Examining the Conditions of Confinement for Civil Detainees Under California's Sexually Violent Predators Act

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"Civil detainees" under the Sexually Violent Predators Act include those persons who have already served their criminal sentences, but are still caged in prisons, awaiting court determination of whether or not they should be civilly committed to a state mental hospital. During this excruciatingly long waiting period, detainees endure conditions of confinement worse than they experienced when they were prisoners, and worse than they would experience if they were eventually to be committed to a state hospital.

Does the disparate treatment while in legal limbo deprive these civil detainees of their statutory and constitutional rights?

This Note examines relevant portions of the California Penal Code, the California Welfare and Institutions Code, and the United States Constitution, and argues that the confinement conditions for civil detainees unreasonably violate their statutory and constitutional rights.

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Introduction

In California, the confinement conditions for detainees awaiting potential civil commitment under the Sexually Violent Predators Act[1] ("SVPA") deprive detainees of rights and privileges. Deprivations of this kind go beyond what is necessary to protect inmates and staff, in violation of California Penal Code section 4002 and detainees' constitutional rights. The term "civil commitment" describes the involuntary hospitalization of persons with mental illnesses.[2] An "SVP detainee" refers to a convicted sex offender who has not yet been civilly committed, but is involved in the legal process pending potential civil commitment. During this civil process, SVP detainees remain housed in jail in solitary confinement.[3]

California Penal Code section 4002 and the United States Constitution require that SVP detainees receive better treatment than criminals whose confinement conditions serve as punishment.[4] Nevertheless, SVP detainees in jail experience substantially worse

1. Cal. Welf. & Inst. Code § 6600 *et seq.* (West 2014). The Sexually Violent Predators Act is also referred to as "SVPA" or "Act."

2. Tanya Kessler, Comment, *"Purgatory Cannot Be Worse Than Hell": The First Amendment Rights of Civilly Committed Sex Offenders*, 12 N.Y. City L. Rev. 283, 288 (2009).

3. Welf. & Inst. § 6602(a); Cal. Penal Code § 4002 (2017).

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

conditions than both convicted felons in prison and civilly committed sex offenders in state mental hospitals.

Judicial remedies may prove promising because SVP detainees' current conditions of confinement arguably violate statutory and constitutional laws. However, such remedies have thus far been inadequate on a macro level due partly to judges' tendencies to misapply constitutional standards.

For example, SVP detainees are not prisoners for Eighth Amendment purposes,[5] though courts often treat them like prisoners when analyzing their other constitutional claims, such as those implicating the Fourth Amendment.[6] Courts categorically deny SVP detainees' Eighth Amendment claims against cruel and unusual punishment because their confinement is not categorized as "punishment" for legal purposes.[7] On the other hand, courts approach SVP detainees' Fourth Amendment claims by mistakenly applying standards that govern *prisoner* claims, not *civil detainee* claims.[8] This may be because section 4002 is part of the California Penal Code,[9] while the SVPA is governed by the California Welfare and Institutions Code.[10] Thus, SVP detainees "are in a kind of purgatory."[11] They "lack the protections of the criminal justice system, but endure all of the restrictions of imprisonment. They are in an untenable legal limbo."[12]

Moreover, claims often fail because judges tend to afford deference to correctional officials and decide cases on technical and procedural issues rather than the merits.[13]

Despite these legal obstacles, there is still hope for SVP detainees to bring claims that succeed in accomplishing systemic change. The Ninth Circuit Court of Appeals has recognized detainees' legitimate claims and reversed summary judgment orders, thus allowing SVP detainees to argue the merits of their cases.[14] In order for systemic change to occur in California, SVP detainees must continue to bring claims of statutory and constitutional violations relating to their conditions of confinement while awaiting potential SVPA commitment.

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5. *Id.* at 931.
6. Kessler, *supra* note 2, at 288; *see, e.g.*, *Jones*, 393 F.3d 918.
7. Hubbart v. Super. Ct., 19 Cal. 4th 1138 (Cal. 1999).
8. Kessler, *supra* note 2, at 295 (explaining courts apply *Turner v. Safley*, but noting *Turner* established a balancing test for when a regulation impinges on a *prisoner's* rights, not a *civil detainee's* rights); *see also Jones*, 393 F.3d at 927.
9. CAL. PENAL CODE § 4002 (2017).
10. CAL. WELF. & INST. CODE § 6600 *et seq.* (West 2014).
11. Kessler, *supra* note 2, at 327.
12. *Id.*
13. *Id.* at 289; *Jones*, 393 F.3d 918.
14. *Jones*, 393 F.3d 918.

This Note contends that the restrictions SVP detainees face are excessive in violation of SVP detainees' statutory and constitutional rights. Part I of this Note discusses the background of the SVPA and provides an illustrative example of how the SVPA, as currently implemented in California, produces unnecessary hardships for SVP detainees. Part II of this Note analyzes the statute responsible for the required administrative segregation of SVP detainees. Part III discusses the Due Process Clause and the appropriate standards to apply when analyzing SVP detainees' constitutional claims. Part IV examines the viability of SVP detainees' First and Fourth Amendment claims. Finally, Part V of this Note discusses the prospect for systemic change relating to the conditions of confinement for SVP detainees.

