

**“PRISONERS OF THE MIND”?: THE INAPPROPRIATENESS OF
COMPARING THE INVOLUNTARILY COMMITTED MENTALLY
ILL TO PRETRIAL DETAINEES IN FOURTH AMENDMENT
ANALYSES**

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INTRODUCTION

In addition to substandard conditions of confinement,¹ the involuntarily committed experience a stunning lack of privacy while institutionalized.² One commentator relates a former patient’s description of life in an institution as follows:

Everything is taken from you, you share a door-less room with as many other “crazy” women as the number of beds that can be fitted in allows There is one bathroom with two (door-less, of course) toilet compartments . . . and *never, never any privacy at all*. It is also a place where patients are instantly robbed of credibility.³

Nevertheless, surprisingly little litigation has taken place over searches of psychiatric patients. One recent case, however, suggests that such claims are likely to be unsuccessful. In *Serna v. Goodno*,⁴ an entire treatment facility of “sexually dangerous persons” was subject

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1 See, e.g., Letter from Benton J. Campbell, U.S. Attorney, E.D.N.Y., & Loretta King, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, to Michael R. Bloomberg, Mayor of N.Y.C. (Jan. 15, 2009), available at http://www.justice.gov/crt/about/spl/documents/KCHC_findlet_01-30-09.pdf (noting “serious . . . sanitation issues” and other dangerous conditions in a public New York psychiatric hospital); see also Civil Rights Div. Special Litig. Sec., *Special Litigation Section Cases and Matters*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/spl/findsettle.php#CRIPA%20Findings%20Letters> (last visited May 11, 2011) (listing recent Department of Justice investigations of substandard conditions in mental health facilities in Delaware, Georgia, New Jersey, New York, Oregon, Connecticut, the District of Columbia, California, Vermont, and North Carolina).

2 E.g., Joseph O’Reilly & Bruce Sales, *Privacy for the Institutionalized Mentally Ill: Are Court-Ordered Standards Effective?*, 11 LAW & HUM. BEHAV. 41, 49–51 (1987).

3 Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1315 (1994) (alteration in original) (quoting Ann Roy, *Escape*, in MADNESS NETWORK NEWS READER 18, 21 (Sherry Hirsch et al. eds., 1974)).

4 *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009), cert. denied, 130 S. Ct. 465 (2009).

to visual body cavity searches⁵ because hospital staff suspected the presence of a cellular phone in the ward.⁶ These suspicionless searches were found to be “reasonable” under *Bell v. Wolfish*, which approved post-visitation visual body cavity searches of pretrial detainees, due to security concerns related to the possibility of accessing child pornography or contacting potential new victims.⁷ Thus, the Eighth Circuit set an alarming precedent: No individualized suspicion whatsoever is required for even intrusive body searches of the involuntarily committed.

Others have argued that in light of *Safford v. Redding*, the *Serna* court misconstrued *Bell* by not putting enough weight on the availability of less invasive alternatives to the searches at issue.⁸ *Serna*’s corollary holding that *Bell* imposes no individualized suspicion requirement is also an issue on which federal circuit opinions diverge.⁹ But even conceding that the *Serna* court interpreted *Bell* correctly, the Eighth Circuit based its comparison of pretrial detainees and the involuntarily committed on several questionable premises. The court’s reliance on the Supreme Court’s and its own prior comparisons of the involuntarily committed and pretrial detainees is misleading in light of these precedents’ holdings. The uncertain distinction between the standards articulated in *Bell* and *Hudson v. Palmer*, which governs searches of convicted prisoners, undermines the claim that *Bell* is sufficient to ensure that the involuntarily committed are treated better than convicted prisoners, as they are entitled. Most importantly, research findings belie the court’s assumptions that a civil commitment determination is a good proxy for what risk an individual poses to institutional security, and that the involuntarily committed and pretrial detainees are comparable in terms of dangerousness.

5 *Id.* at 946. As the *Serna* court described visual body cavity searches, “staff ask[] each patient to lift his genitals. Staff also instruct[] each patient to turn, bend over slightly, and spread his buttocks. There [is] no physical contact with the patients during the searches.” *Id.* at 947.

6 *Id.* at 946.

7 *Id.* at 952–53, 955.

8 See Alexis Alvarez, Note, *A Reasonable Search for Constitutional Protection in Serna v. Goodno: Involuntary Civil Commitment and the Fourth Amendment*, 44 U.C. DAVIS L. REV. 363, 377–89 (2010); see also *Safford v. Redding*, 129 S. Ct. 2633, 2642–43 (2009) (“[T]he *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.”).

9 Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 262–79 (2001); see also *infra* note 37 (discussing circuit split).

This Comment therefore argues that allowing suspicionless searches at intake and after visitation, while otherwise requiring reasonable suspicion, is more consistent with both the legal status of the involuntarily committed and empirical findings on their dangerousness. This proposal balances the traditional Fourth Amendment demand of individualized suspicion, the needs of hospital administrators, and the rights of involuntarily committed patients more fairly. Furthermore, some research on institutional violence suggests that a framework based on individualized suspicion would not be administratively unfeasible, and that such determinations could be reviewed in a way that shows deference to administrative judgment of security risks.

Part I will discuss the Fourth Amendment as applied to convicted prisoners, pretrial detainees, and the civilly committed. Part II will outline the role of individualized suspicion in Fourth Amendment jurisprudence. Part III will discuss the legal status of the involuntarily committed, particularly precedents comparing the involuntarily committed and pretrial detainees, and civilly committed patients' right to be free from punishment. Part IV will discuss the role of dangerousness in legal standards for civil commitment. Part V will discuss institutional concerns, including institutional violence and how individualized suspicion may be reconciled with the requirement that courts defer to the judgment of mental health professionals in Fourth Amendment analysis.

I. THE FOURTH AMENDMENT IN PRISONS AND MENTAL HOSPITALS

A. *Convicted Prisoners: Hudson v. Palmer*

Convicted prisoners retain any constitutional "rights not fundamentally inconsistent with imprisonment itself or . . . objectives of incarceration."¹⁰ *Hudson*, however, held that prisoners do not have a reasonable expectation of privacy in their cells under the Fourth Amendment.¹¹ In light of their confinement and the "needs and objectives of penal institutions," society does not recognize any subjective expectations of privacy prisoners continue to hold as legitimate.¹² Any search of their cells or belongings will therefore not be reviewed for reasonableness because when an individual possesses no legiti-

10 *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (citing examples of free speech and exercise of religion, due process, and freedom from cruel and unusual punishment).

11 *Id.* at 526.

12 *Id.*

mate expectation of privacy, an intrusion is not a “search” within the term’s meaning under the Fourth Amendment.¹³

Because searches of inmate property are not subject to the Fourth Amendment’s limitations, they do not need to be based on individualized suspicion, or, for that matter, reasonable.¹⁴ Even searches solely to harass inmates are permissible under the Fourth Amendment; indeed, the search at issue in *Hudson* was performed solely to harass the inmate.¹⁵ If a prisoner is subject to egregious harassment through searches, the *Hudson* Court reasoned that he may find a remedy in the Eighth Amendment instead.¹⁶ The Court dismissed the notion that a neutral search policy or individualized suspicion should be required in order to prevent harassment of inmates.¹⁷ Randomness is key to the effectiveness of prison search policies; a neutral plan would be predictable and would pose a likelihood of prisoners trying to discern the pattern—and succeeding—in order to avoid detection of contraband.¹⁸

The main objective of incarceration that limits the rights of prisoners, thus allowing for their categorical exclusion from Fourth Amendment protection, is institutional security.¹⁹ The Court pointed out three significant characteristics of the convicted inmate population that give security concerns precedence in any determination of prisoners’ rights. First, a criminal conviction represents

a demonstrated proclivity for antisocial criminal, and often violent, conduct . . . a lapse in ability to control and conform . . . behavior to the legitimate standards of society by the normal impulses of self-restraint . . . [and] an inability to regulate . . . conduct in a way that reflects either a respect for law or an appreciation of the rights of others.²⁰

13 *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

14 *Hudson*, 468 U.S. at 529–30.

15 *Id.* at 520. A later case, *Turner v. Safley*, 482 U.S. 76 (1987), announced any prison regulation is constitutionally “valid if it is reasonably related to legitimate penological interests.” *Id.* at 89; see also Antoine McNamara, Note, *The “Special Needs” of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209, 228 (2007) (explaining the rule that the Court established in *Turner*). The Supreme Court has not applied this new standard of review for prisoners’ constitutional claims in a Fourth Amendment case. *Id.* at 229. Nevertheless, this ruling would likely not reduce convicted prisoners’ Fourth Amendment rights because they are arguably less robust under *Hudson*, 468 U.S. at 526, as *Turner* requires prison regulations to relate to some prison administration interest.

16 *Hudson*, 468 U.S. at 530.

17 *Id.* at 528.

18 *Id.* at 529. For a suggestion of how a neutral search policy could also be completely random, see McNamara, *supra* note 15, at 227.

19 *Hudson*, 468 U.S. at 524.

20 *Id.* at 526.

In other words, criminal convictions justify a presumption that inmates pose a threat to institutional security because of past inability to follow rules or prior dangerous behavior. The second salient characteristic of the prison population, which reinforces the first presumption, is the vast evidence showing that violence and contraband have reached epidemic levels in U.S. prisons.²¹ Third, and perhaps most importantly, convicted prisoners are eligible for punishment. A restrictive regimen is not only consistent but also essential to accomplishing the deterrent, retributive, and correctional aims of the justice system.²²

B. Pretrial Detainees: Bell v. Wolfish

Bell articulated the Fourth Amendment standard for searches of pretrial detainees.²³ In *Bell*, pretrial detainees at a facility also housing convicted prisoners alleged that their conditions of confinement violated numerous constitutional provisions.²⁴ Their Fourth Amendment claim challenged blanket visual body cavity searches after visitation.²⁵

The Court found that pretrial detainees retain a greater expectation of privacy than convicted prisoners.²⁶ Although convicted prisoners could theoretically receive some Fourth Amendment protection, their rights are circumscribed because incursions on their

²¹ *Id.*

²² *Id.* at 524; *see also* *Bell v. Wolfish*, 441 U.S. 520, 546–47 (1979) (“[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.” (alteration in original) (citing *Pell v. Procunier*, 417 U.S. 817, 823 (1974))).

²³ *Bell* defined “pretrial detainees” as “persons who have been charged with a crime but who have not yet been tried on the charge.” 441 U.S. at 523.

²⁴ The convicted prisoners housed in the facility were awaiting transportation to federal prison, serving short sentences, or awaiting trials on additional charges. *Id.* at 524. The center also housed witnesses in protective custody and persons in contempt of court. *Id.* The pretrial detainees also claimed constitutional violations related to “overcrowded conditions, undue length of confinement . . . inadequate recreational, educational, and employment opportunities, insufficient staff, and objectionable restrictions on the purchase and receipt of personal items and books.” *Id.* at 527.

²⁵ *Id.* at 558. The inmates also challenged the reasonableness of conducting cell searches outside of their presence. *Id.* at 555. The Court held that conducting the searches outside of the inmates’ presence did not pose any additional intrusion beyond that of the searches themselves, which were not challenged. *Id.* at 557. The general Fourth Amendment standard for pretrial detainees that the Court articulated related to the facility’s visual body cavity search policy, so this Comment will only address that claim in detail. *Id.* at 558.

