

# An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation

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## I. INTRODUCTION

Sexually Violent Predator (SVP) laws allow the state to deprive persons of their physical liberty using civil commitment, avoiding the tightly bounded, constitutionally circumscribed tools of criminal law. As such, they inhabit an area close to the boundary of criminal and civil justice—and of constitutionality.<sup>1</sup>

Central to the constitutional justification of SVP laws is their purpose.<sup>2</sup> A “non-punitive” or “regulatory” purpose is necessary to the constitutionality of these laws, and conversely, a punitive purpose is not allowed. Since a law’s purpose is antecedent to the particulars of its application, a bad purpose will infect all applications of the law, even those that would be allowable under a (similar) law with a proper purpose. It is for this reason that laws with an improper purpose are struck down, qualifying for the most stringent form of unconstitutionality, “facial” invalidity.<sup>3</sup>

Early decisions found SVP laws facially valid, evaluating their purposes by examining not only legislative espousals of purpose but also the presence of key statutory provisions. Like all civil commitment laws, the constitutionality of SVP laws depends on a variety of markers. These markers specify procedural rules, criteria for confinement, the provision of treatment, and the duration of confinement.<sup>4</sup> In determining purpose, courts frequently check to ensure that statutory language incorporates these markers.

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<sup>1</sup> See ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE* (2006).

<sup>2</sup> As Justice Kennedy stated in lending his qualified support to the Kansas SVP law in *Kansas v. Hendricks*, “[i]f . . . civil confinement were to become a mechanism for retribution or general deterrence . . . our precedents would not suffice to validate it.” 521 U.S. 346, 373 (1997) (Kennedy, J., concurring).

<sup>3</sup> *United States v. Salerno*, 481 U.S. 739, 745 (1987).

<sup>4</sup> We discuss these markers below, though only to give context to our discussion. Each of these aspects has a constitutional dimension, and each, therefore, is a potential hook on which to hang constitutional challenges.

In post-implementation challenges, several courts have determined that (or are considering whether) these markers are not present in the manner, or to the degree, required by the Constitution. But none of these “as-applied” evaluations have resulted in an “invalidation” of an SVP commitment law as a whole; that is, a decision that the law can no longer be applied to anyone, regardless of the facts presented by individual cases.<sup>5</sup>

In this essay, we sketch the case for such as-applied invalidation. In *Seling v. Young*,<sup>6</sup> the Supreme Court heard and rejected a plea to release a committed individual because of the manner in which the SVP law was applied to him. But *Young* left open the possibility that an SVP law might be invalidated based upon evidence of improper purpose derived from the implementation of the law, as opposed to “facial” considerations, such as language and pre-implementation findings regarding legislative intent or purpose. We also raise and sketch a related issue: how an “as-applied invalidation” claim might be successfully litigated, notwithstanding the existence of federal jurisdictional obstacles such as the abstention and fact-deference doctrines, and the requirement that federal habeas litigants first exhaust state remedies.

We begin with a short introduction to SVP laws and the constitutional context in which they are evaluated.<sup>7</sup> We then pose a thought experiment that highlights the question we seek to answer about as-applied invalidation.<sup>8</sup> This is followed by a taxonomy of constitutional challenges that distinguishes as-applied invalidation from other sorts of constitutional challenges.<sup>9</sup> We then offer a brief argument for the recognition of as-applied invalidation.<sup>10</sup> If such a claim is cognizable, it will require evidence about the aggregate and systemic patterns of the SVP programs, including the role of state courts. For a number of interacting reasons, we suggest that a federal trial court forum provides the “outside” view of the SVP system necessary to see the patterns that provide the evidence for unconstitutionality. This discussion then leads us to the final section, which briefly surveys the

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<sup>5</sup> This is the defining feature of a constitutional “invalidation” of a statute. By this standard, SVP laws have been invalidated twice, once by the Kansas Supreme Court in *In re Hendricks*, 912 P.2d 129 (Kan. 1996), and again by a Federal District Court in *Young v. Weston*, 898 F. Supp. 744 (W.D. Wash. 1995). Both judgments were reversed. *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997); *Seling v. Young*, 531 U.S. 250, 267 (2001). In addition, the dissenting judges in *In re Blodgett*, 510 N.W.2d 910, 918–26 (Minn. 1994) (upholding the constitutionality of that state’s SVP law), opined that the statute be struck as invalid. However, in all of these cases, the judges thought the statute was invalid because of its terms (rather than its actual application) and their own inferences from those terms about the statute’s purpose.

<sup>6</sup> See 531 U.S. 250 (2001) (“*Young*” will be used when referencing *Seling v. Young* in both textual sentences and footnote citations; “*Young v. Weston*” will be used when referencing that case).

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part V.

jurisdictional and doctrinal obstacles that might need to be overcome to obtain this kind of a federal forum.<sup>11</sup>

## II. SVP LAWS AND THE CONSTITUTION

### A. Overview

SVP laws are generally considered by state and federal courts<sup>12</sup> to be a legitimate, constitutional use of state power to control sexually violent behavior. SVP laws use civil commitment to confine sex offenders, generally after the completion of criminal sentences. Under most SVP laws, when a sex offender nears the end of his sentence, the agency responsible for his detention notifies the state attorney general. A review process is initiated, which, depending upon its findings, may result in the filing of a petition for the offender's commitment as an SVP. A state trial court reviews and disposes of the petition.<sup>13</sup>

### B. Constitutional Limitations on SVP Commitments

Violence (including sexual violence) is ordinarily controlled through criminal prosecution, conviction, and punishment. SVP laws provide a secondary pathway for social control, unencumbered by the strict procedural constraints circumscribing the criminal justice system. Although these protections do not apply to SVP commitments, there are nevertheless constitutional limits on SVP laws.

SVP commitments must be extraordinary. In other words, the group subject to civil commitment must be a small one, distinct and distinguishable from the group to which criminal prosecution and punishment applies.<sup>14</sup>

There are several key criteria that preserve the extraordinariness—and thereby the constitutionality—of SVP laws. First, since SVP laws are civil instruments, they must have a regulatory rather than punitive purpose; they cannot be used to punish, nor may they threaten the primacy of criminal law as our society's chosen means for dealing with antisocial behavior. The non-punitive criterion is rooted in both the substantive due process jurisprudence and the need to avoid the pitfalls of ex post facto and double jeopardy claims.

Second, SVP laws must possess the essential characteristics of civil commitment laws: the committee must be mentally disordered, dangerous to

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<sup>11</sup> See *infra* Part VI.

<sup>12</sup> See, e.g., *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *In re Linehan (Linehan IV)*, 594 N.W.2d 867 (Minn. 1999).

<sup>13</sup> See, e.g., KAN. STAT. ANN. §§ 59-29a03–59-29a21 (2006).

<sup>14</sup> See Robert F. Schopp et al., *Expert Testimony and Professional Judgment: Psychological Expertise and Commitment as a Sexual Predator After Hendricks*, 5 PSYCHOL. PUB. POL'Y & L. 120, 120–74 (1999), for a discussion of the “distinguishable” arm of this criterion.

others, provided with treatment, and committed no longer than is reasonably necessary. The targets of these laws must be distinguished not only by their dangerousness but also by their mental disorders. It is the latter that “distinguish[es] 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.”<sup>15</sup>

In short, the constitutionality of an SVP law depends on its purpose, the contours of its target (mentally disordered and dangerous), its procedures, and the provision of treatment and conditions of confinement. The latter three criteria have independent operation but also appear to be factors in making the judgment about whether the law has a proper purpose. For example, some judicial reasoning seems to suggest that an SVP law’s non-punitive purpose could be inferred from its application to an extraordinarily narrow band of the most dangerous offenders, who are distinguishable from ordinary recidivists who are appropriately dealt with in the criminal justice system, making its application the exception, not the rule. The underlying reasoning seems to be that the use of SVP laws is proper only to the extent that the laws do not excessively encroach on the role of the criminal law as the primary tool for addressing antisocial behavior and social control.