I. BACKGROUND

Enacted in 1996,[15] the SVPA authorizes California to seek the involuntary civil commitment of any person "who has been convicted of a sexually violent offense . . . and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."[16] Many states have enacted laws similar to the SVPA that aim to "emphasize treatment for offenders and protection of society."[17] For purposes of the SVPA, state legislatures may "define mental illness without strict adherence to psychiatric terminology."[18] This is partly because psychiatrists frequently disagree on what qualifies as "mental illness."[19] Even the U.S. Supreme Court "itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement."[20] Consequently, the Court has traditionally left to legislators, not medical professionals, "the task of defining terms of a medical nature that have legal significance."[21]

The process of determining whether a criminal sex offender satisfies the requirements for SVPA civil commitment occurs in various stages,

15. Hubbart v. Super. Ct., 19 Cal. 4th 1138, 1143 (Cal. 1999).

16. CAL. WELF. & INST. CODE § 6600(a)(1) (West 2014).

17. Jeslyn A. Miller, Comment, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2101 (2010); *see also* Munoz v. Kolender, 208 F. Supp. 2d 1125, 1135 n.7 (S.D. Cal. 2002) (discussing SVP laws in Minnesota, Kansas, Washington).

18. Jennifer Jason, Note, *Beyond No-Man's Land: Psychiatry's Imprecision Revealed by its Critique of SVP Statutes as Applied to Pedophilia*, 83 S. CAL. L. REV. 1319, 1332 (2010).

19. Kansas v. Hendricks, 521 U.S. 346, 359 (1997) (citing Ake v. Oklahoma, 470 U.S. 68, 81 (1985)).

20. *Kansas*, 521 U.S. at 359. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 425 (1979) (using the terms "emotionally disturbed" and "mentally ill"); Jackson v. Indiana, 406 U.S. 715, 732, 737 (1972) (using the terms "incompetency" and "insanity").

21. *Kansas*, 521 U.S. at 359.

both administrative and judicial.[22] First, whenever the Department of Corrections and Rehabilitation determines that an inmate "may be a sexually violent predator," the Secretary refers the inmate to the State Department of State Hospitals for a thorough evaluation.[23] The Secretary must complete this referral at least six months prior to the inmate's scheduled prison release date.[24] Next, the full evaluation "must be conducted by at least two practicing psychiatrists or psychologists in accordance with a standardized assessment protocol[.]"[25] The protocol requires assessment of diagnosable mental disorders and various risk factors associated with re-offense among sex offenders, including "criminal and psychosexual history, type, degree, . . . duration of sexual deviance, and severity of mental disorder."[26] If the two evaluators agree that the inmate is likely to reoffend without treatment or custody due to his or her mental disorder, then the Director of State Hospitals requests a petition for commitment under the Welfare and Institutions Code section 6602 to the county in which the inmate was last convicted.[27] "If the county's designated counsel concurs with the recommendation, a petition for commitment [is] filed in the superior court" of that county.[28]

Next, a superior court judge reviews the petition and determines whether there is probable cause to believe that the inmate "is likely to engage in sexually violent predatory criminal behavior upon his or her release."[29] The inmate remains in custody "pending the completion of the probable cause hearing."[30] If the judge finds probable cause, the judge orders that the offender remain in custody until a trial is held to determine whether, beyond a reasonable doubt, the person meets SVPA criteria.[31] This determination process could last for years.[32] "If the court or jury determines that the person is a sexually violent predator, the person [is] committed for an indeterminate term" to a state mental hospital "for appropriate treatment and confinement."[33] The burden then

22. Hubbart v. Super. Ct., 19 Cal. 4th 1138, 1145 (Cal. 1999); *see also* CAL. WELF. & INST. CODE § 6600 *et seq.* (West 2014).

23. WELF. & INST. § 6601(b).

24. *Id.*

25. *Hubbart*, 19 Cal. 4th 1138 (citing WELF. & INST. § 6601(c)–(d)).

26. WELF. & INST. § 6601(c).

27. *Id.* at § 6601(d).

28. *Id.* at § 6601(i).

29. *Id.* at § 6602(a). The SVP detainee may waive out of the probable cause hearing and go straight to the state mental hospital to avoid the restrictive conditions of confinement. However, SVP detainees should not have to sacrifice their right to a hearing in order to receive rights guaranteed to them by the Constitution. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015).

30. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015).

31. *Id*; WELF. & INST. § 6604.

32. *See, e.g.*, Munoz v. Kolender, 208 F. Supp. 2d 1125 (S.D. Cal. 2002).

33. WELF. & INST. § 6604.

shifts to the "offender seeking his or her release from an SVPA commitment" to prove he or she is no longer a significant risk to society.[34]

Persons awaiting potential SVPA commitment are not civilly committed because they have not yet been found beyond a reasonable doubt to meet SVPA criteria. Nonetheless, they remain detained during the entire determination process.[35] Since the SVPA involves deprivation of personal liberty, detainees undergoing the civil commitment process are subject to statutory and constitutional safeguards.[36]

However, the SVPA, as currently implemented in California, fails to limit unnecessary deprivations of privileges for civil detainees. Persons pending potential civil commitment are held in punitive confinement, deprived of their rights, and housed in isolation.[37] SVP detainees in California spend 23–24 hours per day in their cells.[38] Out-of-cell time is limited to one hour every other day, at inconsistent times of the day.[39] Yard time is limited to a maximum of one hour per week.[40] SVP detainees have no contact with other inmates and only minimal contact with staff.[41] Telephone privileges are extremely restricted; SVP detainees can only make calls during their hour-long out-of-cell time every other day.[42] Further, they are denied access to religious services, libraries, educational classes, rehabilitation programs, and any self-improvement and/or treatment programs.[43]

As discussed throughout this Note, SVP detainees are not, and should not be treated as, prisoners. They are pending *potential* civil commitment, and should be treated better than prisoners and persons who have been involuntarily committed.