²⁶ *Id.* at 545 (“*A fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”).

freedom are inherent to, and justified by, the purposes of punishment.²⁷ In contrast, pretrial detainees have a right to be entirely free from punishment because they have not been convicted of a crime.²⁸ Nevertheless, so long as there has been a neutral probable cause determination,²⁹ the government interest in ensuring presence at trial and “ultimately . . . service of their sentences” justifies continued detainment.³⁰

Detention of pretrial detainees in a prison housing convicted prisoners invokes an additional strong interest in maintaining prison order. The Court emphasized that this interest is not diminished by the detainees’ pretrial rather than convicted status. In a telling footnote, the Court described characteristics of the pretrial population that create an equally substantial interest in security as there is with convicted prisoners:

There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. . . . In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates. This may be particularly true at [this facility,] . . . where the resident convicted inmates have been sentenced to only short terms of incarceration and many of the detainees face the possibility of lengthy imprisonment if convicted.³¹

Complementing this interest in institutional order is a policy of deference toward prison authorities’ judgment on issues related to day-to-day operations.³² When evaluating any constitutional claim arising from prison conditions,³³ courts will defer to administrators’ expertise unless the restriction is shown to be an “exaggerated” response to security concerns.³⁴

The Court concluded that a “reasonableness” test that is “not capable of precise definition or mechanical application” governs

27 *Id.* at 545–46 (“Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” (internal quotation marks omitted) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948))).

28 *Bell*, 441 U.S. at 534.

29 *Gerstein v. Pugh*, 420 U.S. 103, 111–14 (1975), *cited in Bell*, 441 U.S. at 534.

30 *Bell*, 441 U.S. at 534.

31 *Id.* at 546 n.28 (internal citations omitted).

32 *Id.* at 547–48; *see, e.g., Turner v. Safley*, 482 U.S. 78, 84–85 (1987).

33 *Beard v. Banks*, 548 U.S. 521, 528 (2006) (applying the *Turner* standard of deference to prison authorities in a First Amendment claim).

34 *Bell*, 441 U.S. at 547–48 (citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

searches of pretrial detainees.³⁵ Beyond the Court's invocation of the three principles above, it listed four factors to be considered: "the scope of the particular intrusion, the manner in which [the search] is conducted, the justification for initiating it, and the place in which it is conducted."³⁶ Although the Court described this holding as simply answering the question of "whether visual body-cavity inspections . . . can *ever* be conducted on less than probable cause," notably absent from its analysis is an explicit requirement of individualized suspicion.³⁷ Without any requirement of individualized suspicion, the reasonableness test, coupled with the Court's admonition in *Hudson* that abusive searches of pretrial detainees were intolerable, makes the only practical difference between the Fourth Amendment protections of prisoners and pretrial detainees a ban on harassing searches of pretrial detainees. This is particularly true in light of the Court's failure to quantify the scope of a pretrial detainee's legitimate expectation of privacy, thus providing no indication as to how much weight individual privacy concerns are to receive when balanced against institutional safety and deference to prison authorities.³⁸

³⁵ *Id.* at 559.

³⁶ *Id.*

³⁷ Helmer, *supra* note 9, at 262 ("[I]n his *Bell* concurrence, Justice Powell confirmed that the majority failed to articulate a level of cause required to strip search a detainee . . ."); *see also* Powell v. Barrett, 541 F.3d 1298, 1308 (11th Cir. 2008) ("If the [*Bell*] majority had required reasonable suspicion for body cavity inspection strip searches of pretrial detainees, Justice Powell would not have dissented at all."). The majority approach among the federal circuits interprets *Bell* as requiring some individualized suspicion because of its ambiguous characterization of the search in question as on "less than probable cause" and the presence of some suspicion in the facts of the case. Helmer, *supra* note 9, at 262–65. The plaintiff in *Serna* argued for this interpretation, also relying on a prior Eighth Circuit ruling requiring reasonable suspicion for visual body cavity searches of misdemeanor detainees. Brief of Appellant at 26, *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009) (No. 05-3441); *see also* Jones v. Edwards, 770 F.2d 739, 741–42 (8th Cir. 1985) (finding that a strip search of a misdemeanor detainee was unjustified under *Bell* in the absence of reasonable suspicion of the presence of weapons or contraband). Because the Eighth Circuit, citing *Powell*, 541 F.3d at 1298, adopted the suspicionless balancing test interpretation of *Bell* in its disposition of *Serna*, 567 F.3d 944, 950 (8th Cir. 2009), I will rely on this interpretation in my analysis of psychiatric hospital searches. Needless to say, if individualized suspicion were required for searches of all pretrial detainees, there would be no question of its requirement in searches of civilly committed patients.

³⁸ Helmer, *supra* note 9, at 260 ("[T]he *Bell* Court is unclear about what rights exist and the importance of those rights. . . . Justice Rehnquist's silence on the importance of the individual interest appears to end the balancing test without putting the weight of the individual's Fourth Amendment rights on the scale.").

C. *Involuntarily Committed Patients: Serna v. Goodno*

Plaintiff Serna was involuntarily committed as a “sexually dangerous person” through the Minnesota Sex Offender Program.³⁹ Commitment to this program occurs when a “district court finds by clear and convincing evidence that the patient is a sexual psychopathic personality . . . evidencing ‘an utter lack of power to control . . . sexual impulses’ and who ‘is likely to engage in acts of harmful sexual conduct.’”⁴⁰ The purposes of these commitments are “to provide care and treatment” and “teach detainees how to control their dangerous sexual behaviors so that they can eventually return to the community.”⁴¹ In three years of confinement, Serna had not possessed any contraband.⁴²

The incident leading to the searches at issue was the discovery of a cellular phone carrying case in a common room open to patients, staff, and some visitors.⁴³ A search of the area found no phone.⁴⁴ A surveillance video showed specific patients who had recently been in the area, but not who had dropped the case.⁴⁵ Hospital staff then immediately commenced room and visual body cavity searches of the entire facility.⁴⁶ Serna only challenged the visual body cavity searches, which he claimed were unreasonable because the staff had no basis on which to suspect him of possessing the cellular phone and did not limit their search to patients who had been in the common area or possessed contraband in the past.⁴⁷ The facility countered that it had the right to perform blanket visual body cavity searches in response to any “generalized suspicion of contraband.”⁴⁸

The Eighth Circuit asserted that in *Andrews v. Neer*, it had set forth the Fourth Amendment standard for seizures in psychiatric hospitals: objective reasonableness, the same as that applied to pretrial detainees.⁴⁹ The primary basis for imposing the same search standard for both groups was the similarity of institutional concerns over “safety

39 *Serna*, 567 F.3d at 946.

40 *Senty-Haugen v. Goodno*, 462 F.3d 876, 880 (8th Cir. 2006) (internal citation omitted).

41 *Serna*, 567 F.3d at 946 n.3 (internal quotation marks omitted).

42 *Id.* at 947.

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* (“Administrators did not focus their search efforts on the patients identified in the surveillance tape or on patients with a recent history of possessing cell phones or other contraband.”).

48 *Id.*

49 *See id.* at 948 (citing *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001)).

and security of guards,” “order,” and “efficiency of . . . operations.”⁵⁰ The court noted that the government’s justifications for confining each group are “similar”: suspects are detained before trial “if ‘no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community,’” and a person may be committed as a sexually dangerous person on a finding of “future dangerousness.”⁵¹ The court also likened its comparison of pretrial detainees and the civilly committed to that in *Youngberg v. Romeo*, where the Supreme Court made a similar analogy in determining civil committees’ liberty interests in substantive due process claims regarding conditions of confinement in psychiatric institutions.⁵² Based on its ruling in *Andrews* and the similarities between pretrial detainees and civil committees, the Eighth Circuit concluded that the same Fourth Amendment standard should apply to both groups and that *Bell* therefore governs searches of the involuntarily committed.⁵³

Deferring to the hospital administrators’ judgment, the court found that the searches were reasonable under the *Bell* standard despite their suspicionless application and the court’s concern over the immediate resort to such intrusive methods.⁵⁴ Consistent with *Bell*, the court noted the facility’s concern that cellular phones would allow patients to contact past or future victims, access child pornography, or transmit photographs of the facilities to aid in escape.⁵⁵ The staff had also found evidence that a contraband phone was in the facility, which had experienced security issues related to cellular phones in the past. Thus “concrete information and not merely . . . ‘perceived security concerns’” justified the searches, making them reasonable under the Fourth Amendment.⁵⁶

II. SUSPICIONLESS SEARCHES UNDER THE FOURTH AMENDMENT

Searches of patients’ persons such as those in *Serna* are likely the only psychiatric hospital searches that traditional Fourth Amendment doctrine does not cover. Most courts would find that civilly committed patients do not have a reasonable expectation of privacy in their belongings while in the hospital, thus removing searches of their

50 *Id.*

51 *Id.* (quoting 18 U.S.C. § 3142(e)(1); *Hince v. Keefe*, 632 N.W.2d 577, 588 (Minn. 2001)).

52 *Id.* at 949; see *Youngberg v. Romeo*, 457 U.S. 307, 320–21 (1982).

53 *Serna*, 567 F.3d at 949.

54 *Id.* at 954–55.

55 *Id.* at 953.

56 *Id.* (internal citation omitted).

property from the Fourth Amendment's coverage.⁵⁷ Moreover, if law enforcement could perform a particular warrantless search, such as a *Terry* frisk, it would be presumptively reasonable for hospital staff to do so because they have more leeway than law enforcement under the Fourth Amendment.⁵⁸ Therefore, depending on their intrusiveness, searches by hospital staff where there is at least reasonable suspicion of wrongdoing or possession of contraband may be constitutional. It is suspicionless searches of a patient's person by hospital staff that are questionable, as law enforcement could not perform such a search under nearly any circumstances.⁵⁹ Because they are unrelated to law enforcement, the "reasonableness" prong of the Fourth Amendment governs the constitutionality of these searches under either the "special needs" doctrine or what some commentators have described as the "reduced expectation of privacy" doctrine.⁶⁰

57 See John B. Wefing, *The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Cast, Same Script*, 32 SETON HALL L. REV. 769, 802 (2003) (describing the New Jersey Supreme Court's "willingness to give defendants substantially more protection than that afforded under the federal constitution or guaranteed in most other states" in *State v. Stott*, which found the involuntarily committed retain an expectation of privacy in their belongings); see also *State v. Stott*, 794 A.2d 120, 127–28 (N.J. 2002) (finding that involuntarily committed psychiatric patients have a reasonable expectation of privacy in their hospital rooms, even when those rooms are shared with other patients). See generally Marjorie A. Shields, Annotation, *Hospital as Within Constitutional Provision Forbidding Unreasonable Searches and Seizures*, 28 A.L.R. 6TH 245 (2007) (recounting cases that have held no reasonable expectation of privacy exists in hospital rooms).

58 See, e.g., *Stott*, 794 A.2d at 124, 132 (noting without objection that "hospital staff personnel regularly search the patients' rooms, including their wardrobes," and arguing that "[t]he participation of law enforcement officers transformed this search from what might have been an objectively reasonable intrusion by hospital staff into the kind of warrantless police action prohibited by our federal and State Constitutions"); Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 758 (2007) ("[T]he Court has repeatedly suggested that whether criminal proceedings are likely to result is an important consideration in deciding the legality or reasonableness of a suspicionless search.").