Each of these limits on the constitutionality of SVP laws is now briefly reviewed.

#### 1. Civil Commitment Cannot Be Punitive in Purpose

While the state is empowered to imprison individuals pursuant to its police power “for the purposes of deterrence and retribution[,]”<sup>16</sup> it cannot punish using civil commitment. In *Foucha v. Louisiana*, a Louisiana statute allowed the continued confinement of an insanity acquittee on the basis of his antisocial personality after officials had reported no evidence of mental illness and recommended conditional discharge. The court held that this violated due process, as *Foucha* “was not convicted, [and therefore] he may not be punished.”<sup>17</sup>

In nearly every constitutional evaluation of SVP commitments, the absence of punitive intent is a dispositive issue. In *Kansas v. Hendricks*, the absence of a punitive intent was central to the Supreme Court’s validation of the statute:

Nothing on the face of the Act suggests that the Kansas Legislature sought to create anything other than a civil commitment scheme. That manifest intent will be rejected only if *Hendricks* provides the clearest proof that the scheme is so

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<sup>15</sup> *Crane*, 534 U.S. at 413.

<sup>16</sup> *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

<sup>17</sup> *Id.*

punitive in purpose or effect as to negate Kansas' intention to deem it civil.<sup>18</sup>

## 2. Civil Commitment Must Not Threaten Primacy of Criminal Law as Tool for Addressing Antisocial Behavior

The Supreme Court established in *Hendricks*, and reaffirmed in *Crane*, that distinguishing between dangerous sex offenders subject to civil commitment and “other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings[,]”<sup>19</sup> is vital, lest “civil confinement” become a “mechanism for retribution or general deterrence”<sup>20</sup>—functions properly those of criminal law, not civil commitment. As the Minnesota Supreme Court stated: “the judiciary has a constitutional duty to intervene before civil commitment becomes the norm and criminal prosecution the exception.”<sup>21</sup>

## 3. Conditions of Committee

The target of commitment must meet two precommitment requirements to ensure compliance with substantive due process. First, the target must be dangerous.<sup>22</sup> Second, he must exhibit a constitutionally adequate mental disorder or abnormality.<sup>23</sup> In the context of SVP laws, the Supreme Court has held that this mental disorder must produce an inability to control behavior, at least to a degree sufficient to distinguish him “from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.”<sup>24</sup> Anything less will not satisfy the Constitution.

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<sup>18</sup> 521 U.S. 346, 347 (1997).

<sup>19</sup> *Id.* at 360.

<sup>20</sup> *Id.* at 373.

<sup>21</sup> *In re Linehan (Linehan III)*, 557 N.W.2d 171, 181 (Minn. 1996).

<sup>22</sup> *Hendricks*, 521 U.S. at 357–58 (stating that the Kansas SVP law requires “proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated”).

<sup>23</sup> *Id.* at 358. (“The precommitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.”).

<sup>24</sup> *Id.* at 360.

#### 4. Duration of Confinement<sup>25</sup>

In *Jackson v. Indiana*, the Court addressed the state's power to hold an individual indefinitely prior to criminal trial on the basis of mental incompetence.<sup>26</sup> The Court ordered Jackson's release from confinement, holding that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>27</sup> Thus it may be said that the duration of a civil commitment must be related to its purpose, and that, regardless of the validity of the initial commitment, its term must expire with its justification.<sup>28</sup>

#### 5. Conditions of Confinement and Right to Treatment

The statements of the Supreme Court are equivocal with respect to the contours of a constitutional right to treatment for civil committees. For example, in *O'Connor v. Donaldson*, Chief Justice Burger stated in a concurring opinion that the police power of the state applies to all dangerous persons, whether or not they possess a treatable mental disorder.<sup>29</sup> *Hendricks* and *Young* suggest that non-amenability to treatment is not a bar to state police power commitments: "[N]ot all mental conditions [are] treatable. For those individuals with untreatable conditions . . . there [is] no federal constitutional bar to their civil confinement, because the State [has] an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions."<sup>30</sup>

Nonetheless, there are clear indications that the states cannot use the police power free of a rather robust right to treatment. A state's espoused *intent* to provide treatment to committees is commonly relied upon to save SVP laws from claims that they are punitive measures, and therefore, unconstitutional. Further, postured as facial challenges, neither *Hendricks* nor *Young* addressed whether the *ongoing* commitment of dangerous individuals not amenable to treatment is constitutional.<sup>31</sup>

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<sup>25</sup> See Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 341–42 (2003), for a more complete discussion of the duration of confinement and its relationship to the right to treatment.

<sup>26</sup> 406 U.S. 715 (1972).

<sup>27</sup> *Id.* at 738. Applying this principle in *Foucha*, the Court ordered the release of an insanity acquittee who, while still dangerous, was no longer mentally ill. *Foucha v. Louisiana*, 505 U.S. 71, 83 (1992).

<sup>28</sup> *O'Connor v. Donaldson*, 422 U.S. 563, 582–83 (1995) (Burger, C.J., concurring).

<sup>29</sup> *Id.* ("There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts . . .").

<sup>30</sup> *Seling v. Young*, 531 U.S. 250, 262 (2001) (citing *Kansas v. Hendricks*, 521 U.S. 346, 366 (1997)).

<sup>31</sup> See Janus & Logan, *supra* note 25, at 345–47.

### C. Problems with Implementation

SVP laws threaten constitutional protections of liberty. Courts uphold these laws largely on the premise (and promise) that this threat is strictly limited and controlled. However, in many ways this promise has not been kept. It is not the purpose of this essay to explore in any detail the failures in the implementation of SVP laws across the country.<sup>32</sup> For our purposes, a brief précis of some of the failures is enough to suggest that the question we raise has some potential, practical importance.

The key implementation problems concern the actual standards governing commitment, the conditions of confinement (including lack of appropriate treatment), and the failure of SVP confinement schemes to release committees. With respect to the last, the most salient evidence is that the patterns of release vary wildly from state to state.<sup>33</sup> In the fourteen years since Minnesota began committing sexually violent predators, “just 24 men have met what has proved to be the only acceptable standard for release. They died.”<sup>34</sup> A former guard and counselor in the Minnesota Sex Offender Program (MSOP) commented on this unwritten standard of release, stating, “[w]e would say, ‘Another one completed treatment.’”<sup>35</sup> This suggests that release can depend more on state-specific policy decisions (influenced by politics) than on psychological judgments of mental condition and risk.

With respect to the in-use standards determining who gets chosen for commitment, some studies have suggested that the individuals picked for commitment are, as a group, riskier than those passed over for commitment.<sup>36</sup> But there is other evidence that the process is flawed, permitting the commitment of individuals whose risks are moderate, and whose “mental disorders” are non-standard inventions of experts retained by the state or the courts.<sup>37</sup> This is evidenced by some experts determining that, “‘In general, [the risk-assessment tests] are about 70 percent accurate; thus they’re wrong 30 percent of the time.’”<sup>38</sup> Further, evidence from some states shows that the patterns of commitment are significantly influenced by political decisions rather than statutory standards,<sup>39</sup> and

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<sup>32</sup> See JANUS, *supra* note 1, for a detailed discussion of the failure in implementation of SVP laws.

