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Abstract
Sex offender civil commitment (SOCC) is a massive deprivation of liberty as severe as penal incarceration. Because it eschews most of the "great safeguards" constraining the criminal power, SOCC demands careful constitutional scrutiny. Although the Supreme Court has clearly applied heightened scrutiny in judging civil commitment schemes, it has never actually specified where on the scrutiny spectrum its analysis falls. This article argues that standard three-tier scrutiny analysis is not the most coherent way to understand the Supreme Court's civil commitment jurisprudence. Rather than a harm-balancing judgment typical of three-tier scrutiny, the Court's civil commitment cases are best understood as forbidden purpose cases, a construct that is familiar in many areas of the Court's constitutional analysis. But the Court's civil commitment cases tie the search for punitive purpose to another genre of constitutional analysis, the application of the substantive boundaries on governmental power most commonly associated with the specific grants of federal power. In contrast to the normal conception of state power as plenary, limited only by the specific constraints of the bill or rights and the amorphous limits of "substantive due process," the Court has posited a narrowly limited "civil commitment" power. The search for the forbidden purpose maps directly onto the inquiry into the limits of this discrete and special state power. Finally, the article argues that the forbidden purpose/discrete power analysis provides clarity on another vexing issue, the facial/as-applied distinction.

Keywords
Sexual predator laws, Civil commitment, Substantive due process, Strict scrutiny, Forbidden purpose

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BEYOND STRICT SCRUTINY: FORBIDDEN PURPOSE AND THE ''CIVIL COMMITMENT'' POWER

*Eric S. Janus**

Sex offender civil commitment (SOCC) is a massive deprivation of liberty as severe as penal incarceration. Because it eschews most of the "great safeguards" constraining the criminal power, SOCC demands careful constitutional scrutiny. Although the Supreme Court has clearly applied heightened scrutiny in judging civil commitment schemes, it has never actually specified where on the scrutiny spectrum its analysis falls. This article argues that standard three-tier scrutiny analysis is not the most coherent way to understand the Supreme Court's civil commitment jurisprudence. Rather than a harm-balancing judgment typical of three-tier scrutiny, the Court's civil commitment cases are best understood as forbidden purpose cases, a construct that is familiar in many areas of the Court's constitutional analysis. But the Court's civil commitment cases tie the search for punitive purpose to another genre of constitutional analysis, the application of the substantive boundaries on governmental power most commonly associated with the specific grants of federal power. In contrast to the normal conception of state power as plenary, limited only by the specific constraints of the bill or rights and the amorphous limits of "substantive due process," the Court has posited a narrowly limited "civil commitment" power. The search for the forbidden purpose maps directly onto the inquiry into the limits of this discrete and special state power. Finally, the article argues that the

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Keywords: *sexual predator laws, civil commitment, substantive due process, strict scrutiny, forbidden purpose*

INTRODUCTION

Sex offender civil commitment (SOCC) schemes are well into their third decade.[1] These laws confine over 5,000 individuals,[2] the great majority of whom have served their penal sentences. SOCC laws have generated complex systems of bricks and mortar, treatment programming, community supervision, and judicial and administrative direction and oversight.

SOCC laws have always been on the edge of political and legal legitimacy. As transparent expedients for circumventing core constitutional constraints on the criminal justice system, SOCC laws have needed special justification (both legal and political) to assure that their pre-crime, preventive detention methods are limited and non-expandable.[3] Occupying the rather murky and venerable "civil commitment power"—a long-neglected corner of our constitutional jurisprudence—the SOCC programs withstood initial constitutional challenges, but only by promising that they were bona fide civil commitment programs.[4] Now, after almost three decades of implementation, it is appropriate for courts to hold the states accountable for those promises.

The initial challenges concerning the constitutional legitimacy of these laws were framed as "facial," testing the validity of the statutory schemes,

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1. *See, e.g.*, Lucy Massopust & Raina Borrelli, *"A Perfect Storm": Minnesota's Sex Offender Program—More Than Twenty Years Without Successful Reintegration*, 41 Wm. Mitchell L. Rev. 706, 709–10 (2015) ("In 1989, following a number of highly publicized and horrendous crimes involving sexual assaults by recent parolees, a task force convened by the Minnesota Attorney General recommended the resuscitation of sex offender commitments in Minnesota." (internal quotations omitted)).

2. Jennifer E. Schneider, Ph.D., et al, SOCCPN Annual Survey of Sex Offender Civil Commitment Programs 2016, slide 14 (on file with author).

3. Eric S. Janus, *Sexual Violence, Gender Politics, and Outsider Jurisprudence*, *in* Dangerous People: Policy, Prediction, and Practice 73, 78 (International Perspectives on Forensic Mental Health) (Ed. B. McSherry & P. Keyzer eds., 2011).

4. Eric Janus, Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State, ch. 2 (2006).

rather than the propriety of applying civil commitment to the individual challengers. As I shall argue, the fact that the courts postured the challenges as facial is good evidence that the central constitutional question was a forbidden purpose inquiry.[5] In addition, because the laws were not fully specified,[6] sketching only in the broadest terms the complex schemes they were spawning, judicial review was perhaps necessarily tentative. The circumstances surrounding the laws' enactments strongly supported an inference of the "forbidden purpose"[7] of punishment.[8] Yet, the courts were not prepared to discount, *ex ante*, the states' solemn avowals that the laws created bona fide civil commitment schemes, confinement traditionally exempt from the constraints of the "charge and conviction paradigm."[9]

In the two decades following their enactment and approval, the SOCC schemes have evolved into concrete programs. A second wave of litigation has emerged, testing whether the programs that have developed comport with the promises that justified constitutional approval by the courts. Many of these programs have belied those promises, in particular, the cornerstone of civil commitment—the principle that confinement must extend no longer than the duration of the grounds supporting commitment (the "durational principle"). In a majority of the SOCC programs, few individuals have been discharged.[10] SOCC schemes that had been touted as legitimate treatment programs, to be completed in three or four years, morphed into "punitive system[s] that segregate[] and indefinitely detain[] a class of potentially dangerous individuals without the safeguards of the criminal justice system."[11] The fact that this is the pattern in the majority

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5. *See* David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 Iowa L. Rev. 41, 62–63 (2006).

6. *Id.* at 63 ("Fallon's criterion of specification is useful and sensible: it would be imprudent for a court to strike down a statute in all its applications if the court were unsure what those applications might turn out to look like."); *see also* Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1346 (2000).

7. Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (Kennedy, J., concurring) (describing the "forbidden purpose" of punishment).

8. Wayne Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1299–1300 (1998).

9. Foucha v. Louisiana, 504 U.S. 71, 82 (1992).

10. Sex Offender Civil Commitment Programs Network, Annual Survey (2016).

11. Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1144 (D. Minn. 2015), *rev'd sub nom.* Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017).

of the states shows a betrayal of the basic characteristic of civil commitment. This is highlighted by (1) the contrast with the experience of the few states that have released significant numbers without incident,[12] and (2) important new empirical work showing that sex offender treatment is effective in reducing risk,[13] and that the risk of sex offender recidivism declines over time.[14]

This article describes the second-generation constitutional litigation about SOCC in the United States. It focuses mostly on the *Karsjens v. Piper*[15] litigation concerning the Minnesota Sex Offender Program, because this is the most well-developed litigation and can serve as a vehicle for unpacking the confused legal tangle underlying these programs. The constitutional issues are complex, and this article cannot do them complete justice. It is an attempt to sketch an approach that gives the Supreme Court's constitutional jurisprudence some coherence and provides a framework for holding SOCC laws accountable.

The central thesis of this article is that the constitutional validity of SOCC schemes is best understood as a combination of two forms of analysis. Central to the analysis is the notion that the power underlying state civil commitment programs is not the plenary power of the state, but

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12. In comparing Minnesota's Sex Offender Program to those of Wisconsin and New York, the Court noted:

> However, the MSOP [Minnesota Sex Offender Program] has developed into indefinite and lifetime detention. Since the program's inception in 1994, no committed individual has ever been fully discharged from the MSOP, and only three committed individuals have ever been provisionally discharged from the MSOP. By contrast, Wisconsin has fully discharged 118 individuals and placed approximately 135 individuals on supervised release since 1994. New York has fully discharged 30 individuals—without any recidivism incidents, placed 125 individuals on strict and intensive supervision and treatment ("SIST") upon their initial commitment, and transferred 64 individuals from secure facilities to SIST.

Id. at 1147.