59 See Bascuas, *supra* note 58, at 758 ("'Ordinary' searches—those that arise in a criminal investigation—are still held to require some degree of individualized suspicion, whether probable cause or reasonable suspicion."). But see *id.* at 758–59 ("[T]he Court has allowed evidence from suspicionless checkpoints to support felony prosecutions The searches in those cases were justified as being necessary to fulfill some professed government 'special need'"); Ric Simmons, *Searching for Terrorists: Why Public Safety Is Not a Special Need*, 59 DUKE L.J. 843, 888–89 (2010) ("[T]o state that the purpose of the search is distinct from the 'normal need for law enforcement' is merely a semantic game because the special need that justifies the weaker search standard is usually nothing more than the policy justification for the original criminalization of the conduct. . . . In this sense, the suspicionless search jurisprudence is little more than an exercise in redefining the nature of criminal activity and thereby redefining the permissible methods of detecting that activity.").

60 See Derek Regensburger, *DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Requirement and the Primary Purpose Test*,

A. *The Camara-Terry Balancing Test*⁶¹

The balancing inquiries of the special needs and reduced expectation of privacy doctrines originated in *Terry v. Ohio*⁶² and *Camara v. Municipal Court of San Francisco*.⁶³ *Terry* introduced a focus on the reasonableness clause of the Fourth Amendment and created a new category of searches subject to neither the warrant nor probable cause requirements.⁶⁴ A contemporaneous case, *Camara*, was crucial to the *Terry* Court's holding.⁶⁵ While still requiring a judicially issued warrant, *Camara* held that warrants for a building inspection could be issued on less than probable cause.⁶⁶ Under *Camara*, a search may be reasonable where a valid government interest—in *Camara*, universal compliance with the housing code—justifies the intrusion.⁶⁷ In *Terry*, the Court further emphasized *Camara*'s assertion that “there is no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which the search . . . entails.”⁶⁸

The impact of *Camara* and *Terry* was to introduce an interest-balancing inquiry into Fourth Amendment analysis in lieu of a strict distinction between non-searches, searches requiring warrants and probable cause, and categorical exceptions to the warrant require-

19 ALB. L.J. SCI. & TECH. 319, 343 (2009) (distinguishing between special needs searches and searches where individuals had lessened expectations of privacy due to involvement with the criminal justice system); Simmons, *supra* note 59, at 855 (“Courts have . . . used the ‘reasonableness’ language [of the Fourth Amendment] to support exceptions to this general rule [of requiring a warrant and probable cause].”).

61 I adopt this term from Wayne R. LaFave's treatise on search and seizure. *E.g.*, 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(g) (4th ed. 2004).

62 392 U.S. 1, 29–30 (1968) (finding that preserving the security of police officers is a special concern justifying minimal “protective searches” of a suspect's outer garments when he or she is taken into custody, and outweighing a suspect's expectation of privacy).

63 387 U.S. 523, 531–33 (1967) (finding that an individual's expectation of privacy in private property is not outweighed by needs of administrative officials to perform a warrantless inspection of the property justified by time, infeasibility of obtaining a warrant, or minimal nature of demands on occupants).

64 *Terry*, 392 U.S. at 20 (“[W]e deal here with an entire rubric of police conduct . . . which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 395–96, 401–02 (1988) (describing the reasonableness balancing test developed in *Camara* and *Terry* for use in “stop-and-frisk” procedures).

65 *Terry*, 392 U.S. at 20–21 (citing *Camara*, 387 U.S. at 523, 534–35, 536–37).

66 *Camara*, 387 U.S. at 539.

67 *Id.*

68 *Terry*, 392 U.S. at 21 (citing, *inter alia*, *Camara*, 387 U.S. at 536–37).

ment.⁶⁹ Between non-searches and searches requiring a warrant falls a category of searches allowed based on “a balancing of interests where the search or seizure at issue constitutes only a minimal intrusion.”⁷⁰ *Camara* also extended the protection of the Fourth Amendment to non-criminal enforcement activities, which in turn widened the government interests that may weigh in favor of such an intrusion beyond law enforcement.⁷¹

B. *Special Needs and Reduced Expectation of Privacy Searches*

Special needs searches, loosely defined, are searches whose “primary purpose” is something other than collection of evidence for criminal prosecutions.⁷² Justice Blackmun coined this term in his concurrence in *New Jersey v. T.L.O.*,⁷³ though the reach of this doctrine has extended far beyond Blackmun’s likely intended meaning to encompass such disparate scenarios as “railroad workers, Customs Department employees, and school children,” among others.⁷⁴ If a non-law-enforcement purpose is identified, courts evaluate the search’s reasonableness under a balancing test that “undertake[s] a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.”⁷⁵

Notably, the Supreme Court recently may have created a separate exception to the warrant and probable cause requirements for probationers and parolees.⁷⁶ In *Samson v. California*,⁷⁷ the Court did not re-

69 4 LAFAVE, *supra* note 61, § 9.1.

70 3 LAFAVE, *supra* note 61, § 5.4(c).

71 *Camara*, 387 U.S. at 539.

72 *E.g.*, *Simmons*, *supra* note 59, at 887–88 (“The Court uses different language in different contexts—the search must not be ‘aimed at the discovery of evidence of crime’; it must serve ‘special needs[] beyond the normal need for law enforcement;’ or it must fulfill a purpose other than ‘general crime control’ but the requirement itself remains constant.” (alteration in original)). The “primary purpose” test is criticized for its malleability, suggesting that conclusively defining the special needs category of searches is difficult. *See, e.g.*, *Bascuas*, *supra* note 58, at 757, 759 (arguing that the “primary purpose” test creates “arbitrary” results and “can provide a convenient pretext for circumventing any requirement of individualized suspicion”).

73 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 449–50, 454, 459–60 (2007) (describing the creation of the “special needs” test and its eventual adoption by the Court).

74 Butterfoss, *supra* note 73, at 449–50, 454, 459–60 (arguing that Blackmun intended to limit the cases in which a balancing test could be used only to those where obtaining a warrant would not be feasible).

75 *Chandler v. Miller*, 520 U.S. 305, 314 (1997).

76 *See, e.g.*, *Regensburger*, *supra* note 60, at 354.

77 547 U.S. 848, 857 (2006).

quire a non-law-enforcement purpose for the searches at issue and explicitly noted that it was not deciding the cases under the special needs doctrine.⁷⁸ Whether this case marks a total abandonment of the special needs doctrine, creates an exception for searches of any individuals with a “diminished” expectation of privacy, or creates a distinct category for probationers and parolees remains to be seen.⁷⁹ Regardless, the Court applied the same interest-balancing in these cases as it has in the special needs cases, although without requiring a special government need before moving to this analysis. The Court also noted the reduced expectations of privacy of parolees and probationers when weighing their interests against the government’s to find suspicionless searches reasonable, but a diminished expectation of privacy has been a characteristic of many, if not most, groups subject to special needs searches.⁸⁰ Therefore, whether searches of the involuntarily committed fall in this or the special needs category is irrelevant to the ultimate analysis.

C. Individualized Suspicion

Traditionally, reasonableness was thought to demand some degree of individualized suspicion because of the Fourth Amendment’s roots in the colonists’ distaste for general warrants.⁸¹ The introduction of the interest-balancing framework in *Camara* and *Terry* signifi-

⁷⁸ *Id.* at 852 n.3; Butterfoss, *supra* note 73, at 492–93; Regensburger, *supra* note 60, at 355.

⁷⁹ See Butterfoss, *supra* note 73, at 492 (“If it seems radical to suggest the Court should abandon its fairly recently developed special needs doctrine and primary purpose test when evaluating suspicionless searches and seizures, one answer is that it may already have done so.”); Regensburger, *supra* note 60, at 356 (“[*Samson* and *United States v. Knights*, 534 U.S. 112 (2001),] seem to signal an end to the special needs analysis where the subject of the search has a reduced expectation of privacy, reverting back to Justice White’s application of the balancing test from *T.L.O.*”).

⁸⁰ Regensburger, *supra* note 60, at 355–56; see also Simmons, *supra* note 59, at 866–67 (“[J]ust like the schoolchildren in *T.L.O.* and the heavily regulated businesses in *Camara*, the Court noted [in *O’Connor v. Ortega*, 480 U.S. 709, 717 (1987),] that office workers have a diminished expectation of privacy in their workplace.”).

⁸¹ Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 527 (1995) (“The historical abuses associated with search and seizure practices involved broad grants of official authority pursuant to a general warrant. General warrants were the perceived evil.”); see also *Stanford v. Texas*, 379 U.S. 476, 510 (1965) (“Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws.”).

cantly relaxed the individualized suspicion requirement.⁸² In some recent cases, however, the Supreme Court has reemphasized that individualized suspicion is the norm and that suspicionless searches are limited exceptions to the Fourth Amendment.⁸³ This suggests that while individualized suspicion is not an “irreducible” component of reasonableness, a special need may not automatically defeat the presumption that it is required.⁸⁴ Yet predicting when individualized suspicion is required for these searches is a difficult task; various commentators have noted that the Court’s decisions are “*ad hoc*,”⁸⁵ produce “unpredictable and illogical results,”⁸⁶ and that the doctrine is in a “state of disarray.”⁸⁷

While this doctrinal confusion is beyond the scope of this Comment, some common characteristics of the cases in which individualized suspicion has not been required have been noted: “[A] limited intrusion on privacy, reduced expectation of privacy on the part of the subjects, and the fact that imposing a warrant requirement would be impractical and would frustrate the government purpose.”⁸⁸ Searches of psychiatric facilities clearly meet the third and second criteria, but searches of patients’ persons—much less visual body cavity searches like those in *Serna*—clearly are not “limited intrusion[s].”⁸⁹ In fact, *Bell* is the only case where a suspicionless strip-search has ever been permitted, and even suspicionless searches of the home have been limited to cases where the subjects are “convicted criminals under state supervision.”⁹⁰ In addition, although they are, in a sense,

82 Clancy, *supra* note 81, at 533 (“[T]he Court has abandoned any pretense . . . that individualized suspicion remains the preferred model for any searches and seizures to be reasonable.”); *see also id.* at 546–47.

83 *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an ‘irreducible’ component of reasonableness we have recognized only limited circumstances in which the usual rule does not apply.”) (citations omitted); *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (“The Fourth Amendment . . . generally bars officials from undertaking a search or seizure absent individualized suspicion. Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in ‘certain limited circumstances.’” (citation omitted)).

84 *See Edmond*, 531 U.S. at 37.

85 Butterfoss, *supra* note 73, at 434.

86 Bascuas, *supra* note 58, at 723.

87 Simmons, *supra* note 59, at 887.

88 *Id.* at 867–68.

89 Simmons, *supra* note 59, at 867; *see supra* note 57 and accompanying text.

90 Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67, 78 & n.87 (2007); *cf.* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 708 (2009) (“[O]utside of parolees and probationers, the special needs exception had never . . . been extended so far as to allow government searches of individuals’ homes.”).

searches of the body, the Court has also consistently portrayed the invasion drug tests pose “as minimal or even ‘negligible.’”⁹¹

Serna thus represents a departure in suspicionless search doctrine by allowing a highly intrusive search method without individualized suspicion outside the criminal justice context. Such a deviation may be warranted, but it should be so only if there are strong justifications to group involuntary civil commitments in the same category as those under criminal supervision—namely, pretrial detainees. The remaining Parts argue that the Eighth Circuit’s justifications in this regard are unconvincing.

