKS*: THE SUBSTANTIVE LIMITS OF THE PREVENTIVE STATE

The Supreme Court's upholding against constitutional challenge of Kansas' "sexually violent predator" statute was a high-profile decision with important implications for the nearly twenty (by one Justice's count) other states with similar statutes authorizing civil commitment or other mandatory treatment for sexually dangerous persons.<sup>42</sup> The decision was—or should have been—even more significant outside of the narrow, but burgeoning area of sex offender policy. The use of civil, non-punitive confinement to incapacitate or treat (or both) dangerous persons has been a recurring constitutional question for policy-makers and courts in the latter part of this century. From the confinement of juveniles found to be delinquent,<sup>43</sup> to the civil commitment of the dangerous mentally ill,<sup>44</sup> to the pre-trial detention of certain dangerous criminal defendants,<sup>45</sup> the United States Supreme Court has grappled with defining the limits of the state's ability to use what we have come to call "total institutions" to deal prophylactically with dangerous deviance.<sup>46</sup> Yet the Court's decisions rarely speak either to one another or to the problem in generalized terms, and thus the boundaries of the state's power in this important realm remain hazy and haphazard. The *Hendricks* case offered an important opportunity for the Court to take stock and address this issue more globally, but that opportunity was unfortunately squandered. Why and how that opportunity was lost and what might have been done instead are my topics here.

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<sup>42</sup> See *Hendricks*, 117 S. Ct. at 2099 (Appendix of "Selected Sexual Offense Commitment Statutes") (Breyer, J., dissenting).

<sup>43</sup> See *In re Gault*, 387 U.S. 1 (1967).

<sup>44</sup> See *Addington v. Texas*, 441 U.S. 418 (1979).

<sup>45</sup> See *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>46</sup> See ERVING GOFFMAN, *ASYLUMS* xiii (1961) (describing a total institution as "a place of residence and work where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed, formally administered round of life.").

The state statute at issue in *Hendricks* established procedures for the civil commitment of persons who, after being “convicted of or charged with a sexually violent offense,” are found to suffer from a “mental abnormality” or “personality disorder” which makes them “likely to engage” in “predatory acts of sexual violence.”<sup>47</sup> The Kansas Supreme Court invalidated the statute on federal substantive due process grounds, holding that involuntary civil commitment must be predicated on a finding of “mental illness,” which the statute did not specifically require.<sup>48</sup> The United States Supreme Court granted the state of Kansas’ petition for certiorari, which disputed the Kansas Supreme Court’s due process analysis, as well as *Hendricks*’ cross-petition, which asserted additional federal constitutional challenges to the statute based on the Ex Post Facto and Double Jeopardy Clauses.<sup>49</sup>

Justice Thomas wrote for a five-person majority, reversing the decision of the Kansas Supreme Court and rejecting *Hendricks*’ additional constitutional challenges that had not been considered by the Kansas Court. Justice Thomas’ majority opinion was devoted disproportionately to the issues raised by *Hendricks*’ cross-petition—issues that together presented the general question of whether Kansas’ civil commitment of sexually violent predators actually constituted a form of criminal punishment, which would clearly run afoul of both the Ex Post Facto and the Double Jeopardy Clauses. After much lengthy analysis about the statute’s purpose and effect, Justice Thomas rejected *Hendricks*’ claims, concluding that *Hendricks* had failed to provide “‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”<sup>50</sup>

The four dissenting Justices, who all joined an opinion by Justice Breyer, dissented only on the issue of whether the statute, despite its putatively civil nature, actually imposed criminal punishment (and thus ran afoul of the Constitutional Ex Post

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<sup>47</sup> KAN. STAT. ANN. § 59-29a02(a) (1994).

<sup>48</sup> See *In re Hendricks*, 912 P.2d 129 (Kan. 1996).

<sup>49</sup> 116 S. Ct. 2522 (1996).

<sup>50</sup> *Hendricks*, 117 S. Ct. at 2082 (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

Facto prohibition).<sup>51</sup> Justice Breyer concluded that the statute did in fact amount to criminal punishment, primarily because the Kansas legislature “did not tailor the statute to fit the non-punitive civil aim of treatment, which it concedes exists in Hendricks’ case.”<sup>52</sup> Justice Breyer was careful to avoid asserting that treatment must *always* attend involuntary civil commitment; rather, he argued more narrowly that if a state’s putative purpose in employing civil commitment is treatment, and treatment is available, and the person civilly committed is treatable, then the state’s failure to provide such treatment at an appropriate time is convincing evidence that the state’s actual purpose is to punish.<sup>53</sup>

Justice Kennedy, while joining Justice Thomas’ majority opinion, also wrote a brief concurrence expressing sympathy with the dissenters’ cause, though not agreeing with their ultimate conclusion.<sup>54</sup> He, too, focussed his discussion on the punishment issue. While Justice Kennedy fully joined the majority’s analysis and rejection of Hendricks’ *ex post facto* and double jeopardy claims, he cautioned against the “dangers inherent when a civil confinement law is used in conjunction with the criminal process”<sup>55</sup> and appeared to promise future vigilance against attempts by states to use civil confinement as “a mechanism for retribution or general deterrence.”<sup>56</sup>

This disproportionate focus on the punishment issue is symptomatic of the way in which the question of the limits of the preventive state tends to become marginalized. It is often recognized that because the Constitution so explicitly cabins the

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<sup>51</sup> Justice Ginsburg, interestingly, did not join Part I of Justice Breyer’s opinion, which essentially concurred with the majority’s treatment of the main substantive due process holding of the Kansas Supreme Court. *Id.* at 2087. She did not, however, write a separate opinion stating her views on the substantive due process issue.

<sup>52</sup> *Id.* at 2098 (Breyer, J., dissenting). Justice Breyer also raised without purporting to decide the question of whether Kansas’ failure “to provide treatment that it concedes is potentially available to a person whom it concedes is treatable” could be framed as a violation of substantive due process in addition to a violation of the *ex post facto* clause. *Id.* at 2090 (Breyer, J., dissenting).

<sup>53</sup> *Id.* at 2096 (Breyer, J., dissenting).

<sup>54</sup> *Id.* at 2087 (Kennedy, J., concurring).

<sup>55</sup> *Id.* (Kennedy, J., concurring).