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34. Ashley Felando, *California's Sexually Violent Predator Act and the Dangerous Patient Exception*, 40 W. ST. U. L. REV. 73, 76 (2012).

35. WELF. & INST. § 6600 *et seq.*; Kessler, *supra* note 2, at 288.

36. Melissa M. Mathews, *Closing the Loophole in California's Sexually Violent Predator Act: Jessica's Law's Band-Aid Will Not Result in Treatment for Sexual Predators*, 39 MCGEORGE L. REV. 877, 881 (2008).

37. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015); *see also* Jones v. Blanas, 393 F.3d 918 (9th Cir. 2004); Hubbart v. Super. Ct., 19 Cal. 4th 1138 (Cal. 1999).

38. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015).

39. *Id.*

40. *Id.*

41. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015); *Jones*, 393 F.3d 918; *Hubbart*, 19 Cal. 4th 1138.

42. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015); *see also* Cerniglia v. Cty. of Sacramento, No. 2:99-cv-01938-JKS-DAD, 2008 WL 1787855, at *4 (E.D. Cal. Apr. 18, 2008).

43. *See Jones*, 393 F.3d 918; *Hubbart*, 19 Cal. 4th 1138.

II. UNDER CALIFORNIA PENAL CODE SECTION 4002, SVP DETAINEES SHOULD NOT BE DEPRIVED OF PRIVILEGES BEYOND WHAT IS NECESSARY FOR SAFETY

Persons pending potential civil commitment are subject to California Penal Code section 4002, subdivision (b). Section 4002[44] provides in relevant part:

> (b) Inmates who are held pending civil process under the sexually violent predator laws shall be held in *administrative segregation.* For purposes of this subdivision, administrative segregation means *separate and secure housing that does not involve any deprivation of privileges other than what is necessary to protect the inmates and staff*. . . [T]o the extent possible, the person shall continue in his or her course of treatment, if any . . . .[45]

In California, SVP detainees are housed in administrative segregation pursuant to section 4002.[46] However, in violation of section 4002, they receive far fewer rights than when they were housed as criminals in the prison's general population, and fewer rights than they would receive if they were eventually to be civilly committed to a mental hospital. They experience conditions of confinement substantially worse than those faced by criminal detainees in the same jail. Unlike criminal inmates in jail, SVP detainees:

- Are not permitted to have contact with any other inmates or detainees;
- Have restricted access to out-of-cell time;
- Are not permitted to work;
- Have restricted access to legal materials and no physical access to the law library;
- Have restricted access to exercise programs or recreation programs;
- Cannot attend religious services;
- Cannot attend self-help groups;
- Cannot receive confidential correspondence;
- Cannot place confidential phone calls;
- Are inappropriately strip searched.[47]

Section 4002, subdivision (b) explicitly provides that administrative segregation must not deprive detainees of privileges "*other than what is*

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44. Unless otherwise indicated, all subsequent references to section 4002 are to the California Penal Code.

45. CAL. PENAL CODE § 4002 (2017) (emphasis added).

46. Scott Jonbes et al., *Ride Along Brochure, Inmate Classification Definitions*, SACRAMENTO CTY. SHERIFF, http://www.sacsheriff.com/pages/organization/main_jail/documents/Ride%20Along%20Brocure.pdf (last visited Aug. 5, 2017) (explaining that outside of the SVPA context, administrative segregation is normally reserved for inmates who are "very violent towards officers, other inmates, or are major discipline problems.").

47. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015); *see also Jones*, 393 F.3d at 935; *infra* Part V.B.

necessary" for safety.[48] Severe restrictions to legal materials, exercise programs, recreation programs, religious services, confidential correspondence, communications with other detainees, and confidential phone calls are not necessary for protection of the inmates and staff. The Department of Corrections and Rehabilitation could protect inmates and staff utilizing a more lenient approach.[49] As the Ninth Circuit Court of Appeals reasoned, "if the criminal population can be safely housed without the restrictions of [administrative segregation], it is difficult to see why SVP detainees could not be so housed as well."[50]

SVP detainees have brought § 1983 lawsuits[51] to address violations of California Penal Code section 4002.[52] A § 1983 lawsuit is a civil action for depravation of rights.[53] Section 1983 of the United States Code provides in relevant part: "Every person who, under color of any statute . . . of any State[,] . . . subjects, or causes to be subjected, any . . . [person] to the deprivation of any rights [or] privileges . . . secured by the Constitution and laws, shall be liable to the party injured[.]"[54]

The specific language of § 1983 "limits a federal court's analysis to the deprivation of rights secured by the federal Constitution and laws."[55] In other words, "a violation of state law may not form the basis for a [§] 1983 action unless it causes a deprivation of a right provided by the Constitution."[56] Thus, in order to succeed on a § 1983 claim, an SVP detainee must allege a violation of an established constitutional right,[57] including rights provided by the Constitution itself, amendments to the Constitution, and laws passed by Congress.[58] SVP detainees have addressed violations of section 4002 through § 1983 lawsuits that challenge infringements of their Fourteenth Amendment rights, as well as violations of their First Amendment and Fourth Amendment rights.

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48. CAL. PENAL CODE § 4002(b) (2017) (emphasis added).

49. *See Jones*, 393 F.3d at 935.