<sup>33</sup> *See id.*

<sup>34</sup> Larry Oakes, *Locked in Limbo*, STAR TRIB. (Minneapolis), June 8, 2008, at A1.

<sup>35</sup> *Id.*

<sup>36</sup> Karol Lucken & William Bales, *Florida's Sexually Violent Predator Program: An Examination of Risk and Civil Commitment Eligibility*, 54 CRIME & DELINQ. 95, 119–22 (2008).

<sup>37</sup> Robert A. Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357, 385–86 (2006).

<sup>38</sup> Larry Oakes, *'They're all close calls now'*, STAR TRIB. (Minneapolis), June 9, 2008, at A1 (quoting John Austin, a psychologist in St. Paul, who has testified in commitment cases since 1979).

<sup>39</sup> *See* JANUS, *supra* note 1, at 130–44.

that SVP commitments are being used to circumvent the primacy of the criminal justice system.<sup>40</sup>

The lack of treatment and punitive conditions of confinement issue has been well-documented in the *Turay* litigation in Washington State.<sup>41</sup> While the states are granted wide latitude in developing treatment programs for SVPs,<sup>42</sup> they cannot depart substantially “from accepted professional judgment, practice, or standards” without violating the constitution.<sup>43</sup> In *Turay v. Seling*, a federal district court determined that Washington’s Special Commitment Center (SCC) failed to meet professionally reasonable standards for treatment, and issued an injunction in June 1994 “to make constitutionally adequate mental health treatment available at the SCC.”<sup>44</sup> The court’s injunction was decisively affirmed upon review by the Ninth Circuit Court of Appeals.<sup>45</sup>

Finding progress slow, the court appointed a special master, nominated by the SCC, to assist in achieving compliance and report progress toward the same. Five years and seventeen progress reports later, the court found “a continuing failure to meet minimum professional standards.”<sup>46</sup> In November 1999, the court issued a contempt order based on the following findings:

[T]he continuing “failures to comply with the injunction . . . are failures to meet constitutionally required minimum professional standards for the treatment of sex offenders”; that the record showed “footdragging which has continued for an unconscionable time”; that defendants “persistently have failed to make constitutionally adequate mental health treatment available to the SCC residents, and have departed so substantially from professional minimum standards as to demonstrate that their decisions and practices were not and are not based on their professional judgment”;

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<sup>40</sup> In a case reported to one of the authors in the State of Minnesota, a young man, age eighteen, was convicted of criminal sexual conduct and kidnapping and sentenced to prison. Upon his release on parole, the county sought to commit him under the state’s SVP law. It brought two petitions, each of which was dismissed by the court. Subsequently, the man was accused of assaulting an adolescent girl. The girl recanted, then renounced the recantation. The local prosecutor refused to prosecute on the sexual assault, presumably based upon an assessment of the likelihood of conviction. A different prosecutor brought a (third) petition for commitment, introducing the evidence of the alleged assault on the adolescent girl. The man was committed.

<sup>41</sup> *Turay v. Seling*, 108 F. Supp. 2d 1148 (W.D. Wash. 2000).

<sup>42</sup> *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997).

<sup>43</sup> *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

<sup>44</sup> *Turay*, 108 F. Supp. 2d at 1152.

<sup>45</sup> *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (“Based on the numerous inadequacies noted by the district court, we find no error in the court’s conclusion that, taken as a whole, SCC still does not provide the type of treatment program that is constitutionally required for civilly-committed persons—one that gives residents a realistic opportunity to be cured or improve the mental condition for which they were confined.”).

<sup>46</sup> *Turay*, 108 F. Supp. 2d at 1152.

that defendants “have failed to take all reasonable steps within their power to comply or substantially comply with the injunction, and have intentionally disregarded the injunction’s requirements[.]”<sup>47</sup>

All of these failures were in turn ascribed to a systemic resource allocation problem.<sup>48</sup> The court’s injunction was not dissolved until March 2007, nearly fifteen years later.<sup>49</sup>

Within months of the dissolution of the injunction in *Turay v. Richards*, The New York Times published an extensive examination of sex offender treatment programs throughout the country, discovering ongoing, costly failures.<sup>50</sup> Despite the large amount of money spent, treatment programs remain “largely unproven.”<sup>51</sup> Indeed, treatment efficacy appears to be unrelated, in many instances, to release from commitment; “of . . . nine men [released in Iowa] . . . , none had completed treatment or earned the center’s recommendation for release.”<sup>52</sup> There is a continued divergence between the promise of structured, supervised treatment to differentiate the committee from the convict, and a reality in which the life of the committee might actually be the worse of the two: “Unlike prisons and other institutions, civil commitment centers receive little standard, independent oversight or monitoring; sex among offenders is sometimes rampant . . . .”<sup>53</sup>

### III. A THOUGHT EXPERIMENT—“AS-APPLIED” INVALIDITY

Suppose Omniscient Jones<sup>54</sup> reported on the existence of three parallel universes, in each of which is a country which has a constitution and constitutional jurisprudence identical to those of the United States. In each of the three, the State of X has enacted an SVP law. From here, the three universes diverge, as Jones describes:

**Universe I.** SVP-I is a law that includes all constitutionally required features and protections and clearly demonstrates a constitutionally proper purpose in its

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<sup>47</sup> *Id.* at 1153.

<sup>48</sup> *Id.* at 1154–55. (“The chief cause of non-compliance, as found in the November 15, 1999 order, has been the State’s failure to provide needed resources.”).

<sup>49</sup> See *Turay v. Richards*, No. C91-0664RSM, 2007 WL 983132 (W.D. Wash. Mar. 23, 2007).

<sup>50</sup> See generally Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1. (The New York Times estimated that state spending would reach nearly \$450 million in 2007: “The annual price of housing a committed sex offender averages more than \$100,000, compared with about \$26,000 a year for keeping someone in prison, because of the higher costs for programs, treatment and supervised freedoms.”).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Hats off to the late Professor Paul Meehl, in whose musings and writings Omniscient Jones often appeared.

legislative history. Its espoused purpose is in fact its true purpose, and the courts and executive branch officials and professionals implement the law strictly in accordance with the law and that proper purpose.

**Universe II.** SVP-II is, on its face, constitutionally defective. It clearly demonstrates a constitutionally *improper* purpose in its legislative history<sup>55</sup> and lacks the constitutionally required features and protections. State courts and executive branch implement the law in a manner consistent with its unconstitutional purpose, procedural shortcomings, and overbroad targeting. Despite the fact that SVP-II is unconstitutional on its face, it has not yet been invalidated by the courts because Universe II lacks an aggressive, independent defense bar.

**Universe III.** SVP-III is identical to SVP-I, including all constitutionally required features and protections and a constitutionally proper purpose. Its implementation, however, is identical to the implementation of SVP-II. This is because the governor of the state has issued a secret executive order to the effect that the SVP law should be implemented as if it were really punishment.<sup>56</sup> (When

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<sup>55</sup> Omniscient Jones visits the Universe II version of Westlaw, taps a few keys, and reads: “This Act is adopted specifically to ameliorate the problems caused by the strict application of the rules in criminal sexual misconduct cases. The Act adopts lowered standards of proof, reduced immunity from self-incrimination, and broadly worded criteria to give prosecutors an option for the incapacitation of alleged sex offenders whose convictions might be difficult because of the strict application of constitutional procedural protections in the criminal law. Thus, the purpose of this law is to provide society with a more readily available tool for incapacitation where the criminal law’s use might be problematic.”