<sup>56</sup> *Id.* (Kennedy, J., concurring).

use of the penal sanction, there is incentive for the state to avoid these restrictions by turning to various civil restraints as alternative means of punishment.<sup>57</sup> But it is not often enough recognized that because the Constitution so explicitly cabins the use of the penal sanction, there is incentive for individuals subject to civil restraints to portray them as punitive, so as to invalidate or at least diminish them. Thus, the explicit quality of the limitations on the punitive state creates skewed litigation incentives for the individuals who are the necessary sources of challenges to preventive state practices and policies. They stand to win and win big if they can convince a court that the state is inflicting "punishment." It is much harder to attempt to make out a substantive due process claim, especially in light of the paucity of the Court's precedents in this area. Thus, litigants tend to try to squeeze all of their objections to state practices into their argument that the practices are punitive. And courts and commentators tend to take their cue from litigants, judging from the recent outpouring of cases and articles on the punishment question<sup>58</sup> as compared to the relative silence on the question of the limits of the preventive state.

The Supreme Court could have resisted this skewing in the *Hendricks* case. After all, the Kansas Supreme Court framed its decision in terms of substantive due process,<sup>59</sup> and the punishment issue came to the United States Supreme Court only by way of its grant of *Hendricks*' cross-petition for certiorari.<sup>60</sup> Despite this state of affairs, the Court—both majority and dissenting Justices—still managed to be little more than perfunctory in their treatment of the substantive due process issue. Thus, in *Hendricks*, as in many other discussions of the limits of the preventive state, the punishment question tended to dominate and to leave the mistaken impression that if the state is not punishing, it is not doing anything objectionable at all, constitutionally speaking or otherwise.

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<sup>57</sup> See Steiker, *Punishment and Procedure*, *supra* note 35, at 810.

<sup>58</sup> *Id.* at 778-81 (canvassing recent discussions and scholarship on this question).

<sup>59</sup> *In re Hendricks*, 912 P.2d 129 (Kan. 1996).

<sup>60</sup> See Cross Petition for Certiorari, 116 S. Ct. 2522 (1996).

What *was* the Court's treatment of Hendricks' substantive due process claim? The claim on which Hendricks prevailed in the Kansas Supreme Court was the argument that the involuntary, indefinite civil commitment of a dangerous person requires proof not only of dangerousness, but also of "mental illness."<sup>61</sup> Hendricks pointed out, correctly, that the United States Supreme Court had not ever previously upheld civil commitment schemes with criteria as vague and potentially broad as Kansas' language of "mental abnormality" or "personality disorder." The majority made quick work of this argument. Justice Thomas summarized the Court's precedents in a novel and somewhat disingenuous way, stating, "We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality'"<sup>62</sup>—while failing entirely to observe that the precedents he cited in support of this claim never endorsed the broad language of "mental abnormality," but instead used narrower (though not themselves uncontroversial) terms such as "mentally ill" or "mentally retarded."<sup>63</sup> The point, of course, of limiting involuntary civil commitment to those who are mentally ill is to reserve indefinite civil commitment to those who are truly incapable of choosing to understand or to comply with the law; those able to so choose should have their liberty and their autonomy respected by being treated as rational beings—and thus prosecuted pursuant to the criminal law should they choose to do wrong. Justice Thomas recognized this implicit rationale in his opinion in *Hendricks*, finding that "the Kansas Act is plainly of a kind with these other civil commitment statutes" because "it links [a finding of dangerousness] to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible,

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<sup>61</sup> *Hendricks*, 912 P.2d at 138.

<sup>62</sup> *Hendricks*, 117 S. Ct. at 2080.

<sup>63</sup> See, e.g., *Heller v. Doe*, 509 U.S. 312, 314-15 (1993) (Kentucky statute permitting commitment of "mentally retarded" or "mentally ill" and dangerous individual); *Allen v. Illinois*, 478 U.S. 364, 366 (1986) (Illinois statute permitting commitment of "mentally ill" and dangerous individual); *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 271-72 (1940) (Minnesota statute permitting commitment of dangerous individual with "psychopathic personality").



for the [committed] person to control his dangerous behavior.”<sup>64</sup> Justice Thomas found Kansas’ definition of “mental abnormality” to be “comparable” to the criteria set forth in other, less controversial, civil commitment statutes.<sup>65</sup>

Unfortunately, there is not much basis for Justice Thomas’ sanguine conclusion that there is nothing particularly new or unusual about Kansas’ choice of statutory language. Although experts do, of course, disagree about the scope of what constitutes “mental illness” or “mental retardation,” there can be little doubt that whatever the outer limits of these concepts are, they do not come even close to the potential outer limits of the much fuzzier concepts of “abnormality” or “disorder.” At some level, virtually all of those who choose to commit criminal acts, especially those who commit unusually violent or otherwise abhorrent crimes (like sexual assaults on children) can be considered “abnormal.” And the range of potential “disorders” is likewise extraordinarily broad, even among mental health experts.<sup>66</sup> The concept of “mental illness,” however defined, carries with it the legal connotation (although not the strict definition) of the kind of mental state sufficient to impair cognition or volition so seriously as to render an individual legally irresponsible and thus not properly subject to criminal punishment.<sup>67</sup> Hence the need for non-criminal incapacitation and/or

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<sup>64</sup> *Hendricks*, 117 S. Ct. at 2080. This quote is followed by a citation to that section of the Kansas statute defining “mental abnormality” as a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.” See *id.* (quoting KAN. STAT. ANN. § 59-29a02(b)).

<sup>65</sup> *Id.*

<sup>66</sup> For example, the same diagnostic manual cited by Justice Thomas to characterize *Hendricks*’ pedophilia as a “serious mental disorder” also included descriptions of “Caffeine-Induced Disorder,” “Nicotine-Induced Disorder,” and “Male Erectile Disorder.” See *The Supreme Court, 1996—Leading Cases*, 111 HARV. L. REV. 259, 267 (1997) (citing Brief of the American Civil Liberties Union et al. as Amici Curiae in Support of Respondent at 13, *Hendricks* (Nos. 95-1649, 95-9075) (citing AMERICAN PSYCHIATRIC ASS’N DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 212, 244, 502 (4th ed. 1994))).

<sup>67</sup> See, e.g., MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (excluding criminal responsibility for someone suffering from a “mental disease or defect” such that “he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law”).

treatment. In contrast, the concepts of “abnormality” and “disorder” carry the legal connotation of circumstances that constrain choice to a much lesser degree.<sup>68</sup> And since all of us are constrained in our choices to some degree, the line between normal and abnormal seems virtually impossible to draw. Are drug addicts, alcoholics, smokers, or caffeine-ingesters suffering from a “mental abnormality”? How about victims of childhood sexual or other abuse? Or combat veterans with post-traumatic stress disorder? Or women suffering from severe Pre-Menstrual Syndrome? Or how about the now almost quaint concept of “evil”—the category of “bad” people, who seem indifferent to the suffering of others?