13. J. Stinson, J. Becker, & L. McVay, *Treatment Progress and Behavior Following 2 Years of Inpatient Sex Offender Treatment: A Pilot Investigation of Safe Offender Strategies*, 29(1) Sexual Abuse: A J. of Res. and Treatment 3, 19 (2017).

14. R. Hanson, A. Harris, L. Helmus, & D. Thornton, *High-Risk Sex Offenders May Not be High Risk Forever*, 29(15) J. of Interpersonal Violence 1 (2014); *see also* P. Lussier, & J. Healey, *Rediscovering Quetelet, Again: The "aging" offender and the prediction of reoffending in a sample of adult sex offenders*, 26 Just. Q. 827–56 (2009).

15. *Karsjens*, 845 F.3d 394 (8th Cir.), *cert. denied*, 138 S. Ct. 106 (2017); *see also Karsjens*, 109 F. Supp. 3d at 1139.

rather a power with inherent boundaries—the civil commitment power. The limitations on that power arise not from standard substantive due process analysis, but rather, inhere in the power itself. The limits are the traditionally accepted characteristics of civil commitment. Articulated in a series of cases, these limits are, roughly: a mental disorder predicate;[16] danger to self or others;[17] a promise to provide treatment, if that is available;[18] and the durational principle.[19]

Though the source of these categorical limits is tradition, their constitutional significance arises from the need to protect the legitimacy and primacy of the "great safeguards which the law adopts in the punishment of crime and the upholding of justice,"[20] that constrain state power in the criminal law.[21] Since civil commitment allows long-term and comprehensive deprivation of liberty outside of the scope of those constraints, it must be limited or it will swallow and de-legitimize those "great safeguards."

If the first thread in the analysis is this limited-power rubric, the second is a "forbidden purpose" analysis,[22] characteristic of many areas of constitutional law.[23] This analysis departs from standard substantive due process doctrine by restricting permissible state purposes not simply based on their

16. Foucha v. Louisiana, 504 U.S. 71, 82 (1992); *see also* Stephen McAllister, *Sex Offenders and Mental Illness: A lesson In Federalism and the Separation of Powers*, 4 PSYCHOL. PUB. POL'Y & L. 268 (1998).

17. O'Connor v. Donaldson, 422 U.S. 563, 570 (1975).

18. Kansas v. Hendricks, 521 U.S. 346, 367–68 (1997); *see also* Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 321 (2003).

19. Jackson v. Indiana, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.").

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

21. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 339 (1997) (arguing that the Court's purpose scrutiny arises from "a special concern that the challenged governmental action presents core, and not merely peripheral, constitutional concerns").

22. More precisely, the jurisprudence could be described as invoking a "limited purpose" analysis, as the Supreme Court has in some cases characterized the boundaries on civil commitment as limits on its purposes: roughly to address impairments arising of "mental disorders" that cause harm. *O'Connor*, 422 U.S. at 573–75. These of course correspond to the traditional limits on the civil commitment power. *Id.*

23. *See generally* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016). See discussion *infra* Part III.C.

importance ("compelling" or "important" or "legitimate") but on their substance.[24] No matter how compelling the purpose (e.g., protection against sexual violence), the presence of the forbidden purpose (punishment) invalidates the legislation.

The two strands of analysis mirror each other: The valid exercise of the civil commitment power within its traditional boundaries provides a doctrinal safe harbor for escape from the inference that the indefinite deprivation of liberty entails the forbidden purpose of punishment.[25] But the taxonomic analysis is the primary consideration. Civil confinement outside of the permissible boundaries is invalid, whether or not it is considered punishment.[26]

The article begins with a brief history of SOCC laws and the initial round of litigation that upheld the laws. In this context, it introduces the notion that the forbidden purpose and discrete power ideas are central to the Supreme Court's civil commitment jurisprudence. Then, the paper discusses the *Karsjens* litigation as representative of second wave challenges to these laws. The district court, based on six weeks of testimony, held that the program was constitutionally deficient because its two-decade implementation systematically thwarted the durational principle. On appeal, the Eighth Circuit soundly reversed. The paper asserts that the Eighth Circuit's decision inadequately frames the constitutional approach to civil commitment laws. The final section of the paper attempts to sketch a constitutional approach that is coherent with the Supreme Court's decisions, and that provides a framework for ensuring that SOCC schemes are accountable to the Constitution.

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24. *Id.* at 575–78.

25. This analysis keeps the limited-power and forbidden purpose strands conceptually separate. As both Steiker and Schulhofer argue, the constitutional limitations on civil liberty deprivation extend beyond the forbidden purpose of punishment. Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 812 (citing 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, 69 (1996)).

26. Foucha v. Louisiana, 504 U.S. 71, 83 (1992) ("[S]ubstituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."); *see also* Steiker, *supra* note 25, and Schulhofer, *supra* note 25.

I. SHORT HISTORY OF SOCC LAWS AND LITIGATION

SOCC laws use the civil commitment form to accomplish a decidedly non-mental-health goal: protecting society from recidivist sexual violence. Modern SOCC laws arose out of a perception that the criminal justice approach to recidivist sexual violence had shortcomings whose remedy within the criminal justice system was impaired by constitutional prohibitions, specifically ex post facto and double jeopardy protections. The time was the late 1980s, and in two states, Washington and Minnesota, high-profile recidivist sexual violence took on high salience and triggered high-level task force study.[27] Both states identified key shortcomings in the criminal justice approach to sexual violence. One shortcoming was sentences that were too short. Another was the absence of community supervision of released offenders as a result of the adoption of definite term sentences in opposition to indeterminate sentences. Recognizing that these shortcomings could be remedied, but that any criminal justice changes could not be applied to individuals already in the pipeline because of ex post facto and double jeopardy protections, the task forces recommended adapting civil commitment to address recidivist sexual violence. There was strong implication that these laws would be short-term "emergency" fixes, necessary only until prospective reforms to the criminal justice system could take effect.[28]

The history of these SOCC laws stands in some contrast to the first generation of sex psychopath laws, which fit much more closely with traditional civil commitment laws. The first-generation laws, at least initially, had support from the psychiatric community[29] and were framed as diversion programs for individuals too sick for punishment. These historical facts, along with contemporaneous legislative statements, provide strong circumstantial support for the conclusion that these new SOCC laws had a punitive purpose.[30]

The original litigation challenging the validity of the SOCC laws focused centrally on this inference of punitive intent. The Supreme Court upheld the laws via a categorical or taxonomic approach: SOCC, despite its

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27. JANUS, *supra* note 4, at 15.

28. OFF. OF LEGIS. AUDITOR: STATE OF MINNESOTA, PSYCHOPATHIC PERSONALITY COMMITMENT LAW (1994), https://www.auditor.leg.state.mn.us/ped/pedrep/ppcl.pdf.

29. JANUS, *supra* note 4, at 22–23.

30. Logan, *supra* note 8, at 1316.

connection to the criminal justice system, avoids the forbidden purpose of punishment precisely because it fits into a discrete category called civil commitment. The Court's SOCC jurisprudence is best understood not as an application of traditional harm balancing pursuant to substantive due process, but rather as the application of the limits of a discrete state power—the "civil commitment power."

The first four laws enacted were quickly challenged in state court proceedings, with mixed outcomes.[31] The challenges were framed as facial challenges, addressing the nature of the commitment scheme and law itself instead of the facts of the individuals whose commitments were being sought.

The Kansas Supreme Court held that state's Sexually Violent Predator (SVP) Act was unconstitutional, and the U.S. Supreme Court granted review, *In re Hendricks.*[32] The Court split the case into two issues: whether the Act's criteria for commitment were consistent with substantive due process, and whether the Act established "criminal proceedings" with a punitive intent and thus violated ex post facto and double jeopardy protections. This issue focused on whether the Kansas SVP Act was a punitive law.

The Court's substantive due process analysis began by establishing that civil commitment, as a category, is a constitutionally legitimate form of non-criminal liberty deprivation. The constitutional question then became whether the Kansas SVP Act was a valid civil commitment law. The Court framed the issue as a taxonomic question, analyzing the categorical criteria for civil commitment, rather than a dimensional harm-balancing question.

The Court began by acknowledging that "freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,'"[33] but that "that

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31. *See* In re of Hendricks, 259 Kan. 246, 247 (Kan. 1996), *rev'd sub nom*. Kansas v. Hendricks, 521 U.S. 346 (1997); Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995) (invalidating Washington's SVP law on habeas); Kansas v. Hendricks. State v. Post, 541 N. W.2d 115, 130 (Wisc. 1995), *cert. denied*, 521 U.S. 1118 (1997); In re Blodgett, 510 N.W.2d 910, 914 (Minn. 1994), *cert. denied*, 115 S. Ct. 146 (1994); In re Personal Restraint of Young, 857 P. 2d 989 (Wash. 1993) (upholding Washington SVP law).