Returning from the land of fantasy: A real, official Minnesota task force recommended the use of SVP laws to circumvent three problems with the criminal justice system. First, the criminal justice system requires in-court testimony to prove a crime, whereas SVP commitments make liberal use of hearsay evidence embedded in the expert testimony. Thus, the task force recommended that SVP laws can protect society against “individuals ... who may not have been convicted of a sex offense, because of the reluctance of young and/or scared victims to testify against perpetrators of sexual abuse.” Second, SVP laws circumvent the limits imposed by strict burdens of proof by allowing the confinement of individuals who “may be dangerous but evade conviction due to the high burden of proof required in criminal cases.” Third, because SVP laws are not limited by double jeopardy and ex post facto protections, they can compensate for the “comparatively short correctional sentences” for sex offenders by confining individuals after they have completed their criminal sentences. MINN. DEP’T OF HUMAN SERVICES, PSYCHOPATHIC PERSONALITIES SUBCOMM., REPORT TO THE COMMISSIONER: COMMITMENT ACT TASK FORCE 45, 48–50 (1988).

<sup>56</sup> Inadvertently sent a copy of the order by email, Omniscient Jones reads: “The new SVP law is an important new tool in the protection of public safety. A key advantage is that we can achieve the same level of incapacitation of offenders as in the criminal law (actually, a higher level of incapacitation) without being hamstrung by strict application of criminal rules. Therefore, I am advising all prosecutors to make use of the SVP law to the maximum extent possible, and especially when conviction in the criminal law might be doubtful. Further, all state employees should understand that I do not want to see any of these predators released into the community. This was an explicit campaign promise, and I do not want to be embarrassed on this issue.”

Compare this fictional memo to this real news story reporting a statement made by the Chief of Staff of the Governor of Minnesota, referring to the men committed under Minnesota’s SVP laws:

Jones tries to ascertain the true intention of the Universe III legislature, she sees nothing but haze, ambiguity, and self-delusion.)

Now, consider the outcomes of constitutional litigation challenging each of these laws. The litigants are two people whose commitments are sought under these laws: Mr. MDO (Mentally Disordered Offender) is a constitutionally appropriate target for SVP laws (i.e., he has the requisite dangerousness and mental disorder), whereas Mr. NO (Normal Offender) falls outside of the constitutionally appropriate target for these laws (he is not dangerous enough or mentally disordered in the constitutionally required manner).

In Universe I, where the law and its implementation are faithful to the Constitution, Mr. MDO and Mr. NO defend petitions seeking their commitments by raising constitutional challenges. Both seek to have the law “invalidated” on its face. These identical challenges fail. Both also claim that the law is unconstitutional *as-applied* to their respective individual circumstances. Mr. MDO’s *as-applied* claim fails. Mr. NO’s *as-applied* claim succeeds.

In Universe II it is the (unconstitutional) purpose of the law to punish sex offenders. Mr. MDO and Mr. NO both seek to have it invalidated on its face, and both prevail—neither is committed. The need for an *as-applied* challenge is obviated.

In Universe III, Mr. MDO and Mr. NO’s facial challenges fail, because the law espouses a constitutional purpose and looks constitutional. However, in its implementation, SVP-III is identical to SVP-II. Mr. NO’s *as-applied* challenge is successful, but Mr. MDO’s is not, because Mr. MDO is the sort of person to whom a *valid* SVP law could appropriately be applied.

Our thesis is that Mr. MDO ought to have a claim for *as-applied* invalidity, so that his position in Universe III (in which artful drafting gives the law the appearance of validity despite its implementation that is identical to SVP-II) is not worse than his position in Universe II (in which honest drafting makes the law’s improper purpose manifest).

#### IV. A TAXONOMY OF CONSTITUTIONAL CHALLENGES

This subject is often discussed in terms of “facial” and “*as-applied*” challenges, and it is commonly understood that, even if these constructs are not themselves always perfectly defined, they are at least clearly distinguishable from each other. As has been well described,<sup>57</sup> however, these terms and their putative distinction often create more confusion than they clear up. Fallon succinctly describes the problem:

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“The governor doesn’t want these guys to get out, and he’s made that clear ever since he was running for office.” Warren Wolfe, *Sex Offender Release Rules are Changed*, STAR TRIB. (Minneapolis), July 11, 2003, at 1B (quoting Chief of Staff Charlie Weaver).

<sup>57</sup> Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000).

[A]ll challenges to statutes arise when a particular litigant claims that a statute cannot be enforced against her. In ruling on such challenges, courts employ doctrinal tests of constitutional validity, such as “purpose” tests, “suspect-content” tests inquiring whether a regulation is closely tailored to a compelling governmental interest, and so forth. And in applying such tests to resolve particular claims, courts often engage in reasoning indicating that a statute is invalid in whole or in part, and not merely as applied. In this sense, facial challenges undoubtedly occur, and they are important. Nonetheless, it is more misleading than informative to suggest that “facial challenges” constitute a distinct category of constitutional litigation. Rather, facial challenges and invalidations are best conceptualized as incidents or outgrowths of as-applied litigation.<sup>58</sup>

Following Fallon’s suggestion, we propose a more functional taxonomy, in which the nature of the constitutional defect and the type of remedy available are the key variables. Looked at in this way, there seem to be two dimensions. The first dimension indicates whether the challenge is based on some characteristic or provision of the statute itself (we could call this “facial”), or rather, if it is based on the manner in which the statute is implemented, including some characteristic of the target of the statute’s intervention (“as-applied”). The second dimension measures whether the remedy is an invalidation of the law (resulting in the reversal of commitments, or release from custody, of all persons held subject to the law), the reversal or release of only certain individuals (and not others), or an order to fix certain deficiencies in the implementation.<sup>59</sup> Based on this 2x3 classification, we propose the following:

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<sup>58</sup> *Id.* at 1324 (footnote omitted).

<sup>59</sup> We omit damages from this taxonomy because damages seem to be available for any variety of illegal confinement or deprivation of constitutional rights.

	<b>Facial</b>	<b>As-applied</b>
<b>Invalidation</b>	(1) The purpose of the law is improper <sup>60</sup> or, occasionally, the scope of the law is too broad. <sup>61</sup>	(2) The implementation of the law demonstrates that its purpose is improper.
<b>Individual reversal/release</b>	(3)	(4) The individual falls outside of the appropriate categories <sup>62</sup> for commitment, or is held beyond the proper duration. The state fails to provide treatment after sufficient opportunity to do so. <sup>63</sup>
<b>Repair/fix problem</b>	(5) The law is overbroad or otherwise lacks the procedural and categorical limitations required by the constitution; the courts narrow the law, and apply it as narrowed. <sup>64</sup>	(6) Appropriate treatment or conditions of confinement are not provided. <sup>65</sup>

<sup>60</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 381 (1997) (Breyer, J., dissenting) (“[W]hen a State believes that treatment does exist, and then couples that admission with a legislatively required delay of such treatment until a person is at the end of his jail term (so that further incapacitation is therefore necessary), such a legislative scheme begins to look punitive.”); *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996). (“It is clear that the primary objective of the Act is to continue incarceration and not to provide treatment.”); *In re Blodgett*, 510 N.W.2d 910, 918–26 (Minn. 1994) (Wahl, J., dissenting).