Justice Thomas and Justice Breyer both finesse this concern in the same way: whether or not the statutory language of Kansas’ “Sexually Violent Predator Act” strictly requires the degree of volitional impairment sufficient for indefinite, involuntary civil commitment, the record clearly demonstrated that Leroy Hendricks suffered from just such a degree of impairment. He testified himself that he was unable to “control the urge” to molest children when he became “stressed out” and that the only way to be sure that he would not sexually abuse more children in the future would be “to die.”<sup>69</sup> Justice Thomas concluded that “[t]his admitted lack of volitional control . . . adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>70</sup> Justice Breyer essentially reached the same conclusion—that Hendricks’ particular kind of disorder and his detailed testimony about it sufficed to render the use of the statute in his case constitutional.<sup>71</sup> Because Justice Thomas and Justice

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<sup>68</sup> See *Hendricks*, 117 S. Ct. at 2087 (Kennedy, J., concurring) (withholding judgment on whether “mental abnormality” is “too imprecise a category to offer a solid basis for concluding that civil detention is justified”).

<sup>69</sup> *Id.* at 2081 (citing to Record in the Joint Appendix).

<sup>70</sup> *Id.*

<sup>71</sup> As Justice Breyer noted:

Because (1) many mental health professionals consider pedophilia a serious mental disorder; and (2) Hendricks suffers from a classic case of irresistible impulse, namely he is so afflicted with pedophilia that he cannot “control the urge” to molest children; and (3) his pedophilia presents a serious danger to those children; I believe that Kansas can classify Hendricks as “mentally ill” and “dan-

Breyer and, indeed, all of the Justices on the Court (with the possible exception of Justice Ginsburg)<sup>72</sup> could agree that Hendricks himself was properly subject to involuntary civil commitment, none of them found it necessary to tell us anything more about anyone else. Given that the majority opinion, unlike the dissent, endorsed not only Hendricks' incarceration, but the statutory language as well, future policy-makers and courts will remain at a loss to determine the degree of cognitive or volitional impairment necessary as a predicate to the indefinite incarceration of the dangerous.

Indeed, policy-makers might even question whether *any* degree of cognitive or volitional impairment will be held by the Court to be a necessary predicate for the indefinite incarceration of the dangerous in the future, given Justice Thomas' statement in his majority opinion that Hendricks' lack of volitional control adequately distinguishes him "from other dangerous persons who are *perhaps* more properly dealt with exclusively through criminal proceedings."<sup>73</sup> This tantalizing "perhaps" leaves open the door for future decisions permitting the incarceration of the dangerous, period—without any need to restrict the class of those incarcerated to the special case of the mentally ill. Surprisingly, not a single member of the four-person dissent voiced concerns about either the majority's equation of "mental abnormality" with "mental illness" or the majority's apparent equivocation on the need for such an equation. Only Justice Kennedy, in his brief concurrence, flagged this issue for the future in a short and vague clause, buried in his paragraph-long conclusion:

On the record before us, the Kansas civil statute conforms to our precedents. If, however, civil confinement were to become a mechanism for retribution or general deterrence, *or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified*, our precedents would not suffice to validate it.<sup>74</sup>

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gerous" as this Court used those terms in *Foucha* [v. Louisiana, 504 U.S. 71 (1992)].

*Id.* at 2089 (Breyer, J., dissenting).

<sup>72</sup> See *supra* note 51.

<sup>73</sup> *Hendricks*, 117 S. Ct. at 2081 (emphasis added).

<sup>74</sup> *Id.* at 2087 (Kennedy, J., concurring) (emphasis added).

Given the majority's conclusion that "mental abnormality" is not any more problematic than "mental illness"<sup>75</sup> and the dissent's apparent lack of interest in this topic, it is unclear whether anyone except perhaps Justice Kennedy will be watching the future application of Kansas' statute or other public policy developments as carefully as one might hope.

In addition to its surprising and distressing lack of clarity about the degree of cognitive or volitional impairment necessary to permit the indefinite incarceration of the dangerous, the Court was also utterly silent on many other issues surrounding the proper use of civil commitment. Granted, the issue about the meaning and permissibility of the language of "mental abnormality" was explicitly argued and briefed by the parties, and there is thus particular reason to expect clarity on this point. However, Justice Breyer seems clearly correct that the Kansas Supreme Court also appeared to rest its substantive due process analysis on the state's failure to provide Hendricks with treatment during his incarceration.<sup>76</sup> The majority opinion completely missed this point, addressing only the Kansas Supreme Court's holding that the "mental abnormality" language was insufficient.<sup>77</sup> While both the majority and the dissent seemed to agree that treatment is not an indispensable feature of the civil commitment of the mentally ill and dangerous, particularly when no effective treatment of a individual is possible, they disagreed on what a state's obligation should be when such treatment is possible and is at least a plausible purpose of the commitment.

Justice Breyer's dissenting position on this question is quite clear,<sup>78</sup> but Justice Thomas' position for the majority is impenetrable, largely because of Justice Thomas' apparent misreading of the analysis of the court below. Justice Thomas did not ap-

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<sup>75</sup> See *supra* note 61-63 and accompanying text.

<sup>76</sup> *Id.* at 2090 (Breyer, J., dissenting) (citing relevant portions of the Kansas Supreme Court's opinion).

<sup>77</sup> See *id.* at 2079-81.

<sup>78</sup> See *id.* at 2096 (Breyer, J., dissenting) ("[W]hen a State decides offenders can be treated and confines an offender to provide that treatment, but then refuses to provide it, the refusal to treat while a person is fully incapacitated begins to look punitive.").

pear to realize (as Justice Breyer did) that the Kansas Supreme Court was arguing that the purely incapacitative confinement of the dangerous but treatable mentally ill violated the due process clause. Rather, he understood the Kansas Supreme Court to be arguing one of two other things. First, Justice Thomas understood the Kansas Court to be arguing that because there was no effective treatment possible for sexually violent predators, the state's purpose in indefinitely confining such offenders was to inflict criminal punishment. He easily disposed of this argument of by maintaining—without disagreement from Justice Breyer's dissent—that incapacitation alone, quite apart from rehabilitation, could suffice as a sufficient, non-punitive rationale for the civil commitment of the dangerous but *untreatable* mentally ill.<sup>79</sup> Second, and in the alternative, Justice Thomas understood the Kansas Court to be arguing that although Hendricks' condition was treatable, Kansas' primary purpose in confining him was not treatment and in fact, the State of Kansas was not providing him treatment, so that the state's purpose, once again, must be punitive.<sup>80</sup> In response to this perceived argument, Justice Thomas became quite vague. On the one hand, he suggested that treatment need not be a state's "primary" purpose in incarcerating the dangerous but treatable mentally ill,<sup>81</sup> but he did not answer the question whether a state may choose simply to segregate the dangerous mentally ill without providing any treatment, even when such treatment is possible.<sup>82</sup> On the other hand, Justice Thomas suggested, contrary to the conclusions of the Kansas Supreme Court, that treatment actually was being provided. In support of this determination, however, Justice Thomas cited nothing in the record, but rather a statement made by the Kansas Attorney General at oral argument and a statement made by a Kansas trial court judge at a state habeas proceeding long after the date of Hendricks' own commitment.<sup>83</sup> Thus, the majority opinion leaves hanging

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<sup>79</sup> See *id.* at 2083-84.