32. In re Hendricks, 912 P.2d 129 (Kan. 1996), *cert. granted*, 64 U.S.L.W. 3837 (U.S. 1996).

33. Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

liberty interest is not absolute." The Court then states that this liberty "may be overridden even in the civil context." The Court's proximate citation for this assertion is *Jacobson v. Massachusetts*: "'There are manifold restraints to which every person is necessarily subject for the common good.'"[34] Though *Jacobson* involved a question of public health (vaccination), it was actually a criminal case and provides no support for the Court's "civil context" statement.

The real work supporting this key move is historical and taxonomic. The Court's argument seems to be that "civil commitment" is a traditional category of legal intervention that has particular boundaries, and has been used for a long time. "Such commitment statutes," the Court says, have been used in "certain narrow categories" since colonial times. This history demonstrates that "involuntary civil confinement of a *limited subclass* of dangerous persons" is not contrary to our understanding of ordered liberty.[35]

Having established that civil commitment is a constitutionally valid form of liberty deprivation, the Court shifted its attention to determining whether the Kansas law fell within the proper boundaries of civil commitment. The Court treated this as a taxonomic dispute: in its view, constitutional validity requires a mental illness predicate. So, the question was whether the Kansas law identified a proper mental illness. The Court answered in the affirmative. That decision was controversial,[36] but there is no need to rehash its merits here. Suffice it to say the Court treated the question not as an exercise of interest-balancing, but as a matter of historical taxonomy: the Kansas definition fell into the category of mental disorder traditionally underlying civil commitment schemes. This was enough to satisfy that aspect of the Court's constitutional taxonomy.

In *Kansas v. Crane*, the Court revisited the mental illness predicate issue, and reinforced the idea that the Court's civil commitment jurisprudence is taxonomic rather than harm balancing. Again, without alluding to any form of constitutional scrutiny, the Court instructed the states that there were boundaries around civil commitment, not based on harm balancing, but rather on some substantive notion—apparently simply

34. *Id.* at 357 (citing Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)).

35. *Id.* (emphasis added).

36. *See, e.g.*, Robert Schopp et al., *Expert Testimony and Sexual Predator Statutes After* Hendricks, 6 Expert Evidence 1 (1998).

based on history and tradition—about what is properly within the civil commitment power.[37]

With respect to the ex post facto and double jeopardy claims, it is clear that the Court considered the question it had just answered—the taxonomic inclusion of the SVP within the category of "civil commitment"—to be dispositive, characterizing the "confinement of 'mentally unstable individuals who present a danger to the public' as one classic example of nonpunitive detention."[38] The next passage lays bare the essential structure of the Court's argument. The argument for forbidden purpose, in the Court's view, is a circumstantial one, based on the obvious similarity between criminal punishment and "potentially indefinite" civil commitment confinement.[39] The Court's response is twofold: first, the *reductio ad absurdum*—if confinement is evidence of punishment, then all civil commitment would be unconstitutional; and second, the Kansas law conforms to the key characteristic of valid civil commitment, the durational principle:

> Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.[40]

In short, the State overcomes the natural inference of punishment by adhering to the key traditional indicia of civil commitment: a categorical, taxonomic analysis. The analysis does not turn on any of the traditional substantive due process, harm-balancing formulas. The state was not free to design preventive confinement at will—or for any harm severe enough—but rather was constrained by the requirements of the civil commitment power: mental disorder, treatment, and the durational principle.

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37. In *Zadvydas v. Davis*, the Court used a harm-balancing rubric to describe the mental-disorder requirement (referring to "certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" 533 U.S. 678, 690 (2001)). But the Court has never explained how the presence of "mental illness" adds such unique weight to the balance that the individual's interest is outweighed. *See id.*

38. Kansas v. Hendricks, 521 U.S. 346, 363 (1997) (citing United States v. Salerno, 481 U.S. 739, 748–49 (1987).

39. *Id.* at 363–64.

40. *Id.*

In the years that followed, SOCC laws spread to twenty jurisdictions with the population growing to over 5,000 detainees.[41] Huge variations in key aspects of implementation demonstrates that these schemes are merely sketched by their implementing laws whose capacious vagueness facilitates highly discretionary executive implementation.[42] Wide variation in per capita commitment rates and in discharge rates provide strong evidence that the deprivations of liberty in these programs depend more on executive whim than on the rule of law. One thing that does not vary is the controversy and critique these programs engender.[43]

II. *KARSJENS* LITIGATION

A. The District Court Decision

Though not the only constitutional challenge to a state SOCC program,[44] the *Karsjens* litigation in Minnesota was in the vanguard. Led by sophisticated lawyers, this class action mounted a challenge aimed to show systemic

41. Sex Offender Civil Commitment Programs Network, Annual Survey (2016).

42. *Id.*; *see also* off. of Legis. Auditor: State of Minnesota, Civil Commitment of Sex Offenders (2011).

43. David Robinson, *Death, Assaults, and Sex Offenses: Life Behind Central New York Psychiatric Center's Walls*, Usa Today: Lohud (Feb. 7, 2018), https://www.lohud.com/story/news/investigations/2018/02/07/central-new-york-psychiatric-center-crimes/1074161001/. Michael Barajas, *A Prison by Any Other Name: How Texas Created a New For-Profit Lockup, Which it Really Doesn't Want You to Call a "Prison,"* Tex. Observer (Feb. 12, 2018), https://www.texasobserver.org/a-prison-by-any-other-name/. David S. Prescott, *As Courts Censure Civil Detention Practices, is it Time for Professionals to Speak Up?*, Forensic Psychologist (Sept. 14, 2015), https://forensicpsychologist.blogspot.com/2015/09/as-courts-censure-civil-detention.html. Anita Hassan & Mike Ward, *Texas Sex Offender Program a Catch-22 for Mentally Ill*, Hous. Chron. (Dec. 14, 2014), https://www.cbsnews.com/news/sex-offender-confinement-costing-states-too-much/.

44. Willis v. Palmer, 175 F.Supp.3d 1081 (2016). Matherly v. Andrews, 859 F.3d 264, 272 (4th Cir.), *cert. denied*, 138 S. Ct. 399 (2017). R. & R., Matter of Anderson, 730 N.W.2d 570, No. 3:13-cv-3 (N.D. 2007). Van Orden v. Schafer, 129 F. Supp. 3d 839 (E.D. Mo. 2015), *as amended* (Dec. 22, 2015), *on reconsideration in part sub nom.* Orden v. Schafer, No. 4:09CV00971 AGF, 2015 WL 9269251 (E.D. Mo. Dec. 21, 2015), *and opinion vacated in part on reconsideration sub nom.* Van Orden v. Stringer, 262 F. Supp. 3d 887 (E.D. Mo. 2017). Hydrick v. Hunter, 466 F.3d 676 (9th Cir. 2006).

and persistent patterns of implementation that robbed the scheme of its bona fides as a legitimate civil commitment program.

The claims in the *Karsjens* litigation covered a wide range, from freedom of speech and religion, to search and seizure, to the inadequacy of the treatment being offered. But the core claim was that the Minnesota Sex Offender Program (MSOP) systematically thwarted the central legitimizing criterion for civil commitment, the durational principle. The stark numbers provided the scaffolding for the claim: rapid, politically fueled growth in commitments, no discharges even on a conditional basis, and the highest per capita commitment rate in the nation by orders of magnitude.[45] A careful evidentiary case was built on this, culminating in six weeks of trial.

The state, on the other side, could do little to contest the uncontested evidence that the MSOP was detaining many who were not dangerous. The state's strategy was to hobble the court's authority to hold it accountable by invoking the most deferential of review standards, the "shocks-the-conscience" review of executive action under *County of Sacramento v. Lewis*.[46]

In an early motion to dismiss, the level-of-scrutiny dispute was joined. Rejecting the state's argument, the Court characterized the right to live free of physical restraint as a fundamental right invoking strict scrutiny.[47] The Court described the plaintiffs' claim as challenging "the systemic failure of the legislative, executive and judicial branches of the State to rectify the continued deficiencies with the program and to protect the rights of Plaintiffs." It acknowledged that mental health commitment is a constitutionally valid form of liberty deprivation, "provided there is no object or purpose to punish," and placed the durational principle in the center—as a matter of due process, it is "unconstitutional for a State to continue to confine a harmless, mentally ill person."[48] The Court indicated that even if the shocks-the-conscience test were the proper test, the complaint would survive a motion to dismiss.

The District Court took six weeks of testimony about the operation of the MSOP and made detailed findings supporting the conclusion that the State has constructed and operated a program of long-term confinement

45. OFF. OF LEGIS. AUDITOR: STATE OF MINNESOTA, CIVIL COMMITMENT OF SEX OFFENDERS (2011); *see also* Massopust & Borrelli, *supra* note 1.

46. *Lewis*, 523 U.S. 833 (1998).

47. Karsjens v. Jesson, 6 F.Supp.3d 916 (D. Minn. 2015), *rev'd sub nom*. Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017).

48. *Id.* at 930 n. 17.

that thwarts, in a systematic way, the duration-limiting principle of constitutional civil commitment.

The Court's analysis begins with the statute's failure to require regular assessments of risk and the need for continued confinement.[49] As a result, the State lacked systematic knowledge of which of its 700-plus wards could be appropriately placed in lower security settings.[50] The Court found it "undisputed" that non-dangerous individuals continued to be held. Perhaps most damning, it found that the State knew that there were individuals "who meet the reduction in custody criteria . . . but who continue to be confined at the MSOP."[51] The Court found that the State had actively and intentionally thwarted the duration-limitation principle, placing obstacles in the path to regaining liberty,[52] refusing to affirmatively plan for and marshal supervisory and treatment resources in the community.[53] In the end, the Court found that the State's stewardship of the MSOP followed "the influence of public opinion and political pressure on all levels of the commitment process.'"[54]

The Court concluded that the MSOP was unconstitutional facially and as-applied. Essentially, the facial analysis focused on the fact that the statute did not require periodic risk assessments. Applying strict scrutiny, the Court concluded that the statute "is unconstitutional on its face because no application of the statute provides sufficient constitutional protections to render the statute narrowly tailored and results in a punitive effect and application contrary to the purpose of civil commitment."[55] The Court held that "strict scrutiny also applied to [the] as-applied challenge because the claim involve[d] the infringement of a fundamental right." The as-applied analysis addressed the systematic failure of the state to ensure compliance with the durational principle.[56]

In hindsight, one can identify several vulnerabilities in the district court's analysis. First, its use of strict scrutiny and narrow tailoring left its

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49. Karsjens v. Jesson, 109 F.Supp.3d 1139, 1159 (D. Minn. 2015), *rev'd sub nom.* Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017).

50. *Id.*

51. *Id.* at 1164.

52. *Id.* at 1149.

53. *Id.* at 1153.

54. *Id.* at 1174 n.7.

55. *Id.* at 1170.

56. *Id.*

analysis vulnerable to the argument that the Supreme Court has never definitively specified a level of scrutiny for civil commitment cases. Second, the court marginalized the implementation evidence by bifurcating the facial and as-applied analyses, failing to explicitly include the implementation evidence as part of the facial challenge, and characterizing the implementation evidence as solely part of the as-applied claim. This allowed the appellate court to ignore the implementation evidence under the guise of a very deferential level of scrutiny.

B. Court of Appeals Decision

The Court of Appeals reversed in an opinion revealing unalloyed hostility to the constitutional claims. Its constitutional theory, if it stands, would spell the end of any meaningful judicial accountability for civil commitment laws. The Court's decision is based on three questionable moves about the applicable levels of scrutiny. First, the Court dismissed the idea that the case involved a fundamental liberty interest, which would trigger a strict scrutiny review. Second, the Court adopted a superficial, but very consequential, facial/as-applied classification and tied it to the level-of-scrutiny analysis. Third, the Court ignored altogether the District Court's findings about the systematic thwarting of the durational principle.

But the Court's analysis suffers from a deeper error, reflecting a fundamental mis-framing of the constitutional issue involved. The Court failed to address the taxonomic question, whether the systematic failure to implement the durational principle disqualified MSOP as a bona fide civil commitment scheme and, for that reason, required an inference of punitive intent.

The Court began its level-of-scrutiny analysis by pointing out that "[t]he Supreme Court has not expressly identified the proper level of scrutiny to apply when reviewing constitutional challenges to civil commitment statutes."[57] The Court acknowledged that the Supreme Court has, in several cases, used language akin to "fundamental" to describe the liberty interest curtailed in civil commitment, referencing as an example the Supreme Court's characterization of "civil commitment as a 'significant deprivation of liberty'" in *Addington*.[58]

57. Karsjens v. Piper, 845 F.3d 394, 407 (8th Cir.), *cert. denied*, 138 S. Ct. 106 (2017).
58. *Id.* (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)).

But in a key move, the Court stated that the Supreme Court "has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint."[59] The Court explained, quoting from *Hendricks*: "Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' that liberty interest is not absolute."[60] Continuing, the Court cited this language from *Hendricks*: "It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty."

Finally, the Court completed its scrutiny analysis by referencing the original articulation of the durational principle in *Jackson*: "At the least, due process requires that the nature and duration of commitment bear some *reasonable relation* to the purpose for which the individual is committed."[61] From this the Court drew the conclusion that the proper scrutiny for the facial challenge is whether there is a "rational relationship to a legitimate government purpose," a standard the Court called "highly deferential."[62] Noting that the statute allows for a confined person to petition for release, the Court concluded that rational basis is satisfied.

The Court's assertion that people who "pose a significant danger to themselves or others"[63] do not "possess a fundamental liberty interest in freedom from physical restraint" is highly problematic. It is possible to interpret the Court's pronouncements as picking out "dangerous" people, or perhaps dangerous mentally ill people, and saying that they in particular—as opposed to others—don't have a fundamental interest in their physical liberty. Under this reading, dangerous individuals—or perhaps more charitably, committed dangerous individuals—lack a fundamental interest in their own liberty. But this seems an odd and unsupportable construct. After all, strict scrutiny analysis is about determining when the state can impinge on a fundamental liberty, so it hardly makes sense to create a classification that impinges on that right—and then claim that that

59. *Id.*
60. *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).
61. *Id.* (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)).
62. *Id.* at 409.
63. *Id.* at 407.

classification is immune from the very scrutiny reserved for analyzing constraints on the right.

A more charitable (and constitutionally sound) interpretation of the Court's analysis would be this: "civil commitment" is a constitutionally allowable form of liberty deprivation for "dangerous" individuals (more precisely, mentally ill dangerous individuals). But this should have led the Court to the real question posed by the plaintiffs in *Karsjens*: whether the MSOP fit the category of valid civil commitment schemes. As is discussed more fully below, this is a categorical question of state power and purpose that the Court considered outside of the harm-balancing context of scrutiny analysis.

The Court's next step—taking the *Jackson* "reasonable relationship" and translating that to "rational basis" scrutiny—is a category mistake. The Court has taken part of the substantive criteria for a bona fide civil commitment scheme and transformed that to a similar sounding—but quite different—level of scrutiny. But more importantly, the Court uses that slight-of-hand to truncate its examination of the State's systematic failure to implement that very signal of civil commitment validity.

As argued below,[64] the Court incorrectly framed the nature of the facial challenge. It failed to recognize that the plaintiffs' systemic implementation evidence goes to the validity of the scheme, constituting a classic facial challenge based on purpose and legislative power. Instead, the Court used a questionably derived deferential level of scrutiny to avert its gaze from the scheme as implemented.

Next, the Court turned to what was styled the as-applied challenge. As has been mentioned, the real core of the plaintiffs' challenge comprised the systematic thwarting of the durational principle. The Court again sidestepped these findings and their potential consequences. In addition, the Court framed the legal context so as to generate maximum deference to the state. Holding that *County of Sacramento v. Lewis*[65] provided the correct standard of review, the Court used the most deferential standard imaginable, holding that the state's executive implementation would stand unless it shocked the conscience, as measured by whether the conduct was:

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64. See *infra* Part III.B.

65. *Lewis*, 523 U.S. 833 (1998).

> egregious or outrageous . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.[66]

The Court did not explain why the standard developed in *Lewis* to address a tort-like claim involving a high-speed police chase, should be applied to the twenty-five-year pattern of executive and judicial implementation described in the *Karsjens* findings. There is also no clear Supreme Court precedent for treating systematic and longstanding patterns of executive implementation via the *Lewis* standard.[67] But the adoption of the highly deferential standard gave the Court leave to ignore the implementation evidence, the subject of the District Court's meticulous findings. Where the District Court had seen a systematic abandonment of the durational principle, the Circuit Court was satisfied that the law provided a right to petition for discharge, and dismissed the persistent obstruction of that right on the grounds that "[t]he Supreme Court . . . has not recognized a broader due process right to appropriate or effective or reasonable treatment. . . ."[68]

The Court of Appeals decision offers states carte blanche to enact civil commitment laws with little constitutional oversight; that minimal accountability is reduced nearly to zero for the actual implementation of commitment schemes. According to the Court, anything goes so long as it is not "malicious" or "sadistic." For sure, systematic obstruction of the durational principle does not count in the Court's crabbed view of accountability.

But the Supreme Court has consistently provided for constitutional accountability in civil commitment cases, with key language strongly suggesting that the Court is committed to correcting instances of improper implementation.[69] The article turns now to a proposal for

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66. *Karsjens*, 845 F.3d at 408.

67. *See* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 994–98 (2000).

68. *Karsjens*, 845 F.3d at 410.

69. Seling v. Young, 531 U.S. 250, 265 (2001) ("State courts, in addition to federal courts, remain competent to adjudicate and remedy challenges to civil confinement schemes arising under the Federal Constitution. . . . [D]ue process requires that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed."); *see also infra*, Part III.C.

framing the constitutional issues in a way that is consistent with the Court's jurisprudence.

III. COHERENCE ON CONSTITUTIONAL DOCTRINE: BEYOND STRICT SCRUTINY

A. Rights vs. Power

1. Introduction: Validity vs. Application Contexts

The thesis of this article is that challenges to SOCC schemes, that are based on systemic failure to comply with constitutional standards, should be framed as facial validity challenges, applying a categorical, taxonomic determination of the limits of the state's civil commitment power rather than the traditional level of scrutiny and the dimensional harm balancing it entails.[70] Often articulated as a forbidden purpose analysis, this validity inquiry rests on an objective determination, whether the scheme exhibits the four characteristics of a bona fide civil commitment scheme: a mental disorder predicate, a dangerousness requirement, the provision of treatment if it is available, and adherence to the durational principle.[71] Constitutional validity requires compliance with all four criteria.

Once it is determined that a civil commitment scheme is a valid exercise of the civil commitment power, a second level of analysis emerges: what level of deference will the courts give to states implementing a valid scheme? That question is secondary to and conceptually separate from the validity question. The first context will be referred to as the validity context and the second, the application context.

The argument presented here is essentially descriptive: it attempts to reverse-engineer the Supreme Court's holdings, as well as its rhetoric, about civil commitment. A useful description of the Supreme Court's civil commitment jurisprudence must to be able to explain the following touchpoints:

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70. *See* Bhagwat, *supra* note 21, at 368 (arguing that "if the Court adopts constitutionally-rooted purpose scrutiny, it will properly invalidate improperly-motivated legislation or regulation even when the legislation falls outside the 'heightened scrutiny' tiers of the Court's current doctrine").

71. *See* Kansas v. Hendricks, 521 U.S. 346, 367–68 (1997); Foucha v. Louisiana, 504 U.S. 71, 82 (1992); O'Connor v. Donaldson, 422 U.S. 563, 570 (1975); Jackson v. Indiana, 406 U. S. 715, 738 (1972); Janus & Logan, *supra* note 18, at 321.

1. The Supreme Court has refused to approve a general "jurisprudence of prevention,"[72] a principle approving across-the-board preventive civil confinement.
2. On the contrary, when the Court has sought to answer the key question—when can the state lock a person away without using the rigid rules of the "charge and conviction paradigm"?[73]—the answer is only in a few, discrete circumstances, one of which is the traditional mental health intervention called "civil commitment."[74]
3. Some aspects of the Court's jurisprudence have the characteristics of "heightened scrutiny," and other aspects are akin to more deferential review, but the Court has never suggested that state civil commitment programs are virtually exempt from constitutional scrutiny.

Four potential frames deserve consideration as potential doctrinal explanations for the Court's civil commitment jurisprudence. The most straightforward candidate, adopted by both courts in *Karsjens*, is the usual tiered scrutiny analysis, based in part on an initial determination of whether freedom from physical restraint is a fundamental right. A variation on the fundamental rights analysis redefines the right at issue, focusing not simply on the deprivation of liberty, but on the context in which the deprivation takes place. This posits a fundamental right to be subjected to liberty deprivation only in the "charge and conviction" context of robust constitutional protections, rather than in the civil-regulatory context of relaxed protections.

Both of these approaches engage in traditional harm balancing, but both fall short as descriptors for the validity context. The other two approaches, in contrast, are categorical, and do not involve the explicit application of some specific level of scrutiny or the related balancing of harms. These approaches involve purpose analysis and a categorical conceptualization of a discrete state power. Forbidden-purpose analysis judges whether the legislative scheme has the forbidden purpose of punishment. Legislative-

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

73. *See* Brief of Law Professors as Amici Curiae in Support of Petition for Writ of Certiorari at 2–14, Karsjens v. Piper, 845 F.3d 394, 407 (8th Cir.), 2017 WL 2792543.

74. *Id.*; *see also* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("We have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement and it is on these cases."); United States v. Salerno, 481 U. S. 739, 750–51 (1987).

power analysis examines whether the scheme is a valid exercise of a specific kind of state power, the civil commitment power.

2. Freedom from Confinement as a Fundamental Right–Strict Scrutiny and Harm Balancing

We first examine the traditional fundamental-rights, heightened-scrutiny analysis under the substantive due process clause. There is good evidence that the Court is using some sort of heightened scrutiny. Justice Kennedy observed that the Court has "often subjected to heightened due process scrutiny, with regard to both purpose and duration," deprivations of physical liberty that are outside of the criminal justice paradigm.[75] On multiple occasions, the Court has made clear that states do not have plenary free rein in locking people up outside the criminal justice paradigm.[76] These substantive limits on civil commitment cannot be explained by a minimalist arbitrariness standard. And although the Supreme Court has never explicitly identified what level of scrutiny it was employing, a number of state courts have explicitly adopted a strict scrutiny approach.[77]

There are three ways in which the fundamental rights analysis does not fully explain the Court's jurisprudence. First, this analysis proves too little. It does not explain why civil preventive detention has categorical limits. As long as the goal is "compelling"—and the prevention of various forms of violence would seem to suffice—the harm-balancing calculus of strict scrutiny can

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75. *Foucha*, 504 U.S. at 86.

76. Zadvydas v. Davis, 533 U.S. 678 (2001); *Foucha*, 504 U.S. 71 (1991); Jones v. United States, 463 U.S. 354 (1983); O'Connor v. Donaldson, 422 U.S. 563 (1975); Addington v. Texas, 441 U.S. 418, 428 (197).

77. In re Norton, 123 S.W.3d 170, 176 (Mo. 2003) (*En Banc*) (applying strict scrutiny to equal protection claim challenging Missouri SVP law because civil commitment impinges on the fundamental right to liberty.); State v. Post, 541 N.W.2d 115, 122 (Wisc. 1995) (citing Roe v. Wade, 410 U.S. 113, 155) (Wisconsin SVP law restricts a fundamental liberty and thus "the challenged statute must further a compelling state interest and be narrowly tailored to serve that interest."); In re Savala, 147 Wash. App. 798 (Wash. Ct. App. 2008); In re Young, 857 P.2d 989, 1000 (Wash. 1993) (*En Banc*) (citing United States v. Uni, 481 U.S. 739, 750 (1987)); In re Moye, 22 Cal.3d 457 (Cal. 1978); Deborah L. Morris, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators-A Due Process Analysis*, 82 CORNELL L. REV. 594, 599 (1997); *See also*, In re Linehan, 557 N.W.2d 171, 181 (Minn. 1996) (reaffirming that when "the fundamental right to liberty is at stake" the commitment statute "is subject to strict scrutiny.").

easily be satisfied.[78] In particular, this analysis cannot explain why civil confinement is limited to individuals with a mental abnormality.[79] Strict scrutiny on its own does not rule out a "jurisprudence of prevention" that allows for the limitless expansion of non-criminal deprivation of liberty.[80]

On the other hand, strict scrutiny seems to prove too much. If physical confinement triggers strict scrutiny, why is the whole of criminal law exempt from such careful examination?[81] Although criminal law is highly constrained, mostly by constitutionally based procedural rules, the policy choices within the criminal law (definition of crimes, length of sentence) are not subjected to strict scrutiny.[82] Similarly, key policy choices within civil commitment schemes—such as the definition of mental disorder,[83] the precise design of treatment,[84] or the differential treatment of various classifications of commitment[85]—are not closely scrutinized either.[86] *Jackson* also requires only a "reasonable" relationship between purpose and duration.[87]

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78. *See, e.g.*, In re Young, 857 P.2d at 1001 ("It is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions.").

79. *See* Bhagwat, *supra* note 21, at 338 (noting that in "traditional strict scrutiny" analysis, "strict scrutiny seems to presume a potentially unlimited number of 'compelling government interests'" and does not provide any guidance in "evaluating the 'compellingness'" of governmental purposes.)

80. *See* Steiker, *supra* note 25; *cf.* Foucha 504 U.S. at 1787 ("It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.").

81. *See Foucha* at 1792–93 (Kennedy, J. dissenting) ("The same heightened due process scrutiny does not obtain, though, once the State has met its burden of proof and obtained an adjudication. It is well settled that upon compliance with In re Winship, the State may incarcerate on any reasonable basis." (citations omitted)); Chapman v. United States, 500 U.S. 453, 465 (1991); Williams v. Illinois, 399 U.S. 235, 243 (1970).

82. *See* Steiker, *supra* note 25.

83. Kansas v. Crane, 534 U.S. 407 (2002); McAllister, *supra* note 16.

84. *See* Youngberg v. Romeo, 457 U.S. 307, 322–23 (1982).

85. *See* Heller v. Doe, 509 U.S. 312, 319 (1993) (refusing to determine whether strict scrutiny standard applied to review of involuntary commitment statute because the respondent had argued in the lower courts that the statutory scheme was subject to a rational basis review); *cf.* People v. McKee, 47 Cal. 4th 1172 (Cal. 2010) [hereinafter *McKee I*]; People v. McKee, 207 Cal. App. 4th 1325 (Cal. 2012) [hereinafter *McKee II*] (courts applying strict scrutiny analysis to equal protection claim regarding civil commitment law differences).

86. *See, e.g.*, McAllister, *supra* note 16, at 281.

87. Jackson v. Indiana, 406 U.S. 715, 738–39 (1972).

Finally, the Eighth Circuit's no-fundamental-right, high-deference analyses fall entirely short. These minimalist doctrines cannot explain why the Supreme Court has placed clear limits on civil confinement in cases stretching back decades. Even Stephen McAllister, who co-authored the state's briefs in *Hendricks*, rejects rational-basis review. He asserts instead that the Court has applied "reasonableness" review. This view puts the burden on the state to "prove to the courts the actual purposes of the statute, that those purposes are constitutionally legitimate, and that the statute reasonably serves those purposes."[88] But aside from acknowledging that constitutional review pays attention to the "legitimacy" of the state's purposes, McAllister's framework cannot explain the particular categorical characteristics of civil commitment.

3. A Focus on Framing the Fundamental Right

A second way of framing the key validity question is suggested by *Foucha*[89] and *Crane*.[90] Both cases suggest that the fundamental interest is not the liberty deprivation itself, but rather the deprivation of liberty outside of the protections of the criminal law. The state, under this theory, would need to justify its abandonment of the "great safeguards" of criminal law. The Court put it this way in *Foucha*:

> Furthermore, . . . the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct.[91]

Similarly, in *Crane*, the Court emphasized the

> constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment "from other dangerous persons who are perhaps

88. McAllister, *supra* note 16, at 282.

89. "Furthermore, if Foucha committed criminal acts while at Feliciana, such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct." Foucha v. Louisiana, 504 U.S. 71, 82 (1992).

90. Kansas v. Crane, 534 U.S. 407 (2002).

91. *Foucha*, 504 U.S. at 82.

> more properly dealt with exclusively through criminal proceedings." That distinction is necessary lest "civil commitment" become a "mechanism for retribution or general deterrence"—functions properly those of criminal law, not civil commitment.[92]

That role, the Court suggested, would be played by the mental disorder element, which "must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."[93] In other words, to use civil commitment, the state has to prove something (mental disorder) that supports abandoning the criminal law and its protections.[94]

By insisting that civil commitment is interstitial to criminal law, the danger of an unrestrained regime of civil preventive detention is greatly diminished. The doctrine would also explain why strict scrutiny would not be applied in judging criminal laws.[95] Unfortunately, there is not much beyond those two supreme court pronouncements to support the notion that civil commitment is valid only in the interstices unreachable by the criminal law.[96]

4. Forbidden Purpose Analysis

A third approach is to understand the Court's civil commitment cases as resting on a "forbidden purpose" analysis. Any number of constitutional doctrines rest constitutional validity on the absence of some particular forbidden purpose.[97] The doctrine in civil commitment cases rests on

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92. *Crane*, 534 U.S. at 412 (citing *Hendricks*, 521 U.S., at 360).

93. *Id.*

94. *See id.*

95. Steiker, *supra* note 25, citing with approval Schulhofer, *supra* note 25, at 83–94 (arguing that "'[c]ivil' deprivation of liberty should be permissible only as a gap-filler, to solve problems that the criminal process cannot address.").

96. See Eric Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157 (1996) (arguing for a gap-filler approach to SOCC). *But see* In re Linehan, 594 N.W.2d 867 (Minn. 1999) [hereinafter *Linehan II*] (rejecting the gap-filling approach).

97. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 416 (1996) (demonstrating that "a wide range of First Amendment rules—indeed, the essential structure of the doctrine—are best and most easily understood as devices to detect the presence of illicit motive."); *see* Bhagwat, *supra* note 21.

the simple syllogism, repeated several times by the Court: "As he was not convicted, he may not be punished."[98]

Forbidden purpose analysis confounds the usual strict scrutiny/rational basis dichotomy because it does not employ the harm-balancing approach that characterizes the scrutiny cases. Thus, in forbidden purpose cases, neither a compelling interest nor means narrowly tailored to attain that interest, can redeem a scheme from a forbidden purpose.[99]

The Supreme Court has made it clear that purpose analysis—ferreting out the forbidden "purpose to punish,"[100]—is at the center of its civil commitment cases. In *Hendricks* it is the "threshold matter." In *Addington* the Court accepted a diminished standard of proof only because "[i]n a civil commitment state power is not exercised in a punitive sense."[101]

Despite its promise, this approach also seems to prove too little, at least standing on its own. If forbidden purpose analysis were the only explanation, there would be no real limit to preventive detention. As long as the government could claim a regulatory purpose—and presumably protection from harm would suffice as such purpose—confinement outside of the charge and conviction paradigm would be permitted.[102] Justice Scalia warned against such an expansive notion of preventive confinement:

> It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.[103]

But when the forbidden purpose analysis is coupled with the discrete power analysis, to which we now turn, a more coherent foundation emerges.

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98. *Foucha*, 504 U.S. at 82 n.4 (quoting Jones v. United States, 463 U.S. 354, 369 (1983)).

99. *See* Bhagwat, *supra* note 21, at 356, Figure 1. Some commentators understand strict scrutiny as a way for courts to address constitutional standards that are, at bottom, forbidden purpose standards. *But see* Kagan, *supra* note 97, at 453 ("the strict scrutiny standard—indeed, each component of it—is best understood as an evidentiary device that allows the government to disprove the implication of improper motive arising from the content-based terms of a law.").

100. *Hendricks*, 521 U.S. 346 (1997).

101. Addington v. Texas, 441 U.S. 418, 428 (1979).

102. Steiker, *supra* note 25, at 812 n.194 (arguing that the absence of punishment cannot alone account for the desirable limits on "preventive confinement").

103. *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting).

5. Discrete Power Analysis

The final approach posits a discrete state power—the civil commitment power—as the font from which civil commitment programs are authorized. As will be discussed, this power analysis is tied closely to the forbidden purpose analysis. In the discrete power analysis, the constitutional question is whether the civil commitment scheme is the sort authorized by the civil commitment power of the state. As with litigation involving the enumerated powers of the United States, the power is not plenary, and its limits are inherent, rather than arising externally from the nature of the liberty interest being infringed.[104] Thus, like the forbidden purpose theory, analysis under the discrete power rubric does not invoke harm balancing or a determination of the fundamental nature of the particular liberty interest involved.[105]

The Supreme Court has repeatedly referred to the "civil commitment power" as a discrete category of state power, separate from the state's generic and plenary power. Chief Justice Burger's discussion in *Donaldson* is illustrative.[106] He refers to the "civil commitment power" and the "historic parens patriae power."[107] He posits that each of these powers has constitutional limits[108] and that the "the justifications for one may not be invoked to rationalize another."[109] In a similar vein, the Court referred to the "parens patriae power" in both *Allen* and *Addington*, making clear that this source of state power has specific boundaries.[110]

State power is often characterized as plenary, in contrast to the "limited" powers of the federal government. Plenary state powers are constrained

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104. Franklin, *supra* note 5, at 83.

105. *Addington*, 441 U.S. at 428.

106. O'Connor v. Donaldson, 422 U.S. 563 (1975).

107. *Id.* at 583.

108. *Id.* (stating for example that the "parens patriae power . . . must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves").

109. *Donaldson*, 422 U.S. at 581–84. *See also* United States v. Comstock, 560 U.S. 126, 146 (2012) (referring to the "federal civil-commitment power"); *see also* NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982) (positing that the state has two discrete powers to confine: the criminal law power and the mental health power).

110. "The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." Allen v. Illinois, 478 U.S. 364, 373 (1986) (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)).

by the due process clause. Some of the constraints come from "fundamental" rights, specifically privileged types of actions (speech, religion, etc.), but beyond that, according to the received wisdom, the state's plenary power is limited only by a prohibition on arbitrariness via the substantive due process clause.[111]

The argument is that the limits on civil commitment cannot be explained adequately as a product of either of these due process doctrines. Rather, civil commitment is authorized by a discrete font of state power, whose boundaries arise not from a generic notion of arbitrariness, but as a corollary of the strict regime of restraints the Constitution places on the states' exercise of their criminal justice power. *Foucha* is the perfect example. Framing the constitutional question as whether the Louisiana law fits "one of those carefully limited exceptions permitted by the Due Process Clause,"[112] the Court answered in the negative: "We decline to take a similar view of a law like Louisiana's. . . ."[113] The boundaries of the civil commitment power are constitutionally required for the preservation of the legitimacy of the criminal justice system.[114] The Court looks to the age-old, and limited, form of civil commitment to define the very narrow exceptions to the charge and conviction paradigm.

6. Forbidden Purpose and Discrete Power: Understood Together

Finally, we can observe that the forbidden purpose analysis and the discrete power analysis are fundamentally linked. The Court has emphasized that avoiding a forbidden purpose is the lynchpin for validity. Yet the court considers the *bona fides* of a state's civil commitment scheme to be safe-harbor, objective proof of a suitable purpose. Again and again, the Court says that the way to determine whether liberty deprivation is punishment, is to ascertain whether it fits the criteria for civil commitment.

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111. Chesney, *supra* note 67. Jane R. Bambauerd & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 282 (2015).

112. Foucha v. Louisiana, 504 U.S. 71, 83 n.6 (1992).

113. *Id.*

114. "It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." *Id.* at 83.

This passage in *Hendricks* captures the essence of the Court's approach:

> 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.

In other words, if the confinement scheme has the characteristics of a *bona fide* civil commitment scheme, the state has negated the inference that total confinement is undertaken with punitive intent.[115]

B. Facial and As-Applied Analysis

The Eighth Circuit's opinion usefully brought to the foreground the distinction between facial and as-applied analysis. But its analysis succumbed to a superficial understanding of that complex and obscure distinction. Some clarity would help bring coherence into civil commitment jurisprudence.

First, facial challenges question the constitutional validity of a statutory scheme, whereas as-applied challenges question the use of a valid scheme in a particular manner.[116] Whether a particular legal defect falls into one category or the other is a matter of substantive law.[117]

Second, scholars generally recognize two distinct types of facial challenges. In "overbreadth" challenges, the assertion is that the legislature has sought to regulate activity that is protected from regulation. In rule-validity challenges, the challenge points to a constitutional defect with the legislative rule itself. Courts often cite the *Salerno* formulation of facial challenges: Since facial challenges are thought to assert that the enactment is invalid, it is generally thought that overbreadth challenges (at least outside of the First Amendment context) work only where every imaginable application of the rule is constitutionally inappropriate.[118] In rule-validity challenges, on the other hand, the defect in the rule itself means that it is not valid in any

115. *See id.*
116. Franklin, *supra* note 5, at 53–58.
117. *Id.* at 62–63.
118. *Id.*; United States v. Salerno, 481 U.S. 739 (1987).

circumstances, even those that might otherwise be reachable by valid rules.[119] The *Salerno* formulation, thus, is normative for overbreadth challenges but simply descriptive of rule-validity challenges.[120]

For example, in *In re Blodgett*,[121] the Minnesota Supreme Court interpreted an early challenge to Minnesota's SOCC law as an overbreadth challenge, and rejected it, essentially because it did not comply with the *Salerno* formulation for a facial challenges: "The fact that the statute has been misapplied on occasion is not a valid criticism of the statute itself. The remedy for misapplication is not to declare the statute unconstitutional but to appeal erroneous decisions and get them reversed."[122]

Valid-rule facial challenges come in two related forms. Most often, they are based on forbidden purpose analysis.[123] Sometimes these cases are based on the assertion that the legislation is outside of the delineated power of the government. Commerce clause cases fall into this latter category.[124]

Third, standard understandings of facial challenges acknowledge that they are based on statutes as written, and as authoritatively construed.[125] The ubiquitous use of implementation evidence in forbidden purpose cases suggests that the "authoritative construction" can be

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119. Franklin, *supra* note 5, at 78 ("By contrast, on the formalist conception, constitutional-powers provisions simply extend until they exhaust their own internally defined scope. Any limitations on the governmental authority conferred by a power-granting provision, therefore, are already present by negative implication in the provision's own definition, rather than being carved out as oases of privileged conduct. The court's task is to adumbrate the boundary that separates authorized from unauthorized regulation, not to excise discrete zones of exempted conduct.").

120. Franklin, *supra* note 5, at 56–57 (stating that "A valid rule facial challenge is a constitutional challenge that, if successful, satisfies Salerno's 'no set of circumstances' language. That language, however, does not set forth an application-specific method of proof or a facial challenge 'test,' but is rather a descriptive claim about a statute that on its face expresses an invalid rule of law.").

121. In re Blodgett, 510 N.W.2d 910, 915 (Minn. 1994).

122. *Id.*

123. Franklin, *supra* note 5, at 63 ("Most importantly from the point of view of this article, facial challenges often succeed where a court concludes that a statute is motivated by an impermissible legislative purpose."); Kagan, *supra* note 97; *see also* Bhagwat, *supra* note 21, at 332–33 nn.128, 129, 147, 152 (discussing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) as well as United States v. Eichman, 496 U.S. 310 (1990) (flag-burning case) as being based on forbidden purpose analysis support facial invalidation of statutes despite the fact that the conduct at issue could have been prohibited in a properly motivated statute).

124. Franklin, *supra* note 5, at 59–60.

125. *Id.* at 44.

ascertained from patterns of executive implementation as well as judicial pronouncements.[126]

Examining key cases, it is clear that the Supreme Court considers the discrete power and forbidden purpose challenges to civil commitment laws to be facial challenges. Consider *Foucha*. That case addressed a petition for release from commitment of an individual who was no longer mentally ill. The governing statute prohibited the release of dangerous people, even if they were not mentally ill.[127] The Court could have treated the case as an as-applied challenge, simply holding that this non-mentally ill individual could not be held. Since the statute could conceivably be applied to some people whose continued confinement would be proper (i.e., mentally ill and dangerous individuals), a facial challenge under an overbreadth theory would not have succeeded. But the Court treated the challenge as a discrete power challenge, identifying the statute as outside of the civil commitment power of the state, and by that reasoning held the *statute* unconstitutional.[128] This analysis is similar to the Court's analysis in other discrete power cases, notably the two commerce clause cases, *Lopez*[129] and *Morrison*,[130] in which the Court struck down statutes despite the fact that some of the conduct covered by the statute clearly could have been regulable under the commerce clause.[131]

The Court also considers forbidden purpose to be a facial defect in a civil commitment scheme. In *Seling*, the Court characterized the challenge to the "civil nature" of the statue as a facial challenge, going to the "validity of the Washington Act as a civil confinement scheme."[132] A showing of punitive purpose, the Court suggested, "undermine[s] the validity" of the statute, and would require the release of all who are held.[133] This association of forbidden purpose with facial invalidity is common in other areas of constitutional law, as well.[134]

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126. See *infra* Part III.C.

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

128. *Id.* at 84.

129. United States v. Lopez, 514 U.S. 549, 551 (1995).

130. United States v. Morrison, 529 U.S. 598, 610 (2000).

131. Franklin, *supra* note 5, at 94 ("But perhaps the best evidence that the Court is motivated by an underlying concern with legislative purpose is the fact that it adjudicates Commerce Clause cases as valid-rule facial challenges.")

132. Seling v. Young, 531 U.S. 250, 264 (2001).

133. *Id.*

134. Franklin, *supra* note 5.

This leads us to the next step of the argument, that evidence of systematic patterns of implementation is relevant in the forbidden purpose and discrete power contexts.

C. Implementation Evidence: Purpose and Pretext, Authoritative Construction

SOCC schemes are complex amalgams of authorizing legislation giving rise to brick and mortar institutions, treatment programs, community-based supervision and housing, and judicial and administrative policies and adjudications.[135] The law itself is a sketch; judgments about purpose and compliance with the limits of the civil commitment power can be made only tentatively at the beginning. The important question is whether the fully implemented scheme is a valid exercise of the state's civil commitment power.

There are three ways to think of implementation evidence. First, it can be seen as evidence of the state's real purpose. Second is to look at it as the authoritative construction of the meaning of the statute, showing that it is outside of the state's civil commitment power. This article has demonstrated that these two inquiries are tightly tied together. Third, one can view problematic implementation as the misapplication of an otherwise proper civil commitment law. The first two approaches invoke the validity context, addressing the issues of state power and purpose. The third approach invokes what has been referred to as the application context.

In multiple contexts, constitutional validity is dependent on the purpose of a governmental program,[136] and this purpose is characteristically determined by an examination of the program's actual implementation. As early as *Yick Wo v. Hopkins*, in "pass[ing] upon the validity" of an ordinance, the Court held it was "not obliged to reason from the probable to the actual . . . for the cases present the ordinances in actual operation. . . ."[137] In one of the seminal forbidden purpose cases, Justice

135. *See, e.g.*, Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1147 (describing how Minnesota's SOCC "system," originally described as a "thirty-two-month" program, "developed into indefinite and lifetime detention."); *see also* Massopust & Borrelli, *supra* note 1.

136. Franklin, *supra* note 5, at 62 ("Doctrinal tests that turn at least in part on an examination of legislative purpose are often used under the Equal Protection, Free Speech, Dormant Commerce, and Establishment Clauses.").

137. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

Stewart stated that impact is probative evidence of the government's purpose because "normally the actor is presumed to have intended the natural consequences of his deeds."[138] Forbidden purpose analysis governs in numerous constitutional contexts, and the Court has routinely looked to implementation evidence to ascertain the real, rather than sham, purpose of a governmental scheme. The list of constitutional contexts includes free-exercise,[139] search and seizure,[140] establishment of religion,[141] free speech,[142] sex discrimination,[143] and dormant commerce clause.[144] Even Justice Scalia acknowledged that implementation

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138. Washington v. Davis, 426 U.S. 229, 253 (1976) (Stewart, J., concurring).

139. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535, 540 (1993) (in determining the purpose of a facially neutral set of ordinances, "we may determine the city council's object from both direct and circumstantial evidence." "Apart from the text, the effect of a law in its real operation is strong evidence of its object.").

140. Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001) (in evaluating program to screen pregnant women for drug use, the court examined the "purpose actually served" by the policy, considering "all the available evidence in order to determine the relevant primary purpose.") City of Indianapolis v. Edmond, 531 U.S. 32, 46–47 (2000) (examining a program of drug interdiction checkpoints, searching for a forbidden purpose: "courts routinely engage in this [purpose inquiry] in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful.").

141. Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) (In the First Amendment establishment of religion context, the Court has frequently acknowledged that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."); Wallace v. Jaffee, 472 U.S. 38, 64 (1985) (Powell, J., concurring)., ("[the state's] secular purpose must be 'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.'").

142. Bhagwat, *supra* note 21, at 316–17, 348 (discussing Turner Broadcasting, in which the Supreme Court, having found that the regulations were "content-neutral," remanded for a "rigorous lower court review" as to whether the regulations "actually advanced the government's stated objectives").

143. United States v. Virginia (VMI), 116 S. Ct. 2264, 2275 (1996) (finding state's reasons for maintaining a male-only school pretextual).

144. Franklin, *supra* note 5, at 96 ("With respect to the Dormant Commerce Clause, Donald Regan has argued that the Court's decisions . . . are best explained by a principle that outlaws legislation enacted with an impermissible purpose."). David S. Day, *The "Mature" Rehnquist Court and the Dormant Commerce Clause Doctrine: The Expanded Discrimination Tier*, 52 S.D. L. Rev. 1, 10–12 (2007) (citing *Ft. Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992), as an example of the use of implementation evidence to determine forbidden purpose).

evidence could be relevant in determining whether a statute is civil or criminal in the ex post facto context.[145]

D. Remedies—and Purpose Analysis

Two final topics will complete this inquiry. First, how is it determined whether a constitutional challenge is—as a matter of substantive law—facial, in that it addresses the validity of the scheme, or as-applied, in that it addresses the appropriateness of a particular application of a valid scheme? As has been suggested, the context may well determine the intensity of constitutional scrutiny. Putting the question into the concrete context of the *Karsjens* litigation: Should the case be framed as a challenge to the validity of the Minnesota SVP scheme, or as a failure to properly implement a valid scheme? The state might rightly claim more deference in the latter context than in the former.

The preceding discussion provides the framework for an answer. Forbidden purpose challenges are typically understood as facial. So too are limited-power challenges, at least in some contexts.[146] The direct connection between the forbidden purpose and the civil commitment power analyses strengthens the argument that the latter, as well as the former, should be framed as facial challenges. It follows that a challenge should be viewed as facial where the implementation evidence is pervasive and systematic enough to establish authoritatively the state's purpose. In other words, the pattern of implementation, representing the authoritative construction of the law, places the law outside of the limited civil commitment power of the state. Implementation that is erratic or aberrational may properly be evaluated in the application context.

The second concluding topic concerns the proper remedy where the commitment scheme is declared invalid because, as implemented, it falls outside the state's civil commitment power and thus has a forbidden purpose. In general, the remedy for a facially invalid statute is to strike down the statute—by definition, it is not constitutionally enforceable in any circumstance. Could the court simply order the state to cease operating

145. Seling v. Young, 531 U.S. 250, 267–68 (2001) (Scalia, J., concurring) (acknowledging the relevance of state court approvals of "punitive" applications of a statute).

146. See discussion *supra* Part III.A.3.

with the forbidden purpose? How does the state purge itself, and un-think the wish to punish?[147]

Traditionally a daunting dilemma, the problem seems more tractable in the civil commitment context. There are objective elements that the state can implement to negate the forbidden purpose.[148] For example, the court could simply order the state to begin complying with the characteristics of a valid civil commitment law, which provide a safe harbor for purging the improper purpose.[149] This is, of course, what the court in *Karsjens* did.[150]

CONCLUSION

As a system for total deprivation of liberty, civil commitment provides an escape route from the tight constraints of the charge and conviction paradigm. The integrity of those constitutional constraints requires civil commitment boundaries that are judicially patrolled. The Eighth Circuit's *Karsjens* decision eviscerates any accountability for compliance with those boundaries. The Supreme Court's civil commitment jurisprudence demands more.

The root of the Eighth Circuit's mistake is found in its misguided mapping of substantive due process scrutiny analysis. No doubt, the Supreme Court has applied a heightened scrutiny in its civil commitment cases. But standard interest balancing is not the whole, or even the main, picture. Rather, the Court's civil commitment cases are more accurately accounted for by a dual-aspect framing: a focus on the categorical limits of the civil commitment power and the concomitant search for the forbidden purpose of punishment. These constitutional limits arise not from a generic aversion to arbitrary governmental action, nor directly from the

147. *Cf.* John Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1214–15 (1970) (arguing that constitutional invalidation on grounds of improper legislative motivation is problematic in part because it is unclear how a state could purge itself of the forbidden purpose).

148. See Kagan, *supra* note 97, at 414, suggesting that courts could "could construct and use objective tests to serve as proxies for a direct inquiry into motive."

149. See *supra* Part III.A.5.

150. Karsjens v. Jesson, 2015 WL 6561712 (2015) (First interim relief order), vacated and remanded sub nom Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017)), *cert. denied*, 138 S. Ct. 106 (2017).

fundamental nature of physical liberty. Rather, they spring from the imperative to protect the integrity of the "great safeguards" of the criminal justice system.

This framework clarifies the facial/as-applied divide. Forbidden purpose analysis goes hand-in-hand with facial invalidity. Patterns of implementation are evidence of purpose, and of the authoritative construction of vaguely worded statutory mandates. Where the bare statutory reference to the durational principle is thwarted by the complex systems of implementation, facial invalidity is no less appropriate than if the statute had demanded lifetime confinement.

The Supreme Court's civil commitment jurisprudence demands enforceable limits on civil commitment. This article has attempted to sketch a coherent approach for ascertaining and implementing those limits.

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