<sup>61</sup> See, e.g., *Young v. Weston*, 898 F. Supp. 744, 750 (W.D. Wash. 1995) (“[T]his is not an enactment designed to provide for the commitment of dangerous mentally ill or mentally disordered persons. Rather, the Statute targets persons with ‘antisocial personality features.’ As in *Foucha*, persons within the Statute’s reach have ‘an antisocial personality, a condition that is not a mental disease and that is untreatable.’ [Foucha v. Louisiana, 504 U.S. 71, 75 (1992).] But the mere presence of antisocial personality, or other personality disorder falling short of mental illness, is constitutionally insufficient to support indefinite confinement.”) (internal citations omitted); *In re Hendricks*, 912 P.2d at 138 (“[T]o indefinitely confine as dangerous one who has a mental abnormality [as distinguished from the narrower category of mental “illness”] is constitutionally impermissible.”); *In re Blodgett*, 510 N.W.2d at 918–26 (Wahl, J., dissenting).

<sup>62</sup> *In re Hendricks*, 912 P.2d at 138 (“Therefore, as applied to Hendricks, the constitutionality of the Act depends upon a showing of dangerousness without a finding of mental illness. Clearly, the due process standard of . . . *Foucha* is not met by the Act as applied to Hendricks. We conclude that the Act violates Hendricks’ substantive due process rights.”); *In re Linehan* (Linehan I), 518 N.W.2d 609, 614 (Minn. 1994) (“There is . . . no clear and convincing evidence that appellant has an utter lack of power to control his sexual impulses.”); *In re Rodriguez*, 506 N.W.2d 660, 663 (Minn. Ct.

Key cases strongly suggest that improper purpose, if established, would support invalidation. This is Cell (1). Courts seem to ascertain purpose both from the legislative espousals of intent, and from an examination of legislative compliance with the categorical and procedural characteristics constitutionally required for civil commitment laws. That is, courts cite such compliance as evidence of proper purpose. But the converse is not always true. As is suggested in Cell (5), overbreadth and procedural inadequacy are sometimes addressed by judicial rewriting or narrowing of the statute so that it complies with constitutional requirements.

The shaded sector of the table indicates the area of interest in this article: whether evidence relating solely to the implementation of an SVP law that is sufficient to support an inference of improper purpose for the law itself can justify its invalidation.

#### V. WHY AS-APPLIED INVALIDATION SHOULD BE RECOGNIZED

There are two key reasons courts should entertain claims for as-applied invalidation in the SVP context. The first is illustrated by the thought experiment. The laws in Universes II and III result in identical confinement regimes, and yet SVP-II escapes *facial* invalidation through artful drafting. Its true purpose, the extra-legal punishment of sex offenders, *cannot be judicially discerned* until it is implemented. (After all, even Omniscient Jones is unable to ascertain the true “intent” of the legislature.) Without the remedy of as-applied invalidation, some individuals will lose their liberty pursuant to a law whose constitutionally improper purpose, were it clear, would have resulted in invalidation.

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App. 1993) (“We believe that applying the psychopathic personality statute to a nonviolent exhibitionist is beyond the intent of the statute . . .”).

<sup>63</sup> See cases cited in Janus & Logan, *supra* note 25, including *In re Linehan* (Linehan III), 557 N.W.2d 171 (Minn. 1996). See also *In re Turay*, 986 P.2d 790, 812 (Wash. 1999) (implying that release is justified if “deficiencies are ‘so punitive’ that they wholly render the application of [the SVP law] criminal rather than civil”).

<sup>64</sup> The Minnesota Supreme Court provides an example of this approach in *State ex rel. Pearson v. Probate Court of Ramsey County*, 287 N.W. 297 (Minn. 1939). The reach of the SVP law examined in that case might have been interpreted to extend to “every person guilty of sexual misconduct.” *Id.* at 302. Finding that “[s]uch a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application,” the court instead construed the law to apply to a much narrower set of persons, those who “by a habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.” *Id.* In *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 273–74 (1940), this narrowing construction was affirmed upon review by the Supreme Court. See also *Kansas v. Crane*, 534 U.S. 407 (2002); *In re Linehan* (Linehan IV), 594 N.W.2d 867 (Minn. 1999).

<sup>65</sup> See discussion in article text of *Turay v. Seling*, 108 F. Supp. 2d 1148 (W.D. Wash. 2000), *supra* Part II.C, at note 41.

The second reason is that normal as-applied challenges depend on proof that the challenger falls outside the constitutionally circumscribed definition of a committable SVP. But this definition has indeterminate boundaries, and there is ample opportunity to hide the true decision criteria behind credibility decisions, professional conclusions, and deference to trial courts. The bases for these judgments, indispensable for an evaluation of their accuracy, are effectively hidden behind conflated law-fact determinations masquerading first as “expert opinions” and then later as court or jury factual findings. Evaluated individually, judgments about mental status and risk pose as factual questions, escaping review due to fact-deference doctrine. Questions of law turn into questions of fact, and appellate review is truncated by deference to trial courts or jury findings. Battles of experts are resolved on the basis of credibility determinations, when in reality the expert opinions reflect embedded and barely hidden legal standards, as in this passage from the Court’s opinion in *Seling v. Young*: “In the state expert’s opinion, severe paraphilia constitute[s] a mental abnormality under the Act.”<sup>66</sup>

Exacerbating this systemic lack of candor is the fact that a covert punitive purpose by its nature distorts the decisions of its agents, and operates to conceal itself behind multiple layers of protection. Prosecutors, judges and experts are understandably biased against false negatives—“In my judgment it is safe to reintroduce this person back into the community, having taken into account his history of violent, sex-related crimes”—and state officials and workers may get clear signals that their professional success depends on insuring that no one is released from custody.<sup>67</sup> It is to protect against precisely this problem that laws with an improper purpose are nullified through invalidation, rather than merely hobbled through narrowing: the answer to this kind of problem can only be “no more,” not “less of the same.”

Despite the outcome in *Seling v. Young*, most members of the Court appeared to assume—or at least leave open the possibility—that evidence of a statutory scheme’s implementation might dislodge early “facial” findings of proper statutory purpose.<sup>68</sup> Repeatedly, the Justices in *Young* emphasized that the issue was whether a person held under a “civil” law could win release by proving that the law’s application to *him* was punitive. The matter before the court was not whether “respondent’s allegations, if substantiated, would be sufficient to refute the Washington Supreme Court’s conclusion that the Act is civil, and to require the release of all those confined under its authority.”<sup>69</sup> The Court’s holding was carefully worded to leave open the possibility of as-applied invalidation: “An Act, found to be civil, cannot be deemed punitive ‘as applied’ to a single individual in

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<sup>66</sup> *Seling v. Young*, 531 U.S. 250, 256 (2001).

<sup>67</sup> Patricia Lopez, *Governor Cites Bad Judgment on Rodriguez: Pawlenty Faulted Corrections Staffers in Release of Convict*, STAR TRIB. (Minneapolis), Dec. 19, 2003, at A1.

<sup>68</sup> 531 U.S. at 266–67 (O’Connor, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Scalia, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined).