<sup>80</sup> *Id.* at 2084.

<sup>81</sup> *Id.* at 2084-85.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 2085 & n.5 (citing Tr. of Oral Arg. 14-15, 16; App. 453-54); see *id.* at 2096-97 (Breyer, J., dissenting).

much more than it resolves, in particular, two important questions: (1) to what degree must states intend to treat those whom it confines as mentally ill and dangerous? and (2) to what degree must states actually follow through on treatment for those whom it confines as mentally ill and dangerous (and what evidence will suffice to establish the existence of such treatment)?

Finally, a host of other issues about the use of civil commitment also remain hanging after the Court's decision in *Hendricks*. Justice Thomas' concluding paragraph to his "punishment" analysis reads as a laundry list of features that convinced him (and the Court) that the Kansas statute was not so punitive in purpose and effect so as to constitute punishment:

Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and 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.<sup>84</sup>

Justice Thomas never tells us which of these things are necessary or sufficient conditions for upholding a commitment statute as non-punitive. Moreover, he does not answer (or even recognize as an issue) the following question: Once a court has become convinced that a commitment statute is not punitive, are any of the features Justice Thomas lists necessary, as a matter of due process, for a scheme of preventive incarceration? For example, one could imagine a clearly preventive, non-punitive regime that sweeps large numbers of potentially dangerous persons into it (such as a regime in which "mental abnormality" includes alcoholism or drug abuse). Just how "small" a segment of the population must be subject to confinement and just how "particularly dangerous" must this group be? Outside of the context of determining whether the state is punishing (and even within that context), no answers are forthcoming from Justice Thomas' analysis.

In sum, the majority opinion in *Hendricks* (and to a lesser extent, the dissent as well) failed to use the case as an opportu-

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<sup>84</sup> *Id.* at 2085.

nity to clarify important issues regarding whether and what limits exist on the non-punitive use of civil confinement to deal with dangerous individuals. The majority opinion assumed away or finessed the key issues presented squarely in the Kansas Supreme Court's opinion that it reversed, and the dissent failed to challenge this circumspection except as it related to the dissent's own quite narrow analysis. Moreover, neither opinion (nor Justice Kennedy's concurrence) made any effort to set the *Hendricks* case in context: where does Kansas' sexually violent predator law fit in the context of other laws upheld by the Supreme Court? Whereas the Court clearly saw analogies between Kansas' statute and more general civil commitment laws, it had nothing at all to say about how such statutes relate to broader and more diverse efforts of the states to use incarceration prophylactically, such as in the treatment of juvenile delinquents or the preventive pretrial detention of criminal defendants. Thus, the light cast by *Hendricks* Court, dim and smoky as it already is, illuminates only a very small corner of a very large area of the law.

### III. *CHANDLER V. MILLER*: THE PROCEDURAL LIMITS OF THE PREVENTIVE STATE

The Supreme Court's decision in *Chandler*<sup>85</sup> struck down under the Fourth Amendment a Georgia statute requiring candidates for certain state offices to submit to urinalysis drug testing before qualifying for nomination or election. The case is notable partly because it is the only one of the four drug testing cases to reach the Court in the past eight years to be found constitutionally infirm—and by an 8-1 margin, at that.<sup>86</sup> But the *Chandler* decision is even more remarkable for the lack of guidance that it, like the *Hendricks* decision, offers lower courts and future policy-makers—either in the narrow (but burgeoning)

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<sup>85</sup> *Chandler v. Miller*, 117 S. Ct. 1295 (1997).

<sup>86</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding suspicionless drug testing of high school athletes); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding suspicionless drug testing of certain Customs Service employees); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (upholding suspicionless drug and alcohol testing of railway employees involved in train accidents and of those who violate particular safety rules).

area of drug testing in the public sector or in the broader (and also burgeoning) area of suspicionless searches and seizures generally.

*Hendricks* and *Chandler* share a similar unsatisfying relationship to the law of the preventive state. In the case of *Hendricks*, the use of involuntary "total" incarceration is normally restricted to the sphere of substantive criminal law, as punishment for criminal wrongdoing. The use of such incarceration as a preventive measure is thought to be a special case (heretofore generally restricted to the mentally incompetent). But although *Hendricks* presented important issues about the scope of the special case—and even about its specialness to begin with—the Court's decision failed to illuminate those issues, and, indeed, managed to leave them even murkier than they were before the case arose. Similarly, in the case of *Chandler*, searches and seizures are normally thought to be reasonable investigative measures under the Fourth Amendment to the extent that there is individualized suspicion of wrongdoing.<sup>87</sup> Sometimes, this individualized suspicion is present in the classic form of a judicial warrant supported by probable cause;<sup>88</sup> at other times, probable cause or articulable suspicion alone suffice to justify a state intrusion.<sup>89</sup> But suspicionless searches and seizures are exceptional under the Fourth Amendment—limited to a short (but growing) list of circumstances, a subset of which has been termed by the Court to involve "special needs."<sup>90</sup> Once again, however, despite the opportunity in *Chandler* to illuminate the meaning of "special" in a new context, the Supreme Court managed to leave this area, too, in twilight.

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<sup>87</sup> This understanding of the Fourth Amendment is reiterated a number of times in *Chandler* itself. See, e.g., *Chandler*, 117 S. Ct. at 1301 ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.").

<sup>88</sup> See, e.g., CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* § 4.05a (3d ed. 1992) (subchapter on "Determining Whether a Search or Seizure is Reasonable") (citing, *inter alia*, *Katz v. United States*, 389 U.S. 347 (1967)).

<sup>89</sup> See, e.g., *id.* §§ 4.05(b), (d), 11.03(a) (citing, *inter alia*, *Terry v. Ohio*, 392 U.S. 1 (1968)).

<sup>90</sup> See, e.g., *id.* §§ 11.03(b), 13 (citing, *inter alia*, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).