50. *Id.*

51. 42 U.S.C. § 1983. Unless otherwise indicated, all subsequent references to section 1983 are to 42 U.S.C. § 1983.

52. *See, e.g.*, Sundquist v. Philp, No. 08-15930, 2009 U.S. App. LEXIS 16958, at *145 (9th Cir. July 29, 2009); Johannes v. Cty. of L.A., No. CV 02-03197-SVW (VBK), 2011 U.S. Dist. LEXIS 142528, at *79 (C.D. Cal. Apr. 8, 2011).

53. 42 U.S.C. § 1983 (2009).

54. *Id.*

55. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 370 (9th Cir. 1996).

56. *Id.*; *see also* Lomako v. Whitlach, No. 08-16116, 2009 U.S. App. LEXIS 16793 (9th Cir. 2009); Shehee v. Baca, No. CV 08-6480-FMC(E), 2009 U.S. Dist. LEXIS 99192 (C.D. Cal. 2009).

57. *Johannes*, 2011 U.S. Dist. LEXIS 142528, at *79.

58. *Section 1983 Lawsuits*, JAILHOUSE LAWYER'S HANDBOOK, http://jailhouselaw.org/section-1983-lawsuits/ (last visited Aug. 5, 2017).

III. Due Process Under the Fourteenth Amendment Prohibits Punishment of Civil Detainees

An SVP detainee's right to "constitutionally adequate conditions of confinement is protected by the substantive component of the Due Process Clause."[59] The Fourteenth Amendment's Due Process Clause protects the civil liberties of persons in the United States.[60] Both the California Supreme Court and the U.S. Supreme Court have emphasized the civil nature of sexually violent predator laws.[61] The SVPA "does not establish *criminal* proceedings[,] but rather enacts *civil* involuntary confinement proceedings."[62] The Legislature explained that, "despite their criminal record, persons eligible for commitment and treatment" under the SVPA must be viewed "not as criminals, but as sick persons."[63] SVP detainees do not face potential future punishment, but rather, await potential mental health treatment. Accordingly, "the status of the sexually violent predator as one who has been previously been convicted of a crime [does not] limit the rights of one detained" under the SVPA.[64] A person pending potential commitment maintains a "civil status, with all the Fourteenth Amendment rights that accompany it."[65]

In *Bell v. Wolfish*, pretrial detainees brought suit challenging the constitutionality of numerous conditions of confinement in a custodial facility.[66] The Court acknowledged that, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."[67] The proper inquiry is whether the conditions constitute punishment of the detainee, as not all restrictions amount to punishment.[68] The Court explained that if a regulation is reasonably related to a legitimate government interest, it does not amount to punishment.[69] Conversely, if the regulation is *not* reasonably

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59. Sanchez v. Kramer, No. 1:15-cv-01868-SAB, 2016 U.S. Dist. LEXIS 11664, at *3 (E.D. Cal. Jan. 29, 2016) (citing Youngberg v. Romeo, 457 U.S. 307, 320 (1982)).

60. U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

61. *See* Hubbart v. Super. Ct., 19 Cal. 4th 1138 (Cal. 1999); Kansas v. Hendricks, 521 U.S. 346 (1997).

62. People v. Super. Ct. (Howard), 70 Cal. App. 4th 136, 148 (Cal. Ct. App. 1999) (citing *In re* Parker, 60 Cal. App. 4th 1453, 1461 (Cal. Ct. App. 1998)) (emphasis added).

63. *Hubbart*, 19 Cal. 4th at 1171 (citing Cal. Welf. & Inst. Code § 6250).

64. *Jones*, 393 F.3d at 933.

65. *Id.*

66. Bell v. Wolfish, 441 U.S. 520 (1979).

67. *Id.* at 535.

68. *Id.*

69. *Id.* at 538.

related to a legitimate government interest, it constitutes punishment in violation of the Due Process Clause.[70]

While *Bell* involved the treatment of criminal pretrial detainees, courts have applied *Bell* to cases involving civil detainees, as well.[71] For instance, in *Jones v. Blanas*,[72] the court applied *Bell* and concluded that because pre-adjudication detainees retain greater liberty protections than convicted persons,[73] and persons civilly committed retain greater liberty protections than persons criminally committed,[74] "it stands to reason that an individual detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded" to an individual accused, but not convicted, of a crime, and at least as great as those afforded to an individual who has been civilly committed.[75] Stated differently, "purgatory cannot be worse than hell."[76] Like an individual accused but not yet convicted of a crime, a person detained under the SVPA cannot be exposed to conditions that "amount to punishment."[77] Thus, "the Fourteenth Amendment prohibits all punishment of pretrial detainees."[78]

Applying *Bell* and *Jones* to SVP civil detainees' restrictions, the determination of whether restrictions constitute constitutional violations depends on whether the restrictions are rationally related to legitimate, non-punitive governmental objectives.[79] SVP detainees may prevail if they show either an express or implied intent to punish.[80] More specifically, SVP detainees may demonstrate punitive conditions where the challenged restrictions: (1) are expressly intended to punish; (2) serve a "non-punitive purpose but are nonetheless excessive in relation to the alternative purpose[;]"[81] or (3) are used to achieve objectives that could be accomplished in alternative, less harsh methods.[82] Non-punitive, legitimate government interests include maintaining jail security and

70. *Id.*

71. *See* Youngberg v. Romeo, 457 U.S. 307, 320 (1982); *Jones*, 393 F.3d at 918; Atwood v. Vilsack, 338 F. Supp. 2d 985 (S.D. Iowa 2004).