<sup>69</sup> *Id.* at 264–65.

violation of the Double Jeopardy and *Ex Post Facto* Clauses and provide cause for release.”<sup>70</sup>

Note also that the Court carefully limited its holding and reasoning to claims under the Double Jeopardy and *Ex Post Facto* Clauses, explicitly leaving open the question of claims under a substantive due process theory. The former theories—especially the *Ex Post Facto* claim—turn on the nature of the law under consideration. Substantive Due Process claims, in contrast, relate to state actions, a broader category that includes executive as well as legislative acts.<sup>71</sup>

Thus there is good reason to suppose that evidence derived exclusively from the unconstitutional executive implementation of a law can support its invalidation by establishing a constitutionally improper purpose (for the law, or more broadly, for the state actions spawned by the law). A surprising source of support for this thesis is Justice Scalia’s concurrence in *Seling v. Young*.<sup>72</sup> At first reading, Scalia seems to reject out of hand the possibility, left open by the *Young* majority, that a “court may look to actual conditions of confinement and implementation of the statute to determine . . . whether a confinement scheme is civil in nature.”<sup>73</sup> According to Scalia, the resolution of the civil/criminal question “depends upon the intent of the legislature.”<sup>74</sup> The clear implication is that the “intent of the legislature,” obviously fixed in the past when the law was enacted, is not connected to the contours of post-enactment implementation.

But Scalia’s subsequent discussion belies this implication. Scalia articulated that post-enactment implementation might be connected to legislative intent—purpose—in the following way:

When, as here, a state statute is at issue, the remedy for implementation that does not comport with the civil nature of the statute is resort to the traditional state proceedings that challenge unlawful executive action; if those proceedings fail, and the state courts authoritatively interpret the state statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a *statute that on its face is civil to be criminal*.<sup>75</sup>

Thus, a statute that appears to be “civil” on its face, and is held to be “civil” by authoritative state court interpretation, might in fact turn out to be “criminal” upon subsequent inspection of its implementation.

This suggests that any given statute can be characterized as either civil or criminal, non-punitive or punitive. Most importantly to our thesis, it is evident

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<sup>70</sup> *Id.* at 267.

<sup>71</sup> See Janus & Logan, *supra* note 25.

<sup>72</sup> *Young*, 531 U.S. at 267–70 (Scalia, J., concurring).

<sup>73</sup> *Id.* at 267 (quoting majority opinion at 266) (internal quotation marks omitted).

<sup>74</sup> *Id.* at 269.

<sup>75</sup> *Id.* at 269–70 (emphasis added).

from Scalia's abovementioned discussion in *Young*, that even he believes it is possible for this characterization to change over time. It is not clear, nor may it ultimately matter, whether the post-enactment actions of the state *changed* the law's character, or merely revealed its (pre-existing) true character. The important point here is that laws might be invalidated based on their purpose—criminal or civil—and the purpose might be revealed by post-enactment implementation.<sup>76</sup> Of course, this argument is even stronger in the substantive due process context, where purpose might relate to the whole scheme (law plus implementation), rather than narrowly to the law itself.

## VI. AS-APPLIED INVALIDATION AND THE FEDERAL COURTS

The second line of inquiry that Justice Scalia's comments raise concerns the role of the federal courts in supervising the constitutionality of state deprivations of liberty. He appears to be articulating a robust form of exhaustion, at least for claims seeking to invalidate a state law: So long as state law appears to be available to remedy allegedly unconstitutional implementation, he says, litigants must resort to state courts. Federal relief is available only if state courts refuse to provide aid. He explains: "Such an approach protects federal courts from becoming enmeshed in the sort of intrusive inquiry into local conditions at state institutions that are best left to the State's own judiciary, at least in the first instance."<sup>77</sup> In this passage, Justice Scalia seems to suggest an across-the-board rule of exhaustion, placing the federal behind the state judiciary in terms of responsibility for, and to some extent authority over, the enforcement of federal constitutional rights.

Scalia acknowledges that the question of the "civil" character of a statute is, in the end, a federal question, but believes that the federal courts should play a secondary role in the assessment of this aspect of constitutionality, abstaining until it becomes clear that the state law, as established by state court holdings, is at odds with the federal constitution. The punitive implementations of the law are, initially, "ultra vires" and thus the task of policing them falls to the state. It is only if the state fails (thus, according to Scalia demonstrating that the statute itself is not "civil"—i.e., is unconstitutional) that the federal courts can step in.

Before examining the specific doctrines that might result in federal deference to state proceedings, it will be useful to recall the key teaching of *Monroe v.*

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<sup>76</sup> Scalia attaches special significance in his scenario to the fact that state courts, given the opportunity, failed to stop the "punitive" application of the law. *See id.* It is possible, that in Scalia's theory, it is the action of the courts in interpreting the law, rather than the executive in implementing it, that is the true measure of its purpose. But this is an odd conclusion. Both the courts and the executive are charged with faithful implementation of the laws of a state. Systematic patterns in the executive implementation of a legislative scheme, especially long-established patterns, seem to be evidence of its purpose and as probative as judicial decisions.

<sup>77</sup> *Id.* at 270.

*Pape*.<sup>78</sup> As a general matter, federal remedies are available for unconstitutional state actions, even if those state actions are (arguably) contrary to state law (and thus *ultra vires*), and therefore remediable in state courts.

James Monroe sued thirteen Chicago police officers for damages in federal court under § 1983<sup>79</sup> claiming violation of his federal constitutional rights. The officers moved to dismiss Monroe's claim. The District Court granted the motion and the Court of Appeals affirmed. Upon review by the Supreme Court, the officers argued that § 1983 does not apply to state actors if a state remedy is available to those injured by the state action, pointing out that the conduct of the officers violated both the Constitution and laws of Illinois, under either of which relief was available should Monroe's allegations prove true.<sup>80</sup> The Court rejected this argument, holding that state action in violation of the Constitution can be reviewed and redressed in the first instance by the federal courts, regardless of whether the government action was authorized by state law and subject to state remedy.<sup>81</sup> In other words, § 1983 litigation is not constrained by jurisprudence requiring the exhaustion of available state remedies.

Section 1983, the subject of the *Monroe* decision, was passed against the backdrop of Civil War Reconstruction:<sup>82</sup>

[C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.<sup>83</sup>

The problem was not a lack of legal bases in state law for bringing claims to remedy the evident abuses of state power. The core problem, as with SVP laws today, was that the *sub silentio* recalcitrance of state authorities committed to maintaining an unconstitutional regime completely negated the practical effectiveness of any such claim. Section 1983 therefore created a remedy against State actors "*unable or unwilling to enforce a state law.*"<sup>84</sup> But wisely, the Court did not require proof of such inability or unwillingness as a precondition to

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<sup>78</sup> 365 U.S. 167 (1961).

<sup>79</sup> 42 U.S.C. § 1983 (2006).

<sup>80</sup> *Monroe*, 365 U.S. at 172.

<sup>81</sup> *Id.* at 183.

<sup>82</sup> Section 1983 originated in the Act of April 20, 1871, also known at that time as the Ku Klux Klan Act.

<sup>83</sup> *Monroe*, 365 U.S. at 175 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 428 (1871)).

<sup>84</sup> *Id.* at 176 (emphasis added).

accessing the federal forum. “It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”<sup>85</sup>

If we accept the possibility that as-applied invalidation is a viable tool, obstacles remain to bringing this claim for relief. In the following section of the paper, we sketch a discussion of some of the obstacles to litigation seeking to invalidate an SVP law based on its implementation.

As we have suggested, this sort of challenge will be highly fact-specific, and will require the presentation of systemic or aggregate facts demonstrating patterns of implementation. State courts are integral players in the system—determining who is committed and who is released. Such decisions are based on relevant constitutional thresholds involving a complex mix of expert opinion and poorly articulated legal standards. If these key determinations are insulated from effective scrutiny, the system as a whole cannot be fairly evaluated. Scrutiny must take place in a trial court so that independent fact-finding is possible. In short, there is little hope of changing the system without the possibility of challenging SVP statutes in the Federal District Courts.