III. LEGAL STATUS OF THE INVOLUNTARILY COMMITTED: CRITICISM OF *SERNA*’S INTERPRETATION

A. *Use of Force and Conditions of Confinement Precedents: Andrews and Youngberg*

Although the Fourth Amendment standard for the civilly committed was an issue of first impression in *Serna*, the court argued that precedent required psychiatric patients to be treated as pretrial detainees.⁹² Civil committees’ Fourth Amendment claims, however, are distinguishable from the cases that the *Serna* opinion discusses. While these cases provide some support for comparing the civilly committed and pretrial detainees, they do not mandate it. If these cases are not controlling, requiring some individualized suspicion in psychiatric hospital searches is possible.

On closer examination, *Andrews* does not seem to impose a Fourth Amendment standard for civil committees.⁹³ As the opinion pointed out, the Fourth Amendment applies to arrestees’ excessive force claims, whereas pretrial detainees must bring due process claims against excessive force.⁹⁴ Although grounded in separate constitutional rights, both groups’ claims are evaluated under the same standard: objective reasonableness.⁹⁵ It was therefore immaterial wheth-

⁹¹ Feierman & Shah, *supra* note 90, at 78 (citing *Bd. of Educ. v. Earls*, 536 U.S. 822, 823 (2002); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 658 (1995); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 626 (1989)).

⁹² *See Serna v. Goodno*, 567 F.3d 944, 948–49 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 165 (2009).

⁹³ *See id.* at 948; *Andrews v. Neer*, 253 F.3d 1051, 1060–61 (8th Cir. 2001).

⁹⁴ *Andrews*, 253 F.3d at 1060 (“[E]valuation of excessive-force claims brought by pre-trial detainees . . . [is] grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment.”).

⁹⁵ *Id.* at 1061.

er civil committees were compared to arrestees or pretrial detainees in *Andrews*, so long as the court chose objective reasonableness over the less protective Eighth Amendment standard for cruel and unusual punishment.⁹⁶

The question in *Andrews*, therefore, was *which* Amendment covers claims of excessive force in a psychiatric hospital, not how to apply the Fourth Amendment to psychiatric patients.⁹⁷ In equating pretrial detainees' and psychiatric patients' excessive force claims, the *Andrews* court found that civil committees' excessive force claims are really due process claims.⁹⁸ Nevertheless, one of the *Serna* court's most forceful arguments was the need to apply a consistent Fourth Amendment standard to both searches and seizures of psychiatric patients.⁹⁹ Because it did not actually put forth a Fourth Amendment seizure standard for civil committees in *Andrews*, however, the *Serna* court could have adopted a different search standard without risking this inconsistency.

The Eight Circuit's reliance on the Supreme Court's analogy between pretrial detainees and the civilly committed in *Youngberg* is similarly erroneous.¹⁰⁰ *Youngberg* held that "restrictions on [the] liberty" of any civilly confined person must be "reasonably related to legitimate government objectives and not tantamount to punishment."¹⁰¹ *Youngberg's* comparison of the two groups therefore does not require that they be treated identically. In fact, *Youngberg* mandates that the groups' rights differ according to the purposes of their confinement.¹⁰² *Youngberg* accords the civilly committed rights to freedom from unreasonable restraints and to "minimally adequate training" beyond those of pretrial detainees because the purpose of

⁹⁶ See *id.* at 1060–61; see also *Lewis v. Downey*, 581 F.3d 467, 473–74 (7th Cir. 2009) ("In some contexts, such as claims of deliberate indifference to medical needs, the Eighth and Fourteenth Amendment standards are essentially interchangeable. But the distinction between the two constitutional protections assumes some importance for excessive force claims because the Due Process Clause, which prohibits all 'punishment,' affords broader protection than the Eighth Amendment's protection against only punishment that is 'cruel and unusual.' (citations omitted) (quoting *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir.1996))). But see Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 329 (2010) ("Despite the distinction between pretrial detainees and convicted felons drawn by the Supreme Court, most appellate courts have required detainees alleging excessive force [under the Due Process Clause] . . . to meet the same standard that convicted felons must meet under the Eighth Amendment.").

⁹⁷ *Andrews*, 253 F.3d at 1060.

⁹⁸ *Id.* at 1060–61.

⁹⁹ *Serna v. Goodno*, 567 F.3d 944, 948 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 165 (2009).

¹⁰⁰ See *Youngberg v. Romeo*, 457 U.S. 307, 320–21 (1982); *Serna*, 567 F.3d at 949.

¹⁰¹ *Youngberg*, 457 U.S. at 320.

¹⁰² See *id.* at 320–22.

their confinement is “custodial care or compulsory treatment” as opposed to warehousing until trial.¹⁰³

B. *The Right to Be Free from Punishment*

Civil detainees face a heavy burden in challenging punitive conditions of confinement.¹⁰⁴ Nevertheless, courts reviewing these challenges have consistently emphasized *Youngberg*'s holding that a confined person not convicted of a crime is entitled to better treatment than a convicted prisoner.¹⁰⁵ This is particularly true for psychiatric patients, the purpose of whose confinement is not only incapacitation but also treatment.¹⁰⁶

Despite the difficulty of showing that conditions of confinement amount to punishment, the relevance of the right to be free from punishment in Fourth Amendment analysis should not turn on whether a search or seizure practice is so egregious as to be punitive.¹⁰⁷ Rather, the right to be free from punishment requires civil detainees to receive more Fourth Amendment protection than in a criminal setting.¹⁰⁸ If a civil committee may not be “confined in conditions identical to, similar to, or more restrictive than . . . his criminal counterparts,” then he should not be as subject to searches and seizures.¹⁰⁹ Courts that have applied a pretrial detainee standard to civil detainees' excessive force or seizure claims have relied on pre-

103 *Id.* at 321–22, 324 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); *see also* Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 327 (2003) (arguing that civilly committed sexually violent predators have rights to “substantially more than . . . mere warehousing”).

104 *See, e.g.*, *Seling v. Young*, 531 U.S. 250, 263 (2001) (rejecting “as applied” ex post facto and double jeopardy challenges to conditions of civil confinement). *See generally* Janus & Logan, *supra* note 103 (detailing the difficulties of challenging civil confinement conditions on substantive due process grounds, and proposing that civilly committed sex offenders have rights to “more than . . . warehousing” in spite of *Seling v. Young*).

105 *E.g.*, *Sharp v. Weston*, 233 F.3d 1166, 1172–73 (9th Cir. 2000) (quoting *Youngberg*, 457 U.S. at 322).

106 Janus & Logan, *supra* note 103, at 345, 347 (arguing that the police commitment power may not be invoked absent a right to treatment); Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375, 385 n.55, 386 (1982) (summarizing federal courts' stance on and the extent of scholarly argument about institutionalized persons' right to treatment).

107 *See Andrews v. Neer*, 253 F.3d 1052, 1060–61 (8th Cir. 2001).

108 *See Davis v. Rennie*, 264 F.3d 86, 99–100, 102 (1st Cir. 2001) (rejecting the shocks the conscience standard in favor of a Fourth Amendment objective reasonableness standard for involuntarily committed patients' excessive force claims because they are “in the state's custody because of mental illness, not culpable conduct”); *Andrews*, 253 F.3d at 1061.

109 *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

cisely this reasoning, likening civil commitment to pretrial detention because the excessive force standard for pretrial detainees prohibits a wider range of seizures than the Eighth Amendment.¹¹⁰

While the *Serna* court commented that there is no reason to apply different standards for searches and seizures, comparing searches of civil detainees to pretrial detainees is a poor fit because of the lesser distinction between the protections for each group.¹¹¹ The difference between application of the *Bell* standard for searches of pretrial detainees and the *Hudson* standard for convicted prisoners is unclear. For both groups, suspicionless searches related to security justifications are permissible and harassment is not. Although the *Hudson* standard indirectly allows harassment by denying prison inmates any Fourth Amendment protection, the Eighth Amendment may protect prisoners from harassing searches unrelated to prison security.¹¹² Indeed, that deference to institutional decision-making and the invocation of institutional security mandated the outcome in *Serna* despite the court's concerns over immediate resort to intrusive, blanket searches¹¹³ demonstrates the difficulty plaintiffs face in challenging search practices that fall short of harassment under *Bell*. Furthermore, even if *Bell* prohibits some searches that both *Hudson* and the Eighth Amendment would allow for prisoners, from the patient's perspective, frequent blanket searches for security purposes bear little difference from searches conducted solely for harassment; either way, the intrusion feels unjustified because of a lack of wrongdoing.¹¹⁴ *Serna* therefore prevents the involuntarily committed from using the Fourth Amendment to ensure their conditions of confinement vis-à-

110 *Davis*, 264 F.3d at 99–100, 102; *Andrews*, 253 F.3d at 1061.

111 *See Hudson v. Palmer*, 468 U.S. 517, 529–30 (1984) (holding that the Fourth Amendment does not protect prisoners because they retain no legitimate expectation of privacy, and that the protections afforded by the Eighth Amendment provide their only recourse against harassment); *Serna v. Goodno*, 567 F.3d 944, 949–50 (8th Cir. 2009) (holding that the *Bell* reasonableness test imposes no individualized suspicion requirement (citing *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Powell, J., dissenting in part))).

112 *See Hudson*, 468 U.S. at 520, 529–30 (“Our holding that respondent does not have a reasonable expectation of privacy enabling him to invoke the protections of the Fourth Amendment does not mean that he is without a remedy for calculated harassment unrelated to prison needs. . . . The Eighth Amendment always stands as a protection against ‘cruel and unusual punishments.’”); *Serna*, 567 F.3d at 950–51.

113 The court further contended that the manner in which the searches were conducted supported their reasonableness. *Serna*, 567 F.3d at 955 (noting that the searches were “conducted privately, safely, and professionally”). A complete analysis of the legal or constitutional significance of the manner in which searches are conducted in Fourth Amendment claims is outside the scope of this Comment.

114 *Cf. Butterfoss*, *supra* note 73, at 487 (“As a law abiding citizen . . . [i]t is no comfort to me that the government intrusion is merely for a ‘regulatory’ purpose.”).

vis searches are better than those of prisoners, to which their civil detainee status entitles them.¹¹⁵

This reasoning, however, could be interpreted to require courts automatically to increase the Fourth Amendment rights of the civilly committed if the rights of prisoners are expanded. For example, if the Supreme Court overruled *Hudson* and required reasonable suspicion for prison searches, civil committees could argue for requiring probable cause or warrants before a search. This outcome is obviously unacceptable if courts are required to prohibit search practices that are appropriate to the institutional setting and without which security would be severely compromised.

The fear of formalistically having to expand psychiatric patients' Fourth Amendment rights to an absurd degree to maintain their difference from prisoners, however, is more a hypothetical than a serious possibility. It is unlikely that convicted prisoners' right to privacy will ever be expanded much beyond *Hudson* because of their eligibility for punishment as well as the ongoing, serious security problems of prisons.¹¹⁶ Even if prisoners' rights were expanded in such a way that affording the civilly committed more protection would be completely impracticable, this is not the case with merely requiring individualized suspicion in searches of their persons. Moreover, courts that have addressed Fourth Amendment seizures, excessive force claims, and other challenges to confinement conditions in psychiatric hospitals agree with this reasoning and have not indicated that formalistic overexpansion of the rights of the civilly committed is a significant concern.¹¹⁷

IV. DANGEROUSNESS AND CIVIL COMMITMENT LEGAL STANDARDS

Serna's comparison of the dangerousness of the civilly committed to the dangerousness of pretrial detainees is tenuous. *Serna* is correct that they are nominally similar: a finding of "dangerousness" is required for most categories of civil mental health. Its reliance on civil commitment dangerousness findings, however, is a poor fit with Fourth Amendment reasoning.

Implicit in the court's comparison is a reference to the *Hudson* and *Bell* language asserting that the legal status of prisoners and pre-

115 See *Youngberg v. Romeo*, 457 U.S. 307, 320–21 (1982); see also *Jones v. Blanas*, 393 F.3d 913, 932 (9th Cir. 2004).

116 See *Hudson*, 468 U.S. at 526.

117 See *Jones*, 393 F.3d at 932; *Davis v. Rennie*, 264 F.3d 86, 99–101 (1st Cir. 2001); *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001).

trial detainees justifies the inference that they pose an actual danger.¹¹⁸ That is, a criminal conviction, or pending charges coupled with a finding of dangerousness, suggests that someone is likely to be a security risk in the prison setting, thus making blanket searches of these populations reasonable.¹¹⁹ But while the sexually violent predators in *Serna* were committed under a statutory finding of dangerousness, this is not a requirement in many mental health commitments. In addition, although there may be enough overlap between criminal convictions or charges and a real risk of danger to defend a blanket presumption, the connection is less convincing with regard to mental health commitments both because of what qualifies as “dangerousness” and how difficult dangerous behavior in psychiatric patients is to predict.

A. *The Incompatibility of Fourth Amendment Analysis and Legal Criteria for Civil Commitment*

Civil commitment of the mentally ill may occur under either the police or *parens patriae* powers. Involuntary civil commitment originated under the *parens patriae* power, which allows the state to hold and forcibly treat the mentally ill for their own well-being.¹²⁰ Under the police power, the state may also detain the mentally ill in the public interest to prevent them from harming themselves or others.¹²¹ As the deinstitutionalization movement and constitutional limitations on commitment of the 1960s and 1970s introduced a more legalistic civil commitment process, the police power took precedence as the basis for most psychiatric commitments.¹²²

However, presence of a *parens patriae* or police power justification does not automatically give the government the power to confine. A mentally ill person who poses no risk to himself or others may not be confined simply because treatment would be in his best interest.¹²³ Likewise, while a dangerously mentally ill person may be confined even if he is untreatable, the state may not confine a dangerous per-

118 *Hudson*, 468 U.S. at 529; *Bell v. Wolfish*, 441 U.S. 520, 546 n.28 (1979).

119 *Hudson*, 468 U.S. at 529; *Bell*, 441 U.S. at 546 n.28.

120 Developments in the Law, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207–10 (1974).

121 *Id.* at 1222–23.

122 See *Civil Commitment of the Mentally Ill*, *supra* note 120, at 1205 (“Recent statutory enactments appear to indicate a trend toward restricting involuntary civil commitment to the dangerous mentally ill and toward limiting the type and increasing the severity of harm necessary to support a finding of dangerousness.”); Rhoden, *supra* note 106, at 386–87.

123 *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

son who has neither a mental disorder nor been convicted of a crime, even if it would be in the public interest.¹²⁴ An individual must be both mentally ill and exhibit “legally relevant behavior” for his civil confinement to be legitimate.¹²⁵ More importantly, there must be a causal connection between the two.¹²⁶

There are civil commitment mechanisms in addition to the traditional findings of mental illness and danger to oneself or others. A criminal defendant may be committed if he is incompetent to stand trial—incapable of consulting with his lawyer or rationally understanding the charges and proceedings, or, put more simply, of “assisting in preparing his defense.”¹²⁷ An incompetent defendant may be held for a “reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity.”¹²⁸ Many states, however, continue to allow indefinite commitments of the incompetent without a finding of dangerousness, even though *Jackson v. Indiana* held it unconstitutional.¹²⁹

A person found not guilty by reason of insanity (“NGRI”) may also be civilly committed not only after an acquittal for minor charges, but also for longer than the maximum prison sentence for the underlying offense.¹³⁰ A state may confine an NGRI acquittee until he is no longer mentally ill or no longer dangerous—even if confinement turns out to be permanent.¹³¹ The Supreme Court has held, however, that the proof of the elements of a criminal offense required to raise the affirmative defense of insanity is enough to show that an individual is

124 *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). *But see id.* at 87–88 (O’Connor, J., concurring) (“It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee’s continuing dangerousness.”); Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 607 n.8 (1981).

125 Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 193 (1999).

126 *Id.*

127 *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *Dusky v. United States*, 362 U.S. 402, 402 (1960); *see also* Bruce J. Winick, *Restructuring Incompetency to Stand Trial*, 32 UCLA L. REV. 921, 923–25 (1985).

128 *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Commitment may be extended if there is a dangerousness finding after the defendant may no longer be held for the purpose of ascertaining competency. *Id.*

129 Michael L. Perlin, “*For the Misdemeanor Outlaw*”: *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 204 (2000) (“Astoundingly, more than half the states allow for the indefinite commitment of incompetent-to-stand-trial defendants, in spite of *Jackson’s* specific language outlawing this practice.”).

130 *Jones v. United States*, 463 U.S. 354, 368 (1983).

131 *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992); *Jones*, 463 U.S. at 368.

sufficiently dangerous to be committed.¹³² Dangerousness is not synonymous with violence in the civil commitment context but also may include non-violent antisocial conduct.¹³³ In contrast to competency, therefore, insanity acquittees may be committed automatically on the basis of their NGRI verdict, without an additional finding of dangerousness.¹³⁴ In addition, states may later place the burden on the defendant to prove he is no longer dangerous enough to be confined.¹³⁵

Finally, an increasing number of individuals are civilly committed as “sexually dangerous” or “sexually violent.”¹³⁶ The Minnesota statute in *Serna* is typical,¹³⁷ requiring commitment after completion of a criminal sentence for a sex offense if clear and convincing evidence shows a “lack of power to control . . . sexual impulses and . . . [likelihood of continuing] to engage in acts of harmful sexual conduct.”¹³⁸ Sexual offenses leading to eligibility for these commitments need not be physically violent, however, or even particularly serious.¹³⁹ Yet the Supreme Court approved these types of commitments in *Kansas v. Hendricks*¹⁴⁰ and later *Kansas v. Crane*¹⁴¹ on the basis of the requirement that an offender is dangerous and has a “mental abnormalit[y] . . . that inhibit[s] self-control”—even when that “men-

132 *Jones*, 463 U.S. at 364.

133 *Id.* at 365 n.14.

134 *Id.* at 365–67.

135 *Cf. id.* at 355–57, 370 (upholding a statute requiring an insanity acquittee to prove by a preponderance that he is not mentally ill and dangerous to be eligible for release).

136 *E.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 302, 120 Stat. 587, 620 (codified at 18 U.S.C. § 4248 (2006)) (“If, after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person”); IOWA CODE § 229A.1 (2010) (“[T]he general assembly finds that a civil commitment procedure for the long-term care and treatment of the sexually violent predator is necessary.”). For a history of sex offender commitment statutes, see Peter C. Pfaffenroth, Note, *The Need for Coherence: States’ Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, 55 STAN. L. REV. 2229, 2235–39 (2003).

137 MINN. STAT. § 253B.02 (2010); see *Serna v. Goodno*, 567 F.3d 944, 946 (8th Cir. 2009) (citing *Senty-Haugen v. Goodno*, 462 F.3d 876, 880–81 (8th Cir. 2006)), *cert. denied* 130 S. Ct. 165 (2009).

138 *Senty-Haugen*, 462 F.3d at 880.

139 *E.g.* KAN. STAT. ANN. § 59-29a02 (2008) (including any criminal act committed “for the purpose of the defendant’s sexual gratification” in the list of offenses creating eligibility for sexually violent predator commitment); see also Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1, available at <http://www.nytimes.com/2007/03/04/us/04civil.html> (“Sex offenders selected for commitment are not always the most violent; some exhibitionists are chosen, for example, while rapists are passed over.”).

140 521 U.S. 346 (1997).

141 534 U.S. 407, 409 (2002).

tal abnormality” is simply a diagnosis of pedophilia.¹⁴² The Court found that this volitional impairment requirement marked a distinct enough subset of supposedly dangerous offenders to be constitutional, while a past sex offense conviction coupled with evidence of a propensity for recidivism indicated sufficient dangerousness.¹⁴³

Notably absent from any of these standards are specific findings of propensity for physical violence, use of weapons, self-harm, or drug abuse. Moreover, even though traditional involuntary civil commitment requires a finding of dangerousness to oneself or others, this does not always mean that the person has ever committed or attempted to commit a violent or self-harming act. Many states will accept mere threats to inflict serious harm, and courts are split over whether an objective, outward manifestation of dangerousness is required at all.¹⁴⁴ In sum, commitment criteria do not strongly correlate with behaviors that create the security concerns that justify institutional search policies. Civil commitments standards therefore do not map onto Fourth Amendment analysis.

It might not be significant that some patients are committed who have not been shown to exhibit violent or self-harming behavior if these commitments were rare. But patients who are not committed on specific findings of these sorts of behaviors actually constitute a significant number of patients receiving twenty-four hour residential treatment.¹⁴⁵ It is difficult to pinpoint the exact proportion of these types of commitments in the total resident psychiatric population of the United States. Commitments are governed by the states, which do not aggregate their data and have disparate commitment laws,¹⁴⁶ and studies define psychiatric facility differently. Populations also vary from facility to facility, based on a state’s commitment laws and the way facilities are organized.¹⁴⁷ Based on rough calculations from

142 *Hendricks*, 521 U.S. at 360 (“Hendricks’ diagnosis as a pedophile, which qualifies as a ‘mental abnormality’ under the Act, thus plainly suffices for due process purposes.”); Professor Stephen Morse has pointed out that one peculiar aspect of these commitments is that pedophilia diagnoses may not support an insanity defense against criminal charges. Thus, a sex offender may be held criminally culpable at the same time as he is held non-responsible in civil commitment proceedings. Stephen Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 136 (1996).

143 *Hendricks*, 521 U.S. at 357–58, 360.

144 See Virginia Aldigé Hiday, *Dangerousness of Civil Commitment Candidates: A Six-Month Follow-Up*, 14 LAW & HUM. BEHAV. 551, 555 n.6 (1990).

145 See *infra* note 148.

146 E.g., Hugh McGinley & Richard A. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 17 J. PSYCHIATRY & L. 205, 207 (1989).