The “special needs” justification for suspicionless searches and seizures was born, ironically, in a case in which there was no need to justify a suspicionless search and seizure. In *New Jersey v. T.L.O.*,<sup>91</sup> the Court upheld a search by public school officials of a student suspected of smoking in the bathroom, even though the search was conducted without a warrant or even probable cause. The Court reasoned that in the special context of maintaining order in a school environment, school officials could, consistent with the Constitution, conduct searches of students when such searches are reasonable “under all the circumstances”<sup>92</sup>—a fairly freewheeling analysis, but one which would necessarily include the initial justification for the search and the relationship between the scope and intrusiveness of the search to that initial justification. The Court observed that a search will be justified initially “when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>93</sup> Given that the school officials in the case reasonably suspected that a student, T.L.O., had been smoking in the bathroom, and their seizure of her and search of her purse were reasonably related in scope and intrusiveness to their disciplinary concerns, the school officials’ actions were “reasonable under all of the circumstances” and thus not “unreasonable” under the Fourth Amendment.<sup>94</sup> The Court expressly declined to decide “whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities.”<sup>95</sup>

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<sup>91</sup> 469 U.S. 325, 328 (1985).

<sup>92</sup> *See id.* at 341.

<sup>93</sup> *Id.* at 342.

<sup>94</sup> *Id.* at 343. The Court was quite specific about the justifications for the school officials’ treatment of T.L.O. It concluded that the initial detention of T.L.O. and search of her purse for cigarettes was justified by the suspicion that T.L.O. had been smoking in the bathroom. *Id.* at 345. When this initial search revealed the presence of rolling papers, a fuller search of T.L.O.’s purse was justified, reasoned the Court, because there was then reasonable suspicion that marijuana was also present. *Id.* at 347. And, indeed, marijuana and other evidence that T.L.O. had been selling the drug was obtained from her purse and turned over by the school authorities to law enforcement agents. *See id.*

<sup>95</sup> *Id.* at 342 n.8.

In a concurring opinion, Justice Blackmun authored the phrase that has come to justify not only softening the constitutional preference for warrants and probable cause, but also abandoning the need for any sort of individualized suspicion: he recognized that "exceptional circumstances" may sometimes arise "in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. . . ."<sup>96</sup> In the next dozen years, Justice Blackmun's solo musings were invoked in half-dozen majority opinions to justify (until *Chandler*) state actions otherwise incompatible with "traditional" Fourth Amendment analysis.<sup>97</sup>

In two of these instances, the Court invoked the "special needs" rubric to justify searches and seizures in which there was some individualized suspicion, but no warrant or probable cause. In *O'Connor v. Ortega*,<sup>98</sup> a plurality of the Court concluded that the government as employer could conduct work-related searches of an employee's office without a warrant or probable cause, given the special concerns implicated in the running of an efficient government office. The plurality noted that this exception applied even when the government was searching for evidence of employee misconduct, as long as the search was reasonable under all of the circumstances.<sup>99</sup> Because the government employer in *Ortega* had some individualized suspicion of wrongdoing by Ortega, the plurality reserved the question "whether individualized suspicion is an essential element of the standard of reasonableness . . ."<sup>100</sup> intoning exactly the same language that the Court had used in its *T.L.O.* opinion two years earlier.

The same year as *Ortega*, the Court also decided *Griffin v. Wisconsin*,<sup>101</sup> which upheld a probation officer's search of the

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<sup>96</sup> *Id.* at 351 (Blackmun, J., concurring).

<sup>97</sup> See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New York v. Berger*, 482 U.S. 691 (1987); *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

<sup>98</sup> *Ortega*, 480 U.S. at 721.

<sup>99</sup> *Id.* at 722.

<sup>100</sup> *Id.* at 726.

<sup>101</sup> *Griffin*, 483 U.S. at 879-80.

home of a probationer pursuant to a regulation authorizing such searches when there exist "reasonable grounds" to believe contraband is present. Once again, the Court found that the state's interest in supervising probationers constituted a "special need" that rendered unnecessary (indeed, problematic) either reliance on a judicial warrant or use of a probable cause standard in the absence of a warrant.<sup>102</sup> But because the regulation at issue called for some form of individualized suspicion ("reasonable grounds"), the Court once again avoided comment on the question of the relationship between the "special needs" rubric and the possibility of completely suspicionless searches and seizures.<sup>103</sup>

Sandwiched in-between *Ortega* and *Griffin*, however, came a case that used the "special needs" rubric for the first time to justify a search without any individualized suspicion at all. In *New York v. Burger*,<sup>104</sup> the Court upheld a search, authorized by a state regulatory statute, of an automobile junkyard, which revealed evidence that stolen cars were being dismantled by the junkyard's owner. Relying on a series of earlier cases in which searches of "closely regulated" businesses were subjected to less demanding Fourth Amendment scrutiny,<sup>105</sup> the Court concluded that such searches constituted situations of "special need," citing Blackmun's *T.L.O.* concurrence.<sup>106</sup> The *Burger* Court made clear that such searches could be conducted not only without warrants, but also without any quantum of individualized suspicion at all.<sup>107</sup> The reasonableness of such peri-

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<sup>102</sup> *Id.* at 876.

<sup>103</sup> *See id.*

<sup>104</sup> 482 U.S. 691, 715-16 (1987).

<sup>105</sup> *See* *Donovan v. Dewey*, 452 U.S. 594 (1981) (upholding warrantless inspection of stone quarry business by mine inspectors under the Mine Safety and Health Act of 1977); *United States v. Biswell*, 406 U.S. 311 (1972) (upholding warrantless inspection of the premises of a pawnshop operator who was licensed to sell certain weapons pursuant to the Gun Control Act of 1968); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (disapproving warrantless search of a catering business on the narrow ground that the search was not authorized by the relevant federal revenue statutes, but noting that the liquor industry was "long subject to close supervision and inspection").

<sup>106</sup> *New York*, 482 U.S. at 702 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) (Blackmun, J., concurring)).

<sup>107</sup> *Id.*

odic suspicionless searches lay not in any particular reason to believe that the subject of the search had committed some sort of wrongdoing; rather, reasonableness could be established by the existence of (1) a "substantial" state interest in regulating the business at issue; (2) an inspection scheme that "reasonably serves" the State's substantial regulatory interest; and (3) a "constitutionally adequate substitute for a warrant" that limits the discretion of authorized inspectors in conducting the relevant searches.<sup>108</sup> The Court concluded that the constraints present in the statutory scheme at issue in *Burger* were adequate given that the statute provided fair notice to the regulated business of the nature of the searches to which it could be subject and the identity of authorized inspectors, in addition to limiting the time, place, and scope of authorized inspections.<sup>109</sup> The *Burger* case could be portrayed as simply a species of old wine in a new bottle, as merely ratifying and recasting as a "special need" the already existing category of "regulatory searches." But *Burger* raised two related, troubling questions—one about the nature of the old category of regulatory searches and one about the new rubric of special needs—that have yet to be answered today, ten years later.

The *Burger* case exposed the problematic and potentially expansive borderland between the supposedly separate categories of "regulation" and "criminal law enforcement." The New York statutory scheme implicated in the *Burger* case required operators of junkyards to, *inter alia*, obtain licenses, display their registration numbers on all business documentation and on vehicles and parts that pass through their businesses, maintain "police books" recording the acquisition and disposition of motor vehicles and vehicle parts, and make these books available for inspection by the police or agents of the Department of Motor Vehicles.<sup>110</sup> Failure to comply with these provisions was punishable not only by loss of license or civil fines, but by criminal penalties as well.<sup>111</sup> So, when the police came marching, unin-

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<sup>108</sup> *Id.* at 702-03.

<sup>109</sup> *Id.* at 711-12.

<sup>110</sup> *Id.* at 704 (citing N.Y. VEH. & TRAF. LAW §§ 415-a5 (a), (b) (McKinney 1986)).

<sup>111</sup> *Id.* at 704-05.

vited, into Burger's junkyard, looking for his registration number and demanding to see his police book, were they acting as agents of the regulatory state or as criminal law enforcement agents?

The *Burger* Court attempted to explain that administrative statutes and penal laws "may have the same *ultimate* purpose of remedying the social problem" at issue, but that regulation is distinct from law enforcement in that the former "set[s] forth rules to guide an operator's conduct of the business and allow[s] government officials to ensure that those rules are followed," whereas the latter emphasizes "the punishment of individuals for specific acts of behavior."<sup>112</sup> This verbal distinction is not particularly helpful, to say the very least. After all, one could easily say that the very purpose of the criminal law is to "set forth rules to guide . . . conduct" and to "allow government officials to ensure that those rules are followed." And it is equally obvious that "punishment of individuals for specific acts" is central to many regulatory regimes. Perhaps the Court was trying to suggest that deterrence of wrongdoing through close monitoring is different from deterrence through punishment after the fact. But once again, close monitoring deters only because the person or persons monitored know that punishment will follow if the monitoring reveals wrongdoing. Thus, the Court's facile distinction does not come close to clearly defining the border between regulation and law enforcement necessary for any "regulated business" exception to ordinary Fourth Amendment analysis.

This borderline problem became even more pronounced once the Supreme Court began to conceive of the "regulated business" exception under the rubric of "special needs." The earlier "closely regulated business" cases upon which the *Burger* opinion relied had been predicated almost exclusively on the decreased expectation of privacy traditionally entertained by owners of such businesses.<sup>113</sup> But once the *Burger* Court turned to the rubric of "special needs, beyond the normal need for law enforcement," it became even more crucial for the Court to dis-

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<sup>112</sup> *Id.* at 704.

<sup>113</sup> See *supra* note 105.

tinguish “normal” law enforcement (which would be subject to traditional Fourth Amendment constraints) from the “special needs” of the regulatory state (which would not). When the regulatory state shares with the criminal law the same overarching goal of promoting compliance with the law, and seeks to use both criminal sanctions as one of its regulatory strategies and police officers as one of its authorized inspectors—all of which was true in *Burger*—it becomes very difficult to separate the “normal” from the “special” case.

This difficulty is more than academic, because it represents the difficulty of containing the “special needs” exception to manageable proportions—of maintaining it as “exceptional” at all. This concern became more apparent, though it was not resolved, in the case of *Michigan Department of State Police v. Sitz*,<sup>114</sup> in which the Supreme Court upheld against Fourth Amendment challenge a program of suspicionless stops and brief inspections of all vehicles passing through “sobriety checkpoints” established on public roads. The program, which was created and implemented by the Michigan State Police, was designed to enforce the state’s criminal prohibition of driving under the influence of alcohol. For the first time, it was a criminal *defendant* who invoked the Court’s “special needs” cases, arguing that the enforcement of drunk driving laws fell, if anything at all did, within the category of “the normal need for criminal law enforcement” and thus that law enforcement agents should have to demonstrate either probable cause or reasonable suspicion before executing a warrantless stop of an automobile.<sup>115</sup> The Supreme Court, however, declined to use *Sitz* as a vehicle for elaborating on the distinction between the “normal” and “special” needs for law enforcement; instead, the Court narrowed its focus and simply relied upon two earlier cases to deal with the drunk driving checkpoints at issue in the case. First, the Court noted that it had already ruled that the Constitution permitted law enforcement agents to conduct suspicionless stops of motorists at fixed checkpoints near the border in order to detect the

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<sup>114</sup> 496 U.S. 444 (1990).

<sup>115</sup> See *id.* at 449-50 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)).

entry of illegal aliens.<sup>116</sup> Second, the Court invoked the “test” promulgated in *Brown v. Texas*<sup>117</sup> to the effect that, in general, determining the constitutionality of “seizures that are less intrusive than a traditional arrest . . . involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”<sup>118</sup>

What the *Sitz* Court did not seem to realize, however, is that the test that it adopted involved exactly the same freewheeling balancing that the Court employs under the “special needs” rubric. Should we understand *Sitz* to say that we can resort to this inclusive balancing *either* under the “special needs” rubric *or* when evaluating seizures less intrusive than arrest? Or should we understand *Sitz* to say that the “special needs” cases and the checkpoint cases are just subsets of the general category of cases in which searches and seizures are reasonable because the government interests at stake outweigh the private interests at stake? In other words, does the word “special” denote something unusual about the nature of the government’s interest, or does it simply reflect the relative balance of the government’s interest and the individual’s interest in a particular case?

It is against this backdrop that the Supreme Court confronted the latest “special needs” case—*Chandler’s* challenge to the Georgia statute requiring that candidates for certain state offices submit to drug testing in the absence of any individualized suspicion.<sup>119</sup> Of course, *Chandler* was not the first drug-testing case to reach the Court. The Court had previously approved suspicionless testing for drugs and alcohol of railway employees who were involved in certain train accidents or who had violated certain safety rules,<sup>120</sup> suspicionless drug testing of Customs Service employees applying for certain transfers or

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<sup>116</sup> *See id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

<sup>117</sup> 443 U.S. 47, 51-53 (1979) (holding that the Fourth Amendment requires the police to have individualized suspicion before they may stop individuals and require them to identify themselves, even in high crime areas).

<sup>118</sup> *Id.* at 50-51 (citations omitted).

<sup>119</sup> *Chandler v. Miller*, 117 S. Ct. 1295 (1997).

<sup>120</sup> *See Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989).

promotions,<sup>121</sup> and suspicionless drug testing of certain high school athletes.<sup>122</sup> But each of these previous cases simply upheld the testing on the particular facts presented to the Court; in none of these cases did the Court make any attempt to set out the necessary or sufficient conditions for a constitutionally sound program of involuntary suspicionless drug testing in the public sector, much less the precise contours of the “special needs” exception more generally. *Chandler* presented the most recent and most compelling opportunity for the Court to address these issues, given that the Court, for the first time, found a drug-testing regime—or any governmental interest framed as a “special need”—to lie outside of the “special needs” rubric.

But the Court in *Chandler* only perpetuated the confusion already present in Fourth Amendment doctrine. Acknowledging that the earlier drug testing cases and the “special needs” rubric were the relevant touchstones for its analysis, the majority opinion, authored by Justice Ginsburg, noted that Georgia’s plan for administering the drug tests—in the privacy of a medical office at a time chosen by the political candidate—was relatively non-invasive.<sup>123</sup> Thus, the Court construed the central question at issue to be whether the state of Georgia had demonstrated a “special need” that was “substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.”<sup>124</sup> This framing of the question managed to leave unresolved precisely the problematic issue raised by *Sitz*<sup>125</sup> about the limits of the “special needs” rubric: are the state’s needs “special” because they are of a certain nature or type (i.e., regulatory as opposed to criminal) or are they “special” simply because they are important enough to outweigh the individual liberty interests infringed by the state’s action?

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<sup>121</sup> See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

<sup>122</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>123</sup> *Chandler*, 117 S. Ct. at 1303.

<sup>124</sup> *Id.*

<sup>125</sup> *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).



Justice Ginsburg's majority opinion gives very few clues about how the Court should or will answer this question. On the one hand, Justice Ginsburg seems to affirm that traditional Fourth Amendment analysis is the norm: "The Fourth Amendment . . . generally bars officials from undertaking a search or seizure absent individualized suspicion."<sup>126</sup> Moreover, she goes on to insist that suspicionless searches and seizures are not only exceptional, but rare: she characterizes the category of constitutionally permissible suspicionless searches as "closely guarded" and in particular, she describes the Court's earlier decision in *Von Raab* (upholding suspicionless drug testing of certain Customs Service employees) as "[h]ardly a decision opening broad vistas for suspicionless searches."<sup>127</sup>

On the other hand, however, Justice Ginsburg's majority opinion places few clear limits on the type of government interest that can be deemed "special" so as to be subject to the Court's more free-wheeling and undoubtedly more deferential balancing analysis instead of traditional Fourth Amendment limitations. The Court is emphatic that interests that are merely "symbolic" and not "real"—as the Court deemed Georgia's interests to be in *Chandler*—will not be deemed "special" governmental needs.<sup>128</sup> But the Court doesn't explain how lower courts or policy-makers should identify "real" interests. While the Court criticizes the State of Georgia for not demonstrating that a problem of drug use by state officials existed prior to the enactment of its drug testing requirement, the majority opinion also notes that such a demonstration is "not in all cases necessary to the validity of a testing regime."<sup>129</sup> And while the Court criticizes the State of Georgia for enacting a drug testing scheme unlikely to detect and deter much illegal drug use (because the candidates subject to testing could pick the date of the test themselves well ahead of time), Justice Rehnquist, the sole dissenter, seems to have a point when he notes that a better

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<sup>126</sup> *Chandler*, 117 S. Ct. at 1298.

<sup>127</sup> *Id.* at 1304 (construing *National Treasury Employees Union v. Von Raab*, 484 U.S. 656 (1989)).

<sup>128</sup> *Id.* at 1304-05.

<sup>129</sup> *Id.* at 1303.

designed scheme would no doubt be much more intrusive on liberty interests.<sup>130</sup>

The only other definition that the *Chandler* Court offers for the “special needs” rubric—aside from its insistence that the asserted governmental interest be “important” and “real”—is that the category embraces “concerns *other than crime detection*.”<sup>131</sup> At first glance, this restriction seems like a helpful qualifier, able to distinguish between the “normal” and “special” needs of law enforcement. But once one takes into account the interests of the preventive as well as the punitive state, almost every law enforcement initiative can seem profoundly Janus-faced—looking both backward to crime detection and forward to crime prevention. Take *Sitz*<sup>132</sup> as an example. The defendants argued forcefully that the use of sobriety checkpoints constituted classic law enforcement of the crime detection sort—meant to catch those driving under the influence of alcohol and subject them to criminal punishment.<sup>133</sup> But one could also argue that such roadblocks constitute a forward-looking deterrent—surely, their existence would make people think twice before getting behind the wheel of a car while intoxicated, knowing that they would be much more likely to be caught. Ultimately the Court ducked this issue, upholding the checkpoints without opining about the “specialness” (or lack thereof) of the state’s asserted interest.<sup>134</sup> But the *Chandler* Court’s cryptic, almost throw-away definition of “special needs” as concerns “other than crime detection”<sup>135</sup> is of little help in classifying *Sitz*—or a myriad of other possible law enforcement initiatives.

The law enforcement initiatives left unsettled by the obscurity of the *Chandler* opinion include not only programs of suspicionless drug testing, but also other schemes that likewise lie at the intersection of the punitive and the preventive state. For example, consider the rapid development of DNA databases or

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<sup>130</sup> *Id.* at 1307 (Rehnquist, C.J., dissenting).

<sup>131</sup> *Id.* at 1301 (emphasis added).

<sup>132</sup> *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>133</sup> *See id.* at 447-48.

<sup>134</sup> *Id.* at 455.

<sup>135</sup> *Chandler*, 117 S. Ct. at 1301.

"banks" in virtually every state, which until now has been limited to collecting DNA information from convicted felons,<sup>136</sup> who have long been held to have reduced expectations of privacy under the Fourth Amendment.<sup>137</sup> Under what circumstances may the federal or state governments collect and use such valuable and accurate information from citizens other than convicts? On the one hand, one could portray the collection and use of this information as classic "crime detection" in that DNA tests often permit the police to identify after the fact the perpetrator of a prior, discrete crime. On the other hand, however, one could argue that DNA databases are primarily prophylactic in their deterrent effect upon people who might otherwise be disposed to commit crimes with the hope of "getting away with it." Does the collection of DNA information constitute a "special need," in which case it might, under some circumstances,<sup>138</sup> be done in the absence of individualized suspicion? Or is it subject to the usual presumption in favor of individualized suspicion?<sup>139</sup>

And even if we could know with more certainty when the "special needs" analysis applies, the *Chandler* Court leaves the

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<sup>136</sup> See Gisela Ostwald, *Youth No Bar to Genetic Fingerprinting in the U.S.*, DEUTSCHE PRESSE-AGENTUR, May 4, 1998 (explaining that 49 of the 50 states now allow the police to store the DNA fingerprints of criminals); Peter Finn, *Revolution Underway in Use of DNA Profiles; Bid to Link U.S. Databanks is Crime-Solving Edge*, WASH. POST, Nov. 16, 1997, at B4 (noting that Virginia was the first state to create a DNA databank in 1989).

<sup>137</sup> See, e.g., *Price v. Johnston*, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."), quoted in *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (dealing in particular with limitations on inmates' privacy rights).

<sup>138</sup> Circumstances that might favor the widespread collection of DNA information under a "special needs" analysis might include, for example, the ability to collect such information from a fingernail clipping or a hair sample, instead of by drawing blood (given that these former methods would diminish the physical intrusiveness of the extraction of the information), or the ability to shield from disclosure other, private information (such as susceptibility to certain diseases) encoded in DNA (which would diminish the degree of intrusion into personal privacy).

<sup>139</sup> The same questions could be applied to other suspicionless searches and seizures made possible by new technology, such as thermal imaging, widespread video surveillance, and internet eavesdropping. See generally *Symposium: Crime and Technology*, 10 HARV. J.L. & TECH. 383 (1997).

“special needs” balancing test as wide-open and free-wheeling as possible. How much danger must the government be seeking to combat? In the drug testing context, the Court approved both the drug testing of railroad employees<sup>140</sup> (who obviously could cause massive property damage and loss of life if under the influence of drugs or alcohol) and the drug testing of high school athletes (whose danger to others on the playing field seems less in the way of a “surpassing safety interest”). What kind of proof of a pre-existing problem must be shown?<sup>141</sup> How unintrusive must the government’s conduct be?<sup>142</sup> Of course, one of the great virtues of a balancing analysis is to eschew rules and to consider the unique circumstances of each situation. But one of the great vices of a balancing analysis is its lack of predictability, a lack that is particularly dangerous in the context of law enforcement.<sup>143</sup>

This lack of predictability is reflective of the larger problem inherent in both the *Chandler* and the *Hendricks* opinions. Despite the fact that the divisions on the Court as well as the identities of the opinion writers were quite different in the two cases, both majorities failed in strikingly similar ways to see the discrete problems before them as related to, indeed emblematic of, a larger discourse that more and more urgently needs careful engagement. This failure may well be the result of an often laudable cautiousness in decision-crafting, a self-conscious effort to narrow the focus to that and only that which must necessarily be decided within a given case. But it is also a virtue of judicial craftsmanship, particularly at the Supreme Court level, to anticipate the ways in which a particular decision will affect future particular cases and legal discourse more generally. For better

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<sup>140</sup> *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 634 (1989).

<sup>141</sup> See *supra* text accompanying note 129 (remarking that the *Chandler* Court castigates the State of Georgia for failing to document a problem of drug-use by government officials while at the same time it notes that such documentation is not always necessary to survive a “special needs” analysis).

<sup>142</sup> The taking of blood approved in *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989), and the searching of homes approved in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), are fairly serious intrusions into personal security.

<sup>143</sup> See *Steiker, Second Thoughts, supra* note 36, at 854-55 (arguing that a “reasonableness” balancing test is dangerous in the law enforcement context because it fails to adequately contain police discretion).

or worse, the Court will not be able to avoid the implications for and questions about the limits of the preventive state raised by *Hendricks* and *Chandler* for long.

#### IV. THE FUTURE OF THE PREVENTIVE STATE?

The central question that the Court must soon engage in a concerted fashion is whether and to what extent the state's attempt to prevent or prophylactically deter (as opposed to investigate) crime and to incapacitate or treat (as opposed to punish) wrongdoers insulates the state's actions from the limits the law would otherwise place on the investigative/punitive state. The Constitution places limits on the punitive state because of special fears about state abuse both of law enforcement's monopoly on the legitimate use of force and of the justice system's ability "to harness the power of blame" through criminal punishment.<sup>144</sup> These fears are especially heightened when the state moves, as it often does in the criminal context, against a discrete and targeted enemy. Are there any special justifications that would argue for cabining the power of the preventive state? If so, for cabining it in what respects?

I mean to raise rather than to answer these questions here. But the general sorts of concerns raised by the preventive state are not so much focused on the possibility of political or discriminatory oppression of known enemies, although preventive institutions could surely be adapted to such ends. (Think, for example, of the use of the mental institution for political dissidents in the former Soviet Union.) Rather, the biggest concern raised by the growth of the preventive state is likely the fear of a "Big Brother" state—a government even more deeply insinuated into "private" life than it already is. Preventive state actions like the incarceration of the dangerous or the implementation of suspicionless searches and seizures give the state much greater power over and much greater knowledge about its citizenry. The possibility that developing technology will enhance the state's ability to collect data about its citizens and to conduct

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<sup>144</sup> See Steiker, *Punishment and Procedure*, *supra* note 35, at 809.

surveillance of them in both real and “virtual” space makes such concerns more credible and compelling.

On the other hand, the state’s enhanced power over and knowledge about its citizens could have many beneficial effects, particularly in the reduction of crime, social disorder, and personal insecurity. How much does or should the state’s benign intentions in its use of such power or its pursuit of such knowledge count in the constitutional (or policy) balance? One answer is the famous Brandeis quote (offered by Justice Ginsburg in striking down Georgia’s suspicionless drug testing program):

Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.<sup>145</sup>

Whether or not Brandeis’ answer is right or complete, we need answers to the questions posed above. Few courts or scholars have offered such answers (or even recognized the questions).<sup>146</sup> It is time that more do so.

In that spirit, I offer this essay as a “Foreword” in three distinct senses. It is, of course, an introduction to this issue of *The Journal of Criminal Law & Criminology*, an issue that offers a careful and comprehensive discussion of the relevant criminal law decisions of the Supreme Court’s 1996 Term. It is also a preview of topics that I myself plan to continue thinking and writing about in the future. And, finally, I hope that it is a “Foreword” in the sense of a forerunner of other words, by courts and scholars alike, on the important questions—which

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<sup>145</sup> *Chandler v. Miller*, 117 S. Ct. 1295, 1305 (1997) (citing *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J.)).

<sup>146</sup> There are some exceptions: a few scholars have begun to engage the question of the relationship between the civil and criminal state, particularly in regard to the use of preventive incarceration. See, e.g., Paul H. Robinson, *Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993) (arguing in favor of the civil incarceration of the dangerous in order to preserve the blameworthy function of the punitive state for the blameworthy); Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 85 (1996) (arguing for limits on the civil incarceration of the dangerous because “civil deprivation of liberty is permissible only as a gap-filler, to solve problems that the criminal process cannot address”).

are being raised today in a myriad of contexts and guises—  
about the limits of the preventive state.