We discuss three potential obstacles to obtaining this forum: *Younger* abstention, *Pullman* abstention, and the *Preiser* doctrine. Underlying these three questions is one basic issue: whether a litigant seeking to establish as-applied invalidity of an SVP law can have an effective trial court forum in federal court.

As will be seen, each of these three doctrines places federal jurisdiction in a secondary position, required to wait in line for an initial review by state courts. As a consequence, all three, either directly or indirectly, transfer fact-finding responsibility to the state courts. At least two of the doctrines—*Younger* and *Preiser*—contain provisions waiving their application upon a demonstration that the state courts cannot, or will not, effectively grant relief despite the nominal availability of a remedy at law. A key question is how such a demonstration might be made, and a waiver obtained.

#### A. *Younger* Abstention

The essential purpose of the *Younger* abstention doctrine is to prevent federal courts from unnecessary interference in state court proceedings.<sup>86</sup> Abstention is required when (1) there is an ongoing state proceeding; (2) involving important

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<sup>85</sup> *Id.* at 183.

<sup>86</sup> *See Younger v. Harris*, 401 U.S. 37 (1971). Jurisdictional restraint serves to “prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted[.]” and maintains “a proper respect for state functions.” *Id.* at 44.

state interests; (3) that provides an adequate opportunity for review of federal claims.<sup>87</sup> The doctrine has been extended to a variety of civil proceedings.<sup>88</sup>

It seems clear that SVP proceedings involve “important state interests,” so *Younger* abstention may be avoided only upon a showing that either: (1) The federal SVP claim does not involve an ongoing state proceeding; or (2) there is no adequate opportunity for review in state court. These topics are addressed in turn.

A lawsuit seeking to enjoin the operation of an SVP program need not be postured as a challenge to an ongoing commitment proceeding. Since *Younger* abstention applies “only [to] pending state judicial proceedings[,]”<sup>89</sup> one alternative approach is to defer the federal challenge until after the commitment petition is granted. Another is to bring the federal court claim prior to the institution of commitment proceedings in the state court.<sup>90</sup>

It is unclear whether deferral of the challenge would work. It is commonly asserted that state courts have continuing jurisdiction over SVP commitments—to assure that the ongoing commitment remains valid by ordering release from commitment when its justification no longer exists.<sup>91</sup> There is some authority that this sort of continuing jurisdiction is sufficient to invoke *Younger*.<sup>92</sup> But other cases, involving systemic challenges to civil commitment schemes, have not invoked *Younger*.<sup>93</sup>

Any attempt to bring the federal claim prior to the institution of commitment proceedings will face standing and ripeness challenges,<sup>94</sup> and even if the federal

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<sup>87</sup> *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 432 (1982).

<sup>88</sup> See generally Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings—A Response to Professor Stravitz*, 58 *FORDHAM L. REV.* 173, 182–84 (1989) (enumerating civil proceedings the *Younger* doctrine has been expanded to).

<sup>89</sup> *Polykoff v. Collins*, 816 F.2d 1326, 1332 (9th Cir. 1987) (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984) and *Steffel v. Thompson*, 415 U.S. 452, 461–62 (1974)).

<sup>90</sup> *Steffel*, 415 U.S. at 472 (“Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head.”).

<sup>91</sup> See *MINN. STAT.* § 253B.18 (2006).

<sup>92</sup> In *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), a federal district court considered whether a case involving juveniles in state custody, subject to periodic hearings and reviews before the New Mexico Children’s Court, constituted “ongoing state proceedings” within the meaning of the *Younger* doctrine. “These proceedings, while admittedly less than full adversarial hearings, are judicial in nature. Moreover, they exist as long as the child remains in state custody, so they are ongoing. We hold that the continuing jurisdiction of the Children’s Court to modify a child’s disposition . . . coupled with the mandatory six-month periodic review hearings . . . constitutes an ongoing state judicial proceeding.” *Id.* at 1291.

<sup>93</sup> See, e.g., *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

<sup>94</sup> See *Allen v. Wright*, 468 U.S. 737, 750 (1984). Generally speaking, a plaintiff must demonstrate (1) the invasion of a legally protected interest which is (a) “concrete and particularized,” and (b) “actual or imminent”; (2) a “causal connection between the injury and the conduct complained of”; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations and citations omitted).

challenge is mounted before the state petition is filed, *Younger* may require abstention as soon as state authorities file the commitment petition.<sup>95</sup> The only way to meet the *Younger* “ongoing proceeding” exception may be a pre-petition preliminary injunction against the initiation of state court proceedings.<sup>96</sup> It is unlikely such an injunction would be granted given the public safety considerations involved in SVP cases.

Avoiding *Younger* thus turns upon whether there is an adequate opportunity for review through the normal channel of state court litigation with federal appellate review. As the Court stated in *Younger*, the claimant must show that “the threat to [his] federally protected rights [is] one that cannot be eliminated by his defense against a single criminal prosecution.”<sup>97</sup>

It is evident that an individual state court proceeding cannot marshal the type of evidence necessary to support a finding of systemic patterns indicative of unconstitutional purpose. The state court provides a remedy in theory only, because the unconstitutionality arises not from the individual facts, but rather from the aggregate of facts across multiple implementations of the statute.

#### B. *Pullman Abstention*

In articulating his exhaustion requirement, Justice Scalia alludes to the abstention doctrine developed in *Railroad Commission of Texas v. Pullman Co.*<sup>98</sup> *Pullman*’s main concern is to avoid unnecessary intervention by federal courts when an interpretation of ambiguous provisions of state law by state courts can easily obviate a federal constitutional claim.<sup>99</sup> In the SVP context, however, much of the implementation is the direct product of state court action. It is, after all, the state courts that control the patterns of commitments and discharges. It may well be true that state courts have not, in many cases, directly ruled on the adequacy of treatment or conditions of confinement. But these are rarely if ever the result of ambiguity in state law. Further, there is a long history of direct federal trial court review of the conditions of confinement in civil commitment schemes, all without any mention of the necessity for submitting the claims first to state courts.<sup>100</sup> In

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<sup>95</sup> *Hicks v. Miranda*, 422 U.S. 332, 349–50 (1975) (“[W]here state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force.”); *see also* *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>96</sup> *See Hicks*, 422 U.S. at 356–57 (discussing injunction generally).

<sup>97</sup> *Younger*, 401 U.S. at 37.

<sup>98</sup> 312 U.S. 496 (1941).

<sup>99</sup> *Id.* at 501 (“If there was no warrant in state law for the Commission’s assumption of authority there is an end of the litigation; the constitutional issue does not arise.”).

<sup>100</sup> *See, e.g.,* *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Wyatt v. Aderholt*, 503 F.2d 1305, 1311 (5th Cir. 1974) (pervasive unconstitutional conditions in mental institution); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974) (unconstitutional conditions in Minnesota’s institutions for the mentally retarded).

short, there is no risk of the “premature constitutional adjudication”<sup>101</sup> *Pullman* protects against. Scalia’s form of *Pullman* abstention has as its purpose simply determining whether the state courts really meant what they said when they bestowed the “civil” label on SVP laws. Such a purpose is certainly at odds with some of the bases for *all* federal judicial abstention, being both a highly inefficient use of judicial resources, and an extension of deference beyond the limits set by comity.