147 For example, in California, 92% of patients in state-run psychiatric facilities are committed through the criminal justice system, whereas most candidates for civil commitment

other available estimates, however, 10,000¹⁴⁸ or more of the approximately 55,000 individuals hospitalized at a given time¹⁴⁹ may not involve any finding of dangerousness in the narrow sense relevant to Fourth Amendment concerns—violence, self-harm, or drug abuse. In addition, an additional 50% to 85% of patients in a typical residential facility might be voluntary admissions requiring no legal findings for hospitalization.¹⁵⁰

are at least initially held in hospital inpatient psychiatric wards or private psychiatric hospitals. Katharine Mieszkowski, *Napa State Hospital's Grisly Inside Story*, BAY CITIZEN (S.F.), Dec. 16, 2010, <http://www.baycitizen.org/health/story/napa-state-hospitals-grisly-inside-story>; see also Steven P. Segal et al., *Factors in the Use of Coercive Retention in Civil Commitment Evaluations in Psychiatric Emergency Services*, 52 PSYCHIATRIC SERVICES 514, 515 (2001).

148 Recent estimates indicate that approximately 4,000 defendants are being held to restore competency at any given time. Hal Wortzel et al., *Crisis in the Treatment of Incompetency to Proceed to Trial: Harbinger of a Systemic Illness*, 35 J. AM. ACAD. PSYCHIATRY & L. 357, 357 (2007). Insanity acquittals are more rare, and few accurate estimates of their number are available. McGinley & Pasewark, *supra* note 146, at 207 (“[P]olicy makers must still remain largely dependent upon limited and sporadic studies conducted by individual researchers or government agencies.”). An oft-cited estimate, however, is that only about 0.25% of defendants successfully raise this defense. *E.g.*, John P. Martin, *The Insanity Defense: A Closer Look*, WASH. POST, Feb. 27, 1998, <http://www.washingtonpost.com/wp-srv/local/longterm/aron/qa227.htm>. Therefore, based on the number of felony convictions each year in U.S. courts, a reasonable estimate might be about 2,750 NGRI commitments per year. See Transcript of Oral Argument at 23, *Pottawattamie County v. McGhee*, 130 S. Ct. 1047 (2010) (No. 08-1065) (“[T]here were . . . in the year 2006 . . . 1.1, approximately, million felony convictions.”), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1065.pdf. Because insanity commitments can be quite lengthy—possibly nine times longer than the sentence for the underlying offense—the number of insanity acquittals per year may significantly under-represent the number of insanity acquittees housed at a given time. See Perlin, *supra* note 129, at 210. As for sex offenders, as of 2007, 2700 offenders were committed under laws in nineteen states; New York has since passed an offender commitment law, bringing the total number of states to twenty. Davey & Goodnough, *supra* note 139. Again, because in 2007 only 250 such offenders had ever been released, this figure likely accurately represents the number of sex offenders involuntarily hospitalized at a given time. See *id.*

149 SLOBOGIN ET AL., *LAW AND THE MENTAL HEALTH SYSTEM* 705 (5th ed. 2009). Bruce Winick, however, has estimated the total number of individuals subject to involuntary hospitalization annually to be as high as 660,000. BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JUSTICE MODEL* 2–3 (2005). Winick’s number, however, includes some voluntary hospitalizations and does not take into account that many individuals.

150 SLOBOGIN ET AL., *supra* note 149, at 857. Non-forensic facilities often hold a combination of voluntarily and involuntarily admitted patients. See, e.g., MD. CODE ANN., HEALTH-GEN. § 10-632(a) (West 2010) (authorizing involuntary commitments to Veterans Administration hospitals); SLOBOGIN ET AL., *supra* note 149, at 708–09 (describing the frequency of government contracts with private hospitals for involuntary treatment). This raises the question of whether the requirement of individualized suspicion should simply be governed by the “voluntary” versus “involuntary” status of a patient. This view could find support in the facts of another psychiatric hospital Fourth Amendment case, *Aiken v. Nixon*, 236 F. Supp. 2d 211, 218 (N.D.N.Y. 2002), *aff’d* 80 Fed. App’x 146 (2d Cir. 2003). In *Aiken*, the Northern District of New York likened psychiatric patients to prison visitors and guards, who may be strip-searched only on reasonable suspicion of possessing contra-

1. *The Intersection of Civil Commitment and the Criminal Justice System*

While not all types of involuntary commitment require dangerousness findings, some may only occur if the defendant has or is suspected of having committed a criminal offense. It is true that these charges might be a good indicator of future conduct, and thus “dangerousness,” if there was past dangerous conduct.¹⁵¹ Even so, in contrast to pretrial detainees, many, if not most, of those committed for incompetency to stand trial are charged with minor offenses.¹⁵² More NGRI defendants than incompetency detainees commit violent crimes, but a substantial number—31.6% according to one study—are committed on the basis of nonviolent offenses.¹⁵³ Name notwithstanding, sexually violent predator programs often do not primarily target violent sex offenders, and some committed sex offenders are simply too old to be violent because so few are ever released from commitment.¹⁵⁴

band. *Id.* at 234. The plaintiff was a voluntary admit to a state facility that also had involuntary patients. *Id.* at 218. Thus *Aiken* could be construed as limited by its facts to voluntary patients, although the court did not explicitly limit its holding. Such a rule would pose more administrative difficulties than requiring individualized suspicion for all patients because staff in mixed facilities likely will have more information on, and interest in, individual patients’ risk of violent behavior than their legal status. More importantly, the distinction in mental health law between voluntary and involuntary commitments is dubious. A substantial number of decisions to voluntarily enter a residential facility are made either while the person is in some sort of official custody or after learning the results of an involuntary commitment proceeding. SLOBOGIN ET AL., *supra* note 149, at 860–61. In addition, many commitment decisions are made while individuals are incompetent or are the result of coercion. Robert D. Miller, *The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 DENV. U. L. REV. 1169, 1173–75 (1997); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Law Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE, 517, 522–23 n.26 (1994).

151 *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

152 Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 591 n.102, (1995) (“[Forty-two percent] of incompetency commitments were of persons charged with misdemeanors; 20-25% were charged with disorderly conduct.” (citing Walter Dickey, *Incompetency and the Nondangerous Mentally Ill Client*, 16 CRIM. L. BULL. 22, 30–31 (1980))); *id.* at 593 (“[A] high percentage of incompetency cases arise out of misdemeanor charges . . .”).

153 Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 LAW & HUM. BEHAV. 63, 67 (1994).

154 Davey & Goodnough, *supra* note 139 (“[Two hundred fifty] offenders [of 2,700 committed have been] released unconditionally since the first law was passed in 1990 [S]ome exhibitionists are chosen [for commitment], for example, while rapists are passed over. And some are past the age at which some scientists consider them most dangerous. In Wisconsin, a 102-year-old who wears a sport coat to dinner cannot participate in treatment because of memory lapses and poor hearing.”). *But see* Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 376 n.126 (1997) (“[T]he pure sex offender is a rarity; instead,

In short, these patients' alleged or past criminal conduct may suggest a propensity to do *something*, but not necessarily to commit dangerous acts involving contraband that could be the object of a search. Rather, these patients' conduct suggests they might have a propensity to, for example, be disorderly, shoplift, commit sexual acts with minors, or expose themselves in public. Empirical data supports this intuition. Although some researchers argue that forensic patients commit more serious assaults when they are violent, they have consistently been found to have lower rates of assault once institutionalized than patients committed after a civil determination of dangerousness.¹⁵⁵

Even conceding that some NGRI defendants or sex offenders may have a propensity for violent acts for which contraband such as weapons or drugs might be useful or triggering, in order to qualify for an NGRI verdict or sex offender commitment the behavior must be causally connected to a mental disorder.¹⁵⁶ If a predilection for violent behavior is linked to a patient's illness, the behavior should be expected to subside if the patient has been in the institution for more than a short period and is responding to treatment.¹⁵⁷ Research on hospital violence supports this point: violent incidents tend to occur most frequently right after commitment and subside after time in the hospital.¹⁵⁸

One objection might be that regardless of actual dangerousness, incompetency and insanity committees are still entitled to less considerate treatment than sex offenders or traditional involuntary committees based on their quasi-criminal legal status.¹⁵⁹ For example, as

sex offenses are single or infrequent and often are embedded in an extensive criminal history of property and violent crimes.” (quoting Leonore M.J. Simon, *The Myth of Sex Offender Specialization: An Empirical Analysis*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 387, 392 (1997))).

155 Donald M. Linhorst & Lisa Parker Scott, *Assaultive Behavior in State Psychiatric Hospitals: Differences Between Forensic and Nonforensic Patients*, 19 J. INTERPERSONAL VIOLENCE 857, 868 (2004) (“The results of this study are consistent with findings from previous studies that forensic patients are less likely to commit assaults than nonforensic patients in psychiatric hospitals.” (citations omitted)).

156 Morse, *supra* note 125, at 193.

157 See Hiday, *supra* note 144, at 553 (“Regardless of definition [of dangerousness] or admission grounds, most dangerous behavior occurred within the first 7–10 days of admission, and most of that occurred on the first day and tended not to be repeated.” (citations omitted)).

158 Simon Davis, *Violence by Psychiatric Inpatients: A Review*, 42 HOSP. & COMMUNITY PSYCHIATRY 585, 586 (1991).

159 E.g., Chris Kempner, Comment, *Unfair Punishment of the Mentally Disabled? The Constitutionality of Treating Extremely Dangerous and Mentally Ill Insanity Acquittees in Prison Facilities*, 23 U. HAW. L. REV. 623, 627 (2001) (arguing prisons should take over the care of insanity

the Seventh Circuit has pointed out, a plaintiff may not object to *Bell*'s due process holding when, in addition to his civilly committed status, he is also a pretrial detainee.¹⁶⁰

In the case of NGRI defendants, however, the significance of the criminal "conviction" to their legal status is minimal. The NGRI defendant is no longer a pretrial detainee because there is a verdict in his case. At the same time, the successful affirmative NGRI defense has made him ineligible for punishment because of a lack of culpability.¹⁶¹ While proof beyond a reasonable doubt of a criminal act justifies fewer procedural protections before commitment of NGRI defendants, NGRI commitment is nevertheless not a criminal sentence and remains civil in character.¹⁶² NGRI defendants' legal status therefore differs minimally from that of other involuntarily committed detainees and does not alone justify abrogating their Fourth Amendment rights.

Although it is true that the incompetent to stand trial have criminal charges pending for which they may be tried if they gain competence, they nevertheless are not comparable to competent pretrial detainees. Because they are not competent to stand trial, they are ineligible for criminal conviction and punishment in much the same way as NGRI defendants. Additionally, the incompetent to stand trial and competent pretrial detainees differ in ways that are relevant to the security risks that justified the *Bell* standard for pretrial detainee searches. Pretrial detention in both the state and federal systems is not an automatic consequence of criminal charges. Detention depends to a great degree on the nature of the offense and other factors pointing to a defendant's dangerousness.¹⁶³ Indeed, nearly two-thirds of felony defendants alone are released on bail.¹⁶⁴

acquittees who have committed a violent crime and may do so because they do not have "true civil status").

160 *Allison v. Snyder*, 332 F.3d 1076, 1079 (7th Cir. 2003) ("And one must keep in mind that they are pretrial detainees as well as civil committees: criminal charges against them are pending.") *Allison v. Snyder* was an unusual case in that the plaintiffs were part of a pretrial diversion program for sex offenders where civil commitment would occur in lieu of trial, but criminal charges remained open until successful completion of treatment. *Id.* at 1078; see also *Allen v. Illinois*, 478 U.S. 364, 366-70 (1986). The *Allison* court's characterization of these offenders is not typical of incompetency commitments, as criminal charges are normally dismissed if competency is not restored.

161 See, e.g., Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 419 (2002).

162 John Parry, *The Civil-Criminal Dichotomy in Insanity Commitment and Release Proceedings: Hinckley and Other Matters*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 218, 218-19 (1987).

163 Judges have wide discretion in setting bail amounts, but they typically factor prior convictions and the seriousness of the offense into their decisions. Preventive detention without bail is usually limited to the most serious or violent offenses, and often also requires a prior criminal record. See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES:

In contrast, almost all incompetent defendants are committed regardless of the degree of the offense, and usually without the option of quickly disposing of minor cases through a guilty plea.¹⁶⁵ Furthermore, recall that a large proportion of those held for incompetency to stand trial are charged with minor offenses.¹⁶⁶ If these defendants were not mentally ill or disabled, many of them would not be subject to pretrial detention at all. Moreover, when competent misdemeanor offenders are detained, in most jurisdictions—including the Eighth Circuit—they are ineligible for suspicionless strip searches.¹⁶⁷ The result is that incompetent detainees are subject to less Fourth Amendment protection while in custody solely on the basis of their mental illness or impairment.

2. *Predicting Dangerousness*

Of the individuals committed under traditional civil commitment criteria, most are committed either for lack of self-care, inability to avoid physical harm, or dangerousness to themselves, rather than violence toward others.¹⁶⁸ Even among those involuntarily committed specifically for dangerousness to others, however, the weight such a finding should carry in Fourth Amendment analysis is questionable. While the Supreme Court has taken the position that “from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct,” this assertion flies in the face of em-

CASES, STATUTES, AND EXECUTIVE MATERIALS 856–60, 877 (3d ed. 2007). Socioeconomic factors might confound the link between pretrial detention and violence or seriousness of the offense, although the practice of bail bond dealing might lessen their effects. *Id.* at 858–59 (describing the role of bail bond dealers in ameliorating the race and gender disparities in pretrial release).

¹⁶⁴ *Id.* at 857.

¹⁶⁵ Perlin, *supra* note 129, at 203–04 (“When defendants are incompetent to stand trial, the overwhelming majority are committed to state hospitals.”); Winick, *supra* note 152, at 591 (“Defendants arrested for a petty offense, such as disorderly conduct or shoplifting, can usually plead guilty and pay a small fine. If those defendants are incompetent to stand trial, however, they may face many months of incarceration If defendants eventually are restored to competency and returned to court, they probably will accept the same plea bargain at that point.”).

¹⁶⁶ *See supra* note 152 and accompanying text.

¹⁶⁷ *See* *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 299 (3d Cir. 2010) (noting that ten circuit courts of appeal had held that reasonable suspicion was required to strip search detainees charged with “minor offenses” since *Bell*, but that the Ninth and Eleventh Circuits had recently reversed their rulings on the issue), *cert. granted*, 131 S. Ct. 1816 (2011); *Jones v. Edwards*, 770 F.2d 739, 741 (8th Cir. 1985) (following decisions by the Seventh and Tenth Circuits).

¹⁶⁸ Hiday, *supra* note 144, at 553.

pirical data on the accuracy of dangerousness predictions in the context of civil commitment decisions.¹⁶⁹

Prediction of dangerousness among the mentally ill has long been controversial.¹⁷⁰ Studies suggest that little stock can be placed in mental health professionals' clinical judgments of dangerousness because of a high false positive rate.¹⁷¹ Clinicians are better able to capture the individuals who end up committing violent acts than they are at excluding those who do not.¹⁷² Although their accuracy is more impressive when the low base rate of violent behavior is taken into account, their absolute accuracy is still quite low.¹⁷³ Courts have nevertheless traditionally relied on these types of predictions in legal determinations and continue to do so today.¹⁷⁴

Actuarial or statistical predictive tools, which are considered more accurate than clinical violence predictions, have only recently become available in the form of violence risk assessment instruments ("VRAs").¹⁷⁵ While VRAs consistently have been shown to be superior to clinical prediction, measures of their validity are perhaps misleading. Favorable validation studies of these assessments have been based on a statistical tool that calculates the probability of a patient who was later violent having a higher VRAI score than one who was

169 *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) (quoting *Schall v. Martin*, 467 U.S. 253, 278 (1984)) (internal quotation marks omitted).

170 Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80, 87 & n.58 (1995).

171 John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 406–07 (2006) (“[O]f the patients predicted to be violent by the clinicians, one-in-two later committed a violent act, while of the patients predicted to be safe, one-in-three later committed a violent act.”). Clinical prediction usually occurs after the mental health professional interviews the subject. The professional asks questions “designed to determine the individual’s current mental status and to obtain a life history,” and draws inferences from the information in the answers, “presumably based on the interviewer’s professional education, training, and experience.” Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 109 (1984).

172 Monahan, *supra* note 171, at 406–07 (“Patients who elicited professional concern regarding future violence were moderately more likely to be violent after discharge (fifty-three percent) than were patients who had not attracted such concern (thirty-six percent).”).

173 Slobogin, *supra* note 171, at 112–13 (noting that clinical predictions of experienced professionals were three times better than chance).

174 Monahan, *supra* note 171, at 407; Slobogin, *supra* note 171, at 109.

175 Monahan, *supra* note 171, at 408. Actuarial prediction involves combining an individual’s traits known to be linked to violent behavior to arrive at a probability that he will behave violently. Slobogin, *supra* note 171, at 109–10.

not.¹⁷⁶ In the case of two particularly celebrated VRAs, this figure was around seventy percent.¹⁷⁷

As one commentator notes, what this assessment really shows is that these studies are better predictors of a binary outcome—violence versus no violence—than chance, which would be expected to group fifty percent of patients correctly.¹⁷⁸ That is, the verification method indicates little about a particular individual’s propensity for violence or recidivism but rather distinguishes between group members. It simply “tells us that seventy of those [one hundred] ranked, whether [violent] or not, were ranked correctly,” without indicating the chances that a particular individual is one of that correctly ranked seventy percent, and much less whether he should be in the violent category.¹⁷⁹ In addition, “slippage,” or a difference between validation statistics and actual violence or recidivism, can occur because of differences between the study population and the populations on which it is later used.¹⁸⁰ Most VRAs are based on data on, and are aimed at calculating the probability of, criminal recidivism or violent behavior upon discharge from the hospital.¹⁸¹

Although this metric may be most relevant to deciding whether an individual should be involuntarily committed to protect the public, research indicates that it has little relevance to the probability of violent behavior in a hospital environment.¹⁸² Assaultive behavior during inpatient treatment has been shown to be a poor indicator of violence outside the hospital, and each results from different risk factors.¹⁸³ Even an accurate VRAI result may not indicate any probability

176 The statistical tool is known as “Receiver Operator Characteristic,” or ROC, which is described in John A. Fennel, *Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 37, 54–55 (2009).

177 The Classification of Violence Risk (“COVR”), created from data collected during the most comprehensive violence study to date, the MacArthur Violence Risk Assessment Study; and the STATIC-99, which estimates recidivism among sex offenders. For citations describing the MacArthur Study, see generally Monahan, *supra* note 171, at 411 n.80.

178 For a much more detailed discussion of the methodological problems with risk assessment instruments, see generally Fennel, *supra* note 176, on whom I draw throughout the next two paragraphs of analysis.

179 *Id.* at 54–55.

180 *Id.* at 57–58.

181 Patrick Lussier et al., *Chronic Violent Patients in an Inpatient Psychiatric Hospital: Prevalence, Description, and Identification*, 37 CRIM. JUST. & BEHAV. 5, 5–6 (2010).

182 *See id.* (“[A] pattern of violent behavior manifested during inpatient treatment is not necessarily indicative of an increased risk of violence following discharge.” (citations omitted)).

183 *Id.* at 6 (“[P]erpetration of violence during inpatient treatment may be influenced by different risk factors than those influencing the commission of community violence.”).

of misconduct in an institutional environment because this is not what the instrument was designed to measure. These issues with predictive instruments therefore cast doubt on claims that the civilly committed can be presumed dangerous, even when the most cutting-edge methods are used to make the prediction.

Whether or not predictive instruments to identify the violent or sexually compulsive among the mentally ill are accurate, civil commitment hearings are usually non-adversarial, “rubber stamp” proceedings whose reliability is questionable.¹⁸⁴ While a formal hearing is required, commitment candidates’ own attorneys often abdicate their adversarial role in favor of a “best interests” approach, resulting in little testing of the evidence in favor of confinement.¹⁸⁵ In addition, judges almost always defer to the recommendations of the state-provided expert witness.¹⁸⁶ Many judges follow the expert’s recommendation more than ninety-five percent of the time.¹⁸⁷ This is particularly significant because of the strong incentive for experts to over-recommend commitment out of fear of liability under *Tarasoff v. Regents of the University of California*,¹⁸⁸ which some commentators argue has approached a phobic level among mental health professionals.¹⁸⁹

184 Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 40–42 (1999) (citations omitted).

185 *Id.* at 40–41. This relaxed advocacy might be less true with respect to sex offender commitments because the defense bar has vigorously opposed these statutes, primarily on double jeopardy and ex post facto grounds. See, e.g., Fennel, *supra* note 176, at 39 (discussing shortcomings of a Massachusetts statute that aims to determine which sex offenders are at a high risk for reoffending, such that they ought to be civilly committed).

186 See Winick, *supra* note 184, at 41–42 (“[J]udicial agreement with expert witnesses in this area ranges from seventy-nine to one hundred percent, and most frequently exceeds ninety-five percent.”).

187 *Id.*

188 551 P.2d 334, 353 (Cal. 1976) (holding a therapist civilly liable for the murder of a woman by his patient when the therapist heard his patient threatened to kill her, because he failed to warn the victim).

189 Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990’s*, 16 LAW & PSYCHOL. REV. 29, 45–47 (1992) (citing, *inter alia*, Stanley L. Brodsky, *Fear of Litigation in Mental Health Professionals*, 15 CRIM. JUST. & BEHAV. 492, 496, 497 (1988)); *id.* at 61–62 (1992) (citing, *inter alia*, Stanley L. Brodsky, *Fear of Litigation in Mental Health Professionals*, 15 CRIM. JUST. & BEHAV. 492, 497 (1988)).

V. INSTITUTIONAL CONCERNS

A. *Security in Psychiatric Hospitals and Prisons*

Even if the accuracy of dangerousness predictions is suspect, psychiatric hospitals may still be so dangerous as to make blanket search policies reasonable. Unfortunately, reliable statistics regarding rates of violence or possession of contraband in psychiatric hospitals versus prisons are not available.¹⁹⁰ In official estimates for both types of facilities, violent incidents are drastically underreported.¹⁹¹ In addition, researchers' estimates are based on such disparate metrics that any comparison between available studies on psychiatric hospital and prison misconduct would be misleading.¹⁹²

Nevertheless, while not to minimize the dangers that hospital personnel and patients might face, some research indicates that the threat of *serious* misconduct—particularly involving contraband or weapons—is low in psychiatric facilities.¹⁹³ It is true that assaultive or aggressive behavior is increasing in inpatient facilities, and rates of workplace injury of staff are much higher than in other occupations.¹⁹⁴ Even so, “civil commitment candidates do not tend to be dangerous, much less violent, within the 6 months following” commitment, and “[t]hose who behave[] dangerously rarely inflict[] injury.”¹⁹⁵ Furthermore, patient aggression more often takes the form

190 See JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, CONFRONTING CONFINEMENT, A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS, 24–25 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (describing “imprecision and unreliability of the data on assaults”); Ralph Slovenko, Commentary, *Violent Attacks in Psychiatric and Other Hospitals*, 34 J. PSYCHIATRY & L. 249, 249 (2006) (noting that “the actual number of attacks in hospitals is inexact” and that “there is no national reporting system” of hospital violence).

191 GIBBONS & DE B. KATZENBACH, *supra* note 190, at 24–25; Slovenko, *supra* note 190, at 249–50.

192 Compare, e.g., Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 593, 595 (2007) (estimating the percentage of prison inmates who had been victims of assault and the number of assaults per 1000 inmates), with Linhorst & Scott, *supra* note 155, at 864 (measuring the percentage of patients who committed acts of violence and the rate of assault per one hundred days).

193 See e.g., Davis, *supra* note 158, at 585 (noting studies that support the conclusion “that serious incidents are rare”); Hiday, *supra* note 144, at 562 (noting that those who did behave dangerously “rarely inflicted injury”). But see Slovenko, *supra* note 190, at 249 (“[T]he actual number of attacks in hospitals . . . is considered to be extensive.”).

194 Slovenko, *supra* note 190, at 249–51.

195 Hiday, *supra* note 144, at 562 (“[W]e found candidates to be far less dangerous and violent after going through the civil commitment process.”).

of verbal threats than violent attacks, except during instances when staff are administering medication.¹⁹⁶

Although rates of assault remain high, serious violence in prisons has also decreased over the past thirty years to fairly low levels; in fact, as of 2003, the homicide rate in prisons was lower than that of the general population.¹⁹⁷ This decrease in serious prison violence might suggest that the levels of violence and the security concerns of psychiatric hospitals and prisons are comparable and that, therefore, similar search policies will be reasonable in both contexts. The decrease also raises the point in *Bell*, however, that little contraband had been discovered in that facility precisely because the search policy was an effective deterrent.¹⁹⁸ In recent years, prisons have implemented increasingly aggressive security interventions.¹⁹⁹ Notably, many of the most difficult-to-control inmates are now totally isolated from other inmates, and largely prison personnel as well, in what is basically permanent solitary confinement.²⁰⁰ Serious violence and weapons could similarly be rare in psychiatric facilities because of discovery or deterrence through searches, but this argument is less convincing. As opposed to prisons, which uniformly seem to maintain broad search policies regardless of security level, psychiatric hospitals appear to vary widely in their security practices, which therefore may not play as great a causal role in the level of serious violence overall as in prisons.²⁰¹

Another significant way in which the security concerns of prisons differ from those in psychiatric hospitals is the role of prison gangs in violent incidents and smuggling of contraband. Gangs are responsible for a large proportion of prison violence,²⁰² and membership cor-

196 Slovenko, *supra* note 190, at 251.

197 Alan Gomez, *States Work to Curb Prison Violence*, USA TODAY, Aug. 24, 2008, http://www.usatoday.com/news/nation/2008-08-21-prisondeaths_N.htm.

198 *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (“That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.” (footnote omitted)).

199 *See, e.g.*, Gomez, *supra* note 197.

200 *See* Sharon Shalev, *Solitary*, NEW HUMANIST, Jan.–Feb. 2011, <http://newhumanist.org.uk/2479/solitary> (discussing use of “supermax confinement” to safely manage the “worst of the worst” predators in the prison system).

201 *See, e.g.*, Brief of Appellant at 26–42, *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009) (No. 05-3441), (discussing another sex offender treatment facility in Minnesota with the same security level as the facility in *Serna* that centered its inmate search policy around probable cause).

202 *See* John Winterdyk & Rick Ruddell, *Managing Prison Gangs: Results from a Survey of U.S. Prison Systems*, 38 J. CRIM. JUST. 730, 731 (2010) (“[A] recent study by the Department of

relates significantly with both violent behavior and disobeying prison rules in general, including possession of drugs.²⁰³ Moreover, gangs are a major, if not the primary, source of contraband within prisons.²⁰⁴ Manipulation of prison personnel and maintenance of networks outside the prison significantly contribute to inmate gangs' ability to arrange for contraband to be brought to the prison and past prison security.²⁰⁵ Competition for control of contraband "rackets" is itself a precipitant of prison violence.²⁰⁶

In contrast, gangs do not seem to be among the main factors associated with violence in psychiatric facilities. While there are some anecdotal reports of gang activity in psychiatric facilities that primarily house patients committed during the criminal justice process,²⁰⁷ gangs do not appear in the literature on violence risk factors. Instead, studies suggest that low expenditures on care and environmental stressors are some of the most significant predictors of ward violence.²⁰⁸

B. Individualized Suspicion: Administrative Feasibility and Deference to Institutional Decision-making

Perhaps consistent with the difficulty of dangerousness prediction, numerous studies have concluded that a small number of patients are responsible for the majority of violent outbursts in inpatient psychiatric facilities.²⁰⁹ In one study, 56% of violent episodes were the fault

Corrections for Washington State reported that gang members . . . accounted for 43 percent of all major violent infractions inside their prisons." (citation omitted)).

203 See Gerald G. Gaes et al., *The Influence of Prison Gang Affiliation on Violence and Other Prison Misconduct*, 82 PRISON J. 359, 360–61, 381 (2002) (discussing research that shows that prison gang affiliation increases the probability of violence and other prison misconduct).

204 George W. Knox, *The Problem of Gangs and Security Threat Groups (STG's) in American Prisons Today: Recent Research Findings From the 2004 Prison Gang Survey*, NAT'L GANG CRIME RESEARCH CTR. (2005), available at <http://www.ngcrc.com/ngcrc/corr2006.html>; Winterdyk & Ruddell, *supra* note 202, at 731.

205 Winterdyk & Ruddell, *supra* note 202, at 731.

206 See Knox, *supra* note 204 ("For example, in March of 2004, a prison riot in Puerto Rico resulted in two inmates killed and five wounded, which was started by gang members fighting over who would control the a [sic] shipment of illegal drugs . . .").

207 See Mieszkowski, *supra* note 147 (noting one treatment facility, Napa State Hospital, that is "rife with gang activity, methamphetamine use, pimping and extortion").

208 Michael Daffern & Kevin Howells, *Psychiatric Inpatient Aggression: A Review of Structural and Functional Assessment Approaches*, 7 AGGRESSION & VIOLENT BEHAVIOR 477, 487 (2002); Laurent S. Lehmann et al., *A Survey of Assaultive Behavior in Veterans Health Administration Facilities*, 50 PSYCHIATRIC SERVS. 384, 386 (1999).

209 E.g., Raymond B. Flannery, Jr., *Repetitively Assaultive Psychiatric Patients: Review of Published Findings, 1978–2001*, 73 PSYCHIATRIC Q. 229, 231 (2002); John E. Kraus & Brian B. Sheit-

of 1.4% of patients.²¹⁰ Moreover, evidence points to levels of violence decreasing sharply after initial intake.²¹¹ There is therefore empirical justification for search policies targeting newly admitted patients beyond the fact that intake is the most obvious point of entry for contraband.

More importantly, these findings suggest that an individualized suspicion standard may not be so difficult to implement. Predicting violence in patients after hospital admittance is hardly easier than before commitment. Nevertheless, the concentration of violent behavior in a few patients might still give staff a good idea of which patients pose the most risk based on their day-to-day interactions, past violent behavior in the institutional setting, progress in treatment, and stage of illness. Staff might be able to use these intuitions as a starting point to target particular patients when there is a potential security breach.

These findings also suggest a role for deference to institutional judgment. As long as the hospital administrators could show some effort was made to differentiate between individual patients, courts could review their judgment that individualized suspicion existed as to a particular patient under a deferential standard. This would allow courts to avoid making treatment or medical judgments that they are incompetent to perform, while still allowing for protection of patients' constitutional rights. For the involuntarily committed, a degree of court involvement with institutional affairs may not only be appropriate, but also necessary in light of their well-documented vulnerability and difficulty asserting their rights on their own.²¹²

man, *Characteristics of Violent Behavior in a Large State Psychiatric Hospital*, 55 PSYCHIATRIC SERVS. 183, 183 (2004).

²¹⁰ Kraus & Sheitman, *supra* note 209, at 183.

²¹¹ Lehmann et al., *supra* note 208, at 387 (“The admitting and triage areas . . . had the second highest rate per work unit of assaultive behavior.”); Hiday, *supra* note 144, at 553 (“Regardless of definition or admission grounds, most dangerous behavior occurred within the first 7–10 days of admission, and most of that occurred on the first day and tended not to be repeated.” (citations omitted) (footnotes omitted)). *But see* Lehmann et al., *supra* note 208, at 386 (“Length of stay was strongly associated with the rate of assaultive incidents per patient . . .”).

²¹² *See* Robbins v. Budke, 739 F. Supp. 1479, 1486 (D.N.M. 1990) (“[M]any mentally ill individuals have difficulty recognizing the concept that they have rights and will not necessarily identify even the most egregious abuse as a violation of their rights. Even if cognizant of their rights, many of these individuals have difficulty assessing whether their rights have been violated In addition, both the effects of medications and of mental illness may cause confusion and problems with memory, making it difficult to remember and explain possible rights violations after the lapse of several days [T]he combined effects of medication, mental illness, and the passive characteristic of institutionalized people would inhibit many residents from initiating a phone call to a stranger to talk

CONCLUSION

Neither comparisons of the two groups in precedent, nor the legal status of the civilly committed, justifies this association. On the contrary, the involuntarily committed can be distinguished from pretrial detainees because of their right to be free from punishment and the treatment purposes of their confinement. Furthermore, not all forms of civil commitment require dangerousness findings, and there is reason to believe that such findings are inaccurate predictors of misconduct during inpatient treatment. There is also little empirical evidence of the similarity of psychiatric hospital and prison population behavior during confinement, whereas there is some evidence indicating that the security concerns they raise are disparate.

This Comment does not assert that involuntarily committed patients never pose security risks or that psychiatric facilities do not face significant administrative problems. Rather, it is meant to cast doubt on the assumption that the danger involuntarily committed patients pose as a group is so great that they should be analogized to the criminally accused and treated almost as harshly as convicted prisoners. Under civil commitment standards as they are currently structured, this assumption is unwarranted. At the same time, the problem may not lie so much with Fourth Amendment analyses that assume that the involuntarily committed are likely to be dangerous, as with using civil commitment procedures to incapacitate extremely dangerous individuals who have slipped through the cracks of the criminal justice system. Indeed, the continued viability of a strong criminal-civil distinction in constitutional law has been a topic of much discussion since the rise of sex offender commitment statutes.²¹³ Nevertheless, as long as this “distinction is one that the Supreme Court continues to take seriously,”²¹⁴ the distinction between the Fourth Amendment rights of the involuntarily committed and the criminally confined should be vigorously enforced as well through a requirement of individualized suspicion for searches of patients’ persons.

about problems they are having in the institution.”), *quoted in* Kelsey McCowan Heilman, Comment, *The Rights of Others: Protection and Advocacy Organizations’ Associational Standing to Sue*, 157 U. PA. L. REV. 237, 273–74 (2008).

213 See, e.g., 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, 76–80 (1996) (discussing the importance of the civil-criminal distinction in light of states’ “sexually violent predator” statutes).

214 *Id.* at 78.