72. *Jones*, 393 F.3d at 932.

73. *See Bell*, 441 U.S. 520.

74. *See Youngberg*, 457 U.S. 307.

75. *Jones*, 393 F.3d at 932; *see also* Lynch v. Baxley, 744 F.2d 1452, 1461 (11th Cir. 1984) (holding use of jails for purpose of detaining persons awaiting involuntary civil commitment proceedings violated those persons' substantive and procedural due process rights).

76. *Jones*, 393 F.3d at 933.

77. *Id.* at 923 (quoting *Bell*, 441 U.S. at 536).

78. Demery v. Arpaio, 378 F.3d 1020, 1029 (9th Cir. 2004).

79. *Bell*, 441 U.S. at 561.

80. Mauro v. Arpaio, 188 F.3d 1054, 1068 (9th Cir. 1999).

81. *Jones*, 393 F.3d at 923 (citing *Demery*, 378 F.3d at 1028); *see also Mauro*, 188 F.3d at 1067.

82. Hallstrom v. City of Garden City, 991 F.2d 1473, 1484 (9th Cir. 1993) (citing *Bell*, 441 U.S. at 539 n.20).

guaranteeing a detainee's presence at trial.[83] With respect to a civil detainee, "a presumption of punitive conditions arises where [an] individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held, or where the individual is detained under conditions more restrictive than those he or she would face upon commitment."[84]

SVP detainees have brought several viable claims alleging violations of substantive due process rights.[85] However, many of these cases have been inefficacious. One reason claims have been unsuccessful is because courts often mistake the standard to be applied.[86]

As discussed above, in describing the purpose of the SVPA, the California Legislature explained that persons should be committed for treatment "and not for any punitive purposes."[87] Nonetheless, courts have applied *Turner v. Safley*[88] when analyzing SVP detainees' constitutional claims.[89] In *Turner*, inmates challenged the constitutionality of a prison's marriage regulation that permitted an inmate to marry only with permission of the superintendent of the prison, and only when there were compelling reasons to do so.[90] In holding the marriage regulation unconstitutional, the U.S. Supreme Court articulated the appropriate standard to apply in determining whether a *prisoner's* constitutional rights have been violated: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[91] Subsequent cases make clear that *Turner* "applies to all circumstances in which the needs of prison administration implicate constitutional rights."[92]

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83. *Jones*, 393 F.3d at 934.

84. *Id.*

85. *See e.g.*, *Jones*, 393 F.3d at 934; Munoz v. Kolender, 208 F. Supp. 2d 1125, 1146 (S.D. Cal. 2002); Esparza v. Baca, No. CV 07-04118-PSG(OP), 2013 WL 1703042, at *6 (C.D. Cal. Mar 4, 2013).

86. *See* Kessler, *supra* note 2, at 291.

87. 1995 Cal. Legis. Serv. Ch. 763 (A.B. 888).

88. Turner v. Safley, 482 U.S. 78, 81 (1987).

89. *See, e.g.*, Chavez v. Ahlin, No. 1:09-cv-00202-SMS (PC), 2009 U.S. Dist. LEXIS 35063, at *10 (E.D. Cal. Apr. 8, 2009); Johannes v. Cty. of L.A., No. CV 02-03197-SVW (VBK), 2011 U.S. Dist. LEXIS 142528, at *40 (C.D. Cal. Apr. 8, 2011); Rainwater v. McGinniss, No. 2:11-cv-0030 GGH P, 2012 U.S. Dist. LEXIS 113963, at *27 (E.D. Cal. Aug. 10, 2012) (applying *Turner* to SVP's First Amendment claims); *Esparza*, 2013 WL 1703042, at *6.

90. *Turner*, 482 U.S. at 82.

91. *Id.* at 89.

92. Washington v. Harper, 494 U.S. 210, 224 (1990) (applying *Turner* to prisoner's Due Process claims); *see, e.g.*, Thompson v. Souza, 111 F.3d 694, 699 (9th Cir. 1997) (applying *Turner* to prisoner's Fourth Amendment claim); Covino v. Patrissi, 967 F.2d 73 (2d Cir.1992) (Fourth Amendment); Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988) (Fourth Amendment); *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (applying *Tuner* to prisoner's First Amendment claim); Shakur v. Schriro, 514 F.3d 878, 886 (9th Cir. 2008) (First Amendment); Ashelman v. Wawrzaszek, 111 F.3d 674, 677 (9th Cir. 1997) (First Amendment).

The problem with applying *Turner* to civil detainees' claims is that penological interests are "not an appropriate guide for the pretrial detention of accused persons."[93] This is because "legitimate penological interests" include punishment, and the purpose of punishment "generally validates a rule for convicted prisoners, but invalidates it for pretrial detainees."[94] Therefore, in the SVPA context, the correct standard to apply is *Bell*: does the regulation amount to punishment?

Many courts have mistakenly applied Eighth Amendment principles, rather than Fourteenth Amendment standards, when analyzing SVP detainees' constitutional claims.[95] For example, in *Jones v. Blanas*, Jones, an SVP detainee, brought a § 1983 lawsuit against Sheriff Blanas and the County of Sacramento, alleging numerous claims, including claims for substantive due process violations.[96] The district court granted defendants' motion for summary judgment on the substantive due process claim because Jones "had not established a right to any particular amount of recreation, exercise, or fresh air and sunlight" under the Eighth Amendment.[97] However, the Eighth Amendment's Cruel and Unusual Punishments Clause applies only to those being punished for criminal convictions.[98] Because the SVPA is not intended to be punitive, the Eighth Amendment standard does not apply in the SVPA context. The Ninth Circuit reversed the district court's order for summary judgment on Jones' substantive due process claims, holding that the district court mistakenly "applied the standards that govern a claim of cruel and unusual punishment under the Eighth Amendment" rather than applying Fourteenth Amendment standards.[99]

Furthermore, the Ninth Circuit recognized that the "significant limitations on, or total denials of, recreational activities, exercise, phone calls, visitation privileges, out-of-cell time, access to religious services, and access to the law library" indicated that confinement in administrative segregation was substantially more restrictive than confinement in the general population of the Main Jail.[100] Thus, Jones' confinement conditions in administrative segregation raised a

93. Benjamin v. Fraser, 264 F.3d 175, 187 n.10 (2d Cir. 2001); *see* Mauro v. Arpaio, 188 F.3d 1054, 1067 (9th Cir. 1999) (Kleinfeld, J., dissenting) (arguing *Turner* is inappropriate standard for pretrial detainees since *Turner* refers to "penological interests," and state does not have legitimate penological interests as against unconvicted persons).

94. *Mauro*, 188 F.3d at 1067.

95. Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987).

96. *Jones*, 393 F.3d at 918.

97. *Id.* at 931.

98. Whitley v. Albers, 475 U.S. 312, 318 (1986) (citing Ingraham v. Wright, 430 U.S. 651, 664 (1977)); *see, e.g.*, Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir.1998); Munoz v. Kolender, 208 F. Supp. 2d 1125, 1146 (S.D. Cal. 2002).

99. *Jones*, 393 F.3d at 931.

100. *Id.* at 934.

presumption of punitiveness.[101] On remand, the district court granted Jones' motion for summary judgment in part, noting that, as a matter of law, the conditions to which Jones was subjected to in administrative segregation "violated [his] right to due process under the Fourteenth Amendment."[102]

IV. Conditions of Confinement for SVP Detainees Violate Other Constitutional Amendments

A. The Current Conditions of Incarceration Violate SVP Detainees' First Amendment Rights to the Free Exercise of Religion

While in administrative segregation pending potential civil commitment, SVP detainees have no access to religious services, arguably in violation of the First Amendment.[103] The First Amendment of the U.S. Constitution protects, inter alia, the free exercise of religion.[104] In prison, numerous inmates participate in communal services and group prayer.[105] In segregation, SVP detainees cannot participate as part of a religious community.[106] This denial may constitute a violation of the Free Exercise Clause.[107]

To establish standing in an action alleging a violation of free exercise of religion, an SVP detainee must explain his religion and specify exactly how the denial of access to religious services impinges upon his practice of religion.[108] In assessing SVP detainees' First Amendment claims, courts have arguably misapplied the actual injury requirement of the standing doctrine.[109] For example, in *Jones*, the SVP detainee alleged violations of his First Amendment right to free exercise of religion.[110] Jones explained that as a member of the Christian faith, he believes in group prayer, and without the benefit of communal services, he was denied "the uplifting of the spirit, the reassurance of fellow Christians that [he is] one with God, . . . [and] the joy of communal praise

101. *Id.*

102. Jones v. Blanas, No. 2:00-cv-2811-GEB-KJM-P, 2009 WL 367745 (E.D. Cal. Feb. 12, 2009).

103. The Free Exercise Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .". *Id.*

104. U.S. Const. amend. I.

105. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 352 (1987); *Jones*, 393 F.3d at 935.

106. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015); *see also Jones*, 393 F.3d at 935.

107. *Jones*, 393 F.3d at 935.

108. *Id.* at 935; Allen v. Wright, 468 U.S. 737 (1984).

109. *See, e.g.*, *Jones*, 393 F.3d at 935; Halbert v. Herbert, No. C 03-0237 JF (PR), 2008 WL 4460213, at *5 (N.D. Cal. Sept. 30, 2008).

110. *Jones*, 393 F.3d at 935.

of God."[111] The district court granted summary judgment for defendants on Jones' free exercise claim, finding that Jones did not sufficiently explain "how a general denial of access to religious services . . . denied him his ability to practice his own religion."[112]

The Ninth Circuit reversed the summary judgment order and held that the district court did not consider all the relevant evidence offered by Jones.[113] The appellate court reasoned that because "Jones's [sic] explanation of his religious beliefs qualifie[d] as evidence for the purpose of opposing a summary judgment motion[,]" the district court should have exercised its discretion to consider the evidence rather than simply ignoring it.[114] The Ninth Circuit held that Jones "could hardly have been clearer in specifying how the denial of access to religious services impinged upon his practice of his religion, and the district court should have considered this evidence."[115] The Ninth Circuit remanded the case back to the district court for further proceedings.[116]

B. The Current Conditions of Confinement Violate SVP Detainees' Fourth Amendment Rights to Be Free From Unreasonable Searches and Seizures

The Fourth Amendment protects the right of the people to be free from unreasonable searches and seizures.[117] Reasonableness "depends on a balance between the public interest and an individual's right to personal security free from arbitrary interference by law officers."[118] In determining reasonableness, courts generally weigh the public interest against the intrusion into personal privacy.[119] Courts should "consider the scope of the intrusion, the manner in which it [was] conducted, the justification for initiating it, and the place in which it [was] conducted."[120]

Many claims alleging Fourth Amendment violations of SVP detainees' rights have been unsuccessful thus far. Besides the misapplication of *Turner*, some courts have decided cases on the bases of technical and procedural issues rather than the substantive merits of the case.[121] For example, courts have granted summary judgment against SVP

111. *Id.*
112. *Id.* at 926.
113. *Id.*
114. *Id.* at 935.
115. *Id.*
116. *Id.*
117. U.S. Const. amend. IV.
118. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).
119. Camara v. Mun. Court of City & Cty. of S.F., 387 U.S. 523, 536–37 (1967).
120. Bell v. Wolfish, 441 U.S. 520, 559 (1979).
121. *See, e.g.*, *Jones*, 393 F.3d at 924; Cerniglia v. Sacramento Cty., 220 F. App'x 541, 542 (9th Cir. 2007) (district court granted summary judgment for defendants explaining defendants were entitled to qualified immunity; Ninth Circuit reversed).

detainees based on discovery issues[122] or unfounded qualified immunity.[123]

In addressing claims of Fourth Amendment violations within the SVPA context, "courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security."[124] The problem with this rule is that discovering the required substantial evidence can be extremely difficult for SVP detainees. For instance, in *Jones*, Jones alleged violations of his Fourth Amendment right to be free from unreasonable searches and seizures.[125] As an SVP detainee, he was "subjected to numerous strip searches, some of which were conducted outdoors, and many of which were conducted at gunpoint in the middle of the night and accompanied by various intimidating tactics including poking with large weapons."[126] On at least three occasions, Jones was forced at gunpoint to remove his clothing in front of many deputies, including female deputies, and forced to lift his genitals for inspection, run his fingers through his hair and inside his mouth, and bend over and spread his buttocks apart and cough three times.[127]

The district court found that Jones had not "presented anything indicating Sheriff Blanas was involved in the search in any way, nor that the search was conducted pursuant to a policy adopted by the County."[128] The district court granted summary judgment to defendants on this claim because Jones "failed to present evidence implicating either Blanas or a Sacramento County policy in the searches to which Jones was subjected."[129] However, Jones had requested jail records of the searches in discovery, which were not produced despite his requests for additional discovery.[130]

The Ninth Circuit reversed, holding that because "Jones's discovery requests for jail records related to the searches may well have produced evidence that would have enabled Jones to tie the searches to policies of Blanas or the County[,]" the district court abused its discretion in refusing to permit additional discovery.[131] While the Ninth Circuit reversed the district court's order for summary judgment, the Ninth Circuit did not consider the merits of Jones' Fourth Amendment claim.

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122. *Jones*, 393 F.3d at 924.
123. *See, e.g.*, *Cerniglia*, 220 F. App'x at 542.
124. Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 132 S. Ct. 1510, 1513–14 (2012).
125. *Jones*, 393 F.3d at 924.
126. *Id.*
127. *Id.*
128. *Id.* at 925.
129. *Id.* at 930.
130. *Id.*
131. *Id.*

Rather, the court acknowledged that Jones acted diligently and reasonably in pursuing discovery, but "due to the lack of counsel and the limitations in information and resources associated with [his] confinement[,]" Jones was "unable to comply with the district court's schedule."[132] Even if discovery were produced, Jones would have had to then "tie the searches to the policies of Blanas or the County" for his claim to succeed.[133] Most SVP detainees are not trained in legal writing and research, and without full access to law libraries or phones to call their attorneys, their claims are often decided on technical issues without any acknowledgement of the merits.[134]

Another example of an SVP detainees' Fourth Amendment claim being decided on procedural issues rather than the merits is *Hydrick v. Hunter*.[135] In *Hydrick*, SVP detainees brought a class action lawsuit in California against a hospital and state officials, challenging, in part, the detainees' confinement conditions under the Fourth Amendment.[136] The district court granted summary judgment against SVP detainees, finding that the defendants were entitled to qualified immunity on all claims.[137] The Ninth Circuit reversed in part, holding that the defendants were entitled to qualified immunity for monetary damages, but not declaratory and injunctive relief.[138] The Ninth Circuit remanded the case to allow the detainees to proceed on their claims for declaratory and injunctive relief.[139] The SVP detainees then filed a motion for leave to file a third amended complaint, which was denied by the district court based on futility.[140] The district court found the venue improper because the detainees had transferred to a new facility and "sought to amend their complaint to include allegations against their current conditions of confinement[]"[141] rather than filing a separate action in the district of their new facility.

These types of technical and procedural issues have hindered numerous lawsuits brought by SVP detainees and prevented courts from analyzing the merits of cases and making changes on a macro level. In the SVPA context, with such limited access to discovery and confidential

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132. *Id.*

133. *Id.*

134. *See, e.g.*, *id.* at 930; Hydrick v. Hunter, 669 F.3d 937, 942 (9th Cir. 2012) (holding state officials were entitled to qualified immunity on plaintiffs' claims for money damages).

135. *Hydrick*, 669 F.3d at 942.

136. *Id.* at 939.

137. *Id.* at 940.

138. *Id.* at 939–40.

139. *Id.* at 940.

140. Samantha Kirby, *Case Profile*, CIVIL RIGHTS LITIGATION CLEARING HOUSE (Oct. 21, 2014) http://www.clearinghouse.net/detail.php?id=9628.

141. *Id.*

communications, procedural hurdles make it extremely difficult for SVP detainees to prevail on viable claims.

V. There Is Hope For Judicial Remedies

While the most practical approach to establishing meaningful change for SVP detainees is the judicial branch, some courts have concluded instead that the Legislature is the appropriate place to enact systemic change.[142] In *Lewis v. Casey*, the Court explained that "[i]t is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."[143] Unfortunately, there seems to be a lack of political will to improve confinement conditions for SVP detainees.[144] This may be because SVP detainees constitute only a small percentage of the criminal population,[145] so the Legislature tends to focus its resources elsewhere. Or perhaps it is because the public tends to disapprove of convicted sex offenders, so there is not much public support for bettering SVP detainees' conditions of confinement.[146] Moreover, the Legislature already provided clear guidelines for California Penal Code section 4002, expressly stating that the housing must "not involve any deprivation of privileges other than what is necessary[.]"[147] The issue is not the law itself, but the implementation of the law. Therefore, the best avenue for change is the judicial branch.[148]

There have been numerous cases alleging constitutional violations in California where the Ninth Circuit has substantiated SVP detainees' claims by reversing district court orders for summary judgment against SVP detainees.[149] While many cases were reversed and remanded, most of these cases have not resulted in systemic changes and have not since appeared on the public record. Perhaps the cases settled before being tried on remand, since making changes for one SVP detainee may be easier than making macro-level changes for SVP detainees generally.

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142. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 349 (1996).

143. *Id.*

144. *See* Kessler, *supra* note 2, at 290.

145. *Sexually Violent Predators*, LACounty.gov, http://da.lacounty.gov/sexually-violent-predators (last visited Aug. 5, 2017).

146. Isaac D. Buck, *The Indefinite Quarantine: A Public Health Review of Chronic Inconsistencies in Sexually Violent Predator Statutes*, 87 St. John's L. Rev. 847, 860 (2013).

147. Cal. Penal Code § 4002 (2017).

148. *See, e.g.*, *Jones*, 393 F.3d 918; *Hunter*, 669 F.3d 937; Sundquist v. Philp, No. 08-15930, 2009 U.S. App. LEXIS 16958, at *144 (9th Cir. 2009); Cerniglia v. Sacramento Cty., 220 Fed. App'x. 541 (9th Cir. 2007).

149. *See, e.g.*, *Jones*, 393 F.3d 918; *Hydrick*, 669 F.3d 937; *Sundquist*, 2009 U.S. App. LEXIS 16958, at *144; *Cerniglia*, 220 Fed.App'x. 541.

Nonetheless, based on the viability of legal claims, the best method for change is likely the judicial branch. Attorneys are becoming increasingly aware of the issues surrounding SVP detainees, and are discussing legal approaches with their clients.[150] Federal courts are beginning to acknowledge constitutional violations.[151] Moreover, other states are recognizing constitutional violations in the implementation of their sexually violent predator laws.[152] In fact, a federal judge in Minnesota recently ruled that Minnesota's sexually violent predator civil commitment laws, which are similar to California's SVPA, were unconstitutional as implemented.[153]

SVP detainees must continue to bring actions alleging constitutional violations in order to promote awareness and change. Hopefully the judicial branch will appreciate the seriousness of these constitutional violations and implement changes to the confinement conditions for SVP detainees.

CONCLUSION

In California, SVP civil detainees suffer severe restrictions beyond what is necessary for safety in violation of California Penal Code Section 4002 and the U.S. Constitution. The state statute and federal Constitution provide SVP detainees with better treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. SVP detainees "awaiting adjudication [are] entitled to conditions of confinement that are not punitive."[154] Regardless of these statutory and constitutional safeguards, SVP detainees' administrative housing is worse than that of both convicted felons and persons who have actually been civilly committed.

There is a lack of political will to address these issues. The Legislature is not as involved in the implementation of the SVPA as it was in enacting the SVPA. This could be because the Legislature is focusing its resources elsewhere since there are only a small number of SVP detainees, or it could be due to the lack of community support for these sexual offenders. Either way, the Legislature is not the most productive method for change.

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150. Interview with Ernest Torres, SVP Detainee, Santa Rita Jail, in Dublin, Cal. (June 25, 2015).

151. *See, e.g.*, *Jones*, 393 F.3d at 932; *Hydrick*, 669 F.3d at 942; Davis v. Peters, 566 F. Supp. 2d 790 (N.D. Ill. 2008).

152. *See* Peter Cox & Matt Sepic, *Federal Judge: Minnesota Sex Offender Program Unconstitutional*, MPR NEWS (June 17, 2015), http://www.mprnews.org/story/2015/06/17/sex-offender-program-unconstitutional; Atwood v. Vilsack, 338 F. Supp. 2d 985 (S.D. Iowa 2004).

153. *See* Cox & Sepic, *supra* note 152; *see also* Munoz v. Kolender, 208 F. Supp. 2d 1125, 1135 n.7 (S.D. Cal. 2002).

154. *Jones*, 393 F.3d at 933.

Turning to judicial proceedings, there have been several viable yet ineffective cases addressing this issue. The § 1983 lawsuits may have been unsuccessful thus far because courts have often misapplied standards in analyzing these claims and ultimately decided cases on procedural issues rather than merits. Despite the high number of unsuccessful claims, judicial remedies seem to be the most promising with regards to improving the conditions of confinement for SVP detainees.

While there have not yet been system-wide changes, higher courts are beginning to openly recognize the statutory and constitutional violations that SVPs experience. As discussed above, the Ninth Circuit has reversed a number of orders for summary judgment against SVP detainees. Additionally, courts in other states, like Minnesota, are recognizing that the laws, as implemented, may be unconstitutional. With judicial intervention, there is hope for SVP detainees to bring viable claims that succeed in making systemic changes.

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