### C. *Preiser and Habeas*

The Supreme Court’s decision in *Preiser v. Rodriguez*<sup>102</sup> places additional obstacles in the way of an as-applied invalidation challenge. In *Preiser*, the Court held that “when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.”<sup>103</sup> If constitutional challenges to SVP laws are locked into the habeas template, the consequences are grave: First, habeas review requires exhaustion of state court remedies prior to a federal hearing. Second, and more importantly, federal habeas reviews defer to state court findings of fact,<sup>104</sup> insulating these highly problematic artifacts of state court adjudication from proper review, in turn implicating all of the systemic problems with making the key fact/law judgments discussed elsewhere in this essay.<sup>105</sup> Two questions are presented: Whether litigants using the as-applied invalidation theory will be relegated to habeas proceedings by *Preiser* and, if so, whether the crushing effects of the habeas exhaustion and fact deference doctrines might still be avoided.

A threshold question is whether *Preiser* applies to civil commitment at all. While the Supreme Court has suggested as much—“federal habeas corpus review may be available to challenge the legality of a state court order of civil commitment”<sup>106</sup>—several lower courts have made the connection explicitly. A federal judge in California’s Northern District cited *Preiser* for the proposition that “[a] petition for writ of habeas corpus is the exclusive method by which [a

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<sup>101</sup> *Pullman*, 312 U.S. at 500.

<sup>102</sup> 411 U.S. 475 (1973).

<sup>103</sup> *Id.* at 500.

<sup>104</sup> 28 U.S.C. § 2254(e)(1) (2006) (“In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”).

<sup>105</sup> See *supra* article text following note 85.

<sup>106</sup> *Duncan v. Walker*, 533 U.S. 167, 176 (2001) (citing *Francois v. Henderson*, 850 F.2d 231 (5th Cir. 1988) (“entertaining a challenge brought in a federal habeas petition under [28 U.S.C.] § 2254 to a state court’s commitment of a person to a mental institution upon a verdict of not guilty by reason of insanity”)).

California SVP committee] may challenge [his] civil commitment.”<sup>107</sup> Likewise in Florida’s Northern District, with respect to another SVP committee: “To the extent petitioner challenges the validity of his civil commitment (*i.e.*, the legality of the custody itself) and seeks immediate release, his claim arises under habeas corpus.”<sup>108</sup> The question appears fairly well-settled. As the “great and central office” of habeas is to test the legality of a *current* confinement, habeas jurisdiction would appear not to attach to a pre-petition request for relief from an SVP law.<sup>109</sup>

Assuming for the moment that habeas is the only route available for our claim, we are forced to address the exhaustion of state remedies, a precondition to any federal habeas claim.<sup>110</sup> The exhaustion requirement “serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners’ federal rights.”<sup>111</sup> As we have demonstrated, state court review tends to reinforce, rather than remediate, the systemic constitutional abuses we are seeking to root out. To avoid exhaustion, we must look to the traditional circumstances under which it is waived: a habeas application may be granted prior to the exhaustion of remedies in state court if “there is an absence of available State corrective process” or “circumstances exist that render such process ineffective to protect the rights of the applicant.”<sup>112</sup> In our view, the need to demonstrate patterns of implementation in the aggregate renders most state proceedings inadequate, since the focus in these decisions will generally be limited to whether the individual facts place the challenger within the constitutively appropriate target group for SVP laws.

Federal courts must presume that state court factual findings are correct if the petitioner received a fair hearing and the findings are supported by the record.<sup>113</sup> No such presumption applies to state court legal conclusions,<sup>114</sup> setting up a jurisprudential problem with serious ramifications for SVP litigation. As described

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<sup>107</sup> Cheek v. Schwarzenegger, No. C 07-1674 MHP, 2007 WL 2141293, at \*2 (N.D. Cal. July 25, 2007) (citing *Preiser*, 411 U.S. at 500).

<sup>108</sup> Bilal v. Hadi, No. 3:06CV326/LAC/MD, 2006 WL 2583692, at \*2 (N.D. Fla. Sep. 6, 2006) (citing *Preiser*, 411 U.S. 475); See also Banda v. N.J. Special Treatment Unit Annex, 164 Fed. App’x. 286, 287 (3d Cir. 2006) (citing *Preiser*, 411 U.S. at 500) (An SVP committee’s claim for immediate release based on allegations that he was “involuntarily committed, in violation of his civil rights, based on false information and reports, non-sex-related convictions, and deliberate misdiagnoses by defendants . . . must be sought through a petition for a writ of habeas corpus.”).

<sup>109</sup> Walker v. Wainwright, 390 U.S. 335, 336 (1968). More recently the Ninth Circuit Court of Appeals has reiterated that a court’s “authority to grant habeas relief to state prisoners is limited . . . to a person in custody pursuant to the judgment of a State court.” White v. Lambert, 370 F.3d 1002, 1007 (9th Cir. 2004) (quoting *Felker v. Turpin*, 518 U.S. 651, 662 (1996)) (internal quotations and citations omitted).

<sup>110</sup> 28 U.S.C. § 2254(b)–(c) (2006).

<sup>111</sup> Duckworth v. Serrano, 454 U.S. 1, 3 (1981).

<sup>112</sup> 28 U.S.C. § 2254(b)(1)(B).

<sup>113</sup> *Id.* § 2254(e)(1).

<sup>114</sup> Sumner v. Mata, 449 U.S. 539, 543–44 (1981).

above, the factual findings developed during SVP commitment proceedings are frequently conflation of fact and law, nearly impervious to challenge upon review.<sup>115</sup> Though the presumption of correctness generally afforded state court factual findings is well established, such the presumption is negated when those findings are mixed with conclusions of law,<sup>116</sup> and in such situations “the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard.”<sup>117</sup>

Though there is no “rule or principle that will unerringly distinguish a factual finding from a legal conclusion,”<sup>118</sup> independent review of such findings has been permitted when to do otherwise would remove from the federal courts their “primary function as an expositor of law,”<sup>119</sup> or to correct “perceived shortcomings of the trier of fact by way of bias or some other factor.”<sup>120</sup>

## VI. CONCLUSION

*Young* left open the possibility that an SVP law might be invalidated based upon evidence of improper purpose derived from the *implementation* of the law. In his concurrence, Justice Scalia, in our view, unsuccessfully attempted to confine any such relief to the normal channel of state court litigation with federal appellate review.

It is central to our argument that the state courts are themselves an integral part of the SVP commitment system and its manifold problems through their application of the law in a systematically unconstitutional manner. If their activities are hidden from effective scrutiny, the system as a whole cannot be fairly evaluated. A disinterested court must render judgment, and it must be a trial court so that independent fact-finding is possible.

When SVP laws were passed, the legislatures established commitments to protect society by confining a distinct category of sex offenders for a reasonable duration to treat and rehabilitate them. Twenty years later, the accumulated evidence derived from unconstitutional implementations belies these statutory

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<sup>115</sup> See *supra* text following note 85.

<sup>116</sup> See, e.g., *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986) (district court must examine state court record to evaluate mixed question of fact and law); *Burns v. Clusen*, 798 F.2d 931, 941 (7th Cir. 1986) (“‘mixed’ questions of law and fact are subject to independent federal review”); *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1055 (6th Cir. 1983) (“the determination of whether the admission of the hearsay statements violated Haggin’s Sixth Amendment right to confrontation is a question of law, which involves the application of legal principles to historical facts”), *cert. denied*, 464 U.S. 1071 (1984).

<sup>117</sup> *Sumner v. Mata*, 455 U.S. 591, 597 (1982).

<sup>118</sup> *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

<sup>119</sup> *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

<sup>120</sup> *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 518 (1984) (Rehnquist, J., dissenting).

espousals of purpose and intent. As-applied invalidation litigation, heard in federal district courts, is the best hope of holding states to